

Minnesota Public Utilities Commission
Staff Briefing Papers

Meeting Date: April 10, 2008..... ****Agenda Item # 9**

Company: Excelsior Energy

Docket No. E-6472/M-05-1993 - Phase II

In the Matter of a Petition by Excelsior Energy Inc. for Approval of a Power Purchase Agreement under Minn. Stat. §216B.1694, and Determination of Least Cost Technology and Establishment of a Clean Energy Technology Minimum Under Minn. Stat. §216B.1693.

Issues: Should the Commission grant Excelsior's request for an indefinite stay, pending further order of the Commission, of the Phase II proceeding in this docket?

Staff: Marc Fournier..... (651) 201-2214
Janet González. (651) 201-2231
Susan Mackenzie. (651) 201-2241

Relevant Documents

Order Resolving Procedural Issues, Disapproving
Power Purchase Agreement, Requiring Further Negotiations,
And Resolving To Explore The Potential
For A Statewide Market For Project Power
Under Minn. Stat. § 216B.1694, Subd. 5
Docket No. E-6472/M-05-1993 August 30, 2007

Order Denying Petitions for Reconsideration and
Other Post-Decision Relief and
Reconsidering Order on Own to Require Further Filings
Docket No. E-6472/M-05-1993..... November 8, 2007

Excelsior Request for Stay..... February 14, 2008

Response to Request for Stay - Xcel Energy..... February 25, 2008

Response to Request for Stay - Minnesota Power..... February 25, 2008

60 Day Report - Excelsior Energy..... March 10, 2008

Status Report - Xcel Energy..... March 10, 2008

The attached materials are workpapers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

This document can be made available in alternative formats (i.e., large print or audio tape) by calling 651.201.2202 (voice). Persons with hearing or speech disabilities may call us through Minnesota Relay by dialing 7-1-1 or 1-800-627-3529.

Background

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 was 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, listing three issues to be addressed:

- (1) whether the Commission should approve, disapprove, amend, or modify the proposed power purchase agreement submitted by Excelsior;
- (2) whether the Commission should determine that the Mesaba Project would be, or was likely to be, a least cost resource under Minn. Stat. § 216B.1693, obligating Xcel to use the plant’s generation to supply at least two percent of its retail sales; and
- (3) should the Mesaba Project be determined to be a least cost resource, whether the appropriate purchase obligation for Xcel was 13% of retail sales, as Excelsior maintained.¹

The Commission emphasized the importance of determining with as much precision as possible the probable cost to Xcel ratepayers of the power produced by the Mesaba Project:

Further, the Commission encourages the Administrative Law Judge and the parties to develop as much contract price information as possible, using different scenarios and assumptions. Price is a critical issue in this case, and it is one of the most difficult to develop, since no one has had extensive commercial experience with the coal gasification technology Excelsior proposes to use in the power plant under development.

The resolution of these issues [the ones referred, set forth above] turns on numerous sub-issues; two of the most important are what contract prices are likely to be under different scenarios and whether those prices are reasonable.

Notice and Order for Hearing and Order Granting Intervention Petition, this docket, (April 25, 2006), p. 4.

¹ In the ALJ Second Prehearing Order in this proceeding dated June 2, 2006, he acknowledged that the three issues the Commission identified were the ultimate issues in this proceeding. That Order bifurcated this matter into two phases, with Phase 1 addressing the Commission’s first two issues and Phase 2 addressing only the third. The ALJ issued his report in Phase 2 on September 14, 2007.

At the May 15, 2007, prehearing conference, the parties to the case stipulated to the admission of pre-filed testimony and waived cross-examination in Phase 2; 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 June 22, 2007, Excelsior, Xcel, Minnesota Power, MGCP, and the Department of Commerce filed initial post-hearing briefs in Phase 2; Excelsior and Xcel also filed proposed findings of fact and conclusions, and Excelsior filed an Offer of Proof Regarding Evidence Excluded from the Phase 2 Record, consisting of the written testimony of Douglas H. Cortez and Andrew D. Weissman.

