



STATE OF MINNESOTA PUBLIC UTILITIES COMMISSION

August 7, 2007

Mr. Bruce Johnson
Assistant Chief Administrative Law Judge
Minnesota Office of Administrative Hearings
100 Washington Square, Suite 1700
Minneapolis, MN

Re: Minnesota Public Utilities Commission Docket Number E-6472/M-05-1993; Office of
Administrative Hearings Docket Number 2500-17260-2

Dear Judge Johnson:

Pursuant to Minn. Stat. §216A.037, subd. 4(e), I am referring the complaint of Mncoalgasplant.com (MCGP) alleging prohibited ex parte communications by an employee of Excelsior Energy in the above-noted dockets. I have enclosed the following documents:

- A copy of MCGP's complaint and request for sanctions
- A copy of Excelsior's answer to MCGP's complaint
- A copy of the several documents received by Janet Gonzalez of the Commission staff:
 - The initial e-mail in question from the Excelsior employee
 - A follow-up e-mail from the Excelsior employee requesting recall of the initial message
 - An e-mail from the Excelsior employee asking recipients to disregard the earlier e-mail

The Commission looks forward to the report of the Office of Administrative Hearings on this matter. Please let me know if there is any further information you require from the Commission.

Thank you.

Respectfully,

A handwritten signature in black ink that reads "Burl W. Haar". The signature is fluid and cursive, with the first name "Burl" being the most prominent.

Burl W. Haar
Executive Secretary
651.201.2222

Cc: Carol Overland, Attorney for MCGP
Brian Meloy, Attorney for Excelsior
Service list (cover letter only)

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
David C. Boyd
Marshall Johnson
Phyllis Reha
Thomas Pugh

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Petition by Excelsior Energy, Inc.
for Approval of a Power Purchase Agreement under
Minn. Stat. §216B.1694, and Determination of Least
Cost Technology and Establishment of a Clean Energy
Minimum Under Minn. Stat. §216B.1693.

MPUC Docket: E/6472/M-05-1993

OAH Docket: 2500-17260-2

**MCCP's MINN. STAT. §216A.037 COMPLAINT AND REQUEST FOR SANCTIONS
REGARDING EXCELSIOR ENERGY'S EX PARTE CONTACT**

Under Minn. Stat. 216A.037 and Minn. R. 7845.0200, direct and indirect ex parte contact is strictly prohibited. The Complaint process is laid out in Minn. Stat. §216.037, and mncoalgasplant.com submits this verified Complaint.

1) Name and address of Complainant:

Mncoalgasplant.com
c/o Ron Gustafson
P.O. Box 1
Bovey, MN 55709

2) Name and address of Complainant's counsel

Carol A. Overland
Attorney for mncoalgasplant.com
OVERLAND LAW OFFICE
P.O. Box 176
Red Wing, MN 55066

(612) 227-8638
overland@redwing.net

3) Name and address of each person violating ex parte prohibition:

Leanne Stanley
Public Affairs Representative
Excelsior Energy
11100 Wayzata Blvd, Suite 305
Minnetonka, MN 55305

and through agency:

Excelsior Energy
11100 Wayzata Blvd., Suite 305
Minnetonka, MN 55305

4) Name and address of Respondent's Counsel in PUC docket 05-1993:

Thomas Osteraas, Chris Greenman
Excelsior Energy
11100 Wayzata Blvd, Suite 305
Minnetonka, MN 55305

Byron Starns, Brian Meloy, Scott Harris
Leonard, Street & Deinard
150 So. 5th St., Suite 2300
Mpls., MN 55402

5) Facts constituting violation: On July 26, 2007, emails soliciting prohibited indirect ex parte contact were sent by Excelsior and received by counsel for mncoalgasplant.com shortly thereafter.

