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In the Matter of Xcel Energy’s Petition for
Approval of its 2023 Annual Fuel Forecast
and Monthly Fuel Cost Charges

Docket No. E-002/AA-22-179

**MINNESOTA DEPARTMENT OF
COMMERCE’S ANSWER TO XCEL
ENERGY’S PETITION FOR
RECONSIDERATION**

Xcel has had numerous opportunities to present evidence and make arguments as to why it was not imprudent to allow workers to drill at a nuclear power plant in an area with buried control cables without adequate oversight, approved work plans, or up-to-date maps. Instead, Xcel has attempted to delay accountability by focusing on issues irrelevant to a prudence determination and making unsupported assertions that there are material facts in dispute. The Commission may “reverse, change, modify, or suspend” an order if it finds that the original decision “is in any respect unlawful or unreasonable.”¹ The Commission’s decision that Xcel’s operation of the Prairie Island Nuclear Generating Plant (PINGP) leading to the October 2023 outage was imprudent is both lawful and amply supported by the record.² Xcel’s petition does not raise new evidence or issues, expose errors, or otherwise offer a persuasive reason for the Commission to rethink its decision, and should be denied.

¹ Minn. Stat. § 216B.27, subd. 3.

² ORDER APPROVING 2023 FUEL-CLAUSE TRUE-UP REPORT, REQUIRING ADDITIONAL FILINGS, FINDING IMPRUDENCE, AND NOTICE OF AND ORDER FOR HEARING (Nov. 15, 2024) (eDocket No. [202411-211999-01](#)) (November 15 Order).

ARGUMENT

The Commission's decision that Xcel must refund to ratepayers power replacement costs incurred during the October 2023 outage because those costs were caused by Xcel's imprudence complies with all relevant statutes, rules, and caselaw. Xcel argues that the November 15 Order was in error because Xcel is entitled to a contested case hearing on prudence. A referral to the Office of Administrative Hearings for contested case proceedings is required when a proceeding involves "contested material facts" and there is "a right to a hearing under statute or rule."³ Although Xcel *asserts* that there are contested material facts, it neither acknowledges nor meets the legal standard for showing that there are disputed material facts entitling it to a contested case hearing on the issue of prudence. To show that it is entitled to a contested case, Xcel must demonstrate material facts that would aid the agency in making a decision and must do so by identifying the with specificity of the evidence to be offered.⁴ In the absence of disputed material facts, the investigation, notice, and hearing provided in this docket satisfy Minn. R. 7825.2920, subp. 3, which authorizes the Commission to modify Xcel's automatic fuel adjustment provision.

I. THE COMMISSION IS NOT REQUIRED TO REFER THE PRUDENCY QUESTION TO A CONTESTED CASE HEARING BECAUSE IT DOES NOT INVOLVE ANY CONTESTED MATERIAL FACTS

The Commission's decision is procedurally proper and substantively sound. Every utility rate, including the fuel and energy costs passed along to ratepayers through a utility's fuel

³ Minn. R. 7829.1000.

⁴ See, e.g., *In re N. States Power Co.*, 676 N.W.2d 326, 335 (Minn. Ct. App. 2004) (holding that Minn. R. 7829.1000 places burden in on the party requesting the contested case "to demonstrate the existence of material facts that would aid the agency in making a decision."); *Matter of Decision to Deny Petitions for a Contested Case Hearing*, 924 N.W.2d 638, 649 (Minn. Ct. App. 2019) (holding that a party challenging a denial of their request for a contested case hearing must identify evidence they would like to offer with specificity).

adjustment clause (FCA), must be just and reasonable.⁵ Xcel bears the burden of proof, and cannot recover costs that were imprudently incurred.⁶ To evaluate whether a utility was acting prudently, the Commission considers whether the utility was engaged in “good utility practice,” which the Commission has defined as:

[A]ny of the practices, methods, and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods, and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety, and expedition.⁷

Prudence is not evaluated using the benefit of hindsight, and does not require perfection.⁸ It does, however, require “exercising the care that a reasonable person would exercise under the same circumstances at the time the decision was made.”⁹

While Xcel states that it contests the material facts relied upon by the Commission, it identifies no actual dispute about those facts—only the conclusions the Commission drew from

⁵ Minn. Stat. § 216B.03; Minn. Stat. § 216B.16 subd. 7.