By letter dated June 26, 2007, the ALJ incorporated into the Phase 2 hearing record all of the public comments and public exhibits that had been received into the Phase 1 record.

On July 16, 2007, Excelsior, Xcel, and the Department of Commerce filed post-hearing reply briefs, and the OAH hearing record for Phase 2 closed.

On August 30, 2007, the Commission issued Findings, Conclusions and an Order in Phase 1 addressing the issue of whether it should approve, amend, or modify the terms and conditions of a proposed power purchase agreement that Excelsior has submitted to Xcel Energy under Minn. Stat. § 216B.1694.21 Specifically, the Commission found and concluded:

- a. That the Mesaba Project is an Innovative Energy Project under Minn. Stat. § 216B.1694;
- b. That the terms and conditions of the proposed power purchase agreement submitted by Excelsior are not in the public interest;
- c. That the terms and conditions of the proposed contract result in unreasonably high prices, which translate into unreasonably high rates;
- d. That the terms and conditions of the proposed contract expose Xcel and its ratepayers to unreasonable operational risks;
- e. That the terms and conditions of the proposed contract expose Xcel and its ratepayers to unreasonable financial risks;
- f. That the terms and conditions of the proposed contract could have collateral negative consequences for Xcel's financial health; and
- g. That the potential benefits of IGCC technology reflected in the considerations set forth in Minn. Stat. § 216B.1694, subd. 2 (a) (7) do not offset the high price and significant ratepayer risks of the proposed contract's terms and conditions.

On September 14, 2007, the Administrative Law Judge (ALJ) filed his Findings of Fact, Conclusions, and Recommendations, together with a Memorandum (the ALJs' Report) in Phase

2. The Project and its technology do not satisfy the requirements of Minn. Stat. § 216B.1693 (a) because the Project is not likely to be a least cost resource, including the cost of ancillary services and other necessary generation and transmission upgrades, to provide 13% of the electric energy that Xcel supplies to its retail customers.

The ALJ also found it would be contrary to the public interest for the Mesaba Project to supply 13% of Xcel Energy's retail load starting in 2012.

On October 4, 2007, Excelsior Energy filed Exceptions to the Proposed Finding of Fact, Conclusions of Law, and Recommendations of the Administrative Law Judge.

On October 15, 2007, the Minnesota Department of Commerce and Xcel Energy filed replies to the exceptions of Excelsior Energy.

On November 8, 2007, the Commission issued its Order Denying Petitions for Reconsideration and Other Post-Decision Relief and Reconsidering Order on Own Motion To Require Further Filings in Phase 1 of this proceeding. In this Order the Commission reaffirmed its decisions made in its August 30, 2007 Order by denying all petitions for reconsideration and other post-decision requests for relief filed in the case. However, the Commission did reconsider the August 30th Order on Its Own Motion. In its reconsideration, the Commission required a progress report from the parties on the status of power purchase agreement negotiations within 60 days of the date of the Commission's November 8, Order on Reconsideration.

On January 8, 2008, both Excelsior Energy and Xcel Energy filed progress reports on the status of negotiations on a power purchase agreement between the parties.

On February 14, 2008, Excelsior Energy requested a stay of Phase 2 proceedings pending implementation of Phase 1 Orders. On February 25, 2008, responses to the Excelsior's request were filed by Xcel Energy and Minnesota Power (MP).

On March 10, 2008, both Excelsior Energy and Xcel Energy filed Status Reports regarding their negotiations of a Power Purchase agreement (PPA) as ordered by the Commission in its November 8, 2007 Order on Reconsideration.

