

CASE NO. A09-1441

STATE OF MINNESOTA
IN COURT OF APPEALS

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

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LEGAL ISSUES

- I. Whether the Minnesota Public Utilities Commission (“Commission”) correctly determined that the Mesaba Project proposed by Excelsior Energy Inc. and MEP-I LLC (hereinafter “Excelsior Energy” or “Relators”) is an Innovative Energy Project (“IEP”) under Minn. Stat. § 216B.1694, subd. 1.

Apposite Statutes, Rules, and Cases:

Minn. Stat. § 216B.1694

Minn. Stat. § 216B.1693

MCEA v. MPCA, 644 N.W.2d 457 (Minn. 2002)

In the Matter of the Complaint of Kandiyohi Cooperative Electric Power Association, 455 N.W.2d 102 (Minn. Ct. App. 1990)

Arvig Tel. Co. v. Northwestern Bell Tel. Co., 270 N.W.2d 111 (Minn. 1978)

- II. Did the Commission err in finding the Mesaba Project power purchase agreement (“PPA”) is not in the public interest?

Apposite Statutes, Rules, and Cases:

Minn. Stat. § 216B.1694

Minn. Stat. § 216B.1693

Owens v. Water Gremlin Co., 605 N.W.2d 733 (Minn. 2000)

Gale v. Commissioner of Taxation, 37 N.W.2d 711, 716 (Minn. 1949)

Wallace v. Commissioner of Taxation, 184 N.W.2d 588 (Minn. 1971)

In re Quantification of Environmental Costs, 578 N.W.2d 794 (Minn. Ct. App. 1998)

I. STATEMENT OF THE CASE AND FACTS

A. Background and Proceedings Below

Excelsior Energy began the proceeding that is the subject of this appeal on December 27, 2005 by filing a petition (“Petition”) with the Commission. In an order dated April 25, 2006, the Commission referred Excelsior Energy’s petition to the Office of Administrative Hearings for a contested case proceeding and requested the Administrative Law Judges (“ALJs”) address three primary issues:

- (1) approve, disapprove, 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;
- (2) determine that the coal-fueled Integrated Gasification Cycle (IGCC) power plant that Excelsior plans to construct in northern Minnesota is, or is likely to be, a least-cost resource, obligating Xcel to use the plant’s generation for at least 2% of the energy supplied to its retail customers, under Minn. Stat. § 216B.1693; and
- (3) determine that, under the terms of Minn. Stat. § 216B.1693, at least 13% of the energy supplied to Xcel’s retail customers should come from the IGCC plant by 2013.

Relators’ Add. at 35.

At the outset of the contested case, Excelsior Energy sought to bifurcate the contested case into two distinct phases and the ALJs agreed. OAH Order dated June 2, 2006 at para. 2. The ALJs’ scheduling order stated:

This matter is hereby bifurcated into two phases as suggested by Excelsior Energy. Phase 1 will address Mesaba Energy Project Unit I and the first two primary issues. Phase 2 will address Mesaba Energy Project Unit II and all three primary issues. A separate ALJ report will be submitted to the Commission at the

conclusion of each phase. Evidence and argument received in Phase 1 may be offered for incorporation in Phase 2.

On April 12, 2007, the ALJs filed their Findings of Fact, Conclusions, and Recommendations (“ALJs’ Report”) regarding just Phase 1 of the contested case. Per Minn. Stat. § 14.61, subd. 1 and Commission notice dated April 13, 2007, parties filed exceptions and replies to exceptions. On July 31 and August 2, 2007, the Commission heard oral arguments regarding the ALJs’ Report. Relators’ Add at 37.

On August 30, 2007, the Commission issued an order (“August 30, 2007 Order”) rejecting in part and accepting in part the ALJs’ Report. Relators’ Add at 31-54. Excelsior Energy and Minnesota Power both petitioned the Commission to reconsider its August 30, 2007 Order, which the Commission denied on November 8, 2007 (“November 8, 2007 Order”). Relators’ Add. at 57-58. Minnesota Power’s petition for reconsideration asked the Commission to review its designation of the Mesaba Project as an Innovative Energy Project (“IEP”) under Minn. Stat. § 216B.1694, subd. 1.

