STATE OF MINNESOTA

IN COURT OF APPEALS

Excelsior Energy Inc. and MEP-I LLC,

Petitioners-Relators,

vs.

Minnesota Public Utilities Commission,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Court of Appeals No: _____

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

OAH Docket Number: 12-2500-17260-2

DATE OF AGENCY DECISIONS:

August 30, 2007

November 8, 2007

September 24, 2008

July 7, 2009

Date and Description of Event Triggering Appeal Time:

Commission's Order Denying Motions and Denying Reconsideration dated July 7, 2009

TO: THE COURT OF APPEALS OF THE STATE OF MINNESOTA:

Petitioners-Relators Excelsior Energy Inc. and its wholly-owned subsidiary, MEP-I LLC (together, "Excelsior"), are sponsors of the Mesaba Energy Project, an approximately 600-megawatt "integrated gasification combined cycle" or "IGCC" electric power generation project to be located on the Iron Range (the "Mesaba Project"). Excelsior hereby petitions the Court of Appeals for a Writ of Certiorari to review decisions of the Minnesota Public Utilities Commission ("Commission") issued on the above dates. The Commission decisions disapprove the proposed power purchase agreement ("PPA") with Northern States Power Company d/b/a Xcel Energy ("Xcel") submitted by Excelsior under the Innovative Energy Project Statute ("IEP Statute"), Minn. Stat. § 216B.1694, and the Clean Energy Technology Statute, Minn. Stat. § 216B.1693 (together, the "IGCC Enabling Statutes").

The grounds for this Petition for Writ of Certiorari are:

1. The Commission's decisions in this case improperly nullify, negate, and overrule the statutes at issue in this appeal, the IGCC Enabling Statutes, as detailed below.

2. The IGCC Enabling Statutes were enacted over six years ago by the Minnesota Legislature as one component of the Omnibus Energy Bill of 2003 that was principally designed to allow Xcel to store additional nuclear waste on-site and to continue operating its nuclear generating power plants at Prairie Island. The IGCC Enabling Statutes portion of the nuclear waste legislation specifically prescribes public interest and cost standards to drive rapid technological innovation in power generation in Minnesota that the Commission must adhere to when considering "innovative energy projects" under the IEP Statute. In place of the normal statutory obligations that guide the Commission's public interest evaluation of conventional, non-innovative large energy facilities, the IGCC Enabling Statutes create a new and different decision-making framework by providing substantial regulatory incentives that only apply to innovative energy projects, and that change and in many instances directly conflict with the principles that would otherwise guide the Commission's routine public interest determinations about conventional large energy facilities. To qualify for the incentives and statutory approval framework under the IGCC Enabling Statutes, state law specifies that an innovative energy project must be located in northeastern Minnesota.

3. **The Commission's consideration of whether an innovative energy project was needed was an error of law and exceeded its statutory authority.** The IEP Statute explicitly exempts innovative energy projects from all of the certificate of need requirements set forth in Minn. Stat. § 216B.243. Instead, the IEP Statute specifically delineates different factors the Commission is to consider in approving a PPA from an innovative energy project. Minn. Stat. § 216B.1694, subds. 2(a)(1) and 2(a)(7). In a proceeding involving an innovative energy project, the Commission may not consider any of the twelve statutory certificate of need factors in Minn. Stat. §

216B.243 that would ordinarily dictate the proper scope of review and standards that must be used by the Commission to make a public interest determination and approve a certificate of need for a new large energy facility. For the Commission to consider any of the twelve factors set forth in Minn. Stat. § 216B.243, subd. 3 would directly violate the exemption set forth in the IEP Statute and improperly impose requirements on an innovative energy project that state law provides do not apply. The first certificate of need requirement that would customarily be considered under Minn. Stat. § 216B.243, subd. 3 is "the accuracy of the long-range energy demand forecasts on which the necessity for the facility is based." Minn. Stat. § 216B.243, subd. 3(1). The Commission is expressly directed by state law not to consider this requirement when evaluating an innovative energy project. Therefore, the Commission exceeded its statutory authority, made an error of law, and nullified a crucial legislative incentive for innovative energy projects when it not only considered but explicitly and repeatedly concluded that the Mesaba Project was not needed, based on Xcel's long-range energy demand forecasts. In this case, Xcel presented complex computer models of its long-range energy demand forecast in an attempt to demonstrate that it did not need the power to be generated by the innovative energy project. The Commission based its decisions in large part on these forecasts in direct contravention of the exemption from the requirements for a certificate of need for innovative energy projects under state law. The Commission also exceeded its statutory authority by considering and assuming the accuracy of the same impermissible Xcel long-range forecast computer model to make indirect, need-based findings about the projected cost of the Mesaba Project.

