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December 20, 2007

VIA E-FILING & E-MAIL

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

**Re: Petition Under Minnesota Statute Section 216B.1694
MPUC Docket No. _____**

Dear Dr. Haar:

Enclosed for filing please find Excelsior Energy and MEP-I LLC's Petition for an Order confirming that all transmission infrastructure associated with the Mesaba Energy Project is exempt from certificate of need requirements pursuant to Minn. Stat. §§ 216B.1694, subd. 2(a)(1), 216A.05, subd. 5, and Minn. R. 7829.1200.

By copy of this letter, service of the same is made upon the service list for Excelsior's PPA docket, MPUC Docket No. E-6472/M05-1993.

Thank you for your consideration.

Very truly yours,

LEONARD, STREET AND DEINARD
Professional Association

/s/ Byron E. Starnes

BYRON E. STARNES

Enclosure
cc (w/enc.): Attached Service List

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**STATE OF MINNESOTA
BEFORE THE
MINNESOTA PUBLIC UTILITIES COMMISSION**
121 – 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

LeRoy Koppendrayer	Chair
Marshall Johnson	Commissioner
David Boyd	Commissioner
Thomas Pugh	Commissioner
Phyllis Reha	Commissioner

In the Matter of the Petition of
Excelsior Energy Inc. and MEP-I
LLC for an Order Concerning
Transmission Infrastructure Under
Minn. Stat. § 216B.1694

MPUC Docket No. _____

**EXCELSIOR ENERGY AND MEP-I LLC'S
PETITION UNDER MINNESOTA
STATUTE SECTION 216B.1694**

Excelsior Energy Inc. and its wholly owned subsidiary, MEP-I LLC (“MEP-I”) (jointly,
“Excelsior”) for their Petition state as follows:

I.
INTRODUCTION

1. Pursuant to Minn. Stat. §§ 216B.1694, subd. 2(a)(1), 216A.05, subd. 5 and Minn. R. 7829.1200, Excelsior respectfully submits this Petition requesting that the Minnesota Public Utilities Commission (“Commission”) affirm that the certificate of need (“CON”) exemption granted to the Mesaba Energy Project (“Mesaba” or the “Mesaba Project”) as an “innovative energy project” (“IEP”) under Minn. Stat. § 216B.1694, subd. 2(a)(1) applies to all transmission infrastructure associated with the Project’s power generation facilities.

2. Specifically, Excelsior requests that the Commission issue an Order on or before March 1, 2008, affirming that all transmission infrastructure necessary to interconnect the Mesaba Project to the bulk power system is exempt from Minnesota’s CON requirements, including Network Upgrade infrastructure required by the Midwest Independent Transmission System

Operator, Inc. (“MISO”) that might be permitted, constructed or owned by Minnesota Power or any other person.

3. As discussed below, Commission action is necessary to accurately reflect the requirements of the IEP Statute and to move forward with the development of transmission infrastructure associated with the Mesaba Project in an efficient and timely manner.

II. STATUTORY AUTHORITY FOR PETITION

4. This Petition is filed pursuant to Minn. Stat. §§ 216A.05, subd. 5, 216B.1694, subd. 2(a)(1) and Minn. R. 7829.1200.

5. Minn. Stat. § 216A.05, subd. 5 provides:

Hearing upon petition. With respect to those matters within its jurisdiction the commission shall receive, hear, and determine all petitions filed with it in accordance with the rules of practice and procedure promulgated by the commission, and may investigate, hold hearings, and make determinations upon its own motion to the same extent, and in every instance, in which it may do so upon petition.

6. Minn. Stat. § 216B.1694, subd. 2(a)(1) provides:

Regulatory incentives. (a) An innovative energy project:

(1) is exempted from the requirements for a certificate of need under section 216B.243, for the generation facilities, and transmission infrastructure associated with the generation facilities, but is subject to all applicable environmental review and permitting procedures of chapter 216E; [Emphasis added.]

7. Minn. R. 7829.1200 provides:

INFORMAL OR EXPEDITED PROCEEDING.