The Commission received an additional report from the ALJs on Phase 2 of the contested case proceeding that addressed the Clean Energy Technology (“CET”) designation under Minn. Stat. § 216B.1693. As summarized in the Commission’s Statement of the Case, the Commission dismissed Excelsior Energy’s challenges on those remaining issues.

II. STANDARD OF REVIEW

Relators bring this appeal by petition for writ of certiorari pursuant to Minn. Stat. §§ 216B.52 and 14.63. Minnesota Power seeks review pursuant to Minn. R. Civ. App. 106 of only specific parts of the Commission's orders. The procedures of the Minnesota Administrative Procedure Act, Minn. Stat. § 14.69, therefore establish the standard of review for this case. *See Minnesota Public Interest Research Group v. Northern States Power Co.*, 360 N.W.2d 654, 656 (Minn. Ct. App. 1985). That statute provides that the court may affirm, modify, reverse, or remand if the agency decision was: (a) in violation of constitutional provisions; (b) in excess of the statutory authority or jurisdiction of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) unsupported by substantial evidence in view of the entire record submitted; or (f) arbitrary or capricious. The Commission's determination that the Mesaba Project meets the definition of an IEP under Minn. Stat. § 216B.1694, subd. 1 is unsupported by substantial evidence in view of the entire record submitted.

III. ARGUMENT

With regard to the matter of unacceptable ratepayer risks as recognized in this proceeding, Minnesota Power wholeheartedly endorses the Commission's analysis and negative findings on the Mesaba Project power purchase agreement ("PPA") itself as stated within the August 30, 2007 Order. Relators' Add. at 43-53. In addition, while the Commission's public interest determination correctly found the Mesaba Project would impose excessive costs on Xcel Energy and its ratepayers, Minnesota Power ratepayers, who would stand to absorb transmission costs related to the Mesaba Project that are unnecessary for their service reliability, were also protected by the Commission's Order. The Commission's decision on the Mesaba Project PPA is fully supported by the record and is consistent with its authority delegated by the Legislature.

However, the substantial evidence in the record demonstrates that the Mesaba Project does not meet the statutory requirement for significantly reduced emissions compared to traditional technologies and it does not provide a hedged, predictable cost. Minn. Stat. § 216B.1694, subd. 1(1) and (2). The regulatory incentives designated for an IEP are substantial and extraordinary and those incentives were intended to encourage the development of an economically sound energy project for ratepayers with outstanding environmental performance characteristics. Minn. Stat. § 216B.1694, subd. 2(a). In conferring its IEP designation, the Commission ignored the fundamentally minimal emission differences between the Mesaba Project and traditional coal-fired technologies.

The Commission also failed to recognize the lack of any demonstrated capability by Excelsior Energy to negotiate and enter into coal and rail agreements that would result in stable fuel costs for the Mesaba Project. Minnesota Power seeks review pursuant to Minn. R. Civ. App. 106 of this specific part of the Commission's August 30, 2007 Order because it adversely affects Minnesota Power and Minnesota Power ratepayers. *See, e.g.*, Minn. Stat. § 216B.1694, subd. 2(a)(5) (Commission must consider an IEP prior to approving certain types of utility projects).

A. The Commission Incorrectly Designated the Mesaba Project an IEP

1. All Four Emissions Must be Significantly Reduced Under Minn. Stat. § 216B.1694, subd. 1(1)

The Commission's determination that the proposed Mesaba Project has met the qualifications of an IEP in terms of its projected emission performance is unsupported in the record. Relators' Add. at 41-43. The Mesaba Project emission profile would not be significantly lower compared to either a modern supercritical pulverized coal ("SCPC") unit or Minnesota Power's Boswell Energy Center Unit 3 as retrofitted. Relators' Add at 102.

The IEP statute, Minn. Stat. § 216B.1694, subd. 1(1), defines an IEP as a project:

that makes use of an innovative generation technology utilizing coal as a primary fuel in a highly efficient combined cycle configuration *with significantly reduced* sulfur dioxide, nitrogen oxide, particulate, and mercury *emissions* from those of traditional technologies.