⁶ Minn. Stat. § 216B.16 subd. 4; *see, e.g., In re Pet. of N. States Power Co. d/b/a Xcel Energy to Recover February 2021 Nat. Gas Costs*, MPUC Docket No. G002/CI-21-610, ORDER DISALLOWING RECOVERY OF CERTAIN NATURAL GAS COSTS AND REQUIRING FURTHER ACTION at 5 (Oct. 19, 2022) (Gas Cost Order).

⁷ *In re Review of the July 2018–December 2019 Annual Automatic Adjustment Reports*, E-999/AA-20-171, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS AT ¶ 45 (Aug. 11, 2021) ([eDocket No. 20218-177011-01](#)).

⁸ Gas Cost Order at 5. The Department recognizes this standard, and frequently does not seek refunds for ratepayers even for unexpected outages as long as they do not appear to be caused by imprudent action on the utility’s part. For example, the Department is not seeking a refund for additional outages at PINGP after the control cables were repaired. *See* Supplemental Response Comments of the Minnesota Department of Commerce at 6 (May 15, 2024) ([eDocket No. 20245-206783-02](#)) (Department Supplemental Comments).

⁹ Gas Cost Order at 5.

them.¹⁰ Xcel's argument that there are disputed material facts that must be considered in a contested case is similarly unavailing. Contrary to Xcel's assertions, none of the issues raised are relevant to the question of whether the October 2023 outage was caused by imprudent action on the part of Xcel. The Commission did not err in finding that there were no contested material facts that needed to be resolved before deciding that Xcel's conduct was imprudent.

A. The Commission correctly concluded that Xcel's actions were imprudent based on undisputed facts.

The Commission correctly concluded that there were no "disputed material facts necessary to inform a prudence determination" related to the October 2023 outage at PINGP.¹¹ The Commission's decision relied on facts provided by Xcel, and which were not disputed by any other party. Specifically, the Commission found that because Xcel knew or should have known that critical cables could be buried near the excavation site, but nevertheless did not put appropriate safeguards in place and failed to provide reasonable oversight of the workers that struck the cables, its actions were not prudent.¹²

The key facts relevant to a prudency determination for the October 2023 outage are found in the Licensee Event Report that Xcel filed with its federal regulator.¹³ In the report, Xcel stated:

The root cause of this human performance issue was weakness in the Excavation Permit approval process as well as the inadequate oversight of the non-nuclear supplemental workers performing [horizontal directional drilling] HDD work.

¹⁰ *Matter of Decision to Deny Petitions*, 924 N.W.2d at 649 (noting that a request for a contested case may be denied when it is based on an issue of law) (citing *In re Kandiyohi Co-op Elec. Power Ass'n*, 455 N.W.2d 102, 106 (Minn. App. 1990)).

¹¹ November 15 Order at 5.

¹² *Id.* at 5.

¹³ Department Supplemental Comments, Attachment DOC-2, Xcel Prairie Island Nuclear Generating Plant Unit 1 Licensee Event Report 2023-001-01 (May 21, 2024) (eDocket No. [20245-206953-03](#)) (LER).

