

STATE OF MINNESOTA  
IN COURT OF APPEALS

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In the Matter of 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

**ALTERNATIVE PETITION FOR  
DISCRETIONARY REVIEW**

Court of Appeals No: \_\_\_\_\_

MPUC Docket No. E-6472/M05-1993

OAH Docket Number: 12-2500-17260-2

**DATE OF AGENCY DECISIONS:**

August 30, 2007

November 8, 2007

**Date and Description of Event  
Triggering Appeal Time:**

Commission's Order Denying Petitions for  
Reconsideration and other Post-Decision Relief  
dated November 8, 2007

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TO: THE COURT OF APPEALS OF THE STATE OF MINNESOTA:

Pursuant to Minn. R. Civ. App. P. 105.01, Petitioners Excelsior Energy Inc. and its wholly owned subsidiary, MEP-I LLC (together, "Excelsior") request discretionary review of the Minnesota Public Utilities Commission ("MPUC" or the "Commission") Orders issued on the dates noted above disapproving the proposed power purchase agreement with Xcel Energy submitted by Excelsior under the Innovative Energy Project Statute, Minn. Stat. § 216B.1694 ("IEP Statute"). This Alternative Petition for Discretionary Review is filed simultaneously with Excelsior's Petition for Writ of Certiorari for consideration in the event the Court determines the MPUC Orders at issue are not appealable orders.

Immediate review is necessary because the Orders at issue disapprove Excelsior's proposed power purchase agreement ("PPA"), which would provide electric energy and capacity to Xcel Energy as contemplated by the IEP Statute. Immediate review is also necessary because of the urgency of implementing state energy policy: Over four years ago, the Minnesota Legislature passed the IEP Statute to encourage the rapid commercialization of integrated gasification combined cycle or "IGCC" technology to address Minnesota and national energy security and global climate change concerns. Further, the Orders should be reviewed because they raise important issues involving separation of powers and what branch of state government determines state energy policy.

**1. Statement of Facts.**

In 2003, the Minnesota Legislature enacted comprehensive energy policy legislation which, among other things, included two statutes designed to create the conditions necessary for the construction of a state-of-the-art, clean-coal IGCC power plant on the Iron Range. This Petition involves one of those statutes, the Innovative Energy Policy statute, Minn. Stat. § 216B.1694.

This transformative statute cleared regulatory barriers and provided regulatory incentives to ensure that the plant could be built by making a number of significant determinations about the need for, location of, and cost standards applicable to IGCC power plants in Minnesota. Like its federal predecessor and paradigm, the Public Utilities Regulatory Policy Act of 1978 ("PURPA"), one public purpose of the IEP Statute is to promote technological innovation and transformation in baseload power generation technology employed in Minnesota. The IEP Statute provides substantial regulatory incentives for IGCC technology, the only technology available to allow our Nation's most abundant domestic fuel resource, coal, to continue to be used for electric power generation while reducing the emission of health-affecting pollutants such as mercury and fine

particulate matter, as well as carbon dioxide emissions that contribute to global climate change. One of the incentives provided by the Legislature to encourage rapid commercialization of the IGCC technology was the creation of a market for the plant's output, in the form of a conditional entitlement to a long-term, 450-megawatt purchased power contract with the state's largest electric utility, Xcel Energy. The plant's right to this contract was conditioned on the Commission finding that the contract's terms and conditions were in the public interest, subject to, and in conformance with, the many determinations already made by the Legislature in the IEP Statute and taking into consideration five specifically enumerated public interest factors applicable to innovative energy projects.

On December 27, 2005, Excelsior filed a petition with the MPUC stating that lengthy negotiations with Xcel had failed to produce a mutually agreeable power purchase agreement and asked the Commission to approve, amend, or modify the agreement it proposed.

On August 30, 2007, the Commission issued an Order disapproving the terms and conditions of the proposed PPA submitted by Excelsior.

On September 19, 2007, Excelsior filed a timely Petition for Rehearing and Reconsideration of the Commission's August 30, 2007 Order disapproving the proposed PPA. On November 8, 2007, the Commission denied Excelsior's request for rehearing of its decision disapproving the PPA. This petition is triggered by that November 8, 2007 Order.

