



David R. Moeller, Attorney – Legal Services

Fax 218-733-3955 / E-mail dmoeller@allete.com

December 17, 2007

VIA OVERNIGHT MAIL

Frederick K. Grittner
Clerk of Appellate Courts
Minnesota Court of Appeals
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Re: Excelsior Energy Inc. and MEP-I LLC, vs. Minnesota Public Utilities Commission
Appellate Case Numbers: A07-2306 and A07-2305

Dear Mr. Grittner:

Enclosed for filing are four copies of Minnesota Power's Notice of Motion and Motion to Discharge Writ of Certiorari and Dismiss Appeal and Dismiss Alternative Petition for Discretionary Review, Memorandum of Law, and Affidavit of Service

By copy of this letter, service is made upon counsel of record. Thank you for your assistance in this matter.

Yours truly,

David R. Moeller

DRM:sr

Enclosures

c: All Counsel of Record

**AFFIDAVIT OF SERVICE
BY OVERNIGHT COURIER AND U.S. MAIL**

*Re: 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
Appellate Court Case No: A07-2306*

and

*Excelsior Energy Inc. vs. Minnesota Public Utilities Commission
Appellate Court Case No.: A07-2305*

STATE OF MINNESOTA)
) ss.
COUNTY OF ST. LOUIS)

SUSAN ROMANS being duly sworn, says that on the 17th day of December, 2007 she served Minnesota Power's Notice of Motion and Motion to Discharge Writ of Certiorari and Dismiss Appeal and Dismiss Alternative Petition for Discretionary Review and Memorandum of Law in the above-entitled case by Overnight Delivery at Duluth, Minnesota on the following:

Frederick K. Grittner
Clerk of Appellate Courts
Minnesota Court of Appeals
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Alison Archer
Assistant Attorney General
1100 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101
*Attorney for Minnesota Public
Utilities Commission*

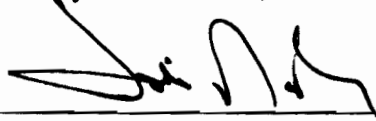
Byron E. Starns
Brian M. Meloy
Leonard Street and Deinard
150 South 5th Street, Suite 2300
Minneapolis, MN 55402
Attorney for Excelsior Energy Inc.

Furthermore, **SUSAN ROMANS** being duly sworn, says that on the 17th day of December, 2007 she served Minnesota Power's Notice of Motion and Motion to Discharge Writ of Certiorari and Dismiss Appeal and Dismiss Alternative Petition for Discretionary Review and Memorandum of Law in the above-entitled case upon those persons on the attached service list by mailing true and correct copies thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the U.S. Mail at Duluth, Minnesota, and further more;

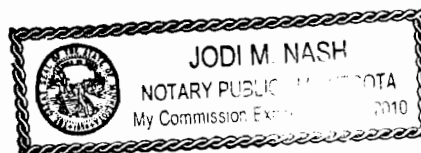


SUSAN ROMANS

Subscribed and sworn to before me
this 17th day of December, 2007.



Notary Public



STATE OF MINNESOTA
IN COURT OF APPEALS
Appellate Court No.: A07-2306 and A07-2305
SERVICE LIST

Minnesota Public Utilities Commission

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

Minnesota Attorney General

Lori Swanson
Attorney General
102 State Capitol
75 Rev. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

Northern States Power d/b/a Xcel Energy

Christopher Clark
Xcel Energy
414 Nicollet Mall, 5th Floor
Minneapolis, MN 55401

Michael C. Krikava
Thomas E. Bailey
Briggs and Morgan
2200 IDS Center
Minneapolis, MN 55402

Excelsior Energy

Byron E. Starns
Brian M. Meloy
Leonard Street and Deinard
150 South 5th Street, Suite 2300
Minneapolis, MN 55402

Thomas L. Ostersaas
Excelsior Energy Inc.
11100 Wayzata Blve, Suite 305
Minnetonka, MN 55305

Minnesota Public Utilities Commission

Alison Archer
Assistant Attorney General
1100 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101

**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 Street, Suite 206
St. Paul, MN 55101-1667

Minnesota Department of Commerce

Valerie M. Means
Assistant Attorney General
1400 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2131

minncoalgasplant.com (MCGP)

Carol Overland
Overland Law Office
P O Box 176
Red Wing, MN 55066

Minnesota Pollution Control Agency

Kathleen Winters
900 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101-2127

Xcel Industrial Intervenors

Andrew P. Moratzka
Robert S. Lee
Mackall, Crouse & Moore, PLC
1400 AT&T Tower
901 Marquette Ave
Minneapolis, MN 55402

