

Minnesota Public Utilities Commission
Staff Briefing Papers

Meeting Date: April 10, 2008..... ****Agenda Item # 8**

Company: Excelsior Energy

Docket No. E-6472/CN-07-1640

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

- Issue(s):
1. Should Excelsior’s Petition be dismissed?
 2. Should the Commission grant Excelsior Energy’s Petition for the Commission to find that all transmission infrastructure associated with the Mesaba Project be 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?

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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

Initial Filing Excelsior Energy..... December 20, 2007

Motion to Dismiss Excelsior Energy’s Petition MGP..... January 2, 2008
Response Excelsior Energy. January 15, 2008
Comments Minnesota Power. January 22, 2008
Reply Comments Excelsior Energy..... February 14, 2008
Reply Comments Xcel Energy..... February 14, 2008

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Background

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

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

On August 30, 2007, the Commission issued Findings, Conclusions and an Order in Phase I 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;

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.

- 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 in Phase II, together with a Memorandum (the ALJ's Report). 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 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 November 8, Order on Reconsideration.

Docket No. E-6472/M-07-1640

On December 20, 2007, Excelsior Energy filed a request with the Commission that the 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.

On January 2, 2008, MCGP filed a Motion to dismiss Excelsior's December 20, 2007 petition. Excelsior Energy responded to MCGP on January 14, 2008.

On January 22, 2008, Minnesota Power MP filed comments on Excelsior's petition. On January 23, 2008, The Commission issued a notice soliciting comments on Excelsior's petition.

On February 14, 2008, reply comments were filed by Excelsior Energy and Xcel Energy.

Issue 1: **Should the Commission Dismiss Excelsior's Petition?**

MCGP: Excelsior Energy has Petitioned the Commission requesting:

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; and
3. 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.

Mncoalgasplant.com (MCGP) requests that Excelsior petition be dismissed as premature. While the statute exempts "associated transmission" from CoN requirements, and MCGP does not contest this statutory exemption, the statute exempts "transmission infrastructure associated with the generation facilities." Logically, where there are no generation facilities, and where there is no PPA, there is no project, a PPA is necessary for the project to go forward, and where there is no project, there is no transmission infrastructure associated with a project does not exist. Where a project does not exist, and may never go forward, there is no need "to move forward with the development of transmission infrastructure associated with the Mesaba project in an efficient or timely manner." Any development of transmission at this time is premature, transmission permitting dockets and construction progress much more quickly than for those for power plants, and there is no reason to push transmission at this time. The petition should be dismissed.

Secondly, any discussion of transfer of the exemption under this statute is premature because there is no PPA and there is no project. It is an issue of concern as to whether the exemption would apply to a third party building the transmission project, if it were approved, and whether a third party would have power of eminent domain and exemption from a CoN, MP is correct to raise the issue. However, this is not the time for this discussion. The petition is premature and should be dismissed.

Excelsior has raised the issue previously, in its “Petition for Clarification” and the Commission correctly declined to address it specifically, and on November 8, 2007, declined to modify its Order of August 30, 2007. If and when a PPA is approved and there is a “Mesaba Energy Project” then Excelsior Energy may bring this petition to the Commission, but until that time, it is premature and should be dismissed.

Excelsior: MCGP argues in its Motion to Dismiss that Excelsior’s Petition is premature, because “where there is no PPA, there is no project, and where there is no project there is no transmission. MCGP concludes that “if and when a PPA is approved and there is a “Mesaba Energy Project” then Excelsior may bring this petition. MCGP provides no further basis in law or fact supporting its request that Excelsior’s Petition be dismissed.

Initially, neither the Minnesota Rules of Administrative Procedure, Minn R. Ch. 1400, nor the Commission’s Rules of Practice and Procedure, Minn. R. Ch 7829, address under what circumstances the Commission will grant a motion to dismiss. As the Commission is aware, Minn. R. 1400.6600 states, that “in ruling on motions where parts 1400.5100 to 1400.8400 are silent , the ALJ shall apply the Rules of Civil Procedures for the District Court for Minnesota to the extent that it is determined appropriate in order to promote a fair and expeditious proceeding.” The Minnesota Rules of Civil Procedure, offer guidance on the appropriate standards to apply here.

