

Minnesota Public Utilities Commission
Staff Briefing Papers

Meeting Date: May 28, 2009..... **Agenda Item # 5

Company: Excelsior Energy

Docket No. E6472/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:
- I. Should the Commission grant Excelsior Energy Inc.'s Motion to Suspend Proceedings?
 - II. Should the Commission grant Excelsior Energy Inc.'s Motion to Supplement the Record and It's Pending Petition for Rehearing, Reconsideration, and Reargument, or in the Alternative Offer of Proof?
 - II. Given that the Commission granted reconsideration, should the Commission amend its September 24, 2008 Order?

Staff: Marc Fournier..... (651) 201-2214

Relevant Documents

Findings of Fact, Conclusions of Law, and Recommendation
Office of Administrative Hearings..... September 14, 2007

Commission Staff Briefing Papers..... August 7, 2008

Order Resolving Procedural Issues,
Denying Petition, and Modifying Negotiation Requirements..... September 24, 2008

Petition for Rehearing, Reconsideration and Reargument
of the September 24, 2008 Commission Order Excelsior Energy..... October 14, 2008

Boston Pacific Company Report Responding to Commission
(Docket No. E017, ET-6131, ET-6130, ET-6144, ET-6135, ET-10/CN-05-619) October 23, 2008

Reply to Excelsior Energy's Petition for Rehearing,
Reconsideration, and Reargument Xcel Energy. October 24, 2008

Answer to Request for Reconsideration Minnesota Power..... October 27, 2008

First 90 Day Status Report Xcel Energy. December 8, 2008

First 90 Day Status Report Excelsior Energy. December 8, 2008

Order-Granting Reconsideration for Procedural Purposes
and Holding Further Reconsideration in Abeyance December 9, 2008

Second 90 Day Status Report Excelsior Energy. March 9, 2009

Second 90 Day Status Report Xcel Energy. March 9, 2009

Order Granting Certificate of Need with Conditions
(Docket No. E017, ET-6131, ET-6130, ET-6144, ET-6135, ET-10/CN-05-619) . March 17, 2009

Excelsior Energy Motions to Suspend and to
Supplement the Record. April 27, 2009

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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, acknowledged that the three issues the Commission identified were the ultimate issues in this proceeding. That Order bifurcated this matter into to 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; 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.1694.22;
- 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 Phase 2 Findings of Fact, Conclusions, and Recommendations, together with a Memorandum (the ALJ' Report). The Project and its technology do not satisfy the requirements of Minn. Stat. § 216B.1693 (a)

because the Project is not nor 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 exception 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 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 (P.A.) as ordered by the Commission in its November 8, 2007 Order on Reconsideration.

On March 10, 2008, both Excelsior Energy and Xcel Energy filed the second set of progress reports on the status of negotiations on a power purchase agreement between the parties.

On April 23, 2008, the Commission issued an Order Denying Request for Indefinite Stay of Phase 2.

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

On June 17, 2008, the Commission issued an Order Denying Reconsideration of its April 23, 2008 Order Denying Excelsior's Request for Indefinite Stay of Phase 2.

On July 3, 2008, Excelsior filed two motions:

- (1) a motion for entry of a partial final order determining that the Mesaba Project is an innovative energy project under Minn. Stat. § 216B.1964, subd. 1; and

- (2) a motion that the Commission (a) permit Excelsior to supplement its Phase II exceptions with additional cost information; (b) appoint an independent evaluator to advise the Commission on the comparative costs of the Mesaba Project, natural gas- fired generation, and various combinations of wind generation and natural-gas fired generation; and © invite comments from the other parties on the cost information with which it seeks to supplement its exceptions.

On July 7, 2008, both Excelsior Energy and Xcel Energy filed Status Reports regarding their negotiations of a Power Purchase agreement (P.A.) as ordered by the Commission in its November 8, 2007 Order on Reconsideration.

On July 8, 2008, Xcel Energy and Minnesota Power filed responses opposing both motions.