First email (emphasis added and Commissioner emails redacted):

>>> "Leanne Stanley" <LeanneS@excelsiorenergy.com> 7/26/2007 10:42 AM >>>

Hello everyone - as you know, our hearing before the Public Utilities Commission is next Tuesday, July 31. We've been working hard to prepare, and as you've seen by our recent announcements, the Project itself is shaping up quickly. We have passed a lot of milestones this summer, including getting our transmission interconnection agreement signed so our output will be deliverable throughout MISO, getting site control of our second site, kicking off the final phase of engineering before construction starts, and nearing the date our joint state/federal EIS will be published. But, now is crunch time - you have been so helpful and supportive in the past, but I would like to ask you to do one more thing before the hearing - please email the PUC Commissioners and express your support for the Mesaba Project. Just a few sentences in your own words would be extremely helpful. Here are the email addresses for the Commissioners: Please reference The Mesaba Energy Project PPA Docket No. 05-1993

(Excelsior linked PUC Commissioner's emails here — REDACTED BY CAO!)

Please do not hesitate to contact Pat Micheletti at 651-214-5184 or me at 218-245-1205 if you have any further questions. As always, thank you so much for your continuing support!

*Leanne Stanley
Public Affairs Representative*

Second email:

>>> "Leanne Stanley" <LeanneS@excelsiorenergy.com> 7/26/2007 11:00 AM >>>

Leanne Stanley would like to recall the message, "UPCOMING PUC HEARING - COULD YOU SEND AN EMAIL FOR US?"

Third email:

>>> "Leanne Stanley" <LeanneS@excelsiorenergy.com> 7/26/2007 12:10 PM >>>

Hi -

Please disregard the email you received from me earlier today. It was sent in error. Please do not send any emails to any of the people listed in my earlier email request. I apologize for any inconvenience caused by my earlier message.

Thank you,

*Leanne Stanley
Public Affairs Representative*

Counsel for mncoalgasplant.com immediately contacted the PUC, and Excelsior's solicitation of ex parte contact was acknowledged by Bob Cupit and Janet Gonzalez, PUC Staff. both of whom stated that the matter had been handled by the PUC staff.

6) Sanctions requested: Appropriate sanctions cannot be requested until MCGP can ascertain the number and impacts of indirect contacts generated by Excelsior's impermissible ex parte solicitation of communications with Commissioners. **Therefore, MCGP requests that all parties be immediately provided with:**

- A) The complete and unredacted Excelsior Energy list of email addresses and names to which the July 26, 2007 request was sent;**
- B) PUC records and documentation of each and every direct contact to Commissioners regarding Excelsior Energy's Mesaba Project, such records and documentation to be provided immediately, electronically, to all parties today, for review before tomorrow;**
- C) That records and documentation of these contacts be posted and accessible on the PUC eDockets site for 05-1993 prior to the start of tomorrow's oral arguments.**

With this information, the extent and impact of Excelsior's ex parte contact and solicitation may be evaluated and appropriate sanctions be requested.

July 30, 2007

Signed and sworn to before me this
30th day of July, 2007.

Swati Patel

Notary Public



Carol A. Overland
Carol A. Overland #254617
Attorney for MCGP
OVERLAND LAW OFFICE
P.O. Box 176
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overland@redwing.net

In the Matter of a Petition by Excelsior Energy, Inc., . . . Administrative Law Judges' Service List

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Bruce H. Johnson (no,record closed)
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(MPCA)

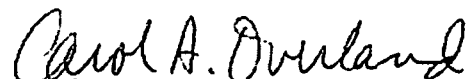
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Carol A. Overland, after being duly sworn on oath, states and deposes that she has served the above parties by mail or by eDockets or email as noted, with mncoalgasplant.com's Motion to Strike and Complaint of Excelsior's Ex Parte contact by mailing copies to the parties at the addresses above in envelopes with proper postage at the Red Wing Post Office.

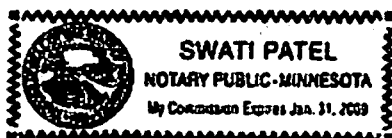
Signed and sworn to before me this
30th day of July, 2007.



