STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

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In the Matter of a Petition by Excelsior Energy, Inc. for Approval Of a Power Purchase Agreement, Under Minn. Stat. § 216B.1694, Determination of Least Cost Technology, and Establishment of a Clean Energy Technology Minimum Under Minn. Stat § 216B.1693	PUC Docket No. E-6472/M-05-1993 OAH Docket No. 12-2500-17260-2 **MINNESOTA POWER'S REPLY BRIEF**

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I. INTRODUCTION

In its Initial Brief, Excelsior Energy attempts to skate past full Minnesota Public Utilities Commission ("Commission") deliberations and decision making on the merits of the Mesaba Project by suggesting that the Legislature mandated that the Project be built without the necessary regulatory due diligence that exists to ensure the interests of customers are served. In this effort, Excelsior Energy uses post-enactment construction of the statutes to reach beyond the plain meaning of the applicable statutes to create its own interpretation of what the Commission's role should be in this proceeding. Accepting this wishful line of argument might lead one to conclude that there would have been no reason for the Commission to have requested the Office of Administrative Hearings ("OAH") conduct this proceeding and for the parties to have supplied the thousands of pages of testimony and evidence about the facts concerning the Mesaba Project that have been brought forward for consideration over the past months. Minnesota Power contends that the Commission retains its instrumental role and standing responsibilities in assessing the Mesaba Project's qualifications in terms of the relevant statues and the determination of public interest concerning the Project. The Legislature did not short circuit or otherwise negate the inherent customer safeguards of the regulatory process

concerning decisions about the purchased power agreement ("PPA") for the Mesaba Project.

II. STATUTORY INTERPRETATION

Excelsior Energy's statutory interpretation and analysis exceeds the plain meaning of the Innovative Energy Project ("IEP") (Minn. Stat. § 216B.1694) and Clean Energy Technology ("CET") (Minn. Stat. § 216B.1693) statutes in order to create the impression that the Mesaba Project is mandated by the Legislature and a PPA with Xcel Energy is a foregone conclusion. The IEP and CET statutes provide only the framework for the Commission to make its public interest determination; they do not provide a "mandate" from the Legislature. The basic tenet of statutory interpretation is set forth in Minnesota Statutes and case law, namely:

> The goal of all interpretation and construction of statutory language is to 'ascertain and effectuate the intention of the legislature.' Minn. Stat. § 645.16. If the words of the statute are 'clear and free from all ambiguity,' further construction is neither necessary nor permitted *Id.; see also, State by Beaulieu v. RJS, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996). It is a fundamental role of statutory construction that words and phrases are to be construed according to their plain meaning. *See* Minn. Stat. § 645.08 (1).

Owens v. Water Gremlin Co., 605 N.W.2d 733, 736 (Minn. 2000).

Furthermore, Excelsior Energy's interpretation of the IEP and CET statutes relies in large part on post-enactment construction of the statutes. Such analysis is only allowed under Minnesota law when the underlying statute is ambiguous. Minn. Stat. § 645.16. As the Minnesota Supreme Court stated in *Owens*, "Our role in interpreting statutes is to look at the language of the statute before us and where that language is clear, as it is here, we must not engage in any further construction." 605 N.W.2d at 737. The reason courts and Minnesota law limit analysis to the statute itself is that legislative intent is and should be limited to the words of the statute, and nothing more. Minn. Stat. § 645.16; *State v. Sebasky*, 547 N.W.2d 93, 99 (Minn. Ct. App. 1996). The Minnesota Supreme Court has held that "as along as the legislature does not transcend the