On September 24, 2008, the Commission issued an Order Resolving Procedural Issues, Denying Petition, and Modifying Negotiation Requirements. In its September 24, 2008, the Commission:

1. denied the motions of Excelsior Energy for a partial final order, for leave to supplement its exceptions, and for the appointment of an independent evaluator to further advise the Commission on the probable costs of different generating technologies;
2. concurred with the Administrative Law Judge's findings and conclusions that the Mesaba Project is not, and is not likely to be, a least-cost technology and that it is therefore ineligible for an order under Minn. Stat. § 216B.1993 directing Xcel to buy 13% of its retail supplies from the project;
3. accepted and adopted the Administrative Law Judge's findings, conclusions, and recommendations, with minor modifications and clarifications on two issues: the environmental costs of particulate matter and the potential costs of carbon capture and sequestration at the proposed Mesaba site;
4. accepted and adopted the Administrative Law Judge's findings, conclusions, and recommendations, with minor modifications and clarifications on two issues: the environmental costs of particulate matter and the potential costs of carbon capture and sequestration at the proposed Mesaba site;
5. set a May 1, 2009 termination date on the duty to negotiate imposed on Xcel and Excelsior in the Commission's Phase I Orders. Unless the parties submit an agreed-upon power purchase agreement or a joint request for a time extension by May 1, this case will close on that date; and
6. modified the interval for progress reports on the parties' negotiations, set in the Phase I orders, from 60 days to 90 days.

On October 14, 2008, Excelsior Energy filed a petition for rehearing, reconsideration and

reargument of the September 24, 2008 Commission Order.

Responses were filed by Xcel Energy on October 24, 2008 and by Minnesota Power on October 27, 2008.

On December 8, 2008, Xcel and Excelsior Energy each filed the first 90 day status report.

On December 9, 2008, the Commission issued its Order Granting Reconsideration for Procedural Purposes and Holding Further Consideration in Abeyance. In this Order, the Commission granted, for procedural purposes, Excelsior Energy's October 14, 2008 petition for reconsideration. Additionally, the Commission held in abeyance further consideration of the petition until May 1, 2009 date on which, under the terms of the September 24, 2008 order, the case will close in the absence of a joint filing by Excelsior and Xcel.

On March 9, 2009, Xcel and Excelsior Energy each filed the second 90 day status report.

On April 27, 2009, Excelsior Energy filed a motion to suspend proceedings. In this motion, Excelsior requested that the Commission suspend this proceeding pending completion of various integrated resource plans (IRPs) and full consideration of the reliability Administrator's statewide need assessment.

On April 27, 2009, Excelsior Energy filed a motion to supplement the record and its pending petition for rehearing, reconsideration, and reargument, or in the alternative offer of proof. In this motion, Excelsior requested that the Commission allow it to supplement the record in this proceeding to include (1) Boston Pacific Company's October 21, 2008 Report entitled "Responding to Commission Inquiries on Emissions Costs, Construction Costs and Fuel Costs and (2) the Big Stone Order issued by the Commission on March 17, 2009.

Issue I. Should the Commission grant Excelsior Energy Inc.'s Motion to Suspend Proceedings?

Excelsior: In its August 30, 2007 Order in this proceeding, the Commission stated that the "public interest requires it" to explore the potential for a statewide market for the power produced by the Mesaba Project. The IRPs referenced in the August 30, 2007 Order as good "starting points" have yet to be completed, and the Reliability Administrator has not yet completed the assessment of Minnesota's power needs through 2025.

Development of any new baseload resource will take a decade or more of planning and the investment of tens of millions of dollars prior to the start of construction (or, in the case of any potential new nuclear development, longer than a decade and the investment of hundreds of millions of dollars prior to construction). No utility in the State of Minnesota is currently working to develop any new baseload resources in Minnesota, and the pending IRPs and statewide need assessment may convince the Commission that it would be beneficial for the State to add a new baseload resource at some point during the next ten to fifteen years. The Mesaba Project is a viable, legislatively favored option to meet such future baseload need. Given the long lead-times and significant cost involved in developing a new baseload resource (particularly one that will be able to capture carbon dioxide using commercially available technologies) the Commission's view that the public interest requires it to explore a statewide market for the Mesaba Project's power through completion of pending resource plans and full consideration of the statewide need assessment is even more powerful today than it was in 2007.

In addition to allowing the Commission to meaningfully explore the potential for a statewide market for output from the Mesaba Project, suspending this proceeding pending completion of the IRPs and full consideration of the statewide need assessment will also foster administrative efficiency. Failure to suspend this proceeding may ripen appellate issues that are currently not ripe, distracting all parties and the Commission with appeals that could be rendered moot should the Commission suspend this proceeding and delay final action until the Commission has before it additional information from the IRPs and statewide need assessment.

