STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger	Chair
Betsy Wergin	Vice Chair
Nancy Lange	Commissioner
Dan Lipschultz	Commissioner
John Tuma	Commissioner

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

DOCKET NO. E-002/CI-13-754

PETITION FOR RECONSIDERATION OF THE OFFICE OF THE ATTORNEY GENERAL

I. INTRODUCTION.

Pursuant to Minnesota Statutes section 216B.27 and Minnesota Rules part 7829.7300, the Office of the Attorney General – Residential Utilities and Antitrust Division ("OAG") files this Petition for Reconsideration of the Minnesota Public Utilities Commission's ("Commission") Order Finding Imprudence, Denying Return on Cost Overruns, and Establishing LCM/EPU Allocation for Ratemaking Purposes ("Order").

The Commission's finding of imprudence is well-reasoned. It is based on a thorough review of all the evidence, a consideration of the arguments of all the parties, and reaches the only result that is supported by the record in this case—that Xcel's imprudent management caused the costs of the Monticello Life Cycle Management/Extended Power Uprate ("LCM/EPU") to rise. The Commission's action subsequent to its finding of imprudence, however, does not properly apply the burden of proof in this case, and does not go far enough to protect ratepayers from costs for which Xcel has not met its burden of proof.

II. THE COMMISSION'S REMEDY DOES NOT PROPERLY APPLY THE BURDEN OF PROOF DEFINED BY LAW AND ARTICULATED BY THE COMMISISON IN THIS MATTER.

After reviewing all of the evidence, the Commission concluded that Xcel had "failed to carry its burden to prove that the LCM/EPU cost overruns were prudently incurred."[1] According to the Minnesota Supreme Court, "Where a party having the burden of proof with respect to a particular issue fails to sustain such burden, [the] decision as to such issue must go against him."[2] The Minnesota Supreme Court has also stated, "Absence of proof on a vital issue loses the case for the party having the burden of proof no matter how difficult it is."[3] As a result, the Commission's conclusion that Xcel has not met its burden of proof on this matter means that, for purposes of this case, the Monticello LCM/EPU cost overruns were not prudently incurred. Any other conclusion improperly shifts the burden of proof onto the OAG and other parties.[4] Because the Commission found that the cost overruns were not prudently incurred, the Commission should have directly disallowed some or all of the overruns: Ratepayers should not be required

[1] Order, at 17. In particular, the Commission stated that, "[B]ecause the record shows that many of the challenges Xcel faced were of its own making, the Commission concurs with the other parties that the Company has not met its burden to establish that its handling of the Monticello LCM/EPU Project was prudent." Order, at 13. The Commission's conclusion was primarily based on two areas in which Xcel failed to produce evidence demonstrating that the cost overruns for the project were prudently incurred. First, the Commission concluded that the evidence in the record showed that "many of the challenges Xcel faced in implementing the LCM/EPU project could have been avoided or addressed in a less costly manner if the Company had taken the time to properly plan and scope the project." Order, at 17. The Commission found that, without this evidence, the Company had failed to satisfy its burden of proof: Second, the Commission concluded that Xcel had not produced evidence on its decision-making process after initial planning. The Commission noted, "This evidence shows *what* the Company did; however, it does not explain any alternatives available as decisions were made and the project's scope changed, such as possible alternative vendors or cost comparisons of equipment alternatives. Xcel's evidence thus lacks the transparency necessary to quantify the prudence of final costs." Order, at 18.

[2] *Howard v. Marchildon*, 37 N.W.2d 833, 837 (Minn. 1949).

[3] *McGerty v. Nortz*, 254 N.W. 601, 602 (Minn. 1934). The Supreme Court continued: "[Y]es, no matter how impossible it is, to procure evidence on that particular point. Such a plight is unfortunate but unavailing to such party." *Id.*

[4] If the Commission's conclusion that Xcel has not proven its costs were incurred prudently means *does not* lead to the conclusion that the costs were not incurred prudently, then the burden of proof would be essentially meaningless.

to compensate Xcel for costs that were not prudently incurred, particularly in light of the Commission's mandate to resolve any doubt as to reasonableness in favor of the ratepayer.[5]

Instead of disallowing costs that it determined were not prudently incurred, the Commission declined to do so because other parties in the case had not been able to identify precise costs that were caused by Xcel's mismanagement.[6] At several points in its Order, the Commission indicated that it would not disallow costs directly because it was "not possible to identify the precise costs attributable to mismanagement due to the Company's cost-tracking methods."[7] This justification improperly shifts the burden of proof, and conflicts with the Commission's articulation of the legal standard for this case:

> [U]nder Minnesota law, the utility always retains the burden of showing that it would be just and reasonable to include a particular utility expense in rates.
>
> Moreover, a utility is in the best position to explain why its costs increased and to identify the amount of the increases. *Allowing a utility to recover its imprudently incurred costs simply because public agencies or other intervenors are unable to precisely identify which imprudent actions caused which costs would not result in just and reasonable rates*.[8]

In other words, the Commission ruled that it would be unreasonable for Xcel to recover costs just because other parties could not identify which costs were caused by imprudent actions. But when the Commission applied this standard to its conclusion that Xcel had not met its burden of proof, that is exactly what the Commission allowed Xcel to do.