Under the Minnesota Rules of Civil Procedure, MCGP’s Motion, which is brought solely on the pleadings, may only be granted where MCGP demonstrates that Excelsior seeks relief which cannot be granted. In making the decision on a motion to dismiss, all facts shall be construed in the light most favorable to Excelsior. As outlined in Excelsior’s petition, the Commission has the authority to grant the clarification, which MCGP does not challenge.

More importantly, MCGP’s Motion is premised on a fundamental misunderstanding of the regulatory incentives granted by statute to an IEP. A plain reading of Minn. Stat. § 216B.1694 shows that the regulatory incentives granted to an IEP are not dependent upon approval of the proposed PPA with Xcel as MCGP posits. As the Commission expressly recognized in its August 30 Order, the IEP statute was enacted “to clear regulatory barriers and provide regulatory incentives to ensure that the plant could be built. Whether the Commission approves a PPA is immaterial under the IEP Statute to the question of whether the exemption from the requirements for a certificate of need applies to all transmission infrastructure associated with an innovative energy project.

Commission Options

1. Dismiss Excelsior's Petition without prejudice.
2. Dismiss Excelsior's petition.
3. Do not dismiss Excelsior's Motion.

Issue 2: **Should the Commission grant Excelsior Energy's Petition for the Commission to find that all transmission infrastructure associated with the Mesaba Project be 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?**

Excelsior: 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." 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."

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. This multi-year process culminated with Excelsior executing a LGIA with Minnesota Power and MISO dated July 9, 2007. 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. 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.

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), which are largely upgrades to Minnesota Power's existing transmission system. 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. 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.

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 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.

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).

Excelsior Reply: Minnesota Power asserts [t]he CoN issue is not ripe for determination by the Commission unless and until the Mesaba Project goes forward. Ripeness cannot be determined until both phases are complete and Excelsior Energy, along with the other participants in the PPA proceedings, has exhausted its administrative appeals regarding the Commission's final decision.. Minnesota Power's attempt to delay confirmation of the scope of the regulatory incentives the Legislature granted to an Innovative Energy Project should be rejected.

First, while Minnesota Power argues that any CON exemption determination should be based on a full record," in its August 30, 2007 Order the Commission correctly found that the Mesaba Energy Project is an Innovative Energy Project (IEP), 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. By Order dated November 8, 2007, the Commission rejected Minnesota Power's reconsideration request on the IEP issue. The Mesaba Project is an IEP.

Further, despite Minnesota Power's statements to the contrary, the current power purchase agreement (PPA) negotiations with Xcel and the pending Phase II proceedings in Docket No. E-6472-/M-05-1993 have no bearing on that determination. As Excelsior noted in its Petition, there are no material facts in dispute as the Petition seeks only confirmation that the plain language of Minn. Stat. § 216B.1694, subd. 2(a)(1) means what it says. In this respect, Excelsior is simply requesting that the Commission affirm the scope of the regulatory incentives previously granted by the Legislature to an IEP.

Second, similar to the arguments MCGP advanced in its January 2, 2008 Motion to Dismiss, Minnesota Power's arguments are premised on a fundamental misunderstanding of the regulatory incentives granted by statute to an IEP. A plain reading of Minn. Stat. § 216B.1694 shows that the regulatory incentives granted to an IEP are not dependent upon any other contingency, including approval of the proposed PPA with Xcel. As the Commission expressly recognized in its August 30 Order, the IEP Statute was enacted to clear regulatory barriers and provide

regulatory incentives to ensure that the plant could be built. Whether the Commission approves a PPA (or whether any other contingency occurs) is irrelevant under the IEP Statute to the question of whether the exemption from the requirements for a certificate of need applies to all transmission infrastructure associated with an IEP. The Legislature has already determined that the certificate of need exemption applies to all transmission infrastructure associated with an IEP, whether or not the Commission approves a PPA.

