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<tr><td>Appeal from the District Court, City and County of Denver, Colorado
The Honorable William W. Hood III
Case No. 2009CV6913 – Division 7</td></tr>
<tr><td>Appellant/Cross-Appellee: STONE & WEBSTER, INC.

Appellee/Cross-Appellant: PUBLIC SERVICE COMPANY OF COLORADO d/b/a XCEL ENERGY</td></tr>
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and 32.

This brief complies with the 9,500 word count limit provided in C.A.R. 28(g), containing 9,480 words, as calculated using Microsoft word processing software.

This brief complies with C.A.R. 28(k). It contains, under a separate heading, a statement of whether Appellee agrees with Appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

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INTRODUCTION

Public Service Company of Colorado hired Shaw as the largest of three principal prime contractors to construct the new Comanche 3 power plant in Pueblo, Colorado. By the time the project ended, Shaw had missed its contractual deadlines by more than 330 days, severely damaging Public Service.

At trial, Shaw blamed all of its delays on Public Service and another of the prime contractors, Alstom. The jury did not believe Shaw, and rightly so, because vast amounts of evidence, including Shaw's own documents, showed that Shaw missed its deadlines because of its own mismanagement and bad decisions. First, Shaw did not complete its engineering on time, producing a cascade of delays. (Trial Exs. 2115, 2185, 2281.) Second, Shaw grossly underestimated the amount of permanent plant materials such as electrical cable and piping that it needed to complete its work, causing more delay. (Trial Ex. 4441-0014.) Third, the quality of Shaw's work was so poor that it had six to seven times the usual amount of rework, causing still more delay. (Trial Exs. 5109, 3569, 2175; Trial Tr. Vol. XIV 4370:4-16; Trial Tr. Vol. VIII 2481:1-2483:25.) Finally, at various points, Shaw simply decided to reduce its effort on the project, causing more delay yet. (Trial Exs. 2389, 2284, 2400, 2312, and Shaw Demonstrative Ex. 169.)

The jury considered all this evidence and more and reached a reasoned verdict, ruling partly for Shaw, but partly for Public Service as well. There is no basis for reversing that verdict on appeal.

ISSUES FOR REVIEW

1. Jury Instructions: Whether the District Court correctly instructed the jury that Public Service was responsible for the actions of its agents with respect to its claim for liquidated damages, and also correctly did not require an agency finding in connection with Shaw's claim for actual damages.

2. Liquidated Damages: Viewing the evidence in the light most favorable to the jury's verdict, whether the District Court correctly concluded that the jury's award of liquidated damages to Public Service was consistent and fully supported by the evidence.

3. Replacement Contractor Damages: Viewing the evidence in the light most favorable to the jury's verdict, whether the District Court correctly concluded that jury's award of replacement contractor damages to Public Service was fully supported by the evidence.

4. Alleged Nondisclosure During *Voir Dire*: Whether the District Court abused its discretion in holding that C.R.E. 606(b) barred admission of all of the juror statements submitted by Shaw, when Shaw had not preserved its record.

STATEMENT OF THE CASE

For almost a month in the fall of 2010, this breach of contract case was tried to a jury in the District Court for the City and County of Denver. The parties offered testimony from 35 witnesses and introduced nearly 500 exhibits. Shaw presented its theories that Public Service owed it $41.5 million in unpaid fees and had also caused it to suffer $87 million through delay and disruption. (Trial Tr. Vol. XVIII 5496:22-5497:3, 5518:20-5519:7, 5520:6-22.) Public Service presented its theories that Shaw's gross mismanagement had caused Public Service to pay $27 million for replacement contractors and had also caused Shaw to miss contractual deadlines, entitling Public Service to $43 million of liquidated damages. (*Id.* at 5542:12-5543:4.)

At the close of the trial, the jury deliberated for two days and returned a verdict finding: (1) for Shaw on its claims and awarding it $41,259,031.13 for unpaid fees and $43 million for delay and disruption damages; and (2) for Public Service on its claims and awarding it $43 million in liquidated damages and $27 million for replacement contractor costs. (Trial Tr. Vol. XX 5638:11-5639:13.)

Shaw has now filed this appeal, repeating arguments it made at trial and attempting to re-try issues the jury rejected. All of Shaw's challenges are meritless.

STATEMENT OF FACTS

I. The Comanche 3 Power Plant Project.

Appellee Public Service provides power to customers across Colorado. In 2003, due to increasing customer demands and environmental concerns, Public Service decided to expand its Comanche Station in Pueblo, Colorado by adding a 750 megawatt, super-critical coal-fired power plant ("Comanche 3" or the "Project") adjacent to the existing Comanche 1 and 2 Units. The total cost of the Project was estimated to be over $1.3 billion. (Trial Tr. Vol. XI 3417:23-24.)

Because of the Project's large size, Public Service contracted with three "EPC" contractors—engineer, procure, construct—to handle discrete segments of the work. (Trial Tr. Vol. I 253:23-254:1.) By far the largest contract—the Balance of Plant ("BOP") Contract with a price in excess of $400 million—was awarded to Stone & Webster, Inc. ("Shaw"). (Trial Ex. 1, § 1.01; Trial Tr. Vol. III 841:17-21.)

As the BOP contractor, Shaw was responsible for all of the work that was not assigned to another contractor. Shaw's work included the design and construction of the air-cooled and water-cooled condensers; the design and construction of the turbine building; the erection of the steam turbine generator; the design, procurement, and erection of the electrical transformers necessary to send power safely to the grid; and the design and construction of all of the mechanical,

electrical, and controls systems necessary to interconnect the various components of the Project. (*See generally* Trial Ex. 1; *see also* Trial Tr. Vol. II 360:13-366:4.)

Public Service also hired two other principal EPC contractors. Alstom Power, Inc. ("Alstom") was hired to design and supply the boiler and to erect the boiler building. (Trial Tr. Vol. I 256:19-21; Trial Tr. Vol. II 350:20-23.) Babcock & Wilcox ("B&W") was hired to design, supply, and construct the air pollution control equipment. (*Id.* at 356:17-24.)

II. The Contractual Process For Setting And Adjusting Deadlines.

To keep the Project on track, the BOP Contract established milestone dates that Shaw was obligated to meet, as well as a Change Order process for adjusting them.

The most important milestone date in the BOP Contract was September 15, 2009, the date by which Shaw had to substantially complete its work on the Project. (Trial Ex. 1, §§ 9.3, 11.1.2(c).)

This date was not inflexible, but the BOP Contract established two essential prerequisites for obtaining an extension through a Change Order. First, Shaw had to show that "an Other Contractor's actions or inactions cause[d] significant delay or cost increases to [Shaw] that could not reasonably be avoided or otherwise mitigated without significant cost or delay." (*Id.*, § 6.1.) Second, Shaw could

receive an extension only "equal to the number of calendar Days of delay in the *critical path progress* of [Shaw's] Work reasonably demonstrated by [Shaw] as resulting from the event necessitating the Change." (*Id.*, § 13.3) (emphasis added).

The reference to Shaw's "critical path progress" referred to the industry-standard, critical-path-method ("CPM") scheduling techniques that the BOP Contract required Shaw to use. (Trial Tr. Vol. XV 4663:3-4666:13.) Under Article 13.3, if another contractor such as Alstom was behind schedule on its work, but that delay did not affect Shaw's ability to complete its work, Shaw was not entitled to an extension of its milestone. No contractor was entitled to delay its work simply because another contractor was late on a separate task. B&W, for example, completed its work on time, even though Alstom and Shaw did not. (Trial Tr. Vol. X 2909:13-24; Vol. XIV 4261:7-4263:5.)

Almost immediately after work began on the Project in May 2006, Shaw fell behind schedule. During the first two years of construction, Shaw requested numerous Change Orders, many of which Public Service granted. (*See, e.g.*, Trial Tr. Vol. IX 2551:22-2552:3.) In its requests, Shaw acknowledged that it was behind schedule. One Change Order request not approved by Public Service requested an extension of 232 days. (Trial Tr. Vol. XIII 3948:1-4.)

By the spring of 2008, the number of pending unapproved Change Order requests had grown so significantly that the parties participated in mediation to resolve them. Ultimately, the parties signed a Settlement Agreement dated June 18, 2008. (Trial Ex. 2.) Both parties released all claims that had accrued to date, and Shaw also released certain future claims. (*Id.*, § 1.01.)

Most importantly for this appeal, in exchange for Public Service agreeing to pay Shaw an additional $35 million (§§ 2.01, 2.02), Shaw reaffirmed its commitment to achieving substantial completion of its work on September 15, 2009, and it also committed to a new interim milestone for achieving Full Load. (*Id.*, Attachment 2.) Specifically, Shaw agreed that its "Work shall not prevent Comanche 3 from achieving 750 mW net generation on ('Full Load') by July 6, 2009." (*Id.*, § 7.02.)

III. The Parties' Liquidated Damages Agreement.

To compensate Public Service for the damages it would suffer if Shaw did not complete its work on schedule, and to simplify the process for calculating those damages, the parties agreed that Shaw would pay Public Service $150,000 for every day it missed certain contractual milestones. Specifically, Shaw agreed to pay $150,000 for every day it prevented the Project from achieving Full Load from July 6, 2009 to September 14, 2009. (*Id.*) Shaw further agreed to pay $150,000 for

every day after September 15, 2009 that it failed to reach Substantial Completion of its own work, up to 10% of the contract price. (Trial Ex. 1, §§ 11.2.3.4; Trial Ex. 2, § 7.03.) At the adjusted contract price of approximately $430 million, 10% produced a liquidated damages cap of $43 million. (Trial Tr. Vol. VI 1850:5-17; Trial Tr. Vol. XV 4575:16-4576:21.)

IV. Shaw's Performance Problems.

Public Service expected Shaw to use some or all of the $35 million payment in the Settlement Agreement to retain qualified labor, add additional shifts, work overtime, and do what was necessary get its work back on schedule. (Trial Tr. Vol. XIV 4197:13-4198:1, 4200:18-4201:1.) Instead, Shaw's management ordered its site team to lay off workers and cut back on the number of hours Shaw's employees were working on the Project. (Trial Exs. 2389, 2284, 2400, 2312; Shaw Demonstrative Ex. 169; Trial Tr. Vol. XIV 4200:18-4201:9, 4201:17-4206:6.) Consequently, Shaw almost immediately began to miss the milestone dates it had agreed to in the Settlement Agreement. (Trial Tr. Vol. III 890:9-894:17; Trial Tr. Vol. XIV 4200:18-4201:1, 4219:7-4220:10.)

Searching for excuses, Shaw began to allege that Alstom's delay on the boiler was disrupting Shaw's ability to complete its electrical and piping work inside Alstom's boiler building. As a result, the parties negotiated Change Order

23, which removed the boiler electrical work from Shaw's BOP Contract scope and assigned it to another contractor. (Trial Ex. 10.) Later, at Shaw's request, Public Service removed additional work in the boiler building from Shaw's scope, leaving Shaw to work on those areas of the Project under its exclusive control, such as the turbine building and the air-cooled condenser. (Trial Ex. 1, § 16.8; Trial Tr. Vol. XIV 4201:17-4204:11, 4206:7-4207:17.) Ultimately, Public Service paid approximately $27 million to replacement contractors to perform piping and electrical work that was originally within Shaw's BOP Contract. (Public Service Demonstrative Ex. 41.)

Despite these adjustments to Shaw's scope of work, Shaw continued to blame Alstom for Shaw's own delays. On March 13, 2009, Shaw submitted Change Order Request 87, seeking an increase of $55 million and a schedule extension of 140 days without including any CPM schedule analysis demonstrating the claimed impact on Shaw's critical path. (Trial Ex. 19.) Public Service denied the request because of Shaw's failure to provide the contractually required analysis. (Trial Ex. 2342.) In fact, neither Alstom nor anyone else caused any delay to Shaw's critical path. (*See infra* Sections II(B), (C).) Shaw's delays and cost overruns were entirely its own fault.

SUMMARY OF ARGUMENT

A correctly instructed jury rejected Shaw's attempt to blame all of its delays on Public Service and Alstom. The verdict should be affirmed.

First, there was no error in the jury instructions. On Public Service's claims, the District Court correctly instructed that Public Service was entitled to recover its contractual liquidated damages unless it or its agents delayed Shaw. On Shaw's claims, the District Court correctly instructed that Shaw was entitled to damages under the BOP Contract, allowing Shaw to recover for delay and disruption caused by Alstom, regardless of whether Alstom was Public Service's agent. Shaw's main argument is that "the jury was instructed that, unless it also determined Alstom was [Public Service's] 'agent' . . . Shaw could not recover delay and disruption damages for Alstom's delays." Shaw Br. 15. This is simply not what the District Court instructed.

Second, the record amply supports the jury's $43 million award of liquidated damages to Public Service. That Shaw failed to meet its contractual deadlines, triggering damages, is undisputed. Shaw argued that the delay was Alstom's fault and that Alstom was Public Service's agent. The jury, however, was entitled to reject both arguments and conclude *either* that no one caused any delay to Shaw's critical path *or* that if Alstom did, it was not Public Service's agent. Both of these

conclusions are supported by the record. Both are also consistent with the jury's decision to award contractual damages to Shaw, which required it to find only that Public Service or a third party *disrupted* Shaw's work—not that Alstom delayed Shaw and not that Alstom was Public Service's agent. The verdict is consistent.

Third, the record fully supports the jury's $27 million award to Public Service for the cost of replacement contractors. Public Service's claim was for breach of contract, as the District Court instructed, not for fraud as Shaw argues. The record showed both breach and damages. Shaw's myopic argument that Public Service did not submit invoices for some costs ignores a vast record of fact testimony, expert testimony, and summary exhibits proving damages.

Finally, Shaw improperly attempts to use post-trial juror testimony describing statements made during deliberations to challenge one juror and undermine the jury's verdict. The District Court did not abuse its discretion in holding that C.R.E. 606(b) barred Shaw's attempt.

The judgment should be affirmed in its entirety.

ARGUMENT

I. The District Court Correctly And Separately Instructed The Jury Regarding Public Service's Claim For Liquidated Damages and Shaw's Claim For Actual Damages.

At trial, Public Service claimed *liquidated* damages from Shaw due to Shaw's delay beyond its contractual deadlines, and Shaw claimed *actual* damages from Public Service due to Alstom's alleged delay or disruption of Shaw's work. The District Court separately instructed the jury on each claim, and both instructions were correct applications of the law. Shaw's attempt to conflate the two instructions on appeal is baseless.[1] There is no ground to vacate the verdict.

A. Standard of review.

"A trial court's decision to give a particular jury instruction is reviewed for abuse of discretion." *Fishman v. Kotts*, 179 P.3d 232, 235 (Colo. App. 2007). This Court finds an abuse of discretion only if the District Court's ruling is "manifestly arbitrary, unreasonable, or unfair." *Wark v. McClellan*, 68 P.3d 574, 578 (Colo. App. 2003). A trial court also has "considerable discretion in ruling on a motion for [a] new trial, and its ruling will not be disturbed absent a clear showing of an

[1] Shaw also makes the irrelevant and incorrect claim that Public Service took inconsistent positions on agency below. Shaw Br. 14. In both briefs Shaw cites, Public Service argued that agency was relevant to liquidated damages and that it was entitled to judgment as a matter of law on the agency issue.

abuse of discretion." *Zolman v. Pinnacol Assurance*, 261 P.3d 490, 502 (Colo. App. 2011).

B. The District Court's agency instruction correctly applied the rule of *Medema Homes* to Public Service's claims for liquidated damages; if it erred at all, the error favored Shaw.

The District Court instructed that Public Service could recover liquidated damages from Shaw under the BOP Contract "*only if*" Public Service "*or any of its agents* did not contribute to the delays for which it seeks liquidated damages." (*See* E-Record, 34571321_09cv6913 [hereinafter, "E-Record"] at 9921 (Jury Instruction No. 24) (emphasis added), 9911 (Jury Instruction No. 15).) Implementing these instructions, the Special Interrogatories asked if any of Shaw's delay was due to "Public Service or any party you find to be Public Service's agent as defined in Instruction No. 15." (E-Record 9926 (Special Interrogatory No. 2).) The jury answered this question, "No." (*Id.*)

On appeal, Shaw argues that the District Court should have instructed that Public Service could not recover any liquidated damages if Alstom caused any of Shaw's delay, regardless of whether Alstom was Public Service's agent. (Shaw Br. 14-17.) This instruction would have been incorrect, and the District Court was justified in refusing it. In *Medema Homes, Inc. v. Lynn*, 647 P.2d 664 (Colo. 1982), the Colorado Supreme Court stated that "a liquidated damages clause addressing

delay in a performance contract will not be enforced where such delay is due in whole or in part to the fault *of the party* claiming the clause's benefit." *Id.* at 667 (emphasis added). The Court thus applied the extreme measure of overriding contractual liquidated damages only when the party itself caused the delay. The District Court broadened the *Medema Homes* rule—to Shaw's benefit—by applying it not only to Public Service itself, but also to Public Service's agents.

There is no support in Colorado law for Shaw's demand that the rule should be broadened still further to preclude an owner from recovering liquidated damages whenever any contractor on a project delays any other contractor, regardless of whether the first contractor was the owner's agent. Shaw's rule would have the perverse effect of denying relief to an owner any time more than one of the contractors it hired not only missed the contractor's own deadlines, but also delayed another contractor. Neither of Shaw's two cases adopts its rule. (Shaw Br. at 17, citing *City of Westminster v. Centric-Jones Constructors*, 100 P.3d 472 (Colo. App. 2003); *Tricon Kent Co. v. Lafarge N. Am., Inc.*, 186 P.3d 155 (Colo. App. 2008).) In *City of Westminster*, the court affirmed a directed verdict against liquidated damages because the *party* seeking damages had caused part of the delay. 100 P.3d at 481 ("[T]he delay was caused in part by the City's decision to redesign the structures."). In *Tricon Kent*, the court declined to consider whether an

instruction on liquidated damages had been properly given because "[t]here was no finding by the jury of any improper performance by" a subcontractor to support an assessment of liquidated damages, so "any error in giving this instruction was harmless." 186 P.3d at 162. Neither case provides the slightest support for Shaw. Because the District Court's jury instructions on agency "adequately informed the jury of the applicable legal principles," they must be affirmed. *Lascano v. Vowell*, 940 P.2d 977, 982 (Colo. App. 1996).

If anything, the liquidated damages instructions unduly favored *Shaw* because the non-apportionment rule of *Medema Homes* does not apply to contracts, like the BOP Contract, that allow parties to adjust deadlines based on an apportionment of the delay. In *Medema Homes*, the contract set a single deadline for delivery of a new home and did not allow for its adjustment, providing that "[i]f Seller fails to deliver said title and possession within the 120 days and 30 day extension specified herein, and such failure is not beyond the control or without the fault or negligence of the Seller," the Seller would have to pay liquidated damages. 647 P.2d at 667. As the Supreme Court held, "[t]he clear wording of this clause dictates that only when the seller fails, because of his own fault, to deliver title and possession on time does liability under this liquidated damages clause come into operation." *Id.* The Court thus cited cases and authorities addressing similar

contract provisions, including decisions from the United States Supreme Court and the courts of California, North Carolina, and Rhode Island.[2]

The same courts that *Medema Homes* cited, however, allow apportionment of liquidated damages when the contract provides for adjusting deadlines or otherwise allows apportionment. *See, e.g., Robinson v. United States*, 261 U.S. 486, 488-89 (1923) (Brandeis, J.) (calling the contrary argument not "tenable"); *Nomellini Constr. Co. v. California ex rel. Dep't of Water Res.*, 19 Cal. App. 3d 240, 246 (Cal. App. 1971) (calling the contrary position "an absurdity"); *Terry's Floor Fashions, Inc. v. Crown Gen. Contractors, Inc.*, 645 S.E.2d 810, 819 (N.C. App. 2007) ("[T]he courts will not attempt to apportion the damages . . . *in the absence of a contract provision for apportionment*.") (emphasis added); *Psaty & Fuhrman, Inc. v. Housing Auth.*, 68 A.2d 32, 38, 39 (R.I. 1949) (allowing apportionment "[w]here there are a number of delays which are separate and distinct from each other" and awarding damages for 198 of 277 days of delay). This is the clear majority rule among modern decisions. *See, e.g., Hutton Contracting Co. v. City of Coffeyville*, 487 F.3d 772, 784-86 (10th Cir. 2007); *E.C. Ernst, Inc. v. Manhattan Constr. Co.*, 551 F.2d 1026, 1038 (5th Cir. 1973);

[2] The Court also cited a decision from South Carolina, *Austin-Griffith, Inc. v. Goldberg*, 79 S.E.2d 447, 452-453 (1953), but that decision found no fault on the part of the owner, and thus did not address apportionment.

Calumet Constr. Corp. v. Metropolitan Sanitary Dist., 533 N.E.2d 453, 456-57 (Ill. App. 1988); *X.L.O. Concrete Corp. v. John T. Brady & Co.*, 104 A.D.2d 181, 185 (N.Y.S. Ct. App. Div. 1984); *Utica Mut. Ins. Co. v. DiDonato*, 453 A.2d 559, 565 (N.J. Super. Ct. App. Div. 1982).

Here, the BOP Contract expressly allowed Shaw to request and receive an extension of its deadlines "equal to the number of calendar Days of delay in the critical path progress of [Shaw's] Work" caused by "Other Contractor[s]." (Trial Ex. 1, §§ 6.1, 13.3) Because the contract allowed the parties to adjust the deadlines based on how much delay was caused by Shaw and how much was caused by anyone else, a non-apportionment rule does not apply here. An alternative basis for rejecting Shaw's agency challenge and affirming the jury's award of liquidated damages is thus that a non-apportionment instruction should not have been given at all, and that any error in giving it was harmless—indeed, it was beneficial to—Shaw. *See Tricon Kent*, 186 P.3d at 162 (affirming judgment because "any error in giving this instruction was harmless").

Finally, Shaw repeatedly argues that, because Public Service agreed in the BOP Contract to extend Shaw's deadlines for delays to its critical path caused by Alstom, Alstom must be Public Service's agent. But Public Service also agreed to extend Shaw's deadlines for delays caused by "Acts of God" (Trial Ex. 1, §§ 14.1,

14.4)—and that does not mean God is Public Service's agent. Public Service generally agreed to extend Shaw's deadlines for delay caused by events outside Shaw's control, including delay caused by other contractors. None of the contractors—including Shaw—were Public Service's agents, as their contracts expressly provided. (*Id.*, § 23.13 (Shaw); Trial Ex. 532, §23.13 (Alstom)). Indeed, the very contractual provision that Shaw invokes to argue that Alstom must be treated as legally equivalent to Public Service expressly distinguishes between "Owner Caused Delay" and delay caused by "Other Contractors." (Trial Ex. 1, § 13.2.1.) Shaw cannot take one provision of the parties' contract out of context and use it to override all other parts of the contract providing for liquidated damages.

C. The District Court did not instruct the jury on agency in connection with Shaw's claim for delay and disruption damages.

In its second attack on the jury instructions, Shaw requests a new trial on a claim on which it won $43 million by arguing that "the jury was instructed that, unless it also determined Alstom was [Public Service's] 'agent' . . . Shaw could not recover delay and disruption damages for Alstom's delays." Shaw Br. 15. This is simply not what the District Court instructed.

The jury instructions on Shaw's claims allowed the jury to award actual damages if Alstom significantly delayed Shaw's critical path *regardless* of whether Alstom was Public Service's agent. Instruction 10 required Shaw to prove only that

the parties entered into the BOP contract, that "Public Service failed to perform its obligation on the Comanche 3 Project in a proper and timely manner as required by the BOP Contract," and that "Shaw substantially performed its part of the BOP Contract." (E-Record 9906.) Because the BOP Contract expressly provided that "significant delays" to Shaw's critical path caused by "Other Contractor[s]"—including Alstom—could support a Change Order request for additional time or money by Shaw, the instructions did not require the jury to find that Alstom was Public Service's agent to award Shaw damages. (Trial Ex. 1, § 6.1.) Indeed, the instructions expressly distinguished "the liquidated damages claimed by Public Service" from "actual damages," making it even clearer that the rules for the two were distinct. (E-Record 9912 (Jury Instruction No. 16).) Public Service never argued to the contrary at trial, and the verdict form asked simply:

> 1. On Plaintiff Shaw's Claims against Defendant Public Service for breach of the BOP Contract, we the jury find in favor of:
>
> ☐ Plaintiff Shaw
>
> ☐ Defendant Public Service

(E-Record 9924.) The jury checked the box for Shaw.

Shaw never objected to Instruction 10 and never asked the trial court to amend that instruction or the Special Verdict Form to make it even plainer that Shaw's claim did not implicate the agency issue. (Trial Tr. Vol. XVIII 5463:3-10.)

It therefore waived the right to challenge these instructions. *See* C.R.C.P. 51; *Hoeper v. Air Wis. Airlines Corp.*, 232 P.3d 230, 247 (Colo. App. 2009); *Farmland Mut. Ins. Cos. v. Chief Indus., Inc.*, 170 P.3d 832, 839 (Colo. App. 2007).

Even if Shaw had preserved a challenge, there is no basis to conclude that the District Court made any error, let alone abused its discretion, in crafting these instructions. Finally, any error that did exist would be harmless because the jury ultimately found for *Shaw* and awarded it $43 million dollars on its delay-or-disruption claim, a result the jury could only have reached by attributing Alstom's conduct to Public Service as the contract required.

II. The District Court Correctly Denied Shaw's Motion To Vacate The Jury's Verdict On Public Service's Liquidated Damages Claim.

Shaw argues that this Court should grant judgment notwithstanding the verdict to Shaw on the jury's award of liquidated damages to Public Service because: (1) the record would support a finding that Alstom delayed Shaw's work (Shaw Br. 21-27); and (2) the award of liquidated damages to Public Service is inconsistent with the award of actual damages to Shaw (Shaw Br. 27). Neither of these arguments can succeed because the question on review is not whether the record could support a verdict for Shaw, but whether it does support the jury's verdict. Overwhelmingly, it does.

A. Standard of review.

On Shaw's request for judgment notwithstanding the verdict, the Court must view the evidence in the light most favorable to Public Service and draw every reasonable inference which may legitimately be drawn from the evidence in Public Service's favor. *Durdin v. Cheyenne Mountain Bank*, 98 P.3d 899, 903 (Colo. App. 2004). Only if, from that perspective, the evidence "would not support a verdict by a reasonable jury," may the Court reverse the verdict. *Id.*

Regarding consistency, the Court must "attempt to reconcile the jury's answers to special verdicts if it is at all possible." *Gutierrez v. Bussey*, 837 P.2d 272, 275 (Colo. App. 1992). "Jury verdicts will not be reversed for inconsistency if a review of the record reveals any basis for the verdicts entered." *Id.*

B. The record overwhelmingly supports the award of liquidated damages to Public Service.

The record overwhelmingly supports the finding that Shaw missed its contractual deadlines, that no one delayed Shaw's critical path to get its work done, and that Public Service was therefore entitled to recover liquidated damages.

The predicate for liquidated damages is beyond dispute. Shaw missed its deadlines by more than 330 days. (Trial Tr. Vol. XV 4687:3-10.) Under the contractual formula of $150,000 per day of delay, this yielded more than $50

million in liquidated damages, which the contract capped at $43 million. (*Id.* at 4573:15-4578:14.)

Shaw's argument that it was entitled to relief from its deadlines is governed by the BOP Contract, which provides that Shaw could obtain an extension of the date for achieving Substantial Completion (or Full Load, under the June 2008 settlement agreement) *only* "equal to the number of calendar Days of delay in the *critical path progress* of [Shaw's] Work reasonably demonstrated by [Shaw] as resulting from the event necessitating the Change." (Trial Ex. 1, § 13.3) (emphasis added); (*Id.*, § 1.1.)

Taken in the light most favorable to Public Service, the trial evidence shows that no one but Shaw delayed Shaw's critical path. Expert witness Henry Rose of Hill International testified directly to this point:

> Q. So as we look through that whole period of time as ha[s] been covered by your scheduling analysis [June 19, 2008 through August 19, 2010], are there any days of delay to the critical path of Shaw's work that were caused by another party?
>
> A. No, there weren't. They have not demonstrated that anybody else impacted their critical path throughout the job.

(Trial Tr. Vol. XV 4690:19-25, 4691:20-23.) Rose's analysis broke down the time period covered by Shaw's claim into four "windows" of time and addressed each window separately. In each window, the evidence overwhelmingly demonstrated

that Shaw caused its own delays. (*See* Demonstrative 10 (graphically illustrating Shaw's critical path in red and summarizing testimony).)

The first window ran from June 19, 2008 to first fire on gas for steam blows, which occurred on July 7, 2009. (Trial Tr. Vol. XV 4666:14-18.) Rose testified that Shaw caused its own delays during this period by failing to erect its steam turbine generator on time. (*Id.* at 4671:3-4.) Robert Zanetti testified to the same effect. (*Id.* at 4472:1-4473:3.) Testimony from Shaw's own witnesses and contemporaneous documents confirmed that Shaw did not have its turbine on turning gear until July 3, 2009, after Alstom's boiler was ready to produce steam. (Trial Tr. Vol. II 449:14-18; Trial Tr. Vol. VIII 2451:25-2453:11; Trial Ex. 285, Trial Ex. 5548.) Both Rose and Zanetti also testified that the last three days of delay in this window, from July 3 to July 6, were Shaw's responsibility because it failed to complete its air cooled condenser on time. (Trial Tr. Vol. XV 4670:3-21, 4472:25-4474:21.) Rose concluded about this first time period:

> Q. At any time during this period, did anyone else do anything that delayed Shaw or prevented it from getting its work done?
>
> A. No, no one delayed Shaw.

(*Id.* at 4671:19-25.)

The second window was from first fire on gas for steam blows to steam bypass operation, July 7, 2009 to September 30, 2009. In this period, Shaw had to

complete its air-cooled condenser and turbine exhaust duct as well as the electric-hydraulic control system that operates the valves at the top of the steam turbine. (*Id.* at 4677:8-4678:20, 4476:6-4477:6.) Shaw's own witnesses and documents showed that Shaw was many months late in completing this work. (Trial Exs. 5329, 2160; Trial Tr. Vol. II 433:10-436:11; Trial Tr. Vol. IV 1142:23-1145:24; Trial Tr. Vol. IX, 2797:5-2811:15.) Shaw's critical path delays during this period were entirely its own responsibility, as Rose testified:

> Q. Did anyone else keep Shaw waiting to begin the steam to bypass operation?
>
> A. No, no one was holding them up.
>
> Q. And how about Shaw? Did Shaw keep others waiting?
>
> A. Alstom was ready to go to steam to bypass earlier than this.

(Trial Tr. Vol. XV 4678:21-4679:8.)

The third window was from steam to bypass to full load, September 30, 2009 to March 31, 2010. In this period, the evidence showed that the critical, 110-day delay in Shaw's work was caused by Shaw's inability to make operational both of its boiler feedwater pumps ("BFPs"). (Public Service Demonstrative Ex. 10; Trial Tr. Vol. XV 4682:1-4684:15.) Shaw's own January 2010 internal monthly report identified the repair of BFP A as "SSW's critical path to support Full Load." (Trial Ex. 4434-0001, Trial Tr. Vol. VI 1808:22-1811:4.) Shaw attempted to blame

its delays during this period on Alstom's boiler tube leaks, but Rose's analysis refuted this contention:

> Q. Now, the period we're looking at here is the time during which the leaks were discovered in Alstom's boiler; is that right?
>
> A. Yes, that's correct.
>
> Q. Did those leaks in any way impact Shaw's critical path?
>
> A. No, they didn't. The critical path went in through the boiler feedwater pumps, and they [Shaw] were never able to make them operational.

(Trial Tr. Vol. XV 4684:7-15.) Shaw's BFP A was not ready to operate until March 26, 2010. (Trial Ex. 4987-0029, Trial Tr. Vol. VIII 2460:2-2462:6; Trial Tr. Vol. X 3160:25-3161:7.)

The fourth and final window ran from March 31, 2010 to August 19, 2010, at which point, Hill International's analysis concluded with Shaw not having achieved substantial completion of its work. Both Rose and Zanetti explained that Shaw's failure to properly design its condensate pumps was the primary cause of Shaw's failure to achieve mechanical completion and, hence, substantial completion. (Trial Tr. Vol. XV 4686:18-4687:2; Trial Tr. Vol. XV 4491:13-4492:21.) Supporting their conclusions, mechanical engineers William Stecker and Jerry Kelly both testified that Shaw's condensate pump calculations omitted eight of twelve required water flows, resulting in pumps that were under-designed. (Trial

Tr. Vol. X 3165:10-3172:22, 2890:24-2895:14; Trial Tr. XVII 5264:22-5270:15.) Shaw's own design documents and contemporaneous correspondence revealed the defects. (Trial Exs. 5623, 5624, 5625.)

There is absolutely no doubt that the evidence, taken as a whole and in the light most favorable to Public Service, amply supported the jury's conclusion that Shaw's critical path delays were its own responsibility.

C. The jury's decision to award damages to both Public Service and Shaw did not require it to reach any inconsistent conclusions.

Shaw argues that the verdict is inconsistent because the jury could not logically have found *both* for Public Service on its claim for liquidated damages *and* for Shaw on its claim for delay and disruption. To the contrary, the jury could have consistently reached both of these conclusions in either of two ways.

First, the jury could have concluded that Alstom was not Public Service's agent, so even if Alstom's conduct entitled Shaw to extra time or money under the BOP Contract, its conduct was not attributable to Public Service for purposes of precluding Public Service's right to liquidated damages.[3] Ample record evidence supports this conclusion. Alstom's contract expressly declared that it was an

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[3] In addition, as demonstrated above, under a correct view of Colorado law, even if the jury had found that Public Service was responsible for some delay, that would not preclude it from recovering liquidated damages for the portion of the delay that Shaw caused. This is another, alternative basis for affirming.

"independent contractor," not an agent, of Public Service. (Trial Ex. 532, § 23.13; *see also* Trial Ex. 1, § 23.13 (same, under Shaw's BOP Contract).) The contract also stated that Public Service "shall have neither the right to control, nor have any actual, potential or other control over, the methods and means by which [Alstom] or any of its Personnel or subcontractors conducts its independent business operations." (Trial Ex. 532, § 23.13.) Jerry Kelly testified that Public Service's role was merely to "review and approve" the access plans that Shaw created to work with Alstom (Trial Tr. Vol. IX 2740:17), and that it was "universal" in construction contracts like Shaw's and Alstom's to grant the contractor "control over the schedule and over the means and methods of how they do the construction." (*Id.* at 2765:2-2766:10.) This evidence fully supports the jury's verdict.

Second, the jury could also have found that Shaw's work was not delayed by anyone, only disrupted by Alstom. "Delay" and "disruption" are distinct concepts in construction law:

> Although the two claim types often arise together in the same project, a "delay" claim captures the time and cost of *not* being able to work, while a "disruption" claim captures the cost of working less efficiently than planned.

Bell BCI Co. v. United States, 81 Fed. Cl. 617, 636 (Fed. Cl. 2008) (emphasis in original), *vacated in part on other grounds*, 570 F.3d 1337 (Fed. Cir. 2009); *see*

also *U.S. Indus., Inc. v. Blake Constr. Co., Inc.*, 671 F.2d 539, 546 (D.C. Cir. 1982); Bruner & O'Connor on Construction Law § 15:103 ("'Disruption' is a claim distinct from delay, suspension, and acceleration . . . .").

The jury instructions allowed the jury to act on the distinction between disruption and delay and find one but not the other. They explained that Shaw sought damages for both "delays" and "interferences" caused by Public Service. (E-Record 9897 (Jury Instruction No. 2).) The special verdict form likewise provided simply that the jury found "delay and disruption damages owed to Plaintiff Shaw in the amount of $43 [million]," without identifying which category the damages were for. (E-Record 9924 (Special Verdict Answer No. 1).)

The factual record also supports this reconciliation. As explained above, the record overwhelmingly shows that no one delayed Shaw's work. In addition, attributing the verdict to disruption damages explains why the jury awarded only $43 million to Shaw, not the $87.25 million it requested. Angela Rice, one of Shaw's witnesses, testified that Shaw's request was comprised of (1) disruptions, (2) delays, and (3) accelerations. (Trial Tr. Vol. IX 2570:16-20, 2562:8-9.) As support for this number, John Borcherding testified that Shaw suffered $27 million in damages because of disruptions to its work, including congestion, crew interference, and crowding. (Trial Tr. Vol. VII 2153:4-10, 2159:12-2160:19,

2191:7-8; Trial Tr. Vol. VIII 2241-43.) Finally, Avram Tucker, one of Public Service's witnesses, separately reviewed Shaw's damages claim and explained which amounts were properly attributable to disruption rather than delay. (Trial Tr. Vol. XV 4586:19-4587:4.) Tucker determined that approximately half of Shaw's claimed delay damages, or $19 million, should instead have been attributed to disruption or acceleration. (*Id.* at 4586:19-4587; Public Service Demonstrative 44; Trial Ex. 1083.) Ultimately, $68 million of Shaw's $87 million in claimed damages were attributable to causes other than delay. (Trial Ex. 1083.)

Because the Court can reconcile the jury's verdict, it must do so and affirm the judgment. *Gutierrez*, 837 P.2d at 275.

III. The District Court Correctly Denied Shaw's Motion For JNOV On Public Service's Replacement Contractor Damages.

Shaw's gross mismanagement and delay required Public Service to pay replacement contractors $27 million to do work that Shaw was supposed to have done. Of this amount, $10.8 million related to Change Order 23, and $16.2 million related to other replacement costs. The jury awarded Public Service the full amount of its damages. Shaw challenges the factual basis for a small part of the $16.2 million award, and both the legal and factual basis for the $10.8 million award on Change Order 23. Because ample evidence supports the jury's award, the Court should reject Shaw's appeal.

A. Standard of review.

See supra at 21.

B. There is ample support in the law and the record for the jury's verdict in favor of Public Service on Change Order 23.

During construction, Shaw alleged that delays by Alstom on its boiler work were disrupting Shaw's ability to complete its electrical and piping work inside Alstom's boiler building. As a result, the parties negotiated the two-page Change Order 23, removing the boiler electrical work from Shaw's BOP Contract and assigning it to another contractor. (Tr. Ex. 10.) Under Change Order 23, Shaw was obligated to accurately estimate the necessary quantities of permanent plant materials and timely provide them. Shaw breached these obligations, and the breach led Public Service to incur $10.8 million in replacement contractor costs. The jury was correctly instructed on Public Service's claim for breach, and ample evidence supports the award.

1. Public Service's claim was correctly submitted to the jury as a contract claim.

Consistent with the pleadings, Public Service's claim on Change Order 23 was submitted to the jury as a contract claim. (*See* E-Record 42, ¶ 26(q).) The Court correctly instructed the jury on the elements of a claim for breach of contract and on the implied covenant of good faith and fair dealing. *Compare* (E-Record

9907, 9909, 9910 (Jury Instructions and Verdict Forms)), *with W. Distributing Co. v. Diodosio*, 841 P.2d 1053, 1057 (Colo. 1992), *and* CJI-Civ. 4th 30:1 (2007). Public Service argued that it should recover damages from Shaw on these theories. (Trial Tr. Vol. XVIII 5551-5555.)

The District Court did not instruct the jury on any claims relating to fraudulent misrepresentation. (Trial Tr. Vol. XVII 5315:5-5317:4.) Shaw's lead argument on appeal—that *if* Public Service's claim were presented as a misrepresentation claim, it would be barred by the economic loss doctrine, Shaw Br. 30-32—is thus irrelevant.

Shaw's next argument is that Public Service's claim for breach was barred by Change Order 23's release of claims "that have arisen to date, or might exist at present (whether known or unknown)." (Trial Ex. 10 at 2.) Public Service did not attempt to reach back to previous disputes; it claimed that Shaw breached Change Order 23 itself and the implied duty of good faith it contained, and the jury instructions reflected this claim. (E-Record 9910, 9918, 9920 (Jury Instruction Nos. 14, 23, 23A).) Change Order 23 did not release claims for its own breach.

Shaw's final legal argument is that the $10.8 million award can only be explained as an award of rescission, which Public Service "did not elect." Shaw Br. 34. To the contrary, Public Service presented ample evidence at trial proving

that Shaw breached its obligations under Change Order 23, and the jury correctly awarded Public Service damages as a result of those breaches.

Shaw's first breach of Change Order 23 related to its obligation to supply all permanent plant materials for the boiler electrical work. (Trial Ex. 10, ¶ 1(b).) Public Service reasonably expected, based on Shaw's representations, that Shaw would have all necessary materials for the boiler electrical work on site and available by November 21, 2008. (Trial Tr. Vol. XII 3630:4-3631:18, 3690:1-3693:9.) The evidence showed that Shaw breached its good-faith duty to provide the materials on time, delaying the boiler electrical work. (Trial Tr. Vol. XII 3620:7-3621:6, 3622:5-3623:14, 3631:19-24, 3633:16-3635:2; Trial Ex. 5616.)

Shaw also breached its duty of good faith under Change Order 23 to provide a reasonable estimate of the quantities and materials necessary to complete the boiler electrical work. Both parties prepared estimates of the cost of the work covered by the change order and agreed to schedules for adjusting the contract price "based upon the given quantities . . . that have been provided by the BOP Contractor [Shaw]." (Trial Ex. 10, ¶ 2.) Public Service demonstrated that Shaw's estimates had no quantitative basis because, despite its representations to the contrary, Shaw had not completed its electrical engineering for the boiler. (Trial Tr. Vol. XII 3637:6-3639:1, 3689:10-3690:22, 3691:6-3698:18; Public Service

Demonstrative Ex. 7 at 8.) The actual quantities needed to complete the work were in many cases more than double what Shaw represented in Change Order 23, causing Public Service significant damage. (Trial Tr. Vol. XII 3698:5-3700:2.)

In light of this evidence, the jury correctly found that Shaw breached Change Order 23, preventing Public Service from receiving the benefit of its bargain and entitling it to actual damages. The jury's award of $10.8 million reflects "the amount of damages necessary to place [Public Service] in the same position [it] would have occupied had the breach not occurred." *Smith v. Farmers Ins. Exch.*, 9 P.3d 335, 337 (Colo. 2000). This is the classic measure of contract damages. *See Decker v. Browning-Ferris Indus. of Colo., Inc.*, 947 P.2d 937, 940-41 (Colo. 1997).

2. The evidence fully supports the award of $10.8 million for breach of Change Order 23.

In a single sentence, Shaw argues that Public Service "offered into evidence only a single invoice for $5.8 million" to support the jury's $10.8 million award. Shaw Br. 35. This ignores a mountain of other supporting evidence.

First, both Trevor Tate and Robert Moran testified regarding the costs Public Service incurred due to Shaw's breach. (Trial Tr. Vol. XII 3644:1-3645:23, 3710:9-3714:16; Trial Ex. 2460A.) Moran, who was Public Service's Electrical Superintendant, monitored the electrical work performed by the replacement

contractor. (Trial Tr. Vol. XII 3674:11-14, 3696:9-14.) "On a day-to-day basis, [he] was out in the field" monitoring the work and subsequent invoices. (*Id.* at 3710:9-3714:4.) Both Tate and Moran testified that the replacement costs were reasonable and appropriate. (*Id.* at 3645:19-23, 3712:18-21.)

Second, Public Service presented expert testimony from Avram Tucker, a CPA and construction accounting professor at Stanford University. (Trial Tr. Vol. XV 4561:13-64:12, 4568:1-10.) Tucker conducted a "detailed review" of "invoices from contractors" and other documents establishing Public Service's replacement contractor cost (*Id.* at 4581:3-12), along with "an extensive review" of "20 binders" of supporting documents. (*Id.* at 4581:10-21.) Based on his review, Tucker testified to Public Service's replacement contractor damages—including the amount attributable to Shaw's breach of the covenant of good faith and fair dealing inherent in Change Order 23. (*Id.* at 4582:10-4583:12; *Id.* at 4627:23-4628:20.) Public Service's Demonstrative Exhibit 41 summarized Tucker's opinion of the damages. (Trial Tr. Vol. XV 4608:4-6.) This evidence is more than sufficient to support the jury's award.

C. The record amply supports the jury's award of other replacement contractor damages.

In two paragraphs containing no factual or legal citations, Shaw also challenges portions of the jury's award of damages for Public Service's other replacement contractor costs. Shaw Br. 35.

These arguments are not sufficiently developed to preserve an issue for the Court's review. *See* Colorado Appellate Rule 28(a)(4) (requiring arguments to be supported "with citations to the authorities, statutes, and parts of the record relied on"); *Holley v. Huang*, --- P.3d ----, 2011 WL 1797236, at *5 (Colo. App. May 12, 2011) (declining to address "bald assertions of error that lack any meaningful explanation"); *Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 19 (Colo. App. 2010).

If the Court reaches the merits, it will find the jury's award fully supported. As described above, Tucker's expert testimony proved up Public Service's damages claim. (Trial Tr. Vol. XV 4582:10-4583:12, 4627:23-4628:20.) His conclusion that Public Service was entitled to receive a total of $26,940,737 in replacement contractor damages was summarized and admitted into evidence as Public Service's Demonstrative Exhibit 41. (*Id.* at 4608:4-6.) All of the invoices underlying Tucker's conclusion were made available to Shaw in advance of trial, and Shaw had the opportunity to cross-examine Tucker at trial, as C.R.E. 1006

requires. Tucker's testimony was also buttressed by extensive additional evidence, including all of the invoices for one replacement contractor (B&W) and summaries of the invoice totals for all of the replacement contractors. (*See, e.g.*, Trial Ex. 5614; Trial Tr. Vol. XII 3598:23-24.) Public Service also offered testimony from Jerry Kelly on the cost and reasonableness of the replacement work. (Trial Tr. Vol. IX 2852:14-2853:8, 2853:19-2854:23.)

Shaw's argument that Public Service did not offer all of the underlying "invoices or other documentation" to support $4.1 million of its $16.2 million in replacement contractor damages is beside the point. Shaw Br. 35. Parties seeking damages are not required to submit what their opponent believes to be "the best obtainable evidence," *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378, 1382-83 & n. 7 (Colo. 1993), and they can and should present summaries of voluminous documents rather than the documents themselves, which is what Public Service did. C.R.E. 1006; *see, e.g.*, *Metro Nat'l Bank v. Parker*, 773 P.2d 633, 634 (Colo. App. 1989).

Finally, Shaw's cursory argument that the jury impermissibly awarded Public Service a double recovery is insufficiently developed to preserve an issue for review, *see* *supra* at 35, and is also contrary to the instructions. Jury Instruction No. 17, entitled "Multiple Recovery Prohibited," stated that if the jury decided for

either party "on more than one claim for relief, [it] may award that party damages only once for the same losses." (E-Record 9913 (Jury Instruction No. 17).) Absent evidence to the contrary, Colorado courts "presume that a jury follows a trial court's instructions." *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1088 (Colo. 2011). Shaw cites no evidence suggesting that the jury failed to follow Instruction No. 17.

Viewed in the light most favorable to Public Service, the evidence is more than sufficient to support the jury's verdict. *See Durdin*, 98 P.3d at 903.

IV. The District Court Did Not Abuse Its Discretion In Denying Shaw's Motion For A Mistrial Based On A Juror's Alleged Non-Disclosure.

A. Standard of review.

"Whether to grant or deny a motion for a mistrial is a matter within the discretion of the trial court, and the court's ruling will not be disturbed absent an abuse of that discretion." *States v. R.D. Werner Co., Inc.*, 799 P.2d 427, 431 (Colo. App. 1990). This Court must "defer to the trial court's findings of historical fact if they are supported by competent evidence in the record." *People v. Harlan*, 109 P.3d 616, 624 (Colo. 2005). Conclusions of law are reviewed de novo. *Kendrick v. Pippin*, 252 P.3d 1052, 1064 (Colo. 2011).

B. The District Court found that it was unclear whether Juror X raised his hand on the relevant question, eliminating the basis for Shaw's challenge.

The entire premise of Shaw's argument for a mistrial is that its counsel asked a question in *voir dire* and "Juror X did not respond to this question." Shaw Br. 37. The District Court, however, found that Shaw could not prove this critical fact because it was "unclear whether [Juror X] raised his hand." (E-Record 11592 (Order Regarding Alleged Juror Misconduct).) This finding is both correct and fatal to Shaw's appeal.

In *voir dire*, counsel for Shaw asked the group of 18 potential jurors, "How many of you have ever hired a construction company or contractor to build or fix something?" (Trial Tr. Vol. I 91:23-92:3.) Counsel then asked more questions of some of the potential jurors who raised their hands. But the record does not establish that he followed up with every individual who raised his or her hand.

Because Shaw did not adequately preserve its own record, it is in no position to ask this Court to take the extraordinary step of reversing the District Court's discretionary decision and insisting that it create an exception to C.R.E. 606(b).

C. The District Court correctly applied Rule 606(b) to bar Shaw's attempt to use testimony about the jury's deliberations to prove that Juror X had something to disclose.

Even if Shaw had preserved its record and could prove that Juror X did *not* raise his hand in response to Shaw's *voir dire* question, it cannot prove that Juror X *should* have raised his hand. The only evidence Shaw offered to prove that he had something to disclose came from affidavits by four other jurors—Jurors A, B, C, and D—about what was discussed in deliberations. (E-Record 10004 (Shaw Motion for a Mistrial); *see id.* at 10151-10205 (Exs. 2, 3, 4, and 7 to Shaw's Motion[4]).) The District Court correctly held that Rule 606(b) of the Colorado Rules of Evidence barred Shaw from using those statements to challenge the verdict.

"Colorado Rule of Evidence 606(b) strongly disfavors any juror testimony impeaching a verdict." *Harlan*, 109 P.3d at 624. In broad terms, with only three exceptions that Shaw does not invoke on appeal, the rule provides that:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. . . . A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

[4] The District Court referred to the jurors by name in its order, but to ensure their confidentiality and to be consistent with how Shaw labels the jurors in its brief, Public Service refers to the jurors by letter.

As the Colorado Supreme Court concluded, "[i]t would have been hard to paint with a broader brush" than Rule 606(b) used. *Stewart v. Rice*, 47 P.3d 316, 321 (Colo. 2002).

In a comprehensive order, the District Court found that Juror X had been "the most conspicuously attentive juror" and that "[h]is body language betrayed no feelings for either party." (E-Record 11597 (Order Regarding Juror Misconduct).) The court held that Rule 606(b) barred all of the juror statements offered by Shaw and found that there was "no evidence to suggest" that Juror X made comments to other jurors "*before* deliberations began." (*Id.* at 11595.) Shaw does not challenge this finding of fact, and it was supported by ample evidence in the record. (E-Record 10153:23-10154:5, 10156:20-22, 10167:12-16, 10175:6-7, 10205:6-7; 14-15.)

Neither of Shaw's two arguments for why Rule 606(b) should not apply is persuasive. Shaw first argues that the Rule does not apply to a statement made when all the jurors are not physically present, even if it is made during deliberations. Shaw Br. 40-41. The decision in *Black v. Waterman*, 83 P.3d 1130 (Colo. App. 2003), which Shaw cites, cuts against Shaw's position. In *Black*, the court allowed submission of part of one affidavit regarding what one juror said to another during *voir dire*, but it excluded all other juror affidavits because they

"discuss[ed] the jury's deliberative process, [and so] are barred by CRE 606(b)." *Id.* at 1138. Shaw's position allowing parties to delve into jurors' discussions as they are coming and going would also directly contradict the "three fundamental purposes" of C.R.E. 606(b): "to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion." *Stewart*, 47 P.3d at 322. It should be rejected.

