

Minnesota Public Utilities Commission
Staff Briefing Papers

Meeting Date: August 14, 2008 **Agenda Item # _____

Company: Excelsior Energy

Docket No. E-6472/M-05-1993 - Phases I and II

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

- Issues:
1. Should the Commission Grant Excelsior Energy’s Motion to Have the Commission Issue a Partial Final Administrative Order to Allow Minnesota Power the Right to Appeal the Narrow Legal Question of Whether Excelsior’s Proposed Coal Fired Plant Constitutes an “Innovative Energy Project” under Minn. Stat. § 216b.1694, Subd. 1?
 2. Should the Commission Grant Excelsior Energy’s Motion Allowing Excelsior to “Supplement” its Phase II Exceptions to the Administrative Law Judge’s (ALJ) Phase II Report?
 3. Should the Commission Grant Excelsior Energy’s Motion to Appoint an Independent Evaluator to Advise the Commission on the Comparative Cost of the Mesaba Project Versus Natural Gas Fired Generation and Various Combinations of Wind and Natural Gas Fired Generation?

Staff: Marc Fournier (651) 201-2214
Janet González (651) 201-2231
Susan Mackenzie (651) 201-2241

Relevant Documents

Order Resolving Procedural Issues, Disapproving Power Purchase Agreement, Requiring Further Negotiations, And Resolving To Explore The Potential For A Statewide Market For Project Power Under Minn. Stat. § 216B.1694, Subd. 5,
Docket No. E-6472/M-05-1993 August 30, 2007

Order Denying Petitions for Reconsideration and Other Post-Decision Relief and Reconsidering Order on Own to Require Further Filings,
Docket No. E-6472/M-05-1993 November 8, 2007

Order Denying Request for Indefinite Stay,
Docket No. E-6472/M-05-1993 April 23, 2008

Order Denying Reconsideration,
Docket No. E-6472/M-05-1993 June 17, 2008

Excelsior Energy Inc.’S Motion for Entry of a Partial
Final Order in this Docket Determining That the
Project Is an Innovative Energy Project
Under Minn. Stat. § 216b.1694, Subd. 1 July 3, 2008

Excelsior Energy Inc.’S Motion to Supplement its
Exceptions to the Proposed Findings of Fact, Conclusions of Law,
And Recommendation of the Administrative Law Judge July 3, 2008

Minnesota Power’s Response to Excelsior Energy’s
July 3, 2008 Motions July 8, 2008

NSP’S Response To Excelsior Energy’s Motions (I) To Seek
Immediate Partial Appeal Of Phase I, And (II) To Supplement
Exceptions To The ALJ’s Phase II Report And Recommendation July 14, 2008

Big Stone II Co-owner’s Response to Excelsior Energy Inc.’S
Motion to Supplement its Exceptions to the Proposed Findings
Of Fact, Conclusions of Law, and Recommendation
Of the Administrative Law Judge - Phase 2 July 14, 2008

Big Stone II Co-Owners request for Permission and Withdrawal
of their July 14, 2008 Response to Excelsior Energy, Inc.’s
July 3, 2008 Motion July 17, 2008

The attached materials are workpapers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

This document can be made available in alternative formats (i.e., large print or audio tape) by calling 651.201.2202 (voice). Persons with hearing or speech disabilities may call us through Minnesota Relay by dialing 7-1-1 or 1-800-627-3529.

Background

On August 30, 2007, the Minnesota Public Utilities Commission ("Commission") issued its initial order in Phase I, determining that Excelsior's proposal was contrary to the public interest and ordering the parties to negotiate while the remaining issues in Phase II of the proceeding were addressed.¹

On September 19, 2007, Excelsior requested appointment of an "independent expert evaluation firm" for purposes of overseeing the negotiation process and reviewing Excelsior's proposals.