Finally, in seeking to delay consideration of this issue, Minnesota Power ignores the fact that the Large Generator Interconnection Agreement (LGIA) requires resolution of this issue in a timely manner. As Excelsior noted in its Petition, 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. As Minnesota Power concedes in its Comments, Minnesota Power felt it prudent that the Commission, as arbiter of CoN determinations generally, should specifically identify the transmission upgrade work as exempt under the statute in order to insulate Excelsior Energy and Minnesota Power from collateral attack. Excelsior agrees and finds it incongruous that Minnesota Power would nevertheless oppose timely resolution of an issue that directly impacts the scope of its own regulatory obligations under the LGIA.

MP: Minnesota Power requests that the Commission delay acting on Excelsior Energy's request until the Commission takes final action on Phase II of Mesaba Project proceeding in Docket No. E-6472/M-05-1993. The Commission has previously refused to grant Excelsior Energy's request regarding the Certificate of Need (CoN) issue when Excelsior filed for reconsideration in Phase I of the Commission proceeding regarding Excelsior Energy's attempted Power Purchase Agreement (PPA) with Xcel Energy. The Commission should continue to hold Excelsior Energy's request in abeyance until both phases of the Mesaba Project PPA proceeding are complete and negotiations between Excelsior Energy and Xcel Energy have been completed.

The CoN issue is not ripe for determination by the Commission unless and until the Mesaba Project goes forward. Ripeness cannot be determined until both phases are complete and Excelsior Energy, along with the other participants in the PPA proceedings, has exhausted its administrative appeals regarding the Commission's final decision. The Minnesota Court of Appeals has already rejected Excelsior's appeal of the Commission's Phase I decision as premature. In a response to the Excelsior Energy request before the Court, Minnesota Power filed a contingent Notice of Review under Minn. R. Civ. App. P. 106 seeking review of certain decisions of the Commission, including the Commission's determination that the Mesaba Project is an Innovative Energy Project ("IEP") under Minn. Stat. § 216B.1694, subd. 2(a)(1). With the Court's dismissal of Excelsior Energy's appeal for the time being, Minnesota Power's Notice of Review is moot until the Commission makes a final decision.

As summarized in Excelsior Energy's Petition, Minnesota Power did enter into a Large Generator Interconnection Agreement ("LGIA") with Excelsior Energy and the Midwest Independent Transmission System Operator ("MISO") on July 9, 2007. In that LGIA, Minnesota

Power specifically required that Excelsior Energy obtain a determination from the Commission that the transmission upgrades necessary to facilitate the Mesaba Project's interconnection with the Minnesota Power transmission system did not require a CoN. Because it is not absolutely clear under the provisions of Minn. Stat. §§ 216B.1694 and 216B.243 that the work to accomplish the transmission upgrades by Excelsior Energy or by Minnesota Power are exempt from the CoN requirements, Minnesota Power was unwilling to spend the time, resources and money to proceed with interconnection facilitation without specific Commission authorization. At the time the LGIA was executed in July, the Commission had not yet acted on Phase 1 of the PPA, so it was unclear at that time that the Mesaba Project would be found to be an IEP.

Even if that determination withstands potential appellate review, the mere designation of the IEP does not necessarily mean that transmission upgrade work qualifies as exempt from the CoN process. Minnesota Power felt it prudent that the Commission, as arbiter of CoN determinations generally, should specifically identify the transmission upgrade work as exempt under the statute in order to insulate Excelsior Energy and Minnesota Power from collateral attack by affected landowners or other parties opposed to the Mesaba Project who could object to transmission infrastructure work performed in furtherance of the LGIA requirements. This is particularly important when the statute obliquely references "transmission infrastructure associated with generation facilities." Minn. Stat. § 216B.1694, subd. 2(a)(1). Because the Mesaba Project requires transmission infrastructure to interconnect the Mesaba Project to the Minnesota Power Blackberry substation, as well as transmission infrastructure to upgrade Minnesota Power transmission facilities extending from the Blackberry substation, the oblique statutory reference does not provide the explicit guidance necessary for Minnesota Power to proceed without greater certainty.

