OAH Docket No.12-2500-17260-2
MPUC Docket No. E-6472/M-05-1993

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PUBLIC UTILITIES COMMISSION

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

EXCELSIOR'S RESPONSE TO MCGP MOTION TO MODIFY PROTECTIVE ORDER

Summary of Argument

There is no reason to change the existing Protective Order. The Protective Order is expressly authorized by the Intervention Rule, Minn. R. 1400.6200, subp. 3.C, and commonly applied in contested cases. Thus, as a matter of law, it is not "overbroad" or "unreasonable," nor does it improperly shift any burden from Excelsior, as mncoalgasplant.com ("MCGP") argues. Further, MCGP makes no showing to justify a change in the Protective Order. MCGP makes no arguments that were not made or available when the Protective Order terms were argued and briefed in May. Nor does MCGP even attempt to comply with the Protective Order by "showing that the interest . . . [it] seek[s] to protect reasonably requires it [access to Trade Secret Information]." (Protective Oder, ¶ 1(c)(ii)(F), at p. 3.) In fact, nothing has changed regarding MCGP's description of the interest it seeks to protect, from the record made on May 15, 2006, which record formed the basis for the Protective Order. Accordingly, the Protective Order should not be modified and MCGP's motions should be denied.

The Rules Provide for Limiting Intervenor Participation Rights

MCGP ignores the legal basis for the Protective Order's limitation on its access to trade secret information. Minn. Rule 1400.6200 specifically authorizes the provision MCGP now challenges.

> **1400.6200 INTERVENTION IN PROCEEDINGS AS PARTY.**
>
> Subp. 3. **Order.** The judge shall allow intervention upon a proper showing pursuant to subpart 1 unless the judge finds that the petitioner's interest is adequately represented by one or more parties participating in the case. An order allowing intervention shall specify the extent of participation permitted the petitioner and shall state the judge's reasons. A petitioner may be allowed to:
>
> A. file a written brief without acquiring the status of a party;
>
> B. intervene as a party with all the rights of a party; or
>
> **C. intervene as a party with all the rights of a party but limited to specific issues and to the means necessary to present and develop those issues.**

(emphasis added) Thus, MCGP's argument that the provision is "overbroad," "unreasonable, or "improper" is simply misplaced.

The Record of the May 15, 2006 Prehearing Justifies the Order

MCGP's Petition to Intervene (6/6/06) identified itself as "an informal organization of landowners and residents in the immediate vicinity of Excelsior's 'preferred' west site." Also in its petition, MCGP characterized its interest in the proceeding as that of a party who, because of property ownership and proximity, "will be affected by the plant and connecting infrastructure," and "as landowners whose land will be condemned for four or five different types of invasive and pervasive utility infrastructure." MCGP's petition also identified direct impacts it will suffer as follows: "In addition to the physical intrusions of infrastructure, mncoalgasplant.com members

will experience a fundamental change in their community and the noise, truck traffic, 100+ car coal trains, dust, water contamination and emissions of this plant."

Excelsior's objection to MCGP's intervention (5/12/06) included the arguments that MCGP's "landowner-based" interests did not establish a direct stake in the PPA proceeding (as compared to the siting proceeding) sufficient to confer party status and that MCGP's other policy interests were no different than those of the general public which were adequately represented by existing parties.

MCGP's reply to Excelsior's opposition to its intervention (5/14/06) conceded that its members are directly impacted only by their ownership of proximate property, but that its desire to raise issues as part of the public interest determination, "particularly given the public nature of the grants, loans and other funding" make it a "worthy" party "to broaden perspectives and inform the record."

At the May 15, 2006 Prehearing Conference, MCGP Counsel argued for party status on the grounds her clients were "citizens" who would be directly impacted if the project went forward, but then conceded: "It's not a literal, direct impact; but it will have an impact on my clients going forward whether or not this plant is built." When asked by Judge Mihalchick about her need for access to trade secret data on pricing, Counsel replied: "Perhaps participation may be minimal . . . . Our participation level may vary, but the most important area is that public interest determination." (Tr. 10-11.)

