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January 20, 2015

Mr. Daniel Wolf, Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, MN 55101-2147

Re: In the Matter of the Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota MPUC Docket No. E-002/GR-13-868

Dear Mr. Wolf:

The Office of the Attorney General – Residential Utilities and Antitrust Division (“OAG”) respectfully submits this letter to inform the Commission of an issue related to Xcel Energy’s Replacement Steam Generator (“RSG”) project at Prairie Island Unit 2 that the OAG believes merits further investigation and consideration by the Commission. The OAG recognizes the unusual nature of providing this information by letter, but the events that led the OAG to investigate this particular issue did not take place until after the evidentiary hearing in this matter. The OAG’s investigation has uncovered some issues of concern, and for that reason the OAG seeks the Commission’s guidance on how to address this issue.

On November 12, 2014, Northern States Power Company (“Xcel” or “the Company”) and SNC-Lavalin Nuclear (USA) Inc. (“SLN”) were sued in Goodhue County District Court by Babcock & Wilcox Nuclear Energy, Inc (“BWNE”).¹ SLN is the general contractor for the RSG project, and BWNE is the subcontractor who performed the majority of the installation work. BWNE’s primary allegation is that Xcel has withheld payment of approximately \$45.3 million for work performed on the RSG project.² The lawsuit was featured in an article in the *Star Tribune* on November 13, 2014.³

¹ The Complaint is attached to this letter as Attachment A. Xcel’s Answer to the Complaint is attached as Attachment B.

² Attachment A.

³ David Shaffer, *Unpaid bills, cost overruns alleged at Prairie Island nuclear plant*, *Star Tribune*, Nov. 13, 2014, available at <http://www.startribune.com/business/282642471.html>.

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In order to investigate the issue, the OAG served several information requests on Xcel on November 14, 2014.⁴ The OAG did not receive responses to the information requests until December 3, 2014.⁵ On December 11, 2014, the OAG served a follow-up information request on Xcel.⁶ The OAG did not receive the response to the follow-up information request until January 9, 2015.⁷ Some of these information requests were provided to Commission staff,⁸ but not all.⁹

Based on the responses to the information requests, and the documents filed in the lawsuit,¹⁰ the OAG can provide the following summary:¹¹

- In its 2012 rate case filed on November 2, 2012, Xcel included \$285 million in the 2013 test year rate base for costs related to the RSG project that Xcel believed would be placed in service during 2013.¹² In its 2013 rate case filed on October 21, 2013, Xcel indicated that the RSG project would be completed in early December, 2013.¹³ According to documents submitted in the lawsuit, BWNE's installation work was "substantially complete" by December 24, 2013.¹⁴
- Sometime after December 24, 2013, Xcel received invoices that included the \$46 million in costs that is disputed in the lawsuit.¹⁵ After receiving the invoices, Xcel withheld payment; Xcel has not paid any portion of the \$46 million to BWNE.¹⁶ According to BWNE's Complaint, BWNE is entitled to collect 18% interest on the unpaid invoices, and interest is currently accruing at \$22,382 per day.¹⁷

⁴ IRs 639–645 are included as Attachment C.

⁵ *Id.*

⁶ IR 646 is attached as Attachment D.

⁷ *Id.*

⁸ See Ex Parte Communication Report, Doc. ID 201412-105198-02 (Dec. 5, 2014); Ex Parte Communication Report, Doc. ID 201411-104689-01 (Nov. 17, 2014).

⁹ The Ex Parte Communication Report filed on December 5, 2015, indicates that the first group of information requests sent by OAG, which are attached as Attachment C, were provided to staff. There has been no similar Ex Parte Communication Report indicating that IR 646, which was received on January 9, 2015, was also provided to staff.

¹⁰ Other litigation documents from the lawsuit, including BWNE's Reply to Counterclaim, SLN's Answer and Crossclaim, and Xcel's Crossclaim, are attached as Attachment E.

¹¹ The following summary is based upon the information available to the OAG at this time, which is limited by Xcel's refusal to fully respond to the OAG's prior information requests. In order to improve the clarity of the record, the OAG has served additional information requests.

¹² Direct Testimony of Timothy J. O'Connor, *In the Matter of the Application of Northern States Power Company for Authority to Increase Rates for Electric Service in Minnesota*, Docket No. E-002/GR-12-961, at 27 (Nov. 2, 2012).

¹³ Ex. 52, at 37 (O'Connor Direct).

¹⁴ Compare Attachment A, Complaint ¶ 21, with Attachment B, Xcel's Answer ¶ 21.

¹⁵ Attachment C, IR 644.

¹⁶ Attachment D, IR 646.

¹⁷ Attachment A, Complaint ¶ 27.

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- In its discovery responses, Xcel indicated that **[TRADE SECRET BEGINS]**

[TRADE SECRET ENDS] In addition to the \$46 million, BWNE is seeking additional interest in the amount of approximately \$4.5 million as of November, 2014.¹⁸ In its Answer to BWNE's Complaint, Xcel claims that it does not owe any portion of the \$46 million to BWNE.¹⁹

Based on this information, the OAG has several concerns. First, regardless of whether it was reasonable for Xcel to include some portion of this \$46 million cost in its projected 2014 test year, it is now clear that Xcel has not paid any of the \$46 million. As such, Xcel's rate increase request includes a substantial investment in the RSG project that Xcel had not paid at any time during the 2014 test year. If Xcel's projected 2014 test year rate base is approved, Xcel's rates will include earning its full rate of return on costs that Xcel has not paid, and that Xcel claims in signed legal documents it does not owe.²⁰

Second, the OAG is concerned that BWNE is charging interest on the unpaid invoices at the rate of 18%, which amounts to more than \$22,000 per day. If Xcel is ultimately unsuccessful in defending the lawsuit, it is likely that Xcel will seek to recover these interest payments from ratepayers. Because Xcel can seek to recover any interest payments from ratepayers, the risk of allowing interest to continue to accrue falls primarily on the ratepayers, rather than on Xcel. If Xcel's decision to withhold payment from BWNE was unreasonable, then it would also be unreasonable to recover the interest payments from ratepayers. The OAG has been unable to assess whether it is reasonable for Xcel to permit the interest to continue to accrue because Xcel has repeatedly refused to provide the contracts and subcontracts at issue in the lawsuit. The OAG formally requested the contracts in IR 642, which was served on November 14, 2014.²¹ The OAG has made additional requests several times, but Xcel has not produced the contracts.

Third, the OAG is concerned that Xcel did not inform the Commission or any interested parties about its dispute with BWNE, and that Xcel has refused to respond fully to the OAG's information requests.²² The dispute is over a relatively large sum of money, and Xcel became

¹⁸ Attachment A, Complaint ¶ 61.

¹⁹ Attachment B, Xcel's Answer ¶ 126.

²⁰ Xcel's representations can be assumed to be warranted by Minnesota law and have evidentiary support. *See* Minn. R. Civ. P. 11.02.

²¹ Attachment C, IR 642.

²² In its objections to the OAG's information requests, Xcel claims that it provided information through the testimony of Mr. O'Connor and in information requests from the Minnesota Chamber of Commerce. While Xcel does not identify which information requests, or what part of Mr. O'Connor's testimony, it appears that Xcel refers to pages 32-38 in Mr. O'Connor's direct testimony, and MCC IRs 228 and 245, which are attached as Attachment F. Xcel did not mention a contract dispute with BWNE, or the fact that its projected test year includes substantial costs that Xcel has never paid, at any point in these documents.

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aware of the dispute sometime in early 2014, or possibly when the installation work was being done at the end of 2013. Xcel should have informed the Commission and parties about the dispute, and the possible change in cost for the RSG project, but chose not to.

Given the significance of these concerns, the OAG determined that it was necessary to bring this information to the attention of the Commission. It was not possible for the OAG to raise the issues before the ALJ issued her Report on December 26, 2014, because Xcel did not respond to the OAG's most recent discovery request until January 9, 2015.²³ The OAG can no longer raise the issue before the ALJ, because the ALJ lost jurisdiction over the matter when her Report was issued.²⁴ Since the ALJ no longer has jurisdiction, it is appropriate to raise the issue directly to the Commission because the formal record in this proceeding remains open until the date for filing exceptions.²⁵ Because of these procedural circumstances, the OAG seeks guidance from the Commission on how to move forward in resolving these concerns.

The OAG believes that the Commission could proceed down several paths. First, the Commission could determine that, based on this information, Xcel has not supported its request to include a portion of the disputed \$46 million in rate base at this time. Given the fact that Xcel has not paid the costs, it would be inequitable to require ratepayers to pay a return on the costs. Because the information only came to light after the lawsuit was filed on November 12, 2014, the OAG would not object to allowing Xcel to provide more information about the issues in whatever form the Commission deems appropriate.

Second, the Commission could determine that the issues surrounding the contractor dispute should be resolved in a separate docket. If the Commission chooses to investigate these issues in another docket, it may be appropriate to leave some portions of the rate case open, or specifically provide for the possibility of reopening the case, in order to make an adjustment after the investigation is completed.

Third, the Commission could require Xcel to make an adjustment for the unpaid \$46 million in the resolved process for the 2014 Plant Related Revenue Requirement True-Up. According to Xcel witness Ms. Heuer, Xcel will make a compliance filing to compare Adjusted 2014 Actual Plant Related Revenue Requirements to Adjusted 2014 Test Year Plant Revenue Requirements.²⁶ In the event that Xcel's 2014 actual plant amounts are lower than its 2014 test year projections, Xcel has committed to "include the amount in the interim rate refund and the

²³ Attachment D, IR 646.

²⁴ Minn. Rules pat 1400.8300 ("Once a judge has issued a report, unless that report is binding on the agency, the judge loses jurisdiction . . .").

²⁵ Minn. Stat. § 14.61, subd. 2 ("In all contested cases where officials of the agency render the final decision, the contested case record must close *upon the filing of any exceptions to the report and presentation of argument . . .*"). Because this period expires today, the OAG was compelled to report this information at this time.

²⁶ Ex. 140, at 3–4 (Heuer Opening Statement).

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calculation of final rates in 2015.”²⁷ The \$46 million is a cost for the RSG project, which will clearly impact the “plant related revenue requirement.”

The OAG respectfully requests that the Commission provide guidance on how it wants the parties to pursue resolution of the issues raised by the dispute between Xcel and BWNE. The OAG also respectfully requests that the Commission direct Xcel to respond in a complete and timely manner to the OAG’s information requests on this issue.

Sincerely,

s/Ryan P. Barlow

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²⁷ *Id.*

STATE OF MINNESOTA
COUNTY OF GOODHUE

DISTRICT COURT
FIRST JUDICIAL DISTRICT

Babcock & Wilcox Nuclear Energy, Inc.,

Case Type: Other Contracts/Mech. Lien
Case File No. _____

Plaintiff,

v.

COMPLAINT

Northern States Power Co., dba Xcel Energy
and SNC-Lavalin Nuclear (USA) Inc.,

Defendants.

Plaintiff Babcock & Wilcox Nuclear Energy, Inc. ("BWNE") for its Complaint against Defendants Northern States Power Co., dba Xcel Energy ("Xcel") and SNC-Lavalin Nuclear (USA) Inc. ("SLN") states and alleges:

OVERVIEW OF THE DISPUTE AND BACKGROUND ALLEGATIONS

The Project

1. This dispute arises out of the Unit 2 Steam Generator Replacement Project ("the Project") at the Prairie Island Nuclear Generating Plant ("Prairie Island") in Welch, MN. Defendant Xcel owns and operates Prairie Island. Defendant SLN was the prime contractor on the Project pursuant to a contract executed on or about December 29, 2009 (the "Prime Contract"). SLN retained some Project engineering work but subcontracted most of the installation work to plaintiff BWNE through a subcontract executed on or about December 30, 2009 (the "Subcontract"). Pursuant to Xcel's labor agreement with the Minnesota State Building and Construction Trades Council and its affiliates, SLN and BWNE were considered "Employers" under that agreement while performing Project work.

Filed

NOV 12 2014

Yvonne J. Black
Court Administrator
By BE Deputy

2. The steam generator in a nuclear power plant is essentially a large heat exchanger—a boiler—that uses heat from the reactor core to make steam to power the turbine that runs the generator that makes electricity.

3. Prairie Island has two steam generators in each of its two reactor units. The Project involved the two steam generators in Unit 2.

4. Like any piece of equipment, steam generators wear out over time. The Project was a long-planned maintenance event approved by the Minnesota Public Utilities Commission (“MN PUC”) intended to allow Prairie Island Unit 2 to continue operating safely for many years.

5. Because much of the Project work had to be performed inside the nuclear containment building:

a. All work was safety-critical and subject to rigorous scrutiny, including inspection and documentation of every operation to satisfy oversight agencies, including the Nuclear Regulatory Commission;

b. The nuclear containment building has only two access points: a single large equipment hatch and an airlock-type personnel door. This limited access created clear choke points that impeded movement of people, equipment, and materials into and out of the structure;

c. Space inside the nuclear containment building is cramped, and the only heavy lift capability is provided by a single polar crane mounted at the top of the containment building. That crane could only be used by one entity at a time;

d. Every person working in the nuclear containment building had to wear radiological protective gear and had to put on and take off that gear every time the structure was entered and exited; and

e. Each time before entering containment, workers were required to log into a computer sentry system for the specific task to be performed and had to attend a pre-job briefing specific to that task held by Xcel Radiation Protection personnel.

6. The size of the steam generators was another challenge. Each of the steam generators was delivered to the Project in two pieces and had to be welded together inside the nuclear containment building. Removal of the existing steam generators required a similar two piece extraction. Extensive scaffolding also had to be delivered into and erected inside the nuclear containment structure to allow for removal and reinstallation of the steam generators.

7. The pictures below show some of the work in process and provide insight into the working conditions on the Project.

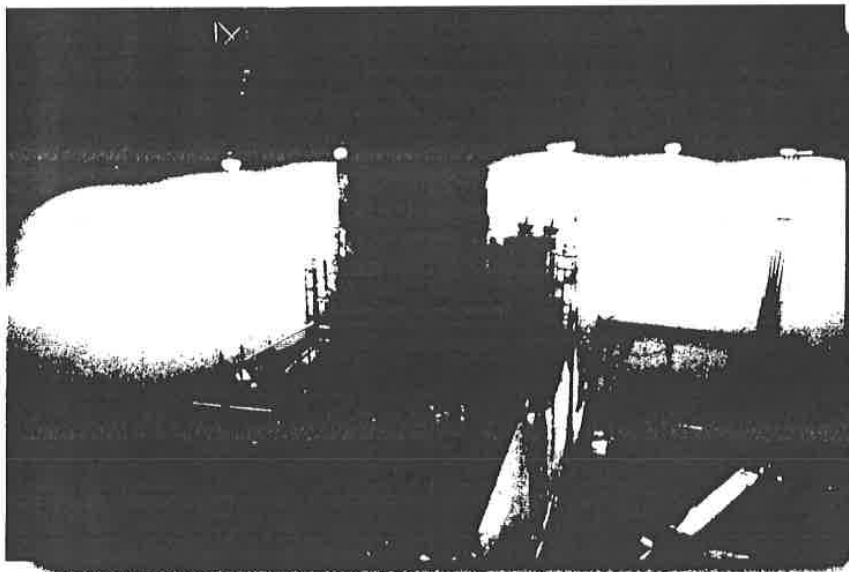


Figure 1 – Upper Portion of Steam Generator Lifted by the Polar Crane

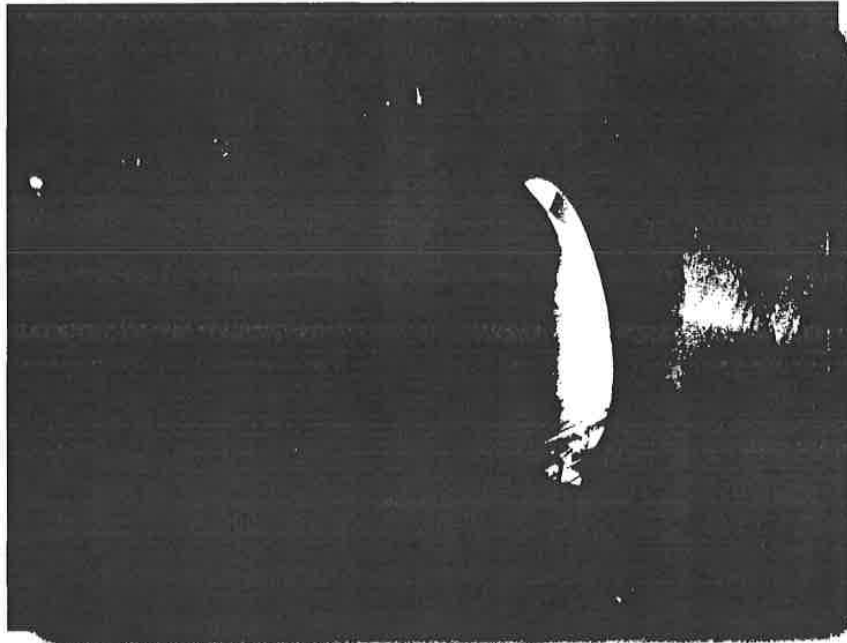


Figure 2 – Upper Portion of Steam Generator Passing Through the Equipment Hatch

8. In addition to space and access issues, the work was performed under severe time constraints. Unit 2 had to be taken off-line during performance of the work. That “outage” period had to be approved by the MN PUC and coordinated with other power plants so that they could provide replacement generating capacity.

9. Xcel wanted the outage to be as short as possible. Its Prime Contract with SLN included liquidated damages of \$100,000 for each day that the outage had to be extended due to the fault of the contractor. The Subcontract passed exposure to those liquidated damages to BWNE. The liquidated damage amount was chosen by Xcel to compensate it for the damages it might suffer due to delays such as, for example, an unexcused, extended outage. Xcel did not, however, have the right to assess liquidated damages for any delays it caused.

The Project Contract's Fixed and Target Prices

10. The Prime Contract had a fixed price component and a target price component. The fixed price portion covered specified preparatory work. The target price portion covered the remaining work, including removal and installation of the steam generators. Cost reimbursable contracts that utilize target pricing are used often in the power generation industry.

11. The Prime Contract expressly provided that the target price would be based upon estimates and that Xcel "shall compensate Contractor for actual costs reasonably incurred."

12. The fixed price and target price components of the Prime Contract (which flowed down to the Subcontract) were initially established when the contracts were executed in 2009.

13. Those prices necessarily relied upon target schedules detailing when SNL and BWNE would require unimpeded access inside the nuclear containment building during the planned outage, unimpeded access to the large equipment hatch and airlock personnel door, and unimpeded access to the single polar crane inside the nuclear containment building.

Xcel Adds Its Own Work

14. Substantially after SLN prepared its target schedule and price, and only months prior to the scheduled outage, Xcel independently added work of its own to be performed inside the nuclear containment building at the same time Project work was already scheduled to be performed. That unilateral Xcel decision increased the outage time, increased the amount of time needed for performance of BWNE's work and increased the likelihood of conflicts between Xcel's work and the work of SLN and BWNE.

15. Among other things, the added Xcel work required that the polar crane be shared by BWNE and Xcel, something that was not included in the target schedule or target price.

16. The Prime Contract provided that the Contractor is entitled to delay damages caused by other contractors. The Prime Contract further provided that Xcel “shall” issue a change order if it causes a delay in the work schedule and that the price paid to the Contractor shall be increased by actual, verified total direct costs, plus 9%. The Prime Contract also provided that payment of such delay damages are expressly excluded from any “no damages for delay” provision in that contract.

The Project Schedule

17. The Project schedule, a crucial document in any delay dispute, is especially important here: a time-critical Project, where tasks were tracked—not in months, weeks or days—but in hours.

18. Xcel maintained the Critical Path Method (“CPM”) schedule during the Project. Xcel artificially and improperly manipulated that CPM schedule to divert responsibility from itself for extending the outage.

19. The native format CPM schedule should have a record of all the changes made to the schedule during the Project. A proper CPM schedule analysis of those changes can help determine the causation and consequence of Project delays. If the Xcel-maintained schedule does not include this information, Xcel will be unable to support its allegation that SLN and/or BWNE caused delay due to Xcel’s deliberate destruction of that crucial evidence.

20. In order to assess the cause and effects of Project delays, SLN and BWNE have requested that Xcel produce the CPM schedule in native format. To-date, Xcel has failed and refused to produce the schedule in that format.