Second, Shaw argues that the Court should create an exception allowing the admission of juror statements about deliberations to prove deceit in *voir dire*. Shaw Br. 42-44. Recent, compelling authority rejects this proposed exception. *See United States v. Benally*, 546 F.3d 1230, 1235-38 (10th Cir. 2008); *Williams v. Price*, 343 F.3d 223, 235 (3d Cir. 2003) (Alito, J.).[5] Moreover, in each of the three cases Shaw cites in support of its proposed exception, the juror testimony was admissible under a different exception to the rule. *See United States v. Henley*, 238 F.3d 1111, 1120 (9th Cir. 2001) (juror made allegedly racist statements "*before* deliberations began and *outside* the jury room"); *United States v. Boney*, 68 F.3d 497, 503 (D.C. Cir. 1995) (juror foreman was a convicted felon and "any discussion of Mr. J's felon status during deliberations would surely seem to be

[5] C.R.E. 606(b) is "substantially similar" to Federal Rule of Evidence 606(b), and the Court may thus look to federal cases interpreting Rule 606(b). *See Stewart v. Rice*, 47 P.3d 316, 321 (Colo. 2002).

'extraneous,' and possibly 'prejudicial' as well"); *Hard v. Burlington N. R.R.*, 812 F.2d 482, 485 (9th Cir. 1987) (juror introduced extraneous information of the defendant's settlement practices in other cases). Nothing similar supports the creation of an exception here.

The District Court did not abuse its discretion in denying a mistrial.

V. Public Service's Conditional Cross Appeal.

Public Service filed a conditional cross appeal for the sole purpose of ensuring that the Court has the authority to vacate the jury's awards for Shaw in the event that it orders a retrial on any issues.

First, if the Court finds an irreconcilable conflict between the jury's award of liquidated damages to Public Service and actual damages to Shaw, the Court must vacate and remand for a new trial on both claims. It cannot simply pick one to affirm and one to reject, as Shaw requests, because there is "no reason for the court to assume that [the one award] was more consistent with the jury's intent than [the other award]." *Wulff v. Christmas*, 660 P.2d 18, 20 (Colo. App. 1982).

Second, if the Court vacates any of the jury's awards to Public Service and remands for a new trial, it must also vacate all of the jury's awards to Shaw because the issues are so "interwoven" or "intertwined" that a retrial on "all issues" is required. *Hildyard v. W. Fasteners, Inc.*, 522 P.2d 596, 602 (Colo. App. 1974);

Bassett v. O'Dell, 491 P.2d 604, 604 (Colo. App. 1971). Each party's claims against the other arise out of the same central dispute over whether Shaw was responsible for its own failure to meet its contractual deadlines, or whether it can blame its delay on someone else. Shaw cannot, therefore, keep the parts of the verdict that it likes and redo only the portions it does not like.

CONCLUSION

The District Court's judgment should be affirmed in its entirety.

Respectfully submitted this 17th day of November, 2011.

s/ Michael S. McCarthy

David W. Stark, #4899
Michael S. McCarthy, #6688
John H. Hinderaker
James J. Hartnett
FAEGRE & BENSON LLP

Attorneys for Appellee/Cross-Appellant Public Service Company of Colorado d/b/a Xcel Energy

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November, 2011, a true and correct copy of the foregoing **OPENING-ANSWER BRIEF OF PUBLIC SERVICE COMPANY OF COLORADO** was electronically filed and served via LexisNexis File & Serve on the following:

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RULE 1006. SUMMARIES

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

RULE 1006. SUMMARIES

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[26] Whether a defendant has shown justifiable excuse or excusable neglect is a question of fact to be resolved by the trial court. *People v. Wiedemer, supra.*

[27] While it is a violation of due process to use unconstitutional convictions in a later criminal proceeding to enhance punishment, *People v. Padilla,* 907 P.2d 601 (Colo.1995), a state may attach reasonable time limitations to the assertion of federal constitutional rights. *See People v. Wiedemer, supra; People v. Vigil,* 983 P.2d 805 (Colo.App.1999).

Here, defendant was charged with four habitual criminal counts. Defendant filed a motion challenging his prior convictions, and following a hearing, the court determined that defendant had not shown justifiable excuse or excusable neglect and that collateral attack on three of the convictions was therefore time barred. The court then concluded that the fourth conviction had been constitutionally obtained and could be used in the habitual criminal proceeding.

The court acted properly in examining each prior conviction and determining that defendant had not established justifiable excuse or excusable neglect as to the lateness of his challenges. We thus find no error.

VII.

Finally, defendant contends that his conviction should be reversed because of cumulative error. We disagree.

[28] Although an appellate court may find that individual errors do not require reversal, numerous irregularities may in the aggregate show the absence of a fair trial. *People v. Roy,* 723 P.2d 1345 (Colo.1986).

Here, we conclude that any errors, considered either individually or cumulatively, did not deprive defendant of a fair trial.

The judgment and sentence are affirmed.

Judge ROTHENBERG and Judge DAILEY concur.

Chrystal Y. BLACK, Plaintiff–Appellant,

v.

Warren WATERMAN, as Sheriff of the Montrose County Sheriff's Department; and G.R. Rowan, in his individual capacity, and as undersheriff of the Montrose County Sheriff's Department, Defendants Appellees.

No. 02CA0172.

Colorado Court of Appeals,
Div. III.

March 27, 2003.

Employee brought sexual harassment claim against employer, alleging that she was subjected to a hostile work environment and fired after she complained about the harassment. The District Court, Montrose County, Al H. Haas, J., entered judgment on jury verdict, but denied employee's request for back pay and front pay, and denied employee's motion for a new trial. Employee appealed. The Court of Appeals, Webb, J., held that trial court was not precluded from awarding back pay or front pay to employee.

Affirmed in part, reversed in part, and remanded with directions.

1. Appeal and Error ⚷893(1), 1004(1)

The appellate court will examine trial court damage awards in employment discrimination cases arising under the Civil Rights Act for abuse of discretion, but review underlying legal questions de novo. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

2. Civil Rights ⚷1571

Although front pay is not expressly listed as a remedy in Title VII, the power to grant equitable relief has been interpreted as including front pay. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

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during voir dire. *See Wilson v. O'Reilly, supra.*

We agree with the trial court that the portion of juror B's affidavit and all of the other juror's affidavit, which discuss the jury's deliberative process, are barred by CRE 606(b). However, we need not penetrate the jury's deliberative process to conclude that juror B's affidavit warranted an evidentiary hearing concerning juror M's alleged failure to disclose bias during voir dire. *Compare Allen v. Ramada Inn, Inc., supra* (new trial ordered because juror who was rape victim deliberately failed to respond when asked whether she had been or knew anyone who had been raped), *with People v. Christopher,* 896 P.2d 876 (Colo.1995) (judgment affirmed because juror's inadvertent failure to disclose acquaintance with testifying officer was of only peripheral significance).

Accordingly, we vacate this aspect of the trial court's order and remand the issue to the trial court for an evidentiary hearing and factual findings whether juror M misrepresented or concealed her beliefs during voir dire, whether the misrepresentation or concealment was deliberate or inadvertent, and whether a new trial on compensatory damages is required. *Cf. People v. Meis,* 837 P.2d 258 (Colo.App.1992)(remand for findings whether juror was able or qualified to perform duties in light of uncertainty whether trial court considered necessary factors).

The trial court's orders declining to award back pay or front pay and declining to consider the issue of juror M's alleged nondisclosure during voir dire are reversed, and the case is remanded for further proceedings on those matters consistent with this opinion. In all other respects, the judgment and orders are affirmed.

Judge DAVIDSON and Judge ROY concur.

The PEOPLE of the State of Colorado, Plaintiff–Appellee,

v.

Afshin PAHLAVAN, Defendant–Appellant.

No. 01CA1331.

Colorado Court of Appeals,
Div. I.

April 24, 2003.

As Modified on Denial of Rehearing
Aug. 7, 2003.

Certiorari Denied Feb. 17, 2004.*

Defendant was convicted by a jury in the District Court, Douglas County, Thomas J. Curry, J., of second degree kidnapping, first degree sexual assault, robbery, third degree assault, and two counts of felony menacing. Defendant appealed. The Court of Appeals, Taubman, J., held that: (1) admission of testimony from four police officers regarding the statement the victim provided to police was not an abuse of discretion; (2) act of the trial court in allowing the jury to take the victim's written statement into the jury room during deliberations was not plain error; (3) trial court error, if any, in admitting evidence of prior acts of domestic violence between defendant and the victim was harmless; and (4) defendant was entitled to be sentenced to a period of discretionary parole.

Judgment affirmed; sentence reversed in part; remanded.

1. Criminal Law ⚷419(1.10)

Admission of testimony from four police officers regarding the statement the victim provided to police was not an abuse of discre-

* Justice HOBBS would grant as to the following issue:

When discretionary parole is annexed to a defendant's "governing" sentence, does the defendant nonetheless have to serve a mandatory parole term that is annexed to the shorter, concurrent sentences imposed.

this case from which a jury might properly find that a bailment existed.

[4] Other than his theory that the defendants were liable to him because of negligent acts on their part performed by them in their capacity as bailees, plaintiff did not allege, nor does the record reflect, a breach of any other duties for which the defendants, either as lessors or otherwise, might be liable to the plaintiff. In the absence of any alternative theory for relief, the defendants' motion for dismissal of the plaintiff's complaint should have been granted. Mathews v. Mathews, 69 Colo. 333, 194 P. 358.

Judgment is reversed, and this cause is remanded with directions that the trial court dismiss this action.

COYTE and DWYER, JJ., concur.

Sandra K. BASSETT, Plaintiff-Appellee,
v.
Douglas B. O'DELL, Defendant-Appellant.
No. 70-441.

Colorado Court of Appeals, Div. I.

Nov. 16, 1971.

Rehearing Denied Dec. 7, 1971.

Certiorari Granted Jan. 3, 1972.

Selected for Official Publication.

Action for damages sustained in an intersectional automobile collision wherein defendant counterclaimed claiming that plaintiff was contributorily negligent. From a judgment of the District Court of the City and County of Denver, James C. Flanigan, J., the defendant appealed. The Court of Appeals, Coyte, J., held that where there was testimony that light was yellow immediately prior to time defendant entered intersection thereby permitting him to enter intersection provided he cleared before the light turned red, and that if defendant in fact entered intersection on the yellow light plaintiff must have entered on a red light, the right-of-way issue presented a factual dispute for jury.

Reversed with directions.

1. Automobiles ⚷245(14, 80)

In action for damages sustained in intersectional automobile collision, wherein defendant counterclaimed claiming that plaintiff was contributorily negligent, and wherein there was testimony that light was yellow immediately prior to time defendant entered intersection thereby permitting him to enter intersection provided he cleared before the light turned red, and that if defendant in fact entered intersection on the yellow light plaintiff must have entered on a red light, the right-of-way issue presented a factual dispute for jury.

2. New Trial ⚷9

Where plaintiff conceded that defendant was entitled to new trial on issue of plaintiff's contributory negligence, new trial would not be confined solely to issue of liability on ground that amount of verdict was not contested by defendant where issues of damages and of liability were so closely intertwined that it would be error to confine the new trial solely to liability issue.

3. New Trial ⚷9

Where issues at trial are interrelated and depend upon one another for determination, then error which requires new trial on one issue, will, of necessity, require a new trial as to all issues.

Kripke, Carrigan & Dufty, P. C., Kenneth N. Kripke, Denver, for plaintiff-appellee.

Burnett, Watson, Horan & Hilgers, Mike Hilgers, Denver, for defendant-appellant.

COYTE, Judge.

This is an action arising out of an automobile accident occurring in Denver, Colo-

Return

this case from which a jury might properly find that a bailment existed.

[4] Other than his theory that the defendants were liable to him because of negligent acts on their part performed by them in their capacity as bailees, plaintiff did not allege, nor does the record reflect, a breach of any other duties for which the defendants, either as lessors or otherwise, might be liable to the plaintiff. In the absence of any alternative theory for relief, the defendants' motion for dismissal of the plaintiff's complaint should have been granted. Mathews v. Mathews, 69 Colo. 333, 194 P. 358.

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Burnett, Watson, Horan & Hilgers, Mike Hilgers, Denver, for defendant-appellant.

COYTE, Judge.

This is an action arising out of an automobile accident occurring in Denver, Colo-

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Because the orders that are the subject of this appeal are not final and appealable, we do not have jurisdiction to resolve them.

Therefore, this appeal is dismissed without prejudice.

Judge CARPARELLI and Judge LOEB concur.

Samuel J. BARNETT, Plaintiff–Appellant,

v.

ELITE PROPERTIES OF AMERICA, INC., d/b/a Classic Homes, Defendant–Appellee.

No. 09CA0693.

Colorado Court of Appeals, Div. II.

May 27, 2010.

Background: Home purchaser brought breach of warranty, misrepresentation, negligence, breach of the covenant of good faith and fair dealing, construction defect, constructive fraud and civil conspiracy action against builder. After action was stayed for arbitration, the District Court, El Paso County, David S. Prince, J., confirmed arbitration award for builder, and granted builder summary judgment on the constructive fraud and civil conspiracy claims based on issue preclusion. Purchaser appealed.

Holdings: The Court of Appeals, Gabriel, J., held that:

(1) trial court acted within its discretion by staying purchaser's nonarbitrable claims pending arbitration of the arbitrable claims;

(2) arbitrator did not exceed his authority by denying purchaser's motion to reopen the evidence;

(3) arbitration award did not violate public policy or show manifest disregard for the law;

(4) as a matter of first impression, a judgment was not final for purposes of issue preclusion until certiorari had been resolved in both the Colorado and United States Supreme Courts;

(5) issue preclusion did not bar purchaser from litigating his constructive fraud and civil conspiracy claims; and

(6) the existence of a fiduciary duty was not required to prove a claim for constructive fraud.

Affirmed in part, reversed in part, and remanded.

1. Alternative Dispute Resolution ⚷374(1, 7)

In reviewing an order confirming or vacating an arbitration award, a district court's factual findings are reviewed for clear error and its legal conclusions de novo.

2. Alternative Dispute Resolution ⚷374(1)

Determinations of an arbitrator are given extreme deference, because the standard of review of arbitral awards is among the narrowest known to law.

3. Alternative Dispute Resolution ⚷191

In deciding whether to stay nonarbitrable claims until an arbitration of arbitrable claims is completed, courts should consider whether: (1) piecemeal litigation of the nonarbitrable claims could result in inconsistent determinations of factual and legal issues to be determined by the arbitrator; (2) piecemeal litigation would be inefficient because of any overlap in the factual issues to be determined in the litigation and the arbitration; (3) the arbitrable issues predominate in the lawsuit; and (4) the nonarbitrable claims are of questionable merit.

4. Alternative Dispute Resolution ⚷196

Trial court acted within its discretion by staying the nonarbitrable claims of constructive fraud and civil conspiracy until arbitration of the arbitrable claims, breach of war-

ings regarding the extent of the arbitrator's authority, he cites no authority requiring such findings, and we are aware of none. To the extent that Barnett is asking us to impose such a new requirement on district courts reviewing arbitration awards, we decline to do so.

B. Arbitrator's Application of the CUAA

[6–8] We likewise reject Barnett's conclusory assertion that the district court erred in confirming the arbitration award because the arbitrator applied the CUAA, rather than the FAA. "An arbitration award is tantamount to a judgment and is entitled to be given such status by the court which reviews it. Thus, when a party attacks the validity of an arbitration award, he bears the burden of sustaining the attack." *Container Technology Corp. v. J. Gadsden Pty., Ltd.,* 781 P.2d 119, 121 (Colo.App.1989) (citation omitted). "A mere assertion of error unsupported by evidence cannot serve as a basis for vacating a judgment confirming an arbitration award." *R.P.T. of Aspen, Inc. v. Innovative Communications, Inc.,* 917 P.2d 340, 344 (Colo.App. 1996).

[9, 10] Moreover, C.A.R. 28(a)(4) states, in pertinent part, that an appellate brief must set forth "the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on." We will not consider a bald legal proposition presented without argument or development. *People v. Simpson,* 93 P.3d 551, 555 (Colo.App.2003). Counsel must inform the court both as to the specific errors asserted and the grounds, supporting facts, and authorities to support their contentions. *Westrac, Inc. v. Walker Field,* 812 P.2d 714, 718 (Colo.App.1991).

Here, although Barnett baldly asserts that the arbitrator failed to apply the FAA and instead applied the CUAA, he never explains how the arbitrator did so or why any such alleged error requires reversal. Absent any specific assertion of error or showing of any specific grounds, facts, or authorities warranting reversal, we decline to disturb the arbitration award.

C. Award of Costs Under CDARA

Barnett next contends that the arbitrator exceeded his authority under the purchase agreement and limited warranty by awarding costs pursuant to CDARA. We are not persuaded.

As an initial matter, we note that Barnett's precise argument is unclear to us. He appears to be asserting that the damages that he was awarded under CDARA were somehow improper, because they amounted to an award of costs, which Barnett claims was prohibited by the purchase agreement. To the extent this is Barnett's argument, which seems to run against his own interest, we reject it.

Barnett's CDARA claim sought damages for his "actual loss of the use of real or personal property." Consistent with this claim, the arbitrator found that Barnett had suffered a loss of use and enjoyment of his property and valued that loss at $1,000 per month for seventeen months, totaling $17,000. The arbitrator further awarded Barnett $3,700, reflecting the increased utility costs that he incurred as a result of problems with his septic system. At no point did the arbitrator characterize his award to Barnett as costs, nor do we perceive any basis for concluding that the award was somehow intended to cover Barnett's arbitration costs.

To the extent that Barnett is arguing, instead, that the arbitrator's cost award to Classic Homes was improper, we likewise disagree. The purchase agreement stated, in pertinent part,

> In the event that any party commences any litigation or arbitration proceeding against the other party to enforce the provisions of the Contract, the prevailing party therein shall be entitled to recover, in addition to any other relief awarded, all reasonable costs incurred in connection therewith, including reasonable attorney's fees.

Here, the arbitrator determined that Classic Homes was the prevailing party, a conclusion that Barnett has not challenged. Thus, the arbitrator properly awarded costs to Classic Homes under the purchase agreement.

BELL BCI COMPANY, Plaintiff–Appellee,

v.

UNITED STATES, Defendant–Appellant.

No. 2008–5087.

United States Court of Appeals, Federal Circuit.

June 25, 2009.

Background: Contractor hired to construct laboratory building brought action against the United States for breach of contract. After a bench trial, The United States Court of Federal Claims, Thomas C. Wheeler, J., 81 Fed.Cl. 617, entered judgment in favor of contractor. Government appealed.

Holdings: The Court of Appeals, Prost, Circuit Judge, held that:

(1) contractor released government from liability for contractor's delay and cumulative impact claims, but

(2) government was not entitled to liquidated damages.

Affirmed in part, vacated in part, and remanded.

Newman, Circuit Judge, dissented and filed opinion.

1. Federal Courts ⚷776, 850.1

Trial court's findings of fact are reviewed under the clearly erroneous standard, while its legal holdings are reviewed de novo.

2. Federal Courts ⚷851

Credibility and intent determinations are questions of fact reviewed under the clearly erroneous standard.

3. Federal Courts ⚷776

Contract interpretation is a question of law subject to de novo review.

4. Federal Courts ⚷813, 874

The clear error standard governs a trial court's findings about the general type of damages to be awarded, e.g., lost profits, their appropriateness, e.g., foreseeability, and rates used to calculate them, e.g., discount rate, reasonable royalty; the abuse of discretion standard applies to decisions about methodology for calculating rates and amounts.

5. Damages ⚷184

The evidentiary basis for a court's ruling on damages need only be sufficient to enable a court or jury to make a fair and reasonable approximation, and as long as a party can clearly establish a reasonable probability of damage, uncertainty as to the amount will not preclude recovery.

6. United States ⚷74(6)

Contractor released government from liability for contractor's delay and cumulative impact claims, based on changes to contract to construct laboratory building, by entering into modification of contract which stated that the modification provided full compensation for the changed work and that the contractor released the government from any and all liability under the contract for further equitable adjustment attributable to the modification.

7. Accord and Satisfaction ⚷1

Accord and satisfaction occur when some performance different from that which was claimed as due is rendered and such substituted performance is accepted by the claimant as full satisfaction of his claim.

8. Accord and Satisfaction ⚷1

To prove accord and satisfaction, the party asserting it must show (1) proper subject matter; (2) competent parties; (3) a meeting of the minds of the parties; and (4) consideration.

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The evidentiary basis for a court's ruling on damages need only be sufficient to enable a court or jury to make a fair and reasonable approximation, and as long as a party can clearly establish a reasonable probability of damage, uncertainty as to the amount will not preclude recovery.

6. United States ⚷74(6)

Contractor released government from liability for contractor's delay and cumulative impact claims, based on changes to contract to construct laboratory building, by entering into modification of contract which stated that the modification provided full compensation for the changed work and that the contractor released the government from any and all liability under the contract for further equitable adjustment attributable to the modification.

7. Accord and Satisfaction ⚷1

Accord and satisfaction occur when some performance different from that which was claimed as due is rendered and such substituted performance is accepted by the claimant as full satisfaction of his claim.

8. Accord and Satisfaction ⚷1

To prove accord and satisfaction, the party asserting it must show (1) proper subject matter; (2) competent parties; (3) a meeting of the minds of the parties; and (4) consideration.

AUSTIN-GRIFFITH, Inc.

v.

GOLDBERG et al.

No. 16808.

Supreme Court of South Carolina.

Dec. 21, 1953.

Building contractor brought proceeding to establish and foreclose liens for labor and materials furnished in erection of building, and owners set up certain claims by way of offset. The Common Pleas Court of Clarendon County, J. Frank Eatmon, J., entered decree adverse to owners, and they appealed. The Supreme Court, Oxner, J., held that where contract stipulates that there must be written application or demand for extention of time, for performance of contract, an oral demand is insufficient.

Decree modified and, as modified, affirmed.

1. Mechanics' Liens ⚩281(4)

In statutory proceeding by contractor to establish and foreclose liens for labor and materials furnished in erection of building, wherein owners sought to offset certain claims, and wherein one of the owners first testified that repair of hot water line cost $184.90, and wherein he later testified that repairs amounted to $894.40 without any explanation of discrepancy, and wherein one who made repairs, was not asked while on the stand as to amount paid him for repairs, court properly allowed owners only $184.90 for repairs.

2. Contracts ⚩308

Where building contractor, at time he requested payments from owners, had not only breached construction contracts, but owed large amount of liquidated damages to owners under contract for failure to complete work on schedule, owners were justified in not making payments requested by contractor.

3. Contracts ⚩300(3)

Where contract for construction of building provided that if completion of building was delayed by owners, time for performance of contract by contractor should be extended, if contractor should make demand on owners in writing for additional time within which to complete performance of contract, and contractor made no written demand on owners for additional time when completion of work was delayed in part allegedly because of the fault of the owners, contractor could not avoid liability under contract for liquidated damages on ground that delay in completion was caused by owners.

4. Contracts ⚩242

Where contract stipulates that there must be written application or demand for extension of time for performance of contract, an oral demand is insufficient.

5. Damages ⚩85

Where building contractor abandoned work after time fixed by contract for completion of the work, clause providing for liquidated damages applied from time fixed for completion until work was abandoned and for further period of time reasonably necessary for owners to complete the job.

6. Damages ⚩85

Where building contractor abandons work after time fixed for completion of work, owner may not increase his recovery under provision of contract providing for liquidated damages, either by unreasonable delay in taking over the job, or by failing to complete it with diligence.

7. Damages ⚩85

Where owners did not know until latter part of September that building contractor would not resume work on building, and owners promptly took possession on October 4, and proceeded to complete the job, and some of the units in the building were ready for occupancy on October 21, though job was not fully completed at that time, owners were properly

'fireworks' by laying out the building for construction some three feet smaller than the plans required. Plaintiff then undertook to construct the same by placing the foundation thereunder much different from what was called for by the contract, and from then on plaintiff engaged in performing shoddy work and neglecting the particulars of the plans and specifications. It is not deemed necessary to enumerate in detail here such other omissions."

As to breach on the part of the owners, he found as a fact that they failed to make the payments within the time required by the contract, and further that they, without justification, seriously interfered with the work of the contractor, all of which contributed to the delay in the completion of the job.

From the foregoing it appears that we have a concurrent finding of fact by the Referee and the Circuit Judge, which is supported by the overwhelming weight of the testimony, that the contractor failed to follow the specifications and that the workmanship was not up to the standard required. But the Referee and Circuit Judge disagreed as to whether there was a breach of the contract on the part of the owners. We think the preponderance of the evidence sustains the view of the Referee. The alleged interference by the owners arose from faulty construction and the failure of the contractor to follow the specifications. We think the Referee also correctly found that there was no default on the part of the owners in paying for the work. The contractor's own testimony shows that the payments were satisfactory until sometime around August, 1949. Mr. W. D. Austin, its vice-president, testified as follows:

"Q. Talking about delays, before you breached the contract, delays in payment? A. I think the delays in payment were on every payment before I reached the final payment.

"Q. Well, you continued that, you waived those, which payment was it you refused to do work on and considered it a breach of the contract? A. Not until I were finished.

"Q. And that was after your time for completing the building had expired, is that correct, September? A. Yes, sir, September, the time was out at that time.

"Q. Now, payments prior to the completion of the building had been acceptable to you? A. Yes, I think so."

[2] The owners were justified in not making the payments requested by the contractor in August and September because at that time the contractor had not only breached the contract, but there had accrued a large amount of liquidated damages for failure to complete the work on schedule. As stated in National Loan Exchange Bank of Greenwood v. Gustafson, 157 S.C. 221, 154 S.E. 167, 171, "it would be manifestly inequitable to require the owner to pay the contract price to the contractor, after a breach of the contract by him, without first making itself whole for such damages as it has suffered by reason of the breach."

[3] But assuming that the delay in completing the work was due in part to the fault of the owners, the contractor is foreclosed from making such claim because he made no demand in writing for an allowance on account of such delay. The contract provides that if completion is delayed by the owners, the time for performance shall be extended "for such additional time as should be considered (caused) by such delay, provided, however, that the contractor herein shall at the time of such delay, if any, demand of the owner in writing such additional time within which to complete the performance of this contract."

Such a provision is regarded by the courts as specifying a condition precedent to any right of the contractor to be excused for delay due to the fault of the owner, and where no demand for such extension of time is made, the contractor is not in a position to assert that the owner caused a de-

Return

in interest on the national debt as a consequence of having the benefit of these revenues. Therefore, the $34,303,980.42 represents only 27 percent of the total benefit ($126,013,824.96) actually received by the Government.

In addition, Congress should authorize the Secretary of the Treasury to deposit the total amount appropriated in a Trust Account of a national bank located in Louisville, Kentucky that has established trust and real estate departments. The Trust Officer should have the power to: issue public notice, describing the class as set forth herein; resolve any disputes regarding whether any particular individual is an "heir" of an original landowner who sold his or her property to the Government to establish Camp Breckinridge between 1942–1944; allocate the amount of appropriated funds to each individual member of the class in proportion to his or her former ownership interest in the original tracts;[40] and pay such allocations from the Trust Account to the individual members of the class within two years after the Trust is established.[41]

Within six months after all payments are made, the Trust Officer should file a Final Accounting with Congress, setting forth the amounts that were paid from the Trust Account, the persons to whom payments were made, and any amount that remains after Claimants' lawyers and all necessary Trust Officer fees, expenses, and costs are paid. Congress should authorize the Trustee to remit any funds remaining in the Trust Account to the Secretary of the Treasury for deposit into the General Treasury Fund.[42]

IT IS SO ORDERED.

BELL BCI COMPANY, Plaintiff,

v.

The UNITED STATES, Defendant.

No. 03–1613C.

United States Court of Federal Claims.

April 21, 2008.

Background: Contractor on building construction project brought suit against the United States asserting a cumulative impact equitable adjustment claim for the disruptive effect of modifications issued during course of project.

(Dr. Charles F. Haywood, Claimants' economics and finance expert, calculating Government's avoidance of interest using one-year "constant maturity" Treasury rate from 1967 to 2005); *see also id.* Table 2 (Government's Enrichment From Avoidance Of Interest One–Year Constant Maturity Rates: 1967–2005).

40. *See Land Grantors I*, 64 Fed.Cl. at 712–13 ("From this information, an amount per acre can be determined and matched against the acreage of the condemned properties, which then can be attributed to the appropriate Plaintiff."); *see also* Plaintiffs' Exhibit Appendix In Response To The Court's December 15, 2005 Order And Comprehensively Summarizing Mineral Sale Proceeds, *Land Grantors v. United States* (No. 93–648X) (Fed. Cl. April 27, 2006), at Tabs B(1–3) (Tables allocating sale and lease proceeds to each tract-*without* factoring in the 1991–1993 coal lease on Tract 7A, and interest avoided from each sale and lease); *Id.* at Tab A (Feb. 26, 2008 Declaration Of William Mattingly, principal in Coulter Mapping Solutions) (describing method by which mineral proceeds may be allocated to their original tracts).

41. With respect to the amount that the Trust Officer should distribute to heirs, the approach suggested by Claimants is recommended, *i.e.*, if the original landowner is deceased, the Trust Officer should authorize payment of the entire amount allocated to the original landowner's tract to his or her statutory heirs who opt into the class (distributed per stirpes in accordance with the laws of descent and distribution of Kentucky, Ky.Rev.Stat. Ann. § 391.040 (Michie 2008)). Heirs who do not opt into the class by a date set by the Trust Officer should be treated as deceased.

42. In light of the genesis of this proceeding as a congressional reference, the court is also forwarding a copy of this Final Report and Memorandum Opinion to the attention of: United States Senator for Kentucky Mitch McConnell; United States Senator for Kentucky Jim Bunning; United States Representative for Kentucky's First District Edward Whitfield; and ranking members of the United States Senate Judiciary Committee, Senator Patrick J. Leahy and Senator Arlen Specter.

time impact methodology that Mr. Brannon employed. (Scott, Tr. 1070, 1073, 1076). Mr. Scott determined that only one EWO, the mechanical revisions in EWO 518, caused any excusable delay to Bell. (Scott, Tr. 1094–95). Of the total delay that Mr. Scott identified on the project, he attributed only 32 days to NIH, based upon EWO 518, and 218 days to Bell. (Scott, Tr. 1095, 1098; DX 151 at 65). With approximately 730 EWOs on the project, it is not credible to conclude that just one of 730 caused excusable delay to the prime contractor. Mr. Scott asserted general allegations of "problems with the subcontractors" and "lack of manpower" to explain Bell's delays (Scott, Tr. 1106), but without more, the Court does not give any weight to these contentions.

The record further indicates that NIH was not planning to assess any liquidated damages against Bell unless Bell submitted a claim. (Temme, Tr. 1017–18; PX 61). Apparently upon the advice of NIH counsel, the agency asserted claims for liquidated damages and backcharges against Bell as a means of gaining leverage in settlement negotiations. (Temme, Tr. 1018–27; PX 80A). On this basis, NIH withheld a Contract balance of $563,125 from Bell. (PX 73 at 7). NIH has known as recently as April 2004 that it has no legitimate backcharges against Bell. (PX 80A). Mr. Temme stated in a 2004 e-mail to the Contracting Officer that "[i]n summary, we have nothing to backcharge at this point in time, but several potentials," and that "[i]f we are going to negotiate with them on the delay claim, I would throw this stuff into the mix." *Id.* Mr. Temme further stated in another 2004 e-mail to the Contracting Officer that "I'm not aware of any costs incurred by NIH to date that we would charge to Bell—I think they addressed everything they were assigned, except the few things they disputed and we decided we didn't have a strong enough case to fight them. . . ." *Id.*

Discussion

A. *Standard for Decision*

[1] Bell's claim for damages from delay and cumulative impact on the NIH project sometimes is called a "delay and disruption" claim. As the Court noted in its earlier opinion in this case, there is a distinction in the law between: (1) a "delay" claim; and (2) a "disruption" or "cumulative impact" claim. The Court described the difference as follows:

> Although the two claim types often arise together in the same project, a "delay" claim captures the time and cost of *not* being able to work, while a "disruption" claim captures the cost of working less efficiently than planned.

Bell BCI Co. v. United States, 72 Fed.Cl. 164, 168 (2006); *see also U.S. Indus., Inc. v. Blake Constr. Co., Inc.,* 671 F.2d 539, 546 (D.C.Cir.1982) (holding that, unlike a delay claim that provides redress from not being able to work, a disruption claim compensates for damages when the work is more difficult and expensive than anticipated).

[2, 3] The contractor must prove for either claim the elements of liability, causation, and resultant injury. *Servidone Constr. Corp. v. United States,* 931 F.2d 860, 861 (Fed.Cir.1991) (citing *Wunderlich Contracting Co. v. United States,* 173 Ct.Cl. 180, 351 F.2d 956, 968 (1965)). When the contractor is asserting a delay claim, the contractor has the burden of showing the extent of the delay, that the delay was proximately caused by government action, and that the delay caused damage to the contractor. *Wilner v. United States,* 24 F.3d 1397, 1401 (Fed.Cir. 1994) (en banc).

[4] A contractor may recover breach of contract damages from the Government by showing that: (1) the damages were reasonably foreseeable by the breaching party at the time of contracting; (2) the breach is a substantial causal factor for the damages; and (3) the damages are proven with reasonable certainty. *See, e.g., Citizens Fed. Bank v. United States,* 474 F.3d 1314, 1318 (Fed. Cir.2007) (holding that trial court did not abuse discretion in applying substantial factor rather than but-for theory of causation); *see also Delco Elecs. Corp. v. United States,* 17 Cl.Ct. 302, 320 (1989) (holding contractor entitled to equitable adjustment upon showing a causal connection between reasonable costs claimed and the event giving rise to the claim).

30:1 Breach of Express Contract—Elements of Liability

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) (its) claim of breach of express contract, you must find (all) (both) of the following have been proved by a preponderance of the evidence:

(1)The defendant entered into a contract with the plaintiff to *(insert the alleged promise on which plaintiff is suing)*; and

(2)The defendant failed to *(insert the alleged promise on which the plaintiff is suing)*; (and)

(3)The plaintiff [substantially] performed [his] [her] [its] part of the contract) (or) (Plaintiff is excused from performance. Plaintiff is excused from performance of [his] [her] [its] part of the contract if you find that *[insert facts that, if proven, would as a matter of law justify non-performance]*).

If you find that (either) (any one or more) of these *(number)* statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to plaintiff's claim]*).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

30:1 Breach of Express Contract—Elements of Liability

For the plaintiff, *(name)*, to recover from the defendant, *(name)*, on (his) (her) (its) claim of breach of express contract, you must find (all) (both) of the following have been proved by a preponderance of the evidence:

(1)The defendant entered into a contract with the plaintiff to *(insert the alleged promise on which plaintiff is suing)*; and

(2)The defendant failed to *(insert the alleged promise on which the plaintiff is suing)*; (and)

(3)The plaintiff [substantially] performed [his] [her] [its] part of the contract) (or) (Plaintiff is excused from performance. Plaintiff is excused from performance of [his] [her] [its] part of the contract if you find that *[insert facts that, if proven, would as a matter of law justify non-performance]*).

If you find that (either) (any one or more) of these *(number)* statements has not been proved, then your verdict must be for the defendant.

On the other hand, if you find that all of these *(number)* statements have been proved, (then your verdict must be for the plaintiff) (then you must consider the defendant's affirmative defense(s) of *[insert any affirmative defense that would be a complete defense to plaintiff's claim]*).

If you find that (this affirmative defense has) (any one or more of these affirmative defenses have) been proved by a preponderance of the evidence, then your verdict must be for the defendant.

However, if you find that (this affirmative defense has not) (none of these affirmative defenses have) been proved, then your verdict must be for the plaintiff.

RULE 606. COMPETENCY OF JUROR AS WITNESS

(a) At the Trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jurors' attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

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RULE 51. INSTRUCTIONS TO JURY

The parties shall tender jury instructions pursuant to C.R.C.P. 16(g). All instructions shall be submitted to the parties, who shall make all objections thereto before they are given to the jury. Only the grounds so specified shall be considered on motion for a new trial or on appeal or certiorari. Before argument, the court shall read its instructions to the jury but shall not comment upon the evidence. Such instructions shall be taken by the jury when it retires. All instructions offered by the parties, or given by the court, shall be filed with the clerk and, with the endorsement thereon indicating the action of the court, shall be taken as part of the record of the cause.

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tion to pay the administrative expenses from the QTIP Trust assets.

Therefore, the probate court erred by approving the Trustee's apportionment of administrative expenses under § 15–12–916(2).

V. Attorney Fees

[17] Albert's daughters also argue that they should be granted attorney fees and costs associated with this litigation because they were required to correct the actions of the Trustees. We agree.

[18] In *Heller v. First National Bank,* 657 P.2d 992, 999 (Colo.App.1982), a division of this court recognized an exception to the general rule prohibiting awards of attorney fees absent statutory or contractual provisions when there has been a breach of trust. The division indicated that an award of attorney fees in a breach of trust action may be appropriate to make an injured party whole. Therefore, the award must be reasonable, and the determination of reasonableness is a question of fact for the trial court. *See Heller v. First Nat'l Bank, supra.*

Because Albert's daughters have prevailed here, we remand to the probate court to determine a reasonable award of attorney fees in their favor.

In conclusion, we hold that there is no statutory basis for Marian's estate to recover state estate taxes and administrative expenses from the QTIP Trust and thus the probate court may not apportion state taxes or administrative expenses of the QTIP Trust. Therefore, we reverse the probate court's order, and on remand the court is instructed to hold an evidentiary hearing to determine (1) whether the Trustees should be removed and an independent Trustee appointed for the QTIP Trust, (2) whether compensation to the Trustees should be reduced or denied in light of the conflict of interest, (3) whether the Trustees or a new Trustee may exercise discretion granted in the QTIP documents to pay "such amounts [of taxes and administrative expenses] as the Trustees deem necessary or advisable," and (4) whether to reconsider its ruling on the motion to compel disclosure of documents. In addition, the probate court is instructed to apply § 2207A to determine the amount of federal taxes apportioned to the QTIP Trust and to determine the amount of reasonable costs and attorney fees that should be awarded to Albert's daughters.

The order is reversed, and the case is remanded for further proceedings consistent with this opinion.

Judge NIETO and Judge CARPARELLI concur.

George E. DURDIN and Carefree Recreation, Inc., a Colorado corporation, Plaintiffs–Appellees and Cross–Appellants,

v.

CHEYENNE MOUNTAIN BANK, a Colorado corporation, Defendant–Appellant and Cross–Appellee.

No. 02CA2224.

Colorado Court of Appeals, Div. IV.

Feb. 26, 2004.

Rehearing Denied April 22, 2004.

Certiorari Denied Oct. 4, 2004.

Background: Corporation and its sole shareholder brought action against lender under Equal Credit Opportunity Act for failure to give timely notice of lender's adverse decision on loan application. Following jury trial in which jury found in favor of plaintiffs and awarded corporation zero damages and shareholder $100,000 in actual damages, the District Court, El Paso County, No. 00CV3101, Richard V. Hall, J., denied lender's motion for judgment notwithstanding the verdict, and denied plaintiffs' motions for costs and attorney fees. Lender appealed and plaintiffs cross-appealed.

Holdings: The Court of Appeals, Loeb, J., held that:

Nevertheless, as Durdin contends, he submitted the loan application to CMB not simply as a guarantor of Carefree, but also as a coborrower. Durdin presented evidence at trial that CMB ordered a credit report on him and requested his personal financial records, personal income tax returns, and personal financial statement.

Moreover, the record reflects that the loan ultimately was denied, at least in part, because of CMB's concerns about Durdin's financial problems and personal character. The bank president also testified that the loan application was denied based in part on Durdin's failure to include certain personal debts in his financial disclosures. Evidence in the record also shows that CMB included the value of Durdin's property when calculating the collateral available for the loan.

Last, CMB did not have a standard application form for the type of loan for which Durdin and Carefree applied, and, in applying for the loan, Durdin specifically requested in writing that CMB consider the loan as a personal one secured by his assets.

Although much of the foregoing evidence was disputed at trial, under these circumstances, there is ample support in the record for the conclusion that Durdin applied for the loan individually, as well as on behalf of Carefree, and that CMB treated the application as such. Thus, Durdin could have been contractually liable as a coborrower under the requested loan, and we conclude that Durdin had standing to bring an action under § 1691e(a) and 12 C.F.R. § 202.9(a)(1).

In light of this conclusion, we need not address CMB's argument that Durdin did not have standing as a shareholder of Carefree.

II.

[7] CMB next contends that the trial court erred in denying its motion for judgment notwithstanding the verdict because no reasonable jury could have found that Durdin's damages resulted from CMB's failure to give timely notice of adverse action on the loan application. We disagree.

[8, 9] In determining a motion for judgment notwithstanding the verdict where the factual basis for the verdict must be analyzed, we review the record in favor of the nonmoving party. Such a motion may be granted only if the evidence, taken in the light most favorable to the party opposing the motion and drawing every reasonable inference which may legitimately be drawn from the evidence in favor of that party, would not support a verdict by a reasonable jury in favor of the party opposing the motion. *See* C.R.C.P. 59(e); *Nelson v. Hammon*, 802 P.2d 452, 454 (Colo.1990). In applying this standard, the court cannot consider the weight of the evidence or the credibility of the witnesses. *See People in Interest of T.R.W.*, 759 P.2d 768, 770 (Colo. App.1988).

Here, viewed in the light most favorable to Durdin, the evidence in the record is sufficient to support the jury's determination that his damages were caused by CMB's failure to provide the timely notice.

CMB contends that the evidence did not support the jury's decision to award Durdin $100,000 in actual damages because, even if Durdin had received notice of adverse action on the loan application, he still could not have obtained a loan sufficient to save his personal residence from foreclosure. However, Durdin presented evidence of several alternatives by which he could have avoided foreclosure. He testified that, had he known CMB was not going to approve the loan, he could have sold certain properties and restructured certain debts in a way that would have provided him with the ability to satisfy Argent sufficiently to avoid foreclosure.

Moreover, there was evidence supporting the jury's $100,000 damages award. Durdin presented evidence that a friend purchased his personal residence for $86,000 and offered to sell it back to Durdin. And there is also evidence in the record that the property was appraised at $117,000 and $180,000.

Thus, sufficient evidence was presented for a reasonable jury to find a causal relationship between CMB's failure to provide timely notice of adverse action and the foreclosure of Durdin's personal residence, and to award actual damages accordingly. *See Nelson v. Hammon, supra; People in Interest of T.R.W., supra.*

Nevertheless, as Durdin contends, he submitted the loan application to CMB not simply as a guarantor of Carefree, but also as a coborrower. Durdin presented evidence at trial that CMB ordered a credit report on him and requested his personal financial records, personal income tax returns, and personal financial statement.

Moreover, the record reflects that the loan ultimately was denied, at least in part, because of CMB's concerns about Durdin's financial problems and personal character. The bank president also testified that the loan application was denied based in part on Durdin's failure to include certain personal debts in his financial disclosures. Evidence in the record also shows that CMB included the value of Durdin's property when calculating the collateral available for the loan.

Last, CMB did not have a standard application form for the type of loan for which Durdin and Carefree applied, and, in applying for the loan, Durdin specifically requested in writing that CMB consider the loan as a personal one secured by his assets.

Although much of the foregoing evidence was disputed at trial, under these circumstances, there is ample support in the record for the conclusion that Durdin applied for the loan individually, as well as on behalf of Carefree, and that CMB treated the application as such. Thus, Durdin could have been contractually liable as a coborrower under the requested loan, and we conclude that Durdin had standing to bring an action under § 1691e(a) and 12 C.F.R. § 202.9(a)(1).

In light of this conclusion, we need not address CMB's argument that Durdin did not have standing as a shareholder of Carefree.

II.

[7] CMB next contends that the trial court erred in denying its motion for judgment notwithstanding the verdict because no reasonable jury could have found that Durdin's damages resulted from CMB's failure to give timely notice of adverse action on the loan application. We disagree.

[8, 9] In determining a motion for judgment notwithstanding the verdict where the factual basis for the verdict must be analyzed, we review the record in favor of the nonmoving party. Such a motion may be granted only if the evidence, taken in the light most favorable to the party opposing the motion and drawing every reasonable inference which may legitimately be drawn from the evidence in favor of that party, would not support a verdict by a reasonable jury in favor of the party opposing the motion. *See* C.R.C.P. 59(e); *Nelson v. Hammon*, 802 P.2d 452, 454 (Colo.1990). In applying this standard, the court cannot consider the weight of the evidence or the credibility of the witnesses. *See People in Interest of T.R.W.*, 759 P.2d 768, 770 (Colo. App.1988).

Here, viewed in the light most favorable to Durdin, the evidence in the record is sufficient to support the jury's determination that his damages were caused by CMB's failure to provide the timely notice.

CMB contends that the evidence did not support the jury's decision to award Durdin $100,000 in actual damages because, even if Durdin had received notice of adverse action on the loan application, he still could not have obtained a loan sufficient to save his personal residence from foreclosure. However, Durdin presented evidence of several alternatives by which he could have avoided foreclosure. He testified that, had he known CMB was not going to approve the loan, he could have sold certain properties and restructured certain debts in a way that would have provided him with the ability to satisfy Argent sufficiently to avoid foreclosure.

Moreover, there was evidence supporting the jury's $100,000 damages award. Durdin presented evidence that a friend purchased his personal residence for $86,000 and offered to sell it back to Durdin. And there is also evidence in the record that the property was appraised at $117,000 and $180,000.

Thus, sufficient evidence was presented for a reasonable jury to find a causal relationship between CMB's failure to provide timely notice of adverse action and the foreclosure of Durdin's personal residence, and to award actual damages accordingly. *See Nelson v. Hammon, supra; People in Interest of T.R.W., supra.*

way 160 at the location of the easement, the Developer may request that Mineral County give notice of new public hearings for the Planning Commission and the board as required by the zoning and subdivision regulations.

[19] The trial court's statements regarding what the developer must do on remand are dicta. Accordingly, we conclude that those statements do not limit the board's discretion.

The order is affirmed, and the case is remanded to the trial court with directions to remand to the board for further proceedings consistent with this opinion.

Judge LOEB and Judge RUSSEL concur.

FARMLAND MUTUAL INSURANCE COMPANIES, Plaintiff–Appellee,

v.

CHIEF INDUSTRIES, INC., Defendant–Appellant.

No. 06CA0402.

Colorado Court of Appeals, Div. I.

Sept. 20, 2007.

Background: After paying claim arising from fire at insured's crop storage and drying facility, property insurer brought subrogation action against manufacturer of crop drying heater, alleging that heater was negligently designed and manufactured. Following a jury trial, the District Court, Weld County, Roger A. Klein, J., entered judgment in favor of insurer. Manufacturer appealed.

Holdings: The Court of Appeals, Taubman, J., held that:

(1) process of elimination was reliable scientific method to determine cause of fire;

(2) experimental testing was not prerequisite to admissibility of expert's testimony;

(3) expert witness was qualified to testify as to standard of care appropriate to crop drying industry;

(4) jury issue existed as to whether manufacturer's failure to include strainer or shutoff valve caused fire; and

(5) jury issues existed as to whether manufacturer had right to expect that professional installer would heed manufacturer's warnings and instructions concerning installation of strainer and as to whether installer's failure to do so was proximate cause of insurer's damages.

Affirmed.

1. Evidence ⚷546

Trial courts are vested with broad discretion to determine the admissibility of expert testimony. Rules of Evid., Rule 702.

2. Appeal and Error ⚷971(2)

Exercise of trial court's discretion regarding admissibility of expert testimony will not be overturned unless manifestly erroneous. Rules of Evid., Rule 702.

3. Evidence ⚷508, 555.2

For expert testimony to be admissible, it must be both reliable and relevant. Rules of Evid., Rule 702.

4. Evidence ⚷535, 555.2

Expert testimony is "reliable," as would support its admissibility, if the scientific principles used by the witness are reasonably reliable and the witness is qualified to opine on such matters. Rules of Evid., Rule 702.

See publication Words and Phrases for other judicial constructions and definitions.

5. Evidence ⚷555.4(2)

Speculative testimony that would be unreliable and therefore inadmissible under evi-

Restatement (Second) of Torts section 402(a) comment j, which recognizes that where a warning is given, the seller may reasonably assume that it will be read and heeded. We conclude that Chief's reliance on *Uptain* is misplaced. There, the plaintiff argued that her failure to read certain warnings printed on a label was foreseeable as a matter of law. Rejecting this contention, the supreme court concluded that whether it was foreseeable that a user of a product in question would disregard warnings "was properly reserved for jury determination in this case." *Id.* Similarly, here, the jury heard evidence of Onion Growers' failure to follow the warnings regarding installation of a fuel line strainer and reached the verdict attributing substantial responsibility to Onion Growers.

Contrary to Chief's contention, we conclude that the trial court did not err in denying a directed verdict in its favor based on *Uptain.*

III. Intervening Cause

[19] Chief contends the trial court erred in denying its motion for judgment notwithstanding the verdict because Chief's failure to include a strainer in the produce dryer was not the proximate cause of the fire. It asserts Onion Growers' and the installer's failure to install a strainer as provided by its instruction manual was an intervening cause, precluding Chief's liability. We conclude that Chief waived this issue by failing to raise it in the trial court.

[20, 21] Questions of negligence and proximate cause are issues of fact to be determined by the jury, and we are bound by the jury's findings when there is competent evidence in the record supporting those findings. *City of Aurora v. Loveless,* 639 P.2d 1061, 1063 (Colo.1981); *see also Morales v. Golston,* 141 P.3d 901, 906 (Colo.App.2005).

Here, as we noted in part II, there was sufficient evidence that Chief was negligent in failing to include a strainer in its dryer unit. In addition, the jury was instructed on negligence, causation, and comparative fault.

As proposed by Chief, the instructions included a pattern jury instruction for causation which stated in part:

> If more than one act or failure to act contributed to the claimed injury, then each act or failure to act may have been a cause of the injury. A cause does not have to be the only cause or the last or nearest cause. It is enough if the act or failure to act joins in a natural and probable way with some other act or failure to act to cause some or all of the claimed injury.

CJI–Civ. 4th 9:20 (1998). Chief did not request that the optional intervening cause jury instruction be given to the jury. That instruction states:

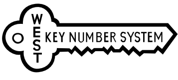
> One's conduct is not a cause of another's injuries, however, if, in order to bring about such injuries, it was necessary that his or her conduct combine or join with an intervening cause that also contributed to cause the injuries. An intervening cause is a cause that would not have been reasonably foreseen by a reasonably careful person under the same or similar circumstances.

Id.

Insofar as Chief now claims that Onion Grower's and the installer's failure to follow the instruction manual and attach a strainer was an intervening cause of the fire, Chief waived this error by failing to request an instruction as to intervening cause. *See Silverview at Overlook, LLC v. Overlook at Mt. Crested Butte Ltd.,* 97 P.3d 252 (Colo.App.2004)(argument not presented to trial court will not be considered for the first time on appeal).

The judgment is affirmed.

Judge MÁRQUEZ and Judge J. JONES concur.



need and the sanction. *See Ricci,* 627 P.2d at 1120; *Weissman v. Board of Educ.,* 190 Colo. 414, 422, 547 P.2d 1267, 1273 (1976). Rather, in reviewing agency action, the legislature has directed the court to look at the whole record to determine whether the action is supportable. *See* § 24-4-106(7), 7 C.R.S. (1997). Where, as here, evidence in the record does support the Commission's imposition of a sanction, it must be upheld absent an abuse of discretion. Our analysis of the facts above indicates that the penalty does bear some relationship to the conduct, and is not manifestly excessive. The court's inquiry must end there.

III.

[13] The proper standard for review of an agency sanction is whether such sanction is arbitrary, capricious, legally impermissible or an abuse of discretion. The "reasonable basis in law" standard that has evolved in the context of agency findings of ultimate fact is inapplicable to a review of sanctions. Furthermore, an agency is not required to make specific findings that its sanction parallels a public need or is proportionately related to the misconduct. As long as the record as a whole provides sufficient evidence that the penalty is not manifestly excessive in relation to the misconduct and the public need, the penalty will be upheld. Accordingly, we reverse the court of appeals' holding and reinstate the Commission's Final Agency Order.