On November 8, 2007, the Commission issued an Order Denying Petitions for Reconsideration and Other Post-Decision Relief and Reconsidering Order on Own to Require Further Filings. The Commission rejected Excelsior's requests (including the request for an "independent expert evaluation firm") and Excelsior attempted an appeal of the Phase I orders. Both Excelsior and MP appealed from the November 8, 2007 Order denying reconsideration of Phase I issues. Minnesota Power, Xcel and the Commission all argued in the Court of Appeals that any appeal was premature until both Phase 1 and Phase 2 were finally decided and that the appeals should be dismissed.

On January 9, 2008, the Minnesota Court of Appeals dismissed the Phase I appeal as premature; the Court instructed that it would not review this case until the Commission determined all issues in the Docket.

On September 14, 2007, the ALJ issued the Phase II Report, recommending that the Commission find Excelsior's proposed coal-fired power plant is not likely to be a least-cost resource as required by Minn. Stat. § 216B.1693(a). Excelsior filed exceptions, and the ALJ's Phase II Report is now available for the Commission's consideration at an agenda meeting. Nevertheless, on February 14, 2008, Excelsior filed a motion to stay Phase II until after the Phase I negotiations are completed. The Commission denied that motion on April 23, 2008, and on June 16, 2008, denied Excelsior's requested reconsideration of the denial.

On July 3, 2008, Excelsior filed the current motions seeking (i) authorization for an immediate appeal of a single issue arising out of Phase I; and (ii) authorization to "supplement its exceptions" to the Phase II Report and the appointment of "an independent evaluator" of the information it proposes to add to the record.

On July 8, 2008 Minnesota Power filed a response to Excelsior Energy's July 3, 2008 Motions.

On July 14, 2008 responses to Excelsior Energy's Motions were filed by Northern States Power Company and the Big Stone II Co-Owner's. On July 17, 2008, the Big Stone II Co-Owner's filed a letter withdrawing their July 14, 2008 response to Excelsior's Motions.

¹ The Commission in the August 30, 2007 found that the Mesaba Project is an "innovative energy project" under Minn. Stat. § 216B. 1694, subd. 1.

Issue 1: Should the Commission Grant Excelsior Energy's Motion to Have the Commission Issue a Partial Final Administrative Order to Allow Minnesota Power the Right to Appeal the Narrow Legal Question of Whether Excelsior's Proposed Coal Fired Plant Constitutes an "Innovative Energy Project" under Minn. Stat. § 216b.1694, Subd. 1?

Excelsior: Excelsior filed a motion with the Commission for an order determining that there is no just reason for delay in entry of ordering paragraph two² of its August 30, 2007 Order in this Docket as a final partial administrative order and requesting that the Court of Appeals accept any appeal (after reconsideration under Minn. Stat. § 216B.27) from that final partial administrative order to aid the Commission in its effort to efficiently manage this docket. This motion is made pursuant to Minn. Stat. § 216B.25, which authorizes the Commission "at any time, on its own motion or upon the motion of an interested party... [to] rescind, alter or amend any order fixing rates, tolls, charges or schedules, or any other order made by the Commission."

The proposed partial final order will allow the Commission to pursue and obtain the information it found on August 30, 2007 was required by the public interest before a final order should be issued in this docket, it would eliminate unnecessary appeals on issues mooted by an orderly completion of this docket, it would expedite the final resolution of a legal issue, qualification as an IEP, for which both Excelsior and its competitors, MP and Xcel, need resolution, and it will protect the procedural due process rights of MP (to a timely appeal of the IEP issue) and Excelsior (from a premature termination of this docket).

NSP: Excelsior states that it is seeking a final partial order to allow Minnesota Power the right to appeal the narrow legal question of whether Excelsior's proposed coal fired plant constitutes an 'innovative energy project' under Minn. Stat. §216B.1694, subd. 1. There are at least three reasons for denying this motion.

