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October 6, 2006

The Honorable Steve M. Mihalchick
Office of Administrative Hearings
Suite 1700
100 Washington Square
Minneapolis, MN 55401

VIA E-MAIL & U.S. MAIL

Re: *In the Matter of a Joint LEPGP Site Permit, HVTL Route Permit and Pipeline (Partial Exemption) Route Permit Application for the Mesaba Energy Project*
OAH Docket No. 12-2500-17512-2; MPUC Docket No. E-6472/GS-06-668

Dear Judge Mihalchick:

This is submitted on behalf of Excelsior Energy Inc. ("Excelsior") in response to the issues raised at the September 26, 2006 prehearing conference.

PROPOSED SCHEDULE.

Based on the discussion at the prehearing conference and further consideration of the issues, Excelsior proposes the following schedule:

<u>DATE</u>	<u>EVENT</u>
November 20, 2006	Deadline for petitions to intervene and requesting non-party participant status (7 days to object)
January 15, 2007	Excelsior's prefiled direct testimony
January 15, 2007 to start of hearing	Discovery
February 2, 2007	Draft Environmental Impact Statement ("EIS") available
February 27-28, 2007	Joint Department of Commerce ("DOC") and Department of Energy ("DOE") public meetings on draft EIS

<u>DATE</u>	<u>EVENT</u>
March 1, 2007	Other parties' prefiled direct testimony
March 1, 2007	Deadline for dispositive and other significant motions (7 days to reply)
March 15, 2007	Prefiled rebuttal testimony by all parties (no new issues)
March 19, 2007	Deadline for written public comments on draft EIS to DOC and DOE
April 2-30, 2007	Contested case hearing (Schedule and location of evidentiary and public sessions to be determined; no sessions April 12-19; see detailed proposal below)
May 15, 2007	Deadline for written public comments to administrative law judge ("ALJ") for inclusion in record of contested case
June 1, 2007	Final EIS
June 8, 2007	Initial briefs and proposed findings
June 22, 2007	Reply briefs
July 22, 2007	ALJ report and recommendation to Public Utilities Commission ("PUC")
August 20, 2007	Exceptions
September 6, 2007	Final PUC decision
October 6, 2007	State Register publication

COMMENTS ON PROPOSED SCHEDULE

Intervention. Excelsior proposes November 20, 2006 as the deadline for petitions to intervene. At the prehearing conference, a date of 30 days after the prehearing conference, or October 26, 2006 was discussed. Moving the deadline to November 20, 2006 will allow sufficient time for notice to potential interveners after the ALJ issues his prehearing order.

Discovery. Excelsior proposes that discovery begin on January 15, 2007 and continue to the start of the hearing in April. The January 15, 2007 date coincides with the deadline for Excelsior's prefiled direct testimony. Earlier discovery may require Excelsior to make responses on the basis of incomplete information and require later supplementation of responses. Furthermore, discovery will proceed in a more orderly and efficient manner if the other parties first have access to Excelsior's direct testimony. Although discovery will not be limited to matters raised in the direct testimony, receipt of the direct testimony will allow the other parties to gauge the topics that Excelsior will emphasize and the areas in which they need additional information. The large amount of discovery in the Power Purchase Agreement proceeding, OAH Docket No. 12-2500-1760-2, demonstrates why it is important for the ALJ to place reasonable limits on the timing and amount of discovery. Based on the experience in the Power Purchase Agreement proceeding, we also recommend that the ALJ also place a reasonable limit on the number of information requests allowed per party.

Role of EIS in Contested Case Proceeding. In assessing the role of the EIS in the contested case proceeding, it is important to review the relevant rules. The rules specify the following sequence of events:

Minn. R. 4400.1700, subp. 1: DOC prepares draft EIS.

Minn. R. 4400.1700, subp. 8: DOC holds public informational meetings on draft EIS no sooner than 20 days after the draft becomes available and no later than the start of the contested case hearing. The DOC holds the record on the EIS open for written comments for not less than 10 days after the close of the informational meetings.

Minn. R. 4400.1700, subp. 9: DOC responds to timely substantive comments on the draft EIS and prepares final EIS.

Minn. R. 4400.1700, subp. 10: PUC decides adequacy of final EIS no sooner than 10 days after the availability of the final EIS is announced in the EQB monitor.

Minn. R. 4400.1900, subp. 2: PUC may not make a final decision on the permit until the PUC has found the EIS to be adequate.

These rules clearly establish a procedure for the creation of the EIS by the DOC that is separate from the contested case proceeding. On the other hand, the rules contemplate that a draft of the EIS will be available prior to the contested case hearing and the PUC will not make its final decision until the final EIS is deemed adequate.

