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

REPLY BRIEF OF THE OFFICE OF THE ATTORNEY GENERAL-RESIDENTIAL UTILITIES AND ANTITRUST DIVISION

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The Office of the Attorney General – Residential Utilities and Antitrust Division ("OAG") respectfully submits its Reply Brief in the matter of the Commission's Investigation into Northern States Power Company's ("Xcel" or "the Company") request for recovery of the cost overruns from the Monticello Life Cycle Management/Extended Power Uprate Project ("Monticello Project" or "the Project"). The OAG will not address every issue raised in this matter in this Reply. Instead, the OAG will respond to the arguments that Xcel raised in its Initial Brief which require a response.

I. LEGAL STANDARD

After reviewing Xcel's Initial Brief, the OAG has grave concerns about the Company's attempt to redefine the standard of proof for rate recovery in Minnesota. The standard described by the Company would depart from the standard that the Commission has consistently applied for decades; it would also violate Minnesota law. Instead, the Commission should apply the burden of proof established by Minnesota law, and require Xcel to prove that it handled the Monticello Project prudently and that all of the costs it seeks to recover are reasonable. Any costs which Xcel cannot demonstrate were incurred prudently, or that other parties demonstrate were the result of unreasonable conduct, should be disallowed.

There are two major flaws with Xcel's arguments about burden of proof. First, Xcel relies heavily on cases from outside of Minnesota that either have little precedential value or are basically irrelevant to the case at hand.[1] The ALJ and the Commission should give little weight to these cases because the legal standard to apply in Minnesota is established by Minnesota law. As discussed in the OAG's Initial Brief, Minnesota law clearly establishes that the burden of proof is on Xcel, and that to satisfy the burden of proof in this case Xcel must prove that the Company's handling of the Monticello Project was prudent in all respects and that all of the cost overruns were reasonable.[2]

Furthermore, Xcel's interpretation of several of the non-jurisdictional cases is potentially misleading. For example, Xcel suggests that the Commission apply a four-factor test it refers to as the "prudent investment standard" in this case, as if the test were the law in Minnesota.[3] It is not. Xcel's "test" is not drawn from any Minnesota law or any Commission decision. To support its assertion that the Commission should apply its preferred standard, Xcel cites the decision of the United States Supreme Court in *Duquesne Light Company v. Barasch*.[4] While the Supreme Court did discuss the "prudent investment" standard in *Duquesne*, Xcel misses the fact that the primary holding in the *Duquesne* case did not require state commissions to apply a "prudent investment" standard. The major dispute in *Duquesne* was the constitutionality of a Pennsylvania law that did not allow recovery of capital projects that were cancelled.[5] The utility argued that the "prudent investment" standard, which would require state commissions to allow recovery of cancelled projects, was required in order to be constitutional. The Supreme Court

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[1] *See* Xcel Initial Brief, at 14–18.
[2] OAG Initial Brief, at 6–10.
[3] Xcel Initial Brief, at 15.
[4] 488 U.S. 299 (1989).
[5] *Id.* at 301–02.

soundly rejected the utility's argument and held that "It cannot be seriously contended that the Constitution prevents state legislatures from giving specific instructions to their utility commissions."[6] In fact, the Court emphatically rejected the suggestion that any particular rule was required by the Constitution, and upheld the state law determining whether utilities should recover costs from cancelled projects: "The Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public."[7] Rather than supporting Xcel's proposed standard, the *Duquesne* case makes clear that the Commission should hold Xcel to the burden of proof established by Minnesota law, rather than the four-part test that Xcel argues should be applied.

Furthermore, Xcel's formulation of the four-part test is misleading. Xcel's "test" is not even drawn from a single statement; instead, it is cobbled together from a series of decisions from across the country.[8] For example, Xcel cites a decision of the Pennsylvania Public Utility Commission to support its formulation of the "prudent investment" test.[9] But that case was about whether that commission could review the internal management of a nuclear power plant in regard to replacement power costs, not about whether a construction project had been conducted reasonably.[10] And the Pennsylvania commission did not apply a four factor test like Xcel suggests.[11] Xcel's proposed "prudent investment" test has not been established in any other jurisdiction in the form that Xcel has suggested, and it should be rejected in this one.[12] The

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[6] *Id.* at 313.
[7] *Id.* at 316.
[8] *Id.*
[9] Pa. Pub. Util. Comm'n v. Philadelphia Elec. Co., 71 Pa. P.U.C. 42 (1989).
[10] *Id.*
[11] *Id.*
[12] Another sign that Xcel's test should not be applied in this case is that Xcel itself does not apply it in making its analysis. Instead, Xcel organizes its analysis by creating a different series of questions. *See* Xcel Initial Brief, at 20.

OAG suggests that the Commission instead apply Minnesota law, as outlined in the OAG's Initial Brief.[13]

Xcel also argues that the Commission's review is limited to whether the Company's conduct was within a "zone of reasonableness."[14] To support that assertion, Xcel points to a United States Supreme Court case involving wholesale power rates in front of the Federal Power Commission.[15] But that case has nothing to do with whether a utility's request for cost recovery is reasonable; the case is about whether the Federal Power Commission had jurisdiction to compare a utility's wholesale rates to its retail rates.[16] While the Supreme Court did discuss a "zone of reasonableness," the Court did so in the very different context of considering the process of ratemaking and determining "just and reasonable" rates.[17] The "zone of reasonableness" concept was used by the Court solely to recognize that "just and reasonable" rates exist as a range of possible alternatives, not as a single point or mathematical answer. The Court quoted its own earlier precedent to explain:

> Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high.[18]

Xcel's citation to the concept of a "zone of reasonableness" in rate setting is clearly irrelevant to whether Xcel acted prudently in managing the Monticello Project and whether its request for cost recovery is reasonable. Presenting these cases as if they were directly comparable to this case is misleading and would drastically shift Minnesota law.