Russell R. DECKER, Petitioner,

v.

BROWNING-FERRIS INDUSTRIES OF COLORADO, INC., Respondent.

No. 96SC303.

Supreme Court of Colorado,
En Banc.

Oct. 27, 1997.

Rehearing Denied Dec. 8, 1997.

Employee who was terminated for allegedly falsifying his time cards brought suit against employer, alleging wrongful discharge in violation of progressive disciplinary policy and breach of an express covenant of good faith and fair dealing. Trial court awarded exemplary, economic, and noneconomic damages to employee, and employer appealed. The Court of Appeals reversed, and employee petitioned for certiorari. The Supreme Court, Martinez, J., held that: (1) economic damages were not improperly awarded under "tort" rubric; (2) economic damage award limited to back pay, loss of future pay and loss of benefits, was appropriate for breach of express covenant of good faith and fair dealing; (3) award of noneconomic damages for inconvenience and emotional stress was appropriate where jury found breach of covenant of good faith and fair dealing to be willful and wanton; (4) employee was not entitled to exemplary damages on breach of contract claim.

Affirmed in part; reversed and remanded in part.

1. Master and Servant ⚷20, 30(1.5)

In Colorado, employment is generally at-will and an employer may terminate an employee without cause and without notice.

2. Master and Servant ⚷41(2)

Economic damages were not improperly awarded under "tort" rubric in suit by former employee who alleged that he was wrongfully discharged in violation of employer's progressive disciplinary policy and that discharge breached express covenant of good faith and fair dealing; although jury was provided with separate verdict form permitting it to find a "breach of employment contract for [employer's] failure to follow its progressive disciplinary policy," in addition to verdict form for breach of the covenant of good faith and fair dealing, jury awarded all economic damages under rubric designated for breach of the covenant of good faith and fair dealing.

3. Master and Servant ⚷41(.5, 2)

Economic damage award limited to back pay, loss of future pay and loss of benefits,

[2] Here, BFI now asks us to overrule *Thomas Decker.* We decline to do so. In the alternative, BFI asserts that our decision in *Thomas Decker* is inapposite because the *Thomas Decker* special verdict forms and the jury instructions differ from those used in the present case. Specifically, BFI contends that the damage sections of the special verdict forms used in *Thomas Decker* did not require the jury to distinguish between the progressive disciplinary damages and the covenant of good faith and fair dealing damages—whereas here, the special verdict form required the jury to reach separate damage determinations with respect to each of Decker's claims for relief. BFI argues that the differences compel this court to disregard the *Thomas Decker* decision and refrain from utilizing the economic damages awarded under the "tort" rubric to support a contract damage claim.

In *Thomas Decker,* the language of the pleadings, instructions, and verdict forms established the claims as contract claims. The instructions related only to contract theories of recovery. The jury verdict forms did not require any distinction between the claims regarding whether damages for lost income, inconvenience, and emotional stress should be awarded. See *Thomas Decker,* 931 P.2d at 446. Damages for inconvenience and emotional stress were allowed if the jury found willful and wanton conduct.

The record here reveals that the pleadings, jury instructions, and verdict forms are identical in all but one respect to those in *Thomas Decker.* The jury in this case was provided with a verdict form permitting it to find a "breach of employment contract for BFI's failure to follow its progressive disciplinary policy," in addition to the verdict for breach of the covenant of good faith and fair dealing. The jury was also provided with an instruction that it was to award damages only once for the same injuries. In *Thomas Decker,* we were satisfied that the verdict for breach of the covenant of good faith and fair dealing was a finding of a breach of contract. We reach the same conclusion here.

Although the jury awarded all economic and noneconomic damages under the rubric designated for the breach of the covenant of good faith and fair dealing, the jury also specifically found that BFI failed to follow its progressive disciplinary policy. The jury did not award damages on the failure of BFI to follow its progressive disciplinary policy, but only on the breach of good faith and fair dealing. However, the jury was specifically instructed to award damages on only one claim of relief. The jury's specific recognition that there was a breach of a disciplinary policy coupled with the trial court's instruction limiting available damages indicates that, as in *Thomas Decker,* we cannot discern whether the awards for economic damages were based on the breach of disciplinary policy or the breach of the covenant of good faith and fair dealing. *Thomas Decker,* 931 P.2d at 447. The award for noneconomic damages for inconvenience and emotional stress were based on findings of willful and wanton conduct as they were in *Thomas Decker.* See *id.* at 447–48.

We recognized in *Thomas Decker* that "the claim for breach of the progressive disciplinary policy and the claim for breach of covenant of good faith and fair dealing were [both] pled, tried, and found by the jury to be breaches of an express contractual obligation." *Id.* at 447. We therefore affirmed the juries' awards of economic damages to Decker and Castillo because the juries' calculations of economic damages were limited to "back pay, loss of future pay and loss of benefits." *Id.*

[3, 4] Here, as in *Thomas Decker,* the claim for a breach of an express covenant of good faith and fair dealing was "pled, tried, and found" by the jury to be a breach of an express contractual obligation. *Id.* Here, as in *Thomas Decker,* we accept the finding of the jury of a breach of an express contractual obligation without addressing the elements of such a claim or the proof necessary to sustain the claim. These issues are not before us and were not before us in *Thomas Decker.* In addition, the jury's calculation of economic damages was limited to "back pay, loss of future pay and loss of benefits." *Id.* We conclude that the economic damage award is appropriate because it was "designed to put the wrongfully discharged employee in the same position he . . . would have been in had

Although Colt Ross argues that the release provisions cover all "animals," this term appears only in the first two provisions of the release, which pertain to the client's cognizance of the "risks and dangers *inherent* with . . . the use of animals." The general release paragraph, on the other hand, refers back to the general contract wherein the activities are described as specifically including the riding of a horse.

As in *Heil Valley Ranch,* the contract here clearly states that the essential service the outfitter must provide is an outfitted hunt by horseback for the duration of the trip; the contract also clearly states that the associated risk Chadwick accepts, and for which he waives liability, is any risk related to that service.

However, the risk to which Colt Ross exposed Chadwick by placing him on an incorrectly equipped mule is not clearly and unambiguously expressed in the release, and Chadwick did not waive that risk. Discharging our duty to construe the exculpatory provisions of the contract against their drafter and in favor of the injured client should lead this court to allow Chadwick's negligence action in this case.

Section 13–21–119 is a carefully-crafted combination of protections for both an outfitter and for participants in outdoor activities, recognizing that recreation is an important economic activity for the State of Colorado, its citizens, and visitors. *See People v. Schafer,* 946 P.2d 938, 944 (Colo.1997). Under contract principles, visitors and citizens of Colorado, with adequate disclosure, may consciously contract away statutory and common law duties of care—but not willful and wanton or gross negligence—and may expose themselves to recreational risks without violating public policy. The release in this case, however, failed to disclose to Chadwick that he might be riding an animal other than a horse and that he would be waiving the outfitter's duty of care to properly equip that animal for riding.

I conclude that Colt Ross is not immunized from Chadwick's claim for damages in this case, either by the statute or the contract he signed. Accordingly, Colorado courts should hear his suit, and I respectfully dissent.

CITY OF WESTMINSTER, a Colorado municipal corporation, Plaintiff–Appellant,

v.

CENTRIC–JONES CONSTRUCTORS, a Colorado corporation; Centric–Jones Co., a Colorado corporation; Nucon Construction Corp., a corporation; J A Jones Construction Co., a corporation; Jones Group, Inc., a corporation; Travelers Casualty & Surety Co., a corporation; Aetna Casualty & Surety Co., a corporation; and Bates Engineering, Inc., a Colorado corporation, Defendants–Appellees,

and

Centric–Jones Co., a Colorado limited partnership, Third–Party–Plaintiff and Cross–Appellant,

v.

Fischbach Masonry, Inc., a Colorado corporation, and Reliance Insurance Company, a foreign corporation, Third–Party–Defendant and Cross–Appellee.

Nos. 01CA0502, 02CA0602.

Colorado Court of Appeals,
Div. II.

Sept. 11, 2003.

Certiorari Granted Nov. 8, 2004.

City brought breach of contract claim against prime contractor on water treatment plant project, and professional negligence claim against engineering design firm. The District Court, Jefferson County, James D. Zimmerman, J., directed verdict for contractor, and entered summary judgment for design firm. City appealed. The Court of Ap-

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CITY OF WESTMINSTER, a Colorado municipal corporation, Plaintiff–Appellant,

v.

CENTRIC–JONES CONSTRUCTORS, a Colorado corporation; Centric–Jones Co., a Colorado corporation; Nucon Construction Corp., a corporation; J A Jones Construction Co., a corporation; Jones Group, Inc., a corporation; Travelers Casualty & Surety Co., a corporation; Aetna Casualty & Surety Co., a corporation; and Bates Engineering, Inc., a Colorado corporation, Defendants–Appellees,

and

Centric–Jones Co., a Colorado limited partnership, Third–Party–Plaintiff and Cross–Appellant,

v.

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Nos. 01CA0502, 02CA0602.

Colorado Court of Appeals,
Div. II.

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City brought breach of contract claim against prime contractor on water treatment plant project, and professional negligence claim against engineering design firm. The District Court, Jefferson County, James D. Zimmerman, J., directed verdict for contractor, and entered summary judgment for design firm. City appealed. The Court of Ap-

Accordingly, we conclude that the trial court properly directed a verdict against the City as to actual damages.

B. Liquidated Damages

The contract between the City and Jones provided $1,000 per day in liquidated damages for each calendar day following the designated completion date that the project was not operational. The City presented testimony that it was entitled to recover $1,994,500 for approximately six years of delay. However, the evidence also showed that the delay was caused in part by the City's decision to redesign the structures, including correction of errors by the initial designers. Hence, the City's liquidated damages claim fails for two reasons.

[17, 18] First, because the City's redesign went beyond correcting breaches by Jones, the City was at least partially responsible for the delays. A liquidated damages clause addressing delay in a construction contract will not be enforced "where [the] delay is due in whole or in part to the fault of the party claiming the clause's benefit." *Medema Homes, Inc. v. Lynn,* 647 P.2d 664, 667 (Colo. 1982).

Second, the City failed to apportion the total delay between optional redesign and necessary correction of Jones' defective construction. Consequently, as with actual damages, the jury would have been required to speculate as to what portion of the delay resulted from Jones' construction defects and the portion of the delay damages for which Jones was responsible. *See Boyajian v. United States,* 191 Ct.Cl. 233, 423 F.2d 1231, 1241 (1970)(although the plaintiff was at fault for some of the delay, it combined all of the defendant's alleged breaches "without in any way attempting to relate any specific damage items to any particular breach"); *see also Net Constr., Inc. v. C & C Rehab & Constr., Inc.,* 256 F.Supp.2d 350 (E.D.Pa.2003); *RPR & Assocs., Inc. v. Univ. of N.C.,* 153 N.C.App. 342, 570 S.E.2d 510 (2002).

Accordingly, we conclude that the trial court also properly directed a verdict as to liquidated delay damages.

C. Harmless Error

Jones argues that any error in the directed verdict was harmless because the jury implicitly resolved any disputed issue in Jones' favor through its verdict for Jones on one counterclaim. In light of our conclusion that the directed verdict was proper, we need not reach this issue.

II. *Nominal Damages, Costs, and Attorney Fees*

The City next argues that, even if it failed to establish actual damages and liquidated damages, the trial court was not justified in dismissing its breach of contract claim because a prima facie case as to Jones' breach entitled the City to at least nominal damages. The City further argues that with an award of nominal damages, it could have sought statutory costs and attorney fees under the contract by asserting that it was the prevailing party.

While we agree that the issue of nominal damages should have been submitted to the jury, we conclude the trial court's failure to do so was harmless error. We further conclude the City's potential recovery of costs and attorney fees is not properly before us and, in any event, would be barred under the net judgment rule.

A. Nominal Damages

[19] Viewed in the light most favorable to the City, the evidence showed Jones breached the contract. Nominal damages are recoverable for a breach of contract even if no actual damages resulted or if the amount of actual damages has not been proved. *Gen. Ins. Co. v. City of Colorado Springs,* 638 P.2d 752 (Colo.1981). Nominal damages involve an award of one dollar. *Dennis I. Spencer Contractor, Inc. v. City of Aurora,* 884 P.2d 326 (Colo.1994).

The parties cite no Colorado case, and we have found none, addressing the significance of a trial court's failure to allow the jury to consider an award of nominal damages although the plaintiff's prima facie case establishes breach.

[20] Other jurisdictions have recognized that, "[i]n the absence of special circum-

and grant him use immunity. Federal Rule of Evidence 403 or the court's inherent powers to control the admission of evidence were ample authority for imposing this condition. Due regard for the rights of the accused, in my view, required the district court to do so. Its failure to so condition introduction of the DePalm evidence unnecessarily and improperly prejudiced Paris' right to a fair trial, denying him due process and the right to confrontation. I would reverse.

Thomas J. HARD, Plaintiff-Appellant,

v.

BURLINGTON NORTHERN RAILROAD, Defendant-Appellee.

No. 85-4326.

United States Court of Appeals, Ninth Circuit.

Submitted Dec. 1, 1986 *.

Decided March 9, 1987.

Worker brought action against railroad under Federal Employer's Liability Act seeking damages for injuries sustained during work-related accident. Jury found both parties to be 50% negligent and awarded damages. Worker filed motion for new trial. The United States District Court for the District of Montana, 618 F.Supp. 1463, Charles C. Lovell, J., denied motion, and worker appealed. The Court of Appeals, Eugene A. Wright, Circuit Judge, held that: (1) failure to hold evidentiary hearing was abuse of discretion where juror's voir dire testimony and juror affidavits indicated possibility of dishonesty, and (2) juror's statements during deliberation regarding railroad's settlement practices constituted evidence of extraneous influence which could be used to impeach jury's verdict.

Reversed and remanded.

1. Federal Courts ⟹825

Denial of motion for new trial is reviewed for abuse of discretion.

2. Federal Courts ⟹822

Trial court's procedural responses to claims of juror misconduct are reviewed for abuse of discretion.

3. Federal Civil Procedure ⟹1974

Failure to hold hearing to investigate allegation that juror failed to answer honestly material question during voir dire was abuse of discretion in worker's action against railroad under Federal Employer's Liability Act, where juror failed to respond to questions which were intended to reveal prior contacts between railroad and himself, or answered in manner which indicated that he had no significant prior contacts with railroad, and postverdict juror affidavits indicated that juror made statements regarding railroad's settlement practices during deliberations. Fed.Rules Evid. Rule 606(b), 28 U.S.C.A.

4. Federal Civil Procedure ⟹1974

Juror affidavits which tend to show deceit during voir dire are not barred by rule prohibiting juror testimony about deliberative process or subjective effects of extraneous information. Fed.Rules Evid. Rule 606(b), 28 U.S.C.A.

5. Federal Civil Procedure ⟹1974

In determining whether to hold evidentiary hearing when faced with allegations of juror misconduct, court is to be guided by content of allegations, seriousness of alleged misconduct or bias, and credibility of source.

6. Federal Civil Procedure ⟹1974

Jurors must rely on their past personal experiences when hearing trial and deliber-

* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 3(f) and Fed.R.App.P. 34(a).

sider the juror affidavits proffered by Hard's attorney. Statements which tend to show deceit during voir dire are not barred by that rule. *See Maldonado v. Missouri Pacific Ry. Co.*, 798 F.2d 764, 770 (5th Cir.1986); 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 606[04] at 606–33. The district court could not properly exclude the affidavits on this ground.

It also refused to consider the affidavits because they resulted from post-verdict interviews with the jurors. While these interviews are not looked on favorably in this circuit, *see Traver v. Meshriy*, 627 F.2d 934, 941 (9th Cir.1980) (questioning jury about its internal deliberations or manner in which it arrived at its verdict should be discouraged); *Smith v. Cupp*, 457 F.2d 1098, 1100 (9th Cir.) (improper and unethical for lawyers to interview jurors to discover their course of deliberation), *cert. denied*, 409 U.S. 880, 93 S.Ct. 208, 34 L.Ed.2d 153 (1972), Ninth Circuit cases have often considered juror affidavits without discussing the propriety of post-verdict interviews, *see, e.g., United States v. Langford*, 802 F.2d 1176, 1180 (9th Cir.1986); *United States v. Marques*, 600 F.2d 742, 746 (9th Cir.1979), *cert. denied*, 444 U.S. 1019, 100 S.Ct. 674, 62 L.Ed.2d 649 (1980). Since we had not joined other courts in holding that evidence acquired in post-verdict interviews conducted without leave of the court makes the evidence obtained inadmissible, the court could not refuse to consider the evidence on this ground.[3]

[5] While it is not always an abuse of discretion to fail to hold an evidentiary hearing when faced with allegations of juror misconduct, *see Langford*, 802 F.2d at 1180, it is preferable that a hearing be held, *id.; United States v. Halbert*, 712 F.2d 388, 389 (9th Cir.1983), *cert. denied*, 465 U.S. 1005, 104 S.Ct. 997, 79 L.Ed.2d 230 (1984). A court is to be guided by the content of the allegations, the seriousness of the alleged misconduct or bias, and the credibility of the source in determining whether a hearing must be held. *United States v. Hendrix*, 549 F.2d 1225, 1227–28 (9th Cir.1977) (citation omitted).

Considering these factors and the policy in favor of such hearings in light of the juror affidavits, the district court abused its discretion by not holding a hearing to investigate the allegation that Fraser failed to answer honestly a material question during voir dire. *See McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984).

The district court has the discretion to determine the extent and nature of the hearing. *Hendrix*, 549 F.2d at 1227. We hold only that a hearing must be held.

B. *Introduction of Extraneous Evidence*

According to the affidavits, juror Fraser told other jurors about Burlington Northern's, or its predecessor's, settlement practices, including payment of injured employees' medical expenses. Hard argues that the introduction of these statements into jury deliberations requires that he be given a new trial. Since Hard seeks to impeach the jury's verdict, he has to once again overcome the hurdle posed by Federal Rule of Evidence 606(b). The district court ruled that he had not.

Federal Rule of Evidence 606(b) prohibits juror testimony about the deliberative process or subjective effects of the extraneous information. *Abatino v. United States*, 750 F.2d 1442, 1446 (9th Cir.1985). Juror

ror's mind or emotions as influencing him to assent or to dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

3. We believe the better practice is for the attorney to seek leave of the court to approach the jury. *See Maldonado v. Missouri Pacific Ry. Co.*, 798 F.2d 764, 769 (5th Cir.1986); *United States v. Kepreos*, 759 F.2d 961, 967 (1st Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 227, 88 L.Ed.2d 227 (1985). *See generally ABA-BNA Lawyers' Manual on Professional Conduct* 71:107 (1984).

Galves division also held that following the entry of a final judgment, the court retains subject matter jurisdiction only over matters that may be raised pursuant to Crim. P. 35. *People v. Galves, supra,* 955 P.2d at 583.

While the majority here faults the division's observation in *People v. Wiedemer* that in prior cases "it appeared" the motion for return of seized property was filed prior to imposition of sentence, the majority acknowledges that at a minimum the earlier cases did not make clear whether the decision to address the return of property was made before or after sentencing. I also note that the earlier cases do not address the issue of jurisdiction or even indicate whether the issue was raised.

Crim. P. 41(e) provides that a person aggrieved by an unlawful search and seizure may move for the "return of the property and to suppress for use as evidence anything so obtained" on certain grounds. The rule, however, does not state when the motion should be filed. Because return of property is included with suppression issues, the implication is that such motions will be filed before or during trial.

As for the one federal court decision cited by Colorado appellate courts on this issue, *United States v. Wilson, supra,* the defendant there pleaded not guilty and four days later filed his motion for return of seized property. Thus, the motion was filed well before sentencing. Moreover, in the federal courts, postconviction filings for the return of property, if made after the termination of criminal proceedings, are treated as civil equitable actions. *Thompson v. Covington,* 47 F.3d 974, 975 (8th Cir.1995); *Rufu v. United States,* 20 F.3d 63, 65 (2d Cir.1994).

Thus, whatever the merits of the position of the federal courts, in my view, the trial court does not have jurisdiction to address the return of seized property if the motion for return is filed after sentence has been imposed. The defendant is not left without a remedy because the option of filing a civil suit is available. *See People v. Rautenkranz, supra,* 641 P.2d at 318 (civil action may be proper remedy for seeking return of property).

Vicky FISHMAN, Plaintiff–Appellant,

v.

Nickolas KOTTS and Judith Kotts, Defendants–Appellees.

No. 05CA1887.

Colorado Court of Appeals, Div. II.

Sept. 6, 2007.

Background: Horse rider, who was injured when dog got underneath her horse which reared up and fell on top of rider, causing her severe injuries, brought negligence action against dog owner. The District Court, Weld County, J. Robert Lowenbach, J., entered judgment on jury verdict for dog owner, and horse rider appealed.

Holdings: The Court of Appeals, Terry, J., held that:

(1) whether dog owner's conduct in not bringing dogs inside the house, confining them in their pen, or otherwise restraining them, was negligent was for jury; and

(2) instruction under worrying livestock statute, providing that any dog found running, worrying, or injuring sheep, cattle, or other livestock may be killed and the owner of such dog shall be liable for all damages done by it, was not warranted.

Affirmed.

1. Animals ⚷**74(7)**

Trial court did not err by not instructing the jury that the violation of county ordinance constituted negligence per se in action

> In those instances where statutes attempt to deal with animals at large by providing ... "that the owner shall not 'permit,' 'allow,' or 'suffer' his animals to run at large, the courts have generally held, or recognized, that statutes of this type are not violated in the absence of at least negligence by the owner of the animals." ....
>
> The word "allow" means to approve of, to sanction, to permit, to acknowledge. So defined, "allow" requires some degree of knowledge, either actual or constructive, on the part of the dog owner that his dog is at large; therefore, its use in the ordinance negates any intention to create strict liability for violation of the ordinance. *We hold that in order for there to be civil liability for violation of this ordinance it must be established that a person coming within the scope of the ordinance intentionally or negligently allowed a dog covered by the ordinance to run at large in violation of the ordinance.*

(Citations omitted; emphasis added.)

Other courts have reached the same conclusion. *See Alvarez v. Ketchikan Gateway Borough,* 91 P.3d 289, 292 (Alaska Ct.App. 2004) ("The verbs 'permit' and 'allow' are commonly understood to imply some volition on the part of the actor. And other jurisdictions having similar—laws laws providing that the owner of an animal shall not 'permit,' 'allow' or 'suffer' the animal to run at large—require proof of at least negligence."); *Slack v. Villari,* 59 Md.App. 462, 476 A.2d 227, 232 (1984) ("There is no indication that [the dog's owner] knew the dog was going out of bounds, or that she 'allowed' him to leave the premises. The mere accidental escape of an animal, without proof of the owner's knowledge or negligence, is insufficient evidence to constitute a violation of [a statute providing that dog owners shall not 'allow' dogs to run at large]."); *see also* John A. Glenn, Annotation, *Dog Owner's Liability for Damages from Motor Vehicle Accident Involving Attempt to Avoid Collision with Dog on Highway,* 41 A.L.R.3d 888 (1972).

Fishman's reliance on *Lui v. Barnhart,* 987 P.2d 942 (Colo.App.1999), is misplaced. There, a horse escaped from a corral and collided with a vehicle. A division of this court held that the violation of a Greenwood Village municipal ordinance constituted negligence per se because it provided: "No person owning or keeping any animal, other than an ordinary domesticated house cat, *shall fail to keep said animal on the premises* of the owner or keeper unless the animal is ... [o]n a leash ... or [w]ithin a vehicle, or similarly confined...." *Lui, supra,* 987 P.2d at 944 (emphasis added). Thus, the Greenwood Village ordinance permitted owners to let their animals run loose *only* on the owner's premises. It did not contain an exception for animals under the owner's control, as does the ordinance at issue here.

We therefore conclude the trial court did not err by not instructing the jury that the violation of the Weld County ordinance constituted negligence per se.

II.

[5] We also reject Fishman's contention that the trial court abused its discretion in instructing the jury on the liability of dog owners.

[6, 7] We review jury instructions de novo to determine whether the instructions as a whole accurately informed the jury of the governing law. A trial court's decision to give a particular jury instruction is reviewed for abuse of discretion. *See Garcia v. Wal-Mart Stores, Inc.,* 209 F.3d 1170, 1173 (10th Cir.2000); *Woznicki v. Musick,* 119 P.3d 567, 573 (Colo.App.2005); *Williams v. Chrysler Ins. Co.,* 928 P.2d 1375, 1377 (Colo.App.1996).

When instructing a jury in a civil case, the trial court shall generally use those instructions contained in the Colorado Jury Instructions (CJI–Civ.) that apply to the evidence under the prevailing law. C.R.C.P. 51.1(1); *Vista Resorts v. Goodyear Tire & Rubber Co., supra,* 117 P.3d at 70.

Here, the trial court gave the jury CJI–Civ. 13:1, which provides:

> For the plaintiff ... to recover from the defendant ... [the jury] must find all the following have been proved by a preponderance of the evidence:

intention to have the rents applied in reduction of the assignor's debt. Thus, in *Wynn v. Adams County Bank,* 761 P.2d 234 (Colo.App.1988), we held that an assignment of rents clause in a lease was absolute in nature because rentals would be applied to reduce the balance due on an underlying note and, accordingly, that the assignee did not have to be in possession of the property before it could enforce the assigned rental.

Here, by taking the property subject to the underlying debt, Raintree agreed to an absolute assignment of rents which did not require placing the collection of hotel revenues within the court's jurisdiction to protect plaintiff's claim. The assignment was intended to be presently effective and contained provisions to assure payment of the debt out of the rentals. Furthermore, it was not contingent on having a receiver appointed to perfect an interest in the rentals and expressly conditioned assignee's right to collect rentals upon the existence of default. Given these provisions, the intent to create an absolute assignment of rents was sufficiently clear.

Order affirmed.

PIERCE and TURSI, JJ., concur.

Charles T. GUTIERREZ and Charles R. Larson, Plaintiffs–Appellees,

v.

Estella D. BUSSEY, Defendant–Appellant.

No. 91CA0330.

Colorado Court of Appeals, Div. III.

April 23, 1992.

Rehearing Denied May 28, 1992.

Certiorari Denied Oct. 13, 1992.

Motorist brought action for damages against driver for injuries suffered in automobile accident. The District Court, El Paso County, Gilbert A. Martinez, J., entered judgment in favor of the plaintiffs, and defendant appealed. The Court of Appeals, Ruland, J., held that: (1) jury verdict for plaintiffs should have been reduced by the amount of settlement with the nonparty defendant who was not at fault; (2) special verdicts attributing different percentage of injuries suffered by plaintiffs in same vehicle from failure to wear safety belts were reconcilable; (3) service of process fees for nonparty defendant should not have been assessed against defendant; and (4) the amount used to determine prejudgment interest awarded to plaintiffs should have been reduced by the amount received from the settlement with the nonparty defendant.

Affirmed and remanded.

1. Damages ⚷63

Verdicts for victims of automobile accident should have been reduced by the amount of the settlement with statutory nonparty, where the jury found that the nonparty was not negligent. West's C.R.S.A. §§ 13–21–111.6, 13–50.5–105.

2. Damages ⚷63

When fault is attributed to nonparty, provision of the Uniform Contribution Among Tortfeasors Act applies and tort verdict is reduced only by the percentage of fault attributed to the nonparty, but, when no fault is attributed to nonparty, alternative statutory provision applies and tort verdict is reduced by any indemnification or compensation for damages received from nonparty, but victims recover full amount of their damages. West's C.R.S.A. §§ 13–21–111.6, 13–50.5–105.

3. Appeal and Error ⚷1070(2)

Jury verdicts will not be reversed for inconsistency if review of the record reveals any basis for the verdicts entered, and thus, appellate court has duty to attempt to reconcile the jury's answers to special verdicts if at all possible.

not deduct settlement proceeds that may not be paid). By reconciling the statutes in this manner, Gutierrez and Larson recover the full amount of their damages while Bussey is liable only for her pro-rata share of fault.

Based upon the foregoing, we conclude that the trial court erred in not reducing the verdict by the amount of the non-party settlement paid to Gutierrez and to Larson.

II

Bussey next argues that the trial court erred when it denied her motion for a new trial based upon what she asserts are inconsistent verdicts. We perceive no error.

Specifically, Bussey argues that the verdicts were inconsistent because even though 10 per cent of the negligence was allocated to Gutierrez for the accident, the jury did not consider this negligence in calculating Larson's damages. In computing Gutierrez' damages, however, the jury did factor in 10 per cent of the negligence it attributed to Gutierrez. Bussey maintains that there was no evidentiary basis to justify the determination that Gutierrez' negligence was not a cause of Larson's injuries and damages.

In further support of her argument, Bussey points to other facts which she interprets as reflecting the jury's confusion. On the Larson verdict form, the jury originally charged Gutierrez with 10 per cent of the negligence, but then scratched out the 1, leaving 0 per cent. Also, Bussey notes that the jury found 10 per cent of Gutierrez' pain and suffering to be caused by failure to wear a safety belt, but it found only 4 per cent of Larson's pain and suffering to be caused by this omission.

[3] Jury verdicts will not be reversed for inconsistency if a review of the record reveals any basis for the verdicts entered. Thus, an appellate court has a duty to attempt to reconcile the jury's answers to special verdicts if it is at all possible. *City of Aurora v. Loveless*, 639 P.2d 1061 (Colo. 1981); *see also Consolidated Hardwoods, Inc. v. Alexander Concrete Construction, Inc.*, 811 P.2d 440 (Colo.App.1991); *Lonardo v. Litvak Meat Co.*, 676 P.2d 1229 (Colo. App.1983).

[4] Applying these principles here, we conclude that the jury's answers to the special verdicts are reconcilable. If the evidence and the jury instructions are considered together, the jury could have determined that 10 per cent of the injuries suffered by Gutierrez resulted from his failure to wear his safety belt and that this failure also constituted his negligence. For example, one jury instruction stated:

> Defendant Estella D. Bussey denies she was negligent and denies the nature and extent of the damages claimed by the plaintiffs; and as affirmative defenses claims the accident was caused by the plaintiffs' negligence, and that the plaintiffs have failed to mitigate their damages because of the plaintiffs' failure to use their seat belts....

Because this instruction does not indicate that failure to wear a seat belt is not the type of negligence referred to, it was possible for the jury to conclude that Gutierrez' negligence in driving the vehicle was his failure to wear a safety belt.

Moreover, there is evidence in the record supporting the jury's finding that failure to wear a safety belt caused 10 per cent of Gutierrez' injuries but only 4 per cent of Larson's injuries. Specifically, the record shows that the driver's side of Gutierrez' vehicle sustained substantial damage as compared to the passenger's side of the vehicle. Accordingly, the jury could have concluded that Gutierrez suffered greater injuries than Larson and, as a result, could have determined that a larger percentage of Gutierrez' injuries was caused by his failure to wear a safety belt. Therefore, since the jury verdicts may be resolved on this basis, we conclude that the court did not err in denying Bussey's motion. *See City of Aurora v. Loveless, supra; Knittle v. Miller*, 709 P.2d 32 (Colo.App.1985).

III

[5, 6] Bussey further argues that the trial court erred when it awarded Gutierrez

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III

[5, 6] Bussey further argues that the trial court erred when it awarded Gutierrez

H
Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. A PETITION FOR REHEARING IN THE COURT OF APPEALS OR A PETITION FOR CERTIORARI IN THE SUPREME COURT MAY BE PENDING.

Colorado Court of Appeals,
Div. IV.
Joan L. HOLLEY, Plaintiff–Appellant,
v.
Linda C. HUANG, M.D., Defendant–Appellee.

No. 10CA1187.
May 12, 2011.

Background: Patient, who underwent breast augmentation surgery, brought action against doctor, alleging that doctor failed to obtain patient's informed consent for the particular procedure, a circumareolar mastopexy, that was used on patient's breast. The District Court, City and County of Denver, Michael A. Martinez, J., entered judgment on jury verdict in doctor's favor, and patient appealed.

Holdings: The Court of Appeals, Russel, J., held that:
(1) because documentation of patient's informed consent was not required, expert opinion on this issue was not admissible;
(2) trial court abused its discretion when it excluded patient's proffered testimony that she would never have consented to a circumareolar mastopexy had she been properly informed of its risks; and
(3) trial court should not have instructed jury on habit testimony.

Affirmed.

West Headnotes

[1] Evidence 157 538

157 Evidence
157XII Opinion Evidence
157XII(C) Competency of Experts
157k538 k. Due care and proper conduct in general. Most Cited Cases

Health 198H 906

198H Health
198HVI Consent of Patient and Substituted Judgment
198Hk904 Consent of Patient
198Hk906 k. Informed consent in general; duty to disclose. Most Cited Cases

Because documentation of patient's informed consent was not required, a failure to document did not constitute a failure to meet the standard of care required of doctors in the pertinent professional community, and therefore, expert opinion on this issue was not admissible.

[2] Health 198H 906

198H Health
198HVI Consent of Patient and Substituted Judgment
198Hk904 Consent of Patient
198Hk906 k. Informed consent in general; duty to disclose. Most Cited Cases

Before performing any medical procedure, a doctor must inform the patient of the procedure's substantial risks and obtain the patient's consent.

[3] Health 198H 906

198H Health
198HVI Consent of Patient and Substituted Judgment
198Hk904 Consent of Patient
198Hk906 k. Informed consent in general; duty to disclose. Most Cited Cases

Doctor may employ any means of communication—such as conversation, writings, video and au-

On appeal, Holley appears to reiterate the concerns that she raised at trial. She suggests that the instruction created a presumption and asserts that habit testimony should be treated like all other evidence. She also states (without elaboration) that the instruction "wrongfully emphasized" the habit testimony.

2. Discussion

We reject the narrow argument that Holley presented at trial. As Huang correctly notes, the instruction contains an accurate statement about the relevance of habit testimony. *See* CRE 406; *Bloskas v. Murray,* 646 P.2d 907, 911 (Colo.1982). And, as the trial court noted, the instruction does not require the jury to credit habit testimony over other forms of evidence.

***4** But we agree with Holley that the instruction should not have been given. Although the instruction contains a correct statement of law, that statement was never intended to guide jury deliberations. *Cf. People v. Mandez,* 997 P.2d 1254, 1270–71 (Colo.App.1999) (instruction on "fingerprint evidence rule" was properly denied because the rule was designed to guide judicial review, not jury deliberations). By giving the instruction, the court erroneously emphasized one type of evidence and highlighted one defense-favorable inference. *See Krueger v. Ary,* 205 P.3d 1150, 1157 (Colo.2009) ("[W]e disfavor instructions emphasizing specific evidence."); *see also Etheridge v. Harold Case & Co.,* 960 So.2d 474, 484 (Miss.Ct.App.2006) (instruction on habit testimony was correctly refused because that instruction would have been an improper comment on the evidence); *but see Hajian v. Holy Family Hospital,* 273 Ill.App.3d 932, 210 Ill.Dec. 156, 652 N.E.2d 1132, 1140 (1995) (because habit testimony was properly admitted, the trial court had discretionary authority to give the pattern habit instruction).

[10] Nevertheless, we decline to reverse:

1. We cannot tell whether Holley's appellate argument implicitly comprises the observations that we have made. But we are sure that her trial objection did not. We therefore regard this issue as an unpreserved assertion of error. *See* C.R.C.P. 51; *Blueflame Gas, Inc. v. Van Hoose,* 679 P.2d 579, 586 (Colo.1984). Because this is a civil case, we will reverse only if convinced that the instruction constituted a manifest injustice that almost surely affected the outcome. *See Harris Group, Inc. v. Robinson,* 209 P.3d 1188, 1195 (Colo.App.2009); *Robinson v. City & County of Denver,* 30 P.3d 677, 685 (Colo.App.2000).

2. We do not perceive the kind of error or prejudice that would warrant reversal. The instruction did not require the jurors to give special weight to habit testimony, nor did it require them to draw inferences in Huang's favor. A separate instruction properly guided the jury's evaluation of the weight and credibility of evidence.[FN3] During closing argument, Holley's attorney noted that habit testimony was merely a type of evidence that could be considered "just like ... anything else that's said in this courtroom." And he argued that Huang's habit testimony was convenient, unreliable, and uncorroborated.

III. Arguments Discussed Briefly

Holley makes several other arguments that warrant only brief discussion. We address those here.

A. Standard of Care

[11] At Huang's request, the court disallowed questions about a physician's "standard of care" and instead required the parties to ask whether physicians' conduct was "reasonable, acceptable, and appropriate." We do not think that this ruling undermined the fairness of the trial. Holley's attorney was able to reframe his questions as the court directed. And during closing argument, he clarified that the "standard of care" referenced in the instructions "means what a reasonable and careful physician would do."

***5** [12] Contrary to Holley's view, the court did not err by instructing the jury to base its determina-

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Victor H. HILDYARD, Plaintiff-Appellee,
v.
WESTERN FASTENERS, INC., a Colorado corporation, and Harvey Bostrom, Defendants-Appellants.
No. 72-428.

Colorado Court of Appeals,
Div. I.
March 19, 1974.
Rehearing Denied April 9, 1974.
Selected for Official Publication.

Action to recover personal injuries and property damage resulting from an automobile accident. The District Court of the City and County of Denver, Mitchel B. Johns, J., entered judgment on verdict for plaintiff, and defendants appealed. The Court of Appeals, Ruland, J., held that whether plaintiff was contributorily negligent by virtue of a sudden and abrupt stopping of his vehicle in an unexpected location prior to time of impact with defendants' vehicle from rear was question for jury, that trial court erred in directing a verdict on issue of plaintiff's contributory negligence and, though it did not err in respect to its other rulings, where issues of liability and damages were interwoven in case, judgment would be reversed and cause would be remanded for a new trial on all issues.

Reversed and remanded.

1. Judgment ⟹81

An offer by defendants to allow judgment to be taken against them must be accepted by plaintiff and, absent acceptance, offer is not binding. Rules of Civil Procedure, rule 68.

2. Pleading ⟹250

Though defendants sought to confess judgment for amount requested in plaintiff's original complaint, where plaintiff refused to accept offer, trial court correctly authorized amendment of complaint on a showing that nature and extent of plaintiff's damages were not entirely known at time original complaint was filed. Rules of Civil Procedure, rules 15(a), 68.

3. Damages ⟹206(2)

A motion for physical examination is addressed to sound discretion of trial court, and it is necessary to demonstrate good cause therefor. Rules of Civil Procedure, rule 35.

4. Damages ⟹206(6)

Refusal of defendant's request for an examination by a physician in same specialty as each physician who had examined and treated plaintiff was not an abuse of discretion, though none of doctors who examined plaintiff were in complete agreement as to whether cervical sprain caused a nerve disorder, circulatory disorder, or both, where there was no indication that examination by additional physicians would resolve uncertainty, and physician selected by defendants was allowed to make two separate examinations. Rules of Civil Procedure, rule 35.

5. Automobiles ⟹245(81)

Whether plaintiff was contributorily negligent by virtue of a sudden and abrupt stopping of his vehicle in an unexpected location prior to time of impact with defendants' vehicle from rear was question for jury.

6. Trial ⟹178

Fact that one of defendants made inconsistent statements in a prior deposition on other facets of case was not relevant in determining propriety of directed verdict for plaintiff on issue whether plaintiff was guilty of contributory negligence.

7. Trial ⟹178

On motion for directed verdict, evidence must be considered in a light most favorable to party against whom motion for directed verdict is requested.

8. Damages ⟹208(7)

Though a thoracic surgeon diagnosed plaintiff's injury as a circulatory disorder and suggested that it could be corrected by a surgical procedure which had resulted in

Colorado Jury Instructions 6:8, did not accurately reflect the law as stated in Newbury v. Vogel, *supra.* In lieu of the given instruction, defendants had tendered a separate instruction covering the same subject matter which the trial court refused.

In the case at hand, one of the medical witnesses testified that the collision in question aggravated a preexisting condition (narrowing of the disc space between the 5th and 6th vertebrae in the neck). However, the record reflects that prior to the accident, plaintiff experienced none of the difficulties of which he now complains. In light of this evidence, the instruction was proper, *see* Intermill v. Heumesser, *supra,* and we do not find any material conflict between the instruction given and Newbury v. Vogel, *supra.*

[16] Defendants tendered and objected to the trial court's refusal to give an instruction which advised the jury that after arriving at their verdict, they should not add any sum of money for federal income taxes because the verdict is not income to the plaintiff within the meaning of the federal tax laws. The trial court properly refused this instruction. Davis v. Fortino & Jackson Chevrolet Co., Col.App., 510 P.2d 1376.

[17] The issues of liability and damages being interwoven in this case, the judgment is reversed and the cause remanded for a new trial on all issues. *See* Bassett v. O'Dell, 30 Colo.App. 215, 491 P.2d 604, affirmed, Colo., 498 P.2d 1134.

SILVERSTEIN, C. J., and COYTE, J., concur.

ty is lack of adequate time to prepare his case, this hardship may be avoided by granting a continuance of the trial date. *Id.; see also, H. W. Huston Construction Co. v. District Court, supra.* In contrast, where prejudice to a party resulting from amendment of the pleadings cannot be avoided by imposing appropriate conditions, or where the party seeking to amend his complaint is guilty of bad faith or dilatory motive, substantial reasons for denying the amendment are presented. 6 C. Wright and A. Miller, *Federal Practice and Procedure,* § 1488 at 440–44 (1971); *see also Spiker v. Hoogeboom, supra.*

[5] Allowing amendment of Eagle River's complaint would have promoted judicial economy by allowing all elements of damage resulting from collapse of the underground water tanks to be resolved in a single proceeding. Nothing in the record before us indicates that the motion to amend was made in bad faith or for a dilatory purpose, and there is no indication that the parties would be prejudiced by any delay in the trial necessitated by the amendment. Indeed, counsel for Lifetime moved for a continuance of the trial for independent reasons. Also, it should be noted that it is the plaintiff, the party that could be expected to have the strongest interest in a prompt resolution of the case, who is seeking the amendment that would require such a continuance. Finally, in assessing the above facts we must be mindful of the liberal policy of amendment contemplated by C.R.C.P. 15, which has been repeatedly recognized by this court. *E.g., H. W. Houston Construction Co. v. District Court, supra; Varner v. District Court, supra; Bobrick v. Sanderson, supra.* Under the facts of the present case and in light of the above considerations, the trial court's desire to preserve the scheduled trial date in this action was not a sufficient justification to deny the motion to amend.

The rule to show cause is made absolute.

MEDEMA HOMES, INC., Petitioner,

v.

Theodore J. LYNN and Mary E. Lynn, Respondents.

No. 81SC208.

Supreme Court of Colorado, En Banc.

July 6, 1982.

Purchasers of residence appealed from judgment entered by the District Court, Arapahoe County, George B. Lee, Jr., J., which awarded them $500 in damages against vendor for breach of contract, and denied other claims for relief. The Court of Appeals, 632 P.2d 623, affirmed in part, reversed in part, and remanded. On grant of certiorari, the Supreme Court, Hodges, C. J., held that: (1) formula devised by Court of Appeals to calculate damages was improper calculation of loss of bargain damages, and (2) purchasers were not entitled to liquidated damages.

Judgment reversed.

Lohr, J., filed specially concurring opinion.

1. Damages ⟹120(3)

Formula devised by Court of Appeals to measure home purchaser's damages, where specific performance was not possible, whereby damages were computed by comparing contract price with property's fair market value at time specific performance became unavailable as remedy, was improper calculation of loss of bargain damages.

2. Damages ⟹78(4)

Liquidated damage clause addressing delay in performance contract will not be enforced where such delay is due in whole or in part to fault of party claiming loss of benefit.

ty is lack of adequate time to prepare his case, this hardship may be avoided by granting a continuance of the trial date. *Id.; see also, H. W. Huston Construction Co. v. District Court, supra.* In contrast, where prejudice to a party resulting from amendment of the pleadings cannot be avoided by imposing appropriate conditions, or where the party seeking to amend his complaint is guilty of bad faith or dilatory motive, substantial reasons for denying the amendment are presented. 6 C. Wright and A. Miller, *Federal Practice and Procedure*, § 1488 at 440–44 (1971); *see also Spiker v. Hoogeboom, supra.*

[5] Allowing amendment of Eagle River's complaint would have promoted judicial economy by allowing all elements of damage resulting from collapse of the underground water tanks to be resolved in a single proceeding. Nothing in the record before us indicates that the motion to amend was made in bad faith or for a dilatory purpose, and there is no indication that the parties would be prejudiced by any delay in the trial necessitated by the amendment. Indeed, counsel for Lifetime moved for a continuance of the trial for independent reasons. Also, it should be noted that it is the plaintiff, the party that could be expected to have the strongest interest in a prompt resolution of the case, who is seeking the amendment that would require such a continuance. Finally, in assessing the above facts we must be mindful of the liberal policy of amendment contemplated by C.R.C.P. 15, which has been repeatedly recognized by this court. *E.g., H. W. Houston Construction Co. v. District Court, supra; Varner v. District Court, supra; Bobrick v. Sanderson, supra.* Under the facts of the present case and in light of the above considerations, the trial court's desire to preserve the scheduled trial date in this action was not a sufficient justification to deny the motion to amend.

The rule to show cause is made absolute.

MEDEMA HOMES, INC., Petitioner,

v.

Theodore J. LYNN and Mary E. Lynn, Respondents.

No. 81SC208.

Supreme Court of Colorado,
En Banc.

July 6, 1982.

Purchasers of residence appealed from judgment entered by the District Court, Arapahoe County, George B. Lee, Jr., J., which awarded them $500 in damages against vendor for breach of contract, and denied other claims for relief. The Court of Appeals, 632 P.2d 623, affirmed in part, reversed in part, and remanded. On grant of certiorari, the Supreme Court, Hodges, C. J., held that: (1) formula devised by Court of Appeals to calculate damages was improper calculation of loss of bargain damages, and (2) purchasers were not entitled to liquidated damages.

Judgment reversed.

Lohr, J., filed specially concurring opinion.

1. Damages ⚿=120(3)

Formula devised by Court of Appeals to measure home purchaser's damages, where specific performance was not possible, whereby damages were computed by comparing contract price with property's fair market value at time specific performance became unavailable as remedy, was improper calculation of loss of bargain damages.

2. Damages ⚿=78(4)

Liquidated damage clause addressing delay in performance contract will not be enforced where such delay is due in whole or in part to fault of party claiming loss of benefit.

ported in the record, we accordingly affirm its holding on this issue. *See Gebhardt v. Gebhardt*, 198 Colo. 28, 595 P.2d 1048 (1979).

II.

LIQUIDATED DAMAGES

Trial court II found the home purchasers' liquidated damages claim inapplicable since they had availed themselves of their legal and equitable rights to consequential damages.

The court of appeals rejected this finding and ruled that the liquidated damages clause of the contract provided an additional, not an alternative, remedy when the home purchaser seeks to enforce a contract. Under the facts of this case, the court of appeals' ruling is contrary to fundamental principles which are adhered to in making damage awards. The trial court's analysis was correct and should not have been rejected by the court of appeals. In addition, we note that the liquidated damages clause of the contract provides:

> "If Seller fails to deliver said title and possession within the 120 days and 30 day extension specified herein, and such failure is not beyond the control or without the fault or negligence of the Seller, Seller shall pay to Purchaser liquidated damages in the amount of $25 per day until such failure is cured."

The clear wording of this clause dictates that only when the seller fails, because of his own fault, to deliver title and possession on time does liability under this liquidated damages clause come into operation. Delivery of title and possession here was never accomplished because of an assortment of reasons, several of which must be attributed to the home purchasers.

[2] It is the majority rule that a liquidated damages clause addressing delay in a performance contract will not be enforced where such delay is due in whole or in part to the fault of the party claiming the clause's benefit. *See, e.g., United States v. United Engineering & Contracting Co.*, 234 U.S. 236, 34 S.Ct. 843, 58 L.Ed. 1294 (1914); *L. A. Reynolds Company v. State Highway Commission*, 271 N.C. 40, 155 S.E.2d 473 (1967); *Kiewit & Sons' Co. v. Pasadena City Jr. Col. Dist.*, 59 Cal.2d 241, 379 P.2d 18, 28 Cal.Rptr. 714 (1963); *Austin-Griffith, Inc. v. Goldberg*, 224 S.C. 372, 79 S.E.2d 447 (1953); *Psaty & Fuhrman v. Housing Authority of City of Providence*, 76 R.I. 87, 68 A.2d 32 (1949). *See also* 5 A. Corbin, *Corbin on Contracts* § 1072 (1964); 25 C.J.S. *Damages* § 115c (1966); 22 Am.Jur.2d *Damages* § 233 (1965).

[3] We embrace this same rule and find it applicable here. The evidence leaves no doubt but that the delay in delivery of the home was due, at least in part, to the home purchasers' actions. It was a clear condition of the contractual relationship that they were to apply for and secure financing for the Medema home. This they did. However, even though the builder estimated the house would be delivered by September 10, 1976, and that trial court I found the delivery date to be October 23, 1976, respondents transferred the loan application on the Medema home to a second home in late August. The builder learned of this transfer by September and became concerned about the home purchasers' intentions to comply with the contract. Evidence at trial clearly showed that this loan transfer contributed directly to the delays in completing the construction. Other evidence revealed that delay was also occasioned by the home purchasers' failure to cooperate with the builder in selecting carpeting and wall coverings for the Medema home. It was testified on behalf of the builder that absent such conduct by the home purchasers, the Medema home would probably have been delivered by the builder in accordance with the contract.

Evidence in the record is clearly supportive of trial court II's refusal to award loss of bargain and liquidated damages to the home purchasers.

We, accordingly, reverse the judgment of the court of appeals on the two issues involved in this review.

LOHR, J., specially concurs.

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We, accordingly, reverse the judgment of the court of appeals on the two issues involved in this review.

LOHR, J., specially concurs.

at the concerts. *See* Denver Revised Municipal Code 53–345(7). However, as was the case with some of its other contractual duties, Fey performed its vendor functions as an agent of the joint venture and, therefore, as a subagent of the Foundation.

As the hearing officer properly concluded, the Foundation is a department of the City for purposes of Denver Revised Municipal Code 53–347(3) and, as such, is exempt from the requirements of the admissions tax. However, she further concluded that, because Fey was a principal of the joint venture, it could not avail itself of the immunities held by the Foundation. In our view, because the Foundation, *i.e.,* the principal of the joint venture, was exempt, so too were its agent (the joint venture) and its subagent (Fey).

In this regard, we find guidance in *City & County of Denver v. Board of Assessment Appeals,* 782 P.2d 817 (Colo.App.1989) in which a division of this court determined that a property tax had been erroneously assessed on improvements and facilities at the Winter Park ski area. The opinion held that, while a private non-profit corporation had built the improvements in its own name and had borrowed the funds needed to construct some of these improvements, the corporation had at all times acted solely as an agent for the City and County of Denver. The corporation had exercised its delegated authority only as needed to carry out its contractual obligations to the City. In concluding that the City remained as the actual owner of the subject property, the division noted that "The fundamental question for tax exemption purposes must be decided on the basis of real ownership, rather than 'forms and labels.'" *City & County of Denver v. Board of Assessment Appeals, supra,* at 821 (quoting *Gunnison County v. Board of Assessment Appeals,* 693 P.2d 400 (Colo.App.1984)).

So too, here, the evidence shows that the Foundation retained ownership of Zoofest and used Fey's services as a surrogate for those of its own employees. Because Fey was, a subagent of the Foundation in all matters relating to the sales of tickets and the collection of box office receipts, the exemption applied. *See City & County of Denver v. Board of Assessment Appeals, supra; see also Metropolitan Denver Sewage Disposal District No. 1 v. Farmers Reservoir & Irrigation Co., supra; Finney v. Estes,* 130 Colo. 115, 273 P.2d 638 (1954)(municipality may contract with private agent to perform particular functions); *but see Vargo v. Sauer,* 215 Mich.App. 389, 547 N.W.2d 40 (1996)(Ernst, J. dissenting).