Big Stone Unit II Co-Owners

Todd J. Guerrero
David Sasserville
Lindquist & Venum
4200 IDS Center
80 S 8th Street
Minneapolis, MN 55402-2274

STATE OF MINNESOTA
IN COURT OF APPEALS
Appellate Court No.: A07-2306 and A07-2305
SERVICE LIST

Manitoba Hydro

Eric F. Swanson
David M. Aafedt
Winthrop & Weinstine, P.A.
225 South Sixth St, Suite 3500
Minneapolis, MN 55402

Minnesota Chamber Of Commerce

Richard J. Savelkoul
Felhaber, Larson, Fenlon & Vogt, P.A.
444 Cedar Street, Suit e2100
St. Paul, MN 55101-2136

Great Northern Power Development, LLP

John E. Drawz
Steven J. Quam
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425

STATE OF MINNESOTA
IN COURT OF APPEALS
Court of Appeals No:A07-2306 and A07-2305

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

Trial Court Numbers:

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

OAH Docket Number: 12-2500-17260-2

Excelsior Energy Inc. and MEP-I LLC,

Relators,

vs.

Minnesota Public Utilities Commission,

Respondent

DATE OF AGENCY DECISIONS:

August 30, 2007

November 8, 2007

**NOTICE OF MOTION AND MOTION TO DISCHARGE
WRIT OF CERTIORARI AND DISMISS APPEAL AND DISMISS ALTERNATIVE
PETITION FOR DISCRETIONARY REVIEW**

TO: Clerk of the Appellate Courts
Minnesota Judicial Center
St. Paul, MN 55155

PLEASE TAKE NOTICE that Minnesota Power hereby moves the Court to discharge the writ of certiorari and dismiss the appeal as well as the alternative petition for discretionary review of Excelsior Energy and MEP-I LLC (collectively, "Relators"), who are attempting a premature appeal from the Minnesota Public Utilities Commission's November 8, 2007 interim

order. This motion is based upon the files, records and proceedings herein, and Minnesota Power's Memorandum, filed contemporaneously herewith.

Respectfully submitted,

Dated: December 17, 2007

A handwritten signature in black ink, appearing to read "David R. Moeller", written over a horizontal line.

David R. Moeller (#0287295)

Attorney

30 West Superior Street

Duluth, Minnesota 55802-2093

218-723-3963

dmoeller@allete.com

ATTORNEY FOR MINNESOTA POWER

S STATE OF MINNESOTA
IN COURT OF APPEALS
Court of Appeals No:A07-2306 and A07-2305

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

Trial Court Numbers:
MPUC Docket Number: E-6472/M-05-1993
OAH Docket Number: 12-2500-17260-2

Excelsior Energy Inc. and MEP-I LLC,

Relators,

vs.

Minnesota Public Utilities Commission,

Respondent

DATE OF AGENCY DECISIONS:

August 30, 2007

November 8, 2007

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISCHARGE WRIT OF CERTIORARI AND DISMISS APPEAL AND DISMISS ALTERNATIVE PETITION FOR DISCRETIONARY REVIEW

INTRODUCTION

Excelsior Energy Inc. and MEP-I LLC's (hereinafter "Excelsior Energy" or "Relators") have sought a writ of certiorari and, in the alternative, discretionary review from an interim order issued by the Minnesota Public Utilities Commission ("MPUC"). Minnesota Power is a party to the ongoing proceeding before the MPUC. Pursuant to Minn. R. Civ. App. 127 and 105.02, Minnesota Power hereby moves this Court to discharge the writ of certiorari and dismiss the

appeal as well as dismiss the alternative petition for discretionary review on the ground that there is no final agency decision from which Relators can appeal.

BACKGROUND

I. THE MPUC PROCEEDING HAS NOT CONCLUDED

Excelsior Energy began the proceeding that is the subject of this appeal on December 27, 2005 by filing a petition (“Petition”) with the MPUC. In an order dated April 25, 2006, the MPUC referred Excelsior Energy’s petition to the Office of Administrative Hearings for a contested case proceeding and requested the Administrative Law Judges (“ALJs”) address three primary issues:

- (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 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 plant’s generation for at least 2% 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.

At the outset of the contested case, Excelsior Energy sought to bifurcate the contested case into two distinct phases and the ALJs agreed. OAH Order dated June 2, 2006 at para. 2.

The ALJs’ scheduling order stated:

This matter is hereby bifurcated into two phases as suggested by Excelsior Energy. Phase 1 will address Mesaba Energy Project Unit I and the first two primary issues. Phase 2 will address Mesaba Energy Project Unit II and all three primary issues. A separate ALJ report will be submitted to the Commission at the conclusion of each phase. Evidence and argument received in Phase 1 may be offered for incorporation in Phase 2.

