

**BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE
MINNESOTA PUBLIC UTILITIES COMMISSION**

In the Matter of a Joint LEPGP Site Permit,
HVTL Route Permit and Pipeline (Partial
Exemption) Route Permit Application for
the Mesaba Energy Project

OAH Docket No. 12-2500-17512-2
PUC Docket No. E-6472/GS-06-668

**MNCOALGASPLANT.COM'S REQUEST FOR EXTENSION OF HEARINGS
OR IN THE ALTERNATIVE
CERTIFICATION TO PUBLIC UTILITIES COMMISSION**

Mncoalgasplant.com submits this Motion, as provided in Minn. R. 1405.1500, Subp. 3, to establish additional hearing dates because the time frame and procedure of the hearings violates due process. The hearing was unduly truncated and therefore thwarted meaningful participation by the directly affected public and organizations that have been significant contributors informing this docket, and limiting opportunity for the general public to participate.

Mncoalgasplant.com is a group of affected landowners, and a part of Public Energy – Mesaba, a coalition of groups and individuals also including, but not limited to, Citizens Against the Mesaba Project. Public Energy – Mesaba filed a Petition for Intervention in the above-captioned matter. Full party status, without limitation, was granted to Public Energy – Mesaba in the Third Prehearing Order, dated February 22, 2007. Under the rules, once granted intervenor status, that intervenor has all the rights of a party. Minn. R. 1405.0900.

This matter was set for a hearing over 8-16 days in the First Prehearing Order¹, broken down to include from 4-13 days for “Stage One” and from 2-3 days for “Stage Two” on the following dates:

April 2-6, 2007 Stage One sessions in St. Paul, Taconite, and/or Hoyt Lakes

¹ First Prehearing Order, January 19, 2007.

April 9-11, 2007	If necessary, additional Stage One sessions in St. Paul, Taconite, and/or Hoyt Lakes
April 20-24, 2007	If necessary, additional Stage One sessions in St. Paul, Taconite, and/or Hoyt Lakes
April 25-26, 2007	Stage Two sessions in Taconite and/or Hoyt Lakes
April 27, 2007	If necessary, additional Stage Two sessions in Taconite and/or Hoyt Lakes

In the Fourth Prehearing Order², the hearing, “Stage One” and “Stage Two” were scheduled over 23 days:

September 10 – October 10, 2007

In the Fifth Prehearing Order, that schedule was changed from 23 days to just TWO, with one day reserved:

January 29, 2008, 1:00 p.m.	Stage One hearing session in Taconite
January 29, 2008, 6:00 p.m.	Stage Two hearing session in Taconite
January 30, 2008, 1:00 p.m.	Stage One hearing session in Hoyt Lakes
January 30, 2008, 6:00 p.m.	Stage Two hearing session in Hoyt Lakes
January 31, 2008, 10:00 a.m.	Reserved, Taconite

In the Fourth Prehearing Order, the ALJ Ordered:

Unless excused by an Administrative Law Judge, failure of a party to file testimony when due shall result in that party being denied further participation as a party in this matter.³

Public Energy – Mesaba (which includes mncoalgasplant.com), Xcel Energy and Minnesota Power, all of which had been granted full party status, did not file testimony in this case. In the Fifth Prehearing Order, the ALJ then Ordered:

Because they have failed to file testimony when due, Xcel Energy, Minnesota Power, and Public Energy—Mesaba are denied further participation as parties in this matter. They shall remain on the service list and may participate as members of the public and interested persons as set forth in the First Prehearing Order (January 19, 2007).⁴

Three actively participating parties in this matter were ejected from the proceeding.

² See Order Point 1, Fourth Prehearing Order, May 1, 2007.
³ See Order Point 3, Fourth Prehearing Order, May 1, 2007.
⁴ See Order Point 4, Fifth Prehearing Order, November 19, 2007.

Intervention is a financial and time drain on parties, and where the PUC has already refused to approve the PPA as Excelsior wants, it is hard to justify further investment of time and effort of parties and witnesses. mncoalgasplant.com, Citizens Against the Mesaba Project, and others have been working on this issue for years, contributing substantively to the record in the Power Purchase Agreement docket, the Environmental Impact Statement before Commerce and the Department of Energy, and in this siting docket, and unlike Excelsior, are not receiving public funds to do so. Local residents and landowners have invested significant amounts of their own time and money to participate. They are those most affected by the siting of this plant.