Subpart 1. **When appropriate.** Informal or expedited proceedings may be used when contested case proceedings are not required, for example, when:

- A. there are no material facts in dispute;
- B. the parties and the commission have agreed to informal or expedited proceedings; or
- C. informal or expedited proceedings are authorized or required by statute.

Subp. 2. **Presentation of facts.** Written submissions are the preferred method of introducing facts. The commission shall allow oral presentation of facts when that can be done without compromising the rights of any person or the integrity of the proceeding. In informal proceedings, the commission shall require that factual allegations be made under oath or by affirmation when facts appear to be in dispute. In expedited proceedings, the commission shall require that factual allegations be made under oath or by affirmation and that documents filed in the proceeding be verified.

Subp. 3. **Notice.** The commission shall notify the persons on the official service list at least ten days before a meeting at which it may act on the basis of informal or expedited proceedings. Under exigent circumstances the executive secretary shall reduce the ten-day notice period.

III. PARTIES

8. Excelsior is an independent energy development company based in Minnetonka, Minnesota, which will license, construct, own and operate, through MEP-I, the Mesaba Project, a coal-fueled Integrated Gasification Combined Cycle (“IGCC”) power plant located in northeastern Minnesota with an initial capacity installation of 603 MW (net) for Unit One. The Mesaba Energy Project is an Innovative Energy Project under Minn. Stat. § 216B.1694.

9. Minnesota Power is an investor-owned public utility organized under the laws of Minnesota, providing retail and wholesale electric services to customers in northeastern Minnesota. Minnesota Power is a transmission-owning member of MISO and has executed a Large Generator Interconnection Agreement (“LGIA”) dated July 9, 2007 with Excelsior and MISO pursuant to which improvements required by MISO to the existing high voltage transmission system, including transmission facilities owned by Minnesota Power, will be made to allow the Mesaba Energy Project’s power generation facilities to interconnect with the existing high voltage transmission system.

IV.
BACKGROUND

10. On August 30, 2007, the Commission issued its Order Resolving Procedural Issues, Disapproving Power Purchase Agreement, Requiring Further Negotiations, and Resolving to Explore the Potential for a Statewide Market for Project Under Minn. Stat. § 216B.1694, subd. 2(a)(5) (“August 30 Order”) in Docket No. E-6472-/M-05-1993. In its August 30 Order, the Commission correctly found that the Mesaba Energy Project is an Innovative Energy Project (“IEP”),¹ and that as an IEP, “[b]oth the plant and its transmission infrastructure were exempted from the certificate of need requirements that would normally apply.”²

11. Because Minnesota Power refused to acknowledge in the LGIA the exemption from the CON for transmission system network upgrades associated with the Mesaba Project (as identified by MISO) that are owned by Minnesota Power, Excelsior agreed in the LGIA to seek an Order from the Commission confirming that the CON exemption applies to all transmission infrastructure associated with the Mesaba Project’s generation facilities. As a result, on September 19, 2007, Excelsior filed a Petition for Clarification of the August 30, 2007 Order asking that the Commission make the following finding on rehearing:

The Commission finds that the Mesaba Project is an “innovative energy project” under Minn. Stat. § 216B.1694, subd. 1., and that all transmission infrastructure associated with the Mesaba Project, including without limitation all transmission infrastructure needed to interconnect to the high voltage transmission grid and any and all network upgrades required by the Midwest Independent Transmission System Operator, Inc. in order for the Mesaba Project to interconnect to the grid, is, pursuant to section 216B.1694, subd. 2(a)(1), exempted from the requirements for a certificate of need under section 216B.243, regardless of whether the Mesaba Project owner or any other transmission owner or person actually permits, constructs, or oversees the construction of the transmission infrastructure associated with the Mesaba Project.

¹ August 30 Order at 24.

² *Id.* at 2.

12. In an Order issued on November 8, 2007, the Commission declined to make any substantive changes to its August 30 Order. Excelsior now brings this separate Petition to obtain the clarification required by Minnesota Power on this issue.