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[13] OAG Initial Brief, at 6–10.
[14] Xcel Initial Brief, at 14.
[15] *Fed. Power Comm'n v. Conway Corp.*, 426 U.S. 271 (1989).
[16] *Id.* at 272–73.
[17] *Id.* at 279.
[18] *Id.* at 278 (quoting *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951)).

Similarly, Xcel cites *Potomac Electric Power Company v. Public Service Commission of District of Columbia* and other non-binding cases for the proposition that a Commission can only impose a remedy if "imprudence proximately caused damages to customers."[19] But the *Potomac* case does not support Xcel's assertion, because the primary issue in the case was not causation. In fact, the word "proximate" does not even appear in the decision. Instead, the case was about whether the Commission had sufficient justification for disallowing costs as a result of poor management by the utility. The District of Columbia's Court of Appeals concluded that the commission *could* disallow costs that were the result of the utility's mismanagement; as the Court stated, "[W]e are satisfied that the Commission need not allow PEPCO 100% of [demand side management] costs."[20] The Court's primary holding on the issue was to affirm the D.C. commission's finding that the utility had "failed to provide information that the . . . programs were implemented at the lowest feasible cost" and failed to prove that "only 'reasonable' costs would be passed on to its customers."[21] The Court agreed with the commission's conclusion that the utility had not met its burden of proof, and remanded the decision only because it wanted a clearer explanation of the rationale for employing the particular remedy that the commission had chosen.[22] On the other disputed issue in the *Potomac* case, the Court held that the utility was not entitled to a presumption of recovery for employee benefit costs, and had failed to meet its burden of proof to show that it was reasonable to pass the costs on to ratepayers.[23] It is not clear to the OAG why Xcel cites this case to support its argument that the Minnesota Commission must find imprudence to have been a proximate cause of damages to customers. Such a

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[19] 661 A.2d 131, 141–42 (D.C. 1995).
[20] *Id.* at 141–42.
[21] *Id.* at 137.
[22] *Id.* at 141–42.
[23] *Id.* at 143.

requirement does not exist in either (most importantly) Minnesota law or (also worth noting) this case.

Xcel also cites statements made by the ALJ while ruling on evidentiary objections during the evidentiary hearing as precedent for its argument that the OAG and the Department bear a burden of proof in this proceeding.[24] Xcel's citation is inappropriate because the ALJ's evidentiary rulings should not be relied on to establish new law. Furthermore, Xcel selectively quotes only part of the ALJ's statement. In its full context, it is clear that both the ALJ and Company witness Mr. Sparby agreed that the burden of proof in this case is on the Company:

> **Counsel for Department**: I mean, you don't question, though, do you, whose burden it is to show whether or not the Company has prudently invested in the [Monticello Project]?
>
> **Mr. Sparby**: *The proof is the Company's burden and my testimony that we've met it*. [*sic*]
>
> . . .
>
> **Counsel for Department**: On line 19 you state, do you note, "*We are mindful that we bear the ultimate burden to prove our costs were reasonably incurred and will result in just and reasonable rates*;" is that right?"
>
> **Mr. Sparby**: Yes, that's what the line says.
>
> **Counsel for Department**: And you agree – do you not, that the Department has no burden of proof here to demonstrate that you did not do so? Would you agree with that?
>
> **Counsel for Xcel**: You know, at this point, Judge, I'm going to object. . . .
>
> **ALJ**: Is there an issue about burden of proof here being upon the Company?
>
> . . .

[24] *See* Xcel Initial Brief, at 17 n.30.

> **ALJ**: Burden of proof is to demonstrate whatever the issue is by a preponderance of the evidence. I always tell students, though, that if you're defending that, you better put some evidence in. You've got some burden. *But I think everybody recognizes that the burden here is on the Company to demonstrate the reasonableness and prudence of the logic [and] investment process*.[25]

Xcel misrepresents the ALJ's own statement by selectively quoting him in its Brief and omitting his final conclusion. The ALJ did not say that the OAG or the Department has to produce evidence in this case as Xcel claims. Instead, the ALJ's statement correctly states the law in Minnesota: Xcel bears the burden of proof in this case.

The second major flaw with Xcel's argument is that the Company fails to cite multiple Minnesota cases, binding precedent upon the Commission, that undercut its argument. Of particular note, the Minnesota Supreme Court has spoken authoritatively about the legal standard to be applied in ratemaking in Minnesota. Xcel should be familiar with the case, as it lost its appeals to both the Court of Appeals and the Supreme Court.[26] The Court noted that rather than being concerned with the particular quantum of evidence produced in a case, in a ratemaking proceeding the Commission is more "concerned with whether the evidence submitted, even if true, justifies the conclusion sought by the petitioning utility when considered together with the Commission's statutory responsibility to enforce the state's public policy that retail consumers of utility services shall be furnished such services at reasonable rates."[27] The Court specifically noted that the Commission does not follow the standard civil burden of proof:

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[25] Tr. Evid. Hearing, Volume 1, at 55:25–57:18 (Sept. 29, 2014) (Sparby) (emphasis added).
[26] *In the Matter of the Petition of Northern States Power Company for Authority to Changes its Schedule of Rates for Electric Service in Minnesota*, 416 N.W.2d 719 (Minn. 1987).
[27] *Id.* at 722.

