

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

In the Matter of the Petition of Northern States  
Power Company d/b/a Xcel Energy to Initiate a  
Competitive Bidding Resource Acquisition  
Process for 375 MW Base Load Generation

**SECOND PREHEARING ORDER**

Timely Petitions to Intervene have been filed by Elizabeth I. Goodpaster on behalf of Izaak Walton League of America – Midwest Office, Wind on the Wires, Fresh Energy, and Minnesota Center for Environmental Advocacy; by Christopher C. Greenman on behalf of Excelsior Energy Inc.; and by Andrew P. Moratzka on behalf of Gerdau Ameristeel US Inc. No objections to the Petitions have been filed.

A Protective Order, revised after consultation with other parties and intervenors, has been filed by Xcel Energy

Based these filings, the Administrative Law Judge makes the following:

**ORDER**

**Parties, Participants and Intervenors**

1. The Izaak Walton League of America – Midwest Office, Wind on the Wires, Fresh Energy, and Minnesota Center for Environmental Advocacy (collectively, IWLA); Excelsior Energy Inc.; and Gerdau Ameristeel US Inc. have demonstrated that their legal rights, duties, or privileges may be determined or affected by this matter and that their interest is not adequately represented by one or more parties participating in the case. Therefore, they are admitted as parties, each with all the rights of a party.

**Discovery**

2. The Protective Order proposed by Xcel Energy, with several changes described in the following Memorandum, is hereby adopted for use in this matter.

Dated: April 18, 2007

s/Steve M. Mihalchick  
STEVE M. MIHALCHICK  
Administrative Law Judge

## MEMORANDUM

On March 23, 2007, Xcel Energy emailed a revised Protective Order to the parties and interested persons. The revisions involved additional language related to Attorney's Eyes Only data. Excelsior Energy and the IWLA responded with comments. Xcel Energy made a correction to address Excelsior Energy's comment; it did not respond to the IWLA comment.

The general purpose of the Attorney's Eyes Only provision is to allow access to the parties' highly sensitive marketing and competitive data only to the attorneys, and their staffs and hired experts, who need the data to properly present evidence and argument in a case. That means that such data about one party should particularly not be provided to the staffs of other parties who might use such data in planning and marketing on behalf of their employer. This process is fairly simple when outside counsel is retained; it is more complicated with internal counsel. An attorney employed as internal counsel often has multiple roles that include litigation on behalf of the employer as a litigator or as a witness, as well as involvement in the marketing and strategic planning functions of the employer.

Two sections of the Protective Agreement proposed by Xcel Energy are at issue here. They are sections 1(c)(i) and (v), which provide:

(c) Use of Trade Secret Information or Nonpublic Data or Attorney's Eyes Only Data and Persons Entitled to Review.

(i) Persons entitled to review; use restrictions. Trade Secret Information or Nonpublic Data or Attorney's Eyes Only Data shall only be made available to a Requesting Party that has been formally granted party status pursuant to Minnesota Rules 7829.800 or 1400.6200. All Trade Secret Information or Nonpublic Data made available pursuant to this Protective Order shall be given solely to counsel for the requesting party or other authorized persons who are designated by counsel as being the party's staff, experts or witnesses in this proceeding and who executed Exhibit A in a timely manner prior to their receipt of the Trade Secret Information and/or Nonpublic Data. *All Attorney's Eyes Only Data made available pursuant to this Protective Order shall be given solely counsel for the requesting party or other authorized persons who are designated by counsel as being the party's counsel, staff to counsel, or contract consultants or experts in this proceeding and who have executed Exhibit B in a timely manner prior to their receipt of the Attorney's Eyes Only Data.* Trade Secret Information and/or Nonpublic Data or Attorney's Eyes Only Data shall not be used or disclosed except for purposes of this proceeding. The Trade Secret Information and/or Nonpublic Data or Attorney's Eyes Only Data may not be used or referenced in other proceedings in Minnesota or in other jurisdictions, including but not limited to (i) use by any Party in connection with any subsequent competitive bidding and/or resource acquisition process in Minnesota or other jurisdictions for the development of electric generating resources, or (ii) used by any Party or any affiliates or consultants in connection

with any efforts in Minnesota or other jurisdictions to seek to develop, amend or lobby for any legislation. Unless otherwise provided in this Protective Order, all Trade Secret Information and/or Nonpublic Data or Attorney's Eyes Only Data will be safeguarded and handled in accordance with the Commission's Procedures. [Emphasis added.]