Notary Public



Carol A. Overland, Atty. for mncoalgasplant.com



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STREET
AND
DEINARD

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BRIAN M. MELOY
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BRIAN.MELOY@LEONARD.COM

August 6, 2007

Dr. Burl W. Haar
Minnesota Public Utilities Commission
121 East Seventh Place, Suite 350
St. Paul, MN 55101-2147

VIA E-FILING & U.S. MAIL

Re: *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.*

OAH Docket No. 12-2500-17260-2; MPUC Docket No. E-6472/M-05-1993

Dear Dr. Haar:

Enclosed for filing, please find the Answer to MCGP's Complaint of Excelsior Energy Inc. By copy of this letter, service of the same is made upon the full service list via e-mail and U.S. Mail. Proof of service is enclosed.

Thank you.

Very truly yours,

LEONARD, STREET AND DEINARD

/s/ Brian M. Meloy

BRIAN M. MELOY

Enclosures

cc (w/enc.): The Honorable Steve M. Mihalchick
The Honorable Bruce H. Johnson
Full Service List

3995661.2

**STATE OF MINNESOTA
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION**

In the Matter of a Petition by Excelsior
Energy Inc. For Approval of a Power
Purchase Agreement, Determination that
the Clean Energy Technology is Likely
to be a Least-Cost Technology, and
Establishment of a Clean Energy Technology
Minimum Under Minn. Stat. 216B.1693

MPUC Docket No.: E6472/M-05-1993

OAH Docket No.: 12-2500-17260-2

**ANSWER TO MCGP'S COMPLAINT
OF EXCELSIOR ENERGY INC.**

Pursuant to Minn. Stat. § 216A.037, subd. 4(d), Excelsior Energy Inc. ("Excelsior") hereby files its Answer to mncoalgasplant.com's ("MCGP") July 30, 2007 Complaint and Request for Sanctions. The central issue raised by MCGP's Complaint is whether Excelsior engaged in prohibited indirect *ex parte* contact with the Minnesota Public Utilities Commission ("Commission") related to the issues under consideration in the above-captioned proceeding.

As discussed below, Excelsior did not attempt, or engage in, prohibited indirect *ex parte* contact with the Commission within the meaning of Minn. Stat. § 216A.037 and Minn. R. Part 7845.7200, because the e-mail at the heart of MCGP's Complaint did not constitute prohibited *ex parte* contact with the Commission. Nonetheless, because the email was sent inadvertently and Excelsior did not intend to fill up e-mail inboxes of individual Commissioners, Excelsior immediately withdrew and retracted the email. Finally, expressions of general support are not communications on a material issue in the proceeding. Accordingly, MCGP's Complaint and Request for Sanctions should be summarily denied.

I. INTRODUCTION

The facts alleged in MCGP's Complaint, while not complete, are not in serious dispute. Such facts, however, do not constitute a violation of Minnesota's *ex parte* statutes and rules. The undisputed facts are as follows: At 10:42 AM on July 26, 2007, an electronic message was sent by Ms. Leanne Stanley (a Public Affairs Representative in Excelsior's Coleraine, Minnesota office) requesting that the e-mail recipients express their support "in their own words" for the Mesaba Energy Project ("Project") by e-mailing members of the Commissioner. This e-mail, however, was sent without the knowledge of senior executives at Excelsior's Minnetonka headquarters.

As soon as it was discovered that the e-mail had been sent, Ms. Stanley was directed to recall the message through an automated function in Microsoft Outlook. The original message was recalled at 11:00 AM, only eighteen minutes after it was sent. At 12:10 PM, Excelsior sent a final e-mail to the same distribution list requesting that the recipients of the original e-mail disregard that e-mail and "*not send any e-mails*" to members of the Commission regarding the Project. As discussed below, the totality of these facts establish that Excelsior did not attempt, or engage in, a prohibited *ex parte* contact. And in any case, Excelsior's actions certainly do not justify an imposition of sanctions. Indeed, no party to this proceeding was prejudiced as a result of Excelsior's actions.