> NSP argues that in a rate application proceeding the [Commission] should weigh the evidence under the 'fair preponderance' standard in the same manner traditionally employed by courts in a civil case
>
> . . . We disagree. While a 'fair preponderance' standard may be applicable in a ratemaking proceeding, the 'weighing' to be employed by the utility commission substantially differs from the type of 'weighing' traditionally employed by a court in a civil case.
>
> . . .
>
> [I]n evaluating the disputes in the typical rate case the accent is more on the inferences and conclusions to be drawn from the basic facts . . . rather than on the reliability of the facts themselves. Thus, by merely showing that it has incurred, or may hypothetically incur, expenses, the utility does not necessarily meet its burden of demonstrating that it is just and reasonable that the ratepayers bear the cost of those expenses. . . . In such cases, the [Commission] may draw its own inferences and arrive at its own conclusions from the undisputed basic facts. Moreover, in ratemaking, as contrasted to civil litigation, evidence in the hearing record consists mostly of economic facts and the opinions of experts who have analyzed those facts rather than reports of sensorily perceived phenomena. Thus, it becomes apparent that the logic and relevance of the facts to the ultimate determination of whether the rate request is reasonable is of substantially more importance than the quantum of proof needed.[28]

The Court continued on to explicitly reject Xcel's argument that it should be entitled to a "rebuttable presumption" in a ratemaking proceeding. The Company argued that it should have a presumption of reasonableness in regard to its capital structure, the Commission and ultimately the Minnesota Supreme Court disagreed because the legislature had overruled any presumption that previously existed by enacting Minnesota Statutes section 216B.16, subdivision 4, which "unequivocally places the burden of proof" on the utility. The Court held:

> If there ever existed in this state a presumption to be applied in ratemaking, enactment of Minn. Stat. § 216B.16, subd. 4 effectively removed any presumption, and placed on the

[28] *Id.* at 722–23.

> petitioning utility the burden of proving the proposed rate is fair and reasonable . . . . When, in the Commission's judgment, a petitioning utility has failed to establish the reasonableness of costs which it claims justifies a proposed rate increase, the Commission itself may compute [a remedy] that will afford an ultimate determination of a reasonable and just rate.[29]

In addition to the statements of the Supreme Court, Minnesota law clearly establishes who bears the burden of proof in ratemaking proceedings before the Commission. As noted by the Supreme Court, Minnesota Statutes section 216B.16, subdivision 4 provides that "the burden of proof to show that the rate change is just and reasonable shall be upon the public utility seeking the change." Other statutes provide similar, complementary guidance: in any case where there is "any doubt" about the reasonableness of a utility's request to recover expenses, the doubts "should be resolved in favor of the consumer."[30] This law makes it clear which party has the burden of proof in requesting a rate increase like this one.[31]

Xcel does not acknowledge any of the precedent established by the Supreme Court or Minnesota law in arguing for its preferred legal standard. It would be difficult for Xcel to do so, because that precedent is directly contrary to the legal standard Xcel asks the ALJ and Commission to apply. While Xcel does not state it clearly, its primary request is buried in a footnote: Xcel argues it should be entitled to a presumption in its favor on the issue of "management prudence," which could apply to nearly every disputed issue in this case.[32] Xcel

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[29] *Id.* at 727.

[30] Minn. Stat. § 216B.03.

[31] Furthermore, cases cited by Xcel make clear that even when state law does provide utilities a "presumption" of recovery, that "presumption" is destroyed when any party "raises serious doubt about the prudence of a particular investment." *Gulf States Util. Co. v. La. Pub. Serv. Comm'n*, 578 So.2d 71, 85 (1991). In the *Gulf States* case "a more searching inquiry becomes necessary" and the "burden shifts to the utility to prove that the expenditure was in fact necessary and appropriate, or resulted in no additional costs." *Id.* Xcel cannot reasonably dispute that the Department and the OAG have raised "serious concerns" about the prudence of the Monticello Project; even under Xcel's preferred "presumption" standard, the Company would still hold the burden to prove that it conducted the Project prudently and that every dollar of the cost overruns was reasonable.

[32] Xcel Initial Brief, at 16 n.27.

ignores the law in making its request: the Supreme Court held that there is no presumption in favor of the utility in Minnesota,[33] and Minnesota law clearly requires that, if there are any doubts, those doubts must be resolved in favor of the ratepayers rather than the utility.[34] Xcel's request to apply a radically different standard that does not comport with the law should be denied.

As Xcel noted, it is "important" to establish where the burden of proof, including both production and persuasion, lies in this matter,[35] because an incorrect application could result in rates that are not just and reasonable. It could also send dangerous economic signals to Xcel and other utilities about how to conduct major infrastructure projects in the future. Minnesota law, and the decisions of the Minnesota Supreme Court, clearly establish that both burdens lie with the Company. The standard applied in this proceeding should be drawn from Minnesota law and the decisions of the Minnesota Public Utilities Commission. Xcel, and only Xcel, has the burden to affirmatively prove that every dollar it seeks to recover was incurred prudently. In every instance in which Xcel fails to meet that burden of proof, the Commission must disallow recovery of costs.