Other Parties:

Issue II. Should the Commission grant Excelsior Energy Inc.'s Motion to Supplement the Record and It's Pending Petition for Rehearing, Reconsideration, and Reargument, or in the Alternative Offer of Proof?

Excelsior: The contrast is stark between the decision-making process in the Big Stone Docket, where an independent expert was appointed to evaluate a proposal involving utilities and conventional, old pulverized coal technology, and the decision-making process in the Mesaba Docket, where Excelsior's request to appoint an independent expert to evaluate a legislatively preferred innovative, new clean coal technology was denied. The Minnesota legislature took concrete steps to encourage innovative new technologies when it enacted unprecedented legislation in 2003 inviting new players with new technologies to participate in Minnesota's energy future, and prescribing the proper scope of the Commission's review of innovative energy projects. The Commission's decision to appoint an independent expert in the Big Stone Docket was prompted primarily by the Commission's desire to avoid blind reliance on complicated modeling opinion evidence presented by interested parties to the proceeding. By failing to similarly appoint an independent expert in the Mesaba Docket the Commission had no choice but to rely on modeling opinion evidence of interested parties. Although not intended by the Commission, the disparate treatment of the "independent expert" issue between the Big Stone Docket and the Mesaba Docket unavoidably serves to discourage any new player with a new technology from seeking to help Minnesota meet the serious energy challenges that lie ahead.

From a procedural perspective, Excelsior is requesting that the Commission allow Excelsior to supplement its October 14, 2008 Reconsideration Request, and allow Excelsior to supplement the record in the Mesaba Docket for the limited purpose of including the Boston Pacific Report and the Commission's recent Big Stone Order.

Minnesota's Rules of Civil Procedure are instructive in guiding the Commission's consideration of Excelsior's motion. Rules 59 ("New Trials") and 60 ("Relief from Judgment or Order") provide for the consideration of new material evidence that was not available "at trial." In the present case, the Boston Pacific Report and the Commission's Big Stone Order only became available on October 21, 2008 and March 17, 2009, respectively, after the record in this proceeding closed and after Excelsior submitted its October 14, 2008 Reconsideration Request. As discussed below, the information contained in the Boston Pacific Report and the Commission's related findings and conclusions in its Big Stone Order are directly relevant to the issues pending in the Mesaba Docket.

In its October 14, 2008 Reconsideration Request, Excelsior noted that the Commission's rationale for appointing an independent expert to advise the Commission in the Big Stone proceeding applied with equal or greater force to the Mesaba proceeding. The contents of the

Boston Pacific Report, issued on October 21, a week after Excelsior filed its October 14, 2008 Reconsideration Request, and the Commission's interpretation of the Boston Pacific Report as reflected in the Commission's recently issued Big Stone Order, validate and affirm all of the reasons Excelsior has asked the Commission to reconsider its denial of Excelsior's request to appoint an independent expert in the Mesaba Docket.

In its Big Stone Order, the Commission summarized the core of Excelsior's argument for an independent expert in the Mesaba Docket with two important statements. First, confirming that any modeling input provided by an interested party is at risk of being unreliable, the Commission stated in the Big Stone Order, "Of course, a model's analysis is only as good as the assumptions that the parties put into it." Second, confirming that an independent, third party expert directly advising the Commission is in the best position to provide unbiased evidence to the Commission, the Commission stated in the Big Stone Order, "[T]he balance of the evidence in the record persuades the Commission that the estimates offered by Boston Pacific are the most reliable in the record.

The Commission made the decision to seek the counsel of an independent evaluator in the Big Stone Docket "to ensure informed decision-making. Excelsior respectfully requests that the Commission allow Excelsior to supplement the record in the Mesaba Docket and its October 14, 2008 Reconsideration Request to include the Boston Pacific Report and the Commission's Big Stone Order before the Commission considers the merits of the pending October 14, 2008 Reconsideration Request. The Boston Pacific Report and Big Stone Order demonstrate that an independent expert directly advising the Commission was necessary in the Big Stone Docket to ensure informed decision making and create a reliable evidentiary record to support the Commission's decision in a contentious, multi-year, highly litigated complex administrative proceeding involving complicated modeling and other opinion evidence from the parties about the cost effectiveness of a conventional, pulverized coal fired electric generating facility. Fundamental notions of due process and equal protection require that the same evidentiary standards be applied to the Mesaba Docket, a similarly contentious, multi year, highly litigated complex administrative proceeding involving complicated modeling and other opinion evidence attempting to evaluate the cost effectiveness of a legislatively preferred, innovative new coal-fueled electric generating facility.