...

(v) Attorney's Eyes Only Data. In addition to the above restrictions, any Confidential Information that has been designated as "**ATTORNEY'S EYES ONLY—CONTAINS HIGHLY SENSITIVE TRADE SECRET INFORMATION- NONPUBLIC DATA-USE RESTRICTED PER PROTECTIVE ORDER IN DOCKET NO. E-002/CN-06-1518**" may only be viewed and disclosed to the following persons: (1) "Outside Counsel" for a party, meaning attorneys privately retained by the party and not any attorney who is an employee of a party; (2) paralegals and staff persons of Outside Counsel; (3) counsel for Intervenor; (4) paralegals and staff persons of counsel for Intervenor; (5) selected contract consultants and contract experts of the Parties. Attorney's Eyes Only Data may also be disclosed to *the internal counsel and* certain designated staff of a party but only upon the express prior consent of the disclosing party. In any case, no Attorney's Eyes Only Data may be disclosed to any person prior to that person's execution of the Exhibit B Nondisclosure Agreement. [Emphasis added.]

Excelsior Energy wanted to be sure that internal counsel acting for any party would have access to any Attorney's Eyes Only data. Xcel Energy confirmed that such was its intent and made a change to better reflect that. It deleted the words, "the internal counsel and" from the second to last sentence of section 1(c)(v). Excelsior Energy found that change acceptable.

Both of the sections quoted above have provisions governing who may be provided and view Attorney's Eyes Only information. But the two provisions are not identical. Section 1(c)(i) lists counsel for a party and persons designated by counsel as staff to counsel or contract consultants or experts in this proceeding. Section 1(c)(v) lists outside counsel and their paralegals and staff persons, counsel for Intervenor and their paralegals and staff persons, and selected contract consultants and contract experts of the parties. It also lists certain designated staff of a party, but only upon the express prior consent of the disclosing party.

Section 1(c)(v) is confusing in its own right because the intervenors are parties. Gerdau has outside counsel, Excelsior Energy has internal counsel, and IWLA's counsel is probably considered internal counsel, at least to one member of the organizations being represented. Moreover, Xcel Energy, one of the original parties, has both outside and internal counsel appearing in this matter. The other original parties, the Department and Westmorland Power have outside counsel appearing in this

matter. It appears that the language of Section 1(c)(v) would exclude Excelsior Energy's internal counsel from access. That is inconsistent with the intent expressed by Mr. Bailey and Mr. Greenman, which was that internal counsel for all parties would have access, as well as outside counsel.

In order to resolve these inconsistencies, and as recommended by IWLA, Section 1(c)(i) has been revised to refer to Section 1(c)(v) without restating the list of persons with access. Section 1(c)(v) has been revised to refer to all counsel for all parties. In addition, the provision that requires prior consent of the disclosing party is broadened to apply to all persons required to sign an Exhibit B, including counsel.

The IWLA requested changes in the Protective Agreement to recognize that it poses no competitive threat to the other parties, has a good history of protecting trade secret data, and does not usually hire outside experts. They request that the list in Section 1(c)(v) include counsel and their paralegals and staff persons and designated employees of a party that is not a market competitor of the producing party. There is no reason to treat IWLA any differently than any other party with regard to Attorney's Eyes Only information. Generally, counsel staff necessary to evaluate the information should have access. But there may be data that is so sensitive that the producing party's right to protect it would outweigh the particular requesting party's need to discover it. That may apply to IWLA or any other party. Therefore, the requirement for prior approval applies to all requests and there is a right to bring the issue to the Administrative Law Judge or the Commission.

A very few obvious errors have been corrected. If any further corrections are needed, please bring them to the Administrative Law Judge's attention.

S.M.M.