## **2. Statement of Issues.**

The core issue in this appeal is which public body has the ultimate authority to establish critically important energy policy for the State of Minnesota: the Minnesota Legislature or the Commission. The Commission's power to set and implement state energy policy is a power exclusively derived from the Minnesota Legislature. Therefore, the Commission is only permitted to exercise powers delegated to it by the Legislature and, conversely, is precluded from ignoring,

revisiting or overruling decisions that the Legislature has already made. In this case, the Commission improperly exceeded its authority by explicitly considering issues that were fully considered, finally decided, and codified by the Legislature in the IEP Statute, such as the need for, location of, and cost standards applicable to an “Innovative Energy Project” that the Legislature determined in 2003 were required to begin displacing Minnesota’s reliance on traditional coal technologies to meet baseload electric energy needs. Affirming the Commission’s decisions in this case would mean the Commission, and not the Legislature, has the supreme and final authority to decide energy policy issues previously decided by the Legislature, a result that would violate the separation of powers provisions of Article III of the Minnesota Constitution.

A. Did the Commission’s decisions improperly nullify, negate, and overrule the statute at issue in this appeal, the IEP Statute, Minn. Stat. § 216B.1694?

B. Was the Commission’s consideration of need and location in determining whether the PPA was in the public interest an error of law?

C. Were the Commission’s findings and conclusions regarding need unsupported by substantial evidence in the record and arbitrary and capricious?

D. Was the public interest and cost standard applied by the Commission erroneous as a matter of law under Minn. Stat. § 216B.1694?

E. Were the Commission’s comparative cost and risk findings and its findings on the five public interest criteria set forth in the IEP Statute unsupported by substantial evidence in the record and arbitrary and capricious?

F. Did the Commission improperly nullify the Legislature’s determination that Xcel Energy should assume the sole obligation for the PPA with the innovative energy project?

G. Were the Commission's decisions (a) in violation of constitutional provisions; (b) in excess of the statutory authority or jurisdiction of the agency; (c) made upon unlawful procedure; (d) affected by other errors of law; (e) not supported by substantial evidence in the record considered as a whole; and (f) arbitrary and capricious?

**3. Statement of Reasons Why Immediate Appeal is Necessary.**

It is Excelsior's position that the MPUC Orders at issue are final Orders disapproving the proposed PPA which are appealable by Writ of Certiorari. However, in the event the Court determines the Orders are not final administrative decisions, Excelsior respectfully requests the Court consider Excelsior's appeal as a discretionary appeal under Minn. R. Civ. App. P. 105.

An appeal from an interlocutory order may be permitted in order to protect "fundamental rights" of the appellant, *Emme v. C.O.M.B., Inc.*, 418 N.W.2d 176 (Minn. 1988), or where the issues raised are of sufficient importance. *Price v. Amdal*, 256 N.W.2d 451 (Minn. 1977); *Fritz v. Warthen*, 298 Minn. 54, 213 N.W.2d 339 (1973).

Petitioner Excelsior has fundamental due process rights that will be adversely affected if it cannot pursue an appeal of the Orders at issue. Since 2003, Excelsior has invested over four years of effort trying to meet the Legislature's objective of rapid commercialization of IGCC technology in Minnesota in order to reduce Minnesota's ever growing dependence on natural gas for power generation and eventually replace Minnesota's existing fleet of old, traditional pulverized coal power plants with IGCC plants. The IEP Statute was enacted by the Minnesota Legislature as a component of Omnibus Energy Bill of 2003, and it provided incentives, such as an exemption from the certificate of need process, that were designed to spur quick development and construction of an IGCC project in Northeastern Minnesota. Like its federal predecessor and paradigm, the Public Utilities Regulatory Policy Act of 1978 ("PURPA"), one public purpose of the IEP Statute is to

promote rapid and necessary technological innovation and transformation in baseload power generation technology employed in Minnesota.

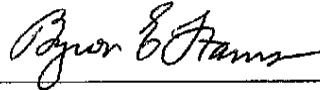
The issues raised in this Petition are of sufficient importance to merit discretionary consideration by this Court. They involve constitutional separation of powers issues and important and urgent issues of state energy policy as set forth in Excelsior's Petition for Certiorari.

**4. Conclusion.**

For the foregoing reasons, Excelsior respectfully requests that the Court grant its Petition for Discretionary Review if it determines the MPUC Orders at issue are not appealable orders.

Dated: December 10, 2007

Respectfully submitted,



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