Issue: **Should the Commission grant Excelsior's request for an indefinite stay, pending further order of the Commission, of the Phase II proceeding in this docket?**

Excelsior: Excelsior indicated that the stay is needed in order to implement the Commission's Phase 1 Orders, dated August 30 and November 8, 2007. In particular, a stay is necessary to enable Excelsior to make progress, with the assistance of the Office of Energy Security of the Minnesota Department of Commerce (OES), in required negotiations with Xcel toward a final power purchase agreement. A stay is also necessary to permit exploration of "the potential for a statewide market for the innovative energy project's power under the provisions of Minn. Stat. § 216B.1694, subd. 2 (a)(5) both in the context of upcoming resource plan proceedings and in other cases in which the Commission reviews (a) request to build or expand fossil-fuel-fired generation facilities or (b) requests to enter into power purchase agreements with those facilities for terms longer than five years."

Excelsior indicated that the counsel for the OES has authorized Excelsior to state that the OES

does not object to a stay of the Phase 2 proceedings.

MP: Excelsior Energy now states that a stay of Phase 2 is needed “to implement the Commission’s Phase 1 Orders, dated August 30 and November 8, 2007.” Excelsior Energy’s reasoning does not justify suspending Phase 2. The implementation of any part of the Commission’s Phase 1 Orders is not directly related to nor assisted by indefinitely staying the Phase 2 proceedings. The Commission has already decided in its November 8, 2007 Order that Excelsior Energy and Xcel Energy continue negotiations, with progress reports every 60 days. At the same time, as the transcript from that hearing makes clear, the Commission has not mandated an affirmative result on the Phase I negotiations. If anything, staying Phase 2 may hinder the Commission’s assessment of Phase 1 negotiations, as was discussed amongst Commissioners at the November 1, 2007 hearing.

In addition, granting a stay on Phase 2 will harm Minnesota Power’s procedural due process rights as a party to this Docket. After the Commission denied Excelsior Energy’s request for reconsideration on Phase 1, Excelsior Energy sought review of the Phase 1 Orders before the Minnesota Court of Appeals. Minnesota Power, along with the Commission and Xcel Energy, opposed Excelsior Energy’s petition for discretionary appellate review as premature and not ripe for the Court’s consideration. However, in order to preserve appeal rights, Minnesota Power filed a contingent Notice of Review in the event the Court accepted the case. On January 9, 2008, the Court dismissed Excelsior Energy appeal based in part on the fact that the Commission has not yet decided Phase 2. The Court stated:

In this agency docket number, the proceedings were bifurcated. The orders made specific reference to additional proceedings on “Phase 2.” Although the agency appears to have determined the issues in “Phase 1,” the agency proceedings on this docket number have not concluded. Accordingly, the certiorari appeal is premature.

Likewise, in Excelsior Energy’s concurrent request to the Court of Appeals for discretionary review the Court rejected that request based in part on the pending Phase 2 proceeding:

The issues identified by petitioners can be reviewed on appeal from a final agency decision, the issues may benefit from the development of the record during Phase II, and we conclude that granting interlocutory review would further delay the resolution of agency proceedings. Accordingly, we deny discretionary review at this time.

If the Commission grants Excelsior Energy’s request to stay Phase 2 indefinitely, then Minnesota Power would be unable to exercise its procedural rights and seek appellate review while the stay is pending. In other words, without a final Commission order in this Docket, an appeal cannot commence under Minnesota law. Under Commission precedent Excelsior Energy may have had the right to withdraw its entire Petition, but to request a stay at this juncture in the Docket without substantive justification prejudices Minnesota Power and other parties that may seek appellate review.

If the Commission does grant Excelsior Energy’s Request for Stay, then Minnesota Power respectfully requests that the Commission also stay the implementation of the designation of the Mesaba Project as an Innovative Energy Project (“IEP”) under Minn. Stat. § 216B.1694, subd. 1. Excelsior Energy apparently believes that a stay of Phase 2 is needed to implement the Phase 1

Orders. However, in those same Phase 1 Orders the Commission granted Excelsior Energy the ability to utilize the regulatory incentives stemming from the IEP designation under Minn. Stat. § 216B.1694, subd. 2(a). A stay of the Commission's IEP designation and any resulting regulatory incentives would mitigate any prejudice incurred by Minnesota Power. Minnesota Power had requested reconsideration of the Commission's IEP designation decision and it would be that decision that Minnesota Power would seek appellate review.