Accordingly, we conclude that the hearing officer misconstrued the plain language of the parties' agreement and misapplied the relevant legal standards in reaching her decision. *See Electric Power Research Institute, Inc. v. City & County of Denver, supra; Denver Center for the Performing Arts v. Briggs, supra.* Thus, the judgment of the district court which affirmed the order of the hearing officer cannot stand.

II.

In light of this disposition, Fey's other contentions of error are either moot or without merit, and we need not address them.

The judgment is reversed and the cause is remanded to the trial court with directions to enter judgment reversing the ruling of the hearing officer.

CRISWELL and JONES, JJ., concur.

Rebecca N. LASCANO, Plaintiff–Appellant,

v.

Gloria M. VOWELL, Defendant–Appellee.

No. 94CA1268.

Colorado Court of Appeals, Div. I.

Sept. 5, 1996.

In personal injury action arising out of automobile accident, the District Court, City

tiff may not recover any damages caused only by the later accidents.

However, if you find the subsequent accidents aggravated any injuries caused by the motor vehicle accident of May 30, 1989, then you must separate, if possible, those damages caused by the automobile accident of May 30, 1989, from those caused by the accidents of August 1989, July 1990 and October 1990, and the plaintiff may recover all those separate damages caused only by the motor vehicle accident of May 30, 1989.

If it is not possible to separate any damages caused by the motor vehicle accident of May 30, 1989 from those caused by accidents of August 1989, July 1990 and October 1990, then the plaintiff may recover those damages only from the date of the motor vehicle accident to the date of the August 1989 log ride at [the] Amusement Park accident.

Such an instruction is appropriately given when, after the injury giving rise to the plaintiff's tort action, a later event or incident either: (1) causes a new, unrelated injury to the plaintiff or (2) aggravates the injury the plaintiff suffered as a result of the defendant's tortious conduct. *See Bruckman v. Pena,* 29 Colo.App. 357, 487 P.2d 566 (1971); *see also Guerrero v. Bailey,* 658 P.2d 278 (Colo.App.1982).

Here, the evidence did not show that any of these later incidents caused an injury to plaintiff that was separate and unrelated to those caused by the automobile accident. Indeed, defendant appears to concede that there was not sufficient evidence of a separate injury, arguing instead that the three incidents aggravated the injuries plaintiff had sustained in the automobile accident.

Thus, for the instruction to be appropriate, there must have been evidence showing that one or more of the later incidents aggravated plaintiff's injuries. The resolution of this question, in turn, depends on how the term "aggravated" is defined in this context.

Here, no definition of the term "aggravated" was provided in the instructions. In the absence of any definition, we presume that the jury applied the common meaning of the word "aggravated." *See Armentrout v. FMC Corp.,* 842 P.2d 175 (Colo.1992).

To "aggravate" an injury can mean: "(3) to make worse, more serious, or more severe: INTENSIFY" or "(4)(b) to produce inflammation in: IRRITATE." *Webster's Third New International Dictionary* 41 (1986).

The first definition is consistent with the term as it is used in *CJI–Civ.3d* 6:9, which lists the words "increased" or "worsened" as acceptable synonyms for "aggravated." *See, e.g., Guerrero v. Bailey, supra.* The second definition implies an inflammation or irritation of an injury, causing additional pain but not necessarily increasing or worsening the injury itself. This common definition does not conform to the requirement that increased injury must be shown.

The factual context of plaintiff's claims here could not have provided a basis for the jurors to determine which of these two equally plausible meanings was appropriate. The only evidence offered of aggravation of plaintiff's injuries related to three events in which plaintiff reported feeling increased pain. The jurors could have drawn conflicting inferences about whether the inflammation of the prior injury constituted an aggravation of it.

Because the term "aggravated" was susceptible to more than one reasonable meaning in this factual context, the instruction was ambiguous. And, since only one of the definitions of this term accurately reflects the applicable law, it is possible that the jurors were confused or misled by the ambiguous wording. Moreover, this defect was not cured by the other instructions. Thus, in our view, the instructions as a whole inadequately appraised the jury of the appropriate meaning of the word "aggravated." *See Armentrout v. FMC Corp., supra.*

Therefore, on remand, the applicability of this instruction must be reconsidered in light of the evidence presented. If it is determined that the evidence supports such an instruction, the trial court should determine whether it is necessary to provide further definitions of terms.

C
NOMELLINI CONSTRUCTION CO., Plaintiff and Respondent,
v.
THE STATE OF CALIFORNIA ex rel. DEPARTMENT OF WATER RESOURCES, Defendant and Appellant

Civ. No. 12614.

Court of Appeal, Third District, California.
August 12, 1971.

SUMMARY

The trial court entered judgment in favor of a construction company in its suit against the state Department of Water Resources to recover an amount withheld by the department from the agreed contract price for construction of portable houses. The amount was withheld pursuant to a liquidated damage provision for failure to complete the project on time. The contractor claimed, and the trial court concluded, that the department had caused the delay by failure to give timely approval to shop drawings submitted by the contractor. (Superior Court of Sacramento County, No. 168823, Frank G. Finnegan, Judge.)

The Court of Appeal reversed the judgment of the trial court, holding that the record showed no delays disallowed by the department for which the contractor was not responsible. It was pointed out, inter alia, that approval of shop drawings was required by the contract only when alterations desired by the contractor were involved and that the drawings in question related to a substituted method of handling the portability feature of the houses that would save the contractor money. As to the contractor's claim that the houses were not portable as originally designed, the court noted that, had they been constructed according to the plans and specifications, the contract price would have been payable even though the houses in fact turned out not to be portable. Though the court found no delay for which the department was responsible, it discussed apportionment of delay time where both parties are partially at fault. It saw no obstacle to apportionment in such a situation. (Opinion by Pierce, P. J., with Regan, J., and Bray, J., [FN*] concurring.)

FN* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

HEADNOTES

Classified to California Digest of Official Reports

(1) Damages § 196--Procedure--Evidence--Sufficiency--Liquidated Damages.

In an action by a contractor to recover amounts withheld by the state Department of Water Resources as liquidated damages for unexcused late completion of a contract for portable houses, the record did not support the trial court's conclusion that the department had caused a delay by failing to give timely approval to shop drawings submitted by the contractor in connection with its claim that redesign was necessary to make the houses portable, where, though the contract provided that shop drawings were to be prepared by the contractor, no special approval of such drawings was required except in the case of alterations desired by the contractor, where the substitute method of handling the portability feature was submitted because it would save the contractor money, and where the drawings were acted upon by the department within the time limit as expressed in the contract or earlier; the plans and specifications contained in the contract were complete, and the contractor would have been entitled to its contract price had it constructed the houses according to them, even though the houses in fact turned out not to be portable.

(2) Damages § 129--Liquidated Damages--Construction Contracts.

Under a state Department of Water Resources contract for the construction and on-site placement of portable houses, delay attributable to the depart-

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Apportionment of Fault in the Award of Liquidated Damages

(2) Government Code section 14376 FN2 requires that in every contract for public work there shall be a provision specifying a date for the completion of the work and further specifying liquidated damages to be deducted from the payments due in the event of late completion. This contract contained the required provision. As stated above, it also contained ***245** a provision for extensions of time for delays which were not the fault of the contractor. (See fn. 2.) We have also shown that the Department disallowed certain claims of Nomellini for extensions. We have been unable to find in the record any instances in which the Department was wrong. Assuming arguendo *contrary to our holding* that there were delays which the Department should have allowed, they were delays which the trial court would have been obligated to apportion.

FN2 The portion of Government Code section 14376 here pertinent provides: "Every contract shall contain a provision in regard to the time when the whole or any specified portion of the work contemplated shall be completed, and shall provide that for each day completion is delayed beyond the specified time, the contractor shall forfeit and pay to the State a specified sum of money, to be deducted from any payments due or to become due to the contractor."

The controlling law is found in the decision of the United States Supreme Court in *Robinson v. United States*, 261 U.S. 486 [67 L.Ed. 760, 43 S.Ct. 420]. That case involved a contract which provided for both liquidated damages and extensions of time. The work was not completed on time. The government acknowledged that 12 of 121 days of delay were chargeable to it; the trial court found the government was chargeable with 60 days delay. The contractor "contended that, since the government had caused some of the delay, the provision for liquidated damages became wholly inapplicable and was unenforceable; ..." (P. 487 [67 L.Ed. 761].) In holding that apportionment was proper the court stated at page 488 [67 L.Ed. at page 762]: "If the provision for liquidated damages is not to govern, it must be either because, as [a] matter of public policy, courts will not, under the circumstances, give it effect (even as a defense), or because, in spite of the explicit finding, no day's delay can, as [a] matter of law, be chargeable to the contractor, where the government has caused some delay. Neither position is tenable.

"The provision is not against public policy. The law required that some provision for liquidated damages be inserted. ... In construction contracts a provision giving liquidated damages for each day's delay is an appropriate means of inducing due performance, or of giving compensation, in case of failure to perform; and courts give it effect in accordance with its terms. ... The fact that the government's action caused some of the delay presents no legal ground for denying it compensation for loss suffered wholly through the fault of the contractor. Since the contractor agreed to pay at a specified rate for each day's delay not caused by the government, it was clearly the intention that it should pay for some days' delay at that rate, even if it were relieved from paying for other days, because of the government's action." This holding of the Supreme Court did not announce a unique or novel principle. 5 Williston on Contracts (3d ed. 1961) pages 764-766, states: "Where both parties are in fault a party who has contributed to the breach cannot recover a sum stipulated as liquidated damages, even though performance of the contract is continued, and the other party is thereafter at fault: ... In building contracts, there ***246** is often inserted a provision giving the architect power to certify an extension of time in certain cases, by virtue of which the effect of a delay caused by the owner operates merely as an extension of the time of performance, and a new time is substituted for the old. In that event though the owner causes delay the builder is liable in liquidated damages, but the period of delay caused by the owner is deducted from the total delay. Unless the contract contains such a provision

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Accordingly, the husband's interest is subject to distribution as marital property. *In re Marriage of Bayer*, 687 P.2d 537 (Colo. App.1984). We conclude that the equal division of the husband's interest in the fee rested within the sound discretion of the trial court, and, being supported by competent evidence, that division will not be disturbed on appeal. *In re Marriage of Price*, 727 P.2d 1073 (Colo.1986).

B.

As to the Fairview fee, however, we conclude that the trial court erred in part.

[3] The trial court's division of the Fairview fee was well within the "reserve jurisdiction method" approved in *Gallo, supra.* However, the trial court should have limited its order to the portion of the husband's interest in the fee attributable to work done during the marriage.

Husband's other challenges to the permanent orders are without merit.

Accordingly, the portion of the judgment concerned with the award of the Fairview fee is reversed, and the cause is remanded to the trial court with directions to modify the judgment and to retain jurisdiction for a determination and division of the marital interest in that fee when payable. In all other respects, the judgment is affirmed.

TURSI and JONES, JJ., concur.

METRO NATIONAL BANK, a national banking association, Plaintiff-Appellee,

v.

Waynard Hugh PARKER, Jr., and Jeanise D. Parker, Defendants-Appellants.

No. 88CA0335.

Colorado Court of Appeals,
Div. C.

April 20, 1989.

Bank brought action to recover deficiency judgment under terms of note and deed of trust. The District Court, City and County of Denver, Connie L. Peterson, J., entered judgment in favor of bank, and defendants appealed. The Court of Appeals, Silverstein, J., sitting by assignment, held that: (1) bank's written sale bid, which contained summary showing principal and interest outstanding, together with testimony of bank officer based on summary, were admissible, and (2) defense raised lacked substantial merit, supporting award of attorney fee to bank.

Affirmed.

1. Evidence ⟹177

Proponent of summary evidence must establish that underlying materials upon which summary is based would be admissible in evidence and they were made available to opposing party for inspection. Rules of Evid., Rule 1006.

2. Evidence ⟹177

Evidence admissible as summary evidence is not objectionable on ground it violates "best evidence rule"; if proper foundation has been established, questions concerning authenticity of evidence or credibility of testimony go to weight of evidence, not its admissibility. Rules of Evid., Rule 1006.

3. Evidence ⟹177

Bank's written sale bid, which contained summary showing principal and interest outstanding, together with testimony of bank officer based on summary, were supported by sufficient foundation and were admissible in bank's action to recover deficiency judgment under terms of note and deed of trust; bank records from which officer prepared bid were kept in regular course of bank's business, and both bid summary and bank records were available to defendants in advance of trial. Rules of Evid., Rules 803(6), 1006.

4. Mortgages ⟹377

Defense raised in bank's action to recover deficiency judgment on deed of trust

lacked substantial merit, supporting award of attorney fee to bank; defendants offered no evidence at trial, only objected to introduction of bank's evidence, and made no effort to discover or examine bank loan records or cite existing authority in support of their evidentiary objections. C.R.S. 13-17-102.

Brownstein Hyatt Farber & Madden, P.C., Kenneth R. Bennington, Denver, for plaintiff-appellee.

David C. Hoskins, P.C., Parker, for defendants-appellants.

SILVERSTEIN *, Judge.

Waynard Hugh Parker, Jr. and Jeanise D. Parker (defendants) appeal from a deficiency judgment in favor of Metro National Bank (bank) under the terms of a note and deed of trust. We affirm.

The bank brought this action to recover the deficiency on a promissory note secured by a deed of trust after a sale of the security by the public trustee. Defendants denied that there was a default and challenged the amount due. They also alleged that plaintiff failed to mitigate damages and asserted their "rights" to an accounting.

Roger Reeves, an officer of the bank, testified, based on his own review of bank records, that the amount of the deficiency was $33,931.33. Reeves' testimony was corroborated by documentary evidence consisting of the public trustee's endorsement of the deficiency on the original promissory note, and the bank's written sale bid, which had been prepared by Reeves and contained a summary showing the principal and interest outstanding, as well as various items of cost.

Defendants challenge the trial court's admission of the foregoing evidence, contending that it was inadmissible hearsay or, alternatively, that it was not the best evidence available. We reject both contentions.

CRE 1006 provides that voluminous evidence which cannot conveniently be examined in court may be introduced in the form of a testimonial or written summary. *See Buchholz v. Union Pacific R.R. Co.*, 135 Colo. 331, 311 P.2d 717 (1957); *Western National Bank v. ABC Drilling Co.*, 42 Colo.App. 407, 599 P.2d 942 (1979).

[1] CRE 1006 requires the proponent of summary evidence to establish that the underlying materials upon which the summary is based would be admissible in evidence and that they were made available to the opposing party for inspection. *International Technical Instruments, Inc. v. Engineering Measurements Co.*, 678 P.2d 558 (Colo.App.1983).

[2] Evidence admissible under CRE 1006 is not objectionable on the ground that it violates the "best evidence rule." *See Omaha World-Herald Co. v. Nielsen*, 220 Neb. 294, 369 N.W.2d 631 (1985); *cf. Bloxsom v. San Luis Valley*, 198 Colo. 113, 596 P.2d 1189 (1979). If a proper foundation has been established, questions concerning the authenticity of the evidence or the credibility of the testimony go to the weight of the evidence, not its admissibility. *Omaha World-Herald Co. v. Nielsen, supra.*

[3] Reeves testified that the bank records from which he prepared the bid were kept in the regular course of the bank's business, and that he personally reviewed the records in preparing the summary. The record thus establishes that the bid summary was based upon business records that were admissible in evidence under CRE 803(6). The record further reflects that both the bid summary and the bank records were available to defendants well in advance of trial. We therefore conclude that a proper foundation was established under CRE 803(6) and 1006, and that both the bid summary and Reeves' testimony were admissible, competent evidence to prove the amount of the deficiency.

* Sitting by assignment of the Chief Justice under provisions of the Colo. Const., art. VI, Sec. 5(3), and § 24-51-1105, C.R.S. (1988 Repl.Vol. 10B).

tionally *immaterial* exculpatory evidence. *See Rodriguez,* 786 P.2d at 1082. However, no one suggests that the witness addresses demanded here are themselves exculpatory. Similarly, although the criminal rules in this jurisdiction permit discretionary orders of disclosure where reasonable, even assuming those provisions apply with equal force to capital post-conviction proceedings, *see* Crim. P. 32.2(b)(3)(III), they authorize non-disclosure for reasons other than the risk of physical harm, including such things as the risk of intimidation, bribery, economic reprisals, or even unnecessary annoyance or embarrassment. *See* Crim. P. 16(I)(d)(2). The majority, however, offers no justification, constitutional or otherwise, for its capital-post-conviction-proceedings-personal-safety balancing test.

Because the majority concludes that the defendant would not be entitled to the addresses in question, even if the Confrontation Clause were to extend to post-trial defense investigations, I consider the majority's announcement of a special capital post-conviction standard to be unnecessary dicta. To the extent the majority opinion could be read not only to prohibit disclosure where considerations of witness safety outweigh the defendant's need but also to imply that disclosure of witness addresses is required except where considerations of witness safety are sufficiently weighty, I disagree.

Because I nevertheless agree with what I consider to be the holding of the case—that the trial court abused its discretion in ordering disclosure of the witnesses' addresses under these circumstances—I respectfully concur in part and dissent in part.

I am authorized to state that Justice RICE and Justice EID join in this concurrence in part and dissent in part.

Cheryl A. KENDRICK, Petitioner

v.

Holly L. PIPPIN, Respondent.

No. 09SC781.

Supreme Court of Colorado,
En Banc.

May 9, 2011.

Background: Plaintiff motorist, whose vehicle was struck by defendant's vehicle during accident that occurred in winter driving conditions filed negligence suit against defendant motorist. The District Court, Larimer County, Stephen J. Schapanski, J., entered judgment on jury verdict in favor of defendant motorist. Plaintiff motorist appealed. The Court of Appeals, 222 P.3d 380, affirmed. Plaintiff filed petition for writ of certiorari.

Holdings: Following grant of petition in part, the Supreme Court, Bender, C.J., held that:

(1) evidence did not support instruction on sudden emergency doctrine;

(2) evidence did not support instruction on doctrine of res ipsa loquitur; and

(3) in a matter of first impression, it was not misconduct for juror to use her professional background in engineering and mathematics during deliberations to calculate defendant motorist's speed, distance, and reaction time and share those calculations with the other jurors.

Reversed.

Martinez, J., concurred in judgment with opinion, in which Hobbs, J., joined.

Eid, J., dissented, with opinion.

1. Automobiles ⚷246(21)

Evidence did not support instruction on sudden emergency doctrine that was requested by defendant motorist, who lost control of her vehicle and struck plaintiff motorist's vehicle in accident that occurred in winter driving conditions, as defendant motorist's

sented competent evidence that extraneous prejudicial information was before the jury. *See Harlan,* 109 P.3d at 624 (stating that the first step in the two-part inquiry requires a court to determine whether extraneous prejudicial information was improperly before the jury); *see also Brooks v. Zahn,* 170 Ariz. 545, 826 P.2d 1171, 1177 (App.1991) ("In determining whether juror testimony is admissible to impeach the verdict, however, our first task is to determine whether the ... information that [the juror] imparted to her fellow jurors constitutes extraneous information. If not, we need inquire no further."). Whether extraneous prejudicial information was before the jury presents a mixed question of law and fact. *Harlan,* 109 P.3d at 624. We apply an abuse of discretion standard to the court's findings of fact, but we review the court's conclusions of law de novo. *Id.*

In previous cases, we considered what constitutes extraneous prejudicial information. We have instructed that "jurors are required to consider only the evidence admitted at trial and the law as given in the trial court's instructions" and, therefore, "any information that is not properly received into evidence or included in the court's instructions is extraneous to the case and improper for juror consideration." *Harlan,* 109 P.3d at 624 (citing *Wadle,* 97 P.3d at 935 and *Wiser,* 732 P.2d at 1141, 1143). Applying this instruction, we have held that legal content and specific factual information learned from outside the record and relevant to the issues in a case constitute extraneous prejudicial information improperly before a jury. *Id.* at 625.

For instance, in *Harlan,* we held it improper for jurors to consult a Bible for passages related to the death penalty. *Id.* at 629. We reasoned that the passages constituted extraneous prejudicial information because "[t]he trial court had not admitted these materials into evidence, nor did the court's instructions allow their use." *Id.* Similarly, in *Wiser,* we held it improper for a juror to consult a dictionary for a definition of "burglary" because "[j]urors are required to follow only the law as it is given in the court's instructions." 732 P.2d at 1141; *see also Wadle,* 97 P.3d at 937 (stating that it was indisputable that the jury's use of an internet description of an anti-depressant drug not admitted into evidence was improper); *Butters v. Wann,* 147 Colo. 352, 357, 363 P.2d 494, 497 (1961) (holding it was misconduct for a juror to conduct an independent investigation of the deceased's drinking habits and driver's license revocation).

[28] While our prior decisions make clear that jurors may not consider legal content and specific factual information relevant to the case if they obtained that information outside of the judicial proceeding, this court has not considered whether jurors may use their own professional and educational experiences to inform their deliberations. The broader proposition that jurors may apply their general knowledge and everyday experience when deciding cases is generally undisputed. *See Harlan,* 109 P.3d at 636 (Rice, J., dissenting) (noting that "the concept of 'extraneous information' does not include the general knowledge a juror brings to court"); *Destination Travel, Inc. v. McElhanon,* 799 P.2d 454, 456 (Colo.App.1990) (stating that "[j]urors are permitted to use their common knowledge and observations in life in deciding cases"); *accord People v. Maragh,* 94 N.Y.2d 569, 708 N.Y.S.2d 44, 729 N.E.2d 701, 704 (2000) (stating that jurors' application of their "everyday experience[s]" never constitutes misconduct because "that is precisely what peer jurors are instructed and expected to use in their assessment of evidence"); *Brooks,* 826 P.2d at 1177 ("We expect jurors to draw upon their common sense and experience and use their knowledge to assist in reaching a verdict.").

Of the jurisdictions that have considered the particular issue of whether jurors may use their professional and educational expertise to inform their deliberations, courts have split over the issue. A minority of courts prohibit jurors from applying their specialized knowledge to deliberations and view a juror's professional or educational expertise as extraneous prejudicial information. Representative of this approach is *Maragh,* 708 N.Y.S.2d 44, 729 N.E.2d at 704–05. In *Maragh,* the New York Court of Appeals held that it was misconduct for two nurses to apply their professional knowledge to the

are intended by the city to be viewed as administrative.

IV. Conclusion

The order is affirmed.

Judge ROY and Judge FURMAN concur.

William L. HOEPER, Plaintiff–Appellee and Cross–Appellant,

v.

AIR WISCONSIN AIRLINES CORPORATION, a Delaware corporation, Defendant–Appellant and Cross–Appellee.

No. 08CA1358.

Colorado Court of Appeals,
Div. IV.

Nov. 12, 2009.

Background: Airline pilot who had been deputized as a federal law enforcement officer and authorized to carry a weapon aboard commercial aircraft brought action against airline, alleging defamation. The District Court, Denver County, Robert L. McGahey, J., entered judgment on jury verdict in favor of pilot. Airline appealed.

Holdings: The Court of Appeals, Webb, J., held that:

(1) issue of immunity for reporting a suspicious transaction under the Federal Aviation and Transportation Security Act (ATSA) was for the jury;

(2) evidence supported finding that airline's fleet manager made the statement alleged;

(3) fleet manager's statement, that pilot may be "unstable" and carrying his federally-issued weapon, involved a matter of public concern, requiring a showing of actual malice;

(4) under Virginia law, statements were actionable statements of fact, rather than protected opinion;

(5) under Virginia law, statements were not substantially true;

(6) evidence supported finding of actual malice; and

(7) pilot waived issue of whether he was entitled to prejudgment interest.

Affirmed and remanded.

1. Action ⚷12
Torts ⚷121

The issue of immunity for reporting a suspicious transaction under the Federal Aviation and Transportation Security Act (ATSA) is for the jury as the finder of fact. 49 U.S.C.A. § 44941.

2. Action ⚷66
Trial ⚷134

The allocation of decision-making between judge and jury was a procedural question to be governed by Colorado law in action governed by the substantive law of Virginia. Rules Civ.Proc., Rule 38.

3. Appeal and Error ⚷1062.1

Any error in submitting to the jury the issue of immunity for reporting a suspicious transaction under the Federal Aviation and Transportation Security Act (ATSA) was harmless error in defamation action against airline, where the jury necessarily found actual malice in awarding presumed and punitive damages, such finding was supported by clear and convincing evidence, and actual malice precluded finding of immunity. 49 U.S.C.A. § 44941.

4. Appeal and Error ⚷999(1)

Appellate review of a jury's verdict is highly deferential.

5. Libel and Slander ⚷112(1)

Evidence in defamation action against airline, brought by airline pilot who had been deputized as a federal law enforcement officer and authorized to carry a weapon aboard commercial aircraft, supported finding that airline's fleet manager, during telephone call

strongly suggests that he attempted to bolster the grounds for the threat connotation of the TSA call by exaggerating the events of October 14.

Third, in Doyle's notes of the TSA call, also made the next day, he wrote:

> William Hoeper, a disgruntled company employee (an FFDO who may be armed) was traveling from IAD–DEN later that day, and we were concerned about the whereabouts of his firearm, and his mental stability at that time.

But in his trial testimony, Doyle denied having told TSA of concerns about Hoeper's "mental stability." This testimony was contradicted by TSA's records of the call, which refer to "unstable tendencies" and "unstable pilot." *See Celle,* 209 F.3d at 190 (finding of actual malice bolstered by reporter's conflicting testimony).

In sum, we agree with amicus United States that, "[o]nly in the highly unusual situation in which an air carrier has acted with knowing falsity or reckless disregard of the truth or falsity of its statements does the air carrier need to fear being held liable for its statements to TSA. . . ." On the particular evidence presented, this is just such an unusual case.

Accordingly, on de novo review we conclude that clear and convincing evidence shows Doyle acted with actual malice in communicating to TSA.

V. Prejudgment Interest

On cross-appeal, Hoeper contends the trial court erred by denying his request for prejudgment interest. We disagree.

Hoeper moved for entry of judgment and requested prejudgment interest under Colorado law. Air Wisconsin opposed the motion, arguing that Virginia law applied to prejudgment interest. Citing *AE, Inc. v. Goodyear Tire & Rubber Co.,* 168 P.3d 507 (Colo.2007), which was decided before trial, the court found that Hoeper had waived prejudgment interest because he failed to tender jury instructions or verdict forms on recovering prejudgment interest, as required by Virginia law. In *AE, Inc.,* 168 P.3d at 511, the Colorado Supreme Court discerned "no convincing reason to engage in a different choice of law analysis to determine the law applicable to a claim for prejudgment interest," and held that "the same law that governs the underlying cause of action in a tort case also governs the award of prejudgment interest."

[30] Section 8.01–382 of the Virginia Code "provides for the *discretionary* award of prejudgment interest by the trier of fact, who 'may provide for' such interest and fix the time of its commencement." *Dairyland Ins. Co. v. Douthat,* 248 Va. 627, 449 S.E.2d 799, 801 (1994). Thus, in Virginia the decision whether to award prejudgment interest rests with the jury. *See Upper Occoquan Sewage Authority v. Blake Construction Co.,* 275 Va. 41, 655 S.E.2d 10, 23 (2008).

[31] Here, we agree with the trial court that because Hoeper failed to request jury instructions or verdict forms on prejudgment interest, he waived this issue. *See Banks v. Mario Industries of Virginia, Inc.,* 274 Va. 438, 650 S.E.2d 687, 694 (2007) (applying waiver to a party's failure to request jury instructions and explaining "trial court was not required to instruct the jury, sua sponte, on the elements of damages Mario was entitled to recover in the absence of a request from Banks to do so")[11].

We reject Hoeper's argument, for which he cites no authority, that because his jury instructions—while silent on prejudgment interest—were consistent with Colorado law, Air Wisconsin was required to object on choice of law grounds. The pretrial ruling that Virginia law would apply to defamation dictated that Virginia law also governed prejudgment interest under *AE, Inc.* Thus, Air Wisconsin was not required to object on this basis. *Cf. Tait v. Hartford Underwriters Ins. Co.,* 49 P.3d 337, 341 (Colo.App.2001) ("An appellate court will not disturb the trial court's ruling if the *complaining party* failed either to tender a desired jury instruction or

11. We express no opinion whether to apply Colorado or Virginia law on waiver because we discern no difference between them. *See Farmland Mut. Ins. Cos. v. Chief Industries, Inc.,* 170 P.3d 832, 839 (Colo.App.2007) (failure to request jury instruction deemed waiver).

The position was held untenable by the court upon considerations and reasoning which we need not reproduce. It is enough to say we approve of them. It is contended by appellant that whatever defects may exist on the face of the act, may be and will be corrected in its administration, and whatever excess there may be in the fees collected will not be assigned to interstate commerce. There is quite a minute and detailed argument to show how this can be done. The District Court upon consideration in connection with the evidence rejected it, and we affirm its judgment.

Judgment affirmed.

(261 U. S. 486)

ROBINSON v. UNITED STATES.

(Argued March 16, 1923. Decided April 9, 1923.)

No. 335.

1. United States ⟹66—Provision for liquidated damages for each day's delay in performing contract not against public policy.

Under Act June 6, 1902, § 21 (Comp. St. § 6922), requiring insertion of a provision for liquidated damages a provision of a government contract for liquidated damages for each day's delay in completion of the work is not against public policy.

2. United States ⟹73—That part of delay caused by government held not to defeat right to damages for delay not so caused.

Under government contract providing that the contractor should be allowed one day additional for each day of delay caused by the government, that no claim for damages should be made for delay so caused, and that the contractor should pay $420 for each day's delay not caused by the government, the fact that part of the delay was caused by the government did not relieve the contractor of liability for the stipulated damages for the part of the delay not so caused.

3. Courts ⟹389—Specific findings of Court of Claims held conclusive.

Specific findings of the Court of Claims as to how much of the delay in performance of a government contract was attributable to the fault of each party are conclusive.

4. United States ⟹73—Contractor not relieved of liability on guaranty of work because government ignored suggestion that material was not suited to the climate.

Where government contractor guaranteed the condition of the work for one year after acceptance, and there was no mutual mistake, fraud, misrepresentation, or concealment, it was not relieved from the obligation so assumed because its suggestion that wood called for by the specifications was not well suited to the climate and locality was disregarded by the government, at least where warping of the wood was not entirely caused by its unsuitability.

Appeal from Court of Claims.

Suit by Roy H. Robinson, administrator of John C. Robinson, deceased, against the United States. From a judgment for claimant (57 Ct. Cl. 7) for an insufficient amount, he appeals. Affirmed.

Messrs. Charles H. Merillat and Charles J. Kappler, both of Washington, D. C., for appellant.

Mr. Blackburn Esterline, of Washington, D. C., for the United States.

Mr. Justice BRANDEIS delivered the opinion of the Court.

On August 30, 1905, claimant's intestate entered into a contract with the United *487 States to install the interior fin*ish in the custom house building then being constructed in New York City pursuant to Act of March 2, 1899, c. 337, 30 Stat. 969. The contract price was $1,037,281.69, and the time for completion of the work, October 15, 1906. Before it had been completed, but after that date, a supplemental agreement was made, which provided for additional work, increased the contract price $200,041.01, and extended the time for completion to June 1, 1907. The work was not completed until 121 days after that date. The government insisted that only 12 days of this delay were chargeable to it, and that the contractor was liable in liquidated damages for $420 for each of the remaining 109 days' delay. It therefore deducted $45,780 from the amount otherwise payable to the contractor.

To recover that sum (and others) the contractor brought this suit in the Court of Claims. He contended that, since the government had caused some of the delay, the provision for liquidated damages became wholly inapplicable and was unenforceable, and that, since the government had failed to prove actual damage, it was not entitled to any damages whatsoever. The court found that, of the 121 days of delay, only 61 days were chargeable to the contractor, and that the remainder were caused by the government, after the date of the supplemental contract. It accordingly gave the claimant judgment (among other things) for $20,160, being that part of the amount withheld which represented the delay in excess of 61 days. 57 Ct. Cl. 7. The case is here on claimant's appeal. Whether on these facts the provision for liquidated damages governs is the main question for decision.

The original contract provided that the contractor "shall be allowed one day, additional to the time herein stated, for each and every day of * * * delay [that may be caused by the government]," "that no claim *488 shall be *made or allowed to [the contractor] for any damages which may arise out of any delay caused by [the government]," and that

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The position was held untenable by the court upon considerations and reasoning which we need not reproduce. It is enough to say we approve of them. It is contended by appellant that whatever defects may exist on the face of the act, may be and will be corrected in its administration, and whatever excess there may be in the fees collected will not be assigned to interstate commerce. There is quite a minute and detailed argument to show how this can be done. The District Court upon consideration in connection with the evidence rejected it, and we affirm its judgment.

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application of the rule against perpetuities. Allowing reformation here would be consistent with the legislative intent and would have no impact other than to interests created pre–1991 which have been adjudged to violate the rule against perpetuities.

For all of the above reasons, I respectfully dissent and would reverse the court of appeals' opinion and allow reformation of the agreement.

I am authorized to state Justice RICE and Justice COATS join in the dissent.

In re: Plaintiff–Appellant: The PEOPLE of the State of Colorado,

v.

Defendant–Appellee: Robert Eliot HARLAN.

No. 03SA173.

Supreme Court of Colorado.

March 28, 2005.

As Modified on Denial of Rehearing April 18, 2005.*

Background: Defendant was convicted in the District Court, Adams County, Philip F. Roan, J., of first degree murder, attempted first degree murder, second degree kidnapping, and assault, and sentenced to death. The Supreme Court, 8 P.3d 448, affirmed the convictions and sentence, and remanded to the trial court for further proceedings. After an intervening Supreme Court decision reinstating defendant's trial counsel, 54 P.3d 871, the trial court, Adams County, John J. Vigil, J., granted defendant's motion to vacate the death sentence due to the jurors' use of a Bible during deliberations, and imposed a sentence of life in prison without possibility of parole. The prosecution appealed.

Holdings: The Supreme Court, Hobbs, J., held that:

(1) trial court's finding that the jurors were exposed to extraneous information was supported by sufficient admissible evidence;

(2) extraneous information was improperly before the jury;

(3) introduction of such information posed reasonable possibility of prejudice to defendant; and

(4) death sentence had to be set aside.

Vacation of death sentence affirmed and rule discharged.

Rice, J., filed dissenting opinion, in which Kourlis, J., joined.

1. Courts ⚷206(2)

Regardless of whether or not statutes authorizing the prosecution's appeal of the trial court's order vacating defendant's death sentence applied to defendant's case, given that defendant's crimes, first degree murder, attempted first degree murder, second degree kidnapping, and assault, occurred prior to General Assembly's adoption of appeal provisions, the Supreme Court would exercise its original jurisdiction to consider's prosecution's appeal, which raised issues of significant public importance that had not yet been considered, as vacation of death sentence was due to jurors' use of Bible passages during deliberations to demonstrate propriety of death as sentence for murder. West's C.R.S.A. §§ 13–4–102(1)(h), 18–1–410(3); Rules App.Proc., Rule 21.

2. Criminal Law ⚷957(1)

Evidence rule, which strongly disfavors any juror testimony impeaching a verdict, even on grounds such as mistake, misunderstanding of the law or facts, failure to follow instructions, lack of unanimity, or application of the wrong legal standard, is designed to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion. Rules of Evid., Rule 606(b).

3. Criminal Law ⚷855(1)

In determining whether the introduction of extraneous prejudicial information to the

* Justice KOURLIS and Justice RICE would grant the Petition.

v. South Denver Windustrial Co., 42 P.3d 19, 20 (Colo.2002)("We exercise jurisdiction under C.A.R. 21 when a case 'raise[s] issues of significant public importance that we have not yet considered.' ")(internal citations omitted). We now turn to the rule of evidence that controls our analysis in this case.

B. CRE 606(b)

[2] Colorado Rule of Evidence 606(b) strongly disfavors any juror testimony impeaching a verdict, even on grounds such as mistake, misunderstanding of the law or facts, failure to follow instructions, lack of unanimity, or application of the wrong legal standard. *See Hall v. Levine,* 104 P.3d 222, 225 (Colo.2005). This rule is designed to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion. *See Stewart v. Rice,* 47 P.3d 316, 322 (Colo.2002).

Nonetheless, CRE 606(b) allows juror testimony on the question of whether extraneous prejudicial information was improperly brought to the jurors' attention:

> Upon an inquiry into the validity of a verdict or indictment, a juror *may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent* from the verdict or indictment *or concerning his mental processes* in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jurors' attention or whether any outside influence was improperly brought to bear upon any juror.* Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

CRE 606(b)(emphasis added).

[3, 4] Two applicable cases involving this exception are *Wiser v. People,* 732 P.2d 1139 (Colo.1987), and *People v. Wadle,* 97 P.3d 932 (Colo.2004). These cases establish a two-part inquiry: first, a court makes a determination that extraneous information was improperly before the jury; and second, based on an objective "typical juror" standard, makes a determination whether use of that extraneous information posed the reasonable possibility of prejudice to the defendant. Answering this inquiry presents a mixed question of law and fact. *Wadle,* 97 P.3d at 936–37. In these instances, we defer to the trial court's findings of historical fact if they are supported by competent evidence in the record, and we review the trial court's conclusions of law de novo. *People v. Matheny,* 46 P.3d 453, 461 (Colo.2002).

[5] As to the first part of the inquiry, *Wiser* and *Wadle* instruct that any information that is not properly received into evidence or included in the court's instructions is extraneous to the case and improper for juror consideration. In *Wiser,* we held it improper for a juror to consult a dictionary for a definition of "burglary," the crime with which the defendant was charged. 732 P.2d at 1141. We found use of the dictionary improper despite the fact that the trial court in that case had not specifically admonished the jurors against the use of a dictionary. Rather, we cited with approval cases holding that jurors are required to consider only the evidence admitted at trial and the law as given in the trial court's instructions, and that they must accept the court's legal definitions and obtain any needed clarifications from the trial judge, not from outside sources. *Id.* at 1141. On this basis, we held that the dictionary was extraneous information and that its introduction and use to derive a definition not given by the trial judge was "improper" and amounted to "misconduct." *Id.* at 1141, 1143.

In *Wadle,* a juror searched the internet for a description of the anti-depressant drug Paxil and its medical uses and then shared the information with other jurors. This occurred after the jury had sent a note to the trial judge asking for a copy of the *Physician's Desk Reference* with which to look up the same information. The trial court refused the jurors' request, stating that reference materials of any kind are prohibited to jurors during their deliberations and referring them back to the instructions it had previously given. *Wadle,* 97 P.3d at 934.

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Thomas SMITH, Petitioner,

v.

FARMERS INSURANCE EXCHANGE and Mid–Century Insurance Company, Respondents.

No. 99SC133.

Supreme Court of Colorado,
En Banc.

Sept. 11, 2000.

Insured brought breach of contract and bad faith action against no-fault insurer that had refused to pay for second surgery necessitated by automobile accident. Following jury trial before the District Court, El Paso County, Steven T. Pelican, J., judgment was entered for insurer on No-Fault Act claim and for insured on breach of contract and bad faith breach of contract claims. Insurer appealed measure of damages employed in calculating breach of contract award. The Court of Appeals, 983 P.2d 71, affirmed in part, reversed in part, and remanded with directions, holding that insured's breach of contract recovery was limited to amounts actually paid by Medicare and his out-of-pocket expenses. Insured petitioned for certiorari. The Supreme Court, Rice, J., held that: (1) limiting charge statute did not apply to limit amount providers could collect when Medicare made conditional payment as secondary payer, and (2) accordingly, measure of damages for breach of contract was not limited to out-of-pocket expenses and amount of Medicare conditional payment, but also included unpaid bills for amounts over Medicare payments to providers.

Judgment of Court of Appeals reversed.

1. Damages ⟹117

Generally, in a breach of contract action, a plaintiff may recover the amount of damages necessary to place him in the same position he would have occupied had the breach not occurred.

2. Insurance ⟹3374

Measure of damages on breach of contract claim against no-fault insurer for failure to pay medical bills was not dependent on whether insured actually paid bills submitted by medical providers.

3. Statutes ⟹184

A court's primary task in interpreting a statute is to give effect to the legislative purpose underlying its enactment.

4. Statutes ⟹188

To determine the legislative purpose, court first looks to the language of the statute itself, giving words and phrases their commonly accepted and understood meaning.

5. Social Security and Public Welfare ⟹241.10

Limiting charge statute, under which medical providers may not seek additional payment above Medicare reimbursement from beneficiaries, does not apply to situation in which Medicare has made conditional payment to providers as secondary payer and no-fault insurer is identified as primary insurer for medical costs. Social Security Act, § 1866(a), as amended, 42 U.S.C.A. § 1395cc(a).

6. Statutes ⟹219(2, 4)

If statute is silent or ambiguous with respect to specific issue, court gives great deference to agency's interpretation of statute, looking only to whether agency's regulation is based on permissible construction of statute.

7. Social Security and Public Welfare ⟹241.10

Medical provider is not limited to amount of conditional payment made by Medicare as secondary payer when no-fault insurer is identified and obligated to make payment for services; provider can collect or seek to collect up to amount "paid or payable" to insured by the primary insurer from insured or insurer. Social Security Act, § 1862(b)(2)(B)(I), as amended, 42 U.S.C.A. § 1395y(b)(2)(B)(I); 42 C.F.R. § 411.35.

notices for the remainder of the bills unpaid by Medicare.[2]

Smith filed suit, alleging that his medical expenses were covered under the no-fault statutory provisions of section 10–4–706, 3 C.R.S. (1993), or, alternatively, under the language of the insurance policy. Smith also alleged that Farmers acted in bad faith in denying payment. After trial, the jury found in favor of Farmers on the No–Fault Act claim, but found that Farmers had breached the insurance contract and the breach was in bad faith. The jury returned a verdict for Smith for $33,300.89 on the breach of contract claim and for $1,700 on the bad faith claim. The amount of actual damages equaled the entire cost of Smith's surgery and related costs, including the Medicare payment, the unpaid bills from medical providers,[3] and any deductibles and copayments.

Farmers filed a motion for a new trial. The trial court did not rule on the motion within sixty days and it was deemed denied pursuant to C.R.C.P. 59(j).

Farmers appealed to the Colorado Court of Appeals, which reduced the damages award to $14,772, the amount of the conditional payment by Medicare, plus the amount of any co-payments and deductibles. The court of appeals ruled that the health care providers were precluded by federal law from pursuing Smith for the balance of their bills above the Medicare payment, but that they could recover the difference from the insurers. Consequently, the court of appeals stated that Smith was only entitled to the amount necessary to repay Medicare plus compensation for his co-payments and deductibles.

This court granted certiorari on the issue whether the court of appeals erred in reducing the trial court's damage award to the amount of the conditional payment by Medicare plus the amount of any co-payments and deductibles, based on the court's ruling that applicable federal statutes prevented the medical providers from seeking to recover their full charges from Smith.[4] We hold that the court of appeals erred in limiting damages to the amount of the Medicare payment plus any deductibles and co-payments. Additionally, we hold that the charge limitation in 42 U.S.C. § 1395cc(a)(1)(A) does not apply to limit the amount a medical provider can collect from an insured who has collected from his no-fault insurance company in a situation in which Medicare has made a conditional payment under 42 U.S.C. § 1395y(b)(2)(B)(I), and the no-fault insurance company later is found responsible as the primary insurer.

II. Measure of Damages

[1, 2] Generally, in a breach of contract action, a plaintiff may recover the amount of damages necessary to place him in the same position he would have occupied had the breach not occurred.[5] *See Pomeranz v. McDonald's Corp.,* 843 P.2d 1378, 1381, (Colo. 1993). In this case, the measure of damages depends, then, on the amount that Smith owes to Medicare and to his medical providers; costs that should have been paid by Farmers.[6] At issue is whether the medical

2. The MSP provisions require Medicare to pay for costs and services that are reasonable and necessary, or the customary charges for such services. *See* 42 U.S.C. § 1395f(b) (1993); 42 C.F.R. § 411.33. Smith was receiving bills for amounts beyond what Medicare covered.

3. Smith offered into evidence copies of bills and collection notices received from his medical providers to establish the amount of unpaid bills.

4. The issue upon which we granted certiorari read as follows: "Whether the court of appeals erred in reducing the trial court's damage award to $14,772, the amount of the conditional payment by Medicare, plus the amount of any copayments and deductibles."

5. We note that our analysis is limited to the actual damages awarded in this case. The punitive damages awarded in the amount of $1,700 based on the bad faith claim are not at issue here.

6. The fact that Smith did not actually pay the bills submitted by the medical providers is irrelevant; the measure of damages was correctly calculated as the total of the medical bills received by Smith, plus the Medicare payment, minus any applicable deductibles and co-payments. *Cf. Gowan v. United States Dep't of the Air Force,* 148 F.3d 1196, 1198 (10th Cir.1998) (finding no abuse of discretion where lower court reopened case to determine measure of damages as amount of medical bills minus applicable deductibles and co-payments); *Hart v. Allstate Ins. Co.,*

position as to petitioner's notice of the testator's death and will, apparently had participated in the earlier petition for the appointment of a guardian on the ground that the testator lacked testamentary capacity before the will was executed; that their father Samuel Podrat had received $2000 from the executrix upon the discontinuance of the appeal; and that Daniel previously had offered to aid the petitioner in claiming an appeal if the latter would pay him $1000, which the petitioner refused to do.

In this general connection two other facts should be noted. First, the affidavits show that the respondent executrix had a criminal record in a matter showing an avaricious disposition in relation to money and property. That factor is pertinent in passing upon her credibility in connection with her efforts to shut off a contest of the will under which she, as sole beneficiary, would obtain some $35,000 to $40,000 or more in realty and cash. Secondly, she paid substantial sums of money to the original appellant and to other next of kin, who now support her position, in order to compromise certain claims and to obtain a withdrawal of the appeal. In our judgment such payments have some bearing on the weight to be given certain of the affidavits for respondent.

[2] Since the petitioner now seeks only to have an opportunity to litigate the validity of a will that apparently was seriously disputed by some of those who now oppose this petition, and since no inventory has been filed or other proceeding taken in the administration of the estate which would prejudice the respondent or any other heirs or claimants if an appeal were now permitted to be filed, and since the motion of other heirs to intervene was filed and served while the original appeal was pending in the superior court, we are of the opinion that in all the existing circumstances the petitioner has shown sufficient cause to justify a conclusion that justice will be better served if he also is permitted to file and litigate his appeal.

The prayer of the petition for relief is granted on condition that the petitioner file in the probate court of the town of Narragansett, within forty days of the date of the filing of this opinion, his claim of appeal from the probate decree in question, and thereafter that such appeal be prosecuted according to law.

PSATY & FUHRMAN, Inc., v. HOUSING AUTHORITY OF CITY OF PROVIDENCE.

HOUSING AUTHORITY OF CITY OF PROVIDENCE v. PSATY & FUHRMAN, Inc.

Nos. 8797, 8798.

Supreme Court of Rhode Island.

Aug. 16, 1949.

1. Contracts ⟹168

Ordinarily where one exacts a promise from another to perform an act, the law implies a counter promise against arbitrary or unreasonable conduct on part of the promisee.

2. States ⟹107

Where "no damage" clause in contract with housing authority for construction of housing development provided that contractor should not recover damages because of hindrance or delay from any cause in the progress of the work, whether or not delays were avoidable, contractor was prohibited from recovering damages for delay caused by arbitrary or unreasonable conduct of the authority, in absence of any claim of concealment, misrepresentation, or fraud, and could recover only in case of delay or hindrance caused by fraud, bad faith or malicious intent.

3. Contracts ⟹103

Ordinarily, "no damage" clauses in construction contracts relating to public improvements, prohibiting payment to contractor of damages for delay or hindrance, are not in violation of law.

4. Contracts ⟹299(2)

If a party to a contract containing a "no damage" clause which prohibits pay-

taining to the matter of credits and applying the rule hereinbefore stated we find modification necessary in the following instances. Item 1: the credit of $30,817.08 in the matter of bituminous surfacing is excessive by $5,142.73, as the Authority actually paid $25,674.35 for that work; and item 2: the credit of $285 for broken walks is excluded as it bears the earmark of unintentional duplication. The total of these items is $5,427.73, which reduces the amount of credits to the Authority from $100,557.50 to $95,129.77.

[8, 9] In the case of the Authority against the contractor we find merit only in part of the latter's contention that the provision of the contract for liquidated damages is in effect the imposition of a penalty and therefore unenforceable. In order to avoid misunderstanding we here observe that in this case the no damage clause of the contract is without force and effect in determining the question under consideration. That clause gave the Authority a defense to the contractor's claim of damages for delay, but it cannot be used as a springboard by the Authority to recover such damages from the contractor. Furthermore, it is generally held that a provision for liquidated damages for delay in the performance of a contract will be enforced provided the delay is not due in whole or in part to the fault of the party claiming the benefit of such provision. In other words, where delays are occasioned by mutual defaults the court will not ordinarily attempt to apportion the damages. See 25 C.J.S., Damages, § 115 c., page 697. The question as to which party is responsible for delay as bearing on the right to liquidate damages is, on a conflict in the evidence, a question of fact for determination by the trier of the facts. Where there are a number of delays which are separate and distinct from each other, then the party without fault in any such instance is in our judgment entitled to recover liquidated damages for delay in any one or more of those instances.

[10-13] Speaking generally, the measure of damages is such sum as will reasonably compensate the person injured for the loss sustained. In building contracts the loss resulting from delay in performance ordinarily is the rental value or the value of the use of the property, which varies according to the circumstances in each case. If such damages are uncertain in nature or amount, or are difficult of ascertainment, the contract may contain a provision fixing a standard, which must be fair, by which to determine the amount to be paid as compensation in the event of a breach. In the instant case we find no reason to declare the provision for liquidated damages, as such, invalid. Provisions similar in character to the one now before us have been held valid. Curry v. Olmstead, supra; Wholey Boiler Works v. Lewis, 45 R.I. 441, 123 A. 595; Wise v. United States, 249 U.S. 361, 39 S.Ct. 303, 63 L.Ed. 647; Robinson v. United States, 261 U.S. 486, 43 S.Ct. 420, 67 L.Ed. 760; Superior Steel Spring Co. v. New Era Spring & Specialty Co., 215 Mich. 594, 184 N.W. 440; City of Topeka v. Industrial Gas Co., 135 Kan. 646, 11 P.2d 1034.

The scope of the clause for liquidated damages in the case at bar is, however, too broad. As hereinbefore stated, the housing project concerned the construction of 744 units. Its primary purpose was to supply housing accommodations at reasonably low rentals. If the construction work was not completed within the time fixed in the contract, it is obvious that in a period of existing and increasing housing shortage the Authority would suffer loss of rents. It is reasonable to infer that with such a situation in mind the parties not only agreed to make time of the essence but they also stipulated that in the event of delay in the construction work the Authority's damages should be computed at the rate of $250 a day. This sum was, in effect, deemed by them as reasonable compensation for loss of rentals. We find nothing in the evidence which warrants us in concluding otherwise. It is therefore our opinion that the Authority was entitled to liquidated damages for delay in the construction work unless it contributed to the delay in some substantial manner, which question we will presently consider.

[14] Keeping in mind the real purpose of the project, the question of whether the Authority should recover liquidated damages in the matter of landscaping presents

an entirely different proposition. What the Authority principally wanted was the completion within a definite time of apartments for rental to prospective occupants, who, we believe, were eager to obtain housing accommodations irrespective of whether or not the contemplated landscaping of the premises was actually finished. In our judgment the circumstances here do not disclose a case where esthetic considerations affected in any pecuniary way the rental value or the value of the use of the property. Viewed in such a light we consider the provision for liquidated damages in the matter of landscaping as coercive in nature and therefore in substance the imposition of a penalty. The Authority was not entitled to recover liquidated damages for the contractor's delay in landscaping.