BWNE's Invoices for Work Performed

21. BWNE substantially completed all of its Project work on or before December 24, 2013, and the two new steam generators installed by BWNE in Unit 2 are generating power without issue. BWNE delivered invoices totaling \$116,139,420 to SLN for Project work. Those invoices included full, detailed support for the actual costs BWNE incurred performing Target Price work.

22. SLN reviewed and approved BWNE's invoices and supporting documentation and included them as supporting documents in its own invoices to Xcel. By including BWNE's invoices in its own billings to Xcel, SLN represented to Xcel that BWNE's invoiced costs were actually incurred, reasonable, and necessary for the completion of Project work.

XCEL's Refusal and Failure to Pay for Work Performed

23. Xcel has not paid SLN and SLN, in turn, has not paid BWNE \$45,387,264 comprised primarily of invoiced amounts related to BWNE's target price work on the Project.

24. Xcel has claimed, among other things, that those costs were not reasonably incurred and therefore are not recoverable, but Xcel has made flatly contrary representations to the MN PUC and the Wisconsin Public Service Commission ("PSC"). In order to recover through a rate adjustment the same costs it refuses to pay to SLN and BWNE, Xcel has represented to both agencies that those costs were reasonable and prudently incurred. Among other things, in May 2014 (after Project completion), Xcel testified to the PSC that the Unit 2 Steam Generator Replacement project was completed at or very close to its anticipated cost. There is no apparent factual basis upon which Xcel can justify these flatly inconsistent positions as being anything other than disingenuous and in bad faith.

Summary of Claims

25. Substantial Completion of BWNE's portion of the Project was achieved on or before December 24, 2013.

26. Xcel has attempted to justify its non-payment of SLN's invoice charges in the following ways, none of which are appropriate:

a. Costs Above Target Price. Xcel has refused to pay \$35,670,451, contending that those charges are *per se* unreasonable solely because they are in excess of the Prime Contract's target price. As such, Xcel has attempted to unilaterally convert a target price to a guaranteed maximum price. There is no justification in the contract or in industry practice for this improper Xcel action.

Xcel has provided no written notice or detailed explanation of any specific charge that it alleges to be unreasonable. The Prime Contract is clear that the target price is not a cap, and Xcel is obligated to pay the actual costs incurred by BWNE to perform the work.

b. Schedule Recovery Costs. Xcel rejected \$2,850,000 in invoiced charges because it claimed those charges were incurred to make up for time lost during the outage. Schedule recovery charges are not excluded from the costs BWNE is entitled to have reimbursed. Moreover, Xcel is obligated to pay those charges because Xcel caused or contributed to the delay that necessitated the recovery efforts it ordered only nine days after the start of the outage.

c. Substantial Completion Liquidated Damages. Xcel assessed liquidated damages of \$3,100,000 and withheld payment of that amount alleging an unexcused thirty-one (31) day delay in achieving Substantial Completion of

BWNE's work. Xcel's claim is based upon an outdated version of the Project schedule. Among other things, after the parties had agreed to the outage schedule, Xcel added twenty-four (24) days to the outage to accommodate work Xcel intended to perform during and after BWNE's work. Moreover, even without access to the native format CPM schedule, BWNE has documented more than nineteen (19) days of delays attributable, in whole or in part, to Xcel. No assessment of Substantial Completion liquidated damages is appropriate.

d. Milestone 17 LDs. Xcel assessed liquidated damages and withheld payment of \$3,062,500 related to completion of Milestone 17. Xcel claims that over 100 work packages were incomplete by the June 20, 2013 deadline and that the milestone was not achieved until July 19, 2013. In fact, all required Milestone 17 work packages were submitted by June 20, 2013. Those Milestone 17 work packages were acknowledged as complete by both SLN and Xcel, and no subsequent revisions were required. Xcel also waived its right to claim liquidated damages by: i) failing to give contractually required notice and opportunity to cure the alleged delay; ii) failing to timely assess liquidated damages according to contract deadlines; and iii) making progress payments after the milestone deadline in contradiction of its later attempt to assess liquidated damages.

e. Miscellaneous Charges. Xcel also rejected improperly an additional \$294,961 on the fixed price portion and \$342,149 on the target price portion of the Prime Contract.

27. Xcel's unexcused failure to pay the amounts owed to BWNE also triggers liability beyond the principal contract sums owed under a Minnesota statute that requires prompt

payment of undisputed amounts due subcontractors. BWNE is entitled to 18% interest on the unpaid amounts and an award of its attorneys' fees incurred in collecting them. *See* Minn. Stat. § 337.10 subd. 3. Because SLN is obligated to pay this interest to BWNE and the attorneys' fees BWNE incurs in collection, SLN is entitled to recover the same from Xcel. Thus, Xcel owes interest of \$4,513,104.41 calculated through October 22, 2014, and interest continues to accrue at \$22,382.76 per day. Attorneys' fees also continue to be incurred.

28. As noted above, Xcel's positions in this dispute are contradicted by its public statements. On September 15, 2014, Patrick Burke, Xcel's Vice President of Nuclear Projects, said in a presentation to the American Nuclear Society that the schedule and budget targets on the Project were achieved. Lauren McCarten, another Xcel VP, discussing similar work performed at Xcel's Monticello Nuclear Power Plant, was quoted in the August 27, 2014, Minneapolis StarTribune as saying, "The nature of these projects is such that every other company that has undertaken a significant project basically trying to rebuild an operating nuclear power plant has faced complexities and ended up spending more than they predicted at the beginning." In that same article, Dave Sparby, the President and CEO of Northern States Power Company, said "We urge the commission to avoid applying hindsight to otherwise reasonable decisions and actions." In his November 4, 2013, testimony to the MN PUC regarding the Monticello project, Scott McCall, Xcel's Manager of Site Projects at Prairie Island, noted, "[I]t is not possible to anticipate every issue that might arise once construction at a nuclear facility begins."

29. On August 26, 2014, David Sparby, testified to the MN PUC. Although he was testifying about the cost overruns experienced by Xcel on a project at the Monticello Nuclear Power Plant, he eloquently articulated BWNE's position in this dispute and the reason SLN and

BWNE entered into contracts containing target prices—not fixed prices—for a majority of the Project work.

While Mr. Crisp recognizes that it is challenging to work within the confines of an operating nuclear plant, he assumes that the difficulties we encountered were caused by lack of preparation and coordination rather than the challenges inherent in the working conditions we encountered.

- All Program work needed to be completed during our periodic refueling outages, which means that our labor force was operating under extreme time pressure. Confined work areas presented significant challenges to our craft labor force.
- Further, as discussed at length by Mr. O'Connor, we encountered many installation challenges for which no amount of advance preparation could have prepared us.
- In short, this job was very hard and that fact more than anything drove our costs.

PARTIES

30. Plaintiff BWNE is a subcontractor to Defendant SLN on the Project.

31. BWNE is a Delaware corporation. Its principal place of business is located at 11525 N. Community House Road, Suite 600, Charlotte, NC 28277.

32. BWNE is registered with the Minnesota Secretary of State as a foreign business corporation.

33. BWNE has a registered office at 100 S. 5th Street #1075, Minneapolis, MN 55402.

34. SLN is a Delaware corporation. Its principal place of business is located at 6585 Penn Ave., Pittsburgh, PA.

35. Upon information and belief, SLN is not registered with the Minnesota Secretary of State as a foreign business corporation.

36. Defendant Xcel is the owner of the Project.

37. Xcel is a Minnesota business corporation. Its principal place of business is located at 414 Nicollet Mall, Minneapolis, MN.

CHOICE OF LAW, JURISDICTION, AND VENUE

38. SLN contracted with Xcel, a Minnesota corporation, to perform work in Minnesota. SLN then subcontracted some of that work to be performed in Minnesota to BWNE. BWNE's claims arise from performance of that subcontract.

39. Both the Subcontract between SLN and BWNE and the Prime Contract between Xcel and SLN specify that Minnesota law shall apply to the interpretation and enforcement of those contracts.

40. Minnesota has personal jurisdiction over SLN in this matter under Minn. Stat. § 543.19.

41. Minnesota has personal jurisdiction over Xcel because it is a Minnesota corporation.

42. Venue is proper in Goodhue County under Minn. Stat. §§ 514.10 and 542.09 because that is where the Project is located.

ADDITIONAL FACTUAL ALLEGATIONS

43. Xcel owns and operates the Prairie Island Nuclear Generating Plant in Welch, Minnesota.

44. Under the Prime Contract, Xcel and SLN estimated the cost to complete a defined scope of work. That estimate was called the "Definitive Estimate", which was later modified to the "Definitive Target."

45. The Prime Contract obligated Xcel to pay SLN's reasonable costs incurred performing the target price phase work by, among other things, stating: "The Definitive

Estimate shall not be a limit on Target Price Phase costs. [Xcel] shall compensate [SLN] for actual costs reasonably incurred.”

46. The Prime Contract included an incentive fee mechanism for the target price phase. The Prime Contract defined a target fee for SLN (“the Target Fee”). The Prime Contract also defined a “Dead Band” to be plus or minus 10% of the Definitive Target. If SLN incurred costs within that Dead Band, those costs would be paid without application of any incentives or disincentives. If SLN’s incurred costs were less than the bottom end of the Dead Band, SLN’s fee would be increased by 10% of the savings. Similarly, if SLN’s costs were greater than the upper end of the Dead Band, SLN’s fee would be decreased by 10% of the amount the costs exceeded the Definitive Estimate. The maximum allowed deduction from SLN’s fee was 10% of the Target Fee.

47. The Prime Contract stated that the liquidated damages set forth in that contract define and limit the monetary damages available to Xcel for late completion of the Project.

48. BWNE completed its work under the Subcontract, and the Plant is working safely.

49. The Subcontract, like the Prime Contract, contained both fixed price and target price phases.

50. The Subcontract stated that BWNE’s costs under the target price phase would be paid as incurred.

51. The target price phase of the Subcontract contained a fee incentive mechanism similar to that of the Prime Contract. It allowed for a plus or minus 10% Dead Band around the target price, with 10% of the cost savings below the Dead Band added to BWNE’s fee and 10% of the costs above the Dead Band subtracted from BWNE’s fee, but the maximum deduction was capped at 10% of BWNE’s target fee.

52. The Subcontract Target Price was \$67,522,952, and the Target Fee was \$6,077,066.

53. The maximum amount that SLN could deduct from BWNE's fee was thus \$607,706, and that amount has already been credited by BWNE to SLN.

54. BWNE has invoiced SLN a total of \$5,850,653 on the fixed price portion of the Subcontract and \$110,288,767 on the target price portion of the Subcontract.

55. SLN submitted BWNE's invoices as part of its own billings to Xcel.

56. By submitting BWNE's invoices as part of its own invoices, SLN represented to Xcel that BWNE's invoices were for costs that were actually and reasonably incurred.

57. SLN has paid BWNE \$70,752,156, leaving an unpaid balance of \$45,387,264. Of that unpaid balance, \$294,961 is on the fixed price portion and \$45,092,303 is on the target price portion of the Subcontract.

58. SLN's failure to pay BWNE is a breach of the Subcontract.

59. SLN's failure to pay BWNE's invoices is a violation of Minn. Stat. § 337.10 subd. 3.

60. BWNE is entitled to 18% interest on unpaid amounts and its attorneys' fees incurred in collecting them because SLN has not timely paid BWNE amounts that are undisputed by SLN. The interest accrued through October 22, 2014 on the unpaid and undisputed by SLN invoices is \$4,513,104.41, and interest continues to accrue at the rate of \$22,382.76 per day as shown in the following table:

Invoice	Date Invoice Sent to SLN	Amount Unpaid	Due Date	Days Overdue as of 10/22/14	Interest Through 10/22/14	Per Diem Interest
G-NP000002-12072013	12/7/2013	\$7,241,001.94	1/21/2014	274	\$978,427.99	\$3,570.91
G-NP000002-01072014	1/7/2014	\$24,082,856.00	2/21/2014	243	\$2,885,983.89	\$11,876.48
G-NP000002-02072014	5/21/2014	\$6,086,992.81	7/5/2014	109	\$327,196.71	\$3,001.80
G-NP000002-03072014	6/12/2014	\$5,714,953.14	7/27/2014	87	\$245,194.98	\$2,818.33
G-NP000002-04072014	6/19/2014	\$1,431,893.76	8/3/2014	80	\$56,491.15	\$706.14
G-NP000002-05072014	8/7/2014	\$534,605.40	9/21/2014	31	\$8,172.87	\$263.64
G-NP000002-03072014FP	6/19/2014	\$294,961.00	8/3/2014	80	\$11,636.82	\$145.46
Total		\$45,387,264.05			\$4,513,104.41	\$22,382.76

61. Xcel has not paid SLN in full for BWNE's work.

62. Xcel is refusing to pay \$35.6 million of BWNE's invoices because Xcel claims that costs in excess of the target price are unreasonable.

63. Neither the Prime Contract nor the Subcontract defines costs in excess of the target price as unreasonable.

64. There is no contractual standard defining an unreasonable cost that allows Xcel to withhold payment on that basis.

65. According to the common law, Xcel can only withhold payments on a cost reimbursable contract on the grounds that they are unreasonable if the costs are incurred in such ruthless disregard of the contractor's obligations as to be tantamount to fraud or gross negligence.

66. Xcel has not specifically identified as unreasonable any particular charges within the \$35.6 million that it refuses to pay.

67. BWNE did not incur any unreasonable costs as defined by the common law or as defined by the Prime Contract or Subcontract.

68. Xcel's refusal to pay costs either within or in excess of the target price Dead Band is a breach of the Prime Contract.

69. Xcel's refusal to pay costs either within or in excess of the target price is imprudent and unreasonable and a bad faith attempt to obtain an unjustified discount based upon the financial pain caused by improperly withholding substantial monies due and owed under the Prime Contract.

70. Xcel is refusing to pay \$3,062,500 invoiced by BWNE because it claims entitlement to liquidated damages related to completion of Milestone 17 work packages.

71. Milestone 17 was an interim milestone by which SLN was required to deliver work package documentation to Xcel. The Prime Contract specified liquidated damages of \$2,500 per day for each work package that was delivered "later than the Contract Milestone Date", which was June 20, 2013.

72. Corresponding requirements and consequences are contained in the Subcontract.

73. The \$2,500 per day per work package amount has no reasonable relation to Xcel's prospective actual damages and, therefore, is an unenforceable penalty.

74. BWNE submitted all required work packages to SLN by June 20, 2013,

75. SLN submitted all required work packages to Xcel by June 20, 2013.

76. SLN notified Xcel of its completion of Milestone 17 on June 20, 2013.

77. Xcel acknowledged receipt of the work packages by June 20, 2013.

78. No subsequent revisions to the work packages were required.

79. There is no contractual, legal or equitable basis for Xcel's claim that it can assess liquidated damages for the time period between when it acknowledged receipt of the completed work packages (June 20, 2013) and the date when Xcel finally classified the work packages as complete in its system (July 20, 2013).

80. Xcel waived any entitlement to Milestone 17 liquidated damages by failing to give SLN and BWNE notice and opportunity to cure the alleged delay. Xcel did not notify SLN of any alleged Milestone 17 delay until July 25, 2013—five days after the alleged delay ended.

81. Xcel waived any entitlement to Milestone 17 liquidated damages by failing to mitigate its own damages. Any delay in completing Milestone 17 was caused by Xcel's failure to timely process the work packages provided by SLN and BWNE.

82. Xcel waived any entitlement to claim liquidated damages related to Milestone 17 by failing to timely assess the liquidated damages. The Prime Contract required Xcel to assess any liquidated damages it claimed no later than the date of Substantial Completion of the Project. The Project was Substantially Complete on December 24, 2013, but Xcel did not notify SLN that it intended to assess liquidated damages related to Milestone 17 until January 3, 2014.

83. Xcel waived any entitlement to claim liquidated damages related to Milestone 17 by making progress payments to SLN after the June 20, 2013, Milestone 17 deadline without assessing the claimed liquidated damages.

84. Xcel's withholding of \$3,062,500 as purported liquidated damages related to Milestone 17 is imprudent, improper, a breach of the Prime Contract, and in bad faith.

85. Xcel is also refusing to pay \$3,100,000 invoiced by BWNE because it claims entitlement to liquidated damages related to BWNE's alleged failure to timely achieve Substantial Completion.

86. The Prime Contract specified liquidated damages of \$100,000 per day for an unexcused delay in meeting the Substantial Completion deadline.

87. Corresponding requirements and consequences are contained in the Subcontract.

88. Xcel claims an unexcused delay of thirty-one (31) days in meeting the Substantial Completion deadline.

89. Xcel's claim is not based on the Substantial Completion deadline in the schedule agreed to and used by the Parties during the Project.

90. Xcel caused at least nineteen (19) days of schedule delay by, among other things, interfering with BWNE's movement of personnel and equipment into the nuclear containment building, commandeering vital project tools—including the polar crane—inside the nuclear containment building, failing to maintain adequate cooling inside the nuclear containment building, interfering with BWNE's means and methods, failing to provide adequate radiological protection support, prioritizing its own work ahead of BWNE's previously-scheduled work, and demanding changes to the work. In addition, numerous material differences between Xcel representations and as-found conditions also delayed the ability to achieve Substantial Completion.

91. Xcel's withholding of \$3,100,000 as alleged liquidated damages related to Substantial Completion is imprudent, improper, a breach of the Prime Contract, and in bad faith.

92. Xcel unilaterally added twenty-four (24) days to the planned outage, and SLN and BWNE achieved Substantial Completion of their work within the outage as extended by Xcel. As such, Xcel suffered no damage from any alleged delay in obtaining Project Substantial Completion.

93. The alleged Substantial Completion liquidated damages therefore constitute an unenforceable penalty prohibited by law and are not recoverable.

94. Xcel is refusing to pay \$2,850,000 invoiced by BWNE (through SLN) because it claims those costs were related to schedule recovery and, therefore, are not compensable under the Prime Contract.

95. The costs that Xcel is refusing to pay were necessary, reasonable, and appropriate to achieve completion of the Project, and they are not properly categorized as “schedule recovery costs” solely attributable to any BWNE unexcused failure to maintain schedule.

96. The Prime Contract does not provide that schedule recovery costs cannot be compensable, and it does explicitly state that Xcel is obligated to pay reasonably incurred costs.

97. BWNE and SLN were entitled by contract to control the means and methods of performing the Project work, were entitled to accelerate work where they deemed reasonable, and are entitled to payment of all actual costs reasonably incurred.

98. Xcel’s refusal to pay those actual costs is particularly unreasonable given that Xcel itself caused the need for schedule recovery on the Project.

99. Xcel’s withholding of the \$2,850,000 is imprudent, improper, a breach of the Prime Contract, and in bad faith.

100. Xcel also is withholding payment of \$294,961 on the fixed price portion and \$342,149 on the target price portion of the Prime Contract for reasons that are arbitrary and unsupportable. Just as Xcel promised incentives to SLN should SLN complete the Project below the target cost, BWNE promised incentives to its subcontractors to obtain optimal performance. Those incentives are actual costs, reasonably incurred to complete the Project. Xcel now purports to reject those incentive payments as “unreasonable” despite having previously

reviewed without objection—and prior to when BWNE entered into them—the subcontracts containing those incentive provisions.

101. Xcel's withholding of those amounts is imprudent, improper, a breach of the Prime Contract, and in bad faith.

102. SLN's failure to pay BWNE's invoices is a breach of the Subcontract.

COUNT I
Mechanic's Lien Foreclosure

103. BWNE realleges all previous paragraphs.

104. At all times relevant to these proceedings, Xcel was the fee owner of the property constituting the Prairie Island Nuclear Power Plant ("the Property").

105. SLN was under contract with Xcel to make permanent improvements to the real property in Goodhue County constituting the Property.

106. BWNE contributed labor, skill, and materials to those improvements under a subcontract with and at the instance of SLN.

107. BWNE has not been paid in full for the labor, skill, and material it contributed to the improvement.

108. On July 11, 2014, BWNE recorded a Mechanic's Lien Statement as Document Number A-615304 in the Goodhue County Records Office. A true and correct copy of that statement is attached as Exhibit A.

109. BWNE complied with all statutory requirements for attachment and perfection of its mechanic's lien.

110. BWNE served and recorded its mechanic's lien statement within 120 days of its last day contributing to the improvement of the real property.

111. Due to the sheer volume of the documents supporting its invoices and the thorough review those documents received by both BWNE and SLN, BWNE had not invoiced all of the costs it incurred by the time it had to record its mechanic's lien statement.