II. DISCUSSION

A. Excelsior Did Not Engage In A Prohibited *Ex Parte* Communication.

Minn. Stat. § 216A.037 and Minn. R. Part 7845.7000 *et seq.*, govern *ex parte* communications. Importantly, not all communications between members of the Commission

and persons concerned with the activities of the Commission are improper. Indeed, an *ex parte* communication is permissible except as prohibited by Minn. R. Part 7845.7200.¹ Minn.

R. Part 7829.7200, subp. 1 provides that:

An *ex parte* communication, either direct or indirect, must not be made or attempted to be made between a commissioner and a party concerning: A. a *material issue during a pending contested case proceeding*, from the date the matter is referred to the Office of Administrative Hearings until the commission issues its final order and the time to petition for reconsideration expires . . . [Emphasis added.]

Minn. R. Part 7829.7000 defines an *ex parte* communication as “an oral or written, off-the-record communication made to or by commissioners or commission decision-making personnel, without notice to parties, that is directed to the merits or outcome of an on-the-record proceeding.” Procedural, scheduling, and status inquiries that do not bear on the merits of a pending proceeding are, by definition, not *ex parte* communications.²

Accordingly, an *ex parte* communication is only prohibited if the communication (or attempt) is made off the record, without notice to other parties, and pertains to a material issue in a pending Commission proceeding. Based upon the facts of this case as applied to these necessary elements, it must be determined that Excelsior did not engage in a prohibited *ex parte* communication and that sanctions are not appropriate.

1. The Facts Demonstrate That No Attempted or Actual Prohibited *Ex Parte* Communication Was Made.

As noted above, Minn. R. Part 7829.7200 Subpart 1 provides that “[a]n *ex parte* communication, either direct or indirect, must not be made or attempted to be made between a

¹ See Minn. R. Part 7845.7100 (“An *ex parte* communication is permissible except as prohibited in part 7845.7200.”).

² See Minn. R. Part 7829.7000, subp. 4 (*Ex parte* communication “does not include procedural, scheduling, and status inquiries or other inquiries or requests for information that have no bearing on the merits or the outcome of the proceeding.”).

commissioner and a party concerning” a material issue. As discussed above, the original correspondence that requested that the recipients e-mail members of the Commission to express support for the Project was (1) recalled within minutes of being sent; and (2) promptly followed-up by an e-mail clearly requesting that the recipients not contact members of the Commission.

Under these circumstances, Excelsior cannot be found to have made or attempted an *ex parte* communication (much less a prohibited communication) within the plain meaning and spirit of Minn. R. Part 7845.7200. The undisputed facts demonstrate that Excelsior made every effort to ensure that no off-the-record communication (prohibited or otherwise) related to the Project was made on its behalf to members of the Commission. Because Excelsior promptly recalled and repudiated its original e-mail, an *ex parte* communication attributable to Excelsior cannot be determined to have occurred.

2. Assuming, *Arguendo*, that An *Ex Parte* Communication Was Made or Attempted, the Communication Was Not Prohibited.

As set forth in Minn. § Stat. 216A.037 and Minn. R. Part 7845.7200, an *ex parte* communication is only prohibited if it pertains to a “material issue” in a pending proceeding. “Material issue” is defined in Minn. R. Part 7845.7000 as “an issue that may affect the merits or outcome of an on-the-record proceeding.” Even assuming the original e-mail requesting that the recipients express support for the Project with members of the Commission constituted an actual or attempted *ex parte* communication (despite being both immediately recalled and repudiated), it does not constitute a prohibited communication on a material issue pending before the Commission.