limitations placed upon it by the constitution, its motives in passing legislation are not the subject of proper judicial inquiry." *Starkweather v. Blair*, 71 N.W.2d 869, 876 (Minn. 1955). To that end, Professor Jim Chen's testimony, the foundation for Excelsior Energy's legal misinterpretations, improperly relies upon analyzing the motives and context of the Legislature in enacting the IEP and CET statutes which is completely inappropriate in this proceeding. (Ex. EE 1137—Chen Rebuttal Testimony, p. 7-8.) Also, statements or testimony made by legislators after enactment are generally inadmissible. *See In the Matter of State Farm Mutual Automobile Insurance Company*, 392 N.W.2d 558, 569 (Minn. Ct. App. 1986); *Washington County vs. AFSCME*, 262 N.W.2d 163, 167 (Minn. 1978). Therefore, Excelsior Energy's reliance on Professor Chen's testimony, on post-enactment statements and interpretations and, most importantly, on discerning legislative intent beyond the plain meaning of the text is contrary to Minnesota law and should not be accepted by the Commission for any consideration in this proceeding.

III. COMMISSION ROLE AND RESPONSIBILITIES

Excelsior Energy goes to great lengths to both diminish and prescribe the Commission's role in this proceeding. *See* Excelsior Energy's Initial Brief, p. 7, 50. However, under the IEP and CET statutes, as well as generally under Chapter 216B, the Commission has been delegated the duty to protect the public interest and determine whether the Mesaba Project is "entitled to a contract" under Minn. Stat. § 216B.1694 and is in the public interest under both statutes. Excelsior Energy cites *Wallace v. Commissioner of Taxation*, 184 N.W.2d 588, 594 (Minn. 1971) for the proposition that the Commission does not have authority to determine what the law shall be. However, the sentence right before what Excelsior Energy quotes best summarizes the correct role of the Commission in this matter: "It is well established that the Legislature may confer discretion on the Commissioner and the execution or administration of the law." *Id.* Legislative bodies conferring such discretion to agencies, not the non-delegation doctrine, is the true bedrock on which administrative law is built. *See Lee v. Delmont*, 36 N.W.2d 530, 538 (Minn. 1949) ("Although purely legislative power cannot be delegated, the

legislature may authorize others to do things (insofar as the doing involves powers that are not exclusively legislative) that it might properly, but cannot conveniently or advantageously, do itself.").

To follow Excelsior Energy's logic would mean that upon enactment of the IEP and CET statutes in 2003, the Commission's determination was a *fait accompli* and any party, including the Department of Commerce, bringing forth challenges to the Mesaba Project is out of line. *See West St. Paul Federation of Teachers v. Independent School District No. 197*, 713 N.W.2d 366, 376-77 (Minn. Ct. App. 2006). Related to this issue, Excelsior Energy's assertion that "the statutes direct Xcel, as the holder of a state-granted monopoly franchise, to enter into an off-take agreement with Project" strains credulity. *See* Excelsior Energy's Initial Brief, p. 7. First, if this was true, then Excelsior Energy should have brought a contract enforcement claim in district court, and not on December 27, 2005 filed a petition with the Commission. Second, as Xcel Energy argued in its initial brief, the IEP statute is not a mandate, but a process for Commission approval of a bilateral contract between two parties. *See* Xcel Energy's Initial Brief, p. 9-12. Even if Xcel Energy had signed on the bottom line of a Mesaba Project PPA, the Commission's role under the IEP statute is still to make a public interest determination. Finally, the only mandate the IEP statute provides is in Minn. Stat. § 216B.1694, subd. 2(a)(5) where the Commission must consider the Mesaba Project prior to approving "any arrangement to build or expand a fossil-fuel-fired generation facility, or to enter into an agreement to purchase capacity or energy from such a facility for a term exceeding five years." *See* Minnesota Power's Initial Brief, p. 22-24.