(emphasis added). The ALJs properly concluded that designating the Mesaba Project an IEP requires significantly reducing all four emissions. Relators' Add. at 104-105 (Finding 75). The ALJs also correctly concluded that the Mesaba Project would not have significantly reduced emissions compared to a SCPC with modern emission controls. *Id.* at 104 (Finding 74).

As cited by the ALJs at Finding 63 (Relators' Add at 102), the Mesaba Project would result in only minimal emission improvements on NO_x, SO₂ and particulates compared to either an existing pulverized coal ("PC) retrofit or a SCPC plant. Minnesota Power's App. at 1-17 (Ex. MP 4011 – Cashin Surrebuttal.) For mercury emission reductions, Minnesota Power's Boswell Unit 3 PC emissions retrofit project is projected to be slightly better than either the Mesaba Project or SCPC. *Id.* at 6, 8, 9, 11 and 13 (Ex. MP 4011 - Cashin Surrebuttal at 6, 8, 9, 11 and 13). Excelsior Energy submitted an air permit application to the Minnesota Pollution Control Agency ("MPCA") containing emission reduction data for both the Mesaba Project and a hypothetical SCPC facility indicates that the Mesaba Project's NO_x reductions would be 91% compared to SCPC at 88% (or 3% lower), its SO₂ reductions would be 98% compared to SCPC at 94% (or 4%

lower), its particulate reduction would be 99.9% compared to SCPC at 99.8% (or .1% lower) and its mercury reduction is about equivalent. *Id.* at 11-13 (Ex. MP 4011 – Cashin Surrebuttal at 11-13). The percentage reductions projected for the Mesaba Project are not significant either as numbers or in the broader contexts of air quality in Minnesota. Relators’ Add. at 104-105 (Findings 74 and 75).

While the IEP statute does not define “significant”, the ALJs correctly determined that the percentage differences between the Mesaba Project and an SCPC unit are small and do not meet the significantly reduced requirement. Relators’ Add. at 104 (Finding 74); *see also Bloomquist v. Commissioner of Natural Resources*, 704 N.W.2d 184, 190 (Minn. Ct. App. 2005) (“...the agency should not take lightly the ALJ’s findings.”). Beyond the black and white facts of the small percentage differentials the proposed Mesaba Project would achieve, it makes no sense to confer IEP status on the Mesaba Project for its emission performance. As the full record illustrates, the Mesaba Project would realize small emission reduction improvements compared to a more traditional SCPC and would have minimal beneficial impact on local air quality, which is currently in attainment with national standards. Minnesota Power’s App. at 7 (Ex. MP 4011 – Cashin Surrebuttal at 7). The minimal additional emission reductions the Mesaba Project might afford compared to an SCPC unit, or even an older generating unit with updated emission controls such as Minnesota Power’s Boswell Unit 3, simply cannot be evaluated as “significant”. The Commission’s determination stated it was making a “more reasonable reading of the statute” based on the legislative intent. Relators’ Add. at 42.

However, for the Commission to determine the Mesaba Project is an IEP under Minn. Stat. § 216B.1694, subd. 1(1) in a manner that does not follow the words of the statute cannot be justified, especially given that such a determination provides the Mesaba Project the extraordinary incentives that are included with such a designation. Minn. Stat. § 216B.1694, subd. 2(a). While the Commission also concluded “if the four listed emissions are considered in the aggregate, the Mesaba Project again clearly meets or exceeds the statutory requirement,” (Relators’ Add. at 43), this predication misses the point on significantly improved environmental performance and, more importantly, overlooks the minimal “return” on environmental performance the Mesaba Project offers in light of all the risks the Mesaba Project holds as further articulated by the Commission. *See* Relators’ Add. at 47-49; *see also, MCEA v. MPCA*, 644 N.W.2d 457, 466 (Minn. 2002) (applying substantial evidence test to agency environmental decision). Considering the minimally reduced Mesaba Project emissions as adequately “beneficial” within the complete context of the substantial technical and financial risks the Mesaba Project poses for ratepayers, as is well-documented in the record, the Commission’s conclusion that the Mesaba Project’s emission reductions warrant IEP designation with its valuable regulatory incentives is misplaced.