First, Excelsior" is not seeking rights on its own behalf and lacks standing to pursue remedies on behalf of other parties. Second, Excelsior is in essence asking that specific legal questions be "certified" by the Commission for immediate appellate review, which is not contemplated by the Commission's rules. Excelsior provides no authority, for such a procedure in the regulatory context. To the contrary, Minn. Stat. §216B.27 and related rules are explicit that only final orders may be appealed. Third, Excelsior's motion contradict the Court of Appeals January 9, 2008 ruling in this case. While Excelsior seeks to characterize its relief as a partial "final" order on the innovative energy: project question, such a partial final order is precluded.

Excelsior's motion acknowledges that the Commission's Phase I orders "found that the public interest required the Commission to retain jurisdiction over this docket." This means that no final, appealable order has been issued and therefore any appeal of any portion of the case would be inappropriate. The court of Appeals dismissed Excelsior's prior appeal.

² Ordering Paragraph 2 of the August 30, 2007 Commission Order states: "The Commission finds that the Mesaba Project is an 'innovative energy project under Minn. Stat. § 216B.1694, subd. 1.

Excelsior's motion explicitly seeks authority to have an appeal proceed on a single narrow question determined in Phase I. That request falls squarely within the Court of Appeals' prohibition. Excelsior's request that the Commission create a new procedural remedy partial appeals of "certified" questions - is similarly precluded. As the Court of Appeals already noted, appeal rights from an agency decision are narrower than appeal rights from the decisions of district courts. Excelsior's request partial final order should be denied.

MP: Excelsior Energy's motion for entry of a partial final administrative order on Phase I to allow Minnesota Power to commence an appeal is rearguing an issue the Commission has already decided. In its November 8, 2007 Order denying petitions for reconsideration, the Commission clearly contemplated ending the Docket upon completion of the Phase 2 proceeding:

To ensure efficient case management, however, and to facilitate prompt resolution of the remaining issues in this case, the Commission will need periodic updates on the negotiations required of Excelsior and Xcel under the August 30 Order. When the Commission takes up the issues in Phase II of this proceeding, it will reassess the need for these reports, and may consider imposing a deadline for the completion of negotiations.

The Commission has also previously rejected Excelsior Energy's arguments that the Commission needs to stay Phase 2 indefinitely to allow the Phase I Order to be implemented. In fact, as the Commission explained in its April 23, 2008 Order, the Commission's continuing obligations to consider the Mesaba Project rests on the statutory requirement in Minn. Stat. § 216B.1694, subd. 2(a)(5), not whether multi-year resource planning processes by Minnesota utilities are completed.

Instead of Commission entry of a partial final administrative order on the Innovative Energy Project ("IEP") designation issue, Minnesota Power believes a better course of action would be for the Commission to hold a hearing and make a final decision on Phase 2, entertain any petitions for reconsideration, and then all parties, including Excelsior Energy, can appeal any aspect of the Commission's orders in accordance with the Minnesota Court of Appeals directives. That would provide all parties the certainty that the Commission has issued a final order as well as provide judicial efficiency with one set of appeals. Excelsior Energy is correct that Minnesota Power appealed from the Commission's November 8, 2007 Order; however, Excelsior Energy misstates that Minnesota Power has ever expressed a desire to "take an immediate appeal of the finding that the Mesaba Project qualifies as an IEP." Minnesota Power took the precautionary step of filing a contingent Notice of Review under Minn. App. Rule 106 in the event the Minnesota Court of Appeals accepted Excelsior Energy's appeal. Minnesota Power, along with the Commission and Xcel Energy, argued that an appeal should not commence until both Phase I and Phase 2 of this Docket are complete. For the same reason, the Commission should not accept Excelsior Energy's premise that entering a partial final administrative order is the best solution when terminating the Docket (upon completion of Phase 2) is consistent with Commission precedent and orders in this Docket.