112. At the time it recorded its lien statement, BWNE had invoiced, but not been paid, \$37,410,850.75.

113. BWNE is entitled to a specific mechanic's lien against the Property for the reasonable value of the work, skill, and material it contributed to the improvement of the Property.

114. BWNE's mechanic's lien against the Property is superior to the right, title, interest, mortgage, or lien claimed by any Defendant except valid mechanic's liens asserted by coordinate mechanic's lien claimants.

115. BWNE is entitled to foreclose its mechanic's lien against the Property for the reasonable value of the work, skill, and material it contributed to the improvement of the Property plus interest, costs, and reasonable attorneys' fees.

116. BWNE has had to retain counsel to prosecute its lien action and will incur attorneys' fees, costs, and disbursements in proving and foreclosing its mechanics lien.

COUNT II
Breach of Contract

117. BWNE realleges all previous paragraphs.

118. The Subcontract is a valid contract between BWNE and SLN.

119. BWNE fully performed under the Subcontract

120. The Subcontract obligated SLN to pay BWNE for its work.

121. BWNE demanded payment for its work through, among other things, its invoices.

122. SLN approved BWNE's invoices and represented to the Project's owner that BWNE's invoices were for actually and reasonably incurred costs.

123. SLN has not paid BWNE \$45,387,264.

124. Xcel's failure to pay SLN is a material breach of the Prime Contract.

125. SLN's failure to pay BWNE is a breach of the Subcontract.

126. BWNE has been damaged by SLN's failure to pay BWNE.

127. The principal amount of BWNE's damages is \$45,387,264.

128. BWNE is entitled to judgment in its favor and against SLN in the principal amount of \$45,387,264, plus pre-judgment interest.

COUNT III

Violation of Minn. Stat. § 337.10 Subd. 3

129. BNWE realleges all previous paragraphs.

130. The Subcontract is a building and construction contract within the meaning of Minn. Stat. chapter 337.

131. BWNE invoiced SLN for its work on the Project.

132. SLN did not dispute those invoices.

133. SLN approved BWNE's invoices and then adopted them by including them in its own invoices to Xcel.

134. SLN has not paid charges invoiced by BWNE totaling \$45,387,264.

135. SLN's failure to pay BWNE's undisputed invoices in full is a violation of Minn. Stat. § 337.10 subd. 3.

136. BWNE is entitled to judgment in its favor and against SLN in the principal amount of \$45,387,264, plus 18% interest and attorneys' fees incurred in collecting the amount due as provided by statute.

137. Because Xcel has not paid SLN for the amounts due BWNE, SLN is entitled to indemnity from Xcel for any amounts that SLN must pay BWNE according to Minn. Stat. § 337.10 subd. 3.

COUNT IV
Unjust Enrichment

138. BNWE realleges all previous paragraphs.
139. The Project was a permanent improvement requested by Xcel.
140. BWNE performed work and provided materials to the Project.
141. The reasonable value of the work and materials provided by BWNE for which it has not been paid is \$45,387,264.
142. Xcel requested and knew that BNWE was performing work on the Project and knew that BWNE expected to be paid for its work. Xcel derived benefit from the work and materials provided by BWNE to the Project.
143. It would be unjust for Xcel to retain the benefit of BWNE's work and materials without compensating BWNE.
144. Minnesota's mechanic's lien statute was amended to provide that unpaid contractors and subcontractors remedies were not limited to the remedies provided in the mechanic's lien statute.
145. BWNE is entitled to judgment in its favor and against Xcel in the principal amount of \$45,387,264, plus pre-judgment interest.

COUNT V
Declaratory Judgment

146. BWNE realleges all previous paragraphs.
147. The Prime Contract governs the Project.

148. The Subcontract incorporates by reference requirements from the Prime Contract.
149. BWNE's rights are affected by the Prime Contract.
150. BWNE has standing to seek a declaratory judgment under Minn. Stat. § 555.02
construing the provisions of the Prime Contract.
151. BWNE is entitled to a declaration that:
- a. Xcel is not entitled to withhold payment of invoiced amounts merely because they exceed the Prime Contract's target price;
 - b. Xcel is obligated under the Prime Contract to pay actual costs reasonably incurred on the target price portion of the Project;
 - c. Unreasonable costs under the Prime Contract are only those incurred in such ruthless disregard of the contractor's obligations as to be tantamount to fraud or gross negligence;
 - d. Xcel is not entitled to assess liquidated damages related to Milestone 17 if the referenced work packages were delivered to it on or before June 20, 2013;
 - e. Xcel is not entitled to assess liquidated damages related to Substantial Completion absent proof of unexcused delays for which SLN and/or BWNE are solely responsible;
 - f. Xcel is not entitled to withhold payment of invoiced amounts on the ground that they are related to schedule recovery;
 - g. Xcel is not entitled to withhold payment of invoiced amounts on the ground that they represent incentive payment to subcontractors;
 - h. Xcel is obligated to pay SLN \$46,285,843;

i. Xcel's contractually based defenses and claims are barred and prohibited by Xcel's material breach of the Prime Contract; and

j. BWNE's contractual obligations are excused by Xcel's material breaches of the Prime Contract.

WHEREFORE, Babcock & Wilcox Nuclear Energy, Inc. respectfully requests a judgment with the following relief:

1. On Count I:

a. Judgment in favor of BWNE and against Northern States Power Co. dba Xcel Energy for the reasonable value of the work, skill, and material BWNE contributed to the improvement of the Property plus interest, costs, and reasonable attorneys' fees;

b. Adjudging a specific mechanic's lien against the Property in the judgment amount;

c. Adjudging the amount, validity, and priority of all liens, encumbrances, and claims asserted against the Property; and

d. Directing the enforcement and foreclosure of BWNE's mechanic's lien and the sale of the Property by the Sheriff of Goodhue County to satisfy the same according to law;

2. On Count II, judgment in favor of BWNE and against SLN in the principal amount of \$45,387,264, plus interest;

3. On Count III, judgment in favor of BWNE and against SLN in the principal amount of \$45,387,264, plus 18% interest and costs and disbursements, including attorneys' fees incurred in obtaining that amount;

4. On Count IV, judgment in favor of BWNE and against Xcel in the principal amount of \$45,387,264, plus interest;

5. On Count V, a declaration that:

- a. Xcel is not entitled to withhold payment of invoiced amounts merely because they exceed the Prime Contract's target price;
- b. Xcel is obligated under the Prime Contract to pay all costs reasonably incurred on the target price portion of the Project;
- c. Unreasonable costs under the Prime Contract are only those incurred in such ruthless disregard of the contractor's obligations as to be tantamount to fraud or gross negligence;
- d. Xcel is not entitled to assess liquidated damages related to Milestone 17;
- e. Xcel is not entitled to assess liquidated damages related to Substantial Completion;
- f. Xcel is not entitled to withhold payment of invoiced amounts because they are related to schedule recovery;
- g. Xcel is not entitled to withhold payment of invoiced amounts on the ground that they represent incentive payment to subcontractors;
- h. Xcel is obligated to pay SLN \$46,285,843;
- i. Xcel's contractually based defenses and claims are barred and prohibited by Xcel's material breach of the Prime Contract; and
- j. BWNE's contractual obligations are excused by Xcel's material breaches of the Prime Contract.

6. An award of BWNE's costs and disbursements, including its reasonable attorneys' fees; and
7. Any further legal or equitable relief the Court deems just.

FABYANSKE, WESTRA, HART & THOMSON, P.A.

Dated: November 12, 2014



Dean B. Thomson (#141045)
M.T. Fabyanske (#28022)
Thomas J. Vollbrecht (#17886X)
Jeffrey A. Wieland (#387918)
333 South Seventh Street, Suite 2600
Minneapolis, MN 55402
(612) 359-7600 (P)
(612) 359-7605 (F)
ATTORNEYS FOR PLAINTIFF

ACKNOWLEDGMENT

I acknowledge that costs, disbursements and reasonable attorney and witness fees may be awarded under Minn. Stat. § 549.211, to the party against whom the allegations in this pleading are asserted.



EXHIBIT A

DOC#: A- 615304

Certified, Filed, and or Recorded on:

July 11, 2014 10:51 AM

Signed: *Lisa M Hanni* Deputy

LISA M HANNI

GOODHUE COUNTY RECORDER

Fee Amount: \$46.00

MECHANIC'S LIEN STATEMENT

Dated: July 9, 2014

The undersigned hereby gives notice to the public and states as follows:

1. I am acting at the instance of the lien claimant **Babcock & Wilcox Nuclear Energy, Inc.**, a corporation under the laws of the **State of Delaware**, as its President.
2. The lien claimant hereby gives notice of intention to claim and hold a lien upon the portion of the land and improvements, totaling less than 80 acres, commonly known as: **Prairie Island Nuclear Generating Plant, Unit 2, 1717 Wakonade Drive East, Welch, MN 55089, and legally described as shown in the attached Exhibit A.**
3. The name and mailing address of the lien claimant is: **Babcock & Wilcox Nuclear Energy, Inc., 11525 North Community House Road, Charlotte, NC 28277.**
4. The amount of the lien claimed is **\$37,410,850.75** plus interest and costs, including attorney's fees, and is due and owing to the lien claimant for labor performed and skill, material and machinery furnished to the land.
5. The lien claimant did or supplied the following: **Among other things, removed and replaced original power block steam generators with new steam generators fabricated by others.**
6. The lien claimant's contribution to the improvement was performed or furnished from **January 1, 2010 to April 24, 2014**, for or to the following person(s): **SNC Lavalin Nuclear (USA) Inc.**
7. The name of the present owner of the land according to the best information lien claimant now has is: **Northern States Power Company, D/B/A Xcel Energy, Inc.**
8. The lien claimant acknowledges that a copy of this statement must be served personally or by certified mail on the owner, the authorized agent of the owner or the person who entered into the contract with the lien claimant within 120 days of doing the last work or furnishing the last item of such skill, material or machinery.

9. Notice as required by Minnesota Statutes Section 514.011(2), if any, was given or was not required.

STATE OF NORTH CAROLINA)
) ss.
COUNTY OF MECKLENBURG)

Babcock & Wilcox Nuclear Energy, Inc.

Joseph A. Zwetolitz
By: Joseph A. Zwetolitz
Its: President

Joseph A. Zwetolitz, being duly sworn, on oath says that I am the President of Babcock & Wilcox Nuclear Energy, Inc., the lien claimant in the above lien statement, and have knowledge of the facts stated in the statement. This statement is made at the instance of said lien claimant and is true of my own knowledge.

Joseph A. Zwetolitz
Joseph A. Zwetolitz

Prepared by:
Fabyanske, Westra, Hart & Thomson, P.A.
333 South 7th Street, Suite 2600
Minneapolis, MN 55402

Subscribed and sworn to before me this 9th day of July, 2014.

Trudy A. Haag
(SIGNATURE OF NOTARY PUBLIC OR OTHER OFFICIAL)

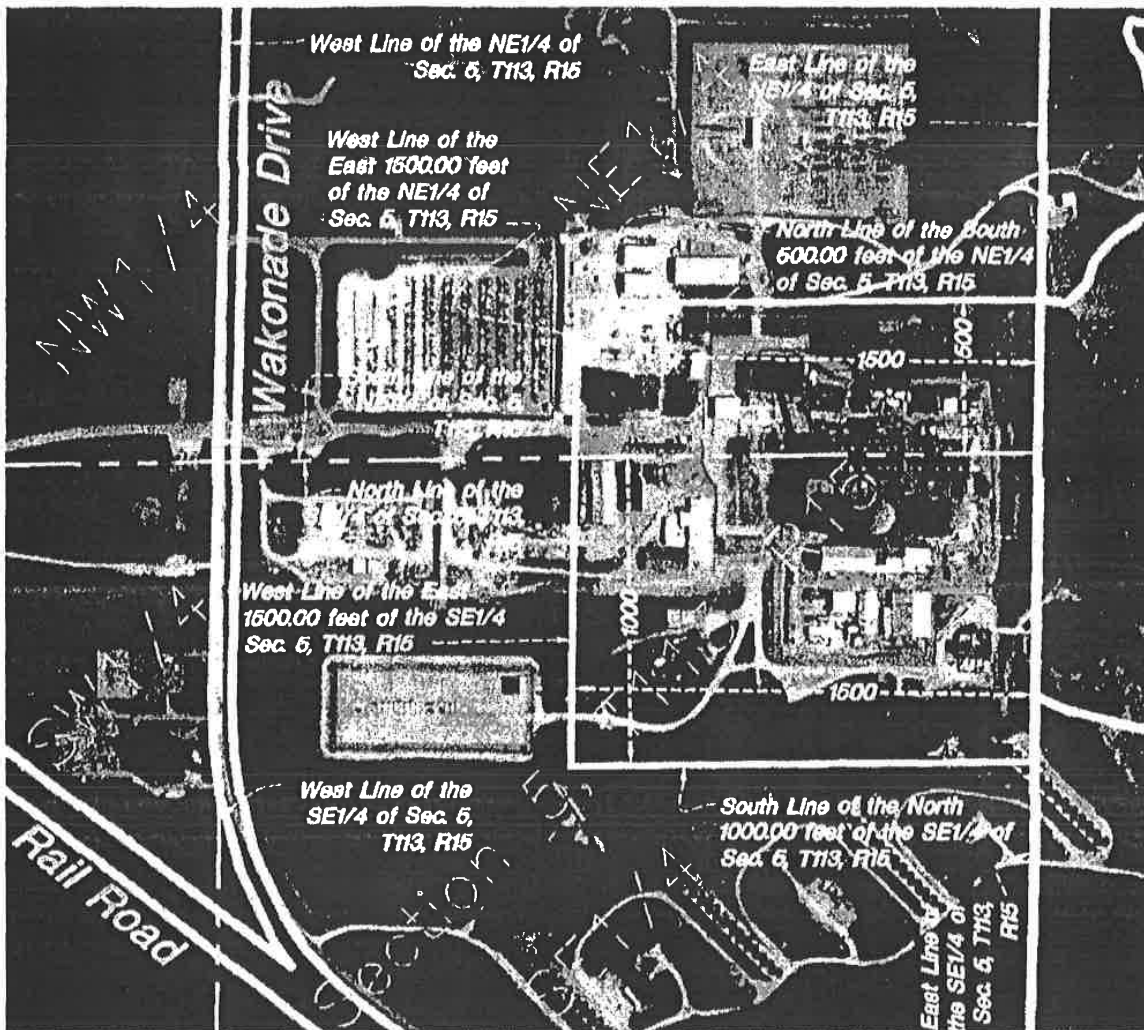
NOTARIAL STAMP OR SEAL. (OR OTHER TITLE OR RANK)

TRUDY A. HAAG
NOTARY PUBLIC
REGISTRATION # 350226
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES
DECEMBER 31, 2016

**Land Description of a portion of The Prairie Island Nuclear Power Plant
 Located In Section 5, Township 113, Range 15,
 GoodHue County, MN**

Exhibit A

The east 1500.00 feet of the south 500.00 feet of the northeast quarter of Section 5. Township 113 North, Range 15 West, Goodhue County, Minnesota, together with the east 1500.00 feet of the north 1000.00 feet of the southeast quarter of said Section 5



SCALE IN FEET

Description Area: 51.688 +/- Acres

I hereby certify that this survey, plan or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State of Minnesota.

Dated this 7th day of July, 2014

SATHRE-BERGQUIST, INC.

Rory L. Systelen, PLS Minnesota License No. 44569
 rory@sathre.com



SATHRE-BERGQUIST, INC.

150 South Broadway Ave.
 Wayzata, MN. 55391
 (952) 476-6000 www.sathre.com

Description Exhibit
 of
 Prairie Island Power

Date: 7-7-14	Revision Date: 7-8-14
Prepared By: RLS	Check By: RLS
Layout Sheet	1
Project Number: 25055-001	1

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STATE OF MINNESOTA
COUNTY OF GOODHUE

DISTRICT COURT
FIRST JUDICIAL DISTRICT

Babcock & Wilcox Nuclear Energy, Inc.,

Plaintiff,

vs.

SNC Lavalin Nuclear (USA) Inc., and
Northern States Power Co., dba Xcel Energy,

Defendants.

Case Type: Other Contracts

Case Number: 25-cv-14-2626

**ANSWER AND
COUNTERCLAIM**

Defendant Northern States Power Co., dba Xcel Energy ("Xcel Energy") for its Answer to the Complaint of Babcock & Wilcox Nuclear Energy, Inc. ("Babcock & Wilcox") and Counterclaim against Babcock & Wilcox alleges as follows:

1. Answering paragraph 1, admits and alleges that Xcel Energy entered into an Agreement for Steam Generator Replacement Installation Services (the "Prime Contract") with SNC-Lavalin Nuclear (USA) Inc. ("SLN") dated December 29, 2009; admits and alleges that the Prime Contract related to replacement of the Unit 2 steam generators at Xcel Energy's Prairie Island nuclear power plant in Goodhue County, Minnesota (the "Project"); admits and alleges, on information and belief, that SLN entered into a subcontract with Babcock & Wilcox that included all or substantially all of the installation work within the scope of the Prime Contract; admits and alleges that SLN and Babcock & Wilcox were considered "Employers" under the labor agreement with the Minnesota State Building and Construction Trades Council and its affiliates.

Filed

DEC 2 - 2014

Yvonne J. Black
Court Administrator
By DC Deputy

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2. Answering paragraph 2, admits and alleges that a steam generator in a nuclear power plant is a boiler that produces steam to power the turbine that runs the generator that makes electricity.

3. Admits the allegations of paragraph 3.

4. Admits and alleges that the Project was long-planned and was intended to improve equipment reliability by replacing aging steam generators.

5. Answering paragraph 5, admits and alleges that construction work inside a nuclear containment building is subject to various constraints.

6. Admits the allegations of paragraph 6.

7. Paragraph 7 does not require a response, but Xcel Energy notes that the first photograph reproduced therein was taken in 2004 and does not represent Babcock & Wilcox's work in 2013.

8. Answering paragraph 8, admits and alleges that maintaining the schedule that SLN agreed to for the Project was important to Xcel Energy. Alleges that the schedule for performing the installation work on the Project that was agreed to by SLN and Babcock & Wilcox was incorporated into the Prime Contract and was made contractually binding on SLN and, through its Subcontract, on Babcock & Wilcox. Alleges that § 4.7.7 of the Prime Contract provides:

Schedule Adherence. Contractor acknowledges and agrees that adherence to the Schedule(s) is of material importance to the Company and a material component of Contractor's obligations hereunder and of its performance of the Work.

Alleges that the Prime Contract's schedule requirements were well known to Babcock & Wilcox and SLN throughout the time when they submitted bids for and worked on the Project, and denies the remaining allegations of paragraph 8.

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9. Answering paragraph 9, admits and alleges that the Prime Contract provided for liquidated damages in the amount of \$100,000 per day, in the event that SLN failed to maintain schedule as was contractually required. Alleges that the Prime Contract speaks for itself, and denies that Xcel Energy caused any critical path delays to the Project.

10. Answering paragraph 10, admits and alleges that the Prime Contract had a fixed price component and a target price component, and alleges that the Prime Contract speaks for itself.

11. Answering paragraph 11, admits and alleges that § 8.1.1 of the Prime Contract states, in part, "The Company shall compensate Contractor for actual costs reasonably incurred." Alleges that the Prime Contract contains numerous additional provisions, some of which are identified herein, that govern Xcel Energy's liability to pay costs allegedly incurred by SLN and that limit SLN's ability to recover costs allegedly incurred on the Project.

12. Admits the allegations of paragraph 12.

13. Denies the allegations of paragraph 13.

14. Denies the allegations of paragraph 14.

15. Denies the allegations of paragraph 15.

16. Denies the allegations of paragraph 16, and alleges that the Prime Contract speaks for itself.

17. Answering paragraph 17, admits and alleges that the Project schedule was critical to the Project and was known by SLN and Babcock & Wilcox to be critical as well as contractually binding.

18. Denies the allegations of paragraph 18.

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19. Answering paragraph 19, admits and alleges that the Project's CPM schedule, which was jointly maintained by Babcock & Wilcox, SLN and Xcel Energy, shows various changes made to the schedule as a result of delays caused by Babcock & Wilcox; denies the remaining allegations.

20. Denies the allegations of paragraph 20; alleges that any discovery requests that are made in the course of this litigation will be responded to by Xcel Energy.

21. Answering paragraph 21, admits and alleges that SLN's work on the Project was substantially complete on December 24, 2013, 31 days late; admits and alleges that the steam generators are now generating power; states that it is without information as to invoices delivered by Babcock & Wilcox to SLN; and denies any remaining allegations.