II. XCEL HAS NOT MET ITS BURDEN OF PROOF

A. Xcel's Framework Inappropriately Distorts the Inquiry in this Case.

In its Initial Brief, Xcel claims that the issues in this case can be answered by answering a series of questions: Was it prudent for the Company to embark on the program? Were the modifications to the Monticello Plant necessary under the circumstances? Why did the capital

[33] *In the Matter of the Petition of Northern States Power Company for Authority to Changes its Schedule of Rates for Electric Service in Minnesota*, 416 N.W.2d 719, 727 (Minn. 1987).
[34] Minn. Stat. § 216B.03.
[35] Xcel Initial Brief, at 16.

costs of the Project roughly double from the initial estimate? Was Xcel's management of the Project reasonable under the circumstances? Is an allocation of costs between LCM and EPU relevant to the proceeding?[36] This framework is unnecessary at best, and at worst is an attempt to lead the Commission's investigation down a series of dead ends.

Answering Xcel's questions may provide useful information for the ALJ and the Commission, but it will not resolve the ultimate question in this case. That question is "whether Xcel Energy's handling of the [Monticello Project] was prudent and whether the Company's request for recovery of [Monticello Project] cost overruns is reasonable."[37] If any of the questions that the Company has proposed are answered negatively for the Company, it would mean that the Company had acted imprudently and that its request for cost recovery was unreasonable. For example, if Xcel completed modifications to the Plant that were not necessary to finish the Project, then its conduct would be unreasonable and imprudent. But even if all of the questions are answered in Xcel's favor, the Company is still not guaranteed a recovery. To continue the previous example, it is possible that all of the modifications that Xcel completed were necessary to finish the project; but if the Company did not act reasonably to minimize the costs of those modifications, then the final costs were the result of imprudence regardless of whether the modifications were necessary. This example shows why Xcel's framework is not sufficient to properly analyze the issue in this case.

Further, the Company's list excludes many questions that are also relevant to the final analysis. For example, in determining whether the Company acted prudently the ALJ and the Commission should also determine whether the Company's decision-making process was

[36] Xcel Initial Brief, at 20.
[37] 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).

prudent for each and every scope modification that led to increased costs. Xcel should also be held to its burden of proof to show that the work it performed, or that was performed by its contractors, was done prudently and did not lead to unreasonable costs; the Company should also be required to demonstrate that its failure to account for the LCM and the EPU separately was reasonable. There are likely many more questions that must be answered in order to reach a final determination of the Company's prudence in completing the Monticello Project. Limiting the analysis to only the questions posed by Xcel would unnecessarily limit the Commission's investigation and take this inquiry down the path preferred by the Company.

For that reason, the OAG recommends that the ALJ and the Commission review this matter without reference to the Company's framework. The ALJ and the Commission should critically analyze every part of the cost overruns the Company requests recovery for and determine whether the Company has produced sufficient evidence to demonstrate that it acted prudently and that the final costs of the Project are reasonable. In any instance where Xcel has failed to produce evidence supporting its claim of prudence, or in any instance where the record indicates that Xcel's conduct led to increased costs, the ALJ and the Commission must disallow the associated cost overruns.

B. Xcel has not proven that the cost overruns were incurred prudently.

As the OAG noted in its Initial Brief, Xcel has produced an enormous volume of testimony discussing "why it decided to undertake the Monticello Project initially, how it discovered significant sub-projects that it did not initially anticipate, and why it was necessary to complete those projects in order to finish the Project."[38] Despite that mountain of testimony,

[38] OAG Initial Brief, at 14.

Xcel has failed to produce evidence on an essential issue for this prudence review: its decision-making process *after* the Company discovered the need for additional work. That information is an essential part of analyzing the Company's conduct for prudence and reasonableness: without it, neither the OAG, the ALJ, or the Commission can bridge the gap from the discovery of additional work to the final amount that it seeks for recovery.

Instead of building that bridge so that the Commission can fully review its decision-making process, Xcel asks the Commission and all of the parties to accept on faith that it acted prudently and reasonably in all respects. Such a request is improper and unreasonable; it is also the reason that Xcel has failed to carry its burden of proof in this case. Minnesota law requires Xcel to produce evidence showing that it acted prudently and reasonably every step of the way, on every part of the Project. By failing to produce evidence about its decision-making during implementation and design of scope modifications, Xcel has failed to meet that burden.

In its Initial Brief, the OAG explained that Xcel had many opportunities in testimony and during the evidentiary hearing to provide information about its decision-making and implementation prudence but that, ultimately, Xcel chose not to produce the information that it had.[39] None of the evidence that Xcel highlighted in its Initial Brief changes the fact that Xcel did not meet its burden of proof in this area.