Considering the extraordinary incentives and authorizations afforded an IEP, including no requirement for a certificate of need, the right of eminent domain and liberal permission to increase transmission capacity, the proposed Mesaba Project should provide emission reductions that truly are “significant” or, in other words, noticeably

better than those of traditional technologies. *Cf.* 40 C.F.R. § 1508.27 (defining significant for purposes of the National Environmental Policy Act based on both context and intensity). The minimal difference between the proposed Mesaba Project's hypothetical performance and that of Minnesota Power's Boswell Unit 3, once its retrofits are completed, or that of the hypothetical SCPC plant cited in the Mesaba Project's air permit application, illustrate that there is nothing significant about the Mesaba Project's emission performance that would warrant IEP designation. Thus, the Commission's finding of IEP status under Minn. Stat. § 216B.1694, subd. 1(1) for the Mesaba Project was in error and should be reversed.

2. Excelsior Energy is Not Capable of Offering a Long-Term Supply Contract at a Hedged, Predictable Cost

In order to qualify as an IEP Excelsior Energy is required to certify that the Mesaba Project is "capable of offering a long-term supply contract at a hedged, predictable cost." Minn. Stat. § 216B.1694, subd. 1(2). Minnesota Power asserted that Excelsior Energy does not meet this statutory requirement based on Excelsior Energy's lack of a fuel supply plan and other inherent project risks that preclude offering a long-term supply contract at a hedged, predictable price. *See* Relators' App. at 171-172 (August 2, 2007 Hearing Transcript at 82-88).

The August 30, 2007 Order did not specifically address this definitional challenge except to note that the Commission concurred with the ALJs' findings on this definitional

requirement, “for the reasons set forth in their Report.” Relators’ Add. at 40. In analyzing this issue, the ALJs stated that Excelsior Energy’s lack of a fuel supply plan was a significant issue. The ALJs correctly concluded: “Until [Excelsior Energy] develops a portfolio of fuel and transportation agreements, Excelsior Energy will have no hedge against future coal prices through an assured source for future fuel at a known price.” Relators’ Add. at 107 (Finding 86). The ALJs also noted that “...it cannot be found that Excelsior Energy is capable of obtaining fuel for the Project at a favorable price.” *Id.* at 108 (Finding 89). However, in reviewing the statutory requirement, the ALJs found that Excelsior Energy “is certainly capable of negotiating a portfolio of agreements of varying terms so that its fuel costs would be hedged, and relatively predictable and stable.” *Ibid*; *see also, Id.* at 109 (Finding 92).

The Commission agreed that the ALJs made correct findings regarding Excelsior Energy’s expected high fuel costs and other inherent risks in waiting on yet to be negotiated rail and fuel contracts to meet the Mesaba Project’s “large need for coal.” *Id.* at 108 (Finding 89). The record does not support the ultimate conclusion that Excelsior Energy meets the “capable” and “long-term” requirements in Minn. Stat. § 216B.1694, subd. 1(2). First, as noted by the ALJs, Excelsior Energy’s “current [fuel] plan [is] to rely on short-term contracts.” *Id.* at 109 (Finding 92). This was restated at the Commission hearing by Excelsior Energy. Relators’ App. at 179 (August 2, 2007 Hearing Transcript at 114). Excelsior Energy’s future expected reliance on short-term contracts demonstrates that its own plans will not meet the “long-term” requirement in

the statute. Second, Excelsior Energy has not shown that it is capable of obtaining any length of contract since it has not obtained any existing fuel supply or transportation contracts and does not anticipate beginning negotiations for another three to four years. Relators' Add. at 107 (Finding 86); Relators' App. at 93 (July 31, 2007 Hearing Transcript at 26-27). To be "capable" requires a showing of an established track record, something Excelsior Energy admits it has not yet accomplished. *See in Re Hibbing Taconite Co.*, 431 N.W.2d 885, 895 (Minn. Ct. App. 1988) (determination of financial capabilities for environmental permit was a question of fact to be answered in a contested case proceeding).

