

**U.S. Chemical Safety and  
Hazard Investigation Board**

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Board Member

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Board Member

**Hon. William E. Wright**  
Board Member



August 23, 2010

Via email and facsimile

Mr. Richard C. Kelly  
Chairman and CEO  
Xcel Energy Inc.  
414 Nicollet Mall  
Minneapolis, MN 55401

Dear Chairman Kelly:

The Chemical Safety and Hazard Investigation Board (CSB) has completed its investigation of the penstock fire that occurred at the Xcel Cabin Creek hydroelectric plant on October 2, 2007. The CSB intends to publish its final report and safety recommendations on August 25, 2010. A video describing the incident and the CSB's findings will be released on the same date. The final report will include specific safety recommendations to Xcel, which I urge be implemented in order to prevent similar incidents in the future. While Xcel is one of several recommendation recipients in this case and one of hundreds in the CSB's history, its actions in the aftermath of the tragedy have been unique in the 13-year experience of the CSB. Specifically, I wish to bring a number of troubling episodes to your attention, and ask you to consider whether these actions truly represent Xcel's stated corporate values or the interests of its shareholders.

Lack of Cooperation with Investigation

Xcel failed to fully respond to a number of CSB requests for both records and interrogatories. The company's non-responsiveness persisted to the point that the CSB

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required the assistance of the Civil Division of the U.S. Attorney's Office for the District of Colorado to obtain information relevant to the CSB investigation from Xcel. Consequently, Xcel's lack of cooperation delayed the CSB's investigation and caused great expense to both the taxpayers of the United States and the shareholders of Xcel.

### Lack of Cooperation in Quality Control Review

In preparing investigation reports for release, the CSB follows the agency's published Data Quality Guidelines.<sup>1</sup> Among other things, the Guidelines establish a pre-dissemination quality review procedure for reports. As part of that procedure, the CSB provides the subject company or companies with a draft version of the report for review. The CSB requests that the company, based upon its review, voluntarily submit two kinds of responses: (1) comments as to whether the draft report contains any information the company considers to be a trade secret or confidential business information; and (2) comments as to whether the draft report contains any information the company considers to be factually or technically inaccurate.

Consistent with these quality assurance procedures, in late April of this year the CSB provided Xcel with a redacted<sup>2</sup> draft version of the investigation report on the Cabin Creek incident, *and invited the company to voluntarily submit comments*. The letter transmitting the report to Xcel legal counsel clearly indicated that the report was a partial draft, not yet approved by the Board, and so was being provided on the condition of confidentiality. The letter went on to state the specific terms of the confidential review:

*The CSB considers this draft, and any comments submitted to the agency in response to this request for review, to be privileged deliberative communications. Therefore, any discussion or distribution of this draft report beyond those personnel of Public Service Company of Colorado, or its agents, who need access*

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<sup>1</sup> See <http://www.csb.gov/UserFiles/file/legal/FinalDataQualityGuidelines.pdf>.

<sup>2</sup> The sections on Regulatory and Industry Standards Analysis, Flammables Used in Confined Spaces: Other Incidents, and Recommendations, respectively, were not included in the version of the draft report sent to Xcel. These sections amounted to a total of 19 pages out of a 200-page report. The regulatory analysis and other incidents sections were not included because neither discussed new information concerning Xcel's activities at the Cabin Creek plant. The recommendations section was not included because it is the CSB's longstanding and consistent practice not to disclose the full written text of recommendations prior to their adoption by the Board.

<sup>3</sup> The Public Service Company of Colorado, a Denver-based company founded in 1869, is a regulated utility company in Colorado that operates seven coal, six hydroelectric, and two natural gas plants, and one wind turbine field, to provide electricity and natural gas utility services to 1.3 million customers located in Denver, other Colorado cities, and some rural areas.

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*to the draft to conduct the reviews described in this letter is strictly prohibited. Furthermore, it is a condition of this communication that neither Public Service Company of Colorado<sup>3</sup>, nor its agents, will voluntarily release this draft, or comments submitted to the CSB in response to this draft, to any third party .... If you do not agree to these conditions, please immediately return the draft investigation report to the CSB.*

Despite the CSB's invitation, Xcel never submitted any comments on either trade secret/confidential business information or factual/technical accuracy issues in the draft report. Xcel management thus passed up an important opportunity to advance both corporate interests and the public interest by contributing constructively to assuring the quality of the CSB report.

### Legal Action to Block Publication of Report

Instead of supplying the requested comments to help conclude the investigation, Xcel took the unprecedented step of going to federal court to block the publication of the CSB report last spring.<sup>4</sup> Ultimately, the presiding judge squarely rejected Xcel's effort to prohibit publication of the CSB's findings and recommendations:

*Based on the evidence presented at the June 24, 2010 hearing, the arguments, and the applicable law, I find Defendants' arguments to be without merit. Moreover, the Defendants cite no authority in support of their request that I bar the issuance of the CSB's final Cabin Creek report. First, I find the CSB acted as an independent federal agency in conducting its investigation and drafting its report as required by 42 U.S.C. §7412(r)(6)(A)-(S). There is no evidence whatsoever that the CSB acted in concert with the prosecution in investigating this accident or intentionally delayed the issuance of its report.<sup>5</sup>*

While the CSB's position was supported by a federal district judge, Xcel's legal action delayed completion of the CSB report for several months, and diverted CSB resources from other ongoing investigations. Despite the clear findings to the contrary in the judge's ruling, Xcel representatives have *continued* to make frivolous claims that the CSB has delayed release of its report to prejudice Xcel in the federal criminal prosecution in which the company is a defendant.

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<sup>4</sup> *United States v. Xcel Energy, Inc., et al.*, No. 09-cr-00389-WYD (District of Colorado).

<sup>5</sup> *Id.* Chief Judge Wiley Y. Daniel's Order of June 30, 2010 (docket #178).

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### Unauthorized Disclosure of Partial Draft Report

Last week, an Xcel attorney, in clear violation of direct instructions contained in the CSB cover letter, provided an incomplete preliminary *draft* of the CSB report to the media on the eve of the Board's completion of its work. The report released by the attorney was the one the CSB had provided for quality control review, *under clear conditions of confidentiality* (as noted above). This last Xcel maneuver caused yet further delays in the process of finalizing and issuing the Board's report. Moreover, the release of an incomplete and draft version of the report, which did not include the Board's recommendations, has now also created a risk that Xcel's Directors and shareholders will draw incorrect conclusions about the incident at Cabin Creek, and what Xcel must do to prevent similar incidents in the future.

In light of this disappointing pattern of corporate conduct, I am writing you directly to ensure that you are personally aware of the actions taken by Xcel to delay the CSB investigation, block publication of the CSB final report, and distort the conclusions of the investigation by releasing an unauthorized draft copy of the CSB report. The CSB will issue a formal recommendation that Xcel shareholders be directly notified by management of the significant findings and recommendations of the CSB report, and of the actions Xcel management intends to take to implement needed safety improvements. In the wake of the corporate responsibility concerns raised by the Big Branch Mine accident in West Virginia and the disaster in the Gulf of Mexico, I strongly urge Xcel to renew its focus on safety and to swiftly implement the CSB's recommendations.

Sincerely,



Rafael Moure-Eraso  
Chairman