4. **The Commission's consideration of the Mesaba Project's location in determining whether the PPA was in the public interest was an error of law and exceeded its statutory authority.** The IEP Statute directs all innovative energy projects, including the Mesaba Project, to be "located in the taconite tax relief area," which is limited to parts of the Iron Range in

Northeastern Minnesota. Minn. Stat. § 216B.1694, subd. 1(3). During the hearings and deliberation in this case, the Commission on a number of occasions not only revisited the Legislature's judgment as to the location of innovative energy projects, but affirmatively and explicitly rejected the Legislature's direction, expressed in statute, by stating that the Mesaba Project was in the wrong location.

5. **The Commission nullified the requirement under state law that Xcel Energy should assume the sole obligation for the PPA with an innovative energy project.** In direct contravention of the express terms of subdivision 2(a)(7) of the IEP Statute, the Commission exceeded its statutory authority in considering whether the public interest could support approval of any PPA which required a public utility that "owns a nuclear generation facility in the state" alone to buy at least 450 MW from an innovative energy project. Substituting its judgment for that of the Legislature and ignoring state law, the Commission determined during deliberations that the public interest would require the Mesaba Project to sell a considerable portion of its output to Minnesota utilities other than just Xcel, the only utility in the state that owns a nuclear generation facility.

6. **The Commission's comparative cost findings are unsupported by substantial evidence in the record and are arbitrary and capricious.** The Commission made a finding that the innovative coal technology, IGCC, as proposed in the Mesaba Project, would cost substantially more than a traditional pulverized coal plant. The comparative cost findings adopted by the Commission for traditional pulverized coal technologies lack *any* factual foundation at all in the record of this case. In spite of the Commission's statements to the contrary in its August 30, 2007 Order, nowhere in the entire voluminous record of this proceeding did any of the Minnesota utilities referenced by the Commission provide any testimony or other affirmative support whatsoever on the cost of traditional pulverized coal plants. Further, no utility party in any way attempted to describe, justify or explain the scope of, completeness of, or factual foundation behind the purported

costs for traditional pulverized coal technologies that were adopted as fact by the Commission. There is simply no record evidence from the utility parties on this subject. The Commission's comparative cost findings in its August 30, 2007 Order are, therefore, arbitrary and capricious and not supported by any, much less substantial, evidence in view of the record considered as a whole. Because the Commission's September 24, 2008 Order is dependent on the arbitrary and capricious comparative cost findings in its August 30, 2007 Order, the September 24, 2008 Order must also be reversed and remanded to the Commission.

7. **The overall decision-making framework and public interest and cost standards applied by the Commission are erroneous as a matter of law under Minn. Stat. § 216B.1694.** In making its public interest determination, the Commission applied an incorrect decision-making framework by expanding its inquiry beyond the IEP Statute and adopting public interest and cost standards that are inconsistent with the plain language of the IEP Statute. The Commission begins its analysis by looking to traditional ratemaking principles as reflected in Minn. Stat. § 216B.01 and Minn. Stat. § 216B.03 that are entirely irrelevant to this case. These statutes are relevant to regulated utilities that come before the Commission seeking approval to set retail rates based upon an exhaustive and comprehensive review of all of the financial and operational circumstances of the regulated utility. This case is not a ratemaking case. No party is requesting that any retail rate be set, and neither Xcel nor any other regulated utility was seeking a comprehensive review of its financial status in order to set rates under Minn. Stat. § 216B.01 and Minn. Stat. § 216B.03. Those statutes do not apply to this case, particularly since in this case state law expressly delineates a different scope of responsibility for the Commission in the IEP Statute itself. The IEP Statute creates incentives, such as an exemption from the requirements for a certificate of need, that directly conflict with the traditional ratemaking principles referenced by the Commission and reflected in Minn. Stat. § 216B.01 and Minn. Stat. § 216B.03. In addition, the Commission based its public interest and cost

determinations in this case on the default traditional public interest determination and "least-cost" standard that the Commission routinely applies when it examines the terms and conditions of PPAs for facilities using conventional, non-innovative technologies. In contrast, the IEP Statute prescribes the use of five specific statutorily prescribed public interest factors in considering innovative energy projects that are necessarily different from the public interest factors that are traditionally applied to projects using non-innovative technologies.

