

STATE OF MINNESOTA
IN COURT OF APPEALS

Excelsior Energy Inc. and MEP-I LLC,
Petitioners-Relators,

vs.

Minnesota Public Utilities Commission,
Respondent.

**STATEMENT OF THE CASE
OF PETITIONERS-RELATORS**

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

Petitioners-Relators Excelsior Energy Inc. and its wholly-owned subsidiary, MEP-I LLC
(together, "Excelsior") hereby submit their Statement of the Case:

1. Court or agency of case origination and name of presiding judge or hearing officer.

Minnesota Public Utilities Commission ("MPUC" or "Commission")

Chair Leroy Koppendraye, Commissioners David Boyd, Marshall Johnson, Thomas Pugh,
and Phyllis A. Reha

2. Jurisdictional statement

B. Certiorari appeal.

Statute, rule or other authority authorizing certiorari appeal:

Minn. Stat. §§ 14.63 and 216B.27; Minn. R. Civ. App. P. 103.03(g) and 115.01.

Authority fixing time limit for appellate review (cite statutory section and date of event triggering appeal time, e.g., mailing of decision, receipt of decision, or receipt of other notice):

Minn. R. Civ. App. P. 115.01 states that “the appeal period and the acts required to invoke appellate jurisdiction are governed by the applicable statutes.” Minn. Stat. § 216B.27 states, in relevant part: “No cause of action arising out of any decision constituting an order of determination of the Commission or any proceeding for the judicial review thereof shall accrue in any court to any person or corporation unless the plaintiff or petitioner in the action or proceeding within 20 days after service of the decision, shall have made application to the commission for a rehearing in which the decision was made.” Minn. Stat. § 14.63 states that “[a] petition for a writ of certiorari by an aggrieved person for judicial review under sections 14.63 to 14.68 must be filed with the Court of Appeals and served on the agency not more than 30 days after the party receives the final decision and order of the agency.” Minn. Stat. § 14.64 provides that “[i]f a request for reconsideration is made within ten days after the decision and order of the agency, the 30-day period provided in section 14.63 shall not begin to run until service of the order finally disposing of the application for reconsideration.”

The MPUC’s original order disapproving Excelsior’s proposed power purchase agreement (“PPA”) was dated August 30, 2007. On September 19, 2007, Excelsior filed its Petition for Reconsideration and Rehearing of the August 30, 2007 Commission Order, and Request for Deferral of Decision on the Merits. The MPUC issued its Order Denying Petitions for Reconsideration and other Post-Decision Relief on November 8, 2007. The date of the event triggering appeal time is November 9, 2007, the date Excelsior received the Commission’s November 8, 2007 Order.

(D) Finality of order or judgment.

Does the judgment or order to be reviewed dispose of all claims by and against all parties, including attorney fees? Yes (X) No ()

Please note that the Order to be reviewed is a final disapproval of the proposed PPA. Under the Order, the parties are subject to a continuing obligation to negotiate over the terms of a revised PPA and participate in the exploration of a statewide market for the output of Excelsior’s Mesaba Energy Project.

If no:

3. State type of litigation and designate any statutes at issue.

Administrative Law. Excelsior seeks to overturn a decision by the MPUC disapproving its proposed power purchase agreement requiring Xcel to purchase at least 450 MW of power from its innovative energy project and finding the power purchase agreement is not in the public interest under the Innovative Energy Project Statute, Minn. Stat. § 216B.1694. The

statutes at issue are Minn. Stat. §§ 216B.1963 and 216B.1964 (together, the “IGCC Enabling Statutes”), and the Omnibus Energy Act of 2003, Minn. Laws 2003, Chapter 11.

4. Brief description of claims, defenses, issues litigated and result below. For criminal cases, specify whether conviction was for a misdemeanor, gross misdemeanor, or felony offense.

In 2003, the Minnesota Legislature enacted comprehensive energy policy legislation which, among other things, included the IGCC Enabling Statutes, two statutes designed to create the conditions necessary for the construction of state-of-the-art, clean-coal integrated gasification combined cycle or “IGCC” power plants on the Iron Range 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.