On April 12, 2007, the ALJs filed their Findings of Fact, Conclusions, and Recommendations (“ALJs’ Report”) regarding just Phase 1 of the contested case. Per Minn. Stat. § 14.61, subd. 1 and MPUC notice dated April 13, 2007, parties filed exceptions and replies to exceptions. On July 31 and August 2, 2007, the MPUC heard oral arguments regarding the ALJs’ Report.

On August 30, 2007, the MPUC issued an order (“Phase 1 Order”) rejecting in part and accepting in part the ALJs’ Report. Excelsior Energy and Minnesota Power both petitioned the MPUC to reconsider its Phase 1 Order, which the MPUC denied on November 8, 2007 (“November 8, 2007 Order”). (This November 8, 2007 order is the order from which Excelsior Energy purports to base its appeal.) Minnesota Power’s petition for reconsideration asked the MPUC to review its designation of the Mesaba Project as an Innovative Energy Project (“IEP”) under Minn. Stat. § 216B.1694, subd. 1. Minnesota Power will likely file a Notice of Review under Minn. R. Civ. App. 106 on this issue if this Court allows Relators appeal to proceed.

II. RELATORS’ PREMATURE APPEAL

On December 10, 2007, Minnesota Power received notice that Relators had filed a petition with this Court for a writ of certiorari for review of the Phase 1 Order and an alternative petition for discretionary review. Neither the Phase 1 Order or the November 8, 2007 Order constitute a final decision by the MPUC on Excelsior Energy’s December 27, 2005 Petition because Phase 2 of that Petition and resulting recommendation from the ALJ has yet to be decided by the MPUC. In addition, in its November 8, 2007 Order, the MPUC required Excelsior Energy and Xcel Energy to continue negotiations on a power purchase agreement (“PPA”) for the output of Excelsior Energy’s Mesaba Project and to report back to the MPUC

within 60 days of that order. Until those negotiations are complete, or have been terminated by the MPUC, the MPUC's actions are not final.

ARGUMENT

Minnesota law requires that only a "final decision in a contested case is entitled to judicial review" by this Court. Minn. Stat. § 14.63. "This language does not contemplate interlocutory appeals." *In re Application by the City of Rochester for an Adjustment of Its Service Area Boundaries with Peoples Coop. Power Ass'n*, 524 N.W.2d 540, 541 (Minn. Ct. App. 1994). As this Court recently stated: "An agency action is final and reviewable when the agency completes its decision-making process and the result of that process directly affects a party." *In the Matter of the Application of Great River Energy, Northern States Power Company (d/b/a Xcel Energy) and Others for a Certificate of Need for the CapX 345-kV Transmission Project*, Case No. A07-1550 (Minn. Ct. App. Sept. 11, 2007 Order).

The Phase 1 Order and the November 8, 2008 Order do not constitute final orders and therefore Relators should not be allowed to appeal. The MPUC explicitly contemplated that negotiations between Excelsior Energy and Xcel Energy on the PPA would proceed and, if and until those negotiations are completed or terminated by the MPUC, the MPUC's order is interim. In addition, Phase II of this proceeding has not even been heard by the MPUC, let alone an order issued. While Minnesota Power did exercise its rights under Minn. Stat. § 216B.27 and seek reconsideration of the Phase 1 Order, it did not file for appellate review of the MPUC's denial of reconsideration precisely because it viewed the MPUC's orders as interim, not final. To allow Relators' appeal to proceed now would cause Minnesota Power and other parties undue disruption, delay, and expense and undermine reliance on the MPUC's clear direction that this proceeding is not yet complete.

Furthermore, Relators' claim that discretionary review is warranted is without merit for the same reasons that the MPUC has not yet issued a final order. Discretionary review under Rule 105.01 is only available "in the interests of justice" when other avenues for appeal are not available. To allow discretionary review to proceed now would run counter to the interests of justice as a tax on judicial economy and inconsistent with the policy against piecemeal litigation. *See Emme v. C.O.M.B., Inc.*, 418 N.W.2d 176, 179 (Minn. 1988) ("the thrust of the rules governing the appellate process is that appeals should not be brought or considered piecemeal.").

CONCLUSION

The MPUC has not yet issued a final order upon which Excelsior Energy or any other party should be allowed to appeal. Therefore, Minnesota Power respectfully requests that this Court discharge the writ of certiorari and dismiss the appeal as well as dismiss the alternative petition for discretionary review.

Respectfully Submitted,

Dated: December 17, 2007



David R. Moeller (#0287295)
Attorney
30 West Superior Street
Duluth, Minnesota 55802-2093
218-723-3963
dmoeller@allete.com

ATTORNEY FOR MINNESOTA POWER