22. Answering paragraph 22, admits and alleges that SLN transmitted various Babcock & Wilcox invoices to Xcel Energy; alleges that for four months, from January 2014 through April 2014, SLN did not transmit any Babcock & Wilcox invoices to Xcel Energy, and that, on information and belief, SLN did not forward Babcock & Wilcox's invoices because it considered them to be unreasonable and improper; denies any remaining allegations.

23. Answering paragraph 23, admits and alleges that SLN has submitted invoices to Xcel Energy totaling \$46,449,136 through October 30, 2014, which Xcel Energy has not paid because it is not obligated to do so under the terms of the Prime Contract for, *inter alia*, the reasons set forth herein; alleges that it lacks information as to payments that SLN has made to Babcock & Wilcox.

24. Denies the allegations of paragraph 24; alleges that Xcel Energy has never made any representation to any regulatory agency about the amounts in dispute in this lawsuit; alleges that all representations to regulatory agencies related to overall project costs.

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25. Admits the allegations of paragraph 25.
26. Denies the allegations of paragraph 26; admits and alleges that Xcel Energy has paid the amounts due to SLN under the Prime Contract, as is more fully alleged herein.
27. Denies the allegations of paragraph 27.
28. Denies the allegation of paragraph 28 that Xcel Energy has contradicted any position it has taken in this action; admits and alleges that various difficulties are inherent in nuclear work; alleges that the Project at issue here followed a similar steam generator replacement project that was carried out at Unit 1 of the Prairie Island nuclear power plant in 2004, and which provided a blueprint for the successful execution of the Project; alleges that the benefits of said Unit 1 experience were made available to SLN and Babcock & Wilcox. Specifically alleges that no employee or representative of Xcel Energy has ever stated in any forum that the costs invoiced by Babcock & Wilcox were reasonable or were payable under the terms of the Prime Contract.
29. Denies the allegation of paragraph 29 that any statement quoted therein had any reference to the Project or any relevance to the invoices' and contract performance that are at issue in this lawsuit.
30. Admits the allegations of paragraph 30.
31. Admits, upon information and belief, the allegations of paragraph 31.
32. Admits, upon information and belief, the allegations of paragraph 32.
33. Admits, upon information and belief, the allegations of paragraph 33.
34. Admits, upon information and belief, the allegations of paragraph 34.
35. Admits, upon information and belief, the allegations of paragraph 35.
36. Admits the allegations of paragraph 36.

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37. Admits the allegations of paragraph 37.
38. Admits the allegations of paragraph 38.
39. Admits the allegations of paragraph 39 as they relate to the Prime Contract.
40. Admits the allegations of paragraph 40.
41. Admits the allegations of paragraph 41.
42. Admits the allegations of paragraph 42.
43. Admits the allegations of paragraph 43.
44. Answering paragraph 44, admits and alleges that SLN and Babcock & Wilcox

estimated the cost to complete their work under Phase 1 and Phase 2 of the Prime Contract, which latter estimate was called the "Definitive Estimate," and later the "re-baselined Definitive Target."

45. Answering paragraph 45, admits and alleges that "The Company shall compensate Contractor for actual costs reasonably incurred," which is a portion of § 8.1.1 of the Prime Contract, was one of many contractual provisions that bear on SLN's ability to recover costs allegedly incurred on the Project; alleges further that the re-baselined Definitive Target was neither a guaranteed nor a fixed amount.

46. Answering paragraph 46, admits and alleges that the Prime Contract included in Schedule E terms that governed the potential payment of a fee to SLN; alleges that these terms were relevant only to the computation of SLN's fee, if any, and did not qualify or override other provisions in the Prime Contract that govern cost recovery by SLN.

47. Answering paragraph 47, alleges that Article 11 and Schedule G of the Prime Contract impose a potential liability for liquidated damages on SLN, and speak for themselves.

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48. Answering paragraph 48, alleges that Babcock & Wilcox completed its work under the Subcontract at least 31 days late; alleges further that Xcel Energy is operating its Prairie Island power plant safely.

49. Answering paragraph 49, Xcel Energy states that it lacks detailed knowledge of the Subcontract, but understands that the Subcontract generally required Babcock & Wilcox to discharge the obligations of SLN under the Prime Contract as they related to construction or installation work on the Project.

50. Answering paragraph 50, Xcel Energy states that it lacks detailed knowledge of the Subcontract, and does not know what amounts have been paid by SLN to Babcock & Wilcox.

51. Answering paragraph 51, Xcel Energy states that it lacks detailed knowledge of the Subcontract, which does not govern Xcel Energy's rights herein.

52. Answering paragraph 52, Xcel Energy states that it lacks detailed knowledge of the Subcontract, which does not govern Xcel Energy's rights herein.

53. Answering paragraph 52, Xcel Energy states that it lacks detailed knowledge of the Subcontract, which does not govern Xcel Energy's rights herein.

54. Answering paragraph 54, Xcel Energy states that it lacks any direct knowledge of total amounts Babcock & Wilcox has billed under its Subcontract.

55. Answering paragraph 55, Xcel Energy admits and alleges that SLN has submitted certain Babcock & Wilcox invoices as part of SLN's billings; alleges that it has no knowledge as to whether those invoices represent the total costs for which Babcock & Wilcox has invoiced SLN.

56. Denies the allegations of paragraph 56; alleges that SLN submitted no Babcock & Wilcox invoices to Xcel Energy during the months January, February, March and April of 2014,

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upon information and belief because SLN considered Babcock & Wilcox's billings to be unreasonable and improper.

57. Answering paragraph 57, Xcel Energy alleges that it has no knowledge as to amounts SLN has paid to Babcock & Wilcox.

58. Xcel Energy lacks information sufficient to allow it to respond to the allegations of paragraph 58, which are directed toward SLN.

59. The allegations of paragraph 59 are directed toward SLN and require no response from Xcel Energy.

60. The allegations of paragraph 60 are directed toward SLN and require no response from Xcel Energy.

61. Denies the allegations of paragraph 61.

62. Answering paragraph 62, Xcel Energy alleges that it has no obligation to make further payments to SLN for amounts invoiced by Babcock & Wilcox for numerous reasons under the Prime Contract, including § 8.1.1 of the Prime Contract.

63. Answering paragraph 63, Xcel Energy states that it lacks detailed knowledge of the Subcontract, and alleges that "unreasonable" is not a defined term in the Prime Contract.

64. Denies the allegations of paragraph 64.

65. Answering paragraph 65, Xcel Energy alleges that it asserts a proposition of law that does not require a response; nevertheless, Xcel Energy denies the allegations of paragraph 65.

66. Denies the allegations of paragraph 66.

67. Denies the allegations of paragraph 67.

68. Denies the allegations of paragraph 68.

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69. Denies the allegations of paragraph 69.
70. Answering paragraph 70, Xcel Energy admits and alleges that it has assessed liquidated damages in the amount of \$3,052,500 because of SLN's failure to timely supply Milestone 17 work packages.
71. Denies the allegations of paragraph 71; alleges that the Prime Contract speaks for itself.
72. Answering paragraph 72, Xcel Energy states that it lacks information that would allow it to respond.
73. Denies the allegations of paragraph 73.
74. Admits the allegations of paragraph 74.
75. Answering paragraph 75, admits and alleges that some of SLN's Milestone 17 deliverables were submitted in an untimely fashion, including some that were submitted as late as June 20, 2013.
76. Admits the allegations of paragraph 76.
77. Admits the allegations of paragraph 77.
78. Denies the allegations of paragraph 78.
79. Denies the allegations of paragraph 79.
80. Denies the allegations of paragraph 80; specifically denies that Xcel Energy did not give SLN notice of delay prior to July 25, 2013.
81. Denies the allegations of paragraph 81.
82. Denies the allegations of paragraph 82; alleges that paragraph 82 mis-states the terms of the Prime Contract, which speaks for itself.
83. Denies the allegations of paragraph 83.

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84. Denies the allegations of paragraph 84.

85. Answering paragraph 85, admits and alleges that it has assessed liquidated damages in the amount of \$3,100,000 because of SLN's failure to achieve Substantial Completion according to the contractual schedule under the Prime Contract.

86. Answering paragraph 86, admits and alleges that under the Prime Contract, liquidated damages for failure to achieve Substantial Completion by the date required by the contractual schedule were \$100,000 per day; alleges that the contract speaks for itself with regard to the assessment of liquidated damages.

87. Answering paragraph 87, Xcel Energy alleges it lacks detailed knowledge of the Subcontract.

88. Answering paragraph 88, Xcel Energy alleges that SLN was at least 31 days late in achieving Substantial Completion.

89. Denies the allegations of paragraph 89.

90. Denies the allegations of paragraph 90; alleges that Xcel Energy has refuted all of the theories asserted in paragraph 90, with no response or rebuttal of any kind from SLN or Babcock & Wilcox.

91. Denies the allegations of paragraph 91.

92. Denies the allegations of paragraph 92.

93. Denies the allegations of paragraph 93.

94. Answering paragraph 94, admits and alleges that at least \$4,791,641 in schedule recovery costs have been invoiced by SLN, which are not recoverable costs under the terms of the Prime Contract.

95. Denies the allegations of paragraph 95.

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96. Denies the allegations of paragraph 96, and alleges that the Prime Contract speaks for itself.

97. Answering paragraph 97, admits and alleges that in general, but with many qualifications, SLN was entitled and required to control the means and methods of executing work on the Project; denies the remaining allegations of paragraph 97, and alleges that the Prime Contract speaks for itself.

98. Denies the allegations of paragraph 98.

99. Denies the allegations of paragraph 99.

100. Denies the allegations of paragraph 100.

101. Denies the allegations of paragraph 101.

102. Answering paragraph 102, Xcel Energy states that it lacks detailed information about the Subcontract and can neither admit nor deny those allegations.

103. Paragraph 103 requires no response.

104. Admits the allegations of paragraph 104.

105. Admits the allegations of paragraph 105.

106. Admits the allegations of paragraph 106.

107. Denies the allegations of paragraph 107.

108. Admits the allegations of paragraph 108.

109. Denies the allegations of paragraph 109.

110. Denies the allegations of paragraph 110.

111. Answering paragraph 111, alleges that it is without factual basis to either admit or deny the allegations of paragraph 111.

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112. Answering paragraph 112, alleges that it is without factual basis to either admit or deny the allegations of paragraph 112.

113. Denies the allegations of paragraph 113.

114. Denies the allegations of paragraph 114.

115. Denies the allegations of paragraph 115; alleges that any such foreclosure of Babcock & Wilcox's purported mechanic's lien is barred by federal law.

116. Denies the allegations of paragraph 116.

117. Answering paragraphs 117 through 136, alleges that those paragraphs are directed toward SLN rather than Xcel Energy, and do not require any response by Xcel Energy.

118. Denies the allegations of paragraph 137.

119. Paragraph 138 requires no response.

120. Admits the allegations of paragraph 139.

121. Admits the allegations of paragraph 140.

122. Denies the allegations of paragraph 141.

123. Answering paragraph 142, admits and alleges that Xcel Energy knew that Babcock & Wilcox provided services as a subcontractor to SLN; alleges that Xcel Energy's rights and obligations with regard to the Project are governed by its Prime Contract with SLN.

124. Denies the allegations of paragraph 143.

125. Paragraph 144 asserts a legal proposition that does not require a response.

126. Denies the allegations of paragraph 145.

127. Paragraph 146 requires no response.

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128. Answering paragraph 147, admits and alleges that the Prime Contract governs the rights and responsibilities of Xcel Energy and SLN and its subcontractors with regard to the Project.

129. Answering paragraph 148, Xcel Energy alleges that it lacks detailed knowledge of the Subcontract, but assumes that many requirements of the Prime Contract are incorporated by reference into the Subcontract.

130. Admits the allegations of paragraph 149.

131. Denies the allegations of paragraph 150.

132. Answering paragraph 151, denies that Babcock & Wilcox is entitled to any declaratory relief herein, including but not limited to subparagraphs a) through j), all of which are denied.

ADDITIONAL FACTUAL ALLEGATIONS

133. The Project at issue in this lawsuit involved the replacement of the steam generators in Unit 2 of the Prairie Island nuclear power plant. The steam generators in Unit 1 had been replaced in 2004; that project, carried out by different contractors, was completed successfully. Xcel Energy gave SLN access to records relating to the Unit 1 project, which provided a blueprint for successful execution of the Unit 2 Project that is the subject of this lawsuit.

134. When the Prime Contract with SLN was signed in 2009, SLN provided a Target Price Phase – Cost / Definitive Estimate in the amount of \$71,673,320.

135. In April 2013, shortly before construction began, SLN re-baselined its Target Price Phase – Cost / Definitive Estimate at \$89,349,844 in 2013 dollars.

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136. Babcock & Wilcox's pre-outage work on the Project began in approximately July 2013. Babcock & Wilcox failed to execute its pre-outage work in a timely manner, and provided a recovery plan in an attempt to catch up. Construction on the Project began in September 2013. SLN and its subcontractor Babcock & Wilcox almost immediately fell behind in their work because they failed to attain the level of productivity on which their schedule was based. They continued to lose ground against the schedule on virtually a daily basis.

137. On September 30, 2013, Xcel Energy requested that SLN furnish a Recovery Plan pursuant to § 4.19.4 of the Prime Contract, showing how SLN and its subcontractor Babcock & Wilcox would recover the time that had already been lost. SLN submitted an initial Recovery Plan, which was rejected as inadequate by Xcel Energy.

138. SLN and its subcontractor Babcock & Wilcox continued to lose time against the contractual schedule. On October 7, 2013, SLN and Babcock & Wilcox submitted a revised Recovery Plan. By that time their work was 112 hours behind schedule on the critical path, and their Recovery Plan did not set forth any means of recovering all of that schedule loss.

139. Under §§ 4.7.7, 4.19.1, 9.1, 23.3, 13.1 and other terms of the Prime Contract, SLN was required to meet the contractual schedule and achieve Substantial Completion by the date required under that schedule. If SLN and its subcontractor fell behind schedule, they were obligated by §§ 4.19.4, 4.19.5, 13.1, 13.9, 23.3 and other provisions of the Prime Contract to recover schedule at their own expense, without billing to Xcel Energy any schedule recovery costs.

140. SLN and its subcontractor Babcock & Wilcox failed to recover schedule as promised in their Recovery Plan dated October 7, 2013. Instead, as the Project proceeded they fell farther and farther behind schedule.

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141. All critical path delays encountered during the installation phase of the Project by SLN and Babcock & Wilcox were caused by those contractors' own actions and inactions, including but not limited to their breach of, among other provisions, §§ 4.4.1 and 12.1.1 of the Prime Contract. Section 4.4.1 provides:

Contractor Supervision. Contractor shall supervise and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with this Agreement.

Section 12.1.1 provides:

Standard of Work. The Work furnished and performed under this Agreement by Contractor or any Subcontractor shall be furnished and performed with due care, skill and diligence, in accordance with Prudent Industry Practice, in compliance with this Agreement and all Applicable Laws and free from defects in materials and workmanship.

142. In addition, on information and belief, Babcock & Wilcox made a conscious decision not to attempt to recover schedule, which would have required intensifying its construction efforts—adding manpower and equipment, and so on—at its own expense as required by the Prime Contract. Instead, on information and belief, Babcock & Wilcox made a conscious decision to allow the Project to be further delayed so that it would not incur recovery costs. By doing so, Babcock & Wilcox knowingly breached its Subcontract and caused SLN to breach its Prime Contract, in an exercise of bad faith.

143. Substantial Completion of the contractors' work was finally achieved at least 31 days late, on December 24, 2013, in violation of SLN's Prime Contract.

144. Article 13 of the Prime Contract required SLN to request a Change Order if it believed it had grounds for "[a]ny change in the scope of Work, the Agreement Price, the Work Schedule, payments, or other Agreement terms..." SLN never requested any Change Order extending the schedule for its work or increasing the amount of payments to which it was

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entitled, and such failure waives any claim for a time extension or for additional payments by SLN or any subcontractor of SLN.

145. SLN's and Babcock & Wilcox's unjustified delays in completing the Project caused substantial damages to Xcel Energy, which under the Prime Contract are compensated in the form of liquidated damages at the rate of \$100,000 per day.

146. The Prime Contract also required certain Milestone dates to be met and provided for liquidated damages if they were not met. SLN failed to meet Milestone 17 of Schedule G of the Prime Contract and as a result is liable to Xcel Energy for \$3,052,500 in liquidated damages.

147. SLN has billed Xcel Energy a total of approximately \$138,877,298 for Target Price Phase work, approximately \$37 million more than the Agreement Price for Phase 2 as of September 19, 2013. Xcel has paid all SLN invoices, including costs submitted on behalf of Babcock & Wilcox, that have been shown to be properly due under the Prime Contract.

148. All amounts that have been invoiced by SLN but not paid by Xcel Energy represent amounts withheld as liquidated damages, recovery plan expenses, and/or unreasonable costs that were incurred because of SLN's and Babcock & Wilcox's inefficiency, delays, and multiple breaches of contract.

149. In addition, specific terms of the Prime Contract provide that Xcel Energy is entitled to withhold any further payments under the circumstances of this case. Section 8.4.1 states in part:

Conditions of Payments; Withholdings; Setoffs. ... Anything in this Agreement to the contrary notwithstanding, Company (i) shall not be required to make any payment to Contractor if Contractor is in material breach of its obligations under this Agreement....

Further, § 8.4.5 provides:

Withholding to Protect Company From Loss. Anything in this Agreement to the

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contrary notwithstanding, Company may, without prejudice to any other rights Company may have, after issuing a Notice to Contractor, withhold all or any portion of any payment to such extent the Company has a reasonable basis for concluding it may sustain losses, costs, expenses, or damages for which Contractor is liable due to:

- (ii) claims filed against Company...by Persons for which Contractor has an indemnity obligation towards Company or Company Indemnitees under this Agreement...
- (x) Contractor's breach or other failure to fulfill and/or correct any of its other material obligations under this Agreement.

AFFIRMATIVE DEFENSES

- 150. Plaintiff's Complaint, wholly or in part, fails to state a claim upon which relief can be granted.
- 151. Plaintiff's claims are barred by plaintiff's material breaches of its Subcontract and by SLN's material breaches of the Prime Contract.
- 152. Plaintiff's claims are barred because it would be unjustly enriched if it were to obtain the recovery it seeks in this action.
- 153. Plaintiff's claim for mechanic's lien foreclosure is barred because plaintiff did not file its lien within 120 days of its last work on the Project as required by statute, and because it exercised bad faith in executing its Subcontract.
- 154. Plaintiff lacks standing to seek declaratory relief with regard to the Prime Contract.
- 155. Plaintiff's claims are barred, wholly or in part, by the doctrine of unclean hands.
- 156. Plaintiff's claims are barred, wholly or in part, by its lack of privity with Xcel Energy.
- 157. Plaintiff has waived and is estopped from asserting its claims.

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158. Plaintiff's claims are barred by the terms of the Prime Contract, including but not limited to §§ 4.4.1, 4.7.7, 4.19.1, 4.19.4, 4.19.5, 6.4, 8.1.1, 8.4.1, 8.4.5, 9.1, 11.2.4, 12.1.1, 13.1, 13.3, 13.9, 14.7 and 23.3, along with the corresponding provisions of the Subcontract.

159. Xcel Energy is entitled to offsets against any amounts found to be due to Babcock & Wilcox under the terms of the Prime Contract.

160. Plaintiff is prohibited from foreclosing its mechanic's lien by federal law, because it is not a licensed operator of a nuclear power plant.

161. Each and every allegation in Plaintiff's Complaint is denied unless expressly admitted or otherwise qualified herein.

COUNTERCLAIM

Xcel Energy for its Counterclaim against Babcock & Wilcox alleges as follows:

COUNT 1: EQUITABLE RELIEF

162. All of the allegations of paragraphs 1 through 161 are incorporated herein by reference.

163. Babcock & Wilcox has provided services in connection with the Project as a subcontractor, as alleged herein.

164. Babcock & Wilcox has submitted invoices for time and expenses for which it was not entitled to be reimbursed under the Prime Contract or under its Subcontract. As a result, Babcock & Wilcox has been paid amounts that exceed the value of its contributions to the Project and, on information and belief, its entitlement under its Subcontract.

165. It would be inequitable for Babcock & Wilcox to retain amounts which exceed the value of its contributions to the Project or its entitlement under its Subcontract.

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166. Xcel Energy is entitled to recover from Babcock & Wilcox that amount found by a court and jury to represent payments in excess of those to which Babcock & Wilcox is entitled by virtue of its contributions to the Project.