For example, Xcel claims that the "options and alternatives" that the Company considered are described "throughout the filing."[40] The Company specifically identifies certain portions and schedules from Mr. Tim O'Connor's direct and rebuttal testimony.[41] But, as the OAG explained in its Initial Brief, a thorough review of Mr. O'Connor's testimony reveals that

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[39] OAG Initial Brief, at 14–18.
[40] Xcel Initial Brief, at 40–41.
[41] *Id.* at 41.

the cited sections do not speak to the Company's decision-making or implementation prudence.[42] In his direct testimony, Mr. O'Connor provides an overview of the purpose of each modification, explains why the modification was necessary, and accounts for the total cost for the modifications.[43] In its Initial Brief, the OAG explained that this testimony did not provide a sufficient "discussion of the Company's decision-making process for increasing the scope of the Project or what alternatives the Company considered once that decision was made."[44] The Company also points to Schedules 17, 19, and 21–28 of Mr. O'Connor's direct testimony and Schedule 32 of Mr. O'Connor's rebuttal testimony, but these do not provide relevant information either. Instead, the Schedules are simply a list of what work Xcel did to complete each modification,[45] rather than information disclosing *how* Xcel made its decisions during implementation. An understanding of *how* Xcel made its decisions is essential in order to determine whether Xcel acted prudently and whether the resulting costs were reasonable; by failing to produce evidence of *how* it made its decisions and implemented scope modifications, Xcel has failed to meet its burden of proof.

In its Initial Brief, Xcel discussed a few areas where it did consider several alternatives. Rather than satisfying its burden of proof, though, these examples only highlight the fact that Xcel has not provided the information necessary to meet its burden. For example, Xcel discusses the fact that the Company had to decide between replacing or repairing several major systems,

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[42] OAG Initial Brief, at 15.

[43] *Id.*; *see* Ex. 3, at 93–145 (O'Connor Direct).

[44] OAG Initial Brief, at 16.

[45] Schedules 17, 19, and 21–28 all use the same format. They list the initial scope and estimate, final scope, milestones, and costs incurred in a bullet-point format for the major modifications to the plant. Ex. 3 TJO-17, 19, 21–28. Schedule 32 provides an in-depth discussion of *why* the Company decided to replace several systems in the Plant, but does not provide any discussion about *how* the Company went about implementing the changes. Ex. 10 TJO-2, Schedule 32. In fact, the primary purpose of Schedule 32 is to explain what portions of the modifications Xcel believes were necessary for the LCM rather than the EPU, rather than a discussion of Xcel's decision-making process. *Id.*

including the exciter and the generator.[46] Xcel explains what decisions it ultimately made, but does not provide any of the information used to reach its decision.[47] Xcel also mentions that it considered adding a third pump to the reactor feedwater system, but ultimately decided to replace the two original pumps instead because "the Company determined the two-pump solution presented fewer challenges."[48] Xcel provides no information about what the "challenges" were; the evidence about Xcel's decision-making process is based on similar conclusory statements. The citations Xcel offers for the options it considers refer back to Schedule 32 of Mr. O'Connor's rebuttal, but, as noted above, that Schedule does not provide enough information to determine whether the Company acted prudently. For example, in regard to the exciter replacement, Xcel states that it decided to install a replacement rather than attempt the repair because "Company personnel concurred that it was prudent."[49] But Xcel is not the entity that decides whether its actions are prudent. That determination is for the Commission to make, and by failing to provide enough information to make that decision, Xcel has failed to meet its burden of proof.

While Xcel has filed a vast amount of information, Xcel has not proved its case. Instead, Xcel has limited the ALJ and Commission's ability to review the prudence of the scope modifications by describing only what was done and how much it cost, rather than how it made its decisions. Without information about *how* Xcel made its decisions, what options it considered, what evidence it had at the time, and why it reached the decisions it did, the ALJ and the Commission cannot determine whether Xcel made prudent decisions about how to change the scope of the project. Further, without information about how Xcel performed during

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[46] Xcel Initial Brief, at 42.
[47] *Id.*
[48] *Id.*
[49] Ex. 10, JTO-2, Schedule 32, at 22.

installation, the ALJ and the Commission cannot determine whether Xcel acted prudently while actually doing the work. Instead, the ALJ and the Commission are limited to speculations about whether the projects were completed prudently and reasonably based only on the final cost. After leaving the ALJ and Commission in this position, Xcel argues that the costs must be approved because "there is nothing in the record to suggest that the modifications we chose were more expensive than they needed to be to serve the purposes we identified or to provide strong designs for the plant."[50] But the reason that nothing is in the record is that *Xcel chose not to produce that evidence*. Without it, Xcel cannot support its claims that that it acted prudently and that the resulting cost overruns were reasonable.[51] Xcel has failed to meet its burden of proof, and the ALJ and the Commission should disallow the cost overruns accordingly.

C. Xcel's Mismanagement Led to Increased Project Costs.

The Commission could disallow some or all of the cost overruns because Xcel has failed to prove that they were incurred prudently. In addition, the evidence that *is* in the record also supports a disallowance because the evidence shows that a significant portion of the cost overruns were the direct result of Xcel's mismanagement of the Monticello Project. Any cost overruns that were caused by Xcel's poor management are unreasonable as a matter of fact, and must be disallowed.

In its Initial Brief, the OAG explained that many aspects of the Monticello Project were impacted by Xcel's poor management. Xcel's initial decision to fast track the Project meant that

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[50] Xcel Initial Brief, at 43.