[15] The contractor's final contention is that if the Authority could recover liquidated damages the amount awarded by the trial justice was excessive. The transcript discloses numerous instances of delay, the causes of which were treated as severable by the parties in their respective briefs. We have reviewed the evidence on the different points thus brought to our attention and find that in the main such instances are in fact distinct and severable from each other. In some of them we are unable to say that the Authority did not materially contribute in causing delay in the construction work, while in others we are of the opinion that it was without fault in the matter. It must be obvious that we cannot here discuss the evidence which has led us to such conclusions. After full consideration of the entire matter we cannot say that the trial justice's decision was clearly wrong in awarding the Authority liquidated damages to the extent of 198 days for the contractor's delay in the construction work. However, we do find such decision clearly wrong with reference to the remainder of the 277 days which was allowed to the contractor for such delay.

Although we have treated the contractor's contentions on the merits of these cases without specifically indicating the exception or group of exceptions relating thereto, nevertheless we have carefully considered all the exceptions that it has briefed or argued. In so far as this opinion modifies the decision of the trial justice in each case the contractor's exceptions relating thereto are sustained; otherwise they are overruled. All other exceptions not briefed or argued are deemed to be waived and are therefore overruled.

Our conclusion in each of these cases is as follows. In the case of Psaty & Fuhrman, Inc. v. The Housing Authority of the City of Providence, Rhode Island, No. 8797, the decision should be for the plaintiff in the sum of $83,427.27, with interest from the date of the writ. In the case of The Housing Authority of the City of Providence, Rhode Island v. Psaty & Fuhrman, Inc., No. 8798, the decision should be for the plaintiff in the sum of $49,500 as liquidated damages for 198 days at $250 a day for delay in the construction work, with interest from January 25, 1946, the date of entry of the trial justice's decision.

Each case is remitted to the superior court with direction to enter judgment on the decision in accordance with this opinion.

LOMASTRO et al. v. HAMILTON et al.

Ex. No. 9026.

Supreme Court of Rhode Island.

Aug. 17, 1949.

1. Wills ⊜384

In will contest presented on theory that will was obtained through undue influence, admissibility of testimony of witness to will as to testator's mental condition was moot and would not be considered by Supreme Court.

2. Witnesses ⊜324

Where proponent of will was examined by opponent under statute providing that a witness may be examined as if under cross-examination at instance of any adverse party and for that purpose may be compelled in same manner and subject to same rules of examination as any other witness

ERICKSON, J., filed a special concurrence in the result and was joined by ROVIRA, C.J., and VOLLACK, J.

Justice ERICKSON specially concurring in the result:

I agree with the majority that the district court's discharge of the writ of habeas corpus should be affirmed. However, in my view, the availability of other possible legal recourse at the time Moody instituted the habeas corpus action precluded issuance of the writ as premature and there is consequently no need to address Moody's assertions of error. *See Kodama v. Johnson,* 786 P.2d 417 (Colo.1990); *Mulkey v. Sullivan,* 753 P.2d 1226 (Colo.1988).

I also write separately because I am troubled by the majority's resolution of the speedy trial issue. I do not concur with the majority's conclusion that the fact that Moody pled guilty and that the district court accepted the pleas does not preclude his constitutional challenges. Maj. op. at 1363. Instead, I agree with the jurisdictions that have held that the right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution does not extend to the sentencing stages of a criminal prosecution. *See, e.g., State v. Drake,* 259 N.W.2d 862 (Iowa 1977); *State v. Johnson,* 363 So.2d 458 (La.1978).[1] There is no need to engage in the ad hoc balancing test of *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), in a case such as this, where the defendant pled guilty and subsequently fled the jurisdiction prior to sentencing.

The constitutional right to a speedy trial "is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell,* 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966). However, none of the concerns underlying the right to a speedy trial are implicated in a situation where the accused has already pled guilty and is awaiting sentencing. *See Brooks v. United States,* 423 F.2d 1149, 1152–53 (8th Cir.), *cert. denied,* 400 U.S. 872, 91 S.Ct. 109, 27 L.Ed.2d 111 (1970); *Johnson,* 363 So.2d at 460–61.

Although certain rights guaranteed by the Sixth Amendment of the United States Constitution, such as the right to counsel, apply to the sentencing phase of a criminal prosecution, the Sixth Amendment right to a speedy trial does not, under the facts of this case, apply to sentencing. In my view, the right to a speedy trial does not guarantee a speedy sentencing procedure to a defendant who has pled guilty and then has fled from the jurisdiction.

I am authorized to say that Chief Justice ROVIRA and Justice VOLLACK join in this special concurrence in the result.

Theodore R. POMERANZ; Pomeranz Investment Company: Marvin L. Stone and Gerald S. Gray, Trustees; Jack and Mildred Zerobnick; David Pollock; Stephen Gordon; Estate of Ruth Stone; Agnete Cohen; Helen B. Barron; Beatrice Pomeranz; Lisa E. Feld; Tony R. Pomeranz; Alan Z. Pomeranz, the Owners, d/b/a Mesa Denver Associates, Petitioners,

v.

McDONALD'S CORPORATION, a Delaware corporation, Respondent.

No. 91SC478.

Supreme Court of Colorado, En Banc.

Jan. 11, 1993.

Landlords for commercial property brought action against tenant to recover

1. The majority recognizes that the United States Supreme Court has not spoken definitively on the issue of whether a criminal defendant's right to a speedy trial under the federal constitution extends through the sentencing phase of the prosecution. Maj. op. at 1363; *see Pollard v. United States,* 352 U.S. 354, 361, 77 S.Ct. 481, 485, 1 L.Ed.2d 393 (1957).

mick]. We have never addressed the rule of certainty in cases involving future taxes or future maintenance expenses.

[4] McDonald's claims that this case is governed by our decisions in lost profit cases. McDonald's asserts that the petitioners failed to prove the amount of future damages with adequate certainty because the petitioners did not present expert testimony regarding mill levies or property valuations, or the best evidence of either past, present, or future maintenance costs. *See Tull v. Gundersons, Inc.*, 709 P.2d 940, 945 (Colo.1985) (stating that in proving the amount of damages for lost profits it is sufficient for a plaintiff to provide the best evidence obtainable under the circumstances). The petitioners, on the other hand, would interpret the rule of certainty as only requiring a plaintiff to prove the fact of future damages with certainty, which is undisputed in this case, and not also the amount of future damages.[6] *See Tull*, 709 P.2d at 943; *Peterson v. Colorado Potato Flake & Mfg. Co.*, 164 Colo. 304, 309, 435 P.2d 237, 239 (1967). In applying the rule of certainty to the facts of this case, we disagree with both McDonald's assertion that a plaintiff is always required to present the best evidence obtainable, and also with the petitioners' oversimplification of the rule of certainty.

III

[5, 6] In a breach of contract action involving future damages, a plaintiff is required to prove both the fact of the injury and the amount of the loss. *See, e.g., Tull*, 709 P.2d at 943–45; *John v. United Advertising, Inc.*, 165 Colo. 193, 197, 439 P.2d 53, 55 (1968); *see also* McCormick, at § 26 ("[t]he certainty rule, in its most important aspect, is a standard requiring a reasonable degree of persuasiveness in the proof of the fact and of the amount of the damage."). Because a plaintiff often faces tremendous practical difficulties in proving future damages, he should not be barred from recovery for failing to prove the amount of future damages simply because the amount of the loss cannot be determined with mathematical certainty. *Riggs*, 157 Colo. at 39, 400 P.2d at 919. In addressing the need for certainty and the practical difficulties of proving future losses with precision, we have struck a balance which allows a plaintiff a certain amount of leeway in proving the amount of the loss in situations where circumstances make proving the exact amount difficult or impossible. *See Peterson*, 164 Colo. at 310, 435 P.2d at 240.

[7] In balancing the competing interests involved in a future damages case, we have adopted a rule requiring a plaintiff to provide the trier of fact with (1) proof of the fact that damages will accrue in the future, and (2) sufficient admissible evidence which would enable the trier of fact to compute a fair approximation of the loss. *See id.* at 310, 435 P.2d at 239; *Tull*, 709 P.2d at 945. This compromise allows courts to avoid harsh applications of the rule of certainty, while at the same time holding a high standard of certainty as an ideal. *See* McCormick, § 27.

[8, 9] In *Tull*, we addressed a situation in which the plaintiff provided detailed estimations of lost profits by submitting itemized costs of completion and expected profits. In finding that the plaintiff had sustained his burden of proof on the issue of lost profits, we held that such testimony was the best evidence obtainable under the circumstances. *Tull*, 709 P.2d at 945. In so holding, we did not establish a requirement that plaintiffs must *always* submit the best obtainable evidence under the cir-

6. Following the 1974 amendment, McDonald's was obligated to pay, in addition to monthly rent, property taxes and maintenance expenses. It is undisputed that McDonald's would be required to make these expense payments had it not breached the lease agreement and that McDonald's made these payments prior to its abandonment and breach of the lease.

cumstances.[7] Rather, in *Tull,* we sought to prevent the rule of certainty from barring an injured party from recovering damages in a situation in which the plaintiff had presented sufficient evidence so that the trier of facts could reasonably compute the amount of the lost profits although the amounts were not mathematically certain. Had we disallowed recovery in *Tull* for injuries that had been proven in fact, we would have rewarded the wrongdoer at the expense of the injured party. *See Peterson,* 164 Colo. at 310, 435 P.2d at 240; *see also* McCormick, § 27. The rule of certainty only requires that, together with the fact of damage, the plaintiff submit substantial evidence, which together with reasonable inferences to be drawn therefrom provides a reasonable basis for computation of the damage. *Peterson,* 164 Colo. at 310, 435 P.2d at 240.

IV

[10] The petitioners contend that the rejection by the court of appeals of the evidence they presented usurped the trial court's discretion to act as fact-finder and determine the credibility, reliability, qualifications, and knowledge of witnesses. A reviewing court will not set aside factual findings of a trial court where the findings are supported by competent and adequate evidence appearing in the record. *Anderson v. Cold Spring Tungsten,* 170 Colo. 7, 13, 458 P.2d 756, 758 (1969). The question in this case is not whether the petitioners presented any evidence in support of their claim for future damages, but rather, whether the evidence they presented was legally sufficient to sustain their burden of proof on the issue of future damages. To sustain their burden, the petitioners were required to present sufficient evidence which would have provided the trial court with a reasonable basis for the computation of the future taxes and future maintenance expenses. *Tull* 709 P.2d at 945; *Peterson,* 164 Colo. at 310, 435 P.2d at 240.

[11] Under the Colorado Rules of Evidence, a witness may not testify unless evidence is introduced to support a finding that the witness has personal knowledge of the matter on which he testifies. C.R.E. 602. A witness who is not qualified as an expert may only testify as to an opinion where it is shown that the opinion is rationally based on the perception of the witness. C.R.E. 701. The petitioners did not qualify Pomeranz as an expert in determining mill levies, property assessments, inflation rates, or maintenance expenses. Pomeranz's sole qualification for testifying as to future taxes and maintenance expenses was that he was co-owner and manager of the property leased to McDonald's. The petitioners made no attempt to establish Pomeranz's basis of knowledge for testifying about the amount of future maintenance expenses, and no evidence was before the court on what the actual maintenance costs were.

A

Despite McDonald's repeated objections, the petitioners laid no foundation for Pomeranz's opinion testimony that maintenance expenses amounted to $4,800 per year and would escalate at an inflationary rate of five percent. Pomeranz may have been qualified to testify about the cost of maintenance if it had been established that he possessed some personal knowledge of the maintenance costs, that maintenance costs were part of the business records relating to the property, or that his opinion was rationally based on his own perceptions as the managing co-owner of the property. *See* C.R.E. 602; C.R.E. 701. However,

7. Were such a requirement always necessary, courts would be required to draw arbitrary lines on what is the best evidence under the circumstances, or whether expert testimony is always necessary. Expert testimony is not always required to establish the amount of future damages. However, under the "best obtainable evidence rule" propounded by McDonald's, expert testimony would almost always be necessary because experts possess a level of knowledge not ordinarily held by owners of property and businesses.

Colorado Revised Statutes and designated the 1988 supplement as "the positive and statutory law of the state of Colorado with the same legal force and effect as, and part of, Colorado Revised Statutes." Section 2-5-125(1)(n)(IV), C.R.S. (1989 Cum.Supp.). Therefore, we conclude that defendant is not entitled to the sentence reduction provisions.

Order affirmed.

METZGER and PLANK, JJ., concur.

Lloyd Dean STATES, Myrna States, and Niagara Fire Insurance Company, Plaintiffs-Appellants,

v.

R.D. WERNER CO., INC., Defendant-Appellee.

No. 89CA0101.

Colorado Court of Appeals, Div. I.

June 21, 1990.

Rehearing Denied July 19, 1990.

Certiorari Denied Oct. 29, 1990.

Appeal was taken from judgment of the District Court, El Paso County, Douglas E. Anderson, J., entered in products liability action arising from plaintiff's fall from step ladder. The Court of Appeals, Pierce, J., held that: (1) defendant could not be held liable for plaintiff's injuries if plaintiff's misuse of step ladder, rather than product defect, was cause of injuries, and (2) evidence that step ladder complied with applicable federal regulations was admissible.

Affirmed.

1. Products Liability ⚷54

Defendant in products liability action arising when worker fell from step ladder at construction site could not be held liable for worker's injuries if worker's misuse of ladder, rather than defect in ladder, caused worker's injuries. C.R.S. 13-21-111, 13-21-406.

2. Products Liability ⚷27

Concept of misuse concerns the issue of causation and provides complete defense to liability in products liability action, regardless of any defective condition, if unforeseeable and unintended use of product, and not alleged defect, caused plaintiff's injuries. C.R.S. 13-21-111, 13-21-406.

3. Statutes ⚷174, 181(1)

In construing statute, court's task is to ascertain and give effect to intent of General Assembly in enacting statute.

4. Statutes ⚷181(1)

In discerning legislative intent, court must look first to statutory language.

5. Negligence ⚷97

Once it has been established that product is defective, if both defective product and injured person's conduct contributed to injury underlying plaintiff's claim, then plaintiff's recovery must be reduced by percentage representing amount of fault attributable to his or her own conduct. C.R.S. 13-21-406.

6. Negligence ⚷97

Products Liability ⚷27

Depending on facts of case, injured person's misuse of product could constitute comparative fault which would reduce plaintiff's recovery; however, if injured person's misuse of product is sole cause of damages, and thus, alleged defect was not cause thereof, then plaintiff cannot recover under strict liability theory. C.R.S. 13-21-406.

7. Products Liability ⚷27, 54

Doctrine of product misuse was question of causation that applied both to products liability claim and negligence claim in action arising when worker fell from step ladder at construction site.

negligence on the part of the manufacturer or seller, if a product:

"complied with, at the time of sale by the manufacturer, any applicable code, standard, or regulation adopted or promulgated by the United States or by this state, or by any agency of the United States or of this state."

[12] Thus, evidence of compliance with applicable federal regulations is admissible to show that the product is not defective. *Blueflame Gas, Inc. v. Van Hoose*, 679 P.2d 579 (Colo.1984).

IV.

[13] Plaintiffs next contend that the trial court should have granted a mistrial because of a defense witness' unsolicited reference to suppressed evidence. We disagree.

[14] Whether to grant or deny a motion for a mistrial is a matter within the discretion of the trial court, and the court's ruling will not be disturbed absent an abuse of that discretion. *Pyles-Knutzen v. Board of County Commissioners*, 781 P.2d 164 (Colo.App.1989). Under the circumstances of this case, we find no abuse of discretion in the trial court's denial of the motion for a mistrial.

V.

[15] Plaintiffs also contend that a videotape of an experiment conducted by defendant was not admissible at trial because the experiment was not conducted under sufficiently similar conditions to that of the accident. We agree.

[16] "For evidence of an experiment to be admissible, it must aid rather than confuse the jury in its resolution of the issues, and it must tend to directly establish or disprove a material issue in the case." *People v. McCombs*, 629 P.2d 1088 (Colo. App.1981). In order not to confuse or mislead the jury, the conditions under which an experiment is conducted must be substantially similar to those present on the occasion of the incident at issue. *Kling v. City & County of Denver*, 138 Colo. 567, 335 P.2d 876 (1959).

Because no horizontal force was applied on the ladder during the experiment, we conclude that the experiment was not sufficiently similar to test the ladder's capacity when a person is actively moving while using the ladder. Thus, we conclude that the trial court erred in admitting the videotape into evidence.

However, an error is reversible only if it had a substantial effect on the rights of the parties. C.R.C.P. 61; *see Cheney v. Hailey*, 686 P.2d 808 (Colo.App.1984).

[17] Here, plaintiffs presented expert testimony concerning the effect of horizontal forces on the ladder. Also, plaintiffs were afforded extensive cross-examination of defendant's expert concerning the effect of horizontal forces on the outcome of the experiment. Under the circumstances, we conclude that the erroneous admission of the videotape did not substantially affect the outcome of the trial and, thus, did not constitute reversible error.

Plaintiffs' remaining contention is without merit.

Judgment affirmed.

PLANK and SILVERSTEIN,* JJ., concur.

* Sitting by assignment of the Chief Justice under provisions of the *Colo.Const.*, art. VI, Sec. 5(3), and § 24-51-1105, C.R.S. (1988 Repl.Vol. 10B).

The majority, however, distinguishes *Sears I* based on the fact that the Act defines the term "guide" and contains a prohibition against revoked outfitters acting as guides. However, I do not find these distinctions compelling because the definition does not grant rulemaking authority and, as I read *Sears I,* the Director's authority to regulate guides derives from its power to regulate those who provide "personal services" for the purpose of hunting or fishing. *See Sears I,* 928 P.2d at 751. Thus, although the *Sears I* division refers to the statutory prohibition as further support, I do not read that reference as a prerequisite to the Director's authority to regulate guides.

Moreover, in my view, *Cartwright v. State Board of Accountancy,* 796 P.2d 51 (Colo. App.1990), relied upon by the majority, does not mandate a different result. In *Cartwright,* the enabling statute gave the accountancy board authority to make rules necessary for the administration of the article. The article regulated financial audits but did not govern financial "reviews," and the article provided that non-accountants were not prohibited from performing services requiring accounting skills if the services did not include investigation, examination, or auditing. A division of this court concluded that the accountancy board exceeded its authority in promulgating rules that prohibited non-accountants from performing reviews. Unlike the enabling statute in *Cartwright,* the enabling statute here expressly provides that it was intended to regulate persons who provide personal services for the purpose of hunting and also expressly gives the Director the authority to promulgate rules to govern the registration of outfitters to carry out that stated purpose. *See* §§ 12–55.5–101, –104(1)(a).

Accordingly, I conclude that the Director did not exceed her statutory authority in promulgating Rule D.17 to the extent it regulates the activities of revoked outfitters acting as booking agents for registered outfitters. Based on this conclusion, I would not reach the issue addressed in part III of the majority opinion of whether the Director may regulate booking agents under her express statutory authority to regulate outfitters.

TRICON KENT CO., Plaintiff–Appellee,

v.

LAFARGE NORTH AMERICA, INC.; Lafarge West, Inc.; and Safeco Insurance Co. of America, Defendants–Appellees.

No. 06CA0595.

Colorado Court of Appeals,
Div. II.

May 1, 2008.

Background: Subcontractor brought action against general contractor on highway construction project, alleging breach of express and implied covenants of subcontract. The District Court, Jefferson County, Jack W. Berryhill, J., denied general contractor's motion for a directed verdict and entered judgment on jury verdict for subcontractor. General contractor appealed.

Holdings: The Court of Appeals, Rothenberg, J., held that:

(1) as a matter of first impression, "no damages for delay" clauses are valid and enforceable in Colorado, but they are to be strictly construed against the owner or contractor;

(2) evidence was sufficient to support finding that general contractor's constituted "active interference" with subcontractor's performance;

(3) subcontractor was not required to show bad faith; and

(4) any error in giving jury instruction regarding reduction of subcontractor's damages was harmless error.

Affirmed.

The majority, however, distinguishes *Sears I* based on the fact that the Act defines the term "guide" and contains a prohibition against revoked outfitters acting as guides. However, I do not find these distinctions compelling because the definition does not grant rulemaking authority and, as I read *Sears I,* the Director's authority to regulate guides derives from its power to regulate those who provide "personal services" for the purpose of hunting or fishing. *See Sears I,* 928 P.2d at 751. Thus, although the *Sears I* division refers to the statutory prohibition as further support, I do not read that reference as a prerequisite to the Director's authority to regulate guides.

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Affirmed.

F.Supp. at 397; *Risky Business,* at 27. The trial court should give the jury an instruction to that effect where active interference is raised as a defense to a "no damages for delay" clause and sufficient evidence is introduced to warrant such an instruction.

In summary, we conclude the trial court did not err in denying Lafarge's motion for a directed verdict because there was sufficient evidence from which the jury could find that Lafarge actively interfered with Tricon's performance of the contract.

Given our conclusion, we need not address the viability in Colorado of any other exceptions to or limitations on "no damages for delay" clauses, nor do we address Tricon's argument that its claim was based on changes to the subcontract.

III. Instruction on Liquidated Damages

[5] Lafarge also contends the trial court abused its discretion in giving the jury an instruction on liquidated damages. Lafarge objected to the instruction at trial, contending that it was unsupported by case law and that it also was confusing and misleading. The trial court concluded that there was evidence presented about the liquidated damages assessed by CDOT and its per diem calculation, and that the jury had to consider it. We agree with the court.

[6] A trial court has substantial discretion in formulating jury instructions so long as they include correct statements of the law and fairly and adequately cover the issues presented, *Taylor v. Regents of Univ. of Colo.,* 179 P.3d 246, 248 (Colo.App.2007), and we will not reverse a trial court's decision to give a particular jury instruction absent an abuse of that discretion. *Fishman v. Kotts,* 179 P.3d 232, 234 (Colo.App.2007).

Here, the trial court gave the following instruction to the jury regarding liquidated damages:

> If you find in favor of Tricon on its breach of contract claims against Lafarge, you must also consider whether Tricon's damages should be reduced for liquidated damages assessed by the Colorado Department of Transportation (CDOT) against Lafarge under the prime contract between Lafarge and CDOT. To reduce Tricon's damages for such liquidated damages you must also find that:
>
> 1. Lafarge's performance time of the prime contract was extended as the result of improper performance by Tricon; and that
> 2. CDOT assessed liquidated damages against Lafarge for the time period that the project was extended; and that
> 3. The extended performance time of the project resulted from Tricon's improper performance and was not caused, in whole or in part, by the actions or fault of Lafarge or others for whom Lafarge was responsible.
>
> If any of these propositions has not been proved, then Lafarge is not entitled to lessen Tricon's damages.

See City of Westminster v. Centric–Jones Constructors, 100 P.3d 472, 481 (Colo.App. 2003) (holding that a "liquidated damages" clause addressing delay in a construction contract will not be enforced "where [the] delay is due in whole or in part to the fault of the party claiming the clause's benefit" (quoting *Medema Homes, Inc. v. Lynn,* 647 P.2d 664, 667 (Colo.1982))).

The jury found that Lafarge had breached the parties' contract, that Tricon had been damaged, and that its damages were caused by Lafarge's breach. There was no finding by the jury of any improper performance by Tricon. Thus, any error in giving this instruction was harmless. *See Martin v. Minnard,* 862 P.2d 1014, 1017–18 (Colo.App.1993) (any error in failing to instruct on negligence per se was harmless where jury found plaintiff had not suffered any injury or damages).

The judgment is affirmed.

Judge FURMAN and Judge J. JONES concur.

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The judgment is affirmed.

Judge FURMAN and Judge J. JONES concur.

to that point. Similarly, as the plaintiff argued in *Young,* the defendant driver must have been generally aware that drivers could swerve in his lane of traffic. *See also Davis v. Cline,* 177 Colo. 204, 208–209, 493 P.2d 362, 364 (1972) (A school bus unexpectedly moving into an adjacent travel lane could justify a finding of emergency when another driver swerves to avoid a collision); *Cudney v. Moore,* 163 Colo. 30, 32, 428 P.2d 81, 82 (1967) (sudden emergency instruction proper when mechanical failure precedes collision). Indeed, if a general awareness that a circumstance could arise forecloses the possibility of a sudden emergency when the circumstance does indeed arise, the sudden emergency instruction would never be given. After today, it is difficult to see what is left of the doctrine, at least with regard to icy driving conditions—a constant in Colorado of which drivers are generally aware.

Compounding the majority's general awareness error is the fact that it orders a new trial in this case on the ground that a sudden emergency instruction was given, even though it finds that the district court properly refused to instruct the jury on res ipsa loquitur and properly denied Kendrick's motion for a new trial based on juror misconduct. As the majority itself points out, however, a sudden emergency instruction merely informs the jury that it should consider the existence of an emergency when evaluating the defendant's conduct. Maj. op. at 1059. In other words, such an instruction simply repeats the negligence formulation—namely, that the jury should consider the defendant's conduct in light of the circumstances, including whatever circumstances the defendant claims to have suddenly confronted. As such, the jury in this case would have properly considered Pippin's testimony that she confronted unexpected icy conditions at the intersection even had the sudden emergency instruction not been given. In fact, the jury in this case was told in two separate instructions that the question was whether the defendant acted reasonably under the circumstances.[1] As we held in *Young,* a sudden emergency instruction "merely serves as an explanatory instruction, offered for the purposes of clarification for the jury's benefit," that it is to apply the reasonable person standard to the circumstances of the case. 814 P.2d at 368. It is difficult to see how such an "explanatory instruction"—even if erroneously given—could have such an impact on the jury such that a new trial should be ordered as a matter of course, as the majority suggests.

It may be that the majority believes that the instruction is more than an explanatory instruction. *See Young,* 814 P.2d at 372 (Lohr, J., dissenting) (arguing for the abolition of the doctrine). If that is indeed the case, the majority should simply abolish the doctrine altogether, rather than leave the doctrine in place but on uncertain footing. *Id.* at 372 n. 3. Because I would affirm the decision of the court of appeals in all respects, including its determination that the district court did not abuse its discretion in finding sufficient evidence to warrant a sudden emergency instruction, and would therefore not order a new trial in this case, I respectfully dissent from the majority's opinion.

QWEST SERVICES CORPORATION and Qwest Corporation, Petitioners

v.

Andrew BLOOD, Carrie Blood, and Public Service Company of Colorado, d/b/a Xcel Energy, Respondents.

No. 09SC534.

Supreme Court of Colorado,
En Banc.

May 23, 2011.

As Modified on Denial of Rehearing
June 20, 2011.*

Background: Lineman who was injured when utility pole collapsed brought person-

1. Instruction Number 19 instructed the jury that: "Negligence means a failure to do an act which a reasonably careful person would do, or the doing of an act which a reasonably careful person would not do, *under the same or similar circumstances,* to protect oneself or others from bodily injury." (Emphasis added.) Instruction Number 20 instructed the jury that: "Reasonable care is that degree of care which a reasonably careful person would use *under the same or similar circumstances.*" (Emphasis added.)

more, immediately after Blood's closing argument, Qwest moved for a mistrial due to Blood's references to Qwest's lack of a post-accident pole inspection program. Even though Qwest failed to request a *Philip Morris* limiting instruction, the trial court, on its own, instructed the jury that "the only conduct that can be considered in relation to the punitive damages is the conduct prior to the date of the accident, that is prior to June 29th, 2004, that is the law." [10] For these reasons, we are convinced that the trial court was sufficiently alerted to *Philip Morris* and the need to protect Qwest from being punished for harm to non-parties implied by its post-accident conduct.

[11] Nothing, however, was said about Qwest's lack of a *pre*-accident inspection program. Qwest's motion in limine only identified the risk that the jury might punish it for the potential harm to non-parties implied by its lack of a post-accident inspection program. The motion did not identify any such risk arising from evidence or argument regarding its lack of a pre-accident inspection program. Moreover, Qwest never requested a limiting instruction regarding its pre-accident conduct or the potential harm to non-parties implied by that conduct. As a result, the trial court was not alerted to the need to protect Qwest from the jury's consideration of Qwest's pre-accident conduct. Thus, even though we realize that evidence or argument regarding Qwest's pre-accident conduct could imply potential harm to non-parties and raise potential *Philip Morris* concerns, we conclude that Qwest has waived its as-applied challenge regarding its pre-accident conduct and thus limit our review to evidence or argument regarding Qwest's post-accident conduct.[11] As such, the issue properly before us is whether the instruction given by the trial court regarding Qwest's post-accident conduct was adequate to satisfy the due process limitations announced in *Philip Morris.* We turn now to that issue.

3.

In *Philip Morris,* the defendant requested an instruction explaining to the jury the distinction between the legitimate use of evidence of harm to nonparties to assess reprehensibility and the illegitimate use of such evidence to punish a defendant. 549 U.S. at 350–51, 127 S.Ct. 1057. The Court held that the Due Process Clause requires assurances "that juries are not asking the wrong questions, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Id.* at 355, 127 S.Ct. 1057. Thus, even though the Court did not expressly approve the limited-purpose instruction requested by Philip Morris, we infer that a similar instruction would be adequate to satisfy the limitations imposed by the Due Process Clause on exemplary damage awards.

[12] In the instant case, the trial court's instruction was adequate to satisfy the due process requirements announced in *Philip Morris.* The trial court prohibited the jury from considering arguments regarding Qwest's lack of a post-accident pole inspection program for *any* purpose. The jury was even forbidden from considering harm to non-parties for the legitimate purpose of assessing the reprehensibility of Qwest's conduct. *Id.* Thus, to the extent Qwest raised any due process concerns regarding the jury's consideration of its post-accident conduct, it received the benefit of an overly-protective jury instruction. Ultimately then, Qwest's as-applied challenge must boil down to the claim that the jury refused to follow the instruction given by the trial court—the final issue we now address.

4.

[13] Absent evidence to the contrary, we presume that a jury follows a trial court's instructions. *See People v. Dunlap,* 975 P.2d 723, 743 (Colo.1999); *Lexton–Ancira Real Estate Fund, 1972 v. Heller,* 826 P.2d 819, 824 (Colo.1992). In *Dunlap,* the defendant was convicted of four counts of capital mur-

10. The trial court also cautioned the jury that arguments or statements by counsel are not evidence.

11. Indeed, even in its briefs to this Court, Qwest did not argue that the evidence or argument regarding its pre-accident conduct raised *Philip Morris* concerns.

der. The Order requires the Local to cease and desist from:

> seeking to enforce or apply, through arbitration, any collective-bargaining agreement with Nevins Realty Corp., or any other person having an agreement with it who is engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Nevins, or any such other person, to cease doing business with Golden Mark Maintenance, Ltd., the State of New York, the City of New York or any other person.

Local 32B–32J, 313 N.L.R.B. at 404. The ALJ based this broad order, which essentially restates § 8(b)(4)(ii)(B), on the Local's "policy" of interpreting its form contract uniformly and consistently throughout the industry. But, the Local correctly maintains that no such "policy" was shown. No evidence was introduced to show the Local's behavior with respect to any other employer. The ALJ inferred the Local's policy merely because a form contract was employed. That assumption is unwarranted in the absence of any showing that any other employer was similarly situated—and that the Local adopted a similar stance. We may not approve an order as broad as the ALJ's without such a showing. *See Sure–Tan Inc. v. NLRB,* 467 U.S. 883, 900, 104 S.Ct. 2803, 2813, 81 L.Ed.2d 732 (1984); *Torrington Extend–A–Care Employee Ass'n v. NLRB,* 17 F.3d 580, 585 (2d Cir.1994); *United Steelworkers of America v. NLRB,* 646 F.2d 616, 640–42 (D.C.Cir.1981).

Accordingly, we deny the petition in part and grant the Board's cross-application for enforcement in part.

UNITED STATES of America, Appellee,

v.

Jermaine BONEY, Appellant.

No. 94–3149.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 7, 1995.

Decided Oct. 20, 1995.

Defendant was convicted in the United States District Court for the District of Columbia, Stanley S. Harris, J., of distribution and possession with intent to distribute more than five grams of cocaine. On appeal, the Court of Appeals, Silberman, Circuit Judge, 977 F.2d 624, affirmed in part, but remanded for evidentiary hearing on defendant's juror-bias claim. On remand, the District Court found no actual bias to defendant and denied defendant's motion for new trial. Defendant appealed. The Court of Appeals, Harry T. Edwards, Chief Judge, held that: (1) at hearing to determine whether defendant was biased by juror's denial of his status as convicted felon, district court's questions to juror were insufficient to reveal any prejudice related to juror's felon status that might have affected jury's deliberations; (2) defense counsel was entitled to cross-examine juror at hearing; and (3) trial court could inquire whether juror's felon status ever came up during jury deliberations and, if so, circumstances surrounding that disclosure, without violating evidence rule prohibiting jurors from testifying regarding validity of their verdict.

Remanded.

1. Criminal Law ⚷959

Although trial judges are generally accorded broad discretion in their conduct of juror-bias hearings, that discretion is not unlimited.

2. Criminal Law ⚷1156(4)

Court of appeals' review of juror-bias hearing is limited to determining whether

nored the serious concerns about possible bias expressed by this court in *Boney I.*

[4] While the most important flaw in the evidentiary hearing was the failure to ask more probing questions, we believe the District Court also erred in not permitting Boney's counsel to cross-examine the juror. Although we recognize that in some cases questioning by counsel may be inappropriate because "jurors should not be subjected to undue impositions," *United States v. Boylan,* 898 F.2d 230, 258 (1st Cir.), *cert. denied,* 498 U.S. 849, 111 S.Ct. 139, 112 L.Ed.2d 106 (1990), in this instance there is no apparent reason why counsel for both parties should not be permitted to question Mr. J directly. The proceedings are much more likely to uncover Mr. J's possible biases if the questions are not filtered through the judge, and, given the specific facts of this case, it is unlikely that such an examination will compromise the confidentiality of jury deliberations. In any event, the court would, of course, still retain the authority to rule on objections at the hearing and to strike specific questions deemed to be inappropriate.

[5] Boney also claims that the trial court erred by not querying Mr. J on what happened during jury deliberations, and by not questioning the other jurors on the panel regarding their contacts with Mr. J. The judge refused to ask such questions apparently on the ground that the inquiry would require the jurors to testify regarding the validity of their verdict, in violation of Federal Rule of Evidence 606(b). Appellant contends that the Rule permits questions regarding "extraneous prejudicial information" and that if Mr. J disclosed any information related to his felony conviction in the jury room, such disclosures would fall within that exception. In light of the fact that Mr. J had no right whatsoever even to serve on the jury, *see* 28 U.S.C. § 1865(b)(5) (1988), it does not seem inappropriate to inquire of him whether his felon status ever came up during jury deliberations, and, if so, the circumstances surrounding that disclosure. Although it is expected that jurors will bring their various life experiences into the jury room, Mr. J's experience as a felon is the one matter that should not have been before the jury at all because no ex-felons should have been on the panel. Therefore, any discussion of Mr. J's felon status during deliberations would surely seem to be "extraneous," and possibly "prejudicial" as well.

While we hold that Rule 606(b) does not prohibit further questioning of Mr. J himself, we do not reach the issue of whether the judge should have questioned the other jurors on the panel. Based on information that might be elicited from a more thorough inquiry of Mr. J, the judge will be better able to assess the value of questioning the other jurors and to determine whether such questions would fall within the "extraneous prejudicial information" exception to Rule 606(b).

III. Conclusion

For the foregoing reasons, we remand this case to the District Court with instructions to conduct a second evidentiary hearing into Mr. J's possible biases. At this hearing, Mr. J should face a more probing inquiry in order to elicit any prejudice related to his felon status that might have affected the jury's deliberations. In addition, counsel for both sides should be permitted to conduct the direct and cross-examination of the juror. Following the hearing, the District Court may decide whether to permit questioning of the other jurors on Boney's panel.

So ordered.

MISSISSIPPI VALLEY GAS COMPANY, Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, Respondent,

Southern Natural Gas Company, et al., Intervenors.

No. 94–1486.

United States Court of Appeals, District of Columbia Circuit.

Argued Sept. 14, 1995.

Decided Oct. 20, 1995.

Natural gas local distribution company (LDC) petitioned for judicial review of Fed-

UNITED STATES of America, Plaintiff–Appellant,

v.

Kerry Dean BENALLY, Defendant–Appellee.

No. 08–4009.

United States Court of Appeals, Tenth Circuit.

Nov. 12, 2008.

Background: After defendant was convicted of forcibly assaulting Bureau of Indian Affairs officer with dangerous weapon, the United States District Court for the District of Utah, 2007 WL 4166135, Dale A. Kimball, J, granted defendant's motion for new trial. United States appealed.

Holdings: The Court of Appeals, McConnell, Circuit Judge, held that:

(1) evidence that jurors expressed racial bias during deliberations fell within scope of evidence rule prohibiting admission of evidence of statements made during jury deliberations;

(2) jurors' alleged statements did not fall within scope of exception for extraneous prejudicial information; and

(3) defendant's Sixth Amendment right to impartial jury did not bar application of evidence rule.

Reversed.

1. Criminal Law ⚷957(3)

When juror's affidavit as to misconduct of himself or other jury members is made basis of motion for new trial, court must choose between redressing injury of private litigant and inflicting public injury that would result if jurors were permitted to testify as to what happened in jury room.

2. Contempt ⚷14, 60(2)

Juror testimony can be used to show dishonesty during voir dire, for purposes of contempt proceedings against dishonest juror.

3. Criminal Law ⚷957(3)

Evidence that jurors expressed racial bias against Native Americans during deliberations fell within scope of evidence rule prohibiting admission of evidence of statements made during jury deliberations for purpose of impeaching verdict, even though jurors had stated during voir dire that they had no preconceptions about Native Americans that would color their evaluation of case. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

4. Criminal Law ⚷957(3)

Jurors' alleged statements about their personal experiences with Native Americans and their preconception that all Native Americans got drunk and then violent did not fall within scope of exception to rule prohibiting admission of statements made during jury deliberations for purpose of impeaching verdict for extraneous prejudicial information, even though jurors' alleged statements were entirely improper and inappropriate, where statements did not concern specific facts about Native American defendant or incident for which he was charged. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

5. Criminal Law ⚷957(3)

Court had no common law authority to create exception to evidence rule prohibiting admission of evidence of statements made during jury deliberations for purpose of impeaching verdict to permit introduction of evidence of jurors' racial bias to impeach verdict. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

6. Criminal Law ⚷661

Courts no longer have common law authority to fashion and refashion rules of evidence as justice of case seems to de-

Juror K.C.'s testimony (along with the affidavit of the investigator reporting the statements of another juror) reported statements made by the jury foreman and other jurors in the jury room as part of the jury's discussion of the case. This evidence unquestionably falls within the category of testimony as to a "statement occurring during the course of the jury's deliberations." Mr. Benally does not argue otherwise.

He does argue, however, that the testimony concerning racial bias falls outside the ambit of the Rule because it is not being offered in connection with an "inquiry into the validity of a verdict or indictment." Fed.R.Evid. 606(b); *see McDonald,* 238 U.S. at 269, 35 S.Ct. 783 ("the principle is limited to those instances in which a private party seeks to use a juror as a witness to impeach the verdict"). The testimony was offered, he argues, only to show that a juror failed to answer questions honestly during voir dire. The jurors had been asked whether they had any negative experiences with Native Americans and whether the fact that Mr. Benally is a Native American would affect their evaluation of the case. All jurors answered "no." Yet the challenged testimony suggests that two jurors allowed preconceptions about Native Americans to color their evaluation.

We cannot accept this argument. Although the immediate purpose of introducing the testimony may have been to show that the two jurors failed to answer honestly during voir dire, the sole point of this showing was to support a motion to vacate the verdict, and for a new trial. That is a challenge to the validity of the verdict.

[2] It is true that juror testimony can be used to show dishonesty during voir dire, for purposes of contempt proceedings against the dishonest juror. *See Clark v. United States,* 289 U.S. 1, 12–14, 53 S.Ct. 465, 77 L.Ed. 993 (1933). Thus, if the purpose of the post-verdict proceeding were to charge the jury foreman or the other juror with contempt of court, Rule 606(b) would not apply. *McDonald,* 238 U.S. at 269, 35 S.Ct. 783. However, it does not follow that juror testimony that shows a failure to answer honestly during voir dire can be used to overturn the verdict.

There is a split in the Circuits on this point. The Ninth Circuit has held that "[s]tatements which tend to show deceit during voir dire are not barred by [Rule 606(b)]," even when the improper voir dire is the basis of a motion for a new trial. *Hard v. Burlington No. R.R.,* 812 F.2d 482, 485 (9th Cir.1987); *United States v. Henley,* 238 F.3d 1111, 1121 (9th Cir.2001) ("Where, as here, a juror has been asked direct questions about racial bias during voir dire, and has sworn that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is indisputably admissible for the purpose of determining whether the juror's responses were truthful."). At least one district court, in addition to the court below, has adopted a similar interpretation of the Rule. *See Tobias v. Smith,* 468 F.Supp. 1287, 1290 (W.D.N.Y.1979) (citing evidentiary treatise that suggested "where comments indicate prejudice or preconceived notions of guilt, statements may be admissible not under F.R.E. 606(b) but because they may prove that a juror lied during the voir dire.").

The Third Circuit, by contrast, has held that such an interpretation would be "plainly too broad," and that Rule 606(b)

that counsel's affidavit relating what juror told him was "obviously hearsay and entitled to no consideration").

If the General Assembly wished to insulate organizations that serve young people from liability, it could have easily done so. With section 13–21–116(2.5)(a), however, the legislature has taken no position on this question. In the absence of either legislative consideration of this issue or unambiguous language in the statute supporting the defendant's interpretation, we decline to judicially decree that the defendant is immune from suit for the reasons stated in this opinion.[4] Such policy determinations lie solely within the domain of the legislature and not this court.

IV. CONCLUSION

For the reasons explained above, the judgment of the court of appeals is affirmed and this case is remanded to the court of appeals to return it to the district court for further proceedings consistent with this opinion.

David STEWART, Jr., minor, by and through his next friend and mother, Chiquita STEWART, Petitioner,

v.

Velma I. RICE, Respondent.

No. 00SC970.

Supreme Court of Colorado,
En Banc.

May 13, 2002.

As Modified on Denial of Rehearing
June 3, 2002.

Mother of minor who had sustained permanent head injuries in automobile accident brought action on minor's behalf against second driver involved in collision. The District Court, El Paso County, James M. Franklin and Thomas K. Kane, JJ., entered judgment on jury verdict for minor, and denied post-trial motions. Appeals were taken. The Court of Appeals, 25 P.3d 1233, Roy, J., affirmed in part and remanded in part. Mother appealed. The Supreme Court, Hobbs, J., held that juror affidavits submitted by defense counsel seeking new trial did not qualify for the exceptions to the rule of evidence that banned solicitation and use of juror affidavits to address the validity of the jury verdict, and thus were not admissible.

Reversed.

1. Courts ⚷97(1)

When a state rule of evidence is similar to the federal rule, courts may look to the federal authority for guidance in construing the state rule.

2. Federal Civil Procedure ⚷2371

The federal counterpart to the state rule of evidence that bans solicitation and use of juror testimony or affidavits to address the validity of a jury verdict is grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences. Rules of Evid., Rule 606(b).

3. Criminal Law ⚷957(1)

Trial ⚷344

The state rule of evidence that bans solicitation and use of juror testimony or affidavits to address the validity of a jury verdict applies to all civil and criminal cases. Rules of Evid., Rule 606(b).

4. Trial ⚷344

The state rule of evidence that bans solicitation and use of juror testimony or affidavits to address the validity of a jury verdict has three fundamental purposes: to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from

4. In deciding this case, we have accepted the fact that JORP was a program offered by Concerned Parents, as Concerned Parents stated in its opening brief to us. Thus, we do not reach the question of whether Concerned Parents would be entitled to immunity if it was able to demonstrate, as a factual matter, that JORP was a program offered by Pueblo County for which it provided services.

tion against impeaching a verdict through juror testimony. Generally, after leaving the courtroom, jurors could not testify to any matter concerning the intent or meaning of their verdict or their thought processes in reaching it. *See Wray v. Carpenter,* 16 Colo. 271, 273, 27 P. 248, 248 (1891); *Knight v. Fisher,* 15 Colo. 176, 180, 25 P. 78, 80 (1890).

We applied this rule in a number of cases. *See, e.g., Richards v. Richards,* 20 Colo. 303, 303–04, 38 P. 323, 323–24 (1894) (rejecting affidavits alleging that jurors failed to consider appellant's counterclaim and stating that "no affidavit, deposition or other sworn statement of a juror will be received to impeach the verdict"); *Johnson v. People,* 33 Colo. 224, 242–43, 80 P. 133, 139 (1905) (stating that "[i]t is scarcely necessary to say that a juror will not be permitted to impeach his own verdict by affidavit"); *Richards v. Sanderson,* 39 Colo. 270, 282, 89 P. 769, 773 (1907) (stating that "[i]t is well settled that the affidavit of a juror cannot be received to impeach a verdict"); *Kreiser v. People,* 199 Colo. 20, 22, 604 P.2d 27, 28 (1979) (holding that the trial judge erred in re-empanelling the jury for a poll and subsequent correction of an error in the verdict form).

Our common-law cases also addressed limited exceptions to this rule. These cases foreshadowed exceptions to CRE 606(b)'s broad prohibition on jury testimony or affidavits. *See, e.g., Butters v. Wann,* 147 Colo. 352, 356–58, 363 P.2d 494, 496–97 (1961) (allowing juror affidavit regarding juror's independent, extra-judicial investigation during trial into decedent's drinking habits); *Wharton v. People,* 104 Colo. 260, 265–66, 90 P.2d 615, 617–18 (1939) (allowing consideration of juror affidavit alleging improper, prolonged coercion by other jurors which compelled juror to assent to death penalty verdict).

B.

CRE 606(b)

We adopted CRE 606(b) in 1980. Substantially similar to its federal counterpart, CRE 606(b) is an exclusionary rule codifying Lord Mansfield's rule; it contains two exceptions.

[1, 2] When our rule is similar to the federal rule, we may look to the federal authority for guidance in construing our rule. *Air Communication & Satellite, Inc. v. EchoStar Satellite Corp.,* 38 P.3d 1246, 1251 (Colo.2002). CRE 606(b)'s federal counterpart is "grounded in the common-law rule against admission of jury testimony to impeach a verdict and the exception for juror testimony relating to extraneous influences." *Tanner v. United States,* 483 U.S. 107, 121, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987). A commentator emphasizes the breadth of the federal rule's prohibition against turning the jurors into witnesses:

> It would have been hard to paint with a broader brush, and in terms of subject, Rule 606(b)'s exclusionary principle reaches everything which relates to the jury's deliberations, unless one of the exceptions applies.

Christopher B. Mueller, *Jurors' Impeachment of Verdicts and Indictments in Federal Court Under Rule 606(b),* 57 Neb. L. Rev. 920, 935 (1978).

[3] CRE 606(b) applies to all civil and criminal cases. *Ravin v. Gambrell,* 788 P.2d 817, 820 (Colo.1990). It broadly prohibits using juror testimony to contest a verdict. A juror:

> may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.

CRE 606(b). The rule bars affidavits and statements, as well as testimony:

> Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

Id. CRE 606(b) embodies the common-law rule protecting and preserving jury deliberations:

> The first half of the first sentence of Rule 606(b) represents the embodiment of the common law tradition of protecting and preserving the integrity of jury delibera-

> tions by declaring jurors generally incompetent to testify as to any matter directly pertinent to, and purely internal to, the emotional or mental processes of the jury's deliberations.

Arthur Best et al., *Colorado Evidence: 2001 Courtroom Manual* 137 (2000). CRE 606(b) provides two narrow exceptions. A juror:

> may testify on the question whether extraneous prejudicial information was improperly brought to the juror's attention or whether any outside influence was improperly brought to bear upon any juror.

Id.

[4] CRE 606(b) has three fundamental purposes: to promote finality of verdicts, shield verdicts from impeachment, and protect jurors from harassment and coercion. *See Ravin,* 788 P.2d at 820; *Santilli v. Pueblo,* 184 Colo. 432, 433–34, 521 P.2d 170, 171 (1974).

[5] These purposes also underlie other Colorado law protecting the jury process. While a jury may change or modify its verdict up to the point the trial court accepts the verdict and discharges the jury,[5] the court may not recall the jurors for this purpose once they leave the judge's control. *Montanez v. People,* 966 P.2d 1035, 1037 (Colo. 1998). "This rule helps to ensure that jury verdicts will not be tainted by any outside influence ... and promotes the finality of verdicts." *Id.*

[6, 7] During post-trial and appellate proceedings, courts must view the jury's verdict in the light most favorable to it. *See Bohrer v. DeHart,* 961 P.2d 472, 477 (Colo.1998) ("We defer to jury verdicts when jurors have been properly instructed and the record contains evidence to support the jury's findings."). Special verdict forms and the instructions that go with them assist a jury with its deliberations; signing the verdict form acknowledges the verdict as the product of each juror's deliberation. *See, e.g., id.* at 477–78.

[8] CRE 606(b) protects the jurors in performing their public service and their post-verdict privacy. It acts to restrain disappointed litigants. The law presumes that jurors have followed the court's instructions and have discharged their duties faithfully. *Bear Valley Church of Christ v. DeBose,* 928 P.2d 1315, 1331 (Colo.1996).

Under CRE 606(b), as with our common law, we have excluded juror testimony or affidavits divulging juror deliberations, thought processes, confusion, mistake, intent, or other verdict impeaching grounds. *See, e.g., People v. Garcia,* 752 P.2d 570, 584 (Colo.1988) (refusing to accept affidavits regarding jurors' mental processes); *People v. McCoy,* 764 P.2d 1171, 1177 (Colo.1988) ("It is well established ... that a juror's affidavit that attempts to explain the mental processes of the jury cannot be used to impeach a jury verdict."); *Neil v. Espinoza,* 747 P.2d 1257, 1261, 1261–62 (Colo.1987) (concluding that juror's affidavit addressed "the sort of 'mental process' into which the litigants and the court may not inquire"); *Crespin v. People,* 721 P.2d 688, 691 n. 6 (Colo.1986) (barring consideration of juror testimony asserting jurors' failure to consider one of the charges against defendant).

Other jurisdictions are in accord.[6] Under circumstances analogous to the case before us, courts have refused to allow jurors to revisit their damages verdict. The West Virginia Supreme Court rejected juror affidavits

5. In *Kreiser v. People,* 199 Colo. 20, 23 n. 1, 604 P.2d 27, 29 n. 1 (1979) we narrowed the holding of *Schoolfield v. Brunton,* 20 Colo. 139, 142, 36 P. 1103, 1104 (1894). In *Kreiser,* we held that the court could not reassemble the jurors and poll them regarding the intent of their verdict after the jury had dispersed.

6. Most states have rules mirroring Federal Rule of Evidence 606(b). *See, e.g.,* Ala. R. Evid. 606(b); Alaska R. Evid. 606(b); Ariz. R. Evid. 606(b); Ark. R. Evid. 606(b); Conn.Super. Ct. § 42–33; Conn.Super. Ct. § 16–34; Del. R. Evid. 606(b); Idaho R. Evid. 606(b); Burns I.R.E. 606(b); Iowa R. Evid. 606(b); Me. R. Evid. 606(b); Md. R. 5–606(b); Minn. Evid. R. 606(b); Miss. R. Evid. 606(b); Neb.Rev.Stat. § 27–606; N.M. R. Evid. 11–606(b); N.D. R. Evid. 606(b); Ohio R. Evid. 606(b); 12 Okla. Stat. § 2060(b); Pa. R. Evid. 606(b); R.I. Evid. R. 606(b); S.C. R. Evid. 606(b); S.D. Codified Laws § 19–14–7; Tenn. Evid. R. 606(b); Tex.R. Evid. 606(b); Utah R. Evid. 606(b); Vt. R. Evid. 606(b); W. Va. R. Evid. 606(b); Wis. Stat. § 906.06(2); Wyo. R. Evid. 606(b).

tion against impeaching a verdict through juror testimony. Generally, after leaving the courtroom, jurors could not testify to any matter concerning the intent or meaning of their verdict or their thought processes in reaching it. *See Wray v. Carpenter,* 16 Colo. 271, 273, 27 P. 248, 248 (1891); *Knight v. Fisher,* 15 Colo. 176, 180, 25 P. 78, 80 (1890).