Based on this dual structure, Excelsior proposes the following approach to the role of the EIS in the contested case hearing:

- The EIS is an important piece of evidence to be received in the record of the contested case hearing. The EIS is a compendium of a great deal of highly relevant environmental information. And, of course, the purpose of the EIS is to inform the decision of the PUC. It is significant that the rules require the preparation of the draft EIS prior to the contested case hearing. *See* Minn. R. 4400.1700, subp. 8. Both the draft and final EIS should be received in the record of the contested case proceeding.
- Although the rules are silent on whether the ALJ is to make a recommendation to the PUC on the adequacy of the final EIS, Excelsior believes that it is appropriate for the ALJ to perform this role. The ALJ will be familiar with both the draft and final EIS, and it will be of obvious service to the PUC for the ALJ to provide a recommendation on adequacy. However, the scope of the ALJ's consideration of adequacy should be limited to the criteria specified in Minn. R. 4400.1700, subp. 10, which provides that the final EIS is adequate if it:
 - A. addresses the issues and alternatives raised in scoping to a reasonable extent considering the availability of information and the time limitations for considering the permit application;
 - B. provides responses to the timely substantive comments received during the draft environmental impact statement review process; and
 - C. was prepared in compliance with the procedures in this chapter.
- The receipt of the draft and final EIS and the role of the ALJ in making a recommendation on the adequacy of the final EIS should not be an occasion for the generation of additional comments that require a response by the DOC. As noted above, there is a separate procedure in the rules for the development of the record on the EIS by the DOC. Comments are received by the DOC within a specified period of time after the informational meetings, and then the DOC is required to respond to the comments received during the specified comment period. *See* Minn. R. 4400.1700, subp. 9. Moreover, Minn. R. 4400.1700, subp. 10.B, quoted in full above, makes it clear that the adequacy of the final EIS is judged by the extent to which the final EIS responds to comments "received during the draft environmental impact statement review process."

- The rules do not require an additional comment period after receipt of the final EIS. However, the parties may address the issue adequacy of the final EIS in their initial and reply briefs to be submitted after the receipt of the final EIS. Briefing by the parties on the adequacy of the final EIS should be limited to the criteria stated in Minn. R. 4400.1700, subp. 10.

Hearing Schedule. Excelsior proposes that the contested case hearing take place during the month of April 2007, with the first testimony being taken on April 2, 2007 and the final day of testimony being no later than April 30, 2007. Excelsior further proposes that there be no hearing sessions scheduled for April 12-19, 2007. This break will allow for the holiday and spring break plans of many persons, including Excelsior counsel.

The two-stage hearing procedure permitted by Minn. R. 1405.1500, subp. 2 should be utilized. This procedure is as follows:

The first stage shall be for the purpose of introducing into evidence all of the prefiled direct testimony of the parties, and the cross-examination of each witness by all other parties. The subsequent stage shall be for the purpose of allowing all other interested persons to present their direct testimony and to question witnesses that offered testimony during the first stage of the hearing process.

Minn. R. 1405.1500, subp. 2. The first stage could take place in St. Paul, Taconite, Hoyt Lakes, or some combination thereof. The second stage could be scheduled for Taconite and Hoyt Lakes.

At this point, it is unknown how many witnesses there will be and how many days of testimony will be necessary. Excelsior believes that it would be prudent to reserve a number of days so that additional hearing sessions can be held if necessary. Excelsior proposes the following schedule:

<u>April 2-6, 2007:</u>	Stage One sessions – St. Paul, Taconite, and/or Hoyt Lakes
<u>April 9-11, 2007:</u>	Reserve for potential additional Stage One Sessions – St. Paul, Taconite, and/or Hoyt Lakes
<u>April 12-19, 2007:</u>	No hearing sessions
<u>April 20, 23-24, 2007:</u>	Reserve for potential additional Stage One sessions – St. Paul, Taconite, and/or Hoyt Lakes
<u>April 25-26, 2007:</u>	Stage Two sessions – Taconite and Hoyt Lakes
<u>April 27, 2007:</u>	Reserve for potential additional Stage Two session – Taconite or Hoyt Lakes

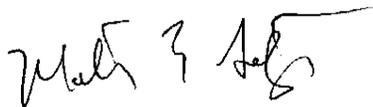
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Finally, there is the question of witness attendance. Excelsior proposes that witnesses only be required to attend the Stage One sessions at which they testify. However, all witnesses would be required to attend the Stage Two sessions for public questioning, unless an exemption is obtained from the ALJ under Minn. R. 1405.2000 prior to the publication of the notice of hearing.

Thank you for your consideration.

Very truly yours,

LEONARD, STREET AND DEINARD
Professional Association

A handwritten signature in black ink, appearing to read "Byron E. Starns", with a long horizontal flourish extending to the right.

BYRON E. STARNES
MATTHEW B. SELTZER

cc: Service List

SERVICE LIST

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

In the Matter of a Joint LEPGP Site Permit,
HVTL Route Permit and Pipeline (Partial
Exemption) Route Permit Application for
the Mesaba Energy Project

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Susan A. Hartinger, being first duly sworn, upon oath deposes and states that on October 6, 2006, she served **EXCELSIOR ENERGY'S LETTER TO JUDGE MIHALCHICK REGARDING A PROPOSED SCHEDULE** by mailing true and correct copies thereof, enclosed in an envelope, postage prepaid, and by depositing same in the U.S. Mail at Minneapolis, Minnesota upon those persons on the attached Service List:



SUSAN A. HARTINGER

Subscribed and sworn to before me
on October 6, 2006.


Notary Public