Finally, Excelsior Energy has identified itself as a "competitor" of Xcel Energy and Minnesota Power in its Motion. Nothing could be further from the truth. Excelsior Energy is not a utility with an obligation to serve the public reliably and cost-consciously like Minnesota Power and Xcel Energy. Excelsior Energy is simply a potential power supplier that under the right conditions – with the right technology, at the right time in its development, at a location more conducive to its proposed operations and with customers for its energy – could be a potential

power supply resource. Unfortunately, Excelsior has continued to fail to demonstrate that these four conditions would be obtained with its projects proposed in either in Phase 1 and Phase 2 of this proceeding.

Staff Comments

Staff agrees with Minnesota Power that a better course of action would be for the Commission to hold a hearing and make a final decision on Phase 2, entertain any petitions for reconsideration, and then all parties, including Excelsior Energy, can appeal any aspect of the Commission's orders in accordance with the Minnesota Court of Appeals directives. Staff see no practical need to excise a specific issue and declare a final order on that issue. As Minnesota Power pointed out, denying Excelsior's request will provide certainty that the Commission has issued a final order as well as provide judicial efficiency with one set of appeals.

Commission Options

1. Deny Excelsior's Motion.
2. Grant Excelsior's Motion

Issue 2: Should the Commission Grant Excelsior Energy's Motion Allowing Excelsior to "Supplement" its Phase II Exceptions to the Administrative Law Judge's (ALJ) Phase II Report?

Excelsior: Good cause exists to allow excelsior to supplement its exceptions. As the Commission is aware, the primary issue set for hearing in Phase 2 of this proceeding is whether integrated gasification combined cycle ("IGCC") technology is or is likely to be a least-cost resource. The only comparative cost information in this proceeding is the cost evidence submitted in Phase 1, prior to enactment of Minn. Stat. ch. 216H.3 The Phase 1 cost evidence only addresses the costs of Mesaba's IGCC plant and the Office of Energy Security's ("OES") view of what Big Stone II, a proposed new conventional supercritical pulverized coal ("SCPC") plant, would cost. Under Minn. Stat. § 216H.03, a new conventional SCPC plant may not be built in Minnesota to serve Xcel. Therefore, the existing comparative cost record in this proceeding cannot support any Commission decision on the threshold issue before the Commission in Phase 2, namely, is IGCC technology likely to be a least-cost resource to meet Xcel's needs.

The Relevant Cost Information set forth on Exhibit A of Excelsior's Motion provides information about comparative costs, under a number of different scenarios, for natural gas fired generation and wind backed up by natural gas fired generation, the most likely legally permissible generation alternatives to the Mesaba Project. Acceptance of the Relevant Cost Information is necessary to allow the Commission to render a decision on the threshold comparative cost question presented in Phase 2 of this proceeding.

NSP: Excelsior should not be permitted to supplement its exceptions to the Phase II Report as it proposes. Under Minn. Stat. § 14.6, subd. 2, the Commission has accepted additional evidence after the close of the evidentiary hearing record before the ALJ. The Commission has interpreted the statute to provide that the record upon which it bases its decision in a contested case is not closed until the date that the parties present post-hearing argument to the agency.³

Excelsior's request is not so much providing additional exceptions to the ALJ's Phase II Report. It is an attempt to reopen the record with new and untested information. Contrary to Excelsior's assertion, the Commission could not merely "invite other parties in this proceeding to provide comments on" the new, purportedly relevant information Excelsior proposes to provide, as it suggests. Any new evidence would have to be reviewed and be subject to cross examination and rebuttal. Minn. Stat. § 14.60, subs. 2 and 3. Excelsior's proposal to "supplement its exceptions" to the Phase II Report thus amounts to reopening of the Phase II evidentiary record: The Commission should reject, this invitation to re-litigate Phase II based on Excelsior's claim of purportedly new relevant cost comparison data.

NSP is also concerned at the nature of the information Excelsior proposes to add to the Phase II record.