Minnesota Power, as the control area operator and transmission infrastructure owner with whose facilities Excelsior Energy must interconnect, is obligated under federal regulations to perform work in order to facilitate a generator's interconnection request pursuant to a LGIA such as that sought by Excelsior Energy. Minnesota Power is entitled to reimbursement of its costs expended in facilitating the described interconnection. Here, Excelsior Energy was unwilling to pay for CoN costs because of its claim that the Mesaba Project is exempt from the CoN requirements for all transmission-related work. However, Minnesota Power was (and is) unwilling to allow its federal regulatory obligation to facilitate the interconnection overshadow confirmation that such work is necessary. Minnesota Power was willing to build into the LGIA schedule the necessary permitting work to prepare, file and obtain a CoN under the Commission's normal process under Minn. Stat. § 216B.243, subd. 5 in order to achieve the timely implementation of the transmission upgrade. Excelsior Energy has instead sought to achieve the exemption through the Mesaba Project PPA proceedings.

Minnesota Power requests that the Commission delay making a CoN determination until the entire Excelsior Energy proceeding is complete. This will allow the Commission to make an exemption determination based on a full record.

Xcel: Xcel Energy has reviewed the Petition and party comments and concurs with Minnesota Power's observation that Excelsior Energy's Petition is not yet ripe for determination by the Commission. Whether the Commission needs to reach the issue of whether all the transmission infrastructure necessary to interconnect the Mesaba Energy Project to the bulk power system is exempt from the Minnesota's Certificate of Need requirements will not be clear until both phases of the Mesaba Energy Project proceedings in Docket No. E6472/M-05-1993 are complete. In the event that no power purchase agreement (PPA) for the Mesaba Energy Project is approved in those proceedings, the certificate of need issue may be moot. The issue could also become moot if the Mesaba Energy Project does not obtain the necessary plant site and transmission interconnection route permits it is seeking in Docket No.: E6472/GS-06-668. As Minnesota Power points out in its comments, delaying a determination of the issue until these multiple proceedings are complete is consistent with the Commission's prior decision not to determine the issue when Excelsior first raised it in its petition for reconsideration of the Commission's order in Phase I of the Mesaba Energy Project proceedings.

Xcel Energy also agrees that it is unclear from whether the exemption provided by the Innovative Energy Project statute is as broad as Excelsior argues. For instance it is unclear whether a certificate of need exemption extends beyond the transmission "associated" with interconnecting the Project to the grid and extends to other transmission upgrades or improvements. A full factual record would have to be developed on the transmission for which Excelsior claims no certificate of need is required for the Commission to properly consider the issue. Likewise, issues of landowner notice have been increasingly prominent and may need to be incorporated into the record. Proceeding to build such a record now when the issue may become moot would be an inefficient use of both public and private resources.

Xcel Energy respectfully requests that the Commission delay making a determination on the certificate of need issue raised in Excelsior Energy's Petition until all Mesaba Energy Project proceedings (on its proposed PPA, and its site and route permits) are complete.

Staff Comments

The statutory basis for Excelsior's request on certificate of need requirements for transmission is found in Minn. Stat. §216B.1694, Subd. 2 (a)(1).

Subd. 2. **Regulatory incentives.** (a) An innovative energy project: (1) is exempted from the requirements of 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; (See **Attachment 1** for the full versions of §§ 216B.1693 and 216B.1694)

In Docket No. E-6472/M-05-1993, Excelsior has raised the transmission exemption issue in its "Petition for Clarification". In the Commission's November 8, 2007 Order on Reconsideration, the Commission declined to address the transmission exemption issue. Excelsior has now raised the issue in a separate petition where it believes a more robust record can be developed.

Staff points out that it is not a foregone conclusion that the transmission facilities to be built by Minnesota Power under the Large Generator Interconnection Agreement (LGIA) would be exempt from certificate of need. First, the statute exempts an Innovation Energy Project (IEP) from certificate of need; it does not directly exempt any other entity.

Second, the concept of “transmission infrastructure associated with the generation facilities” in the statutory language is open to interpretation. What facilities are eligible for exemption? Is the exemption limited to facilities necessary to connect to the nearest substation? If it extends beyond the point of interconnection to the substation, how far beyond does it extend? What is the point of demarcation between exempt eligible facilities and non-exempt eligible facilities?

There are at least two reasons the Commission may not wish to decide the transmission exemption issue at this time. First, the Commission may or may not feel it can decide those issues based on the record to-date. Second, the Commission may not want to make a determination regarding the transmission exemption issue until the completion of all pending proceedings related to the Excelsior Mesaba project.