COUNT II: ACTION TO DETERMINE ADVERSE CLAIMS

167. All of the allegations of paragraphs 1 through 166 are incorporated herein by reference.

168. As alleged in its Complaint, Babcock & Wilcox has encumbered the property on which the Prairie Island Nuclear Power Plant is located by filing the mechanic's lien that is Exhibit A to the Complaint.

169. Said mechanic's lien is invalid because it was not timely filed pursuant to Minn. Stat. Chapter 514.

170. In the alternative, said lien is overstated because Babcock & Wilcox is owed nothing by SLN on its Subcontract, or is owed a lesser amount than the amount stated in the lien.

171. Plaintiff is, or may be, barred by federal law from foreclosing its lien on the Prairie Island facility.

172. Pursuant to Minn. Stat. § 559.01, Xcel Energy, as owner of the property on which Babcock & Wilcox's lien has been filed, is entitled to seek an order determining the validity of Babcock & Wilcox's lien, adjudicating the rights of the parties, and clearing title to the Prairie Island property.

COUNT III: SLANDER OF TITLE

173. All of the allegations of paragraphs 1 through 172 are incorporated herein by reference.

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174. Babcock & Wilcox has encumbered the property on which the Prairie Island Nuclear Power Plant is located by filing the mechanic's lien that is Exhibit A to the Complaint, and by filing a Notice of Lis Pendens stating that **"THIS LAWSUIT MAY AFFECT OR BRING INTO QUESTION TITLE TO REAL PROPERTY."**

175. Xcel Energy is the owner of that property (the "Property"), which is described as:
Prairie Island Nuclear Generating Plant, Unit 2, 1717 Wakonade Drive East,
Welch, MN 55089 located in Section 5, Township 113, Range 15, Goodhue
County, Minnesota

176. Babcock & Wilcox's claim of a lien interest in the Property and its resulting filings of the mechanic's lien and the Notice of Lis Pendens are false and malicious statements and in disparagement of Xcel Energy's title to the Property.

177. Babcock & Wilcox's claim of entitlement to a lien on the Property and its resulting filings of the mechanic's lien and the Notice of Lis Pendens are false and malicious statements because Babcock & Wilcox knows or has, with awareness of probable falsity and doubts as to the truth of its statements, recklessly disregarded the truth that its lien is invalid because it was not timely filed, that it is not owed the money claimed in its lien statement, and that federal law bars it from foreclosing on its purported lien.

178. Xcel Energy's title to the Property has been clouded and it has suffered damages, and will continue to suffer damages, as a direct result of plaintiff's slander of its title to the Property.

179. Xcel Energy hereby demands that Babcock & Wilcox remove its purported lien and the Notice of Lis Pendens from the Property.

WHEREFORE, Xcel Energy, Defendant and Counterclaim Plaintiff, prays judgment as follows:

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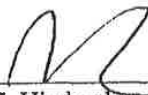
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1. That Babcock & Wilcox take nothing by its Complaint;
2. That Xcel Energy be awarded against Babcock & Wilcox a sum equal to the amount which a jury determines that it would be inequitable for Babcock & Wilcox to retain;
3. That the Court order Babcock & Wilcox's mechanic's lien and Notice of Lis Pendens released and discharged;
4. That Xcel Energy be awarded damages as determined by a jury for slander of title; and
5. That Xcel Energy be awarded its costs, disbursements and attorneys' fees against Babcock & Wilcox.

DATED: December 2, 2014

FAEGRE BAKER DANIELS LLP



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**ATTORNEYS FOR DEFENDANT
NORTHERN STATES POWER CO., DBA
XCEL ENERGY**

**PUBLIC DOCUMENT: TRADE SECRET INFORMATION EXCISED
- PUBLIC DATA -**

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Xcel Energy

Docket No.: E002/GR-13-868

Response To: Office of The Attorney General Information Request No. 639

Requestor: Ryan Barlow

Date Received: November 14, 2014

Question:

Reference: Goodhue County District Court Case 25-CV-14-2626

The Plaintiff in this matter is asserting that Xcel is liable for approximately \$46 million in non-payment for work related to installing the Prairie Island Unit 2 Replacement Steam Generator.

Explain the relationship of this alleged \$46 million liability to the \$285 million the Company requested for recovery in the 2012 rate case?

Are any costs related to the replacement steam generators included in the \$78.9 million that Xcel has requested recovery of for the Prairie Island EPU? If so, provide the total and jurisdictional amount included for rate recovery.

Response:

1. For the 2012 rate case ('13 test year), we included \$285 million as the forecasted budget amount for the total project cost. The forecast was as of May 2012 and as such included actual costs incurred as of March 2012. As we previously discussed in our response to information request MCC-245, on May 29, 2014, the forecasted total cost for the project (CWIP and AFUDC) was approximately \$274 million. As we further noted in our response to that information request we had not yet received all of the final invoices for the project.

[TRADE SECRET BEGINS

**PUBLIC DOCUMENT: TRADE SECRET INFORMATION EXCISED
- PUBLIC DATA -**

TRADE SECRET ENDS]

2. The Company objects to this information request as being untimely. This information request is not related to the complaint recently filed by Babcock and Wilcox, as it pertains to our request to recover the costs associated with the Prairie Island Unit 2 Steam Generator Replacement Project. Additionally, the Company has described the PI EPU project, its costs and the reasons we believe cost recovery is appropriate on this record through, in part, the pre-filed testimonies of Mr. O'Connor, Mr. McCall, Mr. Alders, Mr. Weatherby and Mr. Clark.

Notwithstanding our objection and without waiving our rights, there are no actual costs incurred for the Prairie Island Unit 2 steam generator replacement project included in the \$78.9 million of EPU costs.

Portions of this response have been marked as trade secret consistent with Minn. Stat. § 13.37(1)(b). This data is related to terms currently in dispute with our contractor. This information has independent economic value from not being generally known to, and not being readily ascertainable by other parties, who could obtain economic value from its disclosure or use. Thus, Xcel Energy maintains this information as a trade secret pursuant to Minn. Rule 7829.05000.

Preparer: John L. Walters
Title: Manager, Project Controls
Department: Nuclear
Telephone: 651-267-7232
Date: December 3, 2014

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Xcel Energy

Docket No.: E002/GR-13-868

Response To: Office of The Attorney General Information Request No. 640

Requestor: Ryan Barlow

Date Received: November 14, 2014

Question:

Reference: Goodhue County District Court Case 25-CV-14-2626

In Mr. McCall's Direct Testimony, he stated at page 9 that Xcel "concluded that an uprate could be achieved at Prairie Island by increasing the amount of heat produced in the reactor, which would in turn produce more steam from the steam generators." Provide the following information:

1. Was it necessary to replace the steam generators in order to complete the Prairie Island EPU? If so, explain.
2. Was it necessary to replace the steam generators as part of the Prairie Island license extension? If so, explain.
3. Explain how Xcel selected the steam generator models that were used for replacement. Provide all analysis used in making the decision. Additionally, indicate when Xcel made its decision.
4. Were the steam generators at Prairie Island replaced in a like-for-like fashion? If not, describe all differences between the old generators and the new generators.
 - a. In providing your answer, provide a cost estimate for both the generators that were used for replacement and generators that would have been like-for-like replacements.
5. How much did it cost to replace the steam generators at Prairie Island? In providing your answer, explain whether the cost of the steam generators was

attributed to the license extension or the EPU. Provide all justification for the accounting of the steam generator costs as either license extension or EPU.

- a. Could the Prairie Island license extension have been completed by using different steam generators or making modifications to existing steam generators?
- b. In providing your answer, provide a full accounting of any steam generator options that could have been used to complete the license extension. Specifically indicate the cost of any steam generator that could have been used to complete the license extension, and describe the difference in cost for the steam generators that were actually used for replacement.

Response:

The Company objects to this information request as being untimely. This information request is not related to the complaint recently filed by Babcock and Wilcox. The Company has described the PI EPU project, its costs and the reasons we believe cost recovery is appropriate on this record through, in part, the pre-filed testimonies of Company witnesses Mr. Timothy J. O'Connor, Mr. Scott McCall, Mr. James Alders, Mr. Scott Weatherby and Mr. Christopher Clark.

Notwithstanding our objection, the Prairie Island steam generators needed to be replaced regardless of the EPU based on their being at end of useful life. The Unit 1 generators were replaced in 2004 which was well before an EPU at Prairie Island was even under consideration. Likewise, the Unit 2 steam generators had to be replaced to support continued operations through the extended license period. The primary reason the Unit 2 steam generators were replaced several years after the Unit 1 generators was due to the fact that the prior Unit 2 generators lasted longer than any other steam generators in a U.S. nuclear power plant. Mr. O'Connor addresses this in his Direct Testimony. Please also see our response to OAG-639.

Preparer: John L. Walters
Title: Manager, Project Controls
Department: Nuclear
Telephone: 651-267-7232
Date: December 3, 2014

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Xcel Energy

Docket No.: E002/GR-13-868

Response To: Office of The Attorney General Information Request No. 641

Requestor: Ryan Barlow

Date Received: November 14, 2014

Question:

Reference: Goodhue County District Court Case 25-CV-14-2626

The Complaint filed in this case indicates at page 5 that “Xcel added work of its own to be performed” while Babcock & Wilcox was installing the steam generator. Explain the purpose and cost of all work that Xcel added to the outage, including the components that were added.

Response:

The Company objects to this information request as being untimely. This information request is not related to the complaint recently filed by Babcock and Wilcox as it pertains to our request to recover the costs for the Prairie Island Steam Generator Unit 2 replacement project.

Notwithstanding the foregoing objection and our right to subsequently raise such an objection, the Company disagrees with the statements presented in the Babcock and Wilcox Complaint for the reasons set forth in our Answer to the Complaint. Additionally, the Company’s scope work to which we believe Babcock & Wilcox is referring included other key capital project additions in containment, including the Reactor Coolant Pump Seal Re-Design Modification and Reactor Coolant Pump Motor Rewind discussed in Docket No. E002/GR-13-868, Exhibit (IJO-1), Schedule 9. The cost of this work was budgeted as separate stand-alone projects.

Preparer: John L. Walters
Title: Manager, Project Controls
Department: Nuclear
Telephone: 651-267-7232
Date: December 3, 2014

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Xcel Energy
Docket No.: E002/GR-13-868
Response To: Office of The Attorney General Information Request No. 642
Requestor: Ryan Barlow
Date Received: November 14, 2014

Question:

Reference: Goodhue County District Court Case 25-CV-14-2626

Provide the Contract between SNC-Lavalin Nuclear Inc. and Xcel.
Provide the Subcontract with Babcock & Wilcox Nuclear Energy, Inc.

Response:

The Company objects to this information request as being untimely. This information request is not related to the complaint recently filed by Babcock and Wilcox as it pertains to our request to recover the costs for the Prairie Island Steam Generator Unit 2 replacement project. The Company has described the PI Steam Generator Unit 2 replacement project, its costs and the reasons we believe cost recovery is appropriate on this record through, in part, the pre-filed testimonies of Mr. Timothy J. O'Connor and responses to several information requests on this topic.

Preparer: John L. Walters
Title: Manager, Project Controls
Department: Nuclear
Telephone: 651-267-7232
Date: December 3, 2014

- Non Public Document – Contains Trade Secret Data
 Public Document – Trade Secret Data Excised
 Public Document

Xcel Energy
Docket No.: E002/GR-13-868
Response To: Office of The Attorney General Information Request No. 643
Requestor: Ryan Barlow
Date Received: November 14, 2014

Question:

Reference: Goodhue County District Court Case 25-CV-14-2626

- (a) Provide an accounting for all work performed by and invoices received from Babcock & Wilcox Nuclear Energy, Inc. and SNC-Lavalin Nuclear Inc. In providing this information, specifically identify the date of any work or invoices and amounts paid on these invoices.
- (b) Additionally, describe with specificity what work was performed, and to what extent any of the work was for, for the purpose of the Prairie Island EPU.

Response:

- (a) The Company objects to this information request as being untimely. This information request is not related to the complaint recently filed by Babcock and Wilcox as it pertains to our request to recover the costs associated with the Prairie Island Unit 2 Steam Generator Replacement Project. The Company has described this project, its costs and the reasons we believe cost recovery is appropriate on this record through, in part, the pre-filed testimonies of Mr. Timothy J. O'Connor and several responses to information requests.
- (b) Please see our response to OAG-639.

Preparer: John L. Walters
Title: Manager, Project Controls
Department: Nuclear
Telephone: 651-267-7232
Date: December 3, 2014

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Xcel Energy
Docket No.: E002/GR-13-868
Response To: Office of The Attorney General Information Request No. 644
Requestor: Ryan Barlow
Date Received: November 14, 2014

Question:

Reference: Goodhue County District Court Case 25-CV-14-2626

- (a) Is the dispute between Xcel and Babcock & Wilcox Nuclear Energy, Inc. reflected at any point in this pending rate case?
- (b) If Xcel is found liable for any contractor disputes relating to Prairie Island, would Xcel seek to recover costs from ratepayers? Explain how Xcel would seek recovery.

Response:

- (a) No. As stated in our response to information requests DOC-1134 and MCC-245, we had not received all of the remaining invoices from our prime contractor SNC Lavalin as of early to mid-spring 2014. By the end of spring to early summer, we received a series of invoices which primarily included the [TRADE SECRET BEGINS TRADE SECRET ENDS] that is the subject of the above referenced court case. Due to our concerns over these invoices, we engaged in dispute resolution during this past summer and fall. After the dispute resolution efforts failed, the above-referenced complaint was filed in November 2014.
- (b) Yes, in the event the dispute resolution increases or decreases project costs beyond what we have already included in the pending rate case we will bring the change forward in our next rate proceeding.

In the event a resolution is reached prior to the acceptance of our compliance filing in this case, the Company notes that it has proposed a process to address

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changes in all capital plant additions for 2014 (including RSG and others) in the current rate case. With that said, we would not seek any amounts that increase the overall rate base requested for 2014.

Portions of this response have been marked as trade secret consistent with Minn. Stat. § 13.37(1)(b). This data is related to terms currently in dispute with our contractor. This information has independent economic value from not being generally known to, and not being readily ascertainable by other parties, who could obtain economic value from its disclosure or use. Thus, Xcel Energy maintains this information as a trade secret pursuant to Minn. Rule 7829.05000.

Preparer: John J. Walters / Lisa H. Perkett
Title: Manager, Project Controls / Director
Department: Nuclear / Capital Asset Accounting
Telephone: 651-267-7232 / 612-330-6950
Date: December 3, 2014

- Non Public Document – Contains Trade Secret Data
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Xcel Energy
Docket No.: E002/GR-13-868
Response To: Office of The Attorney General Information Request No. 645
Requestor: Ryan Barlow
Date Received: November 14, 2014

Question:

Reference: Goodhue County District Court Case 25-CV-14-2626

Does Xcel have any other disputes with vendors or contractors that could result in an increased cost for the Prairie Island Project? If so, identify the vendor or contractor, describe the dispute, and identify the amounts in question.

Response:

Xcel Energy is not aware of any other disputes outside the scope of the allegations set forth in the Babcock & Wilcox Complaint.

Preparer: John L. Walters
Title: Manager, Project Controls
Department: Nuclear
Telephone: 651-267-7232
Date: December 3, 2014

PUBLIC DOCUMENT
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Xcel Energy
Docket No.: E002/GR-13-868
Response To: Office of Attorney General Information Request No. 646
Requestor: Ryan Barlow
Date Received: December 11, 2014

Question:

Reference: Goodhue County District Court Case 25-CV-14-2626, OAG IR No. 639.

In its response to OAG IR 639, Xcel indicated that **[TRADE SECRET BEGINS**

TRADE SECRET ENDS].

Provide the following information:

1. Describe how Xcel has accounted for **[TRADE SECRET BEGINS**

TRADE SECRET ENDS]

2. **[TRADE SECRET BEGINS**

TRADE SECRET ENDS]

3. Has Xcel paid any portion of the \$46 million to Babcock & Wilcox?
4. Has Xcel recorded a contingency reserve in relation to Babcock & Wilcox?

**PUBLIC DOCUMENT
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5. Explain if Xcel [TRADE SECRET BEGINS

TRADE SECRET ENDS]

6. Identify the GAAP accounting standards referred to in the response to OAG IR 639.

7. Is the [TRADE SECRET BEGINS

**TRADE
SECRET ENDS]**

8. If Xcel has not paid any portion of the [TRADE SECRET BEGINS

**TRADE SECRET
ENDS].**

Response:

1. Please see our response to OAG IR 639 for a discussion of [TRADE SECRET BEGINS

TRADE SECRET ENDS].

2. [TRADE SECRET BEGINS

TRADE SECRET ENDS]

3. No.

4. No.

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TRADE SECRET INFORMATION EXCISED—PUBLIC DATA**

5. No. [TRADE SECRET BEGINS

SECRET ENDS]

TRADE

6. OAG 639 should have referenced [TRADE SECRET BEGINS

TRADE SECRET ENDS]

7. The amounts in rate base for the test year are a forecast that was developed for the rate case. As discussed in our response to OAG IR 639 [TRADE
SECRET BEGINS

SECRET ENDS]

TRADE

b. No. AFUDC was discontinued on the project when it was placed in service in December 2013.

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8. As noted in 7b, no AFUDC has accrued on the project since the asset was placed in-service in December 2013.

The Company has described this project, its costs, and the reasons we believe cost recovery is appropriate on this record through, in part, the pre-filed testimonies of Mr. Timothy J. O'Connor and several responses to information requests. **[TRADE SECRET BEGINS**

TRADE SECRET ENDS]

Portions of this response have been marked as trade secret consistent with Minn. Stat. § 13.37(1)(b). This data is related to terms currently in dispute with our contractor. This information has independent economic value from not being generally known to, and not being readily ascertainable by other parties, who could obtain economic value from its disclosure or use. Thus, Xcel Energy maintains this information as a trade secret pursuant to Minn. Rule 7829.05000.

Preparer: Scott L. Weatherby and Lisa H. Perkett
Title: VP, Nuclear Finance/Planning and Director, Capital Asset Accounting
Department: Nuclear Finance and Capital Asset Accounting
Telephone: 612-330-7643 and 612-330-6950
Date: January 9, 2015

STATE OF MINNESOTA
COUNTY OF GOODHUE

DISTRICT COURT
FIRST JUDICIAL DISTRICT

Babcock & Wilcox Nuclear Energy, Inc.,
Plaintiff,

Case Type: Other Contracts/Mech. Lien
Case File No. 25-CV-14-2626

v.

**REPLY TO COUNTERCLAIM
OF NORTHERN STATES POWER CO.
dba XCEL ENERGY**

Northern States Power Co., dba Xcel Energy
and SNC-Lavalin Nuclear (USA) Inc.,
Defendants.

Plaintiff Babcock & Wilcox Nuclear Energy, Inc. ("BWNE") for its Reply to the Counterclaim of Defendant Northern States Power Co., dba Xcel Energy ("Xcel"), as set forth in paragraphs 162-179 of Xcel's Answer and Counterclaim ("Counterclaim"), states and alleges:

1. Except as specifically admitted or otherwise expressly answered, BWNE denies each and every allegation.

2. With respect to Xcel's "Additional Factual Allegations" (paragraphs 133-149), BWNE admits only that: (a) the Project at issue in this lawsuit involved replacement of the steam generators in Unit 2 of the Prairie Island nuclear power plant; (b) the steam generators in Unit 1 were replaced by contractors other than BWNE and SNC-Lavalin Nuclear (USA) Inc. ("SLN"); (c) the Target Price Phase – Cost / Definitive Estimate initially negotiated and agreed between SLN and Xcel was \$71,673,320; (d) on or about September 30, 2013, Xcel requested a recovery plan from SLN that Xcel subsequently rejected; (e) on or about October 7, 2013, SLN submitted a revised recovery plan; (f) the provisions of the Prime Contract speak for themselves, and Xcel has not fairly or completely quoted all relevant Prime Contract provisions; and (g)

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DEC 26 2014

By Yvonne J. Black Deputy
Court Administrator

Substantial Completion was achieved on December 24, 2013. BWNE denies all other allegations in paragraphs 133-149.

3. As to paragraph 162, in which Xcel purports to indiscriminately incorporate all paragraphs of its Answer, BWNE likewise incorporates all paragraphs of its Complaint to which that Answer responded.