[51] One additional concern is that Xcel has little incentive to explain its decision-making, especially in combination with Xcel's attempt to modify its burden of proof. Under Xcel's requested "presumption" standard, the Company can expect full recovery of all costs any time that it does not produce full information. If Xcel does not explain how it made its decisions, then the other parties and the Commission will never have enough information to defeat the presumption. Accepting Xcel's arguments in this fashion would lead to poor public policy because it would reinforce Xcel's attempt to conceal its decision-making process and incentivize other utilities to conduct their operations in a similar fashion.

it was continually scrambling to get work done efficiently.[52] The decision to concurrently design and build in parallel meant that design work had to be re-done when the Company discovered that its initial designs were insufficient.[53] These problems were only exacerbated by Xcel's decision to begin the project with only a preliminary level of detail and a limited definition of the scope of the project.[54] The design, scheduling, and scope problems were compounded when Xcel failed to take reasonable steps to select, manage, and oversee its contractors.[55] The ultimate result of this mismanagement was a Monticello Project that cost substantially more than it should have.

Xcel spends a significant amount of its Initial Brief attempting to defend its selection and management of contractors. Xcel argues that its selection of General Electric ("GE") for primary contractor was reasonable because GE was "most efficient given their prior knowledge of the Plant and experience for the work."[56] That statement cannot be supported by the record; Xcel does not know whether GE was the most efficient contractor because Xcel did not consider using any other contractor. Rather than using any critical analysis to choose GE, Xcel chose GE because it was the "obvious choice:"[57] Xcel notes that it "selected GE primarily because of the fact that GE was the original designer of Monticello."[58] This explanation does not excuse Xcel's decision to proceed without considering alternatives because, as the Company admitted, Xcel could have used another contractor after GE performed the "initial pinch point analysis."[59] Once

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[52] OAG Initial Brief, at 19–22.
[53] *Id.* at 22–26.
[54] *Id.* at 26–30.
[55] *Id.* at 30–35.
[56] Xcel Initial Brief, at 33.
[57] *Id.* at 62.
[58] *Id.* at 33.
[59] Tr. Evid. Hearing, Volume 2, at 74:20–22 (Sept. 30, 2014) (Stall).

that work was complete Xcel should have undertaken a competitive bid process to ensure that it found the best contractor for the job. Since Xcel made no attempt to ensure it had the best possible, it is not surprising that Xcel had "difficulties with some of the design and engineering services" that GE provided.[60] Some of those "difficulties," and the increased costs that they caused, could have been avoided if Xcel used a competitive contractor selection process.

Xcel also attempts to defend its contractor selection and management by misinterpreting the testimony of other witnesses. Xcel claims that Department witness Mr. Crisp agreed that it was reasonable to select GE as the primary contractor for the Project.[61] But Xcel takes Mr. Crisp's statements out of context: Mr. Crisp agreed only that it was "absolutely" reasonable for Xcel to rely on GE's opinion in creating its "initial cost scoping assessment," rather than agreeing that Xcel should have hired GE as its primary contractor without considering alternatives.[62] Mr. Crisp did not support Xcel's contractor management; instead, he had serious concerns about Xcel's conduct. In fact, Mr. Crisp testified that Xcel's handling of its contractors, including contractor selection, led him to conclude that "something within the project management execution was ill," which would lead to "cost increases."[63] The OAG agrees. As described in the OAG's Initial Brief, Xcel did not manage its contractors properly and introduced no evidence to show that any systems were in place to be sure that work was done in a prudent fashion. As a result, the Monticello Project suffered increased costs that could have been avoided if Xcel had properly managed the Project.

[60] Ex. 3, at 40 (O'Connor Direct).
[61] Xcel Initial Brief, at 62.
[62] Tr. Evid. Hearing, Volume 3, at 32 (Sept. 30, 2014) (Crisp).
[63] *Id.* at 63:11–14 (Crisp).

Xcel also defends its use of contractors by arguing that it allowed the Company to save money by transferring work from one contractor to another.[64] But moving work from one contractor to another is not "a matter of handing off responsibilities to a new contractor."[65] As noted by Mr. Crisp, moving work between contractors exposes the new contractor to significant risk; as a result, the new contractor has to incur additional costs in order to manage the risk of taking on work that was begun or originally assigned to another contractor.[66] The Company attempts to justify this extra expense by pointing to the cost savings it achieved by moving work between contractors.[67] But Xcel can only point to one project where it saved money by changing contractors – the reactor feedwater piping.[68] Coincidentally, the reactor feedwater pipes was the only issue where Xcel provided *any* detail about its management decision-making process.[69] Xcel claims that there were "other instances where management decisions saved money," but Xcel does not provide any detail about how it saved money, why it was able to do so, or how much money was saved on any other issues.[70] Apparently, Xcel hopes that repeatedly discussing the one project where it *has* produced evidence of how its management benefited the Project will lead the ALJ and the Commission to believe that management was similarly effective on all of the projects that the Company has not sufficiently described or documented. The ALJ and the Commission should not assume that a good decision on one issue means that Xcel made good decisions on other issues, especially since Xcel has provided information only about one instance that reflects well on the Company, and chosen not to provide information about the dozens or

[64] Xcel Initial Brief, at 66–67.
[65] Ex. 300, at 21 (Crisp Direct).
[66] *Id.*
[67] Xcel Initial Brief, at 67.
[68] *Id.*
[69] *See* OAG Initial Brief, at 17.
[70] Xcel Initial Brief, at 67.

hundreds of other decisions where Xcel could have avoided cost overruns through good decision making.