In addition, the Commission should stay other related pending dockets involving Excelsior Energy. Minnesota Power had previously filed comments on Excelsior Energy's petition in Docket No. No. E-6472/M-07-1640. Minnesota Power asked in its January 22, 2008 comments that the Commission not take up that proceeding until Phase 2 is resolved in this Docket. To go forward with a decision on an aspect of the Mesaba Project and the related statutes without a final determination on Phase 2, is an inappropriate use of Commission resources.

Xcel: Following filing of the original petition by Excelsior, the Commission took comments about what process should be used to consider the petition. The Commission decided to use a contested-case procedure and referred the petition and related issues to the Office of Administrative Hearings. Excelsior asked the Administrative Law Judges ("ALJs") to bifurcate the case into two phases and the ALJs agreed to conduct the case in that manner. Extensive proceedings occurred related to both phases of the case, with phase 2 addressing Excelsior's proposed second 600 MW unit.

The ALJs evaluated the Phase 2 record and submitted a detailed report that took Phase 1 into account in the Phase 2 report. The parties have provided comments and briefing to the Phase 2 report consistent with the rules. Thus, the process and record requested by the Commission in referring the case to the Office of Administrative Hearings is complete and the case is ready for return to the Commission. Indeed, Phase 2 was already scheduled for the January 31, 2008 Agenda meeting, although the matter was ultimately pulled due to a conflict with the contested case hearing of Excelsior's siting/routing proceeding (Docket No. E-6472/GS-06-668).

The Company defers to the Commission's preference for whether to take up Phase 2 at this time, or to defer it to a later date. We simply point out that the Commission decision on Phase 1 revealed that one 600 MW unit was not in the public interest. Leaving Phase 2 unresolved is unlikely to move the parties closer together in the ongoing negotiations. Likewise, leaving Phase 2 unresolved may have consequences in other proceedings. For instance, Excelsior is currently proceeding with its siting/routing docket for both units (Docket No. E-6472/GS-06-668) and a transmission docket (Docket No. E-6472/CN-07-1640). Clearly the amount of potential output (600 MW or 1200 MW) is relevant to those important proceedings.

Finally, to the extent Excelsior believes that Phase 2 is no longer warranted given the Commission's Phase 1 Order and other changes in energy policy that have occurred since the date filing, it can choose to withdraw its proposal for consideration or reshape it for a new proceeding. Given the amount of resources expended on the proceeding to date, it is reasonable for the Commission to set some time frame for resolving the issue either through its deliberation and decision or action by the Petitioner.

Commission Options

1. Grant the stay of Phase II requested by Excelsior.
2. Do not grant the stay of Phase II requested by Excelsior.

Staff Comment

There are a few items the Commission may wish to consider in determining the efficacy of a stay. First, Excelsior has argued that a stay of Phase II is necessary for Excelsior to make progress in Commission ordered negotiations with Xcel toward a final PPA. Additionally, Excelsior has argued that a stay is necessary to permit exploration of “the potential for a statewide market for the innovative energy project’s power under the provisions of Minn. Stat. § 216B.1694, subd. 2 (a)(5) as directed by the Commission.

Second, MP raised the issue that a stay on Phase II will harm its procedural due process rights as a party to this docket. MP would be unable to exercise its procedural rights and seek appellate review while the stay is pending. Without a final Commission order in this docket, an appeal cannot commence under Minnesota law.

Additionally, the Commission’s November 8, 2007 Order on Reconsideration indicates that when the Commission takes up Phase II, it will reassess the need for the periodic progress reports, and may consider imposing a deadline for the completion of negotiations. At that time, the Commission can make a determination regarding the imposition of a negotiations deadline.

Finally, Staff notes that if the Commission determines not to grant the stay, Staff will bring the complete Phase II issue back to the Commission in a timely manner.