Weaknesses were identified in the Excavation Permit approval process for the planned HDD work. Site personnel reviewing and approving the permit were not adequately intrusive to ensure that all interferences had been properly identified prior to approving the permit. Specifically, *the use of Ground Penetrating Radar (GPR) had only been completed for some areas and had not been performed in the area that would have identified the interference with the DC cables.*

Additionally, procedural weaknesses and poor communication between site departments allowed the HDD work to continue without a clear understanding of which site department was responsible for providing oversight to the HDD crew. *This resulted in work progressing in the field without all controls in place that would be expected for work at a nuclear plant. Specifically, approved work plans were not always available at the work site and approved construction drawings for HDD work were not updated when changes were made in the field.*¹⁴

Xcel's own description of what happened establishes beyond reasonable dispute that the outage was caused by deficient oversight and inadequate processes that did not meet the standard expected for excavation work at a nuclear facility. Finding that Xcel failed to follow good utility practice is simple: no reasonable person responsible for excavation work at a nuclear facility would provide deficient oversight and implement inadequate and sub-standard processes.

Xcel criticizes the Commission's reliance on its own admissions. Xcel attempts to undermine these undisputed facts by arguing that statements in the LER "were misinterpreted by other parties" and the Commission, and that the facts established in the LER are therefore disputed.¹⁵ However, Xcel does not identify which statements were allegedly misinterpreted, what about the parties' or Commission's understanding of those statements was inaccurate, or how these statements could be interpreted in a way that would support a finding of prudence. Although Xcel yet again noted the "self-critical" nature of an LER, at no point has Xcel ever asserted that

¹⁴ LER at 3.

¹⁵ Petition for Reconsideration at 11, 13.

any of the facts Xcel reported in the LER are inaccurate, or that a reasonable person would have taken the same actions. Simply put, Xcel has not identified any dispute over the material facts relevant to the Commission's prudency decision. The Commission should not permit Xcel to avoid responsibility by disputing its own statements to one of its key regulators about the cause of the outage.

B. Xcel's Petition for Reconsideration does not meet the legal standard for showing disputed material facts.

As the party seeking a contested case, Xcel has the burden of proof to demonstrate that there are contested material facts.¹⁶ Xcel has argued that "the *central* factual question" to a prudence determination is "whether the Company's *overall* operation of the plant was outside the range of action that similar operators exercising reasonable care could have taken."¹⁷ Xcel misstates the "central factual question." Tellingly, Xcel cites no authority in support of this proposition.

The "good utility practice" standard makes no mention of "overall operation[s]," nor does it suggest that utilities can bank credits for prudent action that can be used to offset imprudent actions. Utilities are expected to engage in good utility practice at all times. The standard suggested by Xcel would lead to absurd results, allowing utilities to escape accountability for even the most egregious of actions as long as the plant was run according to good utility practice the majority of the time.

Xcel further insists a contested case should be ordered to explore issues such as "how the outage occurred; what specific mistake was made, the cause of that mistake, and whether that

¹⁶ *In re N. States Power Co.*, 676 N.W.2d at 335.

¹⁷ Petition for Reconsideration at 12 (emphasis added).

mistake was reasonably foreseeable and preventable.”¹⁸ However, Xcel does not explain what possible answers to those questions could render “deficient oversight and inadequate process that fell below the standard expected for excavation work at a nuclear facility” -- drilling near buried control cables at a nuclear facility without knowing where the control cables were located -- consistent with “reasonable judgment in light of the facts known at the time.” To establish a right to a contested case hearing, a party must do more than merely identify the type of evidence that they would develop and show that the evidence that would be produced is contrary to the Commission’s decision.¹⁹ Xcel’s petition does not identify the existence of any disputed material fact that would establish a right to a contested case.

II. THE COMMISSION’S ORDER WAS ISSUED AFTER APPROPRIATE INVESTIGATION, NOTICE, AND HEARING.

The Commission’s Order finding that Xcel’s actions leading to the October 2024 outage were imprudent is procedurally proper. Xcel claims that it is “unambiguously” entitled to a contested case hearing because it asserts that there are contested material facts and it is entitled to a hearing before the Commission modifies an automatic fuel adjustment provision.²⁰ Specifically, the rules governing automatic fuel adjustments only allow the Commission to modify an FCA “after appropriate investigation, notice, and hearing.”²¹ The rule does not specify the type of hearing and certainly does not require a contested case proceeding. Because there are no disputed material facts, as explained above, the Commission correctly concluded that a contested case proceeding on the issue of prudence would serve no useful purpose. The process already provided to Xcel in this docket amply meets the procedural protections identified in the Commission’s rules.