V.
GROUNDNS FOR PETITION

A. An Order from the Commission is Necessary to Ensure that the Development of the Transmission Infrastructure Associated with the Project Moves Forward in an Efficient and Timely Manner.

13. In its August 30 Order, the Commission expressly recognized that the IEP Statute was enacted “to clear regulatory barriers and provide regulatory incentives to ensure that the plant could be built.”³

14. One enumerated regulatory incentive provides that an IEP, like Mesaba, “is exempted from the requirements for a certificate of need under section 216B.243, for the generation facilities, *and transmission infrastructure* associated with the generation facilities, but is subject to all applicable environmental review and permitting procedures of chapter 216E.”⁴

15. In the present case, the *transmission infrastructure associated* with the Mesaba Energy Project’s generation facilities was identified by MISO through generator interconnection studies performed under MISO’s Large Generator Interconnection Procedures (“LGIP”), which are part of MISO’s Federal Energy Regulatory Commission-approved Transmission and Energy Markets Tariff.⁵ This multi-year process culminated with Excelsior executing a LGIA with Minnesota Power and MISO dated July 9, 2007.⁶

³ *Id.* at 1.

⁴ Minn. Stat. § 216B.1694, subd. 2(a)(1) (emphasis added).

⁵ Each generating resource greater than 20 MW seeking to interconnect with the bulk transmission system within the MISO footprint (whether being developed by an independent power producer or an investor owned utility) is required to adhere to the MISO LGIP.

⁶ Two separate LGIAs were executed with Minnesota Power and MISO, one for the preferred West Range Site and one for the alternative East Range Site.

16. In general, the LGIA for the West Range Site identifies the transmission infrastructure associated with the Mesaba Project that MISO determined is necessary to interconnect the Project's generation facilities to the transmission system.

17. Under the LGIA, Excelsior is responsible for permitting and constructing the sole use generator outlet facilities from the Mesaba Project site to the Blackberry substation, and Excelsior is currently seeking the necessary route permits in Docket No. E6472/GS-06-668.

18. Under the LGIA Minnesota Power is responsible for constructing and permitting the transmission system upgrades beyond the Blackberry substation that MISO has determined are associated with the interconnection of the Mesaba Project to the grid (Network Upgrades),⁷ which are largely upgrades to Minnesota Power's existing transmission system.

19. The LGIA sets forth various milestones the parties have agreed to meet in order to ensure that the Project can come online at the anticipated commercial operation date. Included within the milestones is Minnesota Power's permitting and construction of the required Network Upgrades in compliance with all applicable laws.

20. The milestones set forth in the LGIA reflect the fact that the Network Upgrades that MISO requires Minnesota Power to make under the LGIA are "transmission infrastructure associated with" the Mesaba Project's generation facilities, and as such those Network Upgrades are exempt from the CON process under Minn. Stat. § 216B.243 by operation of the IEP Statute.

21. Notwithstanding the plain language of the CON exemption under Minn. Stat. § 216B.1694, subd. 2(a)(1), because Minnesota Power would not acknowledge the exemption from the CON in the LGIA, Excelsior committed in the LGIA to attempt to obtain an explicit Order from the Commission affirming that the statutory exemption from the requirements for a

⁷ Section 1.218 of MISO's Tariff defines "Network Upgrades" as "[a]ll or a portion of the modifications or additions to transmission-related facilities that are integrated with and support the Transmission Provider's overall Transmission System for the general benefit of all Users of such Transmission System."

certificate of need did, indeed, apply to all transmission infrastructure associated with the Mesaba Project's generation facilities. In particular, Appendix B, Section 4 (a) of the LGIA provides that Excelsior would seek an Order from the Commission confirming that the Network Upgrades associated with the Mesaba Project that MISO requires Minnesota Power to make under the LGIA are exempt from any CON requirement pursuant to Minnesota law.⁸

22. In order for the transmission upgrades identified by MISO in the LGIA to proceed, it is necessary for the Commission to affirm the Legislature's determination that all of the transmission infrastructure associated with the Mesaba Project, including the Network Upgrades that MISO requires Minnesota Power to make under the LGIA, are exempt from the requirements for a certificate of need under Minn. Stat. § 216B.1694, subd. 2(a)(1).