Finally, if the Commission declines Excelsior's request, the Commission should accept the Boston Pacific Report and the Big Stone Order as an offer of proof in this proceeding.

Other Parties:

Issue III: **Given that the Commission granted reconsideration, should the Commission amend its September 24, 2008 Order?**

Excelsior:

A. **Standards of Review.**

For purposes of this Petition, there are two relevant standards of review. First, there is the standard of review applied to rehearing by the Commission:

If, in the commission's judgment, after the rehearing, it shall appear that the original decision, order, or determination is in any respect unlawful or unreasonable, the commission may reverse, change, modify, or suspend the original action accordingly.

Second, there is the standard that would ultimately be applied by the appellate courts in review of the Commission's decision:

In a judicial review under sections 14.63 to 14.68, the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious.

B. Remand of This Case to the Office of Administrative Hearings Is Appropriate and Acceptable to Excelsior

Excelsior had suggested in its motion for further record development that if the Commission desired to expedite the proceeding it could accept Excelsior's proposed new cost information and take comments and other relevant cost evidence directly from the parties. However, Excelsior does not object to reopening the record with the ALJ in order to receive an independent expert report and rebuttal testimony from the parties, consistent with the procedures ordered by the Commission in the Big Stone proceeding. All the reasons identified by the Commission in the Big Stone proceeding to justify the need for an ALJ to oversee delivery of the independent expert's report and rebuttal testimony and cross examination also apply in this case, and therefore Excelsior supports a similar remand of this case to the Office of Administrative Hearings on the same procedural terms and conditions that have been applied in the Big Stone proceeding.

C. The New Cost Evidence Proposed by Excelsior Does Differ Substantially in Nature, Kind and Probative Value from Cost Evidence Already in the Record, and New "Plant-to-Plant" Comparative Cost Estimates That Include Wind and Wind-Gas Combinations Are Required to Support Any Decision by the Commission in Phase II

The new cost evidence proposed by Excelsior consisted of a summary of Excelsior's updated modeling of the cost of electricity from the Mesaba Project, from a new combined cycle natural gas plant, and from a combination of wind backed up by new natural-gas-fired generation, with each proposed new generation resource providing the same amount of energy to Xcel. In the entire record of this proceeding the only evidence that purports to demonstrate the cost of electricity from a specific new generation resource other than the Mesaba Project is the Department of Commerce ("Department") estimate of the cost of electricity from a new

supercritical pulverized coal plant as represented by an estimate for the proposed new Big Stone II power plant. Therefore, the “plant-to-plant” cost of electricity comparisons provided by Excelsior for various natural gas and wind generation resources represent a completely new kind of evidence in this case. In light of the moratorium on new conventional coal plant construction that is now law in Minnesota, Excelsior’s proposed new cost evidence is not only probative but necessary if there is to be any evidence at all in the record to allow the Commission to render any decision on the threshold question in Phase II of this proceeding, namely, whether or not IGCC technology is or is likely to be a least-cost resource, including the costs of ancillary services and other generation and transmission upgrades necessary to provide energy to Xcel’s customers.

At the Phase II oral argument in this case, both Xcel and the analyst from the Department argued that Xcel had compared the Mesaba Project’s costs to other non-coal resources, namely a combination of generic new wind and unrelated intermediate hydro generation. Excelsior acknowledges that the ALJ’s Phase II proposed finding number 47 adopted Xcel’s subjective modeling results as evidence that when Xcel’s Strategist model is fed assumptions by Xcel, Strategist confirms Xcel’s view of this case, namely that the Mesaba Project will be more expensive than combinations of new generic wind and unrelated intermediate hydro resources.¹⁵ Nowhere in the record of this proceeding is there any evidence about what the actual total cost of electricity is likely to be over the life of the Mesaba Project from the combination of the generic new wind and unrelated intermediate hydro resources that Xcel purported to model. In addition to the fact that generic new wind additions together with unrelated intermediate hydro resources do not provide baseload capacity, Excelsior agrees in any event with the Commission’s analysis in the Big Stone proceeding that in cases of the complexity and significance of Big Stone or Mesaba, the Commission is required to move beyond a paradigm where modeling assumptions given by parties dictate the outcome of a proceeding. The only way to properly move beyond subjective modeling is for the Commission to engage its own independent expert, as it did in Big Stone and as it should do in this case.