Judge Mihalchick qualified his grant to MCGP of party status: "It seems to me that this organization ought to be admitted as a party, at least through defining the issues. And we're going to be, at least under Xcel's proposal, defining the issues; and the case will be limited to whatever

issues it would result in. so I see little harm in admitting them. And it seems to me they may have an interest." (Tr. 14, emphasis added.)

At the Prehearing, MCGP Counsel had no comment on the protective order language. (Tr. 74.) Judge Mihalchick then noted: "In my experience its not unusual to have different parties be allowed different levels of discovery on particularly secret data, whatever that is. So that remains a possibility, I would think. But I'll have to see what the parties propose." (Tr. 76.) MCGP Counsel made no objection or remark after the Judge introduced the concept of different levels of disclosure.

Tellingly, by the May 22, 2006 deadline, MCGP filed no written final comments respecting the Protective Order issues.

Thus, in light of MCGP's declaration at the Prehearing Conference that its participation would be limited, restricting MCGP's access to trade secret data based on a showing of specific need was not only authorized by Minn. R. 1400.6200, but reasonable and appropriate.

MCGP's Motion Presents No New Evidence Justifying a Change in the Order

MCGP has made no new arguments that were not previously considered, so there is no record to support a change in the Protective Order, or reason to modify it. MCGP has not changed or expanded the description of the interests it seeks to protect, as compared to those identified in Counsel's statements on May 15. The interests MCGP seeks to protect remain interests of landowners whose property is located near one of the two proposed sites for the Mesaba Energy Project and may be affected by the proximity of a major power plant. Thus, MCGP's interest involves the issues to be litigated in the siting permit and environmental review process.

In fact, the only new evidence relevant to the motion are the facts (1) that on July 6, 2006, the Commission will consider staff recommendations on the siting and environmental review

process for the Mesaba Energy Project in MPUC Docket No. E6472/GS-06-668, including the scheduling of contested case proceedings in March 2007; (2) MCGP has requested appointment of a citizen's advisory task force in that proceeding and declared its intention to participate in the siting process to the fullest extent possible; and (3) to date, MCGP has served more than 300 information requests in this docket, many of which call for information that will be at issue in the siting proceedings. Given the certainty of a complete contested siting process, MCGP's participation in that process, and the Commission's admonition in its referral order that the PPA proceedings be "tightly focused,"[1] these new facts dictate that the Protective Order limitation should stand.

MCGP is Not Entitled to "Full Discovery" Nor Has it Made a Showing Of Need to Gain Access to All Non-Public Data.

MCGP tries to bootstrap its status, as a party with rights limited to specific issues, into full discovery rights to all non-public data. Even Xcel, a party MCGP must admit has more at stake, proposed and has accepted less than full discovery rights to non-public data. (*See* Protective Order ¶ 1(c)(ii)(E).) It simply does not follow that party status must automatically include full access to all non-public information.

Moreover, MCGP has not made a showing that the interest it seeks to protect reasonably requires access to all non-public data of Excelsior and other parties to this proceeding. MCGP makes the conclusory statement that "the record reflects that MCGP has more than made its showing" under ¶ 1(c)(ii)(F). But beyond the statements made on May 15, there is no record regarding the need of MCGP to protect the interest of landowners who "will be affected by the plant." Those interests are protected in the siting and environmental review processes where issues of location of plant and mitigation are to be addressed and resolved. Beyond those siting

[1] Notice and Order for Hearing and Order Granting Intervention Petition, dated April 25, 2006 at p. 3.

and mitigation issues, MCGP's stake in the Mesaba Project is no different than that of the general public. With regard to PPA tariff design and cost issues, MCGP's stake is in fact much more attenuated than the interests of other parties who are Xcel ratepayers, or the state agencies charged with the duty to protect ratepayers and to ensure prudency of utility operation.