The Commission has addressed what "capable" means in another context: service territory acquisition compensation under Minn. Stat. § 216B.44. The Commission and courts have declared that a displaced host utility is due compensation for lost service territory where the utility has facilities in place capable of serving the service territory. *See In re City of Rochester*, Docket No. E-299, 132/SA-93-498, Order dated November 30, 1995; *In the Matter of the Complaint of Kandiyohi Cooperative Electric Power Association*, 455 N.W.2d 102, 105-6 (Minn. Ct. App. 1990). In that context "capable" means having actual facilities that can provide service to customers in the "near term". *Id.* The Commission and courts tied "capable" to serving customers, not a utility's potential to someday serve customers' needs under yet to be determined circumstances. Likewise, Excelsior Energy's is not capable (or planning) to enter into a long-term supply

contract that would provide a hedged, predictable price in the near term and doing so in the long term is speculative at best.

Finally, the ALJs' finding that Excelsior Energy is capable of negotiating agreements so that fuel costs can be hedged, albeit not at a favorable price, sets the bar too low to be in the public interest. Relators' Add. at 108 (Finding 89). The Commission should have looked beyond Excelsior Energy's "certification" (Finding 76) in construing Minn. Stat. § 216B.1694, subd. 1(2). Relators' Add. at 105; Relators' App. at 190-191 (August 2, 2007 Hearing Transcript at 159, 161, 162). In this case, the certification contained no legal obligation on the part of Excelsior Energy and merely conveyed a private party's self-interests. *Cf. Iowa Telecommunications Services, Inc. v. Iowa Utilities Bd.*, 563 F.3d 743, 749-50 (8th Cir. 2009) (describing the Federal Communications Commission's deference to a telephone company's self-certification that resulted in common carrier status and obligations). Also, because Excelsior Energy, in theory, could some day enter into "a long-term supply contract at a hedged, predictable cost" as part of future negotiations would mean almost any entity with the legal capacity to contract meets the "capable" test.

Fuel is the largest variable cost of running a power plant and strategic negotiation and utilization of fuel contracts is critical to ensuring a "hedged, predictable cost" for power supply in any case. The record indicates that successful procurement in the extremely tight coal and rail markets requires demonstrated knowledge and experience

which can be further bolstered by existing market presence. Minnesota Power's App. at 23-30 (Ex. MP 4013 – Crowley Surrebuttal at 6-13). Newcomers who have no existing fuel or rail contracts would likely have an even more difficult time exerting leverage in negotiations in such tough markets. *Ibid.* Furthermore, the markets for coal supplies and rail service are getting tighter and harder to finesse. Nowhere in this proceeding is there evidence that Excelsior Energy can bring the necessary expertise to bear securing coal supplies and rail service beyond its own assertions. These assertions provide no evidence of experience or capability. Thus, on the basis of the evidence in this proceeding with regard to rail service and fuel supplies, it is not possible to find that the Mesaba Project could offer “a long-term supply contract at a hedged predictable cost”. Minn. Stat. § 216B.1694, subd. 1(1). Therefore, the Court should find the Commission's adoption of the ALJs' findings on this definitional issue is unsupported by substantial evidence in view of the entire record submitted.

3. The Commission Should Not Have Relied Upon its RDF Order

In its August 30, 2007 Order, the Commission cites the fact of its February 23, 2005 Order Approving and Directing Fund Expenditures, Giving Guidance on the Treatment of Innovative Energy Project, Requiring Consultative Process, and Requiring Compliance Filings in Docket No. E-002/M-03-1883 (“RDF Order”) granting \$10 million to Excelsior Energy for the Mesaba Project as a previous decision about the Project's IEP status. Relators' Add. at 40; Minnesota Power's App. at 31-42. The limited

record in that prior Commission proceeding should not have contributed as a precedent to an IEP outcome in this proceeding. The RDF Order was granted with very limited information compared to that presented in this proceeding and for a miniscule amount of financial impact compared to the hundreds of millions of dollars at stake in this deliberation.