8. The Commission's decision not to approve a PPA between the Mesaba Project and Xcel is (a) in violation of constitutional provisions, (b) in excess of the statutory authority of the agency, (c) affected by other error of law, (d) unsupported by substantial evidence in view of the entire record as submitted, and (e) arbitrary or capricious. Each individual issue described above constitutes an independent basis for this Court to remand this case to the Commission, and the combination of all of the issues described above demonstrates that the Commission disregarded the requirements of state law and improperly exercised its will in evaluating and rejecting the proposed PPA. In light of the many errors of law and arbitrary and capricious comparative cost findings described in this Petition, this Court should remand the Commission Orders in this case to the Commission with instructions to properly apply the provisions and standards set forth in state law as codified in the IGCC Enabling Statutes.

Certiorari review of a decision of the Commission is authorized by the following authorities: Minn. Stat. §§ 14.63, 216B.27, and 216B.52 and Minn. R. Civ. App. P. 103.03(g) and 115.01.

Dated: August 6, 2009

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STATE OF MINNESOTA
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Excelsior Energy Inc. and MEP-I LLC,

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vs.

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STATEMENT OF THE CASE OF PETITIONERS-RELATORS

Court of Appeals No: _____

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Petitioners-Relators Excelsior Energy Inc. and its wholly-owned subsidiary, MEP-I LLC, (together, "Excelsior") hereby submit their Statement of the Case:

1. Agency of case origination and name of presiding hearing officer

This case originated with the Minnesota Public Utilities Commission ("Commission"). The Commission referred the matter to the Minnesota Office of Administrative Hearings for a contested case proceeding. Administrative Law Judge ("ALJ") Steve Mihalchick and ALJ Bruce Johnson presided. The Commission made final decisions based on the contested case record.

2. Jurisdictional statement

Statute, rule or other authority authorizing certiorari appeal:

Minn. Stat. §§ 14.63, 216B.27, and 216B.52; Minn. R. Civ. App. P. 103.03(g) and 115.01.

Authority fixing time limit for appellate review (cite statutory section and date of event triggering appeal time, e.g., mailing of decision, receipt of decision, or receipt of other notice):

Applicable statutes determine appellate timelines and the acts required to invoke appellate jurisdiction. Minn. R. Civ. App. P. 115.01. The Minnesota Administrative Procedures Act governs appeals from final Commission decisions. Minn. Stat. § 216B.52. A party seeking judicial review must apply for a rehearing of the Commission's decision within 20 days after service of the decision before seeking judicial review. Minn. Stat. § 216B.27. A party seeking judicial review must file a petition for writ of certiorari with the Court of Appeals not more than 30 days after the party receives the final decision and order of the agency. Minn. Stat. § 14.63.

Following referral of this case by the Commission to the Office of Administrative Hearings, the presiding ALJs split the contested case proceedings into two phases. The Commission's order on Phase 1 was dated August 30, 2007. On September 19, 2007, Excelsior filed its Petition for Reconsideration and Rehearing of the August 30, 2007 Commission Order, and Request for Deferral of Decision on the Merits. The Commission issued its Order Denying Petitions for Reconsideration and Other Post-Decision Relief on November 8, 2007. On December 10, 2007, Excelsior filed a timely appeal of the Commission's November 8, 2007 order ending Phase 1. In a decision dated January 8, 2008, this Court found that the appeal was premature pending the conclusion of Phase 2 of the contested case, and dismissed Excelsior's December 10, 2007 appeal.

The Commission's order on Phase 2 was dated September 24, 2008. On October 14, 2008, Excelsior filed its Petition for Reconsideration and Rehearing of the September 24, 2008 Phase 2 Commission order. On December 9, 2008, the Commission granted reconsideration of its September 24, 2008 Phase 2 order for procedural purposes, thereby refraining from issuing a final order. On July 7, 2009, the Commission issued a final order on Phase 2, denying reconsideration of

its September 24, 2008 Phase 2 order, and closing the docket entirely. The date of the event triggering appeal time is July 8, 2009, the date Excelsior received the Commission's final order.

Finality of order or judgment

Does the judgment or order to be reviewed dispose of all claims by and against all parties, including attorney fees?

Yes

Date of order:

July 7, 2009

3. State type of litigation and designate any statutes at issue

Excelsior seeks to overturn decisions by the Commission following contested case hearings under the Minnesota Administrative Procedures Act, Minn. Stat. Ch. 14. The statutes and session law at issue are Minn. Stat. §§ 216B.1963 and 216B.1964 (together, the "IGCC Enabling Statutes"), and the Omnibus Energy Act of 2003, Minn. Laws 2003, Ch. 11.

