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APPELLATE COURTS
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STATE OF MINNESOTA
IN COURT OF APPEALS

Excelsior Energy Inc. and MEP-I LLC,

Petitioners-Relators,

vs.

Minnesota Public Utilities Commission,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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

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

Petitioners-Relators Excelsior Energy Inc. and its wholly-owned subsidiary, MEP-I LLC (together, "Excelsior") hereby petition the Court of Appeals for a Writ of Certiorari to review decisions of the Minnesota Public Utilities Commission ("MPUC" or the "Commission") 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.

The grounds for this Petition for Writ of Certiorari are:

1. The Commission's decisions improperly nullify, negate, and overrule the statute at issue in this appeal, the Innovative Energy Project Statute, Minn. Stat. § 216B.1694 ("IEP Statute") as detailed below.

2. 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.

3. The IEP Statute was enacted over four years ago by the Minnesota Legislature as a component of Omnibus Energy Bill of 2003. 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 integrated gasification combined cycle or "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. Since enactment of the IEP Statute, the Legislature's decision to encourage the rapid

commercialization of IGCC technology to address Minnesota and national energy security and global climate change concerns has been validated by actions of the federal government through enactment of the Energy Policy Act of 2005 (which created significant federal incentives for IGCC technology in general, and Excelsior's Mesaba Energy Project in particular) and funding of clean coal programs supporting IGCC by the Federal Department of Energy. The Mesaba Project was selected for funding by the Department of Energy as a critical component of efforts to commercialize IGCC technology and thereby ensure that our Nation can continue to use abundant domestic coal resources for power generation. National environmental groups, such as the Clean Air Task Force, Environmental Defense and Natural Resources Defense Council, have concluded that without very quick commercialization of IGCC that will be able to capture and sequester carbon dioxide, it is not possible to stabilize atmospheric concentrations of carbon dioxide at acceptable levels. In short, the Minnesota Legislature knew what it was doing when it determined in the IEP Statute that a baseload IGCC power plant was needed in Northeastern Minnesota as soon as possible and that a traditional "least cost" standard was not the appropriate cost standard to be used by the Commission. The Commission has no authority to revisit or reconsider in any way the Legislature's determination about the need for, statutorily prescribed location of, or cost standard applicable to the Innovative Energy Project described in the IEP Statute.

4. The 2003 Omnibus Energy Bill was a "package deal" in which the IEP Statute created obligations for Xcel Energy to employ innovative baseload "clean coal" IGCC generation technology in exchange for legislative accommodations enabling Xcel to extend the lives of its traditional baseload technology resources: expanded nuclear waste dry cask storage for its two aged nuclear plants and legislatively mandated rate recovery for over a billion dollars of Xcel's expenses to convert two low-cost but aged metropolitan coal plants (Riverside and High Bridge) to natural

gas fuel and to renovate a third aged metropolitan coal plant (Allen S. King) to bring these coal plants into compliance with air pollution standards.

5. The Commission correctly found that the IEP Statute "attempted to clear regulatory barriers and provide regulatory incentives" for an innovative "clean coal" IGCC plant and that "[o]ne of these incentives 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." MPUC Order of August 30, 2007, p. 1. The decisions appealed from found that the power purchase contract proposed by Excelsior for its innovative "clean coal" IGCC project was not in the public interest. *Id.* at 7, 13-23.

6. In addition to the entitlement to a PPA with Xcel Energy, the Commission also correctly found that the IEP Statute provided seven other regulatory incentives and exemptions which included: "(1) Both the plant and its transmission infrastructure were exempted from the certificate of need requirements that would normally apply." *Id.* at 2.

7. **The Commission's consideration of need in determining whether the PPA was in the public interest was an error of law.** The very first "certificate of need requirement" under Minn. Stat. § 216B.243, subd. 3 is "the accuracy of the long-range energy demand forecasts on which the necessity for the facility is based." Minn. Stat. § 216B.243, subd. 3(1). The Commission applied the wrong legal standard and nullified a crucial legislative incentive for innovative energy projects — a statutory exemption from the requirements for a certificate of need — when it found Excelsior's Power Purchase Agreement ("PPA") was not in the public interest because in the Commission's view Xcel did not need the power to be provided under the PPA. A certificate of need proceeding demands, among other things, that a proponent of a new energy facility

demonstrate need for that facility. In contrast, the IEP Statute is consciously designed to spur construction of innovative energy projects to meet the need for new, clean baseload electric generation that the Legislature has already determined exists. Thus, the Commission's application of certificate of need factors to its public interest analysis effectually repealed one of the most important regulatory incentives in the IEP Statute before the provision ever had the opportunity to yield the sort of technical innovation that the Minnesota Legislature intended to inspire through the passage of the 2003 Omnibus Energy Bill. The Commission's conclusions regarding need are also not supported by substantial credible evidence in the record and are arbitrary and capricious.

8. **The Commission's consideration of the project's location in determining whether the PPA was in the public interest was an error of law.** The IEP Statute requires that the Mesaba Project be located in Northeastern Minnesota. During the hearings and deliberation in this case, the Commission on a number of occasions not only revisited the Legislature's judgment as to the proper location of the Mesaba Project, but affirmatively and explicitly rejected the Legislature's conclusion by stating that the project is in the wrong location. In addition to being an error of law, the Commission's consideration of the purported negative implications of the location of the project are also not supported by substantial credible evidence in the record and are arbitrary and capricious.

9. **The public interest and cost standard applied by the Commission is erroneous as a matter of law under Minn. Stat. § 216B.1694.** The Commission applied the wrong public interest and cost standard and nullified the public purpose of the IEP Statute to promote innovation in making its adverse public interest determination. The Commission based its public interest and cost determinations on the general public interest determination and "least-cost" standard "the Commission routinely makes when it examines the terms and conditions of any power purchase agreement." MPUC Order of August 30, 2007, p. 14. The IEP Statute prescribes that five specific

statutorily delineated public interest factors be applied in considering the Innovative Energy Project that are different from those generally applied. Thus, the Commission exceeded its authority and ignored State law in applying the public interest and "least-cost" standard for approving power purchase agreements employing established, traditional generation technologies, rather than the specific public interest criteria for evaluating innovative generation technology (which are silent on comparative costs) set forth in the IEP Statute itself.

10. **The Commission's comparative cost and risk findings and its findings on the five public interest criteria set forth in the IEP Statute are unsupported by substantial evidence in the record and are arbitrary and capricious.** The Commission adopted comparative cost findings for traditional pulverized coal technologies that lacked any foundation at all in the record of the proceeding from any party with expertise to validate the accuracy or validity of the cost estimates. These comparative cost findings are, therefore, arbitrary and capricious and not supported by substantial evidence in view of the record considered as a whole.

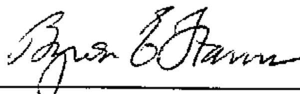
11. **The Commission nullified the Legislature's determination that Xcel Energy should assume the sole obligation for the PPA with the innovative energy project.** In direct contravention of the express terms of the IEP Statute, the Commission arbitrarily and capriciously determined that it would not approve a power purchase agreement which required Xcel to buy at least 450 MW from the Innovative Energy Project and would require Excelsior to obtain participation by other Minnesota utilities in order to gain approval for a PPA for its Innovative Energy Project.

12. The Commission's decisions are (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.

Certiorari review of a decision of the Commission is authorized by the following authorities: Minn. Stat. §§ 14.63 and 216B.27 and Minn. R. Civ. App. P. 103.03(g) and 115.01.

Dated: December 10, 2007

Respectfully submitted,



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