Finally, MCGP argues that it is entitled to all non-public cost information not because of the specific interests it seeks to protect, but because this is "a docket that is focused on cost, such as this PPA . . . ." (MCGP Motion at 9.) Quite simply, MCGP has thus failed to establish a nexus between the landowner interests it seeks to protect and specific non-public information. Thus, MCGP has not made the required showing under the Protective Order for access to non-public data.

It should be noted that Excelsior agrees that other non-utility or non-power producer parties who constitute or represent Xcel ratepayers have an interest which supports their access to non-public cost data under the Protective Order. None of these organizations (including Xcel Industrial Intervenors or the Minnesota Chamber of Commerce) have asked Excelsior for the non-public information nor submitted their Exhibit A Nondisclosure Agreements.

The Case Law Cited By MCGP Supports the Protective Order

A reading of MCGP's cases demonstrates that MCGP's legal arguments are based on at least three fundamentally flawed premises. First, the primary case MCGP relies upon makes clear that intervenors have no basic constitutional or common law right of access to pre-trial discovery in civil litigation or administrative proceedings. Second, the Minnesota Rules of Civil Procedure, the OAH Rules, and the MPUC Rules all: (a) recognize a property interest in privileged, trade secret, and proprietary information of litigants; (b) exclude privileged information from discovery; and (c) extend the discovery exclusion for privileged information to trade secret and proprietary information in the discretion of the Court. Third, in Minnesota, raw

discovery is not a public court record and, in fact, even the records of official court proceedings can be sealed from intervenor and public access (and were in fact under the case relied on by MCGP, *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197 (Minn. 1986), *rev'g*, 383 N.W.2d 323 (Minn. Ct. App. 1986)).

Starting From the Beginning, There is No Constitutional or Common Law Right of Access to Pre-Trial Discovery

There is no basic constitutional right of access to raw pretrial discovery in administrative proceedings. *Starr v. Comm. of Int. Rev.*, 226 F.2d 721, 722 (7th Cir. 1955), *cert. denied,* 350 U.S. 993 (1956). Generally, absent explicit statutory provision, discovery is not available in administrative cases. *Waller v. Powers Dept. Store*, 343 N.W.2d 655, 657 (Minn. 1984). Thus, the scope of access to discovery in this administrative proceeding is governed by statute, by rule, and by agency discretion. *Guise v. Dept. of Justice*, 330 F.3d 1376, 1380 (Fed. Cir. 2003); *Waller*, 343 N.W.2d at 657. Similarly, civil litigants have no First Amendment right of access to discovery materials. *Seattle Times v. Rhinehart,* 467 U.S. 20, 36-37 (1984); *Anderson,* 805 F.2d at 10-13; *In re the Reporters Comm. For Freedom of the Press,* 773 F.2d 1325, 1337-38 (D.C. Cir. 1985).

The general common law presumption of access to court documents does not encompass discovery related materials. The common law right of access to court documents has never been extended beyond materials on which a court relies in determining a litigant's *substantive* rights. *Anderson v. Cryovac, Inc.,* 805 F.2d 1, 13 (1st Cir. 1986); *Simon v. G.D. Searle & Co.*, 119 F.R.D. 683 (D. Minn. 1987) (stating that "[a]t best, the common law presumption of access to judicial records has force only where a Court relies on a particular document to determine the litigants' substantive rights"); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 164 (3d Cir. 1993) (no presumptive common law right of access exists for discovery motions and their

supporting documents). *See also Seattle Times*, 467 U.S. at 33 (stating that there is no common law right of access to discovery materials). The First Circuit reasoned:

> [D]iscovery is fundamentally different from those proceedings for which a public right of access has been recognized. There is no tradition of public access to discovery, and requiring a trial court to scrutinize carefully public claims of access to discovery would be incongruous with the goals of the discovery process.

Anderson, 805 F.2d at 13. Thus, MCGP has no common law right of access to discovery documents.