Xcel argues that its design and scoping management was reasonable because it began to deploy capital before it received approval for its Certificate of Need.[71] According to the Company, this "advance preparation" allowed the Company to work on the Project on an accelerated schedule.[72] Xcel asserts that it should be applauded for using "advance preparation" on a project that would cost hundreds of millions of dollars; in doing so, the Company fails to acknowledge that the testimony of its own witnesses clearly shows that whatever "advance preparation" the Company did was woefully insufficient. Mr. O'Connor testified that the Company was not aware of the need for additional project management until after the 2009 outage, and he would have preferred to have "more robust project management."[73] In fact, after the 2009 outage the Company changed its "management structure" in order to try and fix its problems with project management.[74] Starting to plan for a project early is a good idea, but the Company's own testimony demonstrates that advanced preparation cannot save a project from ineffective management or inappropriate fast track schedules.

Xcel also argues that its system for using field changes was a reasonable approach to dealing with the complexity of the Project.[75] According to the Company, it was a good thing that it had to implement field changes, and deviate from the intended design of the Project, more than 2,000 times.[76] The Company notes that "no witness challenged Company management's

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[71] *Id.* at 60.
[72] *Id.* at 60–61.
[73] Ex. 3, at 63 (O'Connor Direct).
[74] *Id.*
[75] Xcel Initial Brief, at 69–70.
[76] *Id.*

response to [the field changes]," and argues that this fact justifies the Company's request for recovery.[77] But this statement demonstrates clearly that Xcel is trying to apply the burden of proof to the wrong parties. The Company is not entitled to an assumption of reasonableness, or a recovery, just because no witness challenges it on a given point. Instead, the Company has the burden to use the evidence that it possesses to prove that it acted reasonably. Stating that only $1 million of the $25 million in field changes could have been avoided is meaningless if Xcel cannot support its claim with evidence.[78] Xcel has failed to do so. The field changes cost millions of dollars that Xcel now seeks to recovery from ratepayers; if the Company had used proper project management, many of these costs could have been avoided by more effective initial design work.

III. REMEDY

Because Xcel has failed to meet its burden of proving that its conduct was prudent and reasonable in this case, the Commission would be justified in disallowing all of the cost overruns for the Monticello Project. Alternatively, the Commission can disallow those costs that were caused by Xcel's poor management. Any costs that were the result of Xcel's poor management are, by definition, the result of imprudent conduct; those costs were incurred unreasonably and should not be recovered from ratepayers. In its testimony and Initial Brief, the OAG explained that at least 65.5 percent of the total cost overruns were the result of Xcel's mismanagement of the Project. In addition, the OAG explained that additional costs were caused by mismanagement but could not be identified due to Xcel's unreasonable accounting practices. In

[77] *Id.* at 70.
[78] *Id.*

total, the OAG recommended that the Commission disallow 75 percent of the cost overruns.[79] The OAG also recommended that the Commission disallow a return on any cost overruns that are allowed.[80]

Xcel has two primary responses to the OAG's recommendation, and both are representative of Xcel's inappropriate application of the burden of proof in this case. First, Xcel argues that no other party has proved that imprudent conduct caused cost overruns. The Company claims that this causation is an "essential element of a prudence review."[81] But Xcel cannot support that assertion with any citation to Minnesota law.[82] That standard has never been applied in Minnesota, and it runs directly contrary to Minnesota Statute section 216B.16, subdivision 4, which explicitly requires that the burden of proof be placed on the Company at all times.[83]

Furthermore, the cases that the Company relies on are distinguishable. For example, the Company cites *Violet v. Federal Energy Regulatory Commission*, for the proposition that there must be "tangible evidence of a causal link" to imprudence.[84] But that case was about whether, or when, a prudent utility would have cancelled a construction project,[85] not about recovery of cost overruns. Xcel cites *Re San Diego Gas and Electric Companies* for a similar proposition.[86] But that case had nothing to do with prudent management or implementation of a nuclear power plant uprate. Instead, the California Public Utility Commission considered whether a purchased

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[79] OAG Initial Brief, at 41–42.
[80] *Id.*
[81] Xcel Initial Brief, at 128.
[82] *See id.*
[83] Minn. Stat. § 216B.16, subd. 4.
[84] 800 F.2d 280, 282 (1st Cir. 1986)
[85] *Id.*
[86] 31 C.P.U.C.2d 236 (Cal.P.U.C. 1989).

power agreement was reasonable.[87] The analysis used in these other cases is very different from the analysis used to determine whether a utility managed and implemented a project prudently. Presenting these cases as if they were similar to the current investigation is not persuasive.

In stating that no disallowance should be allowed unless a party can prove causation, Xcel is inappropriately shifting the burden of proof for itself to the other parties in this case. Xcel has the burden of proving that every dollar of cost overruns was incurred prudently and reasonably. The OAG and the Department do not have to prove what Xcel claims. If Xcel fails to meet its burden of proof, recovery of the cost overruns must be disallowed.[88]

In addition to attempting to shift the burden of proof, Xcel misrepresents the record in arguing that there is no evidence of causation in this case. Xcel's claim is simply not true. It would have been more accurate if Xcel argued that none of its own witnesses would admit that the Company's management had caused increased costs. But in fact, the other witnesses in this case, or at least the witnesses who are not employees or contractors of Xcel, *did* testify that the Company's mismanagement led to increased costs.

For example, during the evidentiary hearing Department witness Mr. Crisp testified to exactly what Xcel claims does not exist in the record:

> **Mr. Crisp:** . . . [A]s a matter of fact, it's in my testimony that I felt like the management of the project was not in keeping with what I consider to be industry standards and that, as a result of that, there were increased costs incurred.

