
**BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street
St. Paul, Minnesota 55101**

**FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
121 7th Place East
Suite 350
St. Paul, Minnesota 55101-2147**

**MPUC Docket No. E-002/CI-13-754
OAH Docket No. 48-2500-31139**

*In the Matter of a Commission Investigation into Xcel Energy's Monticello Life Cycle
Management/Extended Power Uprate Project and Request for Recovery of Cost Overruns*

**OFFICE OF THE MINNESOTA ATTORNEY GENERAL'S
REPLY TO EXCEPTIONS**

February 17, 2015

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

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OFFICE OF THE MINNESOTA ATTORNEY GENERAL’S REPLY TO EXCEPTIONS

The Office of the Attorney General - Residential Utilities and Antitrust Division (“OAG”) submits its Reply to Exceptions pursuant to Minnesota Rules part 7829.2700.

While Xcel titled its document as Exceptions, it could more accurately be considered its third legal brief in this proceeding. Rather than submitting a document identifying which findings it disagrees with and why,¹ Xcel filed an exceedingly lengthy narrative discussion in which Xcel restates the same arguments and evidence it raised in its previous two briefs. In the body of its Exceptions, Xcel did not identify a single finding or conclusion to which it takes exception. Instead, Xcel spent almost ninety pages re-telling its story of the Monticello Project (“Project”), and included an attachment in which it appears to have rewritten nearly every finding in the ALJ’s Report. At the end of Xcel’s lengthy document, Xcel essentially asks the Commission to throw out the ALJ’s Report completely and start over from scratch. Xcel’s request is unreasonable and cannot be supported by the record.

¹ In its Notice, the Commission indicated that parties who filed exceptions “should state with specificity each ALJ finding or conclusion with which the party takes exception, and the supporting basis in the record for the exception.” Notice of Schedule for Filing Exceptions to the ALJ’s Report, at 1 (Feb. 3, 2015).

I. THE ALJ PROPERLY CONSIDERED THE ENTIRE RECORD.

Xcel's primary contentions in its Exceptions are that the ALJ 1) did not consider the "context in which this situation arose," 2) did not include a "discussion of the overall industry influence," and 3) gave "no recognition of the Company's commitment to nuclear safety and the importance of keeping Monticello a viable part of our fleet for the long term."² Xcel's argument that the ALJ did not consider the entire record because he did not make explicit findings on these three issues is unconvincing. Even assuming that the ALJ did not simply disregard Xcel's repeated platitudes about these issues as unpersuasive, it does not matter if the ALJ considered them because they have nothing to do with the focus of the investigation in this case: whether the costs for the Monticello LCM/EPU Project were incurred prudently, and whether Xcel's request to recover 100 percent of cost overruns is reasonable.³

Xcel first claims that the ALJ's Report is not complete because it did not discuss the context of the Project, including the benefits of keeping the Monticello plant online and fluctuations in the energy market.⁴ But the benefits provided by the Extended Power Uprate ("EPU"), which are difficult to determine since the additional 71 MWs are *still* not online, have nothing to do with whether the costs Xcel incurred to complete the EPU were incurred reasonably. And it is entirely unclear how the price of natural gas has any relation to whether Xcel should have paid five times more than it estimated to install an electric distribution system,⁵ or any other piece of the Project.

² Xcel Exceptions, at 1.

³ See, e.g., Findings of Fact, Conclusions, and Order, In the Matter of the Application of Northern States Power Company for Authority to Increase Rates for Electric Service in the State of Minnesota, Docket No. E-022/GR-12-961, at 17-22 (Sept. 3, 2013).

⁴ See Xcel Exceptions, at 18-23.

⁵ The cost for the electric distribution system rose from \$20.9 million to \$119.5 million. Report, Findings of Fact ¶ 109.

Second, Xcel's argument that the ALJ did not include a discussion of overall industry influence is similarly misplaced. Xcel appears to argue that more than \$400 million in cost overruns for the Project must be reasonable because other nuclear projects around the country have also been subject to cost overruns. That contention has no basis in fact or law. A prudence review, like the one the Commission is currently engaged in, is a fact-specific inquiry into a particular project. Whether a different nuclear project in Florida also saw large cost overruns, and how a different Commission, operating under different laws, and evaluating different facts, handled cost recovery, does not provide *any* information about whether Xcel acted prudently in *this* case.⁶ The ALJ was not required to make findings about other projects.