These transformative statutes clear regulatory barriers and provide regulatory incentives to ensure that the innovative 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. One of the incentives was the creation of a market for the first 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 IGCC Enabling Statutes and taking into consideration five specifically enumerated public interest factors applicable to innovative energy projects.

On December 27, 2005, Excelsior Energy Inc. filed a petition 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. The petition also asked the Commission to find that the Mesaba Project it proposed to build “is or is likely to be” a least-cost resource under Minn. Stat. § 216B.1693, and that Xcel should be required to buy 13% of its retail load from the Project, under the Clean Energy Technology provisions of Minn. Stat. § 216B.1693. The Commission referred the case to the Office of Administrative Hearings.

The parties to the case stipulated to the admission of pre-filed testimony and waived cross-examination; therefore, no formal evidentiary hearings were held. The parties submitted sworn testimony from 47 witnesses and hundreds of pages of exhibits. The Administrative Law Judges conducted three public hearings, which were held in Hoyt Lakes, Taconite, and St. Paul. The parties submitted initial and reply briefs to the Administrative Law Judges.

On April 12, 2007, the Administrative Law Judges (ALJs) filed their Findings of Fact, Conclusions, and Recommendations, together with a Memorandum (the ALJs’ Report). They found, among other things, that the Mesaba Project did not meet the statutory definition of “innovative energy project” set forth in Minn. Stat. § 216B.1694 and was, therefore, ineligible for the long-term purchased power contract it sought.

The parties filed exceptions and replies to exceptions to the ALJs' Report.

The parties presented oral argument on exceptions to the ALJs' Report to the Commission on July 31 and August 2, 2007. On August 2, 2007, the record closed under Minn. Stat. § 14.61.

On August 30, 2007, the Commission issued the Order which is subject of this appeal. The Commission correctly found that the Mesaba Project is an "innovative energy project" under Minn. Stat. § 216B.1694, subd. 1 and declined to adopt the ALJs' proposed contrary finding. In addition, however, the Commission disapproved the terms and conditions of the proposed PPA submitted by Excelsior and found it not to be in the public interest.

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 and finding it was not in the public interest.

On November 1, 2007, the Commission deliberated on the parties' motions for rehearing.

On November 8, 2007, the Commission denied Excelsior's request for rehearing of its decision disapproving the PPA. This appeal is triggered by that November 8, 2007 Order.

5. List specific issues proposed to be raised on appeal.

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, Innovative Energy Project Statute, Minn. Stat. § 216B.1694 ("IEP Statute")?
- 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 not supported 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?

6. Related appeals.

List all prior or pending appeals arising from the same action as this appeal. If none, so state.

There are no prior or presently pending appeals related to this case.

However, there is presently pending before the MPUC a related phase of this case concerning whether Xcel has a related obligation to purchase an additional amount of power in excess of the amount it is obligated to purchase under a PPA authorized by the Innovative Energy Statute. This additional power purchase obligation is created by a second related statute, the Clean Energy Technology Statute, Minn. Stat. § 216B.1693, which provides that if the Commission finds that the technology used by the Excelsior project, IGCC, "is or is likely to be" a least-cost resource, Xcel shall supply at least two percent of the electric energy provided to retail customers from that technology. Xcel is obligated to provide this clean energy technology minimum determined by the Commission from an IEP "unless the Commission finds doing so contrary to the public interest." The ALJ has recommended that the Commission determine that IGCC technology is not presently or likely to be a least-cost resource. Excelsior has filed exceptions to the ALJ's recommended decision and that phase of the case is presently awaiting oral argument before the MPUC.

List any known pending appeals in separate actions raising similar issues to this appeal. If none are known, so state.

None known.

7. **Contents of record.**

Is a transcript necessary to review the issues on appeal? Yes (X) No ()

If yes, full (X) or partial () transcript?

Has the transcript already been delivered to the parties and filed with the trial court administrator? Yes (X) No ()

Because the transcript has already been prepared and filed with the MPUC, Petitioner/Respondent hereby notifies Respondent, for purposes of Rules 115.04, subd. 1 and 110.02, subd. 1(c), that no additional transcripts will be ordered.