Excelsior Energy also attempts to short-circuit any evaluation of whether the Mesaba Project is an innovative energy project. *See* Excelsior Energy's Initial Brief, p. 10. Excelsior Energy cites the Commission's February 23, 2005 Order Approving and Directing Fund Expenditures, Giving Guidance on the Treatment of Innovative Energy Project, Requiring Consultative Process, and Requiring Compliance Filings in Docket No. E-002/M-03-1883 ("RDF Order") as to why the Commission did not ask for a finding of whether the Mesaba Project is an IEP. However, in referring this matter to the

OAH, the Commission did not limit its determination regarding the IEP statute and, in fact, did state specifically that parties "may also raise and address other issues relevant to the petition." Order dated April 25, 2006, p. 4. More importantly, the Commission's RDF Order was not based on the record that has been developed in the instant contested case and did not go beyond a cursory review of the statutory definition of what is an innovative energy project. *See* RDF Order, p. 4-5. For example, as the RDF Order stated: "Excelsior Energy is developing a project that it states meets the statutory definition of an innovative energy project, and no one in this proceeding has contested that claim." RDF Order, p. 4.[1] This one-time reference by the Commission concerning Excelsior Energy's representations about the Mesaba Project within a very limited record, with the Project not yet fully developed and presented for the Commission's consideration, should be accorded limited weight. *See Gale v. Commissioner of Taxation*, 37 N.W.2d 711, 716 (Minn. 1949).

The record that will soon be before the Commission provides a full analysis of whether the Mesaba Project meets the definition of an innovative energy project under Minn. Stat. § 216B.1694, subd. 1. The record includes, among other important facts, an analysis of the projected emissions profile of the Mesaba Project by Minnesota Power showing that the emissions are not significantly reduced relative to other coal-fired alternatives based on forecasted environmental performance disclosures made in the air permit that was filed by Excelsior Energy with the Minnesota Pollution Control Agency long after the RDF Order decision, as well as evidence concerning the lack of fuel supply contracts necessary to determine the Mesaba Project's capability to provide a "hedged, predictable cost". None of this critical information was in the public record, let alone vetted by interested parties in a contested case, when the Commission issued its RDF Order on the Mesaba Project in February of 2005. The RDF Order decision had a $10 million cost impact to Xcel Energy's ratepayers. The Mesaba Project is estimated to cost those same ratepayers well over $1 billion for plant construction alone. The Commission certainly has the right, and Minnesota Power would argue, the obligation to ratepayers to

[1] The RDF Order also states that the Mesaba Project will be constructed near Hoyt Lakes beginning in 2006. RDF Order. RDF Order, p. 4.

make its ultimate determinations on the statutory qualifications of and final decisions about the Mesaba Project with the benefit of a complete record. And, as Minnesota Power and others have demonstrated, the Mesaba Project falls short in significantly reducing emissions and cannot offer a hedged, predictable cost. *See* Minnesota Power's Initial Brief, p. 4-12.

The Commission also did not make a final determination on whether the Mesaba Project is an innovative energy project. The Commission required in RDF Order Point 1(d) that for Excelsior Energy to continue receiving grants from Xcel Energy requires "Commission receipt of evidence that Excelsior Energy continues to meet the criteria set forth in Minn. Stat. § 216B.1694, subd. 1." If the Commission had made a final determination on the Mesaba Project being an innovative energy project, then the ongoing compliance requirement would not be necessary. *See, e.g.*, Docket No. E-002/M-03-1882, Order dated November 29, 2004 (requiring Xcel Energy to comply with future information requests as part of Commission approval of a renewable cost recovery adjustment). Also, if the Commission makes a determination in this proceeding that the Mesaba Project is not an innovative energy project, then under Minn. Stat. § 216B.25, the Commission is authorized by statute to reopen its RDF Order and rescind any grants made or to be made to Excelsior Energy.

IV. CONCLUSION

Excelsior Energy's attempt to short circuit the Commission decision making process in this proceeding through inappropriate legal applications and constructs, thereby avoiding a decision about the Mesaba Project based on the evidence presented within it, is completely without merit. Any decision to build a generating asset, including the Mesaba Project, has serious and decades-long financial, reliability and environmental implications for utility ratepayers and deserves the due diligence of a Commission proceeding without the constraints Excelsior Energy is attempting to apply. There is no support in statutes for circumventing the surety and solid foundation of Commission review and deliberation in making a decision about the Mesaba Project PPA.

Furthermore, the record established in this proceeding illustrates that the Mesaba Project does not meet the statutory requirements for approval.

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Respectfully submitted,

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