Finally, Xcel's claim that the ALJ did not consider the Company's commitment to nuclear safety or the importance of the Monticello plant ignores the purpose of the Commission's investigation in this case. The question is whether Xcel incurred costs prudently and reasonably. How Xcel *feels* about safety adds nothing to that inquiry, and neither does any relative importance of the plant. Xcel may not recover costs that are unreasonable, and Xcel's commitment to safety or the importance of the plant do not change the fact that Xcel's imprudent management led to increased costs for the Project.

II. THE ALJ FOUND THAT XCEL'S WITNESSES WERE NOT CREDIBLE.

The remainder of Xcel's Exceptions primarily try to dispute the ALJ's conclusions that Xcel's imprudent management caused cost overruns. The ALJ concluded:

⁶ For that matter, while Xcel is correct that the Florida Public Utilities Commission allowed Florida Power and Light to recover cost overruns for Turkey Point and St. Lucie, Xcel did not provide any information about the public reaction to the Florida Commission's decision. In the months following the decision, Florida legislators have introduced bills to repeal nuclear cost recovery mechanisms, prohibit *ex parte* communication with Commissioners, modify the procedures used for hearings in front of the Florida Commission, limit the number of terms a Commissioner may serve, and completely change the manner in which Commissioners are selected. *See* Fla. S.B. 170 (2015); Fla. H.B. 199 (2015); Fla. H.B. 399 (2015); Fla. H.B. 473 (2015). Florida bills can be found at <http://www.myfloridahouse.gov/Sections/Bills/bills.aspx>.

Xcel's principal failure was that it did a very poor job managing the initial scoping and early Project management up until beginning installation during the 2009 refueling outage. The Company's decision to proceed with the combined LCM/EPU Project in 2009 rather than 2011 created an extremely difficult task that Xcel was not able to manage. From that point forward, additional issues arose that compounded Xcel's difficulties and required unreasonable amounts of time and money to resolve. It was a failure of management and was not prudent. As a result, significantly increased unreasonable costs occurred until the Project was completed.⁷

Xcel attempts to challenge the ALJ's conclusion by discrediting Department witnesses Mr. Crisp and Dr. Jacob, while highlighting the testimony of Xcel's witnesses. In doing so, Xcel ignores the ALJ's determination that Xcel's witnesses were not credible.

The ALJ stated that Xcel witness Mr. Sparby "appeared quite nervous and unsure while giving testimony," and that his testimony was of "limited value."⁸ The ALJ concluded that Xcel witness Mr. O'Connor was not credible because Mr. O'Connor did not become an employee of Xcel until "well into the planning process" for the Project.⁹ The ALJ noted that Xcel witness Mr. Alders had not personally conducted any technical analysis, and did not provide any testimony directly relevant to the question of prudence.¹⁰ The ALJ also found that Xcel's outside witnesses, Mr. Stall and Mr. Sieracki, "seemed to have a degree of sympathy for Xcel's problems that detracted from the credibility of their testimony," and that "a few of the numbers in some of the testimony were inconsistent or were tailored to fit the issue being addressed."¹¹ In

⁷ Report, Conclusions of Law ¶ 7.

⁸ Report, Memorandum at 37.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

contrast, the ALJ, based on his personal experience presiding over the hearing, found that “the Department and OAG witnesses were more believable.”¹²