In its April 26, 2006 Notice and Order for Hearing and Order Granting Intervention Petition issued in this proceeding, the Commission defined the scope of the proceeding, stating that “the issues in this case are whether the Commission should”:

- (1) approve, disapprove, amend, or modify the terms and conditions of a proposed power purchase agreement that Excelsior has submitted to Xcel Energy under Minn. Stat. § 216B.1694;
- (2) determine that the coal-fueled Integrated Gasification Combined Cycle (IGCC) power plant that Excelsior plans to construct in northern Minnesota is, or is likely to be, a least cost resource, obligating Xcel to use the plants generation for at least two percent of the energy supplied to its retail customers, under Minn. Stat. § 216B.1693; and
- (3) determine that, under the terms of Minn. Stat. § 216B.1693, at least 13% of the energy supplied to Xcel s retail customers should come from the IGCC plant by 2013.

Merely requesting that persons express “support” for the Project “in their own words” does not implicate “an issue that may affect the merits or outcome of an on-the-record proceeding” within the meaning of Minn. R. Part 7845.7200. Indeed, expressing support for the Project generally does not go to the heart of the issues set for hearing. It is telling that MCGP does not even allege, much less demonstrate, that the original correspondence went to the “merits or outcome” of the proceeding. As the Commission has previously determined:

An ex parte communication must be ‘directed to the merits or outcome of an on-the-record proceeding. Deciding whether the parties ‘directed’ their remarks to the merits or outcome of the Commission’s merger proceeding calls for a judgement regarding what the parties meant to communicate by those remarks.[³]

In the present case, it is clear that Excelsior did not, indirectly or otherwise, attempt to influence other persons to communicate with the Commission on a material issue now before

³ See *In the Matter of Northern States Power Company’s Petition for Approval to Merge with Wisconsin Energy Corporation*, ORDER FINDING NO PROHIBITED EX PARTE COMMUNICATION AND DIRECTING COMPLIANCE FILING, Docket No. E-002/PA-95-500 at page 6 (October 28, 1996).

the Commission on exceptions. The fact that Excelsior recalled and repudiated its original e-mail clearly shows that Excelsior did not engage in a prohibited communication on a material issue.

Finally, in the event any *ex parte* communication generally expressing support for the Project was made to members of the Commission as a direct result of Excelsior's initial July 26 e-mail, expressing support for the Project is not substantively different than allowing the public to voice opinions through the existing public hearing and open meetings processes. This fact was illustrated at the Commission's July 31, 2007 Oral Arguments in this matter, where the Commission allowed members of the public to speak on issues relating to the Project. As noted, Excelsior only asked that the recipients of the original e-mail express support for the project in their own words. Under these circumstances, it would be unreasonable to conclude that the facts establish that a prohibited *ex parte* communication on a material issue pending before the Commission was requested or has occurred.

B. Because Excelsior Did Not Engage In A Prohibited *Ex Parte* Communication, Sanctions are Neither Appropriate Nor Warranted.

The Commission's rules set forth the sanctions available in the event a prohibited *ex parte* communication is determined to have occurred. As discussed above, Excelsior did not engage in a prohibited *ex parte* communication with the Commission.⁴ Therefore, pursuant to Minn. Stat. § 216A.037 and Minn. R. Part 7845.7500 sanctions are not appropriate.

⁴ Minn. R. Part 7845.7500.

**III.
CONCLUSION**

WHEREFORE, based on the foregoing discussion, it must be found that Excelsior did not engage in a prohibited *ex parte* communication and MCGP's Complaint and Request for Sanctions should be dismissed.

Dated: August 6, 2007

Respectfully submitted,

/s/ Brian M. Meloy
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Counsel For Excelsior Energy Inc.