However, even if Xcel’s modeling were deemed to be appropriate and credible cost evidence in this proceeding, the CET Statute¹⁶ at issue in Phase II of this proceeding requires that the Commission’s comparative cost analysis take into account “the costs of ancillary services and other generation and transmission upgrades necessary”¹⁷ to deploy any new resource, including generic new wind or hydro or natural gas facilities. Other than with respect to the Mesaba Project, the record of this proceeding does not contain any explicit quantification of the costs of new transmission, for instance, that will be required to accommodate all of the new wind that Xcel is modeling in its efforts to demonstrate that the Mesaba Project will be more expensive than the large amount of generic new wind combined with unrelated, intermediate hydro power. An independent expert could develop and present cost of electricity estimates for various new resources, including the costs of transmission upgrades necessary to deploy those new resources.

In summary, the existing record in this proceeding does not currently include any evidence about the probable cost of electricity from specific new resources, other than the same Big Stone cost evidence that the Commission has already deemed to be inadequate and unreliable in the Big Stone proceeding. Excelsior’s proposed new cost evidence is the type of evidence that the Commission must have before it in this case, and just as in the Big Stone proceeding, the Commission should engage its own independent expert to advise the Commission on these threshold issues.

D. The Commission’s Independent Expert Should Also Advise the Commission on the Financial and Operating Risks of the Mesaba Project

Excelsior agrees that bare cost analysis is only part of the equation the Commission must consider when evaluating any new baseload resource. In Phase I of this case, the ALJ and the Commission adopted Xcel's view of the financial and operational risks to Xcel's ratepayers of the Mesaba Project.¹⁸ Just as it is inappropriate to simply accept a party's modeling evidence without an independent expert advising the Commission, it is also inappropriate to simply accept a party's analysis of financial and operational risks without independent expert advice. Therefore, as suggested at the oral argument, the Commission should include operational and financial risks of various technologies and ownership structures as issues upon which the independent expert should advise the Commission.

In the Big Stone docket the Commission essentially found that without the involvement of an independent expert the Big Stone cost evidence was inadequate and insufficient to sustain any Commission decision on appeal. That exact same Big Stone cost evidence was imported into this case by the Department as the sole basis for the comparative "plant-to-plant" cost analysis that was subsequently adopted by the ALJ and the Commission. The disparate treatment of the same cost evidence in the Big Stone docket compared to this docket cannot be justified, and the Commission should therefore reconsider and grant Excelsior's motion to engage an independent expert in this docket for all of the reasons the Commission correctly found that an independent expert was required in the Big Stone proceeding.

E. Other Grounds For Reconsideration

The Commission should also reconsider the September 24, 2008 Order because it adopted a number of the ALJ's proposed findings and legal conclusions that are not supported by substantial evidence in the record or that represent errors of law that result in the Commission exceeding its authority and jurisdiction by effectively repealing the CET Statute through administrative action, in violation of Article 3 of the Minnesota Constitution.

The ALJ's proposed findings 41–44 concerning the relative costs of the Mesaba Project versus Big Stone are simply not supported by any credible record evidence, for all of the reasons set forth in Excelsior's September 19, 2007 Petition for Reconsideration of the Commission's August 30, 2007 Order in Phase I of this proceeding ("Phase I Petition for Reconsideration") and in Excelsior's October 4, 2007 Exceptions to the ALJ's Phase II Report ("Phase II Exceptions"). Excelsior incorporates by reference its Phase I Petition for Reconsideration and its Phase II Exceptions in their entirety into this Phase II Petition for Reconsideration.