4. Brief description of claims, defenses, issues litigated and result below

In 2003, as part of the settlement that allowed Northern States Power d/b/a Xcel Energy ("Xcel") to expand dry cask storage and continue operating its Prairie Island nuclear generation facility, the Minnesota Legislature enacted comprehensive energy policy legislation that, among other things, included the IGCC Enabling Statutes. These two statutes create the conditions necessary for the construction of state-of-the-art, coal-fueled integrated gasification combined cycle ("IGCC") power facilities on the Iron Range. The IGCC facilities would reduce Minnesota's ever-growing dependence on natural gas for electric generation and eventually replace Minnesota's aging fleet of old, traditional pulverized coal power plants.

The IGCC Enabling Statutes clear regulatory barriers and provide regulatory incentives to ensure that IGCC facilities can be built by making a number of unprecedented, significant

determinations about the need for, location of, and cost standards applicable to IGCC power plants in Minnesota. One of the incentives is the creation of a market for the first IGCC power plant's output, in the form of a conditional entitlement to a long-term, 450-megawatt power purchase agreement ("PPA") with the utility that owns a nuclear generation facility in the state, Xcel. The power plant's right to this contract is conditioned on the Commission finding that the contract's terms and conditions are in the public interest, subject to, and in conformance with, the many determinations already made by the Legislature in the IGCC Enabling Statutes and taking into consideration five specifically enumerated public interest factors applicable to innovative energy projects.

Excelsior is developing the Mesaba Project, which is a group of IGCC facilities to be located on Minnesota's Iron Range. On December 27, 2005, Excelsior filed a petition stating that lengthy negotiations with Xcel had failed to produce a mutually agreeable PPA and asked the Commission to approve, amend, or modify the agreement it proposed, as contemplated by Minn. Stat. § 216B.1694. The petition also asked the Commission to find that the Mesaba Project it proposed to build "is or is likely to be a least-cost resource" under Minn. Stat. § 216B.1693, and that Xcel should be required to buy 13 percent of its retail load from the Mesaba Project pursuant to Minn. Stat. § 216B.1693. After taking comments on procedure, on April 25, 2006 the Commission referred the case to the Office of Administrative Hearings for contested case proceedings.

In Phase I of the contested case proceedings, the parties stipulated to the admission of pre-filed testimony and waived cross-examination; therefore, the ALJs did not hold formal evidentiary hearings. The parties submitted sworn testimony from 47 witnesses and hundreds of pages of exhibits. The ALJs conducted three public hearings in Hoyt Lakes, Taconite, and St. Paul. The parties submitted initial and reply briefs to the ALJs. On April 12, 2007, the ALJs filed their Phase

1 Findings of Fact, Conclusions, and Recommendations, together with a Memorandum (the "Phase 1 Report"). After issuance of the Phase 1 Report, the Commission accepted exceptions and replies to exceptions to the Phase 1 Report from Excelsior and other parties. The parties presented oral argument on exceptions to the Phase 1 Report to the Commission on July 31 and August 2, 2007. On August 2, 2007, the Phase 1 record closed under Minn. Stat. § 14.61.

On August 30, 2007, the Commission issued an order, which is the primary subject of this appeal. The Commission found that the Mesaba Project is an "innovative energy project" under Minn. Stat. § 216B.1694, subd. 1. However, after applying the traditional public interest decision-making framework that under the terms of the IGCC Enabling Statutes does not apply to innovative energy projects, the Commission disapproved the terms and conditions of the proposed PPA submitted by Excelsior and found it not to be in the public interest, primarily due to the Commission's erroneous comparative cost findings about the Mesaba Project. The Commission based its cost findings on comparisons between the Mesaba Project and the purported cost of traditional pulverized coal facilities, the most likely alternatives to the Mesaba Project, as well as Xcel's projections of its future power needs. Based on its flawed comparative cost findings, the Commission found that the Mesaba Project is not eligible for the incentives in Minn. Stat. § 216B.1693 because it is not a least-cost resource. The Commission also ordered Excelsior and Xcel to resume negotiations to reach a mutually beneficial agreement, and indicated that it would explore the possibility of implementing Minn. Stat. § 216B.1694 through approval of a PPA between the Mesaba Project and other Minnesota utilities besides Xcel.

On September 19, 2007, Excelsior filed a timely Petition for Rehearing and Reconsideration of the Commission's August 30, 2007 order. The Commission deliberated on Excelsior's motion for

rehearing on November 1, 2007, and issued an order denying reconsideration of its order on November 8, 2007.