4. BWNE admits paragraph 163.

5. BWNE denies paragraphs 164, 165 and 166.

6. As to paragraph 167, BWNE incorporates its responses above.

7. BWNE admits paragraph 168.

8. BWNE denies paragraphs 169, 170, 171 and 172.

9. As to paragraph 173, BWNE incorporates its responses above.

10. BWNE admits paragraphs 174 and 175.

11. BWNE denies paragraphs 176, 177 and 178.

12. Paragraph 179 of Xcel's Answer is a demand and not an allegation and does not require a response. In any event, BWNE denies any obligation to remove its lien or its Notice of Lis Pendens.

AFFIRMATIVE DEFENSES

13. Xcel's Counterclaim fails, wholly or in part, to state claims upon which relief can be granted.

14. Xcel's Counterclaim is barred, in whole or in part, by its breaches of the Prime Contract and its unjustified interference with BWNE's contract with SLN.

15. Xcel's Counterclaim is barred, in whole or in part, by the equitable doctrines of unclean hands, laches, waiver and/or estoppel.

16. Xcel's Counterclaim is barred, in whole or in part, by the equitable doctrine of unjust enrichment, as Xcel seeks to retain, utilize and profit from BWNE's work without paying for that work. Upon information and belief, Xcel also seeks to avoid paying for BWNE's work despite seeking through testimony to state agencies recovery of the costs of that work from Minnesota and Wisconsin customers through increased rates.

WHEREFORE, BWNE respectfully requests judgment in favor of BWNE and against Xcel's Counterclaim as follows:

1. Awarding Xcel nothing on its Counterclaim,
2. Dismissing Xcel's Counterclaim with prejudice in its entirety;
3. Awarding BWNE its costs and disbursements herein, including reasonable attorneys' fees; and
4. Awarding such further relief as the Court deems just.

FABYANSKE, WESTRA, HART & THOMSON, P.A.

Dated: December 22, 2014

/s Jeffrey Wieland
Dean B. Thomson (#141045)
M.T. Fabyanske (#28022)
Thomas J. Vollbrecht (#17886X)
Jeffrey A. Wieland (#387918)
333 South Seventh Street, Suite 2600
Minneapolis, MN 55402
(612) 359-7600 (P)
(612) 359-7605 (F)
ATTORNEYS FOR PLAINTIFF

ACKNOWLEDGMENT

I acknowledge that costs, disbursements and reasonable attorney and witness fees may be awarded under Minn. Stat. § 549.211, to the party against whom the allegations in this pleading are asserted.

/s Jeffrey Wieland

STATE OF MINNESOTA
COUNTY OF GOODHUE

DISTRICT COURT
FIRST JUDICIAL DISTRICT

BABCOCK & WILCOX NUCLEAR
ENERGY, INC.,

CASE TYPE: OTHER CONTRACTS/
MECHANICS' LIEN

Plaintiff

CASE FILE NO. 25-CV-14-2626

v.

SNC-LAVALIN NUCLEAR (USA) INC. and
NORTHERN STATES POWER CO., dba
XCEL ENERGY,

**ANSWER, COUNTERCLAIMS AND
CROSSCLAIMS OF SNC LAVALIN
NUCLEAR (USA) INC.**

Defendants.

Date Case Filed: November 12, 2014

Defendant SNC Lavalin Nuclear (USA), Inc. ("SLN") for its Answer to the numbered paragraphs of the Complaint of Babcock & Wilcox Nuclear Energy, Inc. ("Babcock"), Counterclaims against Babcock, and Crossclaims against Northern States Power Co., d/b/a Xcel Energy ("Xcel") alleges as follows:

OVERVIEW OF THE DISPUTE AND BACKGROUND ALLEGATIONS

The Project

1. In response to Paragraph 1, SLN admits that it entered into an agreement ("Prime Contract") with Xcel dated December 29, 2009; admits that SLN retained some Project engineering work but subcontracted most of the installation work to Babcock through a subcontract ("Subcontract") executed on or about December 30, 2009; and admits that SLN and Babcock were considered "Employers" under the referenced labor agreement while performing Project work.

Filed
JAN - 5 2015
By Xavier J. Black Deputy
Court Administrator

2. In response to Paragraph 2, SLN admits that Babcock has generally explained what a steam generator is, and how it functions in a nuclear power plant.

3. Admitted.

4. The first sentence of Paragraph 4 is admitted. Upon information and belief, the second sentence is admitted.

5. Admitted.

6. Admitted.

7. Paragraph 7 does not require a response from SLN, but to the extent a response is required, SLN admits that Babcock has presented two (2) photos which purport to be photos of the "work in process", but is without information or knowledge sufficient to form a belief as to when those photos were actually taken."

8. Admitted.

9. Admitted.

The Project Contract's Fixed and Target Prices

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

Xcel Adds Its Own Work

14. Admitted.

15. Admitted.

16. Admitted.

The Project Schedule

- 17. Admitted.
- 18. Admitted.
- 19. Admitted.
- 20. Admitted.

BWNE's Invoices for Work Performed

21. In response to Paragraph 21, SLN admits that Babcock achieved substantial completion of its Project Work on or before December 24, 2013, and that the two new steam generators that it installed in Unit 2 are generating power without issue. SLN admits the allegation that Babcock delivered to SLN invoices totaling \$116,139,420 for Project work. With respect to the final sentence of Paragraph 21, SLN states that in some instances, invoices that were initially submitted by Babcock lacked appropriate backup or were in other instances deficient. In those instances, SLN requested additional review of or support for the invoices prior to incorporating the Babcock invoice into its own invoice package to Xcel, and at the point SLN ultimately included the Babcock materials as part of its invoicing to Xcel, SLN believed that the invoiced amounts were owed to it by Xcel. All allegations of Paragraph 21 not specifically admitted herein are denied.

22. In response to Paragraph 22, SLN states that in some instances, invoices that were initially submitted by Babcock lacked appropriate backup and/or were in some other manner deficient. In those instances, SLN requested additional review of or support for the invoices prior to incorporating the Babcock invoice into its own invoice package to Xcel, and at the point SLN ultimately included the Babcock materials as part of its invoicing to Xcel, SLN believed that the

invoiced amounts were owed to it by Xcel. All allegations of Paragraph 22 not specifically admitted herein are denied.

Xcel's Refusal and Failure to Pay for Work Performed

23. Admitted.

24. In response to Paragraph 24, SLN admits that Xcel has claimed, among other things, that the unpaid amounts were not reasonably incurred and therefore not recoverable under the Prime Contract. SLN is without knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 24, although SLN is in possession of documents that are consistent with Babcock's allegations.

Summary of Claims

25. Admitted.

26. In response to Paragraph 26, SLN admits that Xcel has failed and refused to pay the amounts identified by Babcock, and that Xcel's withholdings are not appropriate. In further response, SLN admits that Babcock has generally summarized Xcel's claimed bases for withholding payments, and why those claimed bases are without merit, and that Babcock has done so accurately.

27. In response to Paragraph 27, SLN admits that there is a Minnesota statute that addresses the situations in which a subcontractor such as Babcock is entitled to recover interest at 18% plus attorneys' fees. To the extent that Babcock is suggesting that it can recover the interest and fees from SLN absent SLN's ability to pass through recovery of those sums to Xcel, Paragraph 27 is denied. All allegations of Paragraph 27 not specifically admitted herein are denied.

28. SLN is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 28, although SLN is in possession of documents that are consistent with Babcock's allegations.

29. SLN is without knowledge or information sufficient to form a belief regarding the statements attributed to Mr. Sparby, although SLN is in possession of documents that are consistent with Babcock's allegations. In further response to Paragraph 29, SLN admits that the majority of the Project work was performed pursuant to target pricing, and that the target price in no way served to cap the amounts that SLN could bill to Xcel under the Prime Contract.

PARTIES

30. Admitted.

31. Upon information and belief, admitted.

32. Upon information and belief, admitted.

33. Upon information and belief, admitted.

34. Admitted.

35. Admitted with respect to SLN's registration status with the Minnesota Secretary of State as of the date the case was filed, but denied with respect to SLN's present registration status.

36. Admitted.

37. Upon information and belief, admitted.

CHOICE OF LAW, JURISDICTION, AND VENUE

38. Admitted.

39. Admitted.

40. Admitted.

41. Admitted.

42. Admitted.

ADDITIONAL FACTUAL ALLEGATIONS

43. Admitted.

44. In response to Paragraph 44, SLN admits that the Prime Contract included what was defined as a “Definitive Estimate”, and that it also contemplated a process of re-baselining that would result in a “Definitive Target”, and that this process did in fact occur. In further response to Paragraph 44, SLN admits that the “Definitive Estimate” did result from a process of estimating the cost to perform a defined scope of work. All allegations of Paragraph 44 not specifically admitted herein are denied.

45. Admitted.

46. Admitted.

47. Admitted that the liquidated damages set forth in the Prime Contract define and limit the monetary damages available to Xcel for late completion of the Project, and that the Prime Contract spells out specifically the liquidated damages available to Xcel for delays in Substantial Completion and the achievement of Milestone 17.

48. Admitted, subject to the following qualification: SLN states that its response is as of the date of this Answer, and is not intended to suggest that Babcock is released from any ongoing warranty obligations. To the extent that such warranty obligations remain, Babcock has continuing obligations, and so may not have “completed its work” under the Subcontract. To be clear, SLN admits only that Babcock has “completed its work” as of the date of this Answer.

49. Admitted.

50. In response to Paragraph 50, SLN admits that Article 2.2 of Appendix C of the Subcontract states that “Payments for the Target Price phase costs will be as incurred.” In further response to Paragraph 50, SLN states that other provisions of the Subcontract bind Babcock to

the terms of the Prime Contract. SLN further states that Article 21 of the Subcontract makes clear that (with a single exception not applicable here) SLN has no obligation to make payments to Xcel until and unless SLN receives the corresponding payment from Xcel; to date, Xcel has not paid SLN the amounts claimed by Babcock in this lawsuit, and so SLN is under no obligation to make any payments to Babcock.

51. Admitted.

52. SLN understands the phrase “Subcontract Target Price” to refer to the target price as contained in the Subcontract, and so Paragraph 52 is denied, as the “Target Price Phase—Cost” in the “Payment Schedule” appendix to the Subcontract shows \$53,258,651 and the “Target Price Phase—Fee” in that document shows \$4,591,498.

53. Denied, based on the response to Paragraph 52. In further response to Paragraph 53, SLN incorporates by reference its response to Paragraph 51 of the Complaint.

54. Admitted.

55. In response to Paragraph 55, SLN states that in some instances, invoices that were initially submitted by Babcock lacked appropriate backup and/or were in some other manner deficient. In those instances, SLN requested additional review of or support for the invoices prior to incorporating the Babcock invoice into its own invoice package to Xcel, and at the point SLN ultimately included the Babcock materials as part of its invoicing to Xcel, SLN believed that the invoiced amounts were owed to it by Xcel. All allegations of Paragraph 55 not specifically admitted herein are denied.

56. Admitted, subject to the following qualification: SLN states that in some instances, invoices that were initially submitted by Babcock lacked appropriate backup and/or were in some other manner deficient. In those instances, SLN requested additional review of or

support for the invoices prior to incorporating the Babcock invoice into its own invoice package to Xcel, and at the point SLN ultimately included the Babcock materials as part of its invoicing to Xcel, SLN believed that the invoiced amounts were owed to it by Xcel. All allegations of Paragraph 56 not specifically admitted herein are denied.

57. Admitted.

58. Denied.

59. Denied.

60. In response to Paragraph 60, SLN admits that there is a Minnesota statute that addresses the situations in which a subcontractor such as Babcock is entitled to recover interest at 18% plus attorneys' fees. To the extent that Babcock is suggesting that it can recover the interest and fees from SLN absent SLN's ability to pass through recovery of those sums to Xcel, Paragraph 60 is denied. All allegations of Paragraph 60 not specifically admitted herein are denied.

61. Admitted.

62. Admitted.

63. Admitted.

64. Admitted.

65. In response to Paragraph 65, SLN states that Babcock is advancing a legal proposition that does not require a response from SLN.

66. Admitted.

67. In response to Paragraph 67, SLN states that it is without knowledge or information sufficient to form a belief as to the *generalized* allegation that Babcock did not "incur any unreasonable costs as defined by the common law or as defined by the Prime

Contract or Subcontract” (bold added for emphasis), but admits that to the best of its knowledge, the invoices that SLN submitted to Xcel did not contain an costs from Babcock that SLN believed to be unreasonable.

68. Admitted.

69. In response to Paragraph 69, SLN states that it is without knowledge or information sufficient to form a belief as to the *generalized* allegation that Xcel’s refusal to pay “costs either within or in excess of the target price is imprudent and unreasonable and a bad faith attempt to obtain an unjustified discount based upon the financial pain caused by improperly withholding substantial monies due and owed under the Prime Contract”, but admits that at the very least, Xcel’s refusal to pay the amounts invoiced by SLN amounts to a breach of the Prime Contract. Further, to the extent that Paragraph 69 is intended to refer to the withholding on account of Milestone 17 liquidated, it is admitted.

70. Admitted, but SLN denies that there is any basis whatsoever to withhold any amounts on account of the Milestone 17 issue.

71. Admitted.

72. Admitted.

73. Admitted.

74. Admitted.

75. Admitted.

76. Admitted.

77. Admitted.

78. Admitted.

79. Admitted.

80. In response to Paragraph 80, SLN admits that there is no contractual basis for the assessment of Milestone 17 liquidated damages by Xcel, and that such an assessment amounts to a breach of the Prime Contract by Xcel. SLN denies Paragraph 80 to the extent that Xcel's April 26, 2013 letter number. SC-XEND-4235 can be interpreted to be inconsistent with the allegations of Paragraph 80.

81. In response to Paragraph 81, SLN admits that there is no contractual basis for the assessment of Milestone 17 liquidated damages by Xcel, and that such an assessment amounts to a breach of the Prime Contract by Xcel. In further response to Paragraph 81, admitted.

82. In response to Paragraph 82, SLN admits that there is no contractual basis for the assessment of Milestone 17 liquidated damages by Xcel, and that such an assessment amounts to a breach of the Prime Contract by Xcel. In further response to Paragraph 82, admitted.

83. In response to Paragraph 83, SLN admits that there is no contractual basis for the assessment of Milestone 17 liquidated damages by Xcel, and that such an assessment amounts to a breach of the Prime Contract by Xcel. In further response to Paragraph 83, admitted.

84. Admitted.

85. Admitted, but SLN denies that there is any basis whatsoever to withhold any amounts on account of Substantial Completion liquidated damages.

86. Admitted.

87. Admitted.

88. Admitted, but SLN denies that there is any basis whatsoever to withhold any amounts on account of Substantial Completion liquidated damages.

89. Admitted.

90. Admitted.

91. In response to Paragraph 91, SLN states that it is without knowledge or information sufficient to form a belief as to the allegation that Xcel's withholding of Substantial Completion liquidated damages was "imprudent, improper...and in bad faith" but admits that the withholding, at the very least, amounts to a breach of the Prime Contract.

92. Admitted.

93. Paragraph 93 constitutes a legal conclusion, and thus no response is required from SLN. To the extent a response is required, admitted.

94. Admitted that Xcel is refusing to pay certain sums invoiced by Babcock (through SLN) because Xcel claims that these are non-compensable recovery costs, but SLN denies that there is any basis whatsoever for Xcel to withhold these sums.

95. Admitted.

96. Admitted.

97. Admitted.

98. In response to Paragraph 98, SLN states that it is without knowledge or information sufficient to form a belief as to the allegation that Xcel's actions was "particularly unreasonable," but admits that the failure to pay actual costs is a breach of the Prime Contract by Xcel and that Xcel caused the need for at least some (if not all) of the schedule recovery for the Project.

99. In response to Paragraph 99, SLN states that it is without knowledge or information sufficient to form a belief as to the allegation that Xcel's withholding of the "2,850,000 was "imprudent, improper...and in bad faith" but admits that the withholding, at the very least, amounts to a breach of the Prime Contract.

100. Admitted.

101. In response to Paragraph 101, SLN admits that's Xcel's withholding of the amounts referenced in Paragraph 100 are improper and constitute a breach of the Prime Contract. At present, SLN is without information as to whether the withholding was "imprudent" or "in bad faith."

102. Denied.

COUNT I

Mechanic's Lien Foreclosure

103. Paragraph 103 requires no response from SLN.

104. Admitted.

~~105. Admitted.~~

106. Admitted.

107. Admitted.

108. Admitted.

109. SLN is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 109.

110. Admitted.

111. SLN is without knowledge or information sufficient to form a belief as to the allegations of Paragraph 111, but admits that the lien is for a lesser amount than the amount being claimed by Babcock in Counts II through V.

112. Admitted.

113. Admitted.

114. Admitted.

115. Admitted.

116. Admitted.

COUNT II

Breach of Contract

117. Paragraph 117 requires no response from SLN

118. Admitted.

119. Admitted, subject to the following qualification: SLN states that its response is as of the date of this Answer, and is not intended to suggest that Babcock is released from any ongoing warranty obligations. To the extent that such warranty obligations remain, Babcock has continuing obligations, and so may not have “fully performed” under the Subcontract. To be clear, SLN admits only that Babcock has “fully performed” as of the date of this Answer.

120. In response to Paragraph 120, SLN admits that the Subcontract contains multiple provisions regarding the payment obligations of SLN to Babcock, including, but not limited to, conditions precedent to SLN’s obligations to make payments. In further response to Paragraph 120, SLN states that other provisions of the Subcontract bind Babcock to the terms of the Prime Contract, and that the Subcontract speaks for itself. SLN further states that Article 21 of the Subcontract makes clear that (with a single exception not applicable here) SLN has no obligation to make payments to Babcock until and unless SLN receives the corresponding payment from Xcel; to date, Xcel has not paid SLN the amounts claimed by Babcock in this lawsuit, and so SLN is under no obligation to make any payments to Babcock. All allegations of Paragraph 120 not specifically admitted herein are denied.

121. In response to Paragraph 121, SLN admits that Babcock submitted invoices and also inquired as to the payment status of those invoices. All allegations of Paragraph 121 not specifically admitted herein are denied.

122. In response to Paragraph 122, SLN states that in some instances, invoices that were initially submitted by Babcock lacked appropriate backup and/or were in some other

manner deficient. In those instances, SLN requested additional review of or support for the invoices prior to incorporating the Babcock invoice into its own invoice package to Xcel, and at the point SLN ultimately included the Babcock materials as part of its invoicing to Xcel, SLN believed that the invoiced amounts were owed to it by Xcel. All allegations of Paragraph 122 not specifically admitted herein are denied.

123. Admitted.

124. Admitted.

125. Denied.

126. In response to Paragraph 126, SLN admits that Babcock alleges that it has been damaged. However, in Paragraph 125, Babcock contends that SLN has breached the Subcontract, which SLN denied. Since SLN understands the damages alleged in Paragraph 126 to flow from the breach alleged in Paragraph 125, and given SLN's denial of Paragraph 125, Paragraph 126 is denied.

127. Denied for the reasons stated in the answer to Paragraph 126.

128. Denied.

COUNT III

Violation of Minn. Stat. § 337.10, Subd. 3

129. Paragraph 129 requires no response from SLN.

130. Admitted.

131. Admitted.

132. Admitted, subject to the following qualification: SLN states that in some instances, invoices that were initially submitted by Babcock lacked appropriate backup and/or were in some other manner deficient. In those instances, SLN requested additional review of or support for the invoices prior to incorporating the Babcock invoice into its own invoice package

to Xcel, and at the point SLN ultimately included the Babcock materials as part of its invoicing to Xcel, SLN believed that the invoiced amounts were owed to it by Xcel. All allegations of Paragraph 132 not specifically admitted herein are denied.

133. Admitted, subject to the following qualification: SLN states that in some instances, invoices that were initially submitted by Babcock lacked appropriate backup and/or were in some other manner deficient. In those instances, SLN requested additional review of or support for the invoices prior to incorporating the Babcock invoice into its own invoice package to Xcel, and at the point SLN ultimately included the Babcock materials as part of its invoicing to Xcel, SLN believed that the invoiced amounts were owed to it by Xcel. All allegations of Paragraph 133 not specifically admitted herein are denied.

134. In response to Paragraph 134, SLN admits that it has not paid Babcock invoices in the amount of \$45,387,264, and states that the Subcontract contains multiple provisions regarding the payment obligations of SLN to Babcock, including, but not limited to, conditions precedent to SLN's obligations to make payments. In further response to Paragraph 134, SLN states that other provisions of the Subcontract bind Babcock to the terms of the Prime Contract. SLN further states that Article 21 of the Subcontract makes clear that (with a single exception not applicable here) SLN has no obligation to make payments to Babcock until and unless SLN receives the corresponding payment from Xcel; to date, Xcel has not paid SLN the amounts claimed by Babcock in this lawsuit, and so SLN is under no obligation to make any payments to Babcock. All allegations of Paragraph 134 not specifically admitted herein are denied.