MP: Phase 2 of this proceeding is ready for Commission action. Administrative Law Judge Johnson issued his Phase 2 Report on September 14, 2007 and exceptions by parties were taken. Minn. Rule 7829.2700. The Commission has twice scheduled the Phase 2 proceeding, but pulled the Docket due to scheduling conflicts and Excelsior Energy's request for a stay of the Phase 2 proceeding that this Commission denied on April 23, 2008 and denied reconsideration on June 17, 2008.

Nevertheless, Excelsior Energy now brings forth a motion requesting to supplement its October 4, 2007 Exceptions to the Phase 2 Report and requests the Commission appoint an independent evaluator to "advise the Commission on the threshold question of whether IGCC technology is or is likely to be a least-cost resource available to meet Xcel's needs". Minnesota Power believes the Commission should reject this motion because the time has long run out since Excelsior Energy and other parties were allowed the opportunity to provide exceptions and Excelsior has not met the burden of "good cause shown" as required under Minn. Rule 7829.3100 for the Commission to extend the 20-day time period to file exceptions allowed under Minn. Rule 7829.2700, subp. 1. Also, the Commission has already made its own determination that the Mesaba Project is not a least cost resource and it need not appoint an independent monitor.

Furthermore, the Commission should reject Excelsior Energy's motion because it violates the Commission's rule on petitions for rehearing. As noted above, Excelsior Energy filed a request to stay indefinitely Phase 2 of this proceeding and the petition for reconsideration included the same arguments upon which Excelsior Energy would seek to supplement its Phase 2 Exceptions. Under Minn. Rule 7829.3000, subp. 7, "A second petition for rehearing, amendment, vacation, reconsideration, or reargument of a commission decision by the same party or parties and upon

³ In the Matter of the Joint Petition for Approval of the Transfer of Transmission Assets of InterState Power and Light Co. and ITC Midwest LLC, Docket No. E-E-001/PA/ PA-07-540, Commission Order Approving Transfer of Transmission Assets with Conditions at pages 29-31 (February 7, 2008).

the same ground as a former petition that has been considered and denied, will not be entertained.” While styled as a motion and not a petition for reconsideration, Excelsior Energy seeks to reargue the Commission’s decision to stay Phase 2 indefinitely because information filed in December 2005 is allegedly no longer the “appropriate benchmark”. However, if the benchmark has changed, then the correct course is for Excelsior Energy to file a new petition as contemplated under Minn. Stat. § 216B.27 (“Only one rehearing shall be granted by the commission; but this shall not be construed to prevent any party from filing a new application or complaint.”).

Staff Comments

Staff believes that Excelsior had an opportunity to provide exceptions to the ALJ’s Report. As was pointed out by MP, the time has expired since Excelsior and other parties were allowed to provide exceptions and Excelsior has not met the burden of “good cause shown” as required by statute. Also, as was pointed out by Minnesota Power, the Commission has twice scheduled the Phase 2 proceeding, but pulled the Docket due to scheduling conflicts and Excelsior Energy’s request for a stay of Phase 2 proceeding that the Commission denied on April 23, 2008 and denied reconsideration on June 17, 2008.

Commission Options

1. Deny Excelsior’s Motion.
2. Grant Excelsior’s Motion

Issue 3:* **Should the Commission Grant Excelsior Energy’s Motion to Appoint an Independent Evaluator to Advise the Commission on the Comparative Cost of the Mesaba Project Versus Natural Gas Fired Generation and Various Combinations of Wind and Natural Gas Fired Generation?*

Excelsior: The Commission should appoint an independent evaluator to review and advise the commission on the relevant cost information and should invite other parties to provide comments on the relevant cost information. The Commission has recently determined, in the Big Stone II proceeding, that an independent evaluator was required to advise the Commission about actual natural gas costs, recent capital cost increases for all generation technologies, and potential regulatory costs relating to carbon dioxide. Similarly, in this docket an independent evaluator is also warranted to advise the Commission on the threshold question of whether IGCC technology is or is likely to be a least-cost resource available to meet Xcel’s needs in light of the same considerations at issue in the Big Stone II proceeding. In order to answer this question it is necessary to evaluate IGCC costs with the likely costs of viable electric generation alternatives to IGCC, either natural gas fired generation or wind backed up by natural gas fired generation.

