

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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I. INTRODUCTION

In compliance with the Court's September 3, 2009 Order, Relators Excelsior Energy Inc. and MEP-I LLC (hereinafter "Excelsior Energy" or "Relators") served their Brief, Addendum and Appendix on September 8, 2009. Minnesota Power served its Brief and Appendix on October 9, 2009. The Minnesota Public Utilities Commission ("Commission") served its Brief and Appendix on October 30, 2009 ("Commission Br.") and addressed at pages 18-31 Minnesota Power's Notice of Review arguments. Northern States Power served its Brief on October 30, 2009 and noted Minnesota Power's cross appeal. Relators served their Reply Brief and Appendix on November 12, 2009 and stated they agree with the Commission's reasoning for designating the Mesaba Project as an innovative energy project ("IEP") under the IEP Statute (Minn. Stat. § 216B.1694). As specified in the Court's Order, Minnesota Power limits this Reply Brief to its Notice of Review issues.

II. ARGUMENT

The Commission's continued reliance on the limited support provided by Excelsior Energy in this record is misplaced and does not warrant the Commission's finding that the Mesaba Project is an IEP and the accompanying regulatory privileges.

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

The Commission disputes Minnesota Power's arguments related to whether the Mesaba Project will significantly reduce emissions compared to traditional technologies. Commission Br. at 20-27. The Commission's rebuttal rests on two premises. First, that the IEP Statute allows the Commission to view the four emissions as a whole and not individually. Second, that Minnesota Power's comparison to its Boswell Unit 3 retrofitted plant was not a valid comparison to traditional technologies, as that term is set forth under the IEP Statute. Taking into account these two premises, the Commission reiterates its analysis as articulated in its August 30, 2007 Order that the Mesaba Project is an IEP "since no facility in existence or on the drawing board significantly outperforms every other facility in every one of the four emission categories". Relators' Add. at 42.

The Commission asserts that a reasonable reading of the IEP Statute is that the four emissions may be significantly reduced as a whole and not individually. The Commission correctly notes that the IEP Statute does not state "...reduce each emission..." (Commission Br. at 27), but the IEP Statute does clearly list all four emissions separately and connects the last emission, mercury, with an "and" to the other three emissions. *See* Minn. Stat. § 645.08 ("words and phrases are construed according to rules of grammar and according to their common and approved usage"). Furthermore, the IEP Statute does not include the provision to reduce

emissions generally as other Minnesota statutes authorize. *See* Minn. Stat. § 216B.1692 (allowing the Commission to approve rate recovery for utilities that propose “emissions-reductions projects”). This distinction is important since different technologies control different emissions. Minnesota Power’s App. at 4-5. (Ex. MP 4011 – Cashin Surrebuttal at 4-14). Likewise, various environmental impacts come from each distinctly listed emission. *Ibid.* The Legislature has recognized this distinction when it enacted the Minnesota Mercury Act of 2006 (Minn. Stat. §§ 216B.68 – 216B.688) to specifically address mercury emissions at coal plants in Minnesota, including Minnesota Power’s Boswell Unit 3 coal plant.¹ Significantly reducing all four emissions compared to traditional technologies was the exacting standard for the Mesaba Project to meet.

The fact that Excelsior Energy cannot demonstrate that each individual emission for the yet-to-be built Mesaba Project will not be significantly reduced compared to traditional technologies, including technologies Minnesota Power has deployed at Boswell Unit 3, leads not to an absurd result, but instead to a pragmatic one that demonstrates Excelsior Energy overpromised and underdelivered on the type of coal generation project that could be developed. The

¹ The Commission approved Minnesota Power’s Boswell Unit 3 retrofit plan in an order dated October 26, 2007 in MPUC Docket No. E015/M-06-1501. The Boswell Unit 3 retrofit was recently completed and placed in-service by Minnesota Power.

Legislature properly enacted a high standard that each individual emission must be significantly reduced to qualify as an IEP given the extraordinary privileges granted to any such designation. *See* Minn. Stat. § 216B.1694, subd. 2(a). The Legislature established criteria for the Commission to fully evaluate and determine whether any project meets the definitional requirements of Minn. Stat. § 216B.1694, subd. 1(1) and should be designated an IEP. The Commission's determination that the proposed Mesaba Project has met this criteria is unsupported by the record.

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

On the statutory requirement under Minn. Stat. § 216B.1694, subd. 1(2) that Excelsior Energy certified that it is capable of offering a hedged, predictable price for the Mesaba Project, the Commission relies on the ALJs' finding that 80 percent of the Mesaba Project proposed power purchase agreement will be "predictable and roughly stable." Commission Br. at 29 (citing Finding 92). However, the Commission does not acknowledge the ALJs' earlier finding that Excelsior Energy could not establish the largest component of that 80 percent was not fixed. In Finding 78, the ALJs made clear that the Mesaba Project power purchase agreement price was not locked down and dependent on contracts that were yet to be executed:

78. The capacity price is the largest component of the total monthly payment that Xcel Energy will pay, about 68 percent of it. It is based largely on the Engineering, Procurement, and Construction (EPC) contract cost. That is stated as a trade secret, forecasted, target cost in the proposed

Final PPA, **to be adjusted and fixed when the EPC contract is executed.** It is likely to be larger by some unknown amount when it is fixed. The capacity price also includes unreimbursed transmission costs, which are relatively minor, but also not fixed at this point. Overall, the capacity price is not hedged or predictable at this point. Excelsior Energy's position is that its "predictability" should be determined after the capacity price is fixed. Xcel Energy argues that it should be determined now.

Relators' Add. at 105 (emphasis added). Furthermore, Excelsior Energy's representatives testified before the Commission that these power purchase agreement monthly costs are not yet fixed and dependent on completion of an "optimization study". Relators' App. at 123-124 (July 31, 2007 Hearing Transcript at 149-150). Therefore, the 80 percent of the total project costs are not predictable as reflected in this record and Excelsior Energy's self-certification for this statutory requirement should not have been approved by the Commission. The Commission's finding on this definitional issue is based on clear error in view of the entire record submitted.

Finally, the Commission takes issue with Minnesota Power's statement that the record does not reflect Excelsior Energy's expertise to secure coal supplies and rail service beyond its own assertions. Commission Br. at 30. Minnesota Power's statement reflected the fact that the only evidence in the record was provided by Excelsior Energy's expert through testimony during the contested case. No third party or any expert not affiliated with Excelsior Energy validated Excelsior Energy's assertions. In addition, the ALJs found that Excelsior Energy

does not have a track record upon which to demonstrate that it has entered into coal supplies or rail service contracts. As stated in Finding 86:

Excelsior Energy has no coal or petroleum coke supply or transportation commitments at this time to hedge against future cost increases, nor does it anticipate beginning to negotiate any for another three to four years. Until it 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.

Realtors' Add. at 107. Without any track record, Minnesota Power continues to assert Excelsior Energy failed to meet the standard of being capable of offering a long-term supply contract at a hedged, predictable cost as required under Minn. Stat. § 216B.1694, subd. 1(2).

III. CONCLUSION

For all the foregoing reasons in this Reply Brief and Minnesota Power's Initial Brief, 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: November 24, 2009

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for Respondent certifies that this reply 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 1353 words, excluding the Table of Contents and Table of Authorities.

Dated: November 24, 2009


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