135. Denied.

136. Denied.

137. Admitted.

COUNT IV

Unjust Enrichment

- 138. Paragraph 138 requires no response from SLN.
- 139. Paragraph 139 is not directed towards SLN, and so requires no response by SLN.
- 140. Paragraph 140 is not directed towards SLN, and so requires no response by SLN.
- 141. Paragraph 141 is not directed towards SLN, and so requires no response by SLN.
- 142. Paragraph 142 is not directed towards SLN, and so requires no response by SLN.
- 143. Paragraph 143 is not directed towards SLN, and so requires no response by SLN.
- 144. Paragraph 144 is not directed towards SLN, and so requires no response by SLN.
- 145. Paragraph 145 is not directed towards SLN, and so requires no response by SLN.

COUNT V

Declaratory Judgment

- 146. Paragraph 146 requires no response from SLN.
- 147. Paragraph 147 is not directed towards SLN, and so requires no response by SLN.
- 148. Paragraph 148 is not directed towards SLN, and so requires no response by SLN.
- 149. Paragraph 149 is not directed towards SLN, and so requires no response by SLN.
- 150. Paragraph 150 is not directed towards SLN, and so requires no response by SLN.
- 151. Paragraph 151 is not directed towards SLN, and so requires no response by SLN.

AFFIRMATIVE DEFENSES

152. Babcock's Complaint, wholly or in part, fails to state a claim upon which relief can be granted.

153. Xcel has denied that Babcock is entitled to any additional sums, and in fact contends that Babcock has been overpaid. Among other things, Xcel argues that Babcock seeks to recover costs that were not reasonably incurred and/or that were for schedule recovery, and

that this is an absolute defense to Babcock's contention that it is entitled to be paid any additional funds. To the extent Xcel is successful in proving up its contentions, SLN has the same defense to making any further payments to Babcock.

154. Xcel has denied that Babcock is entitled to any additional sums, and in fact contends that Babcock has been overpaid. Among other things, Xcel argues that any money that would otherwise be due to Babcock is essentially offset by Xcel's assessment of substantial completion liquidated damages, and its assessment of Milestone 17 liquidated damages. To the extent Xcel is successful in proving up its contentions, SLN has the same defense to making any further payments to Babcock.

155. Babcock may not recover from SLN because the amounts claimed from SLN by Babcock have not been paid to SLN by Xcel, and receipt of that money by SLN from Xcel is an absolute condition precedent to SLN's obligation to make payment to Babcock.

156. Count III for "Violation of Minn. Stat. Section 337.10 Subd. 3" is barred, because (as Babcock acknowledges elsewhere in its Complaint) Xcel has not made payment to SLN, and the referenced Section will not apply until and unless Xcel actually makes payment to SLN and SLN thereafter violates that Section. By Babcock's admission, that has not occurred.

157. Contemporaneous with the filing of this Answer, SLN is asserting cross-claims against Xcel. To the extent that Xcel is successful in defending against SLN's claims against it, SLN must also be successful in defending against Babcock's claims against SLN.

158. Included within the "Schedule Recovery Costs" (Complaint, Paragraph 26.a) rejected by Xcel is a line item of cost incurred by SLN on account of its employee Michael Gray, in the amount of \$72,150.09 plus an additional \$32,573.57, or \$104,723.66. To the extent that Xcel is justified in withholding payment of the Schedule Recovery Costs (which is denied by

SLN), and in particular, the \$104,723.66, SLN is entitled to recover such sum from Babcock, and SLN asserts such claim by way of setoff from Babcock, again, to the extent SLN is unable to recover that money from Xcel. Babcock was put on notice of this claim in SLN's letter of January 17, 2014.

COUNTERCLAIM AGAINST BABCOCK & WILCOX

For its Counterclaim against Babcock & Wilcox, SNC alleges the following:

COUNT I: RETURN OF OVERPAYMENTS

159. Paragraphs 1 through 158 are incorporated herein by reference.

160. Xcel has filed a Counterclaim against Babcock, Count I of which is entitled "Equitable Relief". In Count I, Xcel contends that "Babcock has been paid amounts that exceed the value of its contributions to the Project and, on information and belief, its entitlement under its Subcontract" (Paragraph 164), and that it "would be inequitable for Babcock & Wilcox to retain amounts which exceed the value of its contributions to the Project or its entitlement under its Subcontract." (Paragraph 165) Xcel then claims that it is "entitled to recover from Babcock & Wilcox that amount found by a court and jury to represent payments in excess of those to which Babcock & Wilcox is entitled by virtue of its contributions to the Project." (Paragraph 166)

161. At present, Xcel has asserted its claims directly against Babcock, and not against SLN, although Xcel's pleadings readily acknowledge that any money that flowed from Xcel to Babcock were first paid by Xcel to SLN under the Prime Contract, and then paid by SLN to Babcock under the Subcontract.

162. To the extent that Xcel successfully pursues a factually similar overpayment claim against SLN as is set forth in Count I of Xcel's Counterclaim, SLN will be entitled to recover over from Babcock in an amount that is no less than the amount proven up by Xcel against SLN.

163. To the extent Xcel does not pursue such a claim against SLN, SLN will abandon this claim against Babcock.

COUNT II—SCHEDULE RECOVERY COSTS

164. Paragraphs 1 through 163 are incorporated herein by reference.

165. Included within the “Schedule Recovery Costs” (Complaint, Paragraph 26.a) rejected by Xcel is a single line item of cost incurred by SLN on account of its employee Michael Gray, in the amount of \$72,150.09 plus an additional \$32,573.57, or \$104,723.66. To the extent that Xcel is justified in withholding payment of the Schedule Recovery Costs (which is denied by SLN), and in particular, the \$104,723.66, SLN is entitled to recover such sum from Babcock. Babcock was put on notice of this claim in SLN’s letter of January 17, 2014.

CROSSCLAIM AGAINST XCEL

For its crossclaim against Xcel, SLN alleges as follows:

**COUNT I—BREACH OF CONTRACT (BASED ON CLAIMS ASSERTED AGAINST
SLN BY BABCOCK IN COUNTS II AND III OF THE COMPLAINT)**

166. Paragraphs 1 through 165 are incorporated herein by reference.

167. Babcock has asserted its Counts II (Breach of Contract) and III (Violation of Minn. Stat. Section 337.10, Subd. 3) against SLN.

168. In Count II, Paragraph 123, Babcock states that SLN has not paid Babcock \$45,387,264. In Paragraph 125, Babcock states that the “failure to pay...is a breach of the Subcontract.” In Paragraph 128, Babcock claims that it is entitled to a judgment against SLN “in the principal amount of \$45,387,264, plus pre-judgment interest.”

169. In Count III, Paragraph 135, Babcock states that SLN has violated Minn. Stat. Section 337.10, Subd. 3. In Paragraph 136, Babcock claims that it is entitled to a judgment

against SLN "in the principal amount of \$45,387,264, plus 18% interest and attorney's fees incurred in collecting the amount due as provided by statute.

170. As spelled out above, SLN has answered the Complaint, and denied that Babcock is entitled to judgment against it on either Count II or Count III. However, to the extent that Babcock obtains a judgment against SLN on Count II and/or Count III, SLN is, in turn, entitled to judgment over against Xcel, since any recovery by Babcock from SLN will result from Xcel having breached the Prime Contract with SLN.

171. SLN is entitled to a judgment over against Xcel to the same extent that Babcock recovers over against SLN on Count II and/or Count III.

COUNT II—BREACH OF CONTRACT

172. Paragraph 1 through 177 are incorporated by reference.

173. The Prime Contract is a valid and enforceable contract between SLN and Xcel.

174. SLN fully performed under the Prime Contract.

175. The Prime Contract obligated Xcel to pay SLN for its work.

176. SLN demanded payment through its invoices, as well as through multiple letters sent to Xcel disputing Xcel's withholdings.

177. Xcel has not paid SLN \$46,373,427.50, all of which is owed to SLN. Of this amount, \$294,961.04 is for work associated with the fixed price portion of the Prime Contract, while the balance is associated with the target price portion of the Prime Contract.

178. Xcel's failure to pay SLN is a breach of Xcel's payment obligations to SLN under the Prime Contract.

179. SLN has been damaged by Xcel's failure to pay SLN.

180. SLN is owed \$46,373,427.50 from Xcel, which is the principal amount of SLN's damages.

181. SLN is entitled to judgment in its favor and against Xcel in the principal amount of \$46,373,427.50, plus prejudgment interest.

COUNT III—MECHANIC’S LIEN FORECLOSURE

182. Paragraphs 1 through 181 are incorporated herein by reference.

183. At all times relevant to these proceedings, Xcel was the fee owner of the property constituting the Prairie Island Nuclear Power Plant (the “Property”).

184. SLN was under contract with Xcel to make permanent improvements to the real property in Goodhue County constituting the Property.

185. SLN (through its own forces and/or its subcontractors) contributed labor, skill and materials to the improvements.

186. SLN has not been paid in full for the labor, skill and material it (through its own forces and/or its subcontractors) contributed to the improvements.

187. On August 12, 2014, SLN recorded a Mechanic’s Lien Statement as Document Number A-615971 in the Goodhue County Recorders Office. A true and accurate copy of that statement is attached as Exhibit 1.

188. SLN complied with all statutory requirements for attachment and perfection of its mechanic’s lien.

189. SLN served and recorded its mechanic’s lien statement within 120 days of its last contributing to the improvements of the real property.

190. Due to the sheer volume of the documents supporting its invoices and the thorough review performed by SLN (particularly as concerned the invoices received from SLN’s subcontractor, Babcock), SLN had not submitted its final invoice at the time SLN filed its mechanic’s lien.

191. At the time it recorded its lien statement, SLN used the amount of \$45,306,637.00, which is less than the amount of its breach of contract claims against Xcel in Count II (\$46,373,427.50), and which represented the amount of submitted but unpaid invoices as of that date.

192. SLN is entitled to a specific mechanic's lien against the Property for the reasonable value of the work, skill, and material it (through its own forces and/or its subcontractors) contributed to the improvement of the Property.

193. SLN's mechanic's lien against the Property is superior to the right, title, interest, mortgage, or lien claimed by others, except valid mechanic's liens asserted by coordinate mechanic's lien claimants.

194. SLN is entitled to foreclose its mechanic's lien against the Property for the reasonable value of the work, skill, and material that it (through its own forces and/or subcontractors) contributed to the improvement of the Property, plus interest, costs, and reasonable attorneys' fees.

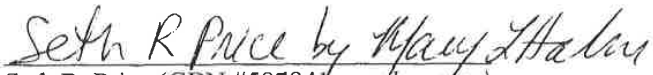
195. SLN has had to retain counsel to prosecute its lien action and will incur attorneys' fees, costs, and disbursements in proving and foreclosing its mechanics' lien.

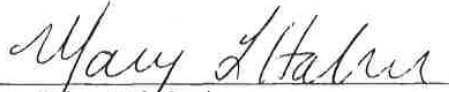
WHEREFORE, SLN prays as follows:

1. That judgment be entered in its favor on the Complaint;
2. That it have judgment on Counts I and II of its Counterclaim to the extent and circumstances set forth in those counts, plus interest;
3. That to the extent judgment is entered in favor of Babcock on the Complaint as against SLN, that SLN have judgment against Xcel on Count I of its Crossclaim, plus interest;

4. That SLN have judgment against Xcel on Count II of its Crossclaim, plus interest;
5. On Count III of its Crossclaim, that SLN have judgment in its favor and against Xcel for the reasonable value of the work, skill, and material SLN (through its own forces and/or its subcontractors) contributed to the improvement of the Property, plus interest, costs and reasonable attorneys' fees; adjudging a specific mechanic's lien against the Property in the judgment amount; adjudging the amount, validity, and priority of all liens, encumbrances, and claims asserted against the Property; and directing enforcement and foreclosure of SLN's mechanic's lien and the sale of the Property by the Sheriff of Goodhue County to satisfy the same according to law;
6. That SLN be awarded its cost, disbursements and attorneys' fees against Babcock and/or Xcel, as appropriate; and
7. That SLN be awarded any other relief as the Court deems just and proper.

Dated: December 31, 2014



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(507) 645-9350 (Fax)

ACKNOWLEDGMENT

SLN, through its attorneys, acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. §549.211, to the party against whom the allegations in this pleading are asserted.



Mary L. Hahn, Esq.

DOC#: A- 615971

Certified, Filed, and or Recorded on:

August 2, 2014 11:14 AM

Signed: *Lisa M Hanni* Deputy

LISA M HANNI

GOODHUE COUNTY RECORDER

Fee Amount: \$46.00

(Top 3 inches reserved for recording data)

MECHANIC'S LIEN STATEMENT
by Business Entity

DATE: August 11th, 2014

The undersigned hereby gives notice to the public and states as follows:

1. I am acting at the instance of the Claimant, **SNC-Lavalin Nuclear (USA) Inc.**, a corporation under the laws of the State of Delaware as its Project Manager, Prairie Island Steam Generator, Replacement Installation Services, and have knowledge of the facts stated herein.

2. The Claimant hereby gives notice of intention to claim and hold a lien upon the real property in Goodhue County, Minnesota, commonly known as Prairie Island Nuclear Generating Plant, Unit 2, 1717 Wakonade Drive East, Welch, MN 55089, and legally described as follows (the "Property"):

The East 1500 feet of the South 500 feet of the Northeast Quarter of Section 5, Township 113 North, Range 15 West, Goodhue County, Minnesota, together with the East 1500 feet of the North 1000 feet of the Southeast Quarter of said Section 5, Township 113 North, Range 15 West, Goodhue County, Minnesota.

(See survey dated July 7, 2014, attached as Exhibit A and incorporated herein by reference).

Check here if all or part of the described real property is Registered (Torrens)

3. The name and mailing address (and license number, if applicable) of the Claimant are as follows:

**SNC-Lavalin Nuclear (USA) Inc.
6585 Penn Avenue
Pittsburg, PA 15206**

4. The amount of the lien claimed is **\$45,306,637.00** and is due and owing to the Claimant for labor performed or skill, material, or machinery furnished to the Property (the "Work").

5. The Claimant performed or furnished the following:

Steam generator installation replacement services at Unit 2, Prairie Island Nuclear Generating Plant

MECHANIC'S LIEN STATEMENT

6. The Work was performed or furnished from **January 1, 2010 to April 24, 2014**, for or to the following person(s):

Northern States Power Company, d/b/a Xcel Energy

7. The name of the present owner of the Property (the "Owner"), according to the best information Claimant now has, is:

Northern States Power Company, d/b/a Xcel Energy

8. The Claimant acknowledges that a copy of this statement must be served personally or by certified mail on the Owner, the authorized agent of the Owner, or the person who authorized the Work within one hundred twenty (120) days of doing the last Work.

9. Notice as required by Minn. Stat. 514.011, subd. 2, if any, was given.

SNC-Lavalin Nuclear (USA) Inc.

BY: _____

Richard Stephens

**Its: Project Manager
Prairie Island Steam Generator
Replacement Installation Services**

Province Ontario Country Canada
-State of _____ County of _____

Subscribed and sworn to before me on August 11th, 2014, by Richard Stephens, Project Manager, Prairie Island Steam Generator Replacement Installation Services for SNC-Lavalin Nuclear (USA) Inc.

(Stamp)

(signature of notarial officer)

Title (and Rank): Lawyer

My commission expires: _____



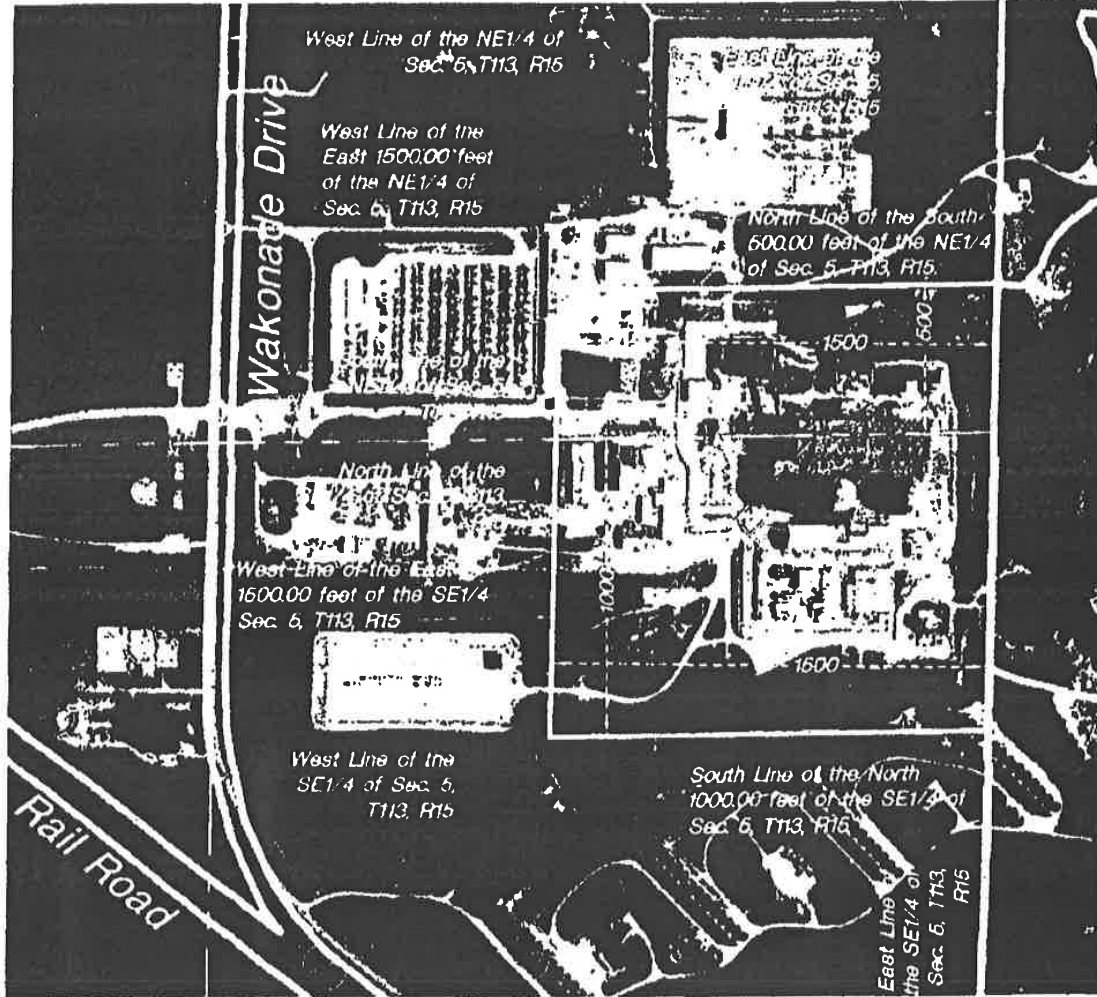
THIS INSTRUMENT WAS DRAFTED BY:

**Mary L. Hahn (#309370)
Hvistendahl, Moersch,
Dorsey & Hahn, P.A.
311 Water Street South
Northfield, MN 55057
(507) 645-9359**

**Land Description of a portion of The Prairie Island Nuclear Power Plant
Located In Section 5, Township 113, Range 15,
Goodhue County, MN**

Exhibit A

The east 1500.00 feet of the south 500.00 feet of the northeast quarter of Section 5, Township 113 North, Range 15 West, Goodhue County, Minnesota, together with the east 1500.00 feet of the north 1000.00 feet of the southeast quarter of said Section 5



SCALE IN FEET

Description Area: 51.668+/- Acres

I hereby certify that this survey, plan or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State of Minnesota

Dated the 7th day of July, 2014.

SATHRE-BERGQUIST, INC.

Rory L. Synelien, PLS Minnesota License No. 44565
rory@sathre.com



SATHRE-BERGQUIST, INC.

150 South Broadway Ave.
Wayzata, MN. 55391

(952) 478-6000 www.sathre.com

Description Exhibit
of
Prairie Island Power

Date: 7-7-14	Revision Date: 7-6-14
Prepared By: RLS	Check By: RLS
Layout Sheet:	1/1
Project Number: 28056-001	

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STATE OF MINNESOTA
COUNTY OF GOODHUE

DISTRICT COURT
FIRST JUDICIAL DISTRICT

Babcock & Wilcox Nuclear Energy, Inc.,

Plaintiff,

vs.