The OAH has authority to adopt procedural rules for contested case proceedings under the Minnesota APA, Minn. Stat. §§ 14.06, 14.51. Minn. R. 1400.5010–1400.8400. The Rules allow discovery pursuant to the Minnesota Rules of Civil Procedure. Minn. R. 1400.6700, subp. 2.

The Minnesota Rules of Civil Procedure expressly contemplate restrictions on access to discovery materials "to protect the privacy of interests of litigants."

> The rule creates a single exception for discovery requests and responses. Filings of depositions, interrogatories, requests for admissions, and requests for production of documents, and any answers or responses to those requests, is not required and is specifically proscribed unless ordered by the Court. The purpose of this change is to reduce the burden of processing and storing documents which are rarely required by the Court. The change also protects the important privacy interests of litigants. *See Tavoulareas v. Washington Post Co.,* 724 F.2d 1010 (D.C. Cir. 1984) (en banc).

1984 Minn. R. Civ. P. 5.04 Advisory Committee Note.

In any case, the Minnesota Supreme Court decision primarily relied on by MCGP for its motion approved limiting intervenor access to court records, in which there is a higher public interest in access than in raw discovery. In *Schumacher*, the Minnesota Supreme Court ruled that a trial court could properly seal court files relating to the settlement of certain actions denying access to this information. The case arose from an aviation disaster that was the subject of great interest to the media. The trial court allowed intervention as a right to the media, but denied the

press's motion to quash orders sealing the files. Although not strictly relating to discovery, the case is significant in establishing in Minnesota the principle that there is not an unlimited right of access to court records by intervenors.

MCGP also relies on an incorrect reading of an unpublished, non-precedential decision[2] of the Minnesota Court of Appeals, *Bonzel v. Pfizer, Inc.*, 2002 WL 1902526 (Minn. Ct. App. 2002). While the Court of Appeals criticized the district court's administration of a protective order which sealed court records in that case, it expressly ruled that the intervenor, Medtronic, had no right to documents and information never filed in district court. *Id.* at 6. Thus, the holding, with respect to raw discovery, is there is no intervenor right of access. And in this case, the documents filed with the Commission, because of its detailed redaction requirements, provide intervenors with sufficient specificity of context to challenge a designation of a portion of a filing as non-public.

There is Good Cause for the Protective Order

Rule 26.02(a) of the Minnesota Rules of Civil Procedure excludes privileged information from discovery. The MPUC rules extend privilege to include trade secrets, which the MPUC cannot compel to be disclosed to the public. Minn. R. 7829.0500.[3] At the risk of being simplistic, the Rule prohibits involuntary public disclosure of privileged, proprietary trade secrets, and so constitutes cause *per se* for a protective order covering trade secrets.

The Protective Order is Not Overbroad or Unreasonable

The order cannot be overbroad, because it is less broad that what Minn. R. Civ. P. 26.03(g) allows: *that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.* The Protective Order

[2] Unpublished decisions of the Minnesota Court of Appeals are not precedential. Minn. Stat. § 480A.08, subd. 3

[3] "Nothing in this chapter requires the public disclosure of privileged proprietary information, trade secrets, or other privileged information." Minn. R. 7829.0500.

already incorporates the latter standard, which authorizes access "in a designated way." On the Rule, the protective order could certainly have been broader, so, on the Rule, it cannot possibly be overbroad.

Broad discretion is accorded to administrative judges in discovery matters. *Guise*, 330 F.3d at 1379. The Protective Order represents the exercise of reasonable discretion, and on appeal would be afforded deferential review. *Cunningham*, 527 U.S. 198, 209. MCGP has not met the required standard for "unreasonability," abuse of discretion.

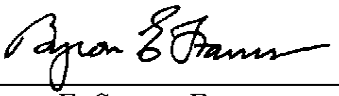
Conclusion

For all the forgoing reasons, MCGP's motion should be denied.

Dated: July 5, 2006

Respectfully submitted,

EXCELSIOR ENERGY INC.



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