Commission Options

1. Delay making a determination on the certificate of need exemption until all Mesaba Energy Project dockets pending before the Commission are complete.
2. Request more information or argument from the parties before making a decision.
3. Grant Excelsior’s petition.

ATTACHMENT 1

216B.1694 Innovative energy project.

Subdivision 1. **Definition.** For the purposes of this section, the term "innovative energy project" means a proposed energy-generation facility or group of facilities which may be located on up to three sites:

- (1) that makes use of an innovative generation technology utilizing coal as a primary fuel in a highly efficient combined-cycle configuration with significantly reduced sulfur dioxide, nitrogen oxide, particulate, and mercury emissions from those of traditional technologies;
- (2) that the project developer or owner certifies is a project capable of offering a long-term supply contract at a hedged, predictable cost; and
- (3) that is designated by the commissioner of the Iron Range Resources and Rehabilitation Board as a project that is located in the taconite tax relief area on a site that has substantial real property with adequate infrastructure to support new or expanded development and that has received prior financial and other support from the board.

Subd. 2. **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 sections 116C.51 to 116C.69;
- (2) once permitted and constructed, is eligible to increase the capacity of the associated transmission facilities without additional state review upon filing notice with the commission;
- (3) has the power of eminent domain, which shall be limited to the sites and routes approved by the Environmental Quality Board for the project facilities. The project shall be considered a utility as defined in section 116C.52, subdivision 10, for the limited purpose of section 116C.63. The project shall report any intent to exercise eminent domain authority to the board;
- (4) shall qualify as a "clean energy technology" as defined in section 216B.1693;
- (5) shall, prior to the approval by the commission of any arrangement to build or expand a fossil-fuel-fired generation facility, or to enter into an agreement to purchase capacity or energy from such a facility for a term exceeding five years, be considered as a supply option for the generation facility, and the commission shall ensure such consideration and take any action with respect to such supply proposal that it deems to be in the best interest of ratepayers;
- (6) shall make a good faith effort to secure funding from the United States Department of Energy and the United States Department of Agriculture to conduct a demonstration project at the facility for either geologic or terrestrial carbon sequestration projects to achieve reductions in facility emissions or carbon dioxide;

(7) shall be entitled to enter into a contract with a public utility that owns a nuclear generation facility in the state to provide 450 megawatts of baseload capacity and energy under a long-term contract, subject to the approval of the terms and conditions of the contract by the commission. The commission may approve, disapprove, amend, or modify the contract in making its public interest determination, taking into consideration the project's economic development benefits to the state; the use of abundant domestic fuel sources; the stability of the price of the output from the project; the project's potential to contribute to a transition to hydrogen as a fuel resource; and the emission reductions achieved compared to other solid fuel baseload technologies; and

(8) shall be eligible for a grant from the renewable development account, subject to the approval of the entity administering that account, of \$2,000,000 a year for five years for development and engineering costs, including those costs related to mercury-removal technology; thermal efficiency optimization and emission minimization; environmental impact statement preparation and licensing; development of hydrogen production capabilities; and fuel cell development and utilization.

(b) This subdivision does not apply to nor affect a proposal to add utility-owned resources that is pending on May 29, 2003, before the Public Utilities Commission or to competitive bid solicitations to provide capacity or energy that is scheduled to be on line by December 31, 2006.

HIST: 1Sp2003 c 11 art 4 s 1

216B.1693 Clean energy technology.

(a) If the commission finds that a clean energy technology is or is likely to be a least-cost resource, including the costs of ancillary services and other generation and transmission upgrades necessary, the utility that owns a nuclear generating facility shall supply at least two percent of the electric energy provided to retail customers from clean energy technology.

(b) Electric energy required by this section shall be supplied by the innovative energy project defined in section 216B.1694, subdivision 1, unless the commission finds doing so contrary to the public interest.

(c) For purposes of this section, "clean energy technology" means a technology utilizing coal as a primary fuel in a highly efficient combined-cycle configuration with significantly reduced sulfur dioxide, nitrogen oxide, particulate, and mercury emissions from those of traditional technologies.

(d) This section expires January 1, 2012.

HIST: 1Sp2003 c 11 art 2 s 4