In Phase 2 of the contested case proceedings, the parties stipulated to the admission of pre-filed testimony and waived cross examination as they did in Phase 1 of the proceedings; again, the ALJs did not hold formal evidentiary hearings. On September 14, 2007, ALJ Johnson filed his Findings of Fact, Conclusions, and Recommendations, together with a Memorandum on Phase 2 (the "Phase 2 Report"). After issuance of the Phase 2 Report, the Commission accepted exceptions and a reply to exceptions to the Phase 2 Report from Excelsior and Xcel, respectively. The parties presented oral argument on Excelsior's exceptions to the Phase 2 Report to the Commission on August 14, 2008, which is also when the Phase 2 record closed under Minn. Stat. § 14.61.

On September 24, 2008, the Commission issued its order in Phase 2. Relying on comparative cost evidence developed in Phase 1, the Commission concluded that the Mesaba Project is not likely to be a least-cost resource and therefore is not entitled to the incentives under Minn. Stat. § 216B.1693. The Commission also set May 1, 2009 as the date that the required negotiations between Excelsior and Xcel would end.

On October 14, 2008, Excelsior filed a timely Petition for Rehearing and Reconsideration of the Commission's September 24, 2008 order. On December 9, 2008, the Commission issued an order granting reconsideration of the September 24, 2008 order for procedural purposes, and holding in abeyance further consideration of Excelsior's petition until after May 1, 2009, when the Commission-ordered negotiations between Excelsior and Xcel were scheduled to end.

On May 28, 2009 the Commission deliberated on Excelsior's motion for rehearing on the September 24, 2008 order. On July 7, 2009, the Commission issued an order denying

reconsideration of its September 24, 2008 order and closing the entire docket. This appeal is triggered by Excelsior's receipt of the July 7, 2009 order, which occurred on July 8, 2009.

5. List specific issues proposed to be raised on appeal

Excelsior raises the following issues in this appeal:

A. Did the Commission's decisions improperly nullify, negate, and overrule Minn. Stat. §§ 216B.1693 and 216B.1694?

B. Was the Commission's consideration of the purported need for electricity from the Mesaba Project in determining whether the PPA was in the public interest an error of law and in excess of its statutory authority?

C. Was the Commission's consideration of the legislatively prescribed location of the Mesaba Project in determining whether the PPA was in the public interest an error of law and in excess of its statutory authority?

D. Was the Commission's consideration of whether the public interest could support a PPA with just the utility that owns a nuclear generation facility, Xcel, an error of law and in excess of its statutory authority?

E. Were the Commission's comparative cost findings unsupported by substantial evidence in the record and arbitrary and capricious?

F. Were public interest and cost standards, and the overall decision-making framework applied by the Commission erroneous as a matter of law under Minn. Stat. § 216B.1694?

G. Were the Commission's decisions (a) in violation of constitutional provisions, (b) in excess of the statutory authority of the agency, (c) affected by other error of law, (d) unsupported by substantial evidence in view of the entire record as submitted, and (e) arbitrary or capricious?

6. Related appeals

List all prior or pending appeals arising from the same action as this appeal. If none, so state.

As described in section 2 above, on December 10, 2007, Excelsior filed a timely appeal of the Commission's November 8, 2007 order ending Phase 1. In a decision dated January 8, 2008, this Court found that the appeal was premature pending the conclusion of Phase 2, and dismissed it.

The order dismissing Excelsior's appeal noted that the order would "not preclude a future appeal from a final order, even if the future appeal raises issues that are substantially similar to those raised in this appeal."

List any known pending appeals in separate actions raising similar issues to this appeal. If none are known, so state.

None known

7. **Contents of record**

Is a transcript necessary to review the issues on appeal?

Yes

If yes, full or partial transcript?

Full transcript

Has the transcript already been delivered to the parties and filed with the trial court administrator?

Yes

Because the transcript has already been prepared and filed with the Commission, Petitioner/Relator hereby notifies Respondent, for purposes of Rules 115.04, subd. 1 and 110.02, subd. 1(c), that no additional transcripts will be ordered.

8. **Is oral argument requested?**

Yes

If so, is argument requested at a location other than that provided in Rule 134.09, subd. 2?

No

9. **Identify the type of brief to be filed**

Formal brief under Rule 128.02

10. **Names, addresses, zip codes and telephone numbers of attorney for appellant and respondent**

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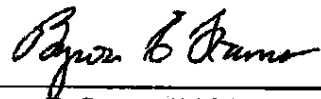
Dated: August 6, 2009

Respectfully submitted,



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