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[3] CRE 606(b) applies to all civil and criminal cases. *Ravin v. Gambrell,* 788 P.2d 817, 820 (Colo.1990). It broadly prohibits using juror testimony to contest a verdict. A juror:

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CRE 606(b). The rule bars affidavits and statements, as well as testimony:

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> The first half of the first sentence of Rule 606(b) represents the embodiment of the common law tradition of protecting and preserving the integrity of jury delibera-

UNITED STATES of America, Plaintiff–Appellee,

v.

Rex HENLEY, Rafael Bustamante, Willie McGowan, and Garey West, Defendants–Appellants.

Nos. 96–50697, 97–50015, 97–50020 and 97–50060.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted June 5, 2000

Filed Feb. 7, 2001

Following defendants' convictions for conspiracy to possess and distribute cocaine and possession with intent to distribute cocaine, defendants moved for a new trial. The United States District Court for the Central District of California, Gary L. Taylor, J., denied motion and defendants appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) co-defendant's attempted bribery of juror was, prima facie, jury tampering; (2) juror's statements were not prohibited under rule prohibiting inquiry into mental processes of jurors in connection with verdict; and (3) District Court erred by rejecting defendants' claim that juror was racially biased without making any findings concerning whether juror actually made racist statement.

Reversed and remanded.

1. Criminal Law ⚷956(12)

In joint trial, co-defendant's attempted bribery of juror was, prima facie, jury tampering, and therefore, there was strong presumption that juror was affected in his freedom of action as a juror and Government had heavy burden to prove otherwise. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⚷957(6)

In evaluation of whether extrajudicial contact was presumptively prejudicial on motion for new trial based upon alleged jury tampering, juror's statements to investigators revealing his professed anxiety about his own and his family's well being were not statements regarding his mental processes, and therefore, were not prohibited under rule prohibiting inquiry into mental processes of jurors in connection with verdict. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

3. Criminal Law ⚷957(3)

Where a juror has been asked direct questions about racial bias during voir dire, and has sworn that racial bias would play no part in his deliberations, evidence of that juror's alleged racial bias is admissible for the purpose of determining whether the juror's responses were truthful. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

4. Criminal Law ⚷961

On motion for new trial based upon alleged jury tampering, District Court erred by rejecting African-American defendants' claim that juror who allegedly used the word "nigger" was racially biased, without making any findings concerning whether juror actually made a racist statement, and if so, its specific content.

Karen L. Landau, Oakland, California, Carol A. Klauschie, Pasadena California, Gail Ivens, Glendale, California, and Mary Ellen Lewis, San Luis Obispo, California, for the defendants-appellants.

John C. Rayburn, Jr., Assistant United States Attorney, and Nancy Spiegel, Assistant United States Attorney, Santa Ana, California, for the plaintiff-appellee.

Appeal from the United States District Court for the Central District of California; Gary L. Taylor, District Judge, Presiding. D.C. No. CR–93–00130–GLT.

Before: FERGUSON, BOOCHEVER, and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

Rex Henley, Rafael Bustamante, Willie McGowan, and Garey West appeal their

ing racial bias as "extraneous," a powerful case can be made that Rule 606(b) is wholly inapplicable to racial bias because, as the Supreme Court has explained, "[a] juror may testify concerning any mental bias in matters *unrelated to the specific issues that the juror was called upon to decide* ...." *Rushen v. Spain,* 464 U.S. 114, 121 n. 5, 104 S.Ct. 453, 78 L.Ed.2d 267 (1983) (per curiam) (citing Fed.R.Evid. 606(b)) (emphasis added). Racial prejudice is plainly a mental bias that is unrelated to any specific issue that a juror in a criminal case may legitimately be called upon to determine.[13] It would seem, therefore, to be consistent with the text of the rule, as well as with the broad goal of eliminating racial prejudice from the judicial system, to hold that evidence of racial bias is generally not subject to Rule 606(b)'s prohibitions against juror testimony.

Some courts have suggested that Rule 606(b) should generally apply to racist statements made by jurors during deliberations, unless the resulting prohibition would deprive defendants of their right to a fair trial.[14] The Seventh Circuit expressed that view as follows:

> The rule of juror incompetency cannot be applied in such an unfair manner as to deny due process. Thus, further review may be necessary in the occasional case in order to discover the extremely rare abuse that could exist even after the court has applied the rule and determined the evidence incompetent. In short, although our scope of review is narrow at this stage, we must consider whether prejudice pervaded the jury room, whether there is a substantial probability that the alleged racial slur made a difference in the outcome of the trial.[15]

Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir.1987). Or, as another court explained, "if a criminal defendant could show that the jury was racially prejudiced, such evidence could not be ignored without trampling the sixth amendment's guarantee to a fair trial and an impartial jury." *Wright,* 559 F.Supp. at 1151. In order to apply Rule 606(b) in this limited manner, a court would first have to receive the juror testimony in question, and then determine whether the testimony established that "prejudice pervaded the jury room" or that "the jury was racially prejudiced." In our circuit, however, it would not be necessary to demonstrate that "prejudice pervaded the jury room" in order to establish a constitutional violation; we have made clear that the Sixth Amendment is violated by "the bias or prejudice of even a single juror." *Dyer v. Calderon,* 151 F.3d 970, 973 (9th Cir.1998) (en banc). One racist juror would be enough.

In this case, there would be even stronger reason to conclude that Rule 606(b) should not bar juror testimony regarding O'Reilly's alleged racist statements, because the statements in question were made *before* deliberations began and *outside* the jury room. Rule 606(b)'s primary purpose—the insulation of jurors' private deliberations from post-verdict scrutiny—would not be implicated by permitting juror testimony about what O'Reilly allegedly said while carpooling with other jurors.

opportunity to question those jurors who [could] be found as to what was said and what occurred." *Id.* at 1291.

13. *See Dobbs v. Zant,* 720 F.Supp. 1566, 1573 (N.D.Ga.1989), *aff'd,* 963 F.2d 1403 (11th Cir. 1991), *rev'd on other grounds,* 506 U.S. 357, 113 S.Ct. 835, 122 L.Ed.2d 103 (1993).

14. For example, the court in *Smith v. Brewer,* 444 F.Supp. 482 (S.D.Iowa 1978), after concluding that Rule 606(b) applied to allegations of juror racism during deliberations, qualified that determination as follows: "Where ... an offer of proof showed that there was a substantial likelihood that a criminal defendant was prejudiced by the influence of racial bias in the jury room, to ignore the evidence might very well offend fundamental fairness." *Id.* at 490.

15. The court's scope of review was "narrow" because the petitioner was challenging his state custody pursuant to 28 U.S.C. § 2254. Therefore, the very high standard the court applied to the petitioner's due process claim should not be applied to the direct appeal of a federal conviction.

ances); *Mitchell*, 126 N.C.App. at 434, 485 S.E.2d at 624 (vacating order adjudicating juvenile neglected because no summons was issued so trial court did not have subject matter jurisdiction nor personal jurisdiction because respondent objected to insufficiency of service of process at initial hearing); *In re J.L.P.*, ––– N.C.App. –––, 640 S.E.2d 446 (2007) (finding that juvenile had waived defense of insufficiency of process by making general appearance and not objecting at hearing, but making no statement as to subject matter jurisdiction even though no summons issued); *In re A.W.M.*, 176 N.C.App. 766, 627 S.E.2d 351 (2006) (finding that respondent had waived issue of insufficiency of process by "fully participating in all proceedings of the trial court without raising the issue" but making no specific statement as to subject matter jurisdiction even though no summons was issued), *disc. review denied*, 361 N.C. 219, 642 S.E.2d 241 (2007).

Nevertheless, given the uncertain history of the copy of the summons in this case, I conclude that the court file and record lack evidence that the summons was issued in a timely manner. I would therefore vacate the order of the trial court for lack of subject matter jurisdiction in this matter. The purpose of a summons to confer subject matter jurisdiction on a trial court, and the requisite distinction between the ability to waive personal jurisdiction but not subject matter jurisdiction, are questions fundamental to our judicial system. Accordingly, I respectfully dissent from the majority opinion.

TERRY'S FLOOR FASHIONS, INC., Plaintiff,

v.

CROWN GENERAL CONTRACTORS, INC and Jerry Shumate Alvis, Defendants.

No. COA06–738.

Court of Appeals of North Carolina.

June 19, 2007.

Background: Flooring subcontractor for project for interior "fit-up" of office suite brought action to enforce subcontractor's subrogation lien, and also brought claims against general contractor for breach of contract and quantum meruit, and against office suite owner for unfair and deceptive trade practices and quantum meruit. Owner brought counterclaims against subcontractor for negligence and breach of contract, and brought and cross-claims against general contractor. The Superior Court, Wake County, Narley L. Cashwell, J., denied owner's motion to transfer the case to the superior court. The District Court, Wake County, Jane P. Gray, J., entered default judgment against general contractor, granted judgment on the pleadings to subcontractor as to owner's counterclaims, granted partial summary judgment to owner as to subcontractor's quantum meruit claim, and after bench trial, entered judgment for subcontractor and awarded subcontractor $17,000 in attorney fees, payable by owner. Owner appealed.

Holdings: The Court of Appeals, Stroud, J., held that:

(1) evidence supported trial court's finding of owner's gross payment deficiency with respect to paying general contractor;

(2) entry of default judgment against general contractor did not have res judicata or collateral estoppel effect; and

(3) owner's refusal to settle was unreasonable, warranting award of attorney fees to subcontractor.

Affirmed.

Tyson, J., filed an opinion concurring in part and dissenting in part.

1. Appeal and Error ⚷1079

Defendant property owner was deemed to have abandoned assignment of error regarding superior court's denial of owner's motion to transfer action from district court to superior court, which motion alleged that owner's counterclaims against plaintiff subcontractor and cross-claims against defendant general contractor raised amount in

[10, 11] Because "a contractor is not liable under a clause for liquidated damages based on a time limit if his failure to complete the contract within the specified time was wholly due to the act or omission of the other party in delaying the work," *L.A. Reynolds Co. v. State Highway Com.*, 271 N.C. 40, 50, 155 S.E.2d 473, 482 (1967), plaintiff argued that defendant Alvis waived his right to receive liquidated damages. Moreover, "where a contract contains a provision for liquidated damages, and delays in its completion are occasioned by mutual defaults, the courts will not attempt to apportion the damages, and the obligation for liquidated damages is annulled in the absence of a contract provision for apportionment." *Id.* at 51, 155 S.E.2d at 482. No such provision is present in the contract *sub judice.*

In its order, the trial court found that defendant Alvis was entitled to a setoff in the amount of $7,000.00 for construction deficiencies and a credit in the amount $2,827.00 for appliances that were not installed by defendant Crown. The trial court did not find that defendant Alvis was entitled to a setoff for liquidated damages. Thus, the total amount setoff by the trial court against the contract price was $9,827.00, leaving a net payment deficiency of $13,375.00. This deficiency exceeds the amount claimed by plaintiff in its lien.

Based on the evidence discussed above, and our review of the record in total, we conclude that plaintiff presented competent evidence from which the trial court could calculate a setoff in the amount of $9,827.00. Although defendant Alvis presented evidence to support a larger setoff, the trial judge was charged with determining the credibility of the testimony of Tilley, defendant Alvis, and Chamberlain, and the weight to be given to the evidence, including the report completed by Sinnett. Accordingly, this assignment of error is overruled.

III. Consistency of Judgments

Defendant Alvis argues that the trial court's award of judgment, pursuant to N.C. Gen.Stat. § 1A–1, Rule 52(a), in favor of plaintiff against him is inconsistent with the trial court's entry of default judgment in his favor against defendant Crown. In support of this argument, defendant asserts that he cannot simultaneously (1) be liable to plaintiff in subrogation based on a gross payment deficiency owed to defendant Crown under the Prime Contract, and (2) be entitled to compensatory damages from defendant Crown for breach of the Prime Contract. Defendant Alvis concludes that the Rule 52(a) judgment must be vacated. We disagree.

Defendant Alvis cites one case, *Streeter v. Cotton,* 133 N.C.App. 80, 514 S.E.2d 539 (1999), in support of his conclusion. In *Streeter* this Court considered the effect of a single trial court order that simultaneously granted the plaintiff's motion for judgment notwithstanding the verdict [JNOV] and the plaintiff's motion for a new trial. 133 N.C.App. at 83, 514 S.E.2d at 542. Because it is legally inconsistent to determine that a plaintiff is entitled to judgment as a matter of law by awarding JNOV and then submit that same claim to a jury by awarding a new trial, this Court vacated the trial court order and remanded the matter "for rehearing of plaintiff's motions for JNOV and new trial." *Id.* In a similar case, this Court noted, "the [trial] court's apparent intent was to grant defendant a JNOV and order a new trial if the JNOV was not upheld on appeal." *Southern Furniture Hardware, Inc. v. Branch Banking and Trust Co.,* 136 N.C.App. 695, 703, 526 S.E.2d 197, 202 (2000). In so doing, the Court described the order as "*internally inconsistent.*" *Id.* at 705, 526 S.E.2d at 203.

Here, defendant Alvis challenges the validity of separate judgments, resolving the rights of three different parties with respect to a claim and cross-claim: A judgment following bench trial entered against Defendant Alvis pursuant to N.C. Gen.Stat. § 1A–1, Rule 52 and a default judgment entered against Defendant Crown pursuant to N.C. Gen.Stat. § 1A–1, Rule 55. The facts *sub judice* do not create an internal inconsistency and are not governed by *Streeter.*

[12] Defendant Alvis argues that the default judgment he obtained against defendant Crown shows that defendant Crown's breach of the Prime Contract, and the damages he incurred thereby, extinguished his financial obligations to defendant Crown; therefore, the trial court erred in entering a judgment

and capacity in the person for which or against whom the claim is made. *Weibert v. Rothe Brothers, Inc.,* 200 Colo. 318, 618 P.2d 1367 (1980); *Pomponio v. Larsen,* 80 Colo. 318, 251 P. 534 (1926). Further, the decision in the prior case must have been rendered on the merits. *Crowe v. Hamilton National Bank,* 74 Colo. 407, 222 P. 394 (1924). We conclude that the earlier dismissal of the case between the Association and MAJ, which we upheld, was not a decision rendered on the merits, and, thus, that the present action is not barred by *res judicata.*

The previous dismissal was based upon a motion which sought dismissal for failure to join a party, as well as for failure to state a claim upon which relief could be granted. In granting that motion, the trial court did not state upon which theory it relied. We are aware that C.R.C.P. 41(b) provides in pertinent part that:

> "Unless the court in its order for dismissal otherwise specifies, a dismissal under this section (b) and any dismissal not provided for in this Rule, other than a dismissal for lack of jurisdiction, for failure to file a complaint under Rule 3, or for failure to join a party under Rule 19, operates as an adjudication on the merits."

However, it has long been the established rule that jurisdictional or procedural grounds for dismissal will be considered prior to examination of the substantive merits of a case.

> "Where one of the grounds of demurrer was a misjoinder of parties, and the other involved the merits, or the right of the plaintiff to recover on his cause of action, it will be presumed that the court sustained it upon the former ground alone. For it is natural to suppose that if the court saw an objection to the action sufficient to necessitate its dismissal, it would not after that proceed to an investigation of the merits."

Black on Judgments § 710 (2d ed. 1902). *See Griffin v. Seymour,* 15 Iowa 30, 83 A.M.Dec. 396 (1863).

In *Summerhouse Condominium Ass'n v. Majestic Savings & Loan, supra,* we upheld the dismissal based upon the absence of proper parties to bring the suit. Accordingly, since we conclude that the earlier dismissal was based upon the absence of proper parties, under C.R.C.P. 41(b), there has been no decision on the merits.

Having determined that the prior dismissal was not on the merits, and that therefore, *res judicata* does not bar the present action, we need not consider the Association's other arguments urging reversal.

Accordingly, the judgment of dismissal is reversed and the cause is remanded with directions to reinstate the action and for further proceedings.

ENOCH, C.J., and STERNBERG, J., concur.

Teddy G. WULFF and Tuesday Enterprises, Inc., a Colorado corporation, Plaintiffs-Appellants,

v.

E.M. CHRISTMAS, individually and d/b/a Colorado Industrial Properties, Inc., Colorado Industrial Properties, Inc., a Colorado corporation, Defendants-Appellees.

No. 81CA1257.

Colorado Court of Appeals, Div. II.

Nov. 26, 1982.

Rehearing Denied Dec. 9, 1982.

Certiorari Denied Feb. 22, 1983.

Plaintiffs brought action arising from dispute over lease on restaurant and bar and liquor license owned by defendants. The District Court, Pueblo County, Phillip

only for damages caused by the defendant corporation.

While we note the inconsistency of the verdicts, we cannot sanction the remedy employed by the trial court to correct it. There was no reason for the court to assume that nominal damages against Christmas was more consistent with the jury's intent than would be a $36,000 damage award against the corporation.

[2-4] Generally, a court may amend a verdict with respect to matters of form but not substance. *Harrison Construction Co., Inc. v. Nissen,* 119 Colo. 42, 199 P.2d 886 (1948); *Weeks v. Churchill,* 44 Colo.App. 520, 615 P.2d 74 (1980). Where the inconsistency of a verdict demonstrates the fact that the jury did not understand its instructions, was misled, or ignored certain instructions, any change in the verdict made by the court is a change of substance and not of form. *Harrison, supra; Weeks, supra.* Only where the inconsistency may be resolved without changing the underlying determination made by the jury may the court resolve the conflict by amending the verdict. *Weeks, supra; Cole v. Angerman,* 31 Colo.App. 279, 501 P.2d 136 (1972).

Here, the court's resolution of the inconsistency changed the jury's determination that Tuesday Enterprises had been damaged in the amount of $36,000. Therefore, it was error for the trial court to amend the verdict.

Because the verdict had been received and recorded, and the jury discharged, the only remedy available is to remand for a new trial. The jury having decided the liability issues adverse to the defendants, it might be deemed appropriate to have the new trial cover only the issue of damages. *See Sanchez v. Rice,* 40 Colo.App. 481, 580 P.2d 1261 (1978). However, since here the issues of damages and liability are so intertwined, in our view, the best resolution of this situation now is to have a new trial on all issues. *Kistler v. Halsey,* 173 Colo. 540, 481 P.2d 722 (1971).

The judgment is reversed and the cause is remanded for a new trial.

SMITH and VAN CISE, JJ., concur.

Charles GARLAND and Elaine Garland, Plaintiffs-Appellants,

v.

BOARD OF COUNTY COMMISSIONERS, LARIMER COUNTY, State of Colorado, Defendant-Appellee.

No. 81CA1114.

Colorado Court of Appeals, Div. I.

Dec. 2, 1982.

Rehearing Denied Dec. 23, 1982.

Landowners appealed from a judgment of the District Court, Larimer County, Williams Dressel, J., affirming determination of board of county commissioners denying landowners' application for a special use permit to operate a greyhound kennel on their property. The Court of Appeals, Enoch, C.J., held that: (1) trial court erred in remanding to board issues raised in landowners' affirmative defenses to board's counterclaim for an injunction filed in landowners' remedial writ proceeding seeking review of board's decision, and (2) trial court erred in refusing to consider landowners' affirmative defenses to board's counterclaim as legal issues separate from remedial writ proceeding.

Judgment affirmed in part, reversed in part, and cause remanded with directions.

1. Courts ⇐207.1

Purpose of an action brought under rule relating to remedial writs is to determine if an inferior tribunal, exercising judicial or quasi-judicial functions, has exceeded its jurisdiction or abused its discretion. Rules Civ.Proc., Rule 106(a)(4).

2. Courts ⇐209(2)

In a remedial writ proceeding, reviewing court is to ascertain from record of

Charles W. WARK, Shauna L. Wark, and Savanah J. Wark, by and through her next friends and parents, Charles W. Wark and Shauna L. Wark, Plaintiffs–Appellants,

v.

Richard M. McCLELLAN, Defendant–Appellee.

No. 01CA1496.

Colorado Court of Appeals, Div. III.

March 13, 2003.

Automobile accident survivors brought action against the motorist with whom they collided for negligence, wrongful death, negligent infliction of emotional distress, and loss of consortium. The Montezuma County District Court, Sharon L. Hansen, J., entered judgment on jury verdict against the survivors, and awarded defendant motorist expert witness fees and costs. The survivors appealed. The Court of Appeals, Davidson, J., held that: (1) trial court acted within its discretion in allowing accident reconstruction expert and psychiatric expert to testify for the defense; (2) there were no grounds upon which to declare mistrial; (3) trial court properly gave comparative negligence jury instruction based upon theory that the survivors arguably should not have placed themselves and their children in vehicle operated by driver who was possibly intoxicated; and (4) trial court acted within its discretion in awarding expert witness fees and costs, although one such award required clarification.

Affirmed and remanded.

1. Trial ⚷133.1

Mistrial is warranted where the prejudice created from improper testimony renders the trial unfair to the other party.

2. Appeal and Error ⚷969

When trial court refuses to declare mistrial, appellate court will not disturb that decision absent gross abuse of discretion and prejudice to the moving party.

3. Trial ⚷18

Mistrial is warranted only where prejudice to the moving party cannot be remedied by other means.

4. Appeal and Error ⚷970(2)
Trial ⚷43

Trial court has considerable discretion in ruling upon the admissibility of evidence, and appellate court will not find abuse of discretion unless the trial court ruling was manifestly arbitrary, unreasonable, or unfair.

5. Evidence ⚷99

Generally, evidence that logically tends to prove or disprove facts in contention, or that sheds light upon contested matters, is relevant.

6. Evidence ⚷99

Evidence so remotely related to contested issues that it affords only conjectural inference should not be admitted.

7. Evidence ⚷99

Trial court has considerable discretion in determining whether evidence has logical relevance.

8. Evidence ⚷555.8(1)

Trial court acted within its discretion in wrongful death action stemming from automobile accident in determining that although the accident scene was modified before having been viewed by the defense accident reconstruction expert, the expert could nevertheless assist the jury through his testimony; the expert accounted for changed road conditions in rendering his opinion, and the trial court excluded photographs that were misleading or confusing. Rules of Evid., Rule 702.

9. Pretrial Procedure ⚷45

Trial court acted within its discretion, in wrongful death action stemming from automobile accident, in allowing defense psychiatric expert to provide additional testimony about alcohol consumption by one particular passenger, though expert was retained solely

[1–3] A mistrial is warranted where the prejudice created from improper testimony renders the trial unfair to the other party. *Margenau v. Bowlin,* 12 P.3d 1214 (Colo. App.2000). A mistrial is a drastic remedy, and we will not disturb the trial court's decision absent a gross abuse of discretion and prejudice to the moving party. Moreover, a mistrial is warranted only where the prejudice to the moving party cannot be remedied by other means. *See People v. Abbott,* 690 P.2d 1263 (Colo.1984); *Pyles–Knutzen v. Board of County Comm'rs,* 781 P.2d 164 (Colo.App.1989).

A.

Plaintiffs first contend that the trial court erred in making certain evidentiary rulings. We disagree.

[4] A trial court has considerable discretion in ruling upon the admissibility of evidence, and we will find an abuse of discretion only if its ruling is manifestly arbitrary, unreasonable, or unfair. *See Rojhani v. Meagher,* 22 P.3d 554 (Colo.App.2000).

[5–7] Generally, evidence that logically tends to prove or disprove a fact in issue or that sheds light upon a matter contested is relevant. Evidence so remotely related to contested issues that it affords only conjectural inference should not be admitted. *People v. Rudnick,* 878 P.2d 16 (Colo.App.1993). A trial court has considerable discretion in determining whether evidence has logical relevance. *People v. Saiz,* 32 P.3d 441 (Colo. 2001).

1.

[8] At trial, plaintiffs objected to the testimony of the defense accident reconstruction expert because he had inspected the road after it had been altered. Plaintiffs also objected to the introduction of photographs of the road taken after the alteration. Plaintiffs continue on appeal to object to the expert's testimony as irrelevant and unreliable. We disagree.

We perceive no abuse of discretion in the court's determination that, regardless of the road modifications, the expert testimony could assist the jury in understanding the evidence. *See* CRE 702; *People v. Shreck,* 22 P.3d 68 (Colo.2001)(trial court has broad discretion in determining the admissibility of scientific evidence and should consider the reliability of the scientific principles, the qualifications of the witness, and the usefulness of the testimony to the jury). Importantly, we note, in rendering his opinion, the expert took the change in road conditions into account.

Moreover, to minimize any prejudice or confusion, the court excluded photographs taken by the expert that showed the modified road at the place of impact. Conversely, photographs of areas of the road other than the specific accident site, as the expert testified, established the approach to the point of impact and were neither confusing nor misleading.

2.

[9] We also disagree with plaintiffs that reversal is required because a defense psychiatric expert, retained only to testify on the question of mitigation of damages, was allowed to testify as to father's alcohol consumption. Because the statement went beyond the scope of the anticipated testimony, it should have been timely disclosed. However, the court sustained plaintiffs' objection and limited that portion of the testimony to a single, brief sentence. *See* C.R.C.P. 16(b)(4); *Freedman v. Kaiser Foundation Health Plan,* 849 P.2d 811 (Colo.App.1992)(court has discretion to impose sanctions when expert testifies outside areas disclosed).

3.

[10] At trial, defendant asked a police officer whether, at the accident scene, he had determined that defendant had "violated any statutes of . . . the traffic code." Plaintiffs objected, and the court, in camera, stated that it would be inappropriate for the officer to answer the question, but ultimately did not sustain or overrule the objection and did not give a curative instruction to the jury. Plaintiffs contend that the court erred by not granting a mistrial on this basis. We disagree.

allowing Faunce's testimony. Prisoners were given adequate opportunity to depose Faunce and supplement the record themselves. In such a situation, we fail to see how Prisoners suffered harm from the admission of Faunce's testimony.

III.

CONCLUSION

For the foregoing reasons, we will affirm the District Court's grant of summary judgment to the Prison Officials.

Ronald A. WILLIAMS, Appellant

v.

James PRICE, Superintendent, SCI–Pittsburgh; D. Michael Fisher, Attorney General.

No. 00–2305.

United States Court of Appeals, Third Circuit.

Argued Feb. 10, 2003.

Decided Sept. 9, 2003.

Following affirmance, 561 A.2d 714, of state conviction for murder, and exhaustion of state remedies, inmate petitioned for federal habeas relief on grounds of juror racial prejudice. The United States District Court for the Western District of Pennsylvania, Donald E. Ziegler, J., denied petition, and inmate appealed. The Court of Appeals, Alito, Circuit Judge, held that: (1) state courts unreasonably applied clearly established federal law by failing to consider testimony by trial witness concerning post-trial encounter with juror during which juror allegedly uttered racial slurs; but (2) no clearly established federal law required state courts to admit juror's testimony that other jurors had made racially biased remarks during trial; and (3) no clearly established federal law conferred constitutional right upon defendant to introduce juror testimony to prove racial bias of jurors irrespective of any restrictions imposed by state's "no impeachment" rule.

Vacated and remanded.

1. Habeas Corpus ⚷452

State-court decision is contrary to United States Supreme Court holding, permitting federal habeas relief, if state court contradicts governing law set forth in Supreme Court's cases or if state court confronts set of facts that are materially indistinguishable from decision of Supreme Court and nevertheless arrives at different result. 28 U.S.C.A. § 2254(d)(1).

2. Habeas Corpus ⚷450.1

State-court decision involves unreasonable application of clearly established federal law, permitting federal habeas relief, if state court identifies correct governing legal rule from United States Supreme Court's cases but unreasonably applies it to facts of particular case, or if state court unreasonably extends legal principle from Supreme Court precedent to new context where it should not apply or unreasonably refuses to extend that principle to new context where it should apply. 28 U.S.C.A. § 2254(d)(1).

3. Habeas Corpus ⚷842

Court of Appeals reviews de novo district court's application of statute setting forth conditions for granting federal habeas relief on claims adjudicated on merits in state court. 28 U.S.C.A. § 2254(d).

remarks that suggested acute racial bias. App. 6a. We discuss each allegation separately.

A.

With respect to the first allegation – regarding the jury's receipt of extraneous information after the guilty verdict was returned – we see no ground for holding that Williams is entitled to relief beyond that already awarded by the Pennsylvania Supreme Court. There is no dispute that Montgomery's testimony about outside information received by the jury falls within the "no impeachment" rule's exception. Indeed, the Court of Common Pleas twice permitted Montgomery to testify about such "extraneous" influence, and the Pennsylvania Supreme Court agreed that this testimony was admissible. *See Williams,* 561 A.2d at 719; *Williams,* 522 A.2d at 1067–68. However, because the jurors first received this information "at the sentencing phase," the state supreme court held that the proper remedy was not a new trial but a reduction of the sentence to one of life imprisonment. *Williams,* 561 A.2d at 719; *Williams,* 522 A.2d at 1067 (*citing* 42 Pa. Cons.St. § 9711(h)). We see no basis for holding that anything more is required by the federal Constitution.

B.

[8] 1. We thus come to Montgomery's allegation that jurors made racially biased remarks at some point during the trial. Williams first contends the state courts were obligated to consider Montgomery's testimony about these remarks because the "no impeachment" rule simply does not apply when a defendant seeks to introduce evidence to support "a claim of juror misconduct committed during voir dire," Appellant's Br. at 19, but this argument is plainly too broad. If it were correct, a party could call jury members to testify about statements made during actual jury deliberations so long as the purpose for introducing the evidence was to show that a juror had lied during voir dire. However, both the Federal and the Pennsylvania Rules of Evidence categorically bar juror testimony "as to any matter or statement occurring during the course of the jury's deliberations" even if the testimony is not offered to explore the jury's decision-making process in reaching the verdict. Indeed, Rule 606(b) was amended during the legislative process precisely to make it clear that the Rule means what its plain terms state in this regard. *See Tanner,* 483 U.S. at 122–25, 107 S.Ct. 2739. Although the question now before us is not whether Montgomery's testimony was prohibited by Federal Rule 606(b) (since Rule 606(b) did not govern the state proceedings) or by the Pennsylvania version of the "no impeachment" rule (since the enforcement of a state rule is a matter for the state courts), the Supreme Court's decision in *Tanner* implies that the Constitution does not require the admission of evidence that falls within Rule 606(b)'s prohibition. *See id.* at 127, 107 S.Ct. 2739. And in any event, *Tanner* surely defeats any argument that it is "clearly established" in Supreme Court jurisprudence that the Constitution mandates the admission of such evidence.[5] Thus, if the juror state-

5. Williams erroneously suggests that our decision in *United States v. Richards,* 241 F.3d 335 (3d Cir.2001), embraced the principle that the "no impeachment" rule does not apply when evidence is offered to prove juror misconduct. In *Richards,* the defendant moved for a new trial on the ground that the jury foreman was a friend of the government's witness and that the juror had failed to describe their relationship honestly during voir dire. *See id.* at 344. Citing *McDonough,* we held that the District Court did not abuse its discretion in finding, based on its review of the voir dire transcript, that the juror in fact

H

Colorado Court of Appeals,
Div. II.
Charlotte ZOLMAN, Plaintiff–Appellant,
v.
PINNACOL ASSURANCE, Defendant–Appellee.

No. 09CA1954.
March 3, 2011.

Background: Claimant brought action against workers' compensation insurer, alleging bad faith after insurer denied requests for post–MMI (maximum medical improvement) care and change of physician. The Denver District Court, Herbert L. Stern, III, J., granted insurer summary judgment, and denied claimant's motion to reconsider. Claimant appealed.

Holdings: The Court of Appeals, Loeb, J., held that:
(1) claimant's request for steroid injections was fairly debatable, and thus, insurer did not act unreasonably in declining request;
(2) claimant's request for change of physician was fairly debatable, and thus, insurer did not act unreasonably in declining request;
(3) evidence of insurer's incentive compensation plan for its claims representatives did not support finding that insurer breached the insurance contract in bad faith; and
(4) denial of claimant's motion to reconsider summary judgment was not improper.

Affirmed.

West Headnotes

[1] Insurance 217 1867

217 Insurance
217XIII Contracts and Policies
217XIII(H) Relations Between Parties; Implied Terms
217k1867 k. Good faith and fair dealing. Most Cited Cases

An insurer must deal in good faith with its insured.

[2] Insurance 217 3419

217 Insurance
217XXVIII Miscellaneous Duties and Liabilities
217k3416 Of Insurers
217k3419 k. Bad faith in general. Most Cited Cases

An insurer's breach of the duty of good faith and fair dealing gives rise to a separate cause of action arising in tort due to the special nature of the insurance contract and the relationship which exists between the insurer and the insured.

[3] Insurance 217 3335

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3334 In General
217k3335 k. In general. Most Cited Cases

Tort of bad faith breach of an insurance contract may arise in either a third-party or first-party context, but each context requires proof of a different standard of conduct.

[4] Insurance 217 3360

217 Insurance
217XXVII Claims and Settlement Practices
217XXVII(C) Settlement Duties; Bad Faith
217k3358 Settlement by First-Party Insurer
217k3360 k. Duty to settle or pay. Most Cited Cases

Tort of bad faith breach of an insurance contract in first-party context requires the insured to prove that (1) the insurer's conduct was unreasonable under the circumstances, and (2) the insurer either knowingly or recklessly disregarded the

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of this court have consistently held that insurers acted reasonably and were entitled to judgment as a matter of law. *See Sanderson,* 251 P.3d at 1216; *Pham,* 70 P.3d at 572–74; *Brennan,* 961 P.2d at 556–57; *Brandon,* 827 P.2d at 560–61. Furthermore, *Zilisch* is distinguishable on its facts because there, the permanency of the insured's injury was undisputed, whereas here, that issue was disputed and eventually decided against Zolman by the ALJ.

Zolman also relies on an earlier Arizona case, *Rawlings v. Apodaca,* 151 Ariz. 149, 726 P.2d 565 (1986), to argue that an insurer may act in bad faith when it does not give "equal consideration to the insured's interests." *Id.* at 572. However, the "equal consideration" standard only applies in third-party bad faith cases, not first-party cases. *See Am. Guar. & Liab. Ins. Co. v. King,* 97 P.3d 161, 169 (Colo.App.2003). Further, *Rawlings* is also factually distinguishable. Unlike the situation in *Rawlings,* Pinnacol did not engage in a course of deceitful conduct to impede Zolman's claim. Indeed, the record shows that Pinnacol carefully considered, rather than ignored, her requests for post–MMI care and change of physician. Thus, while the reasonableness of an insured's conduct may be a jury question in cases like *Zilisch* and *Rawlings,* when the record shows proper claim handling by an insurer and the facts as to fair debatability are undisputed, reasonableness may be decided as a matter of law.

Zolman also relies on Ninth Circuit authority to assert that the reasonableness of Pinnacol's conduct was a jury question. While in *Amadeo v. Principal Mutual Life Insurance Co.,* 290 F.3d 1152 (9th Cir.2002), the court found there was sufficient evidence from which a jury could conclude that the insurer failed to investigate the insured's claim at all, the record in this case shows otherwise, and, thus, the reasonableness of Pinnacol's conduct was properly decided as a matter of law. And while in *Hangarter v. Provident Life & Accident Insurance Co.,* 373 F.3d 998 (9th Cir.2004), the evidence showed a biased investigation that called into question the reasonableness of the insurer's denial of a claim, the record here does not show bias as discussed more fully below.

Further, we note that there are a number of other out-of-state cases where the courts ruled that an insured's bad faith claim was properly decided as a matter of law because the record showed (as it does here) a fairly debatable claim and reasonable claim-handling conduct by the insurer. *See LeRette v. Am. Med. Sec., Inc.,* 270 Neb. 545, 705 N.W.2d 41, 49–51 (2005) (reversing a jury verdict finding bad faith where insurer had an arguable basis, rooted in medical opinions, to deny the insured's claim); *Cortez v. Liberty Mut. Fire Ins. Co.,* 885 S.W.2d 466, 469–70 (Tex.App.1994) (where there is uncontroverted evidence of a reasonable basis for terminating benefits, such as an independent medical evaluation, a bad faith claim is properly defeated as a matter of law); *Prince v. Bear River Mut. Ins. Co.,* 56 P.3d 524, 535 (Utah 2002) (where validity of claim for benefits is fairly debatable due to a medical report, denial of the claim cannot be bad faith as a matter of law and summary judgment is proper).

Because we are able to address Zolman's contentions in the context of well-developed Colorado law on the tort of insurance bad faith, we need not rely on Zolman's cited cases from other jurisdictions. In any event, because those cases are distinguishable on their facts, they do not compel us to alter our conclusion that the district court properly granted summary judgment for Pinnacol on Zolman's bad faith claim.

III. C.R.C.P. 59 Motion

Zolman contends the district court erred by denying her motion for reconsideration pursuant to C.R.C.P. 59. We disagree.

A. Standard of Review

[14] A motion to reconsider a summary judgment order, as here, is properly characterized***502** as a motion for new trial under C.R.C.P. 59(d)(4). *Graven v. Vail Assocs., Inc.,* 888 P.2d 310, 316

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WESTERN DISTRIBUTING COMPANY, d/b/a Western Davis, Ltd., a Colorado corporation, and Mike Diodosio Wholesale Liquor Co., a Colorado corporation, Petitioners,

v.

Warren M. DIODOSIO, John Diodosio, and Charles Diodosio, Respondents.

No. 91SC728.

Supreme Court of Colorado,
En Banc.

Nov. 23, 1992.

Rehearing Denied Dec. 14, 1992.

Sellers of liquor wholesale business brought suit against purchaser for breach of employment agreement, consulting services option agreement, and stock purchase provision of purchase and sale agreement. The District Court, Pueblo County, John R. Tracey, J., entered judgment in favor of sellers and appeal was taken. The Court of Appeals, 826 P.2d 383, affirmed. Purchasers petitioned for certiorari. The Supreme Court, Quinn, J., held that jury instruction imposing burden on sellers of proving substantial performance or justifiable excuse for not performing obligations under contracts was required.

Reversed and remanded.

1. Evidence ⚷91

Burden of proving prima facie case for recovery on civil claim is on plaintiff. West's C.R.S.A. § 13-25-127(1).

2. Evidence ⚷96(1)

Burden of proving affirmative defense rests on defendant asserting defense. West's C.R.S.A. § 13-25-127(1).

3. Evidence ⚷96(1)

Once plaintiff establishes prima facie case, defendant may produce evidence to rebut plaintiff's prima facie case, but burden of proof or persuasion on essential elements of claim remains with plaintiff. West's C.R.S.A. § 13-25-127(1).

4. Contracts ⚷332(2)

Elements for breach of contract claim are: existence of contract; performance by plaintiff or some justification for nonperformance; failure to perform contract by defendants; and damages to plaintiff.

5. Contracts ⚷294

"Substantial performance," which is sufficient to state claim for breach of contract, occurs when defendant receives substantially all benefit which was expected, even though all conditions of contract have not been literally performed.

See publication Words and Phrases for other judicial constructions and definitions.

6. Contracts ⚷322(3)

Party seeking to recover for breach of contract bears burden of proving substantial performance of contract or some justifiable reason for nonperformance by preponderance of evidence.

7. Master and Servant ⚷44

Jury instructions, that one seller of wholesale liquor distributor had burden of establishing by preponderance of evidence that obligations under employment agreement were substantially performed or that justification existed for nonperformance and that other seller was justifiably excused from performance of consulting services option agreement, were required in suits for breach of employment contracts.

Senn, Lewis, Visciano, Hoth & Strahle, P.C., Mark A. Senn, Frank W. Visciano, Horowitz & Berrett, P.C., Jay S. Horowitz, Denver, for petitioners.

Cohen, Brame & Smith, P.C., Jeffrey L. Smith, Marisa L. Williams, Denver, for respondents.

Justice QUINN delivered the Opinion of the Court.

In *Diodosio v. Western Distrib. Co.*, 826 P.2d 383 (Colo.App.1991), the court of appeals affirmed a judgment entered on jury verdicts in favor of the plaintiffs, Warren M. Diodosio, John Diodosio, and Charles Diodosio, against the defendants, the Mike Diodosio Wholesale Liquor Company and

WESTERN DISTRIBUTING COMPANY, d/b/a Western Davis, Ltd., a Colorado corporation, and Mike Diodosio Wholesale Liquor Co., a Colorado corporation, Petitioners,

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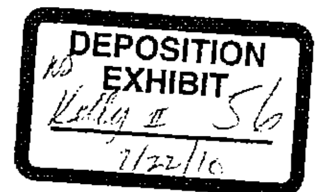

From: Reschly, Scott [scott.reschly@shawgrp.com]
Sent: Friday, July 03, 2009 10:46 PM
To: Farmer, Tim; Nordell, Byron B; Kelly, Gerald J
Cc: Donmoyer, Michael; Follett, Robert; Ezell, Jason; Cunha, Dave; Comanche Unit 3 BOP; Vialpando, Greg; Longanbach, John
Subject: Notification Letter - SSW Ready for Commencement of Steam Blows
Attachments: tf090703 Ready for Commencement of Steam Blows.pdf

Please see attached.

Thanks.

CC 5.35.20

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PLAINTIFF'S
EXHIBIT
285
Case No. 09CV6913

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SETTLEMENT AGREEMENT FOR ALL CLAIMS
(Stone & Webster, Inc.)

THIS SETTLEMENT AGREEMENT ("Agreement"), is entered into and effective as of June 19, 2008, by and between Public Service Company of Colorado, a corporation organized under the laws of the State of Colorado ("PSCo") d/b/a Xcel Energy, and Stone & Webster, Inc., a corporation organized under the laws of the State of Louisiana ("Contractor"). Each of PSCo and Contractor may be referred to in this Agreement individually as a "Party" and collectively as the "Parties."

WITNESSETH:

WHEREAS, PSCo and Contractor entered into that certain Balance of Plant Engineering, Procurement and Construction Contract, dated as of February 1, 2006 (the "BOP Contract"); and

WHEREAS, Contractor is performing Work under the BOP Contract in connection with the construction of a new, approximately 750 mW coal-fired unit at PSCo's Comanche Station ("Comanche 3"); and

WHEREAS, PSCo and Contractor entered into an Interim Settlement Agreement on December 21, 2007 ("Interim Agreement") regarding payment of the costs of per diem and retention bonus programs, without any admission of liability by either Party on any matter, on an interim basis while preserving the Parties' respective rights, providing for further discussions and, if necessary, mediation, in an effort to come to a full and final agreement regarding their disagreements; and

WHEREAS, PSCo and Contractor continued their discussions and participated in mediations on May 21, 2008 and on June 19, 2008; and

WHEREAS, PSCo and Contractor entered into an Agreement in Principle on May 21, 2008 ("Agreement in Principle") to amend the Interim Agreement and, as of that same date, entered into a First Amended Interim Settlement Agreement ("Amended Interim Agreement"); and the Parties subsequently entered into a second Agreement in Principle on June 19, 2008 (together with the Agreement in Principle, the "Agreements in Principle"); and

WHEREAS, on the terms and conditions, and only to the extent, set forth herein, and without any admission of liability or responsibility by either Party, the Parties wish fully and finally to address any and all claims, causes of action, and disputes (collectively, "Claims") between them arising from or relating to (i) Change Order Requests submitted through June 19, 2008, (ii) labor retention and attraction, incentive, and overtime issues, and (iii) all other Claims that have arisen or might exist between the Parties based on occurrences through June 19, 2008.

NOW THEREFORE, in consideration of the mutual covenants and conditions set forth herein, the Parties hereby agree as follows:

RW
GDH

PLAINTIFF'S EXHIBIT 2 Case No. 09CV6913

Return

ARTICLE I

SCOPE OF COVERAGE

Section 1.01 All Claims through June 19, 2008 Covered. Subject to the limitations set forth in Article VII hereof, this Agreement resolves and discharges (i) all of the Change Order Requests and other matters listed in Attachment 1 hereto, (ii) to the extent provided in Article III hereof, all Schedule AD price escalation requests which have been or may be submitted by Contractor in the future, (iii) labor retention and attraction, incentive, and overtime issues, and (iv) all other Claims of either Party by which Contractor or PSCo sought or could have sought an adjustment to the Agreement Price or other relief under the BOP Contract relating to any occurrences through June 19, 2008 including, but not limited to, Non-Conformance Reports ("NCR"), Requests For Information ("RFI"), and Field Change Authorizations ("FCA"). (Items (i), (ii), (iii) and (iv) in this section hereinafter collectively, the "Resolved Claims.")

Section 1.02 Subject Matter of Resolved Claims Also Covered. The Parties agree that the Resolved Claims, as well as the subject matter thereof, are fully and finally resolved and discharged with no relief to Contractor or PSCo other than as expressly provided for or contemplated by this Agreement.

Section 1.03. No Other Presently Planned or Known Potential Claims. Contractor and PSCo each represents and warrants, based on the facts and circumstances as of or prior to June 19, 2008, that it is not preparing, and does not have any present intention to submit, any additional Change Order Requests, deductions, or Claims or knows of (or believes in) any existing conditions that are likely to lead to the submission of any new Change Order Requests, deductions or Claims. Nothing in this section shall limit Contractor's or PSCo's right under the BOP Contract to submit new Change Order Requests, deductions, or Claims based solely on occurrences arising after June 19, 2008 and that do not repeat or arise from or relate in any way to the Resolved Claims.

ARTICLE II

PAYMENTS TO CONTRACTOR

Section 2.01 Lump Sum Payment. Within ten (10) business days of the date of execution of this Agreement, subject to the provision by Contractor of an invoice referencing this Agreement, PSCo shall pay Contractor a lump sum payment in the amount of fifteen million dollars ($15,000,000) by wire transfer.

Section 2.02 Incremental Payments. PSCo shall pay Contractor the additional sum of twenty million dollars ($20,000,000) in five (5) increments as follows: (a) PSCo made an initial advance to Contractor under the Interim Agreement in the amount of four million dollars ($4,000,000), which is fully credited towards the sum due under this section of this Agreement; (b) PSCo made a further payment of four million dollars ($4,000,000) on July 1, 2008 pursuant to the Agreement in Principle and subject to the execution of this Agreement, which is also fully credited towards the sum due under this section of this Agreement; (c) subject to Contractor providing invoices in advance referencing this Agreement, PSCo shall make three (3) further

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ARTICLE VII

SCHEDULE/LIQUIDATED DAMAGES/WARRANTIES

Section 7.01 Milestone Dates. The Parties agree to the target dates listed in Attachment 2. Contractor has developed and furnished to PSCo logic and a CPM schedule to implement these dates, and shall furnish clarifications or updates as reasonably necessary.

Section 7.02 Full Load Liquidated Damages. Contractor's Work shall not prevent Comanche 3 from achieving 750 mW net generation on ("Full Load") by July 6, 2009 (the "Full Load Deadline"). If Contractor's actions or inactions prevent the achievement of such Deadline, then, subject to the BOP Contract limitations, Contractor shall be liable to PSCo for liquidated damages in the amount of one hundred fifty thousand dollars ($150,000) per calendar day for each day after the Full Load Deadline, up to and including the date on which Full Load is achieved ("Full Load Liquidated Damages"), provided that Contractor's liability, if any, for Full Load Liquidated Damages shall end on September 14, 2009, when the BOP Contract provision for liquidated damages relating to Substantial Completion ("Substantial Completion Liquidated Damages") shall supersede the Full Load Liquidated Damages. There shall be no day on which Contractor shall be assessed both Full Load Liquidated Damages and Substantial Completion Liquidated Damages.

Section 7.03 BOP Contract Schedule Liquidated Damages. Anything in this Agreement to the contrary notwithstanding, the provisions of the BOP Contract relating to Liquidated Damages payable if Substantial Completion does not occur by September 15, 2009 shall remain unchanged and unaffected by the Resolved Claims.

Section 7.04 BOP Contract Performance Liquidated Damages. Anything in this Agreement to the contrary notwithstanding, the provisions of the BOP Contract relating to Liquidated Damages for failure to achieve Performance Guarantees shall remain unchanged and unaffected by the Resolved Claims.

Section 7.05 Warranties. The provisions of the BOP Contract relating to Contractor's warranties shall remain unchanged and unaffected by the Resolved Claims except as expressly provided in Section 6.02 of this Agreement provided, however, that PSCo shall not be entitled to declare the Work that is the subject of the above-described NCRs and RFIs to be Defective Work solely because such Work failed to satisfy Contractor's warranties set forth in clauses (ii) or (iii) of Section 12.1.2 of the BOP Contract.

ARTICLE VIII

RESERVATIONS/RELEASES

Section 8.01 Relation to BOP Contract. Terms used, but not defined herein shall have the meanings ascribed to those terms under the BOP Contract. Except to the extent that the duties, obligations, rights, and remedies of a Party are expressly provided, amended, or limited in this Agreement, the Parties shall have all of the duties, obligations, rights, and remedies otherwise imposed or available at law or in equity to the Parties under the BOP Contract. Nothing herein is intended to change any provision of the BOP Contract, except as expressly

ATTACHMENT 2

Critical Activity	Date
Generator rotor set complete	1-Jul-08
Startup transformer ready for backfeed	10-Jul-08
Energize AQCS PDC	1-Aug-08
Energize Coal Handling PDC	15-Aug-08
Generator final assembly	1-Sep-08
Complete weld out LP1 & LP2 dog bone	15-Oct-08
BOP CCW & Aux Cooling system operational	11-Nov-08
Condensate system operational	17-Nov-08
Shaw ready to start Lube Oil flush	15-Dec-08
Instrument Air system operational	15-Dec-08
HRH piping hydro complete / CTO	31-Dec-08
Turbine Lube Oil flush complete/restored	13-Jan-09
Feedwater system piping ready for hydro	15-Jan-09
Pre-boiler chemical cleaning complete/restored	15-Jan-09
Main Steam Piping complete/CTO	15-Jan-09
CRH piping hydro complete / CTO	28-Jan-09
Shaw ready for boiler chemical cleaning	28-Jan-09
Turbine on turning gear	28-Jan-09
Complete all AQCS Electrical and Piping	29-Jan-09
Boiler chemical cleaning complete/restored	10-Feb-09
First Fire gas	23-Feb-09
Start Steam Blow	17-Mar-09
Steam to turbine	4-May-09
First Fire Coal	18-May-09
Full Load	6-July-09
Substantial Completion	15-Sept-09

ARTICLE VII

SCHEDULE/LIQUIDATED DAMAGES/WARRANTIES

Section 7.01 Milestone Dates. The Parties agree to the target dates listed in Attachment 2. Contractor has developed and furnished to PSCo logic and a CPM schedule to implement these dates, and shall furnish clarifications or updates as reasonably necessary.

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ARTICLE VIII

RESERVATIONS/RELEASES

Section 8.01 Relation to BOP Contract. Terms used, but not defined herein shall have the meanings ascribed to those terms under the BOP Contract. Except to the extent that the duties, obligations, rights, and remedies of a Party are expressly provided, amended, or limited in this Agreement, the Parties shall have all of the duties, obligations, rights, and remedies otherwise imposed or available at law or in equity to the Parties under the BOP Contract. Nothing herein is intended to change any provision of the BOP Contract, except as expressly

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SHAW'S IMPACT DAMAGES

	Direct Costs	Markup and Fee	Total
Delay Period A (7/19/08 - 7/6/09)	$21,955,322.19	$2,747,643.73	$24,702,965.92
Delay Period B (7/6/09 - 1/3/10)	$12,082,035.02	$1,414,376.62	$13,496,411.64
Additional Changes	$3,117,050.42	$216,247.42	$3,333,297.84
Unplanned Overtime Premium Costs	$3,658,217.56	$567,023.72	$4,225,241.28
Loss of Productivity	$23,863,450.81	$3,698,834.88	$27,562,285.68
Incremental Field Overhead	$8,950,584.89	$1,387,340.66	$10,337,925.55
Additional Subcontractor Costs [a]	$3,115,252.60	$482,864.15	$3,598,116.75
Total [b]	$76,741,913.48	$10,514,331.17	$87,256,244.66

[a] Includes additional costs paid and pending change orders/claims asserted by Subcontractors (Farwest and Scheek) of which $1,512,090.11 is included in Shaw's job costs.
[b] Excludes interest, costs and fees associated with claims preparation and litigation and COR No. 96.