As noted above, in both Phase 1 and Phase 2 of this proceeding, the Commission and the ALJ’s Findings on the relative cost of Mesaba IGCC generation compared to conventional coal are based upon what OES believed the projected, direct costs of Big Stone II were compared to the Mesaba Project. Such a comparison is no longer legally relevant or reasonable in light of the restrictions on new conventional coal plants set forth in Minn. Stat. § 216H.03. Accordingly, the Commission should accept Excelsior’s Supplement to its Exceptions and appoint an independent

evaluator to review and advise the Commission on the comparative costs of Mesaba versus natural gas fired generation or various combinations of wind and natural gas fired generation. In addition, the Commission should invite other Parties in this proceeding to provide comments on the Relevant Cost Information to the Commission and its independent evaluator.

NSP: In its Phase I order,¹ the Commission determined that Excelsior's Power Purchase Agreement ("PPA") was contrary to the public interest and NSP and Excelsior should attempt to negotiate a PPA pursuant to the guidance provided in the Phase I Order, and with the aid of the Office of Energy Security (OES). The specific task set by the Commission is for Excelsior and NSP to negotiate "where their interests converge and how they might be able to reach a mutually beneficial agreement" with the "benefit of the Commission's thinking on critical issues" pertaining to the public interest. The principal critical issue identified, by the Commission was that the terms and conditions of Excelsior's proposed PPA resulted in unreasonably high energy prices, and therefore unreasonably high rates for ratepayers. But the Commission also identified the unreasonable operational and financial risks posed by the PPA as additional critical issues. All of these issues must be addressed for the PPA to be found to be in the public interest.

Excelsior's proposed supplemental cost information is some of the same information that has been submitted on the current costs of various alternative resources in the pending NSP resource plan docket. It is unclear how any of that data is relevant to Phase II, however, given that it does not include any updated information about the costs of Excelsior's proposed coal-fired plant. Excelsior's plant costs were based on 2005 data and deemed by the Commission to be uncertain, leading to its ultimate determination that Excelsior's proposed PPA was not in the public interest.

Excelsior further repeats its arguments that cost comparisons of different resource alternatives should be used to assess its proposed plant. These same arguments were already made and rejected based on the fully developed record in Phase I of this Docket and before the ALJ in Phase II. Thus, Excelsior's current claim that its proposed coal plant is likely to be a least-cost resource in comparison to certain, select resources (a comparison which excludes other resource alternatives, such as the hydro and wind resources NSP is proposing in its current resource plan), is not new and does not justify reopening the Phase II record. Excelsior of course is free to raise its any new cost data within the negotiations that the Commission ordered in Phase I. That is the appropriate method to bring relevant cost update information about its proposal forward. Excelsior and NSP can review this new cost comparison information together and, with the aid of the OES, determine if it leads to energy pricing that is consistent with the public interest.

Finally, an "independent evaluator" is not necessary to facilitate review of Excelsior's updated cost data or any negotiations of the parties based on that data. To be in the public interest, the PPA's terms with respect to financial and operational risks must also be revised, not just its pricing. The ALJ has already provided extensive analysis and recommendations to the Commission on this point, and the OES is available to analyze and comment on the reasonableness of any proposal brought to it by the parties. NSP suggested that, as determined in Phase I, the proposal to appoint an independent evaluator should be rejected.

MP: See MP's discussion above for issue 2.

Staff Comments

Staff agrees with NSP that an independent evaluator is not necessary to facilitate review of Excelsior's updated cost data or any negotiations of the parties based on the data. As was pointed out by NSP, the ALJ has already provided extensive analysis and recommendations to the Commission on this point. As such, the proposal to appoint an independent evaluator should be rejected.

Commission Options

1. Deny Excelsior's Motion.
2. Grant Excelsior's Motion