STATE OF MINNESOTA
BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

ITMO the Petition of Excelsior Energy Inc.
and Its Wholly-Owned Subsidiary MEP-I,
LLC For Approval of Terms and Conditions
For The Sale of Power From Its Innovative
Energy Project Using Clean Energy
Technology Under Minn. Stat. § 216B.1694
and a Determination That the Clean Energy
Technology Is Or Is Likely To Be a Least-
Cost Alternative Under Minn. Stat.
§ 216B.1693

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

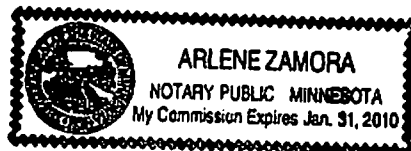
Herrn Brown, being first duly sworn, upon oath deposes and states
that on August 6, 2007, by mailing true and correct copies thereof, enclosed in an envelope,
postage prepaid, and by depositing same in the U.S. Mail at Minneapolis, Minnesota she
served the ANSWER TO THE COMPLAINT OF MCGP OF EXCELSIOR ENERGY INC upon those
persons on the attached Service List:

Copies of were also e-mailed to those persons listed as receiving e-mail filings.

Herrn Brown

Subscribed and sworn to before me
on August 6, 2007.

Arlene Zamora
Notary Public



SERVICE LIST

Commission and Administrative Law Judges

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Subject: UPCOMING PUC HEARING - COULD YOU SEND AN EMAIL FOR US?

Hello everyone – as you know, our hearing before the Public Utilities Commission is next Tuesday, July 31.

We've been working hard to prepare, and as you've seen by our recent announcements, the Project itself is shaping up quickly. We have passed a lot of milestones this summer, including getting our transmission interconnection agreement signed so our output will be deliverable throughout MISO, getting site control of our second site, kicking off the final phase of engineering before construction starts, and nearing the date our joint state/federal EIS will be published. But, now is crunch time – you have been so helpful and supportive in the past, but I would like to ask you to do one more thing before the hearing – please email the PUC Commissioners and express your support for the Mesaba Project. Just a few sentences in your own words would be extremely helpful. Here are the email addresses for the Commissioners: ***Please reference The Mesaba Energy Project PPA Docket No. 05-1993***

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Please do not hesitate to contact Pat Micheletti at 651-214-5184 or me at 218-245-1205 if you have any further questions. As always, thank you so much for your continuing support!

Leanne Stanley
Public Affairs Representative

From: Leanne Stanley [mailto:LeanneS@excelsiorenergy.com]

Sent: Thursday, July 26, 2007 11:00 AM

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Subject: Recall: UPCOMING PUC HEARING - COULD YOU SEND AN EMAIL FOR US?

Leanne Stanley would like to recall the message, "UPCOMING PUC HEARING - COULD YOU SEND AN EMAIL FOR US?".

Janet Gonzalez

From: Leanne Stanley [LeanneS@excelsiorenergy.com]

Sent: Thursday, July 26, 2007 12:11 PM

Hi –

Please disregard the email you received from me earlier today. It was sent in error. Please do not send any emails to any of the people listed in my earlier email request. I apologize for any inconvenience caused by my earlier message.

Thank you,
Leanne Stanley
Public Affairs Representative

8/7/2007

STATE OF MINNESOTA)
COUNTY OF RAMSEY)SS)

AFFIDAVIT OF SERVICE

I, Robin Rice, being first duly sworn, deposes and says:

That on the 7th day of August, 2007 she served the attached
Letter.

MNPUC Docket Number: E-6472/M-05-1993

XX By depositing in the United States Mail at the City of St. Paul, a true
and correct copy thereof, properly enveloped with postage prepaid

XX By personal service

XX By inter-office mail

to all persons at the addresses indicated below or on the attached list:

Commissioners
Carol Casebolt
Peter Brown
Marcia Johnson
Kate Kahlert
Janet Gonzalez
Bob Cupit
Bret Eknes
Marc Fournier
David Jacobson
Susan Mackenzie
Sharon Ferguson - DOC
Julia Anderson - OAG
Curt Nelson - OAG
AG-PUC

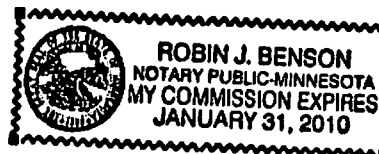
Robin Rice

Subscribed and sworn to before me,

a notary public, this 7 day of

August, 2007

Robin Benson
Notary Public



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