The Commission should not set aside the ALJ’s judgment, made based on first hand observation, that Xcel’s witnesses were not credible. Unlike the ALJ, the Commission’s review will be limited to written testimony and transcripts, and the Commission will not have the benefit of seeing the witnesses give live testimony during the evidentiary hearing. While the Commission is not a court reviewing the ALJ’s recommendation for error, the circumstance is similar enough that the Commission should make use of the same standard of review that is applied to credibility findings in a trial court. According to the Minnesota Supreme Court, courts reviewing credibility determinations “should be guided by the fact that much must necessarily be left to the sound judgment and discretion of [the trial] court, which has the advantages, not possessed here, of observing the witnesses, fully hearing their testimony, and thus acquiring a thorough familiarity with all the circumstances of the controversy.”¹³ Applying this standard, the Supreme Court has held that “the trier of fact is the sole judge of the credibility of witnesses.”¹⁴ The reasons for this standard are sound: It would be unreasonable for the Commission to substitute its judgment about credibility, based only on written testimony and transcripts, for that of a neutral fact-finder who personally observed the quality and demeanor of the witnesses. Most of the arguments in Xcel’s Exceptions are based on the hope that the Commission will believe Xcel’s witnesses, and disbelieve the witnesses presented by the Department and the OAG. The Commission should not do so, because the neutral fact-finder has already determined

¹² *Id.*

¹³ *Caroga Realty Co. v. Tapper*, 143 N.W.2d 215, 220 (Minn. 1966); *see also* Minn. R. Civ. P. 52.01 (providing that “due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses”).

¹⁴ *Dittrich v. Brown County*, 9 N.W.2d 510, 512 (Minn. 1943).

that Xcel's witnesses were less credible than the witnesses presented by the Department and the OAG.

III. THE OAG'S PROPOSED REMEDY IS REASONABLE.

Finally, Xcel argues that the OAG's proposed remedy is unreasonable because it is an arbitrary percentage, and because it is higher than the Department's recommendation. Xcel is wrong, and its argument is disingenuous. First, the OAG has explained repeatedly, in multiple filings,¹⁵ the specific unreasonable costs that form the basis of the OAG's recommendation. The OAG specifically identified four cost areas that witnesses in this case testified were the result of Xcel's poor management and were unreasonable. Those specific recommendations make up the majority of the OAG's recommendation, and the remaining percentage-based recommendation was made necessary only because Xcel's improper accounting made it exceedingly difficult, or impossible, to identify additional costs that were caused by Xcel's imprudent management.¹⁶

Second, there is no good reason to judge the OAG's proposed remedy against the remedy proposed by the Department. The OAG independently reviewed the record to determine whether Xcel had prudently managed the project, and, if not, which costs had been caused by Xcel's imprudent management. Following that analysis, the OAG recommended that the costs that were caused by imprudent management be disallowed. The recommendation should be judged on its own merit, and not decided on the basis of how it compares to the Department's recommendation, or how it compares to the amount of money that Xcel would still be permitted to recover.

¹⁵ OAG Initial Brief, at 38–46; OAG Reply Brief, at 21–27; OAG Exceptions, at 2–17; *see also* Ex. 200, at 28–30 (Lindell Rebuttal); Ex. 204, at 24 (Lindell Surrebuttal).

¹⁶ The ALJ also found that Xcel's accounting was unreasonable. Report, Conclusions of Law ¶ 11.

The ALJ's findings, the arguments of the OAG, the Department, and XLI, along with the balance of the record, make it exceedingly clear that Xcel's imprudent management was the direct cause of a significant portion of the cost overruns. The only remaining question is what the Commission must do to protect the interests of ratepayers and ensure that Xcel's rates are just and reasonable. Given the severity of Xcel's mismanagement, and the public policy concerns with the Department's recommendation, the Commission should adopt the OAG's recommendation to disallow at least 75 percent of the cost overruns, and deny a return on any cost returns that are recovered.

Dated: February 17, 2015

Respectfully submitted,

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s/Ryan Barlow

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February 17, 2015

The Honorable Judge Steve M. Mihalchick
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RE: *In the Matter of a Commission Investigation into Xcel Energy's Monticello Life Cycle Management/Extended Power Uprate Project and Request for Recovery of Cost Overruns*
MPUC Docket No. E-002/CI-13-754
OAH Docket No. 48-2500-31139

Dear Judge Mihalchick:

Enclosed and efiled in the above-referenced matter please find the *Office of the Minnesota Attorney General's Reply to Exceptions*.

By copy of this letter all parties have been served. An Affidavit of Service is also enclosed.

Sincerely,

s/ Ryan Barlow

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