The Minnesota Rules are clear: Intervenors may participate as much or as little as they can afford or desire. Often in contested cases, parties proceed without submission testimony of experts and instead build the record through cross-examination and entry of exhibits and briefing. Minnesota Rules under the Administrative Procedure Act provide for limited party status upon granting of intervention, but do not provide for later revocation of parties participatory rights once full party status has been granted. The rules state:

Subp. 4. Responsibilities of intervenors. Once a petition to intervene has been granted, an intervenor shall have all of the rights and responsibilities of a party.

Minn. R. 1405.0900, Subp. 4. The rules also provide for participation by the public:

1405.0800 PUBLIC PARTICIPATION.

At all hearings conducted pursuant to parts [1405.0200](#) to [1405.2800](#), all persons will be allowed and encouraged to participate without the necessity of intervening as parties.

Such participation shall include, but not be limited to:

A. Offering direct testimony with or without benefit of oath or affirmation and without the necessity of pre-filing as required by part [1405.1900](#).

B. Offering direct testimony or other material in written form at or following the hearing. However, testimony which is offered without benefit of oath or affirmation, or written testimony which is not subject to cross-examination, shall be given such weight as the administrative law judge deems appropriate.

C. Questioning all persons testifying. Any person who wishes to cross-examine a witness but who does not want to ask questions orally, may submit questions in writing to the

administrative law judge, who will then ask the questions of the witness. Questions may be submitted before or during the hearings.

Minn. R. 1405.0800.

In this docket, the public was offered assurances that it was not necessary to be a party, that participation as a member of the public would be possible:

Members of the public need not become formal parties to participate in the hearings. Members of the public may offer either oral or written testimony, may offer exhibits for inclusion in the record and may question the parties' witnesses as set forth below.⁵

Instead, the public has been prohibited from participation through cross-examination and entry of exhibits and briefing. For example, at the hearing in Hoyt Lakes, MCGP was informed that only parties would be allowed to question during the "Stage I" daytime session.

JUDGE MIHALCHICK: Well, at this point we're talking about Stage 1 of the proceedings, and it's for the parties, and the only parties are the applicant and the commission.

Tr. P. 42, l. 19-22. Although the only "parties" were the applicant and commission, the Dept. of Commerce was allowed to question, although Commerce rarely availed itself of this opportunity. On the record, MCGP verified that the Dept. of Commerce was not a party in the proceeding.

On the second day of the hearing, the format was changed, without discussion on the record, and rather than introduce one witness, then proceed with cross-examination by parties and then questioning by the public, questioning by the public was cut out:

We're going to go back, essentially, to the originally scheduled process of doing the Stage 1 proceedings at the start of today, meaning the company will call its witnesses and have them testify. If I or the department have any questions, we'll take those, and then when we've completed those witnesses, we'll move into Stage 2, the public comments and questions.

Transcript p. 308, l. 9-16.

JUDGE MIHALCHICK: We're not taking public questions. We've changed the process. We've gone back to the original process that we're going to do the Stage 1 portion of the applicant putting in its exhibits or testimony. Then when we're done with that, we'll take questions from the public.

MS. OVERLAND: Does that mean all the witnesses?

JUDGE MIHALCHICK: That's right. We're about halfway done.

⁵ First Prehearing Order, p. 2, Order point 5.

MS. OVERLAND: You mean through the entire list of witnesses?
JUDGE MIHALCHICK: Right.

Transcript p. 366, l. 2-14. Commerce, admittedly not a party, was still allowed to ask questions, but again, there were few questions from Commerce and none for the majority of witnesses. No questions from “the public” were allowed until after all of Excelsior’s witnesses, testimony and exhibits and testimony “summaries” had been entered and until after non-party Commerce had the opportunity to question. Sixteen witnesses were rammed through at once, leaving no time at all for questioning by the public in the January 30, 2008, daytime hearing, and insufficient time for questioning in the evening.

Members of the public graciously cut their questioning short in Taconite on January 29, 2008, and in Hoyt Lakes the following day, knowing that there was insufficient time allotted and that others wanted to speak. That should not have been necessary and the public’s awareness of others’ interest and unreasonably limited time should not be used to limit public participation.

The public questioning in Hoyt Lakes was ultimately cut off in mid-sentence:

Q. At what point will you --
JUDGE MIHALCHICK: I think that's enough. I'm going to have to ask you, if you want to submit anything more, please do so within the next month in writing. I have one person back here who seems to really want to talk, but maybe not. So I'm going to take some other comments now and then adjourn.
MR. MULLER: Okay. Well, I'd like the record to show that I do have more questions for more witnesses.
JUDGE MIHALCHICK: Thank you. It will show that.

Transcript, p. 629, l. 17 – p. 630, l. 3.