Finally, the Commission's adoption of the ALJ's proposed finding that Xcel's obligation to purchase power under the CET Statute terminates in 2012 constitutes a reversible error of law and usurpation of legislative power since it effectively repeals the CET Statute altogether by improperly interpreting the CET Statute in a way that leads to an absurd result that could not have been intended by the Legislature as a matter of law.

Xcel Energy: The Commission's September 24, 2008 Order is well supported in law and fact. Xcel presented the following positions on the issues raised by Excelsior's Petition:

Excelsior offers nothing new to support its Petition;

Excelsior's "new" evidence is cumulative and does not address several separate bases supporting the Commission's decisions to find Excelsior's power purchase agreement contrary to the public interest; and

The Clean Energy Technology statute expires in 2012 by its terms.

A. Reconsideration Standard Not Satisfied

Excelsior's Petition does not provide new arguments or bases for reconsideration. To the contrary, the Petition restates positions and arguments made and rejected before. Excelsior repeats that only its evidence should be considered and the analysis by the Office of Energy Security ("OES") and Xcel Energy should be disregarded. Excelsior repeats its rejected claim that the ALJ's analysis was inadequate because the ALJ did not agree with Excelsior. Excelsior again asserts that only an "independent expert" can review the facts, disregarding the record and the roles played by both the ALJ and the OES. In short, Excelsior offers nothing new.

B. Constitutional Claims Unsupported

Excelsior based its motion on the Big Stone II proceedings, Docket No. ET-6131, et. al./CN-05-619, a case with a different record that developed in fundamentally different ways than the present case. Without providing factual support, Excelsior declares that since the Commission ordered cost updates and an independent evaluation in the Big Stone II proceedings, the Commission must do so here as well. Disregarding the voluminous probative evidence already in this record, Excelsior asserts that supplementation and independent review is required to provide an adequate record and Excelsior even asserts that rejecting its position would violate the specified due process and equal protection rights.

Excelsior's arguments offer nothing new. A voluminous record has been developed in this docket. While Excelsior may not agree with some of the decisions, there can be no valid claim on appeal that Excelsior was denied the full right to make its case.

In any case, as the Commission observed, Excelsior's proposed new cost estimates "do not differ substantially in nature, kind, or probative value from cost estimates already in the record." Excelsior has no legal right to re-open the record of a proceeding to offer cumulative evidence. Minn. Star. ~ 14.60 (specifically allowing exclusion of "repetitious" evidence). The Commission should decline Excelsior's request to reconsider its Order. Further, the Commission already stated that "adding Excelsior's new cost estimates to the record and appointing an independent evaluator would add little, if anything, to the Commission's ability to make an informed decision on the remaining issues in the case. It reached this conclusion because Excelsior's new cost estimates:

do not differ substantially in nature, kind, or probative value from cost estimates already in the record. Nor could they be dispositive on cost issues under any circumstances, since they do not speak to the financial and operational risks that the Commission found to be critical in weighing the public interest impact of requiring Xcel to buy Mesaba Project power."

Finally, Excelsior ignores an important independent basis for the Commission's decision. The Commission noted that any analysis of the data by an independent evaluator would suffer from the same problem:

At the end of that process, half of the cost equation - the unreasonable operational and financial risks which, together with pricing considerations, led the Commission to reject the contract Excelsior sought to impose on Xcel in Phase I - would not be further illuminated.

This provides an independent basis for denying Excelsior's reconsideration request and will provide the Commission with an important additional basis for defending its decisions if Excelsior chooses to appeal.

C. Statutory Interpretation Claim Incorrect

The Commission adopted the ALJ's legal conclusion that "there is nothing ambiguous about" the expiration date of the Clean Energy Technology statute because it is part of an "entire section [that] ceases to have the force and effect of law on January 1, 2012." Excelsior once again repeats its claim that the plain meaning of the words of the statute should be ignored in favor of some assumed legislative intent to provide Excelsior with a guaranteed project.

It is well settled that the Commission has lawful authority to interpret the statutes with which it has been charged to apply. This is no error of law or usurpation of legislative power as argued by Excelsior. To the contrary, the Commission regularly interprets legislation in applying utility statutes to the specific facts presented in a docket and the Commission has the authority to apply a statute according to its plain language, committing no error of law.