B. The Plain Language and Intent of the IEP Statute Mandates That All Transmission Infrastructure Associated with the Mesaba Energy Project is Exempt from CON Requirements Under the IEP Statute.

23. The fundamental rule of statutory construction is to "look first at the specific statutory language and be guided by its natural and most obvious meaning."⁹ This rule reflects the fact that the Legislature must be presumed to have chosen the words of a statute "thoughtfully and meaningfully, not uselessly."¹⁰ In this case, the plain language of the IEP Statute says that the CON exemption applies to any "transmission infrastructure associated with the [Project's] generation facilities." The LGIA sets forth exactly what transmission infrastructure is associated with interconnecting the Project's generation facilities to the grid. MISO has determined that the Network Upgrades to be undertaken by Minnesota Power under the LGIA are associated with the

⁸ Relevant excerpts from Appendix B of the LGIA are attached hereto as Exhibit A.

⁹ *State v. Edwards*, 589 N.W.2d 807, 810 (Minn. Ct. App. 1999) (citing *Heaslip v. Freeman*, 511 N.W.2d 21, 22 (Minn. Ct. App. 1994)).

¹⁰ *In re Haskvitz*, 104 F. Supp. 173, 181 (D. Minn. 1952).

Mesaba Project since those Network Upgrades are required in order for the Project to deliver its energy to the bulk transmission system.

24. Furthermore, even if the actual words of the statute contained any ambiguity at all (which they do not), the general legislative purpose would then have to be considered.¹¹ Here, the Legislature sought to support the Mesaba Project by exempting it from burdensome and time consuming CON requirements—a fact recognized by the Commission in its August 30 Order. There would be no point to the exemption if it applied to some, but not all “transmission infrastructure associated with the generation facilities” within the plain meaning of the IEP Statute. Affirming the statutory exemption from the CON requirements for all transmission infrastructure associated with the Mesaba Project reflects the express terms of the IEP Statute and facilitates the development of transmission infrastructure associated with the Mesaba Project in the manner required by the Legislature.

C. Expedited Commission Action at This Time Is Appropriate.

25. Excelsior requests expedited action under Minn. R. 7829.1200 for good cause shown. As demonstrated herein, expedited consideration is appropriate as there are no material facts in dispute; instead, this Petition seeks only confirmation, to satisfy Excelsior’s obligations under the LGIA, that the plain language of Minn. Stat. § 216B.1694, subd. 2(a)(1) requires that all transmission infrastructure associated with the Mesaba Project’s generation facilities is exempt from the requirements for a certificate of need.

¹¹ *Gleason v. Geary*, 214 Minn. 499, 8 N.W.2d 808 (Minn. 1943).

VI.
CONCLUSION

26. Based upon the foregoing, the Commission should grant Excelsior's Petition on an expedited basis, and find that all transmission infrastructure associated with the Mesaba Project, including without limitation all transmission infrastructure needed to interconnect to the high voltage transmission grid and any and all Network Upgrades required by MISO in order for the Mesaba Project to interconnect to the grid, is, pursuant to section 216B.1694, subdivision 2(a)(1), exempted from the requirements for a certificate of need under section 216B.243, regardless of whether the Mesaba Project owner or any other transmission owner or person actually permits, owns, constructs, or oversees the construction of the transmission infrastructure associated with the Mesaba Project.

Dated: December 20, 2007

Respectfully submitted,

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EXHIBIT A

EXCERPTS FROM LGIA WITH MINNESOTA POWER AND MISO

Project G519

LARGE GENERATOR INTERCONNECTION AGREEMENT

entered into by the

Midwest Independent Transmission System Operator, Inc.