JUDGE MIHALCHICK: Take one more comment. I didn't mean to have cut off Mr. Muller, but I think the hearing has gone long enough.

Transcript, p. 631, l. 20-22. Despite a need for additional time for questioning, the hearing was adjourned at 9:30 p.m., January 30, 2008, a full hour and a half before the 11:00 p.m. time for recess imposed under the rules. Minn. R. 1405.1500, Subp. 1. It was not reconvened the following day.

Excelsior introduced evidence at the last minute regarding zero liquid discharge. Mncoalgasplant and Citizens Against the Mesaba Project asked, separately, that the time to review the final EIS be

extended beyond the one week provided for in the schedule, but this request was denied in both instances. Minn. R. 1405.1400 allows for extended time for comment on environmental review.

Public participation was further chilled by the setting of the hearing, a gymnasium next to the hockey arena in Hoyt Lakes. Because use of the blowers rendered speech in the room inaudible, on a 20 below zero day, the heat was turned off and everyone in the room had their coat on, many with boots, hats and gloves or mittens:

MR. MULLER: My name is Alan Muller. Before I begin, I'd like to note that Mr. Micheletti is wearing gloves, representatives of the Department of Commerce are wearing gloves. Many people in the room are wearing gloves and overcoats. I don't know if the rules of the Office of Administrative Hearings call for holding public hearings in heated facilities, but that might be something to consider in the future.
JUDGE MIHALCHICK: Nobody is suffering more than I am.

Transcript p. 590, l. 15-24.

Restriction, limitation, prohibition and the chilling of public participation has occurred in this proceeding through:

1. Improper revocation of party status under the Fourth Prehearing Order, in violation of Subp. 4;
2. Denial of ability to cross-examine, enter exhibits and submit briefs as a party under the Fourth Prehearing Order, in violation of Minn. R. 1405.0900, Subp. 4;
3. Denial of adequate and sufficient opportunity for questioning and entry of exhibits as a "non-party participant" at the "Stage I" hearing on January 29-30, 2008, in violation of Minn. R. 1405.0800; 1405.1500, Subp. 2.
4. Denial of adequate and sufficient opportunity for questioning and entry of exhibits as a member of the public during the "Stage II" hearing on January 29-30, 2008, in violation of Minn. R. 1405.0800; 1405.1500, Subp. 2.
5. Denial of adequate and sufficient opportunity when witnesses were introduced en masse, in violation of Minn. R. 1405.0800; 1405.1500, Subp. 2.
6. No time at all allotted for public questioning of individual witnesses during "Phase I" on January 30, 2008, in violation of Minn. R. 1405.0800; 1405.1500, Subp. 2.
7. Denial of adequate and sufficient opportunity for public participation through rescheduling and severe shortening of the time allowed for the hearing from that of the Fourth Prehearing Order to that in the Fifth Prehearing Order, in violation of Minn. R. 1405.0800; 1405.1500, Subp. 2.

8. Denial of adequate and sufficient opportunity for public participation through limitation of the hearing to those two days and not utilizing the date reserved in the Fifth Prehearing Order, in violation of Minn. R. 1405.0800; 1405.1500, Subp. 2.
9. Denial of adequate and sufficient opportunity for general public participation in the siting hearings held in Taconite and Hoyt Lakes over January 29-30, 2008, and thus far limited to those two days, in violation of Minn. R. 1405.0800; 1405.1500, Subp. 2.
10. Refusal to extend time for comment on adequacy of the EIS beyond the one week provided for in the schedule, despite new information entered by Excelsior Energy at the last minute, in violation of Minn. R. 1405.1400.
11. Literal chilling of public participation occurred on January 30, 2008, when the hearing was held on a -20 degree day in an unheated gymnasium in the Hoyt Lakes arena and members of the public had to wait all day and into the evening to question witnesses.

mncoalgasplant.com requests additional hearings because the time frame and procedure of the hearing violates due process and the public's rights to participation. The hearing process was unduly truncated and thwarted meaningful participation by the directly affected public and the very organizations that have been significant contributors informing this docket and other related dockets. Without time, the public cannot meaningfully participate.

As provided by Minn. R. 1405.1500, Subp. 3, mncoalgasplant.com respectfully requests that the hearing be extended for at least two more days, one in Taconite and one in Hoyt Lakes, to provide the public the opportunity to participate in a meaningful and substantive way. Mncoalgasplant.com also requests that the time for comments on the adequacy of the Final Environmental Impact Statement be extended to 30 days from release and availability of the EIS. In the alternative, mncoalgasplant.com requests that this request be certified to the Public Utilities Commission.



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