¹⁸ Petition for Reconsideration at 12-13.

¹⁹ See *Matter of Decision to Deny Petitions*, 924 N.W.2d 638 at 649 (citations omitted).

²⁰ Petition for Reconsideration at 8.

²¹ Minn. R. 7825.2920, subp. 3.

After Xcel filed its 2023 FCA Report,²² the Department initiated an investigation into the October 2023 outage at Prairie Island, issuing information requests and providing notice that it would address the outage in supplemental comments.²³ The Office of the Attorney General-Residential Utilities Division (RUD) also sent Xcel information requests to investigate the issue.²⁴ Both the Department and RUD filed supplemental comments on May 15 arguing that Xcel's imprudence was the cause of the outage and that the costs of power replacement costs during that period must be refunded to ratepayers.²⁵ After those comments were filed, Xcel requested and received two extensions before filing its own reply comments on July 30.²⁶ Further comments were filed by the Department and the Citizens Utility Board (CUB).²⁷

The issue of prudence was squarely at issue in the comments filed and the information requests issued. There is no question that Xcel had notice that the Department, RUD, and CUB were challenging the prudence of its actions leading up to the October 23 outage at Prairie Island. Then, at an appropriately noticed Commission meeting,²⁸ Xcel was provided an opportunity to make oral arguments and answer questions. During the meeting, the Commissioners explained how they were analyzing the prudence question and directly invited Xcel to provide any additional

²² Xcel 2023 Annual True-Up Report (Mar. 1, 2024) (eDocket No. [20243-204018-02](#)).

²³ Comments of the Minnesota Department of Commerce at 13, Attachment 1 (Apr. 15, 2024) (eDockets No. [20244-205419-02](#)) (Department Comments).

²⁴ Comments of the Office of the Attorney General at Attachment A (May 15, 2024) (eDocket No. [20245-206795-01](#)) (RUD Comments).

²⁵ Department Comments; RUD Comments.

²⁶ NOTICE OF EXTENDED REPLY COMMENT PERIOD at 1 (June 12, 2024) (eDockets No. [20246-207637-01](#)); SECOND NOTICE OF EXTENDED REPLY COMMENT PERIOD at 1 (July 12, 2024) (eDockets No. [20247-208530-01](#)); Xcel Reply Comments (July 30, 2024) (eDockets No. [20247-209117-03](#)).

²⁷ Response Comments of the Minnesota Department of Commerce (Aug. 23, 2024) (eDockets No. [20248-209745-01](#)); Reply Comments of the Citizens Utility Board of Minnesota (July 30, 2024) (eDocket No. [20247-209116-01](#)).

²⁸ See Notice of Commission Meeting (Sept. 6, 2024) (eDockets No. [20249-210007-02](#)).

relevant information that it had.²⁹ In short, there was appropriate investigation, notice, and a hearing before the Commission issued its November 15 Order.

CONCLUSION

The Department respectfully requests the Commission deny Xcel's Petition for Reconsideration. Xcel provides nothing calling into question the Commission's finding of imprudence. The only genuinely disputed issue is the amount of the refund due ratepayers and the Commission properly referred that issue for a contested case proceeding.

Dated: December 16, 2024

Respectfully submitted,

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²⁹ Minnesota Public Utilities Commission Sept. 19, 2024 Agenda Meeting at Agenda Item 5. Available at: https://minnesotapuc.granicus.com/player/clip/2421?view_id=2&redirect=true.