

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

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

**ORDER DENYING MCGP'S  
MOTION TO COMPEL AND  
REQUEST FOR SANCTIONS**

This contested case proceeding was initiated by the Minnesota Public Utilities Commission (the Commission) by a Notice and Order for Hearing and Order Granting Intervention Petition issued on April 25, 2006. On January 2, 2007, mncoalgasplant.com (MCGP) filed a Motion to Compel and Request for Sanctions. On January 3, 2007, Excelsior Energy, Inc., filed a written response to MCGP's motion, and MCGP filed a Reply to Excelsior's response. This matter is therefore before Administrative Law Judges Steve M. Mihalchick and Bruce H. Johnson for a determination on MCGP's motion.

Based upon the file, record, and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

**ORDER**

IT IS HEREBY ORDERED, that MCGP's Motion to Compel and Request for Sanctions is DENIED.

Dated: January 3, 2007

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STEVE M. MIHALCHICK  
Administrative Law Judge

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BRUCE H. JOHNSON  
Assistant Chief Administrative Law Judge

## MEMORANDUM

On August 9, 2006, the undersigned ALJs issued their Sixth Prehearing Order, which established the schedule for proceedings in this matter. The evidentiary hearing relating to Phase 1 was scheduled for November 20 through December 1, 2006, at the Commission's offices. Public hearings were scheduled for December 18-20, 2006, with a deadline for public comment of December 22, 2006. Thereafter, the parties were to file their initial post-hearing briefs and proposed findings on or before January 5, 2007, with reply briefs due on or before January 19, 2006.

However, at a prehearing conference on November 16, 2006, all of the parties to this proceeding agreed that they would waive cross-examination at an evidentiary hearing, and that the case could be submitted to the undersigned ALJs based on pretrial pre-filed testimony and exhibits.<sup>1</sup> At that time, the ALJs directed that the parties would have until Wednesday, November 29, 2006, to supplement the pre-filed testimony with responses to information requests and any public documents they considered to be relevant.<sup>2</sup> Thereafter, counsel for Excelsior volunteered to work with counsel for the other parties to produce a numbered Master Exhibit List, listing all of the pre-filed testimony and other exhibits comprising the evidentiary record in this matter.<sup>3</sup> On December 11, 2006, counsel for Excelsior did file a Master Exhibit List. Some corrections were subsequently made to that list, and on December 20, a final Master Exhibit list was filed. On December 18, 19, and 20, 2006, six public hearings were conducted in the cities of St. Paul, Hoyt Lakes, and Taconite. The public hearing record was left open until Friday, December 22, 2006, at 4:30 p.m., at which time the evidentiary record in this proceeding was closed. Under the scheduling order, all that remains to be done in Phase 1 is submission of proposed findings and post-hearing briefs.

On January 2, 2007, MCGP filed a motion for an order that: (1) Excelsior submit updated to reflect cost estimates contained in a U. S. Department of Energy Notice of Financial Assistance Award (DOE Notice) dated May 19, 2006, thereafter that the parties be given one week to revise their cost estimates, testimony, and conclusions for inclusion in the evidentiary record, and that the parties be given another week to submit supplemental briefs based on any revised cost analysis. MCGP is also requesting that sanctions be imposed on Excelsior for failure to disclose material cost information.

First of all, to the extent MCGP's motion represents a discovery request, it is untimely. The Sixth Prehearing Order established the time for discovery as "ongoing to start of hearing." In other words, the original deadline for discovery was November 20, 2006. However, on November 16, 2006, the parties, including MCGP, waived a formal evidentiary hearing and agreed to submit the

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<sup>1</sup> Transcript of November 16, 2006, prehearing conference (hereafter "Tr."). At the hearing, the parties agreement to a "global waiver" of cross-examination was subject to certain conditions, none of which are placed at issue by MCGP's pending motion.

<sup>2</sup> Tr. at pp. 60-61.

<sup>3</sup> *Id.*

matter to the ALJs on pre-filed testimony and other written exhibits. Although some parties requested at that prehearing conference that some provisions be made for some additional information gathering before the written record was closed, MCGP made no such request, nor did it raise the issues that it now raises in its pending motion. On December 20, 2006, the written evidentiary record was closed, and the time for all discovery of any kind ended.

Second, MCGP's motion raises what it claims is a discrepancy between the Project's cost estimate in the DOE Notice and other cost estimates presented by Excelsior in other parts of the evidentiary record. DOE's Notice has been a matter of public record since May 19, 2006. In fact, MCGP has placed that document, with its cost estimate, into the hearing record as its Exhibit 5055.<sup>4</sup> In other words, the DOE Notice is already evidence in this proceeding, and MCGP had ample opportunity well before the evidentiary record closed to conduct discovery relating to the contents of that document.

Finally, Excelsior bears the burden in this proceeding of establishing the costs of the Project based on evidence in the record. Other parties, such as MGCP, are free to rely on any evidence in the record to establish what they claim are the Project's costs. In other words, the contentions set forth in MGCP's motion are more in the nature of argument than a discovery request and are more properly raised in MGCP's post-hearing briefs.

For the reasons set forth above, MGCP's Motion to Compel and Request for Sanctions is denied.

**S.M.M.; B.H.J**

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<sup>4</sup> MCGP Ex. 5055 appears both in the initial Master Exhibit List of December 11, 2006, and the final Master Exhibit List of December 20, 2006.