Minnesota Power: The Commission should deny Excelsior Energy's Petition for Reconsideration. The Commission has repeatedly stated in orders denying petitions for reconsideration that the petitioner (here Excelsior Energy) must demonstrate the Commission's decision was incorrect. For example, in a 1991 service territory dispute, the Commission stated:

The Commission finds that the Excelsior's petition raises no new issues, offers no new evidence, and identifies no issues requiring further consideration. The petition restates the Excelsior's original arguments, which the Commission has duly reexamined and continues to reject for the reasons set forth in the March 15 Order.

Likewise, Excelsior Energy raises no new issues, offers no new evidence and merely restates or incorporates Excelsior Energy's original arguments before the Administrative Law Judge and the Commission. The Commission's Order addressed Excelsior Energy's issues. Minnesota Power respectfully requests that the Commission deny Excelsior Energy's Petition for Reconsideration and resolve any remaining issues as to what constitutes the Commission's final decision.

Staff Comments

Regarding Excelsior's Motion to suspend the proceeding, Staff believes that suspension of this proceeding pending completion of integrated resource plans and full consideration of the Reliability Administrators statewide need assessment will do nothing to change the facts and the record of this proceeding. The arguments made by Excelsior are essentially the same arguments the Commission rejected in its April 23, 2008 Order Denying Request for Indefinite Stay. The Order stated:

The Commission concurs with Xcel and Minnesota Power that there is nothing to be gained by deferring action on Phase II of this proceeding. The record is complete; the issues have been fully developed; the Administrative Law Judges have submitted their report and recommendations. The matter is ready for decision.

As such, the Commission should deny Excelsior's motion to suspend this proceeding.

With respect to Excelsior's Motion to supplement the record, Staff agrees with Xcel that there has been a voluminous record developed in this proceeding. While some of the Commission's decisions may have been contrary to Excelsior's direct interests, Excelsior was provided a full and complete opportunity to make its case before the Commission. Also, Staff does not see a great deal of difference between this Motion and Excelsior's pending request for reconsideration. As such, Excelsior's motion to supplement the record should be denied.

Regarding reconsideration, in the Commission's September 24, 2008 Order Resolving Procedural Issues, Denying Petition, and Modifying Negotiation Requirements, the Commission directed that this docket be closed on May 1, 2009, unless the parties file an agreed-upon power purchase agreement or a joint request for a time extension by that date.

In its December 9, 2008 Order Granting Reconsideration for Procedural Purposes and Holding Further Consideration in Abeyance, the Commission granted reconsideration for procedural purposes, tolling the 60-day deadline. The Commission held in abeyance further consideration of the petition until after the May 1, 2009 date on which the case will close in the absence of a joint filing from Excelsior and Xcel. The deadline passed without a joint filing.

Finally, the Commission has granted reconsideration for procedural purposes. The issue before the Commission is the determination of whether specific issues raised by Excelsior have merit. The Commission needs to decide whether to take arguments and make decisions on the merits of any or all of those petitions. The Commission may decide these issues with or without taking oral comments from the parties. If the Commission determines that Excelsior's issues are without merit, the docket should be closed.

Commission Options

Issue I. Should the Commission grant Excelsior Energy Inc.'s Motion to Suspend Proceedings?

1. Deny Excelsior's Motion to Suspend Proceeding
2. Grant Excelsior's Motion to Suspend Proceeding.
3. Take other action the Commission deems appropriate.

Issue II. Should the Commission grant Excelsior Energy Inc.'s Motion to Supplement the Record and It's Pending Petition for Rehearing, Reconsideration, and Reargument, or in the Alternative Offer of Proof?

1. Deny Excelsior's Motion to Supplement the Record and its Pending Petition for Reconsideration.
2. Grant Excelsior's Motion to Supplement the Record and its Pending Petition for Reconsideration.
3. Accept the Boston Pacific Report and the Big Stone Order as an offer of proof in this proceeding.
4. Take other action the Commission deems appropriate.

Issue III. Given that the Commission granted reconsideration, should the Commission amend its September 24, 2008 Order?

Issues which reconsideration was requested by Excelsior:

1. Should the Commission remand the case back to the Office of Administrative Hearings for further record development;
2. The Commission's Independent Expert Should Also Advise the Commission on the Financial and Operating Risks of the Mesaba Project
3. Should the Commission reconsider its adoption of a number of the ALJ's proposed findings and legal conclusions.