Plaintiff's
Exhibit 1083
Case No: 09CV6913

CHANGE ORDER

CONTRACT / WORK ORDER / PURCHASE ORDER NO: **M170608**	CHANGE ORDER NO.: **023**
CONTRACT AGREEMENT DATED: February 1, 2006	CHANGE ORDER EFFECTIVE DATE: October 27, 2008
DOCUMENT NO:	INTERNAL ADMINISTRATIVE CHANGE NO: ***For Internal Company Use Only***

COMPANY

☒ Public Service Company of Colorado
☐ Northern States Power Company (Wisconsin)
☐ Northern States Power Company (Minnesota)
☐ Xcel Energy Services Inc.
☐ Southwestern Public Service Company

Herein After Referred To As The "COMPANY"

CONTRACTOR/SUPPLIER/CONSULTANT/AGENCY: **Stone & Webster, Inc.**

CONTRACT / PURCHASE ORDER TITLE: **Balance of Plant Engineering, Procurement, and Construction (BOP)**

This Change Order constitutes the authority for the following changes in the scope of work and/or total cost of the Work, and/or other changes to the Contract Documents, as provided in the above referenced Contract Agreement/ Work Order/Purchase Order Number and/or Document Number (the Contract Documents).

Change Order Number 023 is issued to make the following change(s) to the above Contract Agreement/Purchase Order Number as follows:

1. Company hereby assumes responsibility for the "Boiler Electrical" Scope of Work and removes same from Contractor's Schedule A – Scope of Work. Company has awarded this "Boiler Electrical Work" to Frauenshuh Power Development LLC (FPD) and Company is responsible to ensure that FPD is productive in this Work. The following data and information is to remove the **labor and associated supervision and support** of the "Unit 3 Boiler Electrical Installation" as identified below.

   a. Remove the following:

- Install Gaitronics as required by the BOP contract and shown on drawings D017803-SICUE13300-S01 R00 and –S02 R00.
- Install Lighting and receptacles as required by the BOP contract shown on drawings D017803-SIELE03030-S01 R00 through – S47 R00, SIILE03030-S35 R02 through S36 R02 and SIILE43030-S01 R02.
- Install cable tray as required by the BOP contract and shown on drawings D017803-SIMBE03303-S01 R02, -S02 R00, S03 R01, S04 R00, S05 R00, S06 R02, S07 R01, S08 R00, S09 R00, S10 R01, S11 R01, S12 R01, S13 R00, S14 R01, S15 R00, S16 R01, S17 R00 and S18 R00.
- Install all cable, continuity checks, terminations, and associated conduit.
- Area cleanup during working in those areas.
- All required safety personnel.
- All required small tools, consumables, and construction equipment.

   b. The following will remain the responsibility of the BOP Contractor

- Permanent plant materials will be supplied by BOP Contractor.
- All engineering and construction documents, for non field route items, will be by BOP Contractor
- Startup responsibilities will remain with the BOP Contractor.

Plaintiff's Exhibit 10

Case No: 09CV6913

2. Both parties have prepared separate calculations of what they believe the cost of the remaining boiler electric work is based upon the given quantities, shown in Attachments 1 and 2, that have been provide by the BOP Contractor. Attachment 1 includes the Company's estimate and Attachment 2 includes the BOP Contractor's estimate. These estimates will be adjusted when the work is complete by the actual quantities that are installed. Actual quantities shall not include re-work due to FPD installation errors or for quantities for which the Contractor would have been due a change order under the original contract, or excess quantities due to FPD waste, damage, or loss. BOP Contractor has agreed to be responsible for actual costs without Company mark up or Company cost, up to the estimated total cost show in Attachment 2 after it has been adjusted to the actual quantities installed. Attachment 1 is Company's estimate for the cost of the Work, which will be adjusted to final quantities installed. If the actual cost of the work exceeds the estimated total value of Attachment 2 (adjusted for final quantities) the amount up to the value of Attachment 2 (adjusted for final quantities) will be covered by the BOP Contractor and the amount that exceeds the value of Attachment 2 (adjusted for final quantities) up to the value of Attachment 1 (adjusted for final quantities) will be split between BOP Contractor and Company, anything over the value of Attachment 1 (adjusted for final quantities) will be covered by Company.

3. Company shall report all quantity and cost information in a mutually acceptable form, on a weekly basis to the BOP Contractor and BOP Contractor shall have full audit rights to FPD files for the Work under this Change Order. When this Change Order Work is completed, the actual quantities required to perform the Work will be determined and confirmed by both parties. Once

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CHANGE ORDER

CONTRACT / WORK ORDER / PURCHASE ORDER NO: **M170608**	CHANGE ORDER NO.: **023**
CONTRACT AGREEMENT DATED: February 1, 2006	CHANGE ORDER EFFECTIVE DATE: October 27, 2008
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Change Order Number 023 is issued to make the following change(s) to the above Contract Agreement/Purchase Order Number as follows:

1. Company hereby assumes responsibility for the "Boiler Electrical" Scope of Work and removes same from Contractor's Schedule A – Scope of Work. Company has awarded this "Boiler Electrical Work" to Frauenshuh Power Development LLC (FPD) and Company is responsible to ensure that FPD is productive in this Work. The following data and information is to remove the **labor and associated supervision and support** of the "Unit 3 Boiler Electrical Installation" as identified below:

   a. Remove the following:

- Install Gaitronics as required by the BOP contract and shown on drawings D017803-SICUE13300-S01 R00 and –S02 R00.
- Install Lighting and receptacles as required by the BOP contract shown on drawings D017803-SIELE03030-S01 R00 through –S47 R00, SIILE03030-S35 R02 through S36 R02 and SIILE43030-S01 R02.
- Install cable tray as required by the BOP contract and shown on drawings D017803-SIMBE03303-S01 R02, -S02 R00, S03 R01, S04 R00, S05 R00, S06 R02, S07 R01, S08 R00, S09 R00, S10 R01, S11 R01, S12 R01, S13 R00, S14 R01, S15 R00, S16 R01, S17 R00 and S18 R00.
- Install all cable, continuity checks, terminations, and associated conduit.
- Area cleanup during working in those areas.
- All required safety personnel.
- All required small tools, consumables, and construction equipment.

   b. The following will remain the responsibility of the BOP Contractor

- Permanent plant materials will be supplied by BOP Contractor.
- All engineering and construction documents, for non field route items, will be by BOP Contractor
- Startup responsibilities will remain with the BOP Contractor.

Plaintiff's Exhibit 10

Case No: 09CV6913

2. Both parties have prepared separate calculations of what they believe the cost of the remaining boiler electric work is based upon the given quantities, shown in Attachments 1 and 2, that have been provide by the BOP Contractor. Attachment 1 includes the Company's estimate and Attachment 2 includes the BOP Contractor's estimate. These estimates will be adjusted when the work is complete by the actual quantities that are installed. Actual quantities shall not include re-work due to FPD installation errors or for quantities for which the Contractor would have been due a change order under the original contract, or excess quantities due to FPD waste, damage, or loss. BOP Contractor has agreed to be responsible for actual costs without Company mark up or Company cost, up to the estimated total cost show in Attachment 2 after it has been adjusted to the actual quantities installed. Attachment 1 is Company's estimate for the cost of the Work, which will be adjusted to final quantities installed. If the actual cost of the work exceeds the estimated total value of Attachment 2 (adjusted for final quantities) the amount up to the value of Attachment 2 (adjusted for final quantities) will be covered by the BOP Contractor and the amount that exceeds the value of Attachment 2 (adjusted for final quantities) up to the value of Attachment 1 (adjusted for final quantities) will be split between BOP Contractor and Company, anything over the value of Attachment 1 (adjusted for final quantities) will be covered by Company.

3. Company shall report all quantity and cost information in a mutually acceptable form, on a weekly basis to the BOP Contractor and BOP Contractor shall have full audit rights to FPD files for the Work under this Change Order. When this Change Order Work is completed, the actual quantities required to perform the Work will be determined and confirmed by both parties. Once

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CHANGE ORDER

confirmed and agreed to, Attachment 1 and Attachment 2 will be recalculated and the costs will be allocated as stated in section 2 above. Then this Change Order value will be adjusted up or down based on such adjusiments.

4. The BOP Contractor shall be responsible for permanent plant material quantity risks and shall provide all permanent plant materials required for the Work under this Change Order. Xcel will accept all schedule risk for the Work.

5. Xcel shall be able to pass on, without markup, additional third party man-lifts and scaffolding costs up to $200,000. The total of these costs will be determined and added to the Change Order cost when the Work is complete. Complete documentation and backup will be available to BOP Contractor for review on a weekly basis.

6. The adjustment of the contract value for the removal of this Electrical Scope will be deducted from the following payment milestones. A final change to payment milestone BOP-252 will be processed when the Change Order Work is completed per Section 3 above.

a.	BOP-190	Boiler Area Cable Tray Install Complete	- $1,031,997
b.	BOP-242	Boiler Area Power Cable & Terminations Complete	- $2,683,193
c.	BOP-252	Mechanical Completion	- $ 407,960
	Total		- $4,123,150

7. This Change Order fully and finally addresses, resolves and discharges any and all claims, causes of action and disputes, known or unknown, including impact claims, if any (under that or any other name), (collectively, "Claims") between the Parties arising out of, in connection with, concerning or relating to, directly or indirectly, the reduction to the Contractor's Scope of Work in the Boiler described by this Change Order that have arisen to date, or might exist at present (whether known or unknown). Nothing herein is intended to change any provision of the BOP Contract, except as expressly stated herein or as necessarily required by the terms of this Change Order.

8. Schedule E – Payment and Maximum Drawdown Schedule is hereby deleted in its entirety and replaced with Schedule E – Payment and Maximum Drawdown Schedule, Rev. 17, attached hereto as Exhibit A.

Original Contract Amount:	$	412,798,883
All Previous Change Orders	$	40,626,398
This Change Order (Base Value to be adjusted when work complete)	$	-4,123,150
New Contract Total:	$	**449,302,131**

All other terms and conditions shall remain unchanged.

CONTRACTOR
ACCEPTED:
Stone & Webster, Inc.
Contractor/Supplier/Consultant/Agency Name

By: [signature]
Authorized Representative

Printed Name: ROBERT FOLLETT
Date: 11/18/08
Title: PROJECT DIRECTOR

COMPANY
ACCEPTED: Xcel Energy Services Inc.
Acting as an agent for: Public Service Company of Colorado
A Colorado Corporation d/b/a Xcel Energy

By: [signature]
Authorized Representative

Printed Name: Wm Kle Hussen
Date: 11/20/08
Title: Managing Director Supply Chain

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XESI001839482

CHANGE ORDER

CONTRACT / WORK ORDER / PURCHASE ORDER NO: **M170608**	CHANGE ORDER NO.: **023**
CONTRACT AGREEMENT DATED: February 1, 2006	CHANGE ORDER EFFECTIVE DATE: October 27, 2008
DOCUMENT NO:	INTERNAL ADMINISTRATIVE CHANGE NO: ***For Internal Company Use Only***

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- Install all cable, continuity checks, terminations, and associated conduit.
- Area cleanup during working in those areas.
- All required safety personnel.
- All required small tools, consumables, and construction equipment.

   b. The following will remain the responsibility of the BOP Contractor

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Plaintiff's Exhibit 10

Case No: 09CV6913

2. Both parties have prepared separate calculations of what they believe the cost of the remaining boiler electric work is based upon the given quantities, shown in Attachments 1 and 2, that have been provide by the BOP Contractor. Attachment 1 includes the Company's estimate and Attachment 2 includes the BOP Contractor's estimate. These estimates will be adjusted when the work is complete by the actual quantities that are installed. Actual quantities shall not include re-work due to FPD installation errors or for quantities for which the Contractor would have been due a change order under the original contract, or excess quantities due to FPD waste, damage, or loss. BOP Contractor has agreed to be responsible for actual costs without Company mark up or Company cost, up to the estimated total cost show in Attachment 2 after it has been adjusted to the actual quantities installed. Attachment 1 is Company's estimate for the cost of the Work, which will be adjusted to final quantities installed. If the actual cost of the work exceeds the estimated total value of Attachment 2 (adjusted for final quantities) the amount up to the value of Attachment 2 (adjusted for final quantities) will be covered by the BOP Contractor and the amount that exceeds the value of Attachment 2 (adjusted for final quantities) up to the value of Attachment 1 (adjusted for final quantities) will be split between BOP Contractor and Company, anything over the value of Attachment 1 (adjusted for final quantities) will be covered by Company.

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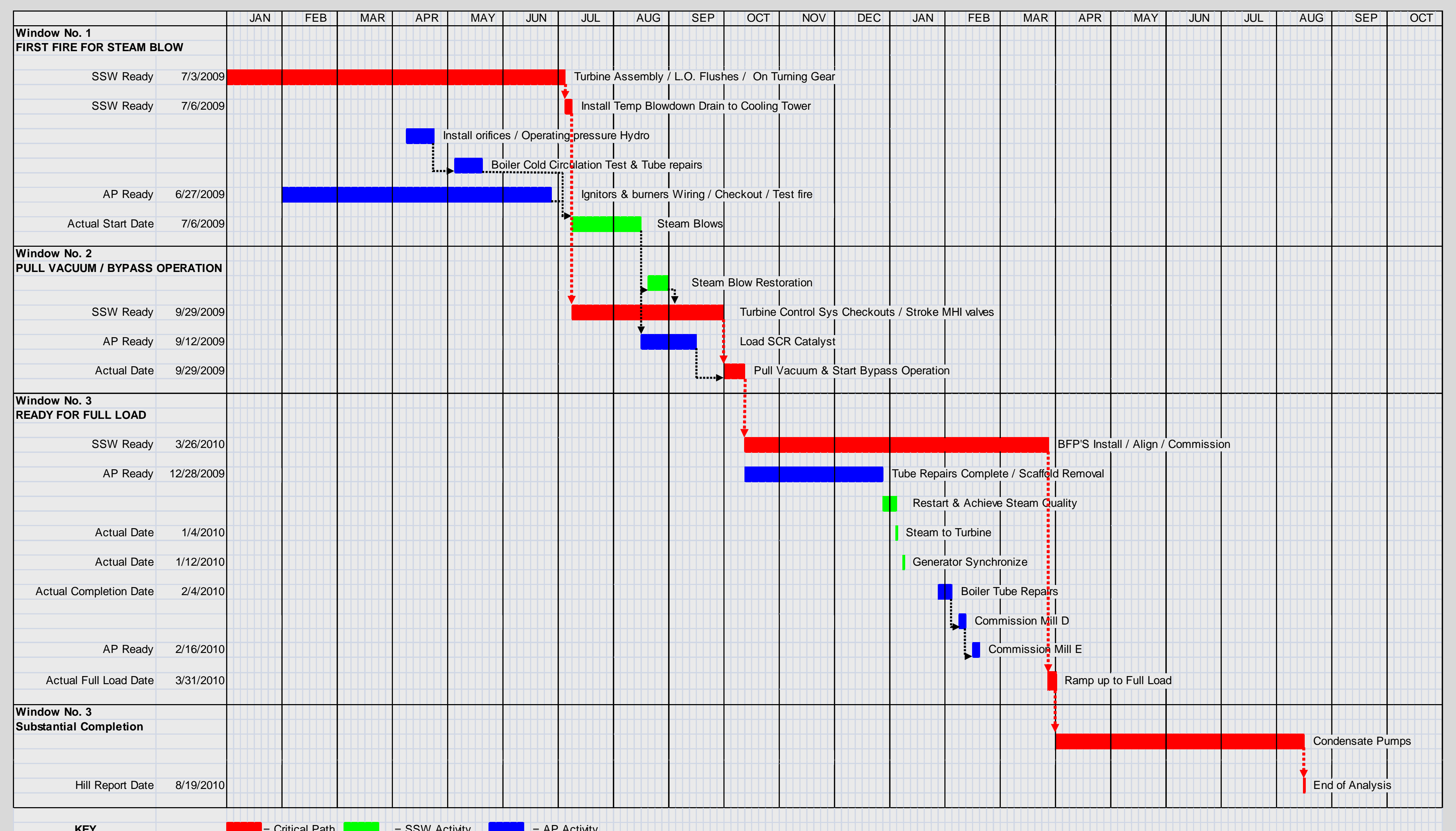
XESI001839481

Full Critical Path Analysis



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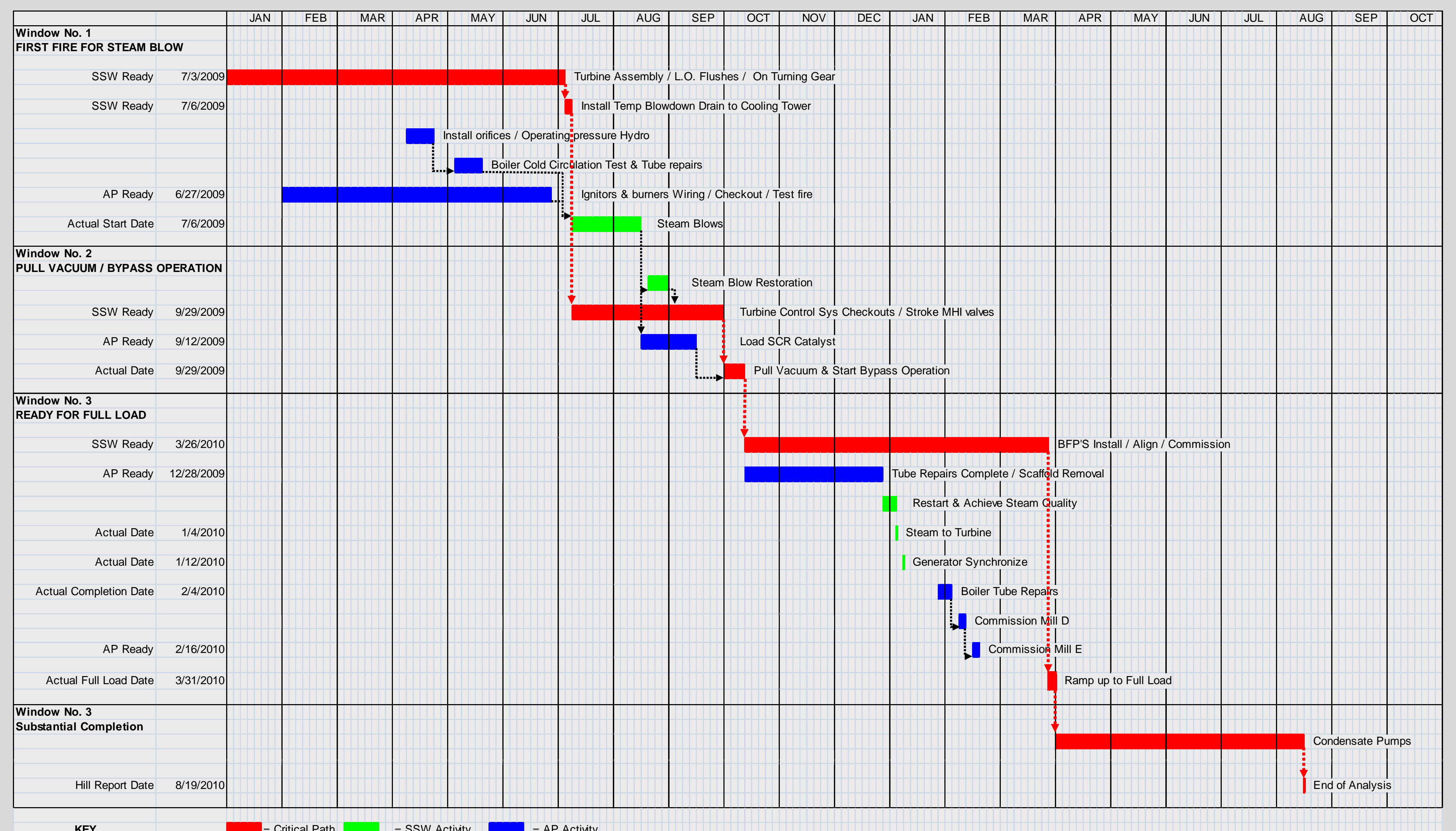
Full Critical Path Analysis



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Shaw's Replacement Contractor and Other Costs

Item		Amount
Change Order 23 (Boiler Electrical)	$	10,766,236
Change Order 26 (Boiler Vents and Drains)		1,794,063
Change Order 27 (Superheater Spray Water Line)		378,890
Change Order 28 (AQCS Mechanical and Piping)		5,292,056
Change Order 31 (Boiler Mechanical and Piping)		3,754,527
Change Order 33 (Fire Protection System)		843,147
Change Order 35 (Utility Drop Work)		1,192,990
Pending Change Orders		1,501,151
Claimed Replacement Contractor Costs	**$**	**25,523,060**
Additional Public Service Employees	$	1,417,677
Claimed Replacement Contractor and Other Costs	**$**	**26,940,737**

Shaw's Replacement Contractor and Other Costs

Change Order 23 (Boiler Electrical)	$	10,766,236
Change Order 26 (Boiler Vents and Drains)		1,794,063
Change Order 27 (Superheater Spray Water Line)		378,890
Change Order 28 (AQCS Mechanical and Piping)		5,292,056
Change Order 31 (Boiler Mechanical and Piping)		3,754,527
Change Order 33 (Fire Protection System)		843,147
Change Order 35 (Utility Drop Work)		1,192,990
Pending Change Orders		1,501,151
Claimed Replacement Contractor Costs	**$**	**25,523,060**
Additional Public Service Employees	$	1,417,677
Claimed Replacement Contractor and Other Costs	**$**	**26,940,737**

Adjustments to Claimed Delay Related Daily Rate

	Delay Rate Period 1 07/01/08 – 06/30/09	Delay Rate Period 2 07/01/09 – 12/31/09
MRI Delay Related Daily Rate	$ 174,249	$ 113,981
Less: Non-Time Related Costs	(88,510)	(56,339)
Less: Overstated Costs	(29,936)	(20,331)
Corrected Daily Rate	**$ 55,803**	**$ 37,311**
Daily Rate w/ Markup and Fee	**$ 64,452**	**$ 43,094**

From: Koch, Judy
Sent: Wednesday, July 16, 2008 9:20 PM
To: Ezell, Jason
Cc: Reschly, Scott
Subject: FW: Wednesday

Attachments: PF Issues 07-15-08.doc

Jason,

Attached is my write-up when talking to the Superintendents about what is affecting their PFs - past and future.

See me with questions. I'm bringing you a hard copy.

Judy A. Koch, MSA
Cost Analyst 3
Fossil Project Controls
Shaw Power Group
Comanche Unit #3 BOP
2001 Lime Rd.
Pueblo, CO 81006
719.296.5064 - direct
720.219.8378 - cell
719.296.5026 - fax

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-----Original Message-----
From: Reschly, Scott
Sent: Wednesday, July 16, 2008 1:26 PM
To: Koch, Judy
Subject: RE: Wednesday

Thanks for what you did here. Send a copy of this previous chain and attach what you did. Send to Jason and I. Give him a hard copy.

Scott Reschly, MBA
Project Controls Manager
Fossil Project Controls
Shaw Power Group
719-296-5016 Office
719-296-5026 Fax
303-868-2552 Cell

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www.shawgrp.com

-----Original Message-----
From: Koch, Judy
Sent: Monday, July 14, 2008 2:46 PM
To: Reschly, Scott
Subject: RE: Wednesday

Give me the rest of today and some tomorrow morning to talk to the guys and put

CO-23 Electrical Material Overruns

ITEM	UNIT	BASELINE QUANTITY	ACTUAL QUANTITY	CHANGE (+/-)	CHANGE (%)
CABLE	Lf	325,918	751,619	425,701	131%
TERMINATIONS	Ea	8,378	24,486	16,108	192%
CONDUIT	Lf	116,173	241,572	125,399	108%
CABLE TRAY	Lf	2,697	5,149	2,452	91%
LIGHTING CONDUIT	Lf	20,400	70,266	49,866	244%
LIGHTING WIRE	Lf	81,599	205,692	124,093	152%
LIGHTING TERMINATIONS	Ea	4,345	9,279	4,934	114%
LIGHTING FIXTURES	Ea	1,086	915	(171)	-16%
RECEPTACLES & PHOTO CELLS	Ea	132	363	231	175%
PHOTO CELL BOXES	Ea	10	10	0	0%
MISC ELECTRICAL EQUIPMENT	Ea	17	107	90	537%
JUNCTION BOXES	Ea	53	191	138	260%
GAI-TRONICS	Ea	35	35	0	0%
HVAC (HEATERS)	Ea	88	41	(47)	-53%

CO-23 Electrical Material Overruns

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HVAC (HEATERS)	Ea	88	41	(47)	-53%

rights shall continue unchanged and remain in full force and effect.

23.9 Entire Agreement.

This Agreement contains the entire agreement between the Parties with respect to the subject matter hereof, and supersedes any and all prior and contemporaneous written and oral agreements, proposals, negotiations, warranties, guarantees, understandings and representations pertaining to the subject matter hereof.

23.10 Amendments.

No amendments or modifications of this Agreement shall be valid unless evidenced in writing and signed by a duly authorized representative of the Party against which enforcement is sought.

23.11 No Third Party Rights.

This Agreement and all rights hereunder are intended for the sole benefit of the Parties and, to the extent expressly provided, for the benefit of the Financing Parties and the Company Indemnitees, and shall not imply or create any rights on the part of, or obligations to, any other Person.

23.12 Company's Obligations Non-recourse.

The Parties acknowledge that Company has entered into this Agreement on its own behalf as an owner of the Facility and as an agent, if applicable, for any Co-Owners, but in no manner on behalf of its Affiliates. The Parties acknowledge that Contractor shall not have any recourse against any of Company's Affiliates, members, partners, joint venturers, officers, directors, employees, any Financing Party or any Co-Owner for any reason.

23.13 Relationship of the Parties.

Contractor shall be an independent contractor with respect to the Boiler Facility, each part thereof, and the Work, and neither Contractor nor its Subcontractors nor the Personnel of either shall be deemed to be agents, representatives, employees or servants of Company in the performance of the Work, or any part thereof, or in any manner dealt with in this Agreement. Company shall have neither the right to control, nor have any actual, potential or other control over, the methods and means by which Contractor or any of its Personnel or subcontractors conducts its independent business operations. Contractor shall not perform any act or make any representation to any Person to the effect that Contractor, or any of its Personnel or Subcontractors is the agent, representative, employee or servant of Company.

23.14 Publicity.

All public relations matters arising out of or in connection with this Agreement shall be Company's responsibility. Contractor shall obtain prior approval of the text of any advertising or promotional literature or material, news or press release or any other publication or publicity in any form or medium concerning this Agreement, the Facility or the Work prior to any dissemination or release by Contractor or any Subcontractors. Contractor shall not use or include Company's or Xcel Energy's name or the name of any Co-Owner (other than Company) of any part of the Facility in any customer or client lists or references without the prior written permission of Company. Contractor shall refer all media inquiries with respect to this Agreement, the Work or the Facility to Company.

Highly Confidential Pursuant to Protective Order XESI014955379

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Highly Confidential Pursuant to Protective Order XESI014955379

From: Warwick, James
Sent: Thursday, October 16, 2008 4:23 PM
To: Ezell, Jason; Moody, James; Nayak, Ram; Turner, Jim; Moore, Sonja
Subject: Disciplinary Action Melvin Carroll

Attachments: Carroll Reprimand.doc; Disciplinary Record Form.doc

All,

For your review.

Sonya,

I think we need to put warnings in from site management and the proper dates accordingly.

I know James Moody has had some discussions with Melvin

Jim Warwick

Manager, Orbital Welding/Heat Treatment

Shaw Power/Construction

1430 Enclave Parkway

Houston, TX. 77077

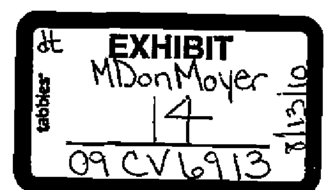
281.368.3812 Direct

832.755.3769 Mobile

281.368.3801 Fax

james.warwick@shawgrp.com

SW 02257591



From: Follett, Robert
Sent: Friday, October 03, 2008 1:24 PM
To: Donmoyer, Michael; Ezell, Jason
Subject: Re: Craft Layoff

We will do it but we may not make first fire schedule.
Bob Follett
Director, Construction Operations
Shaw, Fossil Power Division
Centennial, CO 80112
Office: 303-741-7448
Cell: 303-570- 3595

From: Donmoyer, Michael
To: Follett, Robert; Ezell, Jason
Sent: Fri Oct 03 05:40:38 2008
Subject: Craft Layoff

Bob and Jason

I talked to Monty (he called at 4:30am on his way to see JB) He wants to confirm we are proceeding with the craft RIF immediately to get the craft labor down by He said 30% I said 20-25%. After the RIF we will re-evaluate going forward.

Michael R DonMoyer
Manager of Projects - Coal
Shaw Power Group
9201 E Dry Creek Road
Centennial, Colorado 80112
303.741.7344 direct
303.882.0076 cell
303.741.7703 fax

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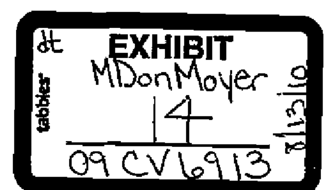

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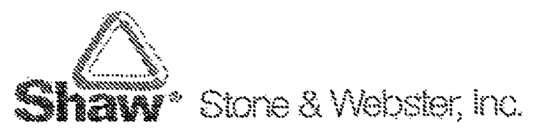
SW 02280151

EXHIBIT
64
AGREN BLANDO REPORTING
7-9-10 PO



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December 10, 2008

Mr. Tim Farmer
Project Director
Public service of Colorado d/b/a
Xcel Energy
550 15th Street, Suite 1200
Denver, CO 80202

RE: Comanche Unit #3 BOP Contract

Subject :Delay Notification – PSCo Boiler Completion

Dear Mr. Farmer,

Since June 19, 2008, we have spent millions of dollars in a good faith effort to meet the Target Dates in the Settlement Agreement, and in most cases, we have succeeded. Meanwhile, your boiler contractor continues to fall behind schedule. At the time we negotiated the Settlement Agreement, boiler hydro was scheduled to take place by November 21, 2008. That date has long since passed.

We have now been told that boiler hydro will take place by January 29, 2009, but we have serious doubts about the validity of that date. To achieve it, the boiler contractor would have to perform a significant amount of work during the worst season of the construction year and do it at a productivity rate far better than anything that has been achieved on the site to date. The staffing curves you recently provided show that the boiler contractor plans on maintaining craft levels above 400 men into the March time frame which strongly suggests he will not be ready for hydro by the end of January. Even if the boiler contractor completes the mechanical portion of his work, January will be too late to perform the actual hydro testing due to the danger of freeze damage. We have considerable experience with boiler erection, and it is impossible to completely drain all of the cavities once the boiler has been filled. We also note that the boiler is being insulated prior to hydro. That is contrary to the best industry practice. Any leaks discovered during hydro will be difficult to repair and will cause further delay in completing the test.

Given these facts, we believe that the boiler hydro will probably not be completed until late March. Under the terms of the Settlement Agreement, we have 94 days to achieve first fire after boiler hydro. That means that first fire will occur no sooner than June 11, 2009. Under the circumstances, it is pointless for us to waste money chasing interim Target Dates which have been rendered moot by your boiler contractor. Therefore, we intend to reschedule our remaining work assuming a boiler hydro date of March 15, 2009 and to adjust our field efforts to support that schedule in the most cost-efficient way possible. This will involve a substantial reduction in our field forces and a return to a forty hour week wherever possible. If it appears that your boiler contractor will beat the March 15 date, we will adjust our efforts accordingly.

It is also obvious that the ongoing delay in boiler hydro will delay Substantial Completion. Under separate cover, we will provide you with Change Order Request CR-087 for the anticipated schedule and cost impacts of this delay in accordance with BOP Contract Article 13.

If you have any questions related to this correspondence, please contact me as shown below or when I am at the Jobsite.

Best Regards,

Robert Follett
Project Director
Stone & Webster, Inc.

RF/gv

cc: 5.35.20

9201 EAST DRY CREEK ROAD • CENTENNIAL, CO 80112
DIRECT 303.741.7700 • FAX 303 741 7680 • THE SHAW GROUP INC.®

081211 Boiler Delay Notification.doc

SW 02187702

EXHIBIT
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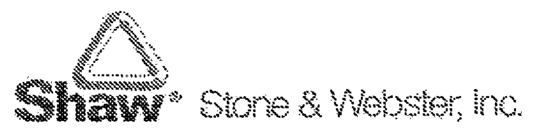
AGREN BLANDO REPORTING
7-9-10 DO



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Project Director
Public service of Colorado d/b/a
Xcel Energy
550 15th Street, Suite 1200
Denver, CO 80202

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Best Regards,

Robert Follett
Project Director
Stone & Webster, Inc.

RF/gv

cc: 5.35.20

9201 EAST DRY CREEK ROAD • CENTENNIAL, CO 80112
DIRECT 303.741.7700 • FAX 303 741 7680 • THE SHAW GROUP INC.®

081211 Boiler Delay Notification.doc

SW 02187702

Xcel Energy
2001 Lime Road
Pueblo, CO 81006
719-549-0351
Fax: 719-549-0375

EXHIBIT
95
AGREEN BLANDO REPORTING
7-9-10 nr

SSW Stone & Webster, Inc.
9201 E. Dry Creek Road
Centennial, CO 80112

May 7, 2009
BOP-09-032

Subject: Response to SSW-CR-087 Rev 1 COR for Xcel Delays after June 19, 2008[1]

Reference: 1. Balance of Plant Engineering, Procurement and Construction Contract (the "BOP Contract") dated February 1, 2006 between Public Service Company of Colorado d/b/a Xcel Energy and Stone & Webster, Inc. ("SSW") for the Comanche Unit 3 Project. Capitalized terms used but not defined herein shall have the meanings ascribed to them in the BOP Contract.[2]

Attention: Robert Follett
Tel: 303-741-7448
Email: Robert.Follett@SSWgrp.com

Dear Mr. Follett:

Public Service Company of Colorado d/b/a Xcel Energy has reviewed SSW's Change Order Request letter, "SSW-CR-087 Rev 1 COR for Xcel Delays after June 19, 2008" (along with the supporting attachments), and, based on the available information, cannot grant the request at this time. The issues SSW raises with respect to entitlement are familiar, and, as you are aware, Xcel Energy does not share SSW's views regarding responsibility for schedule delays, the productivity claim, and the acceleration claim.

Notwithstanding the foregoing, Xcel Energy is willing to review a resubmitted Change Order Request provided that it contains (i) supporting documentation of SSW's assertions as to entitlement to and amount of relief and (ii) anything else SSW believes would be useful for a discussion of SSW's entitlement to the requested Change Order. The Change Order Request, as submitted, omits adequate supporting documentation in a number of areas. First, the Change Order Request lacks sufficient documentation concerning the delay claim. For example, missing from the request is SSW's analyses of the critical path and its current schedule, its own delays, concurrent delays, and delays through Substantial Completion. Second, the Change Order Request lacks sufficient documentation concerning the claimed productivity impact. For example, the request does not include a description of specific activities in the boiler and other areas that were impacted, the hours expended in these areas, and a comparison of SSW productivity in impacted and unimpacted areas. Third, the Change Order Request lacks sufficient documentation concerning the quantum of the requested relief. For example, the request does not support the daily costs for overhead and general conditions, explain when and where overtime was incurred or how SSW could have met the milestones in the Settlement Agreement absent overtime, or justify the to-go costs.

Without further development of the basis for entitlement and adequate documentation, Xcel Energy does not approve the Change Order Request. If SSW wishes to resubmit the Change Order Request with appropriate supporting documentation along the lines discussed above, Xcel Energy will evaluate that request. In such a resubmission, SSW should address fully all issues of entitlement to and

[1] Public Service Company of Colorado d/b/a Xcel Energy understands that the March 25, 2009 revised SSW-CR-087 supersedes prior versions of the submission. Accordingly, Xcel Energy only responds to the most recent revision.

[2] Other capitalized terms not defined herein have meanings set forth in the BOP Contract or the June 19, 2008 Settlement Agreement.

From: Glover, Monty
Sent: Monday, June 23, 2008 3:38 PM
To: Davis, Bruce
Subject: RE: Comanche

Bruce,
Thanks, I don't like Charlie's tone a cha approach, I still wonder what changed from Boston to Denver.

R. M. "Monty" Glover

President

Fossil Power

Shaw Power Group

128 South Tryon Street

Charlotte, NC 28202

704.331.7876 direct

713.213.7896 cell

225.987.3427 e-fax

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From: Davis, Bruce
Sent: Monday, June 23, 2008 11:31 AM
To: Glover, Monty
Subject: FW: Comanche

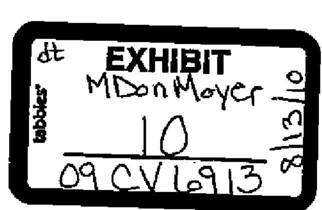
It's been posted. Donmoyer is talking to Bradley now.

Bruce M. Davis
Vice President
Shaw Power Group
Fossil / Coal
128 South Tryon Street, Suite 600
Charlotte, NC 28202
704.343.7526 (office)
704.331.6001 (fax)
704.340.7561 (mobile)

From: King, Charles
Sent: Monday, June 23, 2008 9:59 AM
To: Donmoyer, Michael; Davis, Bruce
Cc: Reschly, Scott
Subject: FW: Comanche

Attached is the revised Monthly Report for May 2008 based on changing the assumptions as listed below.

As we discussed in our conference call last nite these are very aggressive assumptions in light of our recent experience.



SW 04712631

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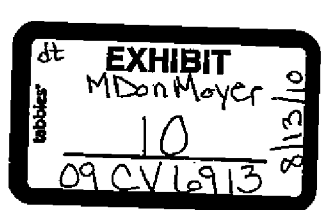


SW 04712631

From: Ezell, Jason
Sent: Monday, December 08, 2008 11:35 PM
To: Follett, Robert
Subject: RE: F519 Client Feedback

Does this mean that I am not doing my job?? I am starting to get a little concerned that this may be the general opinion. I heard from Scott that Walt Sanders was grilling him at the Christmas party about why we just realized that first fire was going to slip to April, we have known that since we finished our layoff's back in October when the superintendants reworked their schedules. My concern is that this is the message that is being sent up the ladder as well as to the client in our cat and mouse game reflects on the way the project is being managed and in the end, I will be held responsible. We have known that the PF was probably not going to be better than a 1.4 since back in September when we worked it out on the board in my office, we had piping at 1.25 and electrical at 1.35 but nobody wanted to publicize this info. I semi understand the game but I don't want to be the one tied to the post in front of the firing squad when the judgment comes down. Just thought I would let you know.

Jason Ezell
Construction Site Manager
Shaw/Stone&Webster Construction
Comanche Unit 3 BOP Project
2001 Lime Road
Pueblo Co. 81006
409-284-2650 - Mobile
719-296-5005 - Office
www.shawgrp.com

-----Original Message-----
From: Follett, Robert
Sent: Monday, December 08, 2008 3:05 PM
To: Ezell, Jason
Cc: Peterson, Tammy; Mills_jr, Andrew (DEN)
Subject: FW: F519 Client Feedback

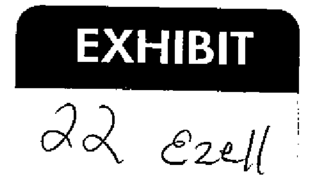
FYI
Please ensure it is placed in documentum

Bob Follett
Director, Construction Operations
Shaw, Fossil Power Division
Centennial, CO 80112
Office; 303-741-7448
Cell; 303-570-3595
robert.follett@shawgrp.com

-----Original Message-----
From: Farmer, Tim [mailto:tim.farmer@xcelenergy.com]
Sent: Monday, December 08, 2008 3:02 PM
To: Follett, Robert
Cc: Comanche 3 Project
Subject: F519 Client Feedback

Per your request.

Tim Farmer
Comanche 3 Project Director
2001 Lime Road, Pueblo, CO 81006
719-549-0351
cell 303-250-3386



SW 02258370

From: Ezell, Jason
Sent: Monday, December 08, 2008 11:35 PM
To: Follett, Robert
Subject: RE: F519 Client Feedback

Does this mean that I am not doing my job?? I am starting to get a little concerned that this may be the general opinion. I heard from Scott that Walt Sanders was grilling him at the Christmas party about why we just realized that first fire was going to slip to April, we have known that since we finished our layoff's back in October when the superintendants reworked their schedules. My concern is that this is the message that is being sent up the ladder as well as to the client in our cat and mouse game reflects on the way the project is being managed and in the end, I will be held responsible. We have known that the PF was probably not going to be better than a 1.4 since back in September when we worked it out on the board in my office, we had piping at 1.25 and electrical at 1.35 but nobody wanted to publicize this info. I semi understand the game but I don't want to be the one tied to the post in front of the firing squad when the judgment comes down. Just thought I would let you know.

Jason Ezell
Construction Site Manager
Shaw/Stone&Webster Construction
Comanche Unit 3 BOP Project
2001 Lime Road
Pueblo Co. 81006
409-284-2650 - Mobile
719-296-5005 - Office
www.shawgrp.com

-----Original Message-----
From: Follett, Robert
Sent: Monday, December 08, 2008 3:05 PM
To: Ezell, Jason
Cc: Peterson, Tammy; Mills_jr, Andrew (DEN)
Subject: FW: F519 Client Feedback

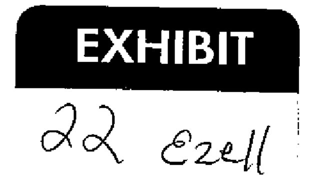
FYI
Please ensure it is placed in documentum

Bob Follett
Director, Construction Operations
Shaw, Fossil Power Division
Centennial, CO 80112
Office; 303-741-7448
Cell; 303-570-3595
robert.follett@shawgrp.com

-----Original Message-----
From: Farmer, Tim [mailto:tim.farmer@xcelenergy.com]
Sent: Monday, December 08, 2008 3:02 PM
To: Follett, Robert
Cc: Comanche 3 Project
Subject: F519 Client Feedback

Per your request.

Tim Farmer
Comanche 3 Project Director
2001 Lime Road, Pueblo, CO 81006
719-549-0351
cell 303-250-3386



SW 02258370

From: Hjermstad, Steven K
Sent: Tuesday, June 09, 2009 7:45 PM
To: Hudson, Gary D
Subject: FW: UA Investigation on Welding

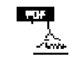
Sensitivity: Confidential

I know you already had this - but just in case you can't find it in Sharepoint

---

From: Nordell, Byron B
Sent: Tuesday, June 09, 2009 2:44 PM
To: Hjermstad, Steven K
Cc: Farmer, Tim
Subject: UA Investigation on Welding
Sensitivity: Confidential

Attached is an investigation by the United Association in response to Shaw claiming sabotage by the welders. The date on the cover is wrong, it should be March 14, 2009. This may be of some help to Gary on Thursday with Monty.
Byron



UA Investigation Report 03 14 ...

Byron Nordell
Comanche 3 Site Construction Manager
Xcel Energy Engineering & Construction
2001 Lime Road
Pueblo, Colorado 81006
Direct 719-549-0373 Cell 719-557-0447

- SSW – Safeway is damaging piping insulation – Op deck and heater level. Safeway is addressing this issue.
- SSW is working millwrights Sat on ACC

03/26/10 Friday 55 F sun

Shaw –

- STG/SG/Yard buildings/areas
    - Sturgeon working back end lighting, STG building, ACC
    - Insulators–not on site
    - Beltramo not on site
- **BFP's – Required work for Full Load**
    - A BFPT on turning gear overnight. Ran to 3325 rpm by 9:40 AM –holding for exhaust flange temp and SSW 4-hour flow hold. Exhaust temp reached at about 11:40 AM. Issues with bringing the pump in service included: OVS speed v. actual speed indication did not match, Recirc valve was left forced closed (pump ran deadheaded for a few minutes), suction flow annubar won't read properly, seal cooling not valved in for significant duration of time, then valves opened full.
    - OVS test okay at 2PM. Swapping pumps at 3:45 PM
    - B BFP recirc valve won't close all the way (stays at about 7%). Load limited to this flow.
- Startup/commissioning – Unit ramping up in load. Stuck at 10 AM due to B BFP recirc valve not closing all the way.
    - Misc loop and I/O. Xcel has a running list of open items for SSW to correct. SSW has about 30 items. **Required work for Full Load**
    - CWAC A pump vibration check planned again for today, didn't happen
    - FP system alarms still in. SSW investigating problem
    - ACC freeze control issues persist. Logic changes are required.
    - A Condensate Booster pump wouldn't start for a while. SSW fixed issue.
- Piping/Mechanical
    - BSDR isolation valve at TED gasket leak. Repaired last night. SSW reports that the line is improperly supported in the valve area putting stress on joint.
    - 7A FW Htr outlet MOV card bad. Heater isolated, valve won't move in any direction
    - Xcel noted about a dozen or so steam/water leaks to SSW.

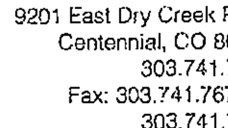
Daily 3 PM Coordination Meeting Notes Attendees: not held

- n/a

03/29/10 Monday 71 F partly cloudy – S Gorman reporting

Shaw

Stone & Webster, Inc.



9201 East Dry Creek Road
Centennial, CO 80112
303.741.7000
Fax: 303.741.7670 or
303.741.7671

March 13, 2009

Mr. Tim Farmer
Project Director
Public Service of Colorado
d/b/a Xcel Energy
550 15th Street, Suite 1200
Denver, CO 80202

RE: Comanche Unit #3 BOP

Subject: SSW-CR-087 COR for Xcel Delays after June 19, 2008

Dear Mr. Farmer:

This Change Order Request is submitted due to Public Service Company of Colorado d/b/a/ Xcel Energy (PSCo) delays and the resulting cost and schedule impacts arising after 19-Jun-08.

Shaw Stone & Webster (SSW) has experienced numerous delays since the 19-Jun-08 Settlement agreement date due to PSCo and its Other Contractors. Attached is a description of these delays and pricing for the cost and schedule impacts.

This letter is issued to transmit the attached BOP Contract Schedule U Change Order Request Form and attachments. This is a Change to the BOP Contract in accordance with Article 6.1 Other Contractors and Article 13 Changes.

Please issue a Change Order in accordance with the BOP Contract at your earliest convenience.

If there are any questions related to this Change Request, please contact or when I am at the Jobsite.

Best Regards,

Robert Follett
Project Director
Stone & Webster, Inc.

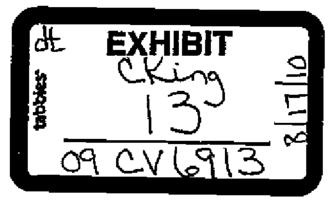
RF/gv

Attachments: Delay and Impact Change Order Request for Delays Arising After June 19, 2008
CR-087 Exhibits 1 through 37

cc: 5.35.10 Folder CR-087

Plaintiff's Exhibit 19

Case No: 09CV6913



From: Stewart, Thomas
Sent: Monday, July 09, 2007 2:25 PM
To: King, Charles
Subject: RE: NEED YOUR HELP // WITH PLANNING
Thank you !!

From: King, Charles
Sent: Monday, July 09, 2007 7:46 AM
To: Stewart, Thomas
Subject: RE: NEED YOUR HELP // WITH PLANNING

When I was down there week before last I sensed a lack of coordination and that's why I told you that we would meet this week (Thursday) when I am at the site with Buck and Paul to review the ACC work - especially TED.

I had a wonderful vacation but my plans have not changed. I'll get the meeting announcement out this afternoon.

Charlie King
Project Manager
Shaw Stone & Webster
9201 East Dry Creek Road
Centennial, CO 80112
303-741-7179 direct
303-741-7500 fax
charles.king@shawgrp.com

From: Stewart, Thomas
Sent: Friday, July 06, 2007 12:56 PM
To: King, Charles; Green, James H (Pueblo); Pixton, Mark
Cc: Gappa, Rob; Bonner, Gary
Subject: NEED YOUR HELP // WITH PLANNING

Charlie,
I'm so frustrated with other people and there inability's to plan there work and my area paying the price for it. I have planned my work accordingly and the mentality is you do not need to install that yet. 3 months ago I started the design for the track system to roll TED in. The lead Engineer is on site yesterday and today and told me he would have everything done for me, they throw him under the bus which it's not his fault. Well guess what ,do to peoples poor planning of equipment arrivals I'm being put on the back burner again because the critical lift plans are taking priorty, do to the fact they wait 3 days before it gets here and decide to do the lift plan and everything else is put on hold. I may be ahead of schedule in some areas but being ahead of schedule does not count until its (completed) ahead of schedule called done done. Boss all I'm trying to do is build a project and bring it in on time and make up for lost time in other areas of the project. Plans and schedules need to be established and etched in granite and people need to be held accountable. Sorry to vent on you but the truth will be revealed to you in its own manner.