Minnesota Power

and

MEP-I LLC

**Appendix B
To LGIA**

Milestones

1. **Selected Option pursuant to Article 5.1:** The Parties acknowledge that Section 30.2 provides that conflicts between the Appendices and the body of the LGIA are to be resolved in favor of the body of the LGIA. The parties acknowledge that the items set forth below are intended to explain the provisions of the LGIA and to set forth the specific agreement of the Interconnection Customer and Transmission Owner relating to certain aspects of the agreement which are not resolved by the terms of the LGIA. The specific items set forth below are not intended to be in conflict with the provisions of the LGIA
2. Interconnection Customer selects the Standard Option as described in Article 5.1.1. Articles 5.1.2, 5.1.3, 5.1.4 and 5.3 shall not apply to this LGIA. If it is asserted that any element of the items set forth above are in conflict with the terms of the LGIA, then any party to this LGIA may exercise its Section 205 or 206 rights under the Federal Power Act to resolve such conflict and the terms of the LGIA shall not be deemed to be controlling until any such proceeding commenced has been resolved by a final, non-appealable order.
3. Interconnection Customer shall be entitled to a repayment by the Transmission Owner provided Interconnection Customer is entitled to such reimbursement under the provisions of Attachment FF of the Tariff, including any tax gross-up or other tax-related payments associated with Network Upgrades, and not repaid to Interconnection Customer, pursuant to Article 5.17.8 or otherwise, to be paid to Interconnection Customer within ninety (90) Calendar Days following the date the Generating Facility achieves Commercial Operation. In accordance with Section 11.4 of the LGIA, any repayment to Interconnection Customer shall include interest calculated in accordance with the methodology set forth in FERC's regulations at 18 C.F.R. § 35.19a (a)(2)(iii) from the date of any payment for Transmission Owner Network Upgrades through the date on which the Interconnection Customer receives a repayment.
4. Minnesota Certificate of Need Exemption.

At the time of execution of the LGIA, Transmission Owner is of the view that pursuant to Minn. Stat. section 216B.243 that a Certificate of Need is a required state approval from a Governmental Authority under Article 14. Interconnection Customer disagrees. To comply with the Transmission Provider's Large Generator Interconnection Procedure, Transmission Owner has conditionally included the CON on Exhibit A-11 as a required Governmental Approval. The Milestones set forth in this LGIA have been developed, however, based on the Interconnection Customer's representation to Transmission Owner and Transmission Provider that the Network Upgrades are exempt from the Minnesota Certificate of Need ("CON") process under Minn. Stat. section

216B.243 by operation of the Minnesota Innovative Energy Project (IEP) legislation under Minn. Stat. section 216B.1694, subd.2 (a)(1) ("IEP Legislation").

- a. The Minnesota Public Utilities Commission ("MPUC") is currently overseeing a proceeding which Interconnection Customer believes will address whether or not the Network Upgrades are exempt from the CON process under the IEP Legislation. *See* MPUC Docket No. E-6472/M-05-1993, OAH Docket No. 12-2500-17260-2.

Interconnection Customer represented to Transmission Owner and Transmission Provider that the following ordering language (or, by mutual agreement, its substantive equivalent), if included in any final order from the MPUC will legally exempt Transmission Owner from any CON requirement for the Network Upgrades under this LGIA pursuant to Minnesota law and the CON listed on Exhibit A-11 will not be required:

"Because it is an Innovative Energy Project, ...all transmission infrastructure associated with the Project, including without limitation all transmission infrastructure needed to interconnect to the high voltage grid and any and all network upgrades required by the Midwest Independent System Operator in order for the Project to interconnect to the grid, is, pursuant to section 216B.1694, subd. 2(a)(1), exempted from the requirements for a CON under section 2167B.243, regardless of whether the Project owner or any other transmission owner or person actually permits, constructs, or oversees the construction of the transmission infrastructure associated with the Project" (the "Ordering Language").

Nothing in this Section 4 is intended to limit or expand any rights a Party may have under Article 14 of the LGIA.