In referring this matter to the OAH, the Commission did not limit its determination regarding the IEP statute. *Id.* at 35. The Commission also noted that the “ALJs acted properly in examining [the Mesaba Project’s] continuing compliance with all statutory requirements.” *Id.* at 40. More importantly, the Commission’s RDF Order was not based on the record that was developed in the contested case and did not go beyond a cursory review of the statutory definition of what is an innovative energy project. *See* Minnesota Power’s App. at 34-35 (RDF Order at 4-5). For example, as the RDF Order stated: “Excelsior Energy is developing a project that **it** states meets the statutory definition of an innovative energy project, and no one in this proceeding has contested that claim.” (emphasis added). Minnesota Power’s App. at 34 (RDF Order at 4).¹ This one-time reference by the Commission concerning Excelsior Energy’s representations about the Mesaba Project within a very limited record, with the Project not yet fully developed and presented for the Commission’s consideration, should have been accorded limited weight.

¹ The RDF Order also states that the Mesaba Project will be constructed near Hoyt Lakes, Minnesota beginning in 2006. Minnesota Power’s App. at 34 (RDF Order at 4).

See Arvig Tel. Co. v. Northwestern Bell Tel. Co., 270 N.W.2d 111, 114 (Minn. 1978); *see also, In re City of Redwood Falls*, 756 N.W.2d 133, 137-39 (Minn. Ct. App. 2008).

The record before the Commission provided a full analysis of whether the Mesaba Project meets the definition of an IEP under Minn. Stat. § 216B.1694, subd. 1. The record included an analysis of the projected emissions profile of the Mesaba Project showing that the emissions are not significantly reduced relative to other coal-fired alternatives as well as evidence concerning the lack of fuel supply contracts necessary to determine the Mesaba Project's capability to provide a "hedged, predictable cost". None of this information was in the record when the Commission issued its RDF Order on the Mesaba Project in February of 2005. The RDF Order decision had a \$10 million cost impact to Xcel Energy's ratepayers. The Mesaba Project is estimated to cost those same ratepayers well over \$1 billion for plant construction alone in addition to costs that would be imposed on Minnesota Power ratepayers. The Commission had the obligation to ratepayers to make its ultimate determinations on the statutory qualifications of and final decisions about the Mesaba Project with the benefit of a complete record and explain such determinations instead of simply relying on the RDF Order. *In re Review of 2005 Annual Automatic Adjustment of Charges for All Elec. and Gas Utilities*, 768 N.W.2d 112, 120 (Minn. 2009) ("...we conclude that an agency must generally conform to its prior norms and decisions or, to the extent that it departs from its prior norms and decisions, the agency must set forth a reasoned analysis for the departure that is not arbitrary and capricious.")

The Commission also did not make a final determination in the RDF Order on whether the Mesaba Project is an IEP. The Commission required in RDF Order Point 1(d) that for Excelsior Energy to continue receiving grants from Xcel Energy requires “Commission receipt of evidence that Excelsior Energy continues to meet the criteria set forth in Minn. Stat. § 216B.1694, subd. 1.” Minnesota Power’s App. at 12 (RDF Order at 12). If the Commission had made a final determination on the Mesaba Project being an IEP, then the ongoing compliance requirement would not be necessary. *See, e.g.*, Docket No. E-002/M-03-1882, Order dated November 29, 2004 (requiring Xcel Energy to comply with future information requests as part of Commission approval of a renewable cost recovery adjustment). Therefore, the Court should find the Commission erred in relying on its prior decision and the ultimate IEP designation determination is unsupported by substantial evidence in view of the entire record submitted in this proceeding.