8. **Is oral argument requested?** Yes (X) No ()

If so, is argument requested at a location other than that provided in Rule 134.09, subd. 2? Yes () No (X)

9. **Identify the type of brief to be filed.**

Formal brief under Rule 128.02.

10. **Names, addresses, zip codes and telephone numbers of attorney for appellant and respondent.**

Petitioner's Counsel:

Byron E. Starns (#104486)
Brian M. Meloy (#287209)
Leonard, Street and Deinard
150 South Fifth Street, Suite 2300
Minneapolis, MN 55402
Telephone: (612) 335-1500

Thomas L. Oстераas
Excelsior Energy Inc.
11100 Wayzata Boulevard
Suite 305
Minnetonka, MN 55305
Telephone: (952) 847-2366

Respondent's Counsel:

Lori Swanson
Minnesota Attorney General
102 State Capitol
75 Rev. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155
Telephone: (651) 296-6196

Alison Archer
Assistant Attorney General
1100 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101
Telephone: (651) 297-5945

Parties' Counsel:

Northern States Power
d/b/a Xcel Energy

Christopher Clark
Xcel Energy
414 Nicollet Mall, 5th Floor
Minneapolis, MN 55401
Telephone: (612) 215-4593

Thomas E. Bailey
Michael C. Krikava
Briggs and Morgan
2200 IDS Center
Minneapolis, MN 55402
Telephone: (612) 977-8566

Minnesota Power

David R. Moeller
Minnesota Power
30 West Superior Street
Duluth, MN 55802-2093
Telephone: 1-800-228-4966

Minnesota Center for Environmental
Advocacy, Izaak Walton League of America -
Midwest Office, and Fresh Energy

Kevin Reuther
Minnesota Center For
Environmental Advocacy
26 E. Exchange St., Suite 206
St. Paul, MN 55101-1667
Telephone: (651) 223-5969

Big Stone Unit II Co-Owners

Todd J. Guerrero
David Sasseville
Lindquist & Venum
4200 IDS Center
80 South 8th Street
Minneapolis, MN 55402-2274
Telephone: (612) 371-3211

Minnesota Department of Commerce

Valarie M. Means
Assistant Attorney General
1400 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101
Telephone: (651) 296-6170

minncoalgasplant.com (MCGP)

Carol Overland
Overland Law Office
P.O. Box 176
Redwing, MN 55066
Telephone: (612) 227-8638

Xcel Industrial Intervenors

Andrew P. Moratzka, Esq.
Robert Lee, Esq.
Mackall, Crouse & Moore, PLC
1400 AT&T Tower
901 Marquette Ave.
Minneapolis, MN 55402
Telephone: (612) 305-1400

Minnesota Chamber of Commerce

Richard J. Savelkoul
Felhaber, Larson, Fenlon & Vogt, P.A.
444 Cedar Street, Suite 2100
St. Paul, MN 55101-2136
Telephone: (651) 312-6042

Manitoba Hydro

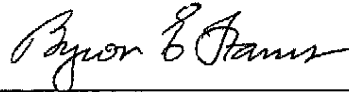
Eric F. Swanson
David M. Aafedt
Winthrop & Weinstine, P.A.
225 South Sixth St, Suite 3500
Minneapolis, MN 55402
Telephone: (612) 604-6400

Great Northern Power Development, LLP

John E. Drawz
Fredrikson & Byron, P.A.
200 South Sixth St., Suite 4000
Minneapolis, MN 55402-1425
Telephone: (612) 492-7000

Dated: December 10, 2007

Respectfully submitted,



Byron E. Starns (#104486)
Brian M. Meloy (#287209)
LEONARD, STREET AND DEINARD
Professional Association
150 South Fifth Street, Suite 2300
Minneapolis, Minnesota 55402
Telephone: (612) 335-1500

**ATTORNEYS FOR PETITIONERS-RELATORS
EXCELSIOR ENERGY INC. AND MEP-I LLC**