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[87] *Id.*
[88] *Id.*

Counsel for OAG: . . . Do you believe that absent Xcel's poor management, the project could have been completed for less money?

Mr. Crisp: I feel like there's every probability that it would have been completed for less money, yes

. . .

Counsel for OAG: Do you believe that the project could have ultimately cost less if Xcel had not used a fast-track schedule?

Mr. Crisp: Yes. . . . Project management . . . is the tool that the owner, the Company, uses to execute a project. The more thorough the initial scoping, the more clear the requirements and the . . . more complete that you can build your design prior to installation, obviously prepares that project for a much better execution.

Now, it's not unusual to start a project without 100 percent design. It is fairly unusual, in my experience very unusual, to initiate a new . . . project with so many unknowns that are not addressed through some risk mitigation method contingencies.

Knowledge of these unknowns in paramount to a functional implementation. Without that foundation, I have grave reservations about any project being brought on line within budget and on schedule.

. . .

Counsel for OAG: Do you believe that Xcel's . . . handling of contractors led to increased costs for this project?

. . .

Mr. Crisp: All I have is what was provided to us that detailed that, for example, 2010 poor performance on the part of Day & Zimmermen and Sargent Lundy led to a transfer of some of the project's scope. I'm also aware of other issues that [are] similar to this. . . . [T]hese failures are indicators that something within the project management execution program was ill, and that does cause cost [increases].

> **Counsel for OAG:** Do you believe that if everything had gone right with this project and if Xcel had done a good job in management, that this project could have been done for less than $665 million?
>
> **Mr. Crisp:** Yes.[89]

Any reading of Mr. Crisp's testimony makes clear that Mr. Crisp testified that Xcel's management led to increased costs for the Monticello Project. Department witness Dr. Jacobs also agreed that Xcel's conduct was "unreasonable."[90] Department witness Ms. Campbell agreed with the consulting witnesses, and stated that "Xcel has not shown [its recovery] proposal to be reasonable."[91] OAG witness Mr. Lindell reached the same conclusion, and testified that "a significant amount of the cost overruns were caused by Xcel's poor management, and that those costs should not be recovered from ratepayers."[92] It is clear that Xcel would prefer it if the record was not full of damaging evidence; it is also clear that the experts in this case who were not paid by the Company agree that Xcel's mismanagement led to increased costs for the Monticello Project.

Xcel's second response to the OAG's recommendation is also flawed. Xcel's objection essentially boils down to a protest that the OAG's recommended disallowance is too large. To support its complaint, Xcel claims that the "OAG assumes that any costs over the amount estimated in the Certificate of Need proceeding are not appropriate and a disallowance is justified."[93] That is not true. The OAG's recommendation, as discussed in detail in the OAG's testimony and Initial Brief, is that those costs that were caused by Xcel's mismanagement

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[89] Tr. Evid. Hearing, Volume 3, at 60–67 (Sept. 30, 2014) (Crisp).
[90] Tr. Evid. Hearing, Volume 4, at 60 (Oct. 1, 2014) (Jacobs).
[91] Ex. 315, at 33 (Campbell Surrebuttal).
[92] Tr. Evid. Hearing, Volume 4, at 87:19–21 (Oct. 1, 2014) (Lindell).
[93] Xcel Initial Brief, at 141.

should be disallowed. The recommendation was not made with reference to "cost caps" or based on an "assumption" that costs above the Certificate of Need were unreasonable. Rather, they were based on a thorough analysis of the record in this case. That analysis demonstrates two facts: Xcel has not satisfied its burden to prove that all of the cost overruns were prudent and reasonable, and the evidence in the record demonstrates that a significant portion of the cost overruns were the result of Xcel's poor management. The OAG made its recommendation accordingly, and Xcel's argument that the recommended "disallowance is unsustainable" is wildly inappropriate.

It is inappropriate because Xcel is not a competitive business. Xcel is not entitled to raise its prices simply because it spent too much in finishing a construction project. Xcel is a regulated utility. As a regulated utility, Xcel is *only* permitted to increase its prices when it can *prove* that its expenses were incurred prudently, and that the resulting costs were reasonable. The statements in Xcel's brief echo statements made by Mr. Sparby when he noted that the disallowance proposals in this case were a "concern for the financial health of the utility."[94] The decisions of the ALJ and the Commission in this matter must be based on Minnesota law and reference to whether the Company has proved its case, not on whether a disallowance would be "unsustainable" or bad for the Company's shareholders. As a regulated utility, Xcel does not enjoy any presumption of recovery; instead, it has the responsibility of providing electric service at a reasonable cost. If a disallowance in this matter would mean that the Company's shareholders do not enjoy the returns they hoped for, then the Company should use more rigorous project management in the future.

[94] Ex. 12, at 33 (Sparby Rebuttal).

CONCLUSION

For the reasons set forth in this Reply Brief and in the OAG's Initial Brief, the OAG respectfully requests that the ALJ and the Commission adopt the OAG's recommendation to disallow 75 percent of the cost overruns, and to disallow any return on cost overruns that are allowed.

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Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota

s/ Ryan P. Barlow
RYAN P. BARLOW
Assistant Attorney General
Atty. Reg. No. 393534

445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131
(651) 757-1473(Voice)
(651) 297-7206 (TTY)

ATTORNEYS FOR OFFICE OF THE ATTORNEY GENERAL-RESIDENTIAL UTILITIES AND ANTITRUST DIVISION