By declining to order a disallowance because it was "not possible to identify the precise costs attributable to mismanagement," the Commission effectively allowed Xcel to recover costs

[5] Minn. Stat. § 216B.03.
[6] *See* Order, at 3, 23.
[7] *See* Order, at 3, 23.
[8] Order, at 13 (emphasis added) (citations omitted).

that the Commission had already determined were not incurred prudently. The Commission also improperly shifted the burden to the OAG and other parties to *prove imprudence* by identifying precise costs, rather than requiring the Company to demonstrate its prudence. That kind of burden shifting is not allowed,[9] and is particularly unreasonable since the Commission had *already acknowledged* in this same Order that it was not the law. While the Commission properly recognized that it has quasi-legislative authority to determine just and reasonable rates,[10] the proper application of the burden of proof is a legal matter that is outside the bounds of that quasi-legislative authority. Since Xcel failed to demonstrate that the cost overruns were prudently incurred, some or all of those costs should be directly disallowed.

While the Commission provided several policy considerations in support of its decision to allow recovery of the cost overruns, these policy justifications do not justify allowing Xcel to recover cost overruns that it could not demonstrate were incurred prudently. The Commission stated that its decision was influenced by the fact that Xcel's ratepayers will benefit from many years of carbon-free power, and that it is possible that some of the factors that led to increased cost were beyond Xcel's control.[11] These factors, unlike the correct application of the burden of proof, may be within the Commission's quasi-legislative authority.[12] But these factors alone do not justify allowing Xcel to recover all of the cost overruns. Instead, they demonstrate that it may be appropriate for the Commission to allow Xcel *some* of the cost overruns in addition to denying a return on the cost overruns that are allowed, as recommended by the OAG.[13]

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[9] *See Howard v. Marchildon*, 37 N.W.2d 833, 837 (Minn. 1949) ("Where a party having the burden of proof with respect to a particular issue fails to sustain such a burden, decision as to such issue must go against him."); *see also State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986) ("The prosecutor may not shift the burden of proof to the accused by *commenting about his failure to call witnesses or to present evidence.*").
[10] *See* Order, at 12–13; Minn. Stat. § 216B.16, subd. 6.
[11] Order, at 22.
[12] *See* Order, at 12–13; Minn. Stat. § 216B.16, subd. 6.
[13] *See* OAG Reply Brief, at 21–28.

In its briefs, the OAG recommended that the Commission disallow at least $261.1 million for imprudent costs related to the 13.8 kV distribution system, the feedwater heater, and the installation costs; $19.5 million for duplicative design, abandoned subprojects, and field changes; and an additional percentage of total cost overruns to represent costs caused by imprudent management that could not be identified as a result of Xcel's accounting practices, for a total disallowance of 75 percent of the cost overruns.[14] This recommendation would disallow most of the cost overruns, since the Commission determined that they were not incurred prudently, but would allow Xcel to recover a portion of the cost overruns, in recognition of the policy factors identified by the Commission. For that reason, the OAG's recommendation is the most reasonable remedy based on the information in the record, the policy considerations of the Commission, and the Commission's finding that the cost overruns were not prudently incurred. After concluding that Xcel had not shown that the cost overruns were incurred prudently, the Commission should have directly disallowed the majority of the imprudent costs as recommended by the OAG. The Commission's failure to do so does not properly apply the burden of proof, and is inequitable for ratepayers.

III. CONCLUSION.

The Commission should reconsider its decision to allow Xcel to recover the full cost overruns for the Monticello LCM/EPU project. The Commission's decision was based, in part, on the premise that it was not possible to identify which costs were caused by imprudence. That statement inappropriately shifts the burden to the OAG and other parties to discover and prove which specific costs were caused by imprudence. That burden-shifting is inappropriate,

[14] OAG Initial Brief, at 40–42. These disallowances total 75 percent of the difference between Xcel's initial cost estimate of $320 million and final costs of $748 million. *See* Order, Supplemental Finding (c) ("In 2008, Xcel . . . estimated total project costs of approximately $320 million."). The percentage would change if cost overruns are calculated differently.

especially since the Commission identified in this very Order that, "Allowing a utility to recover its imprudently incurred costs simply because public agencies or other intervenors are unable to precisely identify which imprudent actions caused which costs would not result in just and reasonable rates."[15] As a result, the Commission should reconsider its Order and adopt the OAG's recommendation to disallow 75 percent of the cost overruns, and deny a return on any cost overruns that are allowed.

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Respectfully submitted,

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[15] Order, at 13.