B. The Commission Properly Construed the Mesaba Energy Project PPA

Excelsior Energy attempts to overlook Commission deliberations and decision making on the merits of the Mesaba Project by suggesting that the Legislature mandated that the Project be built without the necessary regulatory due diligence that exists to ensure the interests of customers are served. Relators’ Br. at 41-48. In this effort, Excelsior Energy uses post-enactment construction of the statutes to reach beyond the

plain meaning of the applicable statutes to create its own interpretation of what the Commission's role should be in this proceeding. Despite the erroneous finding with the Commission's IEP designation statutory application,² the Commission properly assessed the Mesaba Project's qualifications in terms of the relevant statutes and the determination of public interest. *See Minnesota Energy & Economic Dev. Auth. v. Printy*, 351 N.W.2d 319, 349-51 (Minn. 1984) (the Legislature may delegate decisions to administrative agencies rather than fixing them by statutory provisions).

The Legislature did not short circuit or otherwise negate the inherent customer safeguards of the regulatory process concerning decisions about the PPA for the Mesaba Project. If the Legislature wanted to specifically mandate (or prohibit) the Mesaba Project, it has the authority and power to do so. For example, the Legislature has enacted a ban on construction of any new nuclear-powered electric generating plant in the State of Minnesota. *See* Minn. Stat. § 216B.243, subd. 3b(a). Likewise, the Legislature has mandated electric utilities generate or procure specific percentages of renewable energy through 2025. *See* Minn. Stat. § 216B.1691, subd. 2a.

Excelsior Energy's statutory interpretation and analysis exceeds the plain meaning of the IEP and CET statutes in order to create the impression that the Mesaba Project is

² If the Court agrees with Minnesota Power's position on the IEP designation, no further review of Excelsior Energy's appeal is necessary since the regulatory incentives under Minn. Stat. § 216B.1694, subd. 2(a) would be inapplicable.

mandated by the Legislature and a PPA with Xcel Energy is a foregone conclusion. The IEP and CET statutes provide only the framework for the Commission to make its public interest determination; they do not provide a “mandate” from the Legislature. The basic tenet of statutory interpretation is set forth in Minnesota Statutes and case law, namely:

The goal of all interpretation and construction of statutory language is to ‘ascertain and effectuate the intention of the legislature.’ Minn. Stat. § 645.16. If the words of the statute are ‘clear and free from all ambiguity,’ further construction is neither necessary nor permitted *Id.*; *see also, State by Beaulieu v. RJS, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996). It is a fundamental role of statutory construction that words and phrases are to be construed according to their plain meaning. *See* Minn. Stat. § 645.08(1).

Owens v. Water Gremlin Co., 605 N.W.2d 733, 736 (Minn. 2000).

Furthermore, Excelsior Energy’s interpretation of the IEP and CET statutes relies in large part on post-enactment construction of the statutes. *See* Relators’ App. at 36-37. Such analysis is only allowed under Minnesota law when the underlying statute is ambiguous. Minn. Stat. § 645.16. As the Minnesota Supreme Court stated in *Owens*, “Our role in interpreting statutes is to look at the language of the statute before us and where that language is clear, as it is here, we must not engage in any further construction.” 605 N.W.2d at 737. The reason courts and Minnesota law limit analysis to the statute itself is that legislative intent is and should be limited to the words of the statute, and nothing more. Minn. Stat. § 645.16; *State v. Sebasky*, 547 N.W.2d 93, 99 (Minn. Ct. App. 1996). The Minnesota Supreme Court has held that “as long as the legislature does not transcend the limitations placed upon it by the constitution, its

motives in passing legislation are not the subject of proper judicial inquiry.” *Starkweather v. Blair*, 71 N.W.2d 869, 876 (Minn. 1955). To that end, Professor Jim Chen’s testimony, the foundation for Excelsior Energy’s legal misinterpretations, improperly relied upon analyzing the motives and context of the Legislature in enacting the IEP and CET statutes which is completely inappropriate in this proceeding. Relators’ App. at 36-37. Also, statements or testimony made by legislators after enactment are generally inadmissible. See *In the Matter of State Farm Mutual Automobile Insurance Company*, 392 N.W.2d 558, 569 (Minn. Ct. App. 1986); *Washington County vs. AFSCME*, 262 N.W.2d 163, 167 (Minn. 1978).