- b. By entering into this LGIA, Transmission Owner or Transmission Provider expresses no position on the suitability or merits of Interconnection Customer's representation that a CON is not needed for the Network Upgrades. It is further understood that Interconnection Customer has the burden and responsibility of establishing that the Network Upgrades are exempt from any CON requirement.
- c. Should it be determined that the Interconnection Customer's Mesaba Energy Project does not qualify as an IEP, or should the MPUC or a Minnesota Court of competent jurisdiction at any time determine that the Network Upgrades to be built by Transmission Owner are not exempt from the CON process under the IEP Legislation in any proceeding, the Parties acknowledge that the Milestones under this LGIA will have to be reviewed to determine any implications on the cost estimates and schedules, and amended by the Parties. It is understood that the schedule will be extended under the Milestones to allow time to complete the amendment process. Should Interconnection Customer desire Transmission Owner to continue to proceed with the Network Upgrades by then following the section

216B.243 CON process, the amended schedule will provide Transmission Owner with reasonable time to perform pre-CON application work, prepare and file a CON application and conduct its own CON proceedings with respect to the Network Upgrades in accordance with Article 14 of the LGIA.

- d. Interconnection Customer understands that May 1, 2008 is a critical path date by which a CON application would need to be filed by Transmission Owner if a CON were required in order for Transmission Owner to obtain the Final Route Permit and to meet the requested In-Service Dates in the event there is no CON exemption available to Transmission Owner. Transmission Owner presently anticipates that if the MPUC and/or Minnesota Court has not issued a final order indicating that the Network Upgrades are exempt from the CON process on or before May 1, 2008, then Transmission Owner will give Interconnection Customer a notice under Article 5.1.1 that it reasonably expects not to be able to complete the Network Upgrades by the dates specified in the current Milestones and will use Reasonable Efforts to meet earliest reasonable dates thereafter. Upon receipt of such notice and assuming Interconnection Customer does not have a final order including the Ordering Language (or, by mutual agreement, its substantive equivalent), then not later than ten (10) Days after receipt of such notice the Interconnection Customer shall either:
- i) without waiving its right to suspend the LGIA, notify the Transmission Owner to proceed with the CON pre-application work and pay a non-refundable deposit of \$150,000 to cover the Transmission Owner's additional estimated costs of such work and to develop a revised set of Milestones and cost estimates to apply for and proceed with an MPUC proceeding to obtain a CON and Interconnection Customer will post such additional security for payment under Article 11.5 as required by such revised cost estimates; or
 - ii) without waiving its right to suspend the LGIA, notify the Transmission Owner to temporarily stop work on all permitting, design, procurement and construction activities that would require a CON pending issuance of an MPUC or Minnesota Court final order (confirming Interconnection Customer's representation above) that the Network Upgrades are exempt from the CON process, and the remaining Milestones will automatically extend day for day, until Interconnection Customer furnishes Transmission Owner with a copy of a final MPUC or Minnesota Court final order so confirming without any material qualifications or conditions that the Network Upgrades are exempt from the CON process. Transmission Owner will then resume permitting, design, procurement and construction activities and use Reasonable Efforts to complete its Interconnection Facilities and Network Upgrades according to the extended schedule. The automatic extension of milestone dates in this subpart (ii) is contingent on Reasonable Efforts by Interconnection Customer to obtain a final order on an expedited basis. Interconnection Customer will use Reasonable Efforts to obtain expedited consideration necessary to obtain a final order from the MPUC

and/or a Minnesota Court. If the Interconnection Customer fails to demonstrate such Reasonable Efforts to the satisfaction of Transmission Provider, the Transmission Provider may declare a Breach for a failure to meet Milestones.

- e. Pursuant to the terms of this LGIA, any costs, fees and expenses, including but not limited to those from delays, rescheduling, storing materials, liabilities, claims, actions or proceedings against or incurred by the Transmission Owner resulting from its reliance on Interconnection Customer's representation that a CON under Minn. Stat. section 216B.243 is not required shall be considered as part of the costs of obtaining the required approvals from Governmental Authorities for the permitting and construction of the Network Upgrades.
5. **Milestones:** The description and date entries listed in the following tables are provided solely for the convenience of the Parties in establishing their applicable Milestones consistent with the provisions of this LGIA and the LGIP. The Milestones are subject to Paragraph 4 above.