SNC Lavalin Nuclear (USA) Inc., and
Northern States Power Co., dba Xcel Energy,

Defendants.

Case Type: Other Contracts

Case Number: 25-cv-14-2626

CROSS-CLAIM

Defendant Northern States Power Company, dba Xcel Energy ("Xcel Energy") for its Cross-Claim against SNC Lavalin Nuclear (USA) Inc. ("SLN"), alleges as follows:


1. In December 2009, Xcel Energy entered into an Agreement for Steam Generator Replacement Installation Services (the "Prime Contract") with SLN. The Prime Contract related to replacement of the Unit 2 steam generators at Xcel Energy's Prairie Island nuclear power plant in Goodhue County, Minnesota (the "Project"). SLN entered into a subcontract with Babcock & Wilcox Nuclear Energy, Inc. ("Babcock & Wilcox") that included all or substantially all of the installation work within the scope of the Prime Contract (the "Subcontract").

2. The steam generators in Unit 1 of the Prairie Island nuclear power plant were replaced in 2004. That project, carried out by different contractors, provided a blueprint for successful execution of the Project that is the subject of this lawsuit, and Xcel Energy gave SLN access to records relating to the Unit 1 project.

3. In 2009, when the Prime Contract was signed, SLN provided Xcel Energy a Target Price Phase - Cost / Definitive Estimate in the amount of \$71,673,320. In April 2013,

Filed

JAN - 9 2015

By  Yvonne J. Black
Court Administrator Deputy

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shortly before construction began, SLN re-baselined its Target Price Phase – Cost / Definitive Estimate at \$89,349,844 in 2013 dollars.

4. Construction on the Project began in September 2013. SLN and its subcontractor, Babcock & Wilcox, almost immediately fell behind in their work because they failed to attain the level of productivity on which their schedule was based. They continued to lose ground against the schedule on virtually a daily basis.

5. On September 30, 2013, Xcel Energy requested that SLN furnish a Recovery Plan pursuant to § 4.19.4 of the Prime Contract, showing how SLN and its subcontractor Babcock & Wilcox would recover the time that had already been lost. SLN submitted an initial Recovery Plan, which was rejected as inadequate by Xcel Energy.

6. SLN and its subcontractor Babcock & Wilcox continued to lose time against the contractual schedule. On October 7, 2013, SLN and Babcock & Wilcox submitted a revised Recovery Plan. By that time their work was 112 hours behind schedule on the critical path, and their Recovery Plan did not set forth any means of recovering all of that schedule loss.

7. Under §§ 4.77, 4.19.1, 9.1, 23.3, 13.1 and other terms of the Prime Contract, SLN was required to meet the contractual schedule and achieve Substantial Completion by the date required under that schedule. If SLN and its subcontractor fell behind schedule, they were obligated by §§ 4.19.4, 4.19.5, 13.1, 13.9, 23.3 and other provisions of the Prime Contract to recover schedule at their own expense, without billing Xcel Energy any schedule recovery costs.

8. SLN and its subcontractor Babcock & Wilcox failed to recover schedule as promised in their Recovery Plan dated October 7, 2013. Instead, as the Project proceeded they fell farther and farther behind schedule.

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9. All critical path delays encountered during the installation phase of the Project by SLN and Babcock & Wilcox were caused by those contractors' own actions and inactions, including their breach of, among other provisions, §§ 4.4.1 and 12.1.1 of the Prime Contract.

Section 4.4.1 provides:

Contractor Supervision. Contractor shall supervise and direct the Work competently and efficiently, devoting such attention thereto and applying such skills and expertise as may be necessary to perform the Work in accordance with this Agreement.

Section 12.1.1 provides:

Standard of Work. The Work furnished and performed under this Agreement by Contractor or any Subcontractor shall be furnished and performed with due care, skill and diligence, in accordance with Prudent Industry Practice, in compliance with this Agreement and all Applicable Laws and free from defects in materials and workmanship.

10. In addition, on information and belief, SLN and Babcock & Wilcox made a conscious decision not to attempt to recover schedule, which would have required intensifying their construction efforts—adding manpower and equipment, and so on—at their own expense as required by the Prime Contract. Instead, on information and belief, SLN and Babcock & Wilcox made a conscious decision to allow the Project to be further delayed so that they would not incur recovery costs. By doing so, SLN and Babcock & Wilcox knowingly and intentionally breached the Prime Contract and Babcock & Wilcox's Subcontract.

11. Substantial Completion of SLN's work was finally achieved at least 31 days late, on December 24, 2013, in violation of SLN's Prime Contract.

12. Article 13 of the Prime Contract required SLN to request a Change Order if it believed it had grounds for "[a]ny change in the scope of Work, the Agreement Price, the Work Schedule, payments, or other Agreement terms..." SLN never requested any Change Order

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extending the schedule for its work or increasing the amount of payments to which it was entitled, and such failure waives any claim for a time extension or for additional payments.

13. SLN's unjustified delays in completing the Project caused substantial damages to Xcel Energy, which under the Prime Contract are compensated in the form of liquidated damages at the rate of \$100,000 per day.

14. The Prime Contract also required certain Milestone dates to be met and provided for liquidated damages if they were not met. Schedule G imposed liquidated damages for certain deliverables failing to progress in a timely manner (Milestone 17) and SLN failed to meet this milestone and as a result is liable to Xcel Energy for \$3,052,500 in liquidated damages.

15. SLN has billed Xcel Energy a total of approximately \$138,877,298 for Target Price Phase work, approximately \$37 million more than the Agreement Price for Phase 2 as of September 19, 2013. Xcel has paid all SLN invoices that have been shown to be properly due under the Prime Contract.

16. All amounts that have been invoiced by SLN but not paid by Xcel Energy represent amounts withheld as liquidated damages, recovery plan expenses, and/or unreasonable costs that were incurred because of SLN's and Babcock & Wilcox's inefficiency, delays, and multiple breaches of contract.

17. In addition, specific terms of the Prime Contract provide that Xcel Energy is entitled to withhold any further payments under the circumstances of this case. Section 8.4.1 states in part:

Conditions of Payments; Withholdings; Setoffs. ... Anything in this Agreement to the contrary notwithstanding, Company (i) shall not be required to make any payment to Contractor if Contractor is in material breach of its obligations under this Agreement....

Further, § 8.4.5 provides:

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Withholding to Protect Company From Loss. Anything in this Agreement to the contrary notwithstanding, Company may, without prejudice to any other rights Company may have, after issuing a Notice to Contractor, withhold all or any portion of any payment to such extent the Company has a reasonable basis for concluding it may sustain losses, costs, expenses, or damages for which Contractor is liable due to:

- (ii) claims filed against Company...by Persons for which Contractor has an indemnity obligation towards Company or Company Indemnitees under this Agreement...
- (x) Contractor's breach or other failure to fulfill and/or correct any of its other material obligations under this Agreement.

18. On July 11, 2014, Babcock & Wilcox recorded a mechanic's lien statement as Document Number A-615304 in the Goodhue County Recorder's Office, claiming a lien on the Prairie Island property in the amount of \$37,410,850 (the "Babcock & Wilcox Lien"). A true and correct copy of that statement is attached hereto as Exhibit A.

19. Section 15.2 of the Prime Contract states:

Obligations With Respect to Liens. Contractor shall indemnify, save harmless and defend the Company Indemnitees from and against any and all Contractor Liens filed or made, including all expenses and attorney's fees incurred in discharging or defending such Contractor Liens.

The Babcock & Wilcox Lien is a Contractor Lien as defined in the Prime Contract.

20. On July 17, 2014, Xcel Energy tendered defense of the Babcock & Wilcox Lien to SLN, under §§ 1.1, 8.6 and 15.2 of the Prime Contract, requesting that SLN satisfy the lien or obtain a Contractor Lien Bond, and hold Xcel Energy harmless against the Babcock & Wilcox Lien.

21. SLN has refused Xcel Energy's tender of the Babcock & Wilcox Lien, and has also filed its own lien. On August 11, 2014, SLN recorded a mechanic's lien statement as Document Number A-615971 in the Goodhue County Recorder's Office, claiming a lien on the

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Prairie Island property in the amount of \$45,306,637 (the "SLN Lien"). A true and correct copy of that statement is attached hereto as Exhibit B. The SLN Lien is a Contractor Lien as defined in the Prime Contract.

COUNT ONE: BREACH OF CONTRACT

22. All of the allegations of paragraphs 1 through 21 are incorporated herein by reference.
23. SLN has breached the Prime Contract by, *inter alia*, failing to properly supervise its subcontractor Babcock & Wilcox; failing to adhere to the contractual schedule; failing to create a Recovery Plan that would allow schedule to be regained and the Project to be completed on schedule; failing to supervise and direct its work under the Prime Contract competently and efficiently or to apply such skill and expertise as were necessary to perform the work in accordance with the Prime Contract; and by invoicing Xcel Energy for amounts that were not properly due and payable under the Prime Contract.
24. Xcel Energy has sustained damages as a direct result of SLN's breaches of contract.
25. Xcel Energy is entitled to recover damages for all such breaches of contract, in an amount to be determined by the jury in this action.

COUNT TWO: BREACH OF CONTRACT (CONTRACTOR LIENS)

26. All of the allegations of paragraphs 1 through 25 are incorporated herein by reference.
27. As alleged herein, the Prime Contract obligated SLN to protect Xcel Energy against Contractor Liens by satisfying them or bonding them off. Both the Babcock & Wilcox Lien and the SLN Lien are Contractor Liens within the meaning of the Prime Contract.

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28. SLN has refused or failed to secure the discharge of the Contractor Liens on the Project property. In consequence of that failure, Xcel Energy has incurred and will incur expense, including attorneys' fees, to secure the discharge of the Contractor Liens.

29. SLN is liable to indemnify Xcel Energy against all costs incurred in this litigation, including, but not limited to, attorneys' fees and costs, expert fees, etc., and any additional costs that have been or may be incurred in order to secure the discharge of the Contractor Liens.

COUNT THREE: INDEMNITY AND CONTRIBUTION

30. All of the allegations of paragraphs 1 through 29 are incorporated herein by reference.

31. Babcock & Wilcox alleges in its Complaint that SLN has breached the Subcontract and that Babcock & Wilcox has sustained damages as a result. Section 15.1 (v) of the Prime Contract states:

Indemnity. To the fullest extent permitted by law, Contractor hereby assumes liability for, and shall defend, indemnify and hold harmless (i) Company and its affiliates...from and against all liability...arising out of:

(v) Contractor's breach of any Subcontracts except to the extent that Company's material breach of this Agreement caused such breach by Contractor.

32. To the extent that any damages alleged by Babcock & Wilcox arise out of any breach of the Subcontract by SLN, SLN is liable to Xcel Energy for indemnity.

33. To the extent that a jury finds that Babcock & Wilcox has sustained damages as a result of SLN's breaches of the Prime Contract, SLN is liable to Xcel Energy for indemnity or contribution.

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COUNT FOUR: ACTION TO DETERMINE ADVERSE CLAIMS

34. All of the allegations of paragraphs 1 through 33 are incorporated herein by reference.

35. As alleged herein, SLN has encumbered the property on which the Prairie Island Nuclear Power Plant is located by filing the mechanic's lien that is Exhibit B to this Cross-Claim.

36. Said mechanic's lien is overstated because SLN is owed nothing under the Prime Contract, or is owed a lesser amount than the amount stated in the lien. On information and belief, the lien was intentionally overstated by SLN and is therefore invalid.

37. SLN is barred by federal law from foreclosing its lien on the Prairie Island facility.

38. The SLN Lien was not filed within 120 days of SLN's last performance of work on the improvement to Xcel Energy's property, as required by Minn. Stat. § 514.08, and is therefore invalid.

39. Pursuant to Minn. Stat. § 559.01, Xcel Energy, as owner of the property on which the SLN Lien has been filed, is entitled to seek an order determining the validity of the SLN Lien, adjudicating the rights of the parties, and clearing title to the Prairie Island property.

WHEREFORE, Xcel Energy prays judgment against SLN as follows:

1. That Xcel Energy be awarded monetary damages for breach of contract in an amount determined by the jury;
2. That the Court order SLN's mechanic's lien released and discharged;

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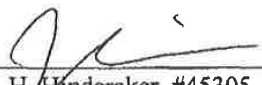
3. That Xcel Energy be awarded indemnity, or in the alternative, contribution to the extent consistent with the jury's findings, with respect to the claims asserted by Babcock & Wilcox herein;

4. That Xcel Energy be awarded its costs, disbursements and attorneys' fees against SLN; and

5. Such further legal and equitable relief as the Court may deem just and appropriate.

DATED: January 9, 2015

FAEGRE BAKER DANIELS LLP



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**ACKNOWLEDGMENT REQUIRED BY
MINN. STAT. § 549.211, SUBD. 1**

The undersigned hereby acknowledges that pursuant to Minn. Stat. § 549.211, Subd. 3, sanctions may be imposed if, after notice and a reasonable opportunity to respond, the Court determines that the undersigned has violated the provisions of Minn. Stat. § 549.211, Subd. 2.



John H. Hinderaker

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Xcel Energy
 Docket No.: E002/GR-13-868
 Response To: MN Chamber of Commerce Information Request No. 228
 Requestor: Larry Schedin/Kavita Maini
 Date Received: April 28, 2014

Question:

Referring to the Prairie Island Unit 2 Replacement Steam Generators (RSG) project, please provide:

- a. status report including startup and testing dates; and
- b. amount and timing of additions to rate base.

Response:

- a. The Prairie Island Unit 2 Replacement Steam Generators (RSGs) were placed in-service on December 16, 2013 at 15:35:58 hours when the Prairie Island Operations Shift Manager accepted the RSGs as being available for decay heat removal. Additional testing of the RSGs both preceded and will follow the start up date. The most significant testing is described below:

Test	Purpose	Date
Secondary Side Hydrostatic Test	Ensure compliance with ASME Section III requirements	Conducted December 9 th 10, 2013. Results: Passed
Primary to Secondary Leakage Test	Ensure that leakage flow from the primary to the secondary side of the Replacement Steam Generators shall be zero (0).	Completed with final results on January 23, 2014. Results: Passed
Moisture Carryover Test	Ensure that steam leaving the Replacement Steam	Date: scheduled for early to mid-summer 2014.

Test	Purpose	Date
	Generators will not exceed the design basis limit of 0.10% moisture content when operating at 100% of steam flow and temperature conditions.	Results: Not available. We expect to pass with margin similar to the Unit 1 Replacement Steam Generators

- b. In Docket GR-12-971, approximately \$285.1 million was forecasted to be placed in service for the project in 2013, and an additional \$2.6 million placed in service in 2014. For the bridge year and test year for the current case, approximately \$280.1 million was forecasted to be placed in service for the project in 2013, and an additional \$2.3 million placed in service in 2014. The project was actually placed in-service on December 16, 2013. The 2013 plant addition was \$284.5 million. The 2014 plant additions (related to trailing charges) are (\$10 million) through March. The negative addition is due to the reversal of a December 2013 accrual.

Witness: Timothy J. O'Connor
Preparer: John L. Walters
Title: Manager, Projects
Department: Prairie Island Nuclear Generating Plant
Telephone: 651-267-7232
Date: May 7, 2014

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Xcel Energy

Docket No.: E002/GR-13-868

Response To: MN Chamber of Commerce Information Request No. 245

Requestor: Larry Schedin/Kavita Maini

Date Received: May 15, 2014

Question:

Referring to Xcel's response to MCC IR No. 228:

- a) What was the cost estimate of the Prairie Island Unit 2 RSG project at the time of the CN compared to the final installation?
- b) How does the final cost of approximately \$275 million compare to the initial estimate made at the time of the CN?
- c) What impairment in Prairie Island Unit 2 operation is caused by the delay of a moisture carryover test until early to mid-summer, 2014? At what maximum output level will it operate until that test is successful and then after the test?
- d) How will refunds be determined and made due to the \$10 million over accrual in 2013?

Response:

- a) At the outset, we note that a certificate of need (CN) is not required for the Unit 2 Replacement Steam Generator project because there is no change in generation capacity, only a replacement of existing equipment. We had begun estimating the costs of the project during the time the Prairie Island Certificates of Need for the Extended Power Uprate and Additional Dry Cask Storage were pending before the Minnesota Public Utilities Commission in Docket Nos. E002/CN-08-509 and E002/CN-08-510. Consistent with the capital project governance process set for in Ms. Amy Stitt's Direct Testimony, as initial cost estimate of \$259 million was approved. The forecast for the project's costs was later updated to \$280 million, as shown in Company witness Mr. Timothy J. O'Connor's Direct Testimony Schedule 8.

- b) The referenced \$275 million amount is the April 2014 forecast of additions to plant in service (CWIP and AFUDC, excluding RWIP). For a proper comparison to the Board-approved estimate of \$259 million from 2006, we would use the April 2014 forecast of \$280 million (CWIP and RWIP, excluding AFUDC). See the following table for details of these April 2014 forecast amounts.

Cumulative RSG Additions to Rate Base @ EOY 2014 <i>(\$ in millions)</i>	August 2006 Cost Estimate	April 2014 Forecast (actuals to 3/31/14)
CWIP Additions through 2014		\$ 245.4
RWIP Additions through 2014		\$ 34.9
Subtotal - Project Expenditures	\$ 259.0	\$ 280.3
AFUDC through 2014		\$ 29.3
Rate Base Additions EOY 2014		\$ 309.7

Plant in Service Additions (CWIP + AFUDC only) **\$274.7**

Please note that final costs for the RSG project are still to be determined. We are waiting for final invoicing from our primary RSG installation services vendor. The forecasted costs will be validated (or updated, if needed), once final invoicing and cost reconciliation of invoiced costs is accomplished.

- c) No impairment in Prairie Island Unit 2 operations is caused by the schedule of the moisture carryover (MCO) test, and Prairie Island Unit 2 has been operating at its maximum output level without the completion of the MCO test. Xcel Energy anticipates favorable Unit 2 RSG MCO test results similar to that of the Unit 1 RSGs conducted in mid-2005 in that steam leaving the RSGs will not exceed the design basis limit of 0.10% moisture content when operating at 100% of steam flow and temperature conditions.
- d) There is no over-accrual of costs to account for. The following summarizes the amounts and timing of total rate base additions (including RWIP) for the RSG project through the end of test year 2013 in the prior and current rate case, in comparison to actuals through 12/31/13:

Cumulative RSG Additions to Rate Base @ EOY 2013 <i>(\$ in millions)</i>	2013 Test Year Filed Nov 2012	2014 Rate Case Filed Nov 2013	Actual through 12/31/13
CWIP Additions through 2013	\$ 257.2	\$ 251.5	\$ 255.2
RWIP Additions through 2013	\$ 20.1	\$ 24.3	\$ 21.2
Subtotal - Project Expenditures	\$ 277.3	\$ 275.8	\$ 276.3
AFUDC through 2013	\$ 27.9	\$ 29.3	\$ 29.3
Rate Base Additions EOY 2013	\$ 305.2	\$ 305.1	\$ 305.7

For the 2013 test year, the actual additions to rate base (including AFUDC and RWIP) for the RSG project for that year were more than the test year estimate, as shown in the table above.

The amounts discussed in Information Request MCC-228 (part b) for the RSG project were only additions to plant in service, and not total additions to rate base (which would also include RWIP additions). The table below compares the 2014 test year amounts in the current case to our recent forecast of total project costs going into rate base.

Cumulative RSG Additions to Rate Base @ EOY 2014 <i>(\$ in millions)</i>	2014 Test Year Filed Nov 2013	April 2014 Forecast (actuals to 3/31/14)
CWIP Additions through 2014	\$ 251.5	\$ 245.4
RWIP Additions through 2014	\$ 24.3	\$ 34.9
Subtotal - Project Expenditures	\$ 275.8	\$ 280.3
AFUDC through 2014	\$ 29.3	\$ 29.3
Rate Base Additions EOY 2014	\$ 305.1	\$ 309.7

The (\$10 million) credit referenced in MCC-228 (part b) was the 2014 forecast activity for only plant in service, and excluded RWIP costs. The credit was comprised of two items: spend for the year of about \$4 million, and a reclassification of CWIP amounts to RWIP of about (\$14 million). Those items are included in the respective lines in the table above as part of total cumulative rate base additions. As the table shows, forecasted project costs are higher than test year 2014 amounts on both a total expenditure and a total rate base addition view. Consequently, no overaccrual of costs has occurred.

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