Since the Commission’s August 30, 2007 Order, the Legislature has not taken action to correct the Commission’s interpretation and in the 2009 legislative session has specifically allowed the Mesaba Project to be exempt from personal property taxation if it is “**eligible to** be designated as an innovative energy project under section 216B.1694...” (emphasis added). Minnesota Power’s App. at 43 (2009 Minn. Laws. Ch. 88, Art. 2, § 5 (amending Minn. Stat. § 272.02, subd. 55)). See also, *Gale v. Commissioner of Taxation*, 37 N.W.2d 711, 716 (Minn. 1949) (administrative interpretations of statutes are entitled to some consideration, “especially where intervening sessions of the legislative have given interested parties – who may deemed themselves prejudiced by such interpretation – an opportunity to urge corrective amendments to change the course of such interpretation.”). Therefore, Excelsior Energy’s reliance on Professor Chen’s testimony, on post-enactment statements and interpretations and, most importantly, on discerning

legislative intent beyond the plain meaning of the text is contrary to Minnesota law and should not be accepted by the Court for any consideration in this proceeding.

Excelsior Energy goes to great lengths to both diminish and prescribe the Commission's role in this proceeding. *See* Relators' Br. at 41-48. However, under the IEP and CET statutes, as well as generally under Chapter 216B, the Commission has been delegated the duty to protect the public interest and determine whether the Mesaba Project is "entitled to a contract" under Minn. Stat. § 216B.1694 and is in the public interest under both statutes. *See Wallace v. Commissioner of Taxation*, 184 N.W.2d 588, 594 (Minn. 1971) ("It is well established that the Legislature may confer discretion on the Commissioner and the execution or administration of the law.")

To follow Excelsior Energy's logic would mean that upon enactment of the IEP and CET statutes in 2003, the Commission's determination was a *fait accompli* and any party, including the Department of Commerce, bringing forth challenges or cost data regarding the Mesaba Project is out of line. *See* Relators' Br. at 39-40; *see also, West St. Paul Federation of Teachers v. Independent School District No. 197*, 713 N.W.2d 366, 376-77 (Minn. Ct. App. 2006). The IEP statute is not a mandate, but a process for Commission approval of a bilateral contract between two parties with costs and benefits to other parties. Even if Xcel Energy had signed on the bottom line of a Mesaba Project PPA, the Commission's role under the IEP statute is still to make a public interest determination. *See In re Quantification of Environmental Costs*, 578 N.W.2d 794, 799

(Minn. Ct. App. 1998). Finally, the only mandate the IEP statute provides is in Minn. Stat. § 216B.1694, subd. 2(a)(5) where the Commission must consider an IEP prior to approving “any arrangement to build or expand a fossil-fuel-fired generation facility, or to enter into an agreement to purchase capacity or energy from such a facility for a term exceeding five years.” This provision in and of itself demonstrates that the Commission’s role is to determine the public interest as a whole and not the parochial interests of Excelsior Energy.

Excelsior Energy’s attempt to short circuit the Commission decision making process in this proceeding through inappropriate legal applications and constructs, thereby avoiding a decision about the Mesaba Project based on the evidence presented, is completely without merit. Any decision to build a generating asset, including the Mesaba Project, has serious and decades-long financial, reliability and environmental implications for ratepayers and the entire State of Minnesota and deserved the due diligence of a Commission proceeding without the constraints Excelsior Energy believes are legally defensible. There is no support in statutes for circumventing the surety and solid foundation of Commission review and deliberation in making a decision about the Mesaba Project PPA.

IV. CONCLUSION

For all the foregoing reasons, Minnesota Power respectfully requests the Court of Appeals reverse the Commission's decision as to the IEP designation and affirm its remaining decisions in all other respects.

Dated: October 9, 2009

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent certifies that this brief complies with the requirements of Minn. R. App. P. 132.01 in that it is printed in a 13-point, proportionately spaced typeface utilizing Microsoft Office Word 2003 and contains 5240 words, excluding the Table of Contents and Table of Authorities.

Dated: October 9, 2009



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