Regards. Tom Stewart SSW

SW 02746141

Return

Daily Report

7-3-09 Day Shift (Holiday)
Xcel Energy, Comanche, Unit #3 Pueblo CO.
TG #3 Manpower 1 GF, 1 TMF, 2 TM

Turbine
Work Completed

- ***Continued the step #2 lube oil flush today***
- Insulation work on the HP casing did not continue due to Holiday
- Checked the bearing supply strainers and return basket today
- Unit was placed on turning gear for 2-1/2 hours this afternoon for initial run

Generator:
Work Completed

- NA

Comments

- Second step oil flush continued this morning. Sampling was completed on the supply strainers and drain basket.
- The second oil flush supply side strainers have a few stainless steel particles in the #7 bearing so flushing will continue. Minor debris found in return strainer basket
- MHI has agreed to allow the unit to be placed on turning gear while completing the 2nd step oil flush with the 120 mesh strainers in service. Strainers should be checked every 3 or 4 days
- Machine is ready for continuous turning gear service for steam blows

Comanche Unit #3 - 750MW Supercritical BOP/#119573
PROJECT MANAGEMENT REVIEW PACKAGE

Reporting Period:	January 2010			
Prepared by:	Scott Reschly		PCM	
	(print)	(signature)	(title)	(date)
Checked by:	Kirk Breaux		RPCM	
	(print)	(signature)	(title)	(date)

HIGHLY CONFIDENTIAL
SW 06120779
Return
DEFENDANTS TRIAL EX. 4434-0001

Comanche Unit #3 - 750MW Supercritical BOP/#119573 | Reporting Period: August 2010

Cost Summary

(000)/($000)

	BUDGET									ACTUAL TO DATE				ESTIMATE TO COMPLETE			EAC			EAC VARIANCE			
	Original Approved			Current Approved			Target			Committed	Actual						Estimate at Completion			This Month		To Date	
	Whrs	Rate	$	Whrs	Rate	$	Whrs	Rate	$	$	Whrs	Rate	$	Whrs	Rate	$	Whrs	Rate	$	Whrs	$	Whrs	$
HOME OFFICE																							
Project Management Labor	76.3	$57.73	$4,404	76.2	$58.14	$4,433	76.2	$58.14	$4,433	$6,130	118.5	$51.75	$6,130	0.7	$47.34	$32	119.1	$51.72	$6,162	0.6	$23	42.9	$1,729
Engineering Labor	257.9	$46.39	$11,965	261.3	$49.46	$12,927	261.3	$49.46	$12,927	$21,315	364.8	$58.43	$21,315	0.2	$60.83	$12	365.0	$58.43	$21,328	0.1	$7	103.6	$8,401
Expenses & Supplies			$981			$984			$984	$2,601			$2,601			$23			$2,624		($20)		$1,640
Sub-Total Home Office	334.2		$17,351	337.6		$18,344	337.6		$18,344	$30,046	483.2		$30,046	0.9		$67	484.1		$30,114	0.7	$10	146.5	$11,770
PROCUREMENT																							
Engineered Equipment			$103,888			$67,394			$67,394	$72,605			$72,551			($75)			$72,476		$253		$5,082
Permanent Plant Materials			$43,272			$48,020			$48,020	$72,883			$72,373			($86)			$72,287		($365)		$24,267
Sub-Total Procurement			$147,160			$115,413			$115,413	$145,487			$144,923			($161)			$144,763		($112)		$29,349
CONSTRUCTION																							
Indirect Field Non-Manual Labor	238.1	$56.01	$13,335	238.4	$56.38	$13,442	238.4	$56.38	$13,442	$21,149	424.0	$49.88	$21,149	0.5	$58.64	$32	424.6	$49.89	$21,181	0.5	$34	186.1	$7,739
Indirect Field Manual Labor	273.8	$36.26	$9,929	361.6	$36.38	$13,154	361.6	$36.38	$13,154	$36,494	968.0	$37.70	$36,494		-	$0	968.0	$37.70	$36,494	0.0	$0	606.5	$23,340
Indirect Field Non-Manual Expenses	0.0	-	$3,452			$12,311			$12,311	$19,430			$19,430			$12			$19,441	0.0	$17	0.0	$7,130
Indirect Subcontracts	20.5		$969	7.8	$758.77	$5,902	7.8		$5,902	$13,311	40.5	$327.79	$13,269	0.2		$55	40.7		$13,324	0.0	$8	32.9	$7,422
Distributables			$19,427			$6,659			$6,659	$15,863			$15,863			$36			$15,899		$30		$9,240
Construction Equipment			$4,545			$10,755			$10,755	$18,059			$18,059			$29			$18,089		$0		$7,334
Direct Hire Labor	1,408.2	$37.88	$53,340	1,731.8	$43.50	$75,328	1,731.8	$43.50	$75,328	$124,859	2,900.2	$43.05	$124,859	0.0	-	$0	2,900.2	$43.05	$124,859	0.0	($0)	1,168.4	$49,531
Direct Subcontract	231.3		$34,764	130.4		$69,444	130.4		$69,444	$85,855	341.4	$249.65	$85,237	1.9	$101.97	$190	343.3	$248.85	$85,427	4.7	$80	212.9	$15,983
Sub-Total Construction	2,171.9		$139,761	2,469.9		$206,995	2,469.9		$206,995	$335,020	4,674.2		$334,361	2.6		$353	4,676.8		$334,714	5.2	$169	2,206.8	$127,719
COMMISSIONING/START UP																							
Direct Hire Labor	45.9	$42.47	$1,949	45.9	$42.47	$1,949	45.9	$42.47	$1,949	$5,096	101.0	$50.46	$5,096	0.0	-	$0	101.0	$50.46	$5,096	0.0	$0	55.1	$3,148
Field Non-Manual/Home Office Svcs.	29.4	$72.16	$2,119	29.5	$72.19	$2,128	29.5	$72.19	$2,128	$3,485	46.0	$75.72	$3,485	0.0	-	$0	46.0	$75.72	$3,485	(0.1)	($4)	16.5	$1,357
Subcontract Craft Labor	23.4	$121.38	$2,840	23.4	$121.38	$2,840	23.4	$121.38	$2,840	$3,083	24.5	$124.05	$3,040	0.4	$102.09	$43	24.9	$123.68	$3,083	0.0	$8	1.5	$243
Expenses & Supplies			$631			$631			$631	$366			$366			$5			$371		$0		($260)
Equipment/Distribs/Spares			$1,427			$1,434			$1,434	$1,876			$1,876			$8			$1,884		$0		$449
Vendor Reps	0.0	-	$512			$512			$512	$671			$671			$99			$770	0.0	$306	0.0	$259
Sub-Total Commissioning/Start Up	98.7		$9,478	98.8		$9,493	98.8		$9,493	$14,576	171.5		$14,534	0.4		$155	172.0		$14,689	(0.1)	$309	73.2	$5,196
OTHER PROJECT COSTS																							
Contingency			$18,299			$25,822			$25,822	$0			$0			$133			$133		($189)		($25,689)
Construction Labor Reserve			$0			$17,026			$17,026	$0			$0			$0			$0		$0		($17,026)
Productivity Reserve			$0			$0			$0	$0			$0			$0			$0		$0		$0
Other Reserve			$23,436			$0			$0	$0			$0			$0			$0		$0		$0
Project Incentive Plan (PIP)			$0			$0			$0	$366			$366			$0			$366		($8)		$366
Escalation			$7,447			$0			$0	$0			$0			$0			$0		$0		$0
Warranty			$1,674			$1,680			$1,680	$174	0.2	$626.65	$131			$1,549			$1,680		$0		$0
Transportation			$2,467			$1,643			$1,643	$0			$0			$0			$0		$0		($1,643)
Overhead Expense to Date			$0			$0			$0	$0			$0			$0			$0		$0		$0
Legal & Mitigation			$0			$0			$0	$0	0.0		$0			($0)			$0		$0		$0
Lititgation (99166)			$0			$0			$0	$0	0.0		$0			($0)			$0		$0		$0
Sales Tax (91200)			$1,520			$1,522			$1,522	$2,351			$2,351			$188			$2,539		$0		$1,017
Letter Of Credit/LOC (88312,88316,88510)			$2,922			$2,922			$2,922	$3,449			$3,449			$77			$3,526		$50		$604
Unrecorded Liabilities (URL)			$0			$0			$0	$0			$468			($468)			$0		$0		$0
Sub-Total Other Project Costs			$57,765			$50,614			$50,614	$6,340	0.2		$6,764			$1,479			$8,244		($147)		($42,370)
TOTAL SHAW JOB COST	2,604.7		$371,515	2,906.3		$400,859	2,906.3		$400,859	$531,470	5,329.1		$530,629	3.9		$1,894	5,332.9		$532,523	5.8	$228	2,426.6	$131,664
GROSS MARG N																							
Gross Margin			$41,284			$54,154			$54,154	($51,248)			($51,248)			$0			($51,248)		($228)		($105,402)
Safety Incentive			$0			$0			$0	$0			$0			$0			$0		$0		$0
Sub-Total Gross Margin			$41,284			$54,154			$54,154	($51,248)			($51,248)			$0			($51,248)		($228)		($105,402)
TOTAL VALUE	2,604.7		$412,799	2,906.3		$455,013	2,906.3		$455,013	$480,222	5,329.1		$479,382	3.9		$1,894	5,332.9		$481,275	5.8	$0	2,426.6	$26,262
Reimbursable Insurance			$0			$0			$0	$0			$0			$0			$0		$0		$0
TOTAL VALUE incl REIMBURSABLES	2,604.7		$412,799	2,906.3		$455,013	2,906.3		$455,013	$480,222	5,329.1		$479,382	3.9		$1,894	5,332.9		$481,275	5.8	$0	2,426.6	$26,262
Indirect Cost-Project Indirect Allocation			$10,351			$10,362			$10,362	$3,309			$3,341			$31			$20,369		($23)		$10,018
PROJECT GROSS PROFIT			$30,933			$43,792			$43,792							($31)			($71,617)		$251		($102,550)

Highly Confidential
SW 06142133
Return
DEFENDANTS TRIAL EX. 4441-0014

357

1 with Shaw?
2 **A. Not on this project.**
3 Q. Did B&W answer to Shaw in any way on the
4 project?
5 **A. Not on this project.**
6 Q. Who did B&W answer to?
7 **A. They also answered to Xcel.**
8 Q. Next we see a contractor, Kiewit. Who
9 was Kiewit?
10 **A. Kiewit was under contract to Xcel to do**
11 **the rough site grading and the dirt work -- major dirt**
12 **work on this project.**
13 Q. And who did Kiewit have a contract with
14 on this job?
15 **A. Kiewit had a contract with Xcel as one**
16 **of the six primes.**
17 Q. All right. And so who did Kiewit answer
18 to on this job?
19 **A. Kiewit answered to Xcel and had no**
20 **contractual relationship with Shaw.**
21 Q. Next we see Karrena?
22 **A. Karrena was under contract to Xcel to**
23 **furnish and install the chimney. Their contract was**
24 **with Xcel, and Shaw had no contractual relationship**
25 **with Karrena.**

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1 Q. So who did Karrena answer to on this
2 job?
3 **A. They answered to Xcel.**
4 Q. So did Shaw have any control over any of
5 the other contractors?
6 **A. No.**
7 Q. Who had control over the other
8 contractors?
9 **A. That was all coordinated through Xcel.**
10 Q. Okay. And Shaw also entered into a
11 contract with Xcel, correct?
12 **A. That's correct. We entered into a**
13 **contract with them in February of 2006 for the BOP**
14 **scope.**
15 Q. Okay. And if you'd turn to Tab 5 in
16 your binder.
17 **A. Yes.**
18 MR. CIPOLLONE: And, Your Honor, this is
19 the model that's been used without objection in this
20 case, I believe. Plaintiffs are also using the model.
21 I'd like to publish this and then ultimately give it
22 to the jury so they can have the benefit of this.
23 MR. HINDERAKER: No objection.
24 THE COURT: 79 is the exhibit number?
25 MR. CIPOLLONE: Yes, it's Plaintiff's

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1 Demonstrative Exhibit 79.
2 THE COURT: 79 is admitted.
3 (Exhibit 79 was received in evidence.)
4 MR. CIPOLLONE: Thank you.
5 Q. (BY MR. CIPOLLONE) So, Mr. King, what
6 does this represent?
7 **A. This is a model of Comanche Unit 3, and**
8 **it shows the layout of the equipment from looking from**
9 **the east side towards the west. The boiler equipment**
10 **is here in the middle. It's a 15-story-tall building.**
11 **The AQCS equipment is shaded in green here. This is**
12 **pollution control equipment. And then this is the**
13 **stack.**
14 **The turbine and the accessory equipment**
15 **is located here in the turbine building. This is an**
16 **air-cooled condenser, which works like a radiator on a**
17 **car, as part of the cooling system, and this is a**
18 **cooling tower, which is also part of the cooling**
19 **system.**
20 Q. So, Mr. King, where is the steam
21 generated in this plant?
22 **A. The steam is created here in the boiler,**
23 **and the cavity is right underneath this area here.**
24 MR. CIPOLLONE: Okay. I'd like to --
25 this is a series of slides, Your Honor, using the same

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1 exhibit, I believe all without objection.
2 THE COURT: All right.
3 MR. CIPOLLONE: They are at Tab 6, 7, 8,
4 9, 10, 11, 12.
5 THE COURT: All right. And those are,
6 respectively, Exhibits 80, 84, 86, 87, 94, 97, and 98.
7 Any objection to the admission of those exhibits?
8 MR. HINDERAKER: No, Your Honor.
9 THE COURT: They're all admitted.
10 (Exhibits 80, 84, 86, 87, 94, 97, and 98
11 were received in evidence.)
12 MR. CIPOLLONE: Thank you.
13 Q. (BY MR. CIPOLLONE) So if he can move to
14 Plaintiff's Demonstrative Exhibit 80.
15 **A. The box basically outlines the scope of**
16 **the work that was provided by Alstom. As I said**
17 **earlier, these pieces of equipment were installed on**
18 **foundations that Shaw placed.**
19 Q. Okay.
20 MR. CIPOLLONE: And can we please
21 publish Plaintiff's Demonstrative 84?
22 **A. And the green box on this one surrounds**
23 **the area that is the air pollution control quality --**
24 **the air quality control system. It is the pollution**
25 **equipment. There is a piece of equipment here that is**

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1 **pipe just in the water walls in the boiler.**
2 Q. All right. And then there's also a
3 flame in the boiler?
4 **A. There's a cavity where the conveyors and**
5 **the coal piping feeds coal into the cavity, and in**
6 **that cavity, there's fire that burns coal to generate**
7 **heat to create steam.**
8 MR. CIPOLLONE: Your Honor, I'm going to
9 approach the witness, if that's okay, and provide him
10 a binder.
11 (Binder tendered.)
12 Q. (BY MR. CIPOLLONE) Mr. King, I'd like
13 you to turn to Exhibit 3, and before you publish
14 that -- I'm sorry, Tab 3, which is Plaintiff's
15 Demonstrative Exhibit 83. It's in your binder,
16 Mr. King, if you would turn to that.
17 **A. Yes.**
18 Q. Are you familiar with this document?
19 **A. Yes. This is a photograph inside the**
20 **boiler cavity, looking up at the water walls that we**
21 **just talked about.**
22 MR. CIPOLLONE: And, Your Honor, I
23 believe this exhibit has also been submitted without
24 objection.
25 MR. HINDERAKER: Yes, no objection.

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1 THE COURT: All right. 82 is admitted.
2 (Exhibit 83 was received in evidence.)
3 MR. CIPOLLONE: Thank you, Your Honor.
4 I'd like permission to go ahead and publish that?
5 THE COURT: Or is it 83?
6 MR. CIPOLLONE: It's 83.
7 THE COURT: 83 is admitted. 82 is not
8 yet.
9 Q. (BY MR. CIPOLLONE) Mr. King.
10 **A. These are the water walls in the**
11 **interior of the boiler. This is where that ball of**
12 **fire we looked at earlier was or will occur, and these**
13 **are the panels. The white panels are where the pipes**
14 **go up, and the water is fed into the bottom; and steam**
15 **comes out top.**
16 Q. And how tall is that structure?
17 **A. The boiler building itself is about 15**
18 **stories, and I don't know exactly, but I'd guess the**
19 **cavity is probably 10 stories.**
20 Q. And who was responsible for providing
21 this boiler?
22 **A. Xcel contracted with a company called**
23 **Alstom to furnish and install the boiler.**
24 Q. Okay. Well, Mr. King, again, what was
25 your first experience with the Comanche 3 project once

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1 you returned to Shaw?
2 **A. We received the RFP in July of 2005, and**
3 **I was part of the group that looked at all the**
4 **information that Xcel provided us in order to prepare**
5 **a bid. One of the things they provided us was a**
6 **Section G to Schedule A, which had information about**
7 **the boiler that included not only the schedule but --**
8 **for the boiler to be installed, but a schedule for**
9 **their design deliverables and the things we would have**
10 **to depend on in order to do our work.**
11 Q. Mr. King, what's an RFP?
12 **A. RFP is an acronym for request for**
13 **proposal, and in this case, it was a series of**
14 **documents. My copy is four 3-inch binders, so it's**
15 **about 12 inches of documents that include technical**
16 **information, schedules, and some commercial data.**
17 Q. And that was a document that was sent
18 out by who?
19 **A. That was sent out by Xcel, and that**
20 **became the basis of our proposal.**
21 Q. Okay. And at the point in time when
22 Xcel sent the RFP out, had Xcel entered into any other
23 contracts on the Comanche 3 project?
24 **A. Based on the information in the proposal**
25 **at that time, we understood that they'd reached an**

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1 **arrangement with Alstom to provide the boiler, B&W to**
2 **provide the pollution control equipment, an**
3 **arrangement with Mitsubishi to supply the turbine, and**
4 **a contract with Kiewit to do the site preparation and**
5 **dirt work.**
6 Q. Were those contracts already in place by
7 the time Xcel issued the RFP for the BOP contract?
8 **A. They had contract documents -- or they**
9 **had documents that they purported to be from the**
10 **contracts that became part of the RFP. Some of them**
11 **were issued during the bid period, but by that time,**
12 **my understanding is they'd reached some kind of**
13 **commercial agreement with all of them.**
14 Q. And can you describe what the BOP
15 contract was?
16 **A. BOP is an acronym for balance of plant,**
17 **and that is the contract to do general construction**
18 **work on the site. There were some buildings, but we**
19 **did all of the foundations for all the equipment. So,**
20 **for example, we did the boiler foundations, and then**
21 **Alstom erected their equipment on our foundation. We**
22 **did the AQCS foundations, and then B&W erected their**
23 **equipment on those foundations. We poured and placed**
24 **the foundation for the steam turbine that was supplied**
25 **by Mitsubishi, and then we installed the steam turbine**

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1 **on that foundation. We made all the piping**
2 **connections between the various pieces of equipment**
3 **and the other units. We provided electrical wiring**
4 **and instrumentation wiring between all the different**
5 **elements of the plant and the distributed control**
6 **system, DCS, for the entire plant.**
7 **Then we built the transformer yard where**
8 **the generator sent the electricity to before it went**
9 **across the Xcel switch yard to be dispatched.**
10 **So I guess a shorthand is that**
11 **everything that was not a major piece of equipment**
12 **that they'd already awarded was -- as defined as part**
13 **of the RFP was part of our scope and we connected that**
14 **piece.**
15 Q. And did that RFP ultimately lead to a
16 contract?
17 **A. Yes, it did. We turned our proposal in**
18 **in early December 2005, and then over the next six to**
19 **eight weeks, we were involved in a series of**
20 **negotiations and a series of meetings with Xcel staff.**
21 **The result was a contract signed on February 1st,**
22 **2006.**
23 Q. Okay. Now, Mr. King, when Shaw was
24 considering bidding on the BOP work, did they
25 understand what Xcel's role was to be in the project?

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1 **A. The RFP included a draft of the**
2 **commercial documents, and those commercial documents**
3 **defined Xcel's role as a company and were very similar**
4 **to the contract that we finally negotiated.**
5 Q. Okay. Mr. King, could I ask you to turn
6 to Tab 4 in your binder?
7 MR. CIPOLLONE: And, Your Honor, this is
8 Plaintiff's Demonstrative 103. It was also used in
9 opening I also believe without objection.
10 MR. HINDERAKER: Yes, no objection for
11 illustrative purposes.
12 THE COURT: So you're not seeking its
13 admission? You just want to use it for illustrative
14 purposes?
15 MR. CIPOLLONE: I would also like to
16 ultimately to admit it as a fair representation --
17 THE COURT: Any objection to 103?
18 MR. HINDERAKER: Your Honor, I don't
19 think it's a demonstrative. It's a set of logos. I
20 have no problem for illustrative purposes, no
21 objection.
22 THE COURT: You're welcome to lay a
23 foundation if there's not a stipulation. You're
24 welcome to proceed.
25 MR. CIPOLLONE: I'll use it for

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1 illustrative purposes, Your Honor. I'll lay
2 foundation as we go and then probably seek to admit
3 it.
4 THE COURT: All right.
5 MR. CIPOLLONE: So may I go ahead and
6 put it up on the screen then?
7 Q. (BY MR. CIPOLLONE) Mr. King, can you
8 describe what Alstom's role was in this project?
9 **A. Alstom was one of the six prime**
10 **contractors. Their role was to furnish and install a**
11 **boiler on foundations that were prepared by Shaw.**
12 Q. All right. Did Alstom have a contract
13 with anyone on this project?
14 **A. Alstom had a contract with Xcel, and, in**
15 **fact, the way the project was organized, this diagram**
16 **shows that Xcel had a separate contract with each of**
17 **the major contractors on the project, and that was the**
18 **primary contractual relationship for each of us.**
19 Q. Did Shaw have any contract with Alstom?
20 **A. Not on this project.**
21 Q. Did Alstom answer to Shaw in any way?
22 **A. Not in any way.**
23 Q. Who did Alstom answer to?
24 **A. Xcel was the boss.**
25 Q. With respect to the second contractor,

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1 Mitsubishi, who did Mitsubishi have a contract with on
2 this job?
3 **A. Mitsubishi had a contract with Xcel to**
4 **design and to furnish a steam turbine generator to be**
5 **installed by the BOP contractor. So Shaw installed**
6 **the turbine and the generator they provided.**
7 Q. Okay. And did Shaw have any contract
8 with Mitsubishi on this job?
9 **A. No.**
10 Q. Did Mitsubishi answer to Shaw in any way
11 on this job?
12 **A. No.**
13 Q. Who did Mitsubishi answer to on this
14 job?
15 **A. Mitsubishi's contract was with Xcel, and**
16 **that was the reporting relationship.**
17 Q. Okay. Next you see B&W. Who is B&W?
18 **A. B&W is an acronym for Babcock & Wilcox.**
19 **They provided the pollution control equipment on this**
20 **project and installed that pollution control equipment**
21 **on foundations that were installed by Shaw.**
22 Q. Okay. And who did B&W have a contract
23 with on this job?
24 **A. They also had a contract with Xcel.**
25 Q. All right. Did B&W have any contract

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1 **piping in the beginning of the boiler. Some of it**
2 **would be part of the preclean and some of it not.**
3 Q. And turbine on turning gear, January 28,
4 2009, you didn't need the boiler to get your turbine
5 on turning gear, did you?
6 **A. No.**
7 Q. And you didn't make that date either,
8 did you?
9 **A. No, we did not.**
10 Q. Now, turbine on turning gear is
11 particularly important because that has to happen
12 before first fire and steam blows?
13 **A. That's correct.**
14 Q. Do you remember how late you were in
15 getting your turbine on turning gear before that
16 January 28 date?
17 **A. I remember that that date was in early**
18 **July. I think July 3rd of '09.**
19 Q. So six months-plus late compared to the
20 settlement date?
21 **A. That's correct, but I don't believe that**
22 **held up the startup at all.**
23 Q. I want to talk just a little bit about
24 the mediation or the settlement agreement.
25 MR. HINDERAKER: Can you bring up the

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1 settlement agreement?
2 Q. (BY MR. HINDERAKER) Let's look at the
3 next page, Section 1.03. Now, you were involved in
4 the mediation that led to the execution of this
5 settlement agreement, weren't you, sir?
6 **A. Yes, I was.**
7 Q. And is it fair to say that you read the
8 settlement agreement with care?
9 **A. Yes.**
10 Q. And are you aware of this Section 1.03?
11 **A. Yes.**
12 Q. It says, "Contractor" -- that's Shaw,
13 right?
14 **A. Yes.**
15 Q. "Contractor and PSCo each represents and
16 warrants, based on the facts and circumstances as of
17 or prior to June 19, 2008, that it is not preparing,
18 and does not have any present intention to submit, any
19 additional Change Order Requests, deductions, or
20 claims or knows of or believes in any existing
21 conditions that are likely to lead to the submission
22 of any new Change Order Requests, deductions or
23 Claims."
24 Now, you knew this provision was in this
25 agreement when Shaw made the agreement, didn't you?

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1 **A. Yes.**
2 Q. I want to show you Exhibit 2552.
3 MR. HINDERAKER: If I might approach the
4 witness?
5 THE COURT: Yes.
6 Q. (BY MR. HINDERAKER) Mr. King, can you
7 identify Exhibit 2552?
8 **A. Yes.**
9 Q. What is it?
10 **A. It's an e-mail that was written about**
11 **three months before the mediation.**
12 Q. And actually there are two e-mails
13 between you and Michael Donmoyer, right?
14 **A. Actually, the first one is from Mike**
15 **Donmoyer to me, and the second one is my response to**
16 **Mike.**
17 Q. Right. Between the two of you?
18 **A. Right.**
19 Q. Did he report to you at this time?
20 **A. Yes.**
21 Q. And what is the subject matter of these
22 e-mails?
23 **A. The subject line says Alstom.**
24 Q. And do you see from the Bates number in
25 the lower right-hand corner that this is a business

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1 record of Shaw that was produced to us in this
2 litigation?
3 **A. Yes.**
4 MR. HINDERAKER: We'll offer Exhibit
5 2552.
6 THE COURT: Any objection or voir dire?
7 MR. CIPOLLONE: No objection.
8 THE COURT: 2552 is admitted.
9 (Exhibit 2552 was received in evidence.)
10 Q. (BY MR. HINDERAKER) Now, the first
11 e-mail is the one on the bottom, Mr. Donmoyer to you,
12 April 14, 2008. And he says, "Bobby Smith said in the
13 call today that Alstom told him that they think we are
14 six months behind."
15 That was true, wasn't it? You were
16 about six months behind as of April 2008?
17 **A. That's what we were reporting to Xcel.**
18 Q. And Mr. Donmoyer continues, "And do not
19 feel that they need to flag that they are behind
20 because they are less behind than we are and we will
21 be the primary cause of the plant being late."
22 Do you remember Mr. Donmoyer sending you
23 this e-mail?
24 **A. Yes.**
25 Q. And the report, at least as you

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1 Q. Okay. So you couldn't block the road?
2 **A. Could not block the road, that's right.**
3 Q. But in terms of erecting the cooling
4 tower, Alstom didn't do that, correct?
5 **A. Oh, no. GEA did that.**
6 Q. Your subcontractor?
7 **A. Yes.**
8 Q. No Alstom, no B&W?
9 **A. No.**
10 Q. Let's take a look at Exhibit 5329, and
11 this one apparently has been objected to.
12 MR. HINDERAKER: If I may approach, Your
13 Honor, I'll hand it to the witness.
14 THE COURT: Yes.
15 (Document tendered.)
16 Q. (BY MR. HINDERAKER) Mr. King, what is
17 Exhibit 5329?
18 **A. It starts with -- it's an e-mail -- a**
19 **series of e-mails, and it starts with an e-mail --**
20 MR. CIPOLLONE: Your Honor, we don't
21 have any objection to this document.
22 THE COURT: 5329 is admitted. You may
23 publish.
24 (Exhibit 5329 was received in evidence.)
25 Q. (BY MR. HINDERAKER) Let's start with

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1 the bottom e-mail on this page, which is from Stewart
2 Thomas (sic) to you and several others on July 6th,
3 2007. Do you see that?
4 **A. Yes, Tom Stewart had written me this**
5 **e-mail.**
6 Q. Who was Tom Stewart?
7 **A. At that time, he was the superintendent**
8 **over the ACC installation.**
9 Q. And Mr. Stewart writes to you, "Charlie,
10 I'm so frustrated with other people and their
11 inability to plan their work and my area paying the
12 price for it. I have planned my work accordingly and
13 the mentality is you do not need to install that yet.
14 3 months ago, I started the design for the track
15 system to roll TED in." Then he goes on to say a
16 little bit later, "Well, guess what, due to people's
17 poor planning of equipment arrivals, I'm being put on
18 the back burner again because the critical lift plans
19 are taking priority."
20 Do you remember this complaint from Tom
21 Stewart?
22 **A. Yes.**
23 Q. And you replied to him the following
24 Monday, July 9, and you wrote, "When I was down there
25 week before last, I sensed a lack of coordination, and

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1 that's why I told you that we would meet this week,
2 Thursday, when I was at the site with Buck and Paul to
3 review the ACC work" -- is that air-cooled condenser?
4 **A. Yes.**
5 Q. -- "especially TED." And you recall
6 this e-mail exchange generally, don't you?
7 **A. Yes.**
8 Q. Now, the lack of coordination that you
9 referred to in your e-mail to Mr. Stewart, is that a
10 lack of coordination between Shaw people or between
11 Shaw and subcontractors or both?
12 **A. At this time, we had about 700 people**
13 **working on the site, if I remember correctly. This**
14 **would have been the summer of '07. Maybe not quite**
15 **that, but we had a lot of people working on site, and**
16 **we had work going on in a number of different areas.**
17 **So coordination -- any time you get that many people**
18 **on a project, coordination is an issue.**
19 Q. Can you answer my question, though,
20 Mr. King? I simply asked whether the lack of
21 coordination you referred to here was a lack of
22 coordination among Shaw people and their contractors?
23 **A. In this particular case, the topic was**
24 **all Shaw people.**
25 Q. And Mr. Stewart is trying to get going

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1 on TED here back in 2007. Do you know when the
2 turbine exhaust duct, or TED, finally got finished?
3 **A. The exhaust duct was finished, I think,**
4 **in June of '09, and then the risers that go over**
5 **the -- the risers that come out of the exhaust duct**
6 **and go horizontally across the ACC were finished up in**
7 **I think August of '09.**
8 Q. Fair to say that the turbine exhaust
9 duct was finished about a year late compared to Shaw's
10 baseline schedule?
11 **A. Yes.**
12 Q. Now, let's take a look at Exhibit 2392.
13 THE COURT: Well, before we go there,
14 let me ask you how many more you have.
15 MR. HINDERAKER: I've got more.
16 THE COURT: I'm sure you do. Why don't
17 we go ahead and take our lunch recess. Let me ask
18 whether the jury would feel comfortable confining that
19 to an hour today because of our late start? Is
20 everybody comfortable with that?
21 Does that work for counsel as well?
22 MR. HINDERAKER: Yes, Your Honor.
23 THE COURT: And does that work for you,
24 Sandra?
25 THE COURT REPORTER: Yes.

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1 month on how they wanted something to be done.
2 You're going to hear, ladies and
3 gentlemen, from the people who had their boots in the
4 dirt on this job. And you're going to hear from the
5 people who were responsible for the cost -- for
6 managing the costs and recording the costs of what
7 Shaw spent on this. And you're going to hear from
8 independent accounting and construction experts who
9 have calculated Shaw's damages as a result of this
10 delay -- these delays and disruption. It comes to
11 about 42 million dollars. I'm sorry. It comes to
12 about 46 million dollars.
13 The third thing, briefly, they need to
14 pay what they owe. They owe Shaw about 40 million
15 dollars for unpaid amounts under the contract. As
16 well, there are some other issues for which they owe
17 us. I do not have time to slow down. Other
18 obligations they have, including from a previous
19 project. And they have held onto that money, even
20 though the plant was finished.
21 And when I say the plant is finished,
22 understand, in May of this year, Shaw's systems went
23 through a test called substantial completion and
24 passed that test. And in May of this year,
25 Mr. Farmer -- again, the head of the project -- went

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1 to the Public Utilities Commission and he told them
2 the following: "Commencing at 11:00 a.m. on May 7,
3 2010, and ending at 11:00 a.m. on May 8, Comanche 3
4 generated continuously at a capacity of 750 megawatts
5 or more, with all necessary supporting systems
6 operating normally."
7 Now, they're going to say, of course,
8 Shaw didn't finish this work. Shaw left the job
9 early. Shaw left a lot of things undone. Ladies and
10 gentlemen, what they're talking about is, Shaw
11 supplied thousands of pieces of equipment to this job.
12 Thousands. And this is not window fans and microwave
13 ovens. This is heavy duty, complicated gear. And at
14 any given time, it's easy for them to go point to some
15 piece that's not working right. This is the warranty
16 work. Shaw is responsible for that into the future
17 for the warranty and will stand behind its warranty.
18 Those things have nothing to do with having completed
19 the job.
20 And when they tell you that Shaw didn't
21 finish this job, just remember Mr. Farmer on May the
22 7th. "All necessary supporting systems operating
23 normally."
24 Ladies and gentlemen, that's going to
25 bring me to the end of my opening statement. I want

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1 to thank you for your attention. I'll conclude by
2 saying that Shaw/Stone & Webster, I believe the
3 evidence will show, put the resources into the job
4 that they needed, they brought the people and the
5 equipment to the job that they needed to do the job.
6 And now it's time for Xcel Energy to step up to the
7 plate and honor its promises under the contract.
8 Thank you for your attention.
9 THE COURT: Thank you, Mr. McCormick.
10 Opening statement for the defendant.
11 MR. HINDERAKER: Yes, Your Honor. It
12 will take just a moment for us to rearrange slightly,
13 if that's okay.
14 THE COURT: All right. Ladies and
15 gentlemen, if you want to take one of those short
16 stretch breaks, you're welcome to do that now.
17 (Pause in the proceedings.)
18 THE COURT: Mr. Chavez, I think
19 we're --
20 MR. CHAVEZ: I'm sorry.
21 THE COURT: That's all right. I was
22 the one that invited you to take that break.
23 MR. CHAVEZ: Apologize, Your Honor.
24 THE COURT: Not a problem.
25 Mr. Hinderaker.

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1 MR. HINDERAKER: Thank you, Your Honor.
2 And good afternoon, ladies and gentlemen
3 of the jury. I'm John Hinderaker, and I represent
4 Public Service Company of Colorado. You'll also hear
5 Public Service referred to as Xcel Energy. For
6 purposes of this case, it's the same company.
7 I have already introduced my colleagues
8 and staff. I won't do that again, but I will
9 introduce Jerry Kelly of Public Service. He will be
10 with us for the duration and will testify later in the
11 trial.
12 I appreciate this opportunity to tell you
13 about this case as Public Service sees it. Now, what
14 is this case about? We believe that this case is
15 about a giant construction company's attempt to avoid
16 responsibility by blaming everyone else for its own
17 failure to do what it was contractually obligated to
18 do.
19 The Comanche 3 plant was built to meet
20 Colorado's need for cheaper and cleaner energy. But
21 when building a plant of this magnitude, you go to the
22 experts. And that is exactly what Public Service did.
23 Public Service hired Shaw, a Fortune 500,
24 multibillion dollar construction company, to be one of
25 the three major contractors on the job. Shaw

EXHIBIT 1 Return

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1 negotiated an EPC contract. That means engineer,
2 procure, and construct. In other words, Shaw designs
3 the work, it buys or makes the required materials, and
4 it constructs the work. So Shaw's EPC contract gave
5 it full control over its portions of the plant.
6 And in general, Shaw's part of the plant
7 is shown on this diagram in red. Those are the areas
8 over which Shaw had total and exclusive control.
9 Shaw's contract also made it the BOP, or
10 balance of plant, contractor, meaning that it would
11 design, procure, and construct all parts of the
12 project that were not covered by another contractor.
13 The evidence will show that from day one,
14 Shaw's work was late, flawed, and incomplete, from
15 underestimating the magnitude and cost of the work in
16 the bid, to not hiring enough workers, to numerous
17 cost overruns. As a result, Shaw fell farther and
18 farther behind schedule.
19 Finally, something had to be done, so
20 Public Service sat down with Shaw to try to work out a
21 way for Shaw to get back on schedule. Public Service
22 paid Shaw an additional 35 million dollars to help
23 Shaw hire more workers, work more overtime, and step
24 up their efforts to get back on schedule so that Shaw
25 could meet what it originally promised to do in its

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1 contract.
2 Instead, the evidence will show that Shaw
3 took the money and ran. After pocketing Public
4 Service's 35 million dollars, Shaw cut its workforce
5 rather than increasing it, refused to do work that was
6 within its contract. And instead of getting back on
7 schedule as promised, Shaw fell farther and farther
8 behind. Sometimes, in order to get Shaw's work done,
9 Public Service had to hire another contractor to do
10 it.
11 Today Shaw is saying it's not our fault
12 we were late, we shouldn't have to abide by the
13 contract we signed, and you haven't paid us for work
14 that we've done.
15 In fact, the evidence will show that Shaw
16 has been paid over 400 million dollars. But Public
17 Service believes that it should not have to pay for
18 work that was not done or work that was done poorly.
19 Shaw abandoned the project without finishing it, and
20 is now blaming Public Service and Alstom for its own
21 problems.
22 Public Service believes that a deal is a
23 deal. And Shaw made a deal with Public Service that
24 it would engineer, procure, and construct a critical
25 piece of the Comanche 3 energy plant according to the

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1 agreement that it signed. Shaw negotiated the deal.
2 Shaw signed the deal. But today, Shaw wants to get
3 out of the deal.
4 Public Service paid for a new power
5 plant, and we think deserves to get what it paid for.
6 Now, let me walk you through some of the
7 evidence that shows how Shaw failed to live up to its
8 contract. To do so, I will cover, one, the deal, the
9 contract. What was it? Two, the ways in which Shaw
10 failed to live up to its contractual obligations.
11 And, three, the damage caused to Public Service by
12 Shaw's failure to live up to its contract.
13 So let's start with the contract. Shaw's
14 BOP contract was negotiated January of 2006 and signed
15 in February of 2006. Shaw was one of three main
16 contractors on the Comanche 3 project. The other two
17 were Alstom Power and Babcock & Wilcox, or B&W.
18 Each contractor had its own distinct area
19 of the plant where it carried out its work. Alstom
20 supplied the boiler and designed and built the boiler
21 building. The piping that carries steam from the
22 boiler to the steam turbine was erected by Shaw. The
23 turbine building was designed and built by Shaw. And
24 Shaw erected the Mitsubishi turbine inside that
25 building. That whole building was Shaw's

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1 responsibility.
2 Shaw installed and wired up the
3 transformers, and the air cooled condenser was a big
4 part of its work. Once again, nobody involved in that
5 except Shaw. Just Shaw's work, the air cooled
6 condenser.
7 This is the cooling tower, which Shaw
8 also designed and built. Again, no other contract
9 anywhere near it; just Shaw's work. And if we pause
10 here, we can see the turbine exhaust duct, or TED as
11 it's sometimes called, which runs from the bottom of
12 the turbine along the air cooled condenser. You'll
13 hear a lot of that over the course of the trial.
14 Again, 100 percent Shaw's work. No other contractor
15 involved. Shaw designed. Shaw procured. Shaw
16 erected.
17 And here you see what's called the back
18 end of the plant, the air quality system that was
19 designed and installed by Babcock & Wilcox.
20 Here you can see the different areas that
21 were controlled by each contractor. Shaw is red.
22 Alstom is is green. And B&W is blue. And this
23 overhead view shows the areas that were assigned to
24 each contractor, including the laydown areas where
25 they kept their equipment.

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1 more.
2 THE COURT: This is something I'm
3 learning, too. Well, Ms. Richardson, if you had to
4 reschedule either the dental appointment or the
5 appointment with the neurologist, would that place you
6 in any kind of jeopardy, compromise your health?
7 MS. RICHARDSON: I don't think so.
8 THE COURT: Of course, you're not a
9 doctor, right?
10 MS. RICHARDSON: I can always call and
11 see.
12 THE COURT: All right. Okay. Well,
13 let's forge ahead. And I'll let the lawyers follow up
14 with you. And if you have some concerns as further
15 questions are asked, just let me know.
16 MS. RICHARDSON: Okay.
17 THE COURT: Thank you very much.
18 Anybody else among the five newcomers who
19 want to share any concerns? All right. Thank you.
20 All right. Ladies and gentlemen, what
21 I'm going to do now is turn it over to the attorneys
22 to ask questions. They each have an hour. So what I
23 plan to do is at least get started with that process.
24 And we'll take a break. If we go a bit into the noon
25 hour, is that going to create a problem for anyone, if

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1 we try to go perhaps to at least 12:15 or 12:30?
2 All right. Well, let's do this: Why
3 don't we try -- Sharon, if we go till 12:30, will that
4 be all right?
5 THE COURT REPORTER: Sure.
6 THE COURT: We'll forge ahead to 12:30,
7 and we'll take a break at that point. So, plaintiff's
8 voir dire.
9 MR. FROST: Thank you, Your Honor.
10 Ladies and gentlemen, good morning.
11 Again, I'm Dan Frost. And along with Steve McCormick
12 and Pat Cipollone, it will be our privilege to speak
13 during this trial on behalf of Shaw.
14 This is an important case to Shaw, and I
15 appreciate the opportunity to have a chance to speak
16 with you directly for a few minutes. And my questions
17 are not intended to pry, but, rather, to help elicit
18 some information so that both you and I can decide if
19 this is the best case for you to serve as jurors on.
20 Now, you might have heard from Judge
21 Hood's remarks earlier that this case is about a
22 large, complex construction case. It ran into some
23 problems for some very simple reasons, but at the
24 outset, I'd like to talk to you a little bit about
25 your experience in construction.

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1 How many of you have ever hired a
2 construction company or contractor to build or fix
3 something? Mr. Matthews, can you tell us about that
4 experience?
5 MR. MATTHEWS: Been involved in home
6 construction before. I've been involved in home
7 remodels before. Varying -- various success rates on
8 those.
9 MR. FROST: What was that experience
10 like?
11 MR. MATTHEWS: A frustrating experience.
12 MR. FROST: Why was it frustrating?
13 MR. MATTHEWS: My wife says that look for
14 three things in a contractor: Price, do they keep
15 their word, and how do they do their work. Two out of
16 three were done well.
17 MR. FROST: And did you do well?
18 MR. MATTHEWS: Some, yes. Some, no.
19 MR. FROST: Now, did you manage the
20 contractor, or did you expect the contractor to manage
21 itself?
22 MR. MATTHEWS: We had some of both.
23 MR. FROST: Did you feel like it was
24 important for you to manage the contractor?
25 MR. MATTHEWS: I didn't think it was part

93

1 of the deal. I thought it's part of what happened.
2 MR. FROST: And did you think it was
3 important for you to communicate with the contractor?
4 MR. MATTHEWS: Sure.
5 MR. FROST: And why was that?
6 MR. MATTHEWS: Just to keep informed.
7 MR. FROST: And, Ms. Richardson, you
8 raised your hand, too. Can you tell us about your
9 experience in construction?
10 MS. RICHARDSON: Well, it was
11 satisfactory for me. I had a room converted from a
12 garage into a bedroom. And it was done within the
13 time specified to my -- you know, to my -- I was
14 satisfied.
15 MR. FROST: And what was it about the
16 project that especially satisfied you, ma'am?
17 MS. RICHARDSON: Well, my particular
18 contractor took time to say, well, what I wanted -- he
19 said, well, that might not be the best thing for this
20 particular room. So he gave me ideas that improved
21 the room, you know. It was a garage being converted.
22 So I wanted all the frills and tangles, you know, all
23 the bells and whistles. He said, this isn't right, so
24 you might want to reconsider doing the walls this way,
25 the ceiling that way, which I thought was helpful.

845

1 entitled to if some of those things occurred would be
2 the submission of a change order under the contract,
3 right?
4 **A. Correct.**
5 Q. And Shaw did submit change order requests
6 under this contract, did it not, sir?
7 **A. Yes, they did.**
8 Q. There are -- Mr. Frost showed you quite a
9 few. I guess, one of them was -- what? -- 103 or 104,
10 right?
11 **A. I believe that's correct, yes.**
12 Q. And so that would reflect the consecutive
13 numbering of change order requests submitted by Shaw
14 on this project, would it not?
15 **A. I don't know if submitted, but prepared,**
16 **anyway.**
17 Q. Okay. So Shaw prepared upwards of a
18 hundred change order requests in connection with its
19 work on this project, did it not?
20 **A. That would indicate that, yes.**
21 Q. And, in fact, all those boiler hydro
22 delays that Mr. Frost talked to you about in your
23 direct examination, that was the subject of a specific
24 change order request, wasn't it?
25 **A. I believe there were change order**

846

1 **requests associated with the various boiler hydro**
2 **delays.**
3 Q. You're familiar with change order request
4 87, are you not, sir?
5 **A. Yes.**
6 Q. That was a very lengthy change order
7 request submitted by Shaw, was it not?
8 **A. Yes, it was.**
9 Q. And, in fact, that change order request
10 was specifically about all these boiler hydro delays,
11 was it not?
12 **A. That was part of that change order, yes.**
13 Q. Now, there was a specified process in
14 this contract for submitting change orders, was there
15 not, sir?
16 **A. Yes, there was.**
17 Q. In fact, that's paragraph 13.2, procedure
18 for changes. Can you find that for me?
19 **A. Yes, sir.**
20 Q. So under the contract, if Shaw
21 encountered a significant delay as a result of another
22 contractor that could not be reasonably mitigated,
23 Shaw would be entitled to submit a change order
24 request. And the way that Shaw was required to do
25 that under the contract is set forth in paragraph

847

1 13.2.1, right?
2 **A. That is the procedure, yes.**
3 Q. It says, "As soon as contractor becomes
4 aware of any circumstances which contractor has reason
5 to believe may necessitate a change, including a
6 change in law, delay by other contractor as provided
7 in section 6.1, or owner caused delay, contractor
8 shall promptly issue to company a change order request
9 substantially in the form attached as item 3 to
10 Schedule U."
11 And then it goes on to say, "All change
12 order requests shall include documentation sufficient
13 to enable the company to determine the factors
14 necessitating the possibility of a change, the impact
15 which the change is likely to have on the agreement
16 price, the impact that the change is likely to have on
17 the time achievement of the milestones set forth in
18 the milestone work schedule, including the guaranteed
19 substantial completion date and guaranteed acceptance
20 date, and such other information which company may
21 reasonably request in connection with such change."
22 Again, a mouthful. But I did read that
23 correctly, didn't I?
24 **A. You did. You did read that correctly,**
25 **yes.**

848

1 Q. Okay. And that was Shaw's obligation
2 under this contract. When one of these significant
3 delays could not be reasonably mitigated occurred,
4 Shaw was obligated to promptly submit a change order
5 request with all this information so that Public
6 Service Company could evaluate it, correct?
7 **A. That would be correct.**
8 Q. And there's a very specific clause
9 regarding schedule -- changes involving schedule
10 extensions. That's paragraph 13.3. That we've seen
11 before. And I apologize for reading it again, but I'm
12 going to read it again.
13 "Changes involving a schedule extension."
14 It says, "To the extent that the contractor
15 demonstrates to company's reasonable satisfaction that
16 a change or a change event necessitating a change, as
17 described in section 13.2 shall delay contractor in
18 complying with the work schedule, then company shall
19 cause the change order directing such change to extend
20 the dates in the work schedule, including the
21 guaranteed contract dates, by the number of days, at
22 maximum, equal to the number of calendar days of delay
23 in the critical path progress of the work reasonably
24 demonstrated by contractor as resulting from the event
25 necessitating the change."

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, Colorado 80202
- - - - - - - - - - - - - - - - -x

STONE & WEBSTER, INC.,   :

Plaintiff,   :

vs.   : Case No. 09CV6913
Courtroom: 7

PUBLIC SERVICE COMPANY   :

COLORADO d/b/a XCEL ENERGY,   :

Defendant.   :

- - - - - - - - - - - - - - - - -x

REPORTER'S TRANSCRIPT

October 20, 2010

Volume III

The trial in the above-entitled matter continued on Wednesday, October 20, 2010, at 1437 Bannock Street, Courtroom 7, Denver, Colorado 80202, before the Honorable William W. Hood III.

The transcript is a complete transcription of the proceedings that were had in the above-entitled matter on the aforesaid date.

Reported by: Sharon L. Szotak, CRR, RPR

1141

1 **these bundles were laying out there -- they're big,**
2 **huge radiators is what they are.**
3 **The hailstorm damaged all the fins, like**
4 **on a radiator on a car, and we had to have a couple of**
5 **laborers out there combing these fins back out**
6 **straight so the air would flow through, and that was**
7 **taking a long time.**
8 **I don't recall whether it was determined**
9 **that it was our improper storage that was the actual**
10 **reason for that, though.**
11 Q. But it is up to Shaw to protect its
12 materials on the site from hail and the elements and
13 dirt and so on; isn't that true?
14 **A. Sometimes. Sometimes it's a vendor**
15 **responsibility to provide shipping protection when**
16 **they send the pieces out.**
17 Q. But it's up to Shaw to make sure either
18 the vendor has it protected or you've got it
19 protected?
20 **A. If it's our vendor, yes.**
21 Q. And there were a number of times when
22 Shaw had a problem keeping its materials on the site
23 clean and free of debris, true?
24 **A. Define "a number of times." What do you**
25 **mean by that?**

1142

1 Q. Do you remember issues with the iso
2 phase bus duct getting dirty?
3 **A. Yes.**
4 Q. Requiring extensive cleaning?
5 **A. Yes.**
6 Q. And that's because Shaw failed to
7 properly protect it, right?
8 **A. No. Actually the iso phase issue was**
9 **because of high winds and dust storms after we**
10 **installed it. During the time it was in the yard, it**
11 **was completely protected.**
12 Q. Let's go back to Exhibit 2160. She goes
13 on to say, "Waited 6 weeks for scaffolding and 6 weeks
14 for chairs." Do you remember why you had to wait six
15 weeks for scaffolding and six weeks for chairs?
16 **A. I don't.**
17 Q. And then she says, "This will cause
18 layoffs and then rehires will have to be trained."
19 That obviously impairs your productivity and your
20 efficiency, doesn't it?
21 **A. It would. I'm not sure that actually**
22 **happened.**
23 Q. Let's move on to the bottom of the page
24 where she talks about the turbine exhaust duct, TED.
25 **A. Okay.**

1143

1 Q. I think we all, again, know what that
2 is. She says, "Trying to rework but not getting the
3 resolution."
4 Do you remember why it was you had to do
5 rework on the turbine exhaust duct in this time frame?
6 **A. In July of '08, no, I don't.**
7 Q. And when she says, "But not getting the
8 resolution or coming up with a plan and then changing
9 their mind," do you recall that Shaw had trouble
10 coming up with plan to do the rework for the turbine
11 exhaust duct?
12 **A. I don't recall that, and it really**
13 **doesn't make any sense if you think about it because**
14 **until you have a plan, there is no rework to be done.**
15 **You've got to know what you're going to do before you**
16 **can redo it. So I don't understand the wording of**
17 **that.**
18 **You know, we had some issues with TED**
19 **back in July or that time frame -- I don't recall the**
20 **exact date, but the biggest issues were we were trying**
21 **to develop a plan on how to move this big duct**
22 **underneath the turbine, the turbine itself. There**
23 **were a lot of discussions in-house with our**
24 **engineering group on how to set this, you know,**
25 **1200-ton piece of ductwork on steel beams and have to**

1144

1 **roll it underneath the concrete floor. So that may be**
2 **what she was referring to. I don't know.**
3 Q. Let's keep reading and see if we learn
4 some more.
5 **A. Okay.**
6 Q. She says, "The turbine crew is holding
7 them up due to routing and setting the BFP turbines."
8 Now, that's the boiler feed pumps, right?
9 **A. That is correct.**
10 Q. And that is Shaw work being done by Shaw
11 people, right?
12 **A. Correct.**
13 Q. Inside the turbine building, right?
14 **A. Yes.**
15 Q. So what she is describing there is a
16 conflict between two groups of Shaw people, correct?
17 **A. That is correct.**
18 Q. And then she says, "Affects PF," or
19 productivity factor, "forward progress isn't
20 happening." Would you agree with that?
21 **A. Yes.**
22 Q. Then she says, "Other work takes place
23 but not progress as planned. Can't move TED because
24 of fabrication of the weld collar is wrong."
25 What do you remember about Shaw having

2152

1 to its admission but not an objection to its use as a
2 an illustrative during his testimony. Is that true?
3 MR. HARTNETT: Yes.
4 MS. TUN: Your Honor, I can elicit the
5 information for that and lay a foundation for it to be
6 admitted.
7 THE COURT: Why don't you use it as
8 illustrative, and then I can better evaluate whether
9 it should be admitted.
10 MS. TUN: That's fine. So we can go
11 ahead and publish it, right?
12 THE COURT: You're welcome to publish
13 it.
14 MS. TUN: All right. Thank you.
15 Q. (BY MS. TUN) Dr. Borcherding, can you
16 represent for us what this slide represents?
17 **A. Yes, this lists the documents that I**
18 **reviewed in preparation for my report that I wrote in**
19 **July of 2010.**
20 Q. Okay. And can you go through and talk
21 with us about what each one of these represents?
22 **A. Yes. The first one, the supervisory**
23 **reports, these were -- these notebooks were put**
24 **together by foremen, general foremen, superintendents,**
25 **construction engineers. For example, you heard from**

2153

1 **Rob Gappa. I read his notebook. You heard from**
2 **Mr. Ezell. I read his notebook. These were people**
3 **supervising the work in the field.**
4 Q. What about -- you have several weekly
5 and monthly reports listed here. Can you tell us why
6 you looked at those?
7 **A. Yes, I looked at the Shaw weekly reports**
8 **and Shaw monthly reports to get an understanding of**
9 **the problems affecting the project, in particular, the**
10 **problems affecting the labor productivity.**
11 Q. And you also have on here you looked at
12 several deposition transcripts; is that correct?
13 **A. Yes, 25 deposition transcripts on the**
14 **project, and that included, as is indicated here, 466**
15 **exhibits. So if you read a deposition from someone**
16 **like Mr. Ezell, there's usually about 50 or 60**
17 **exhibits that are attached to the deposition itself.**
18 Q. Did you also look at photographs of the
19 work?
20 **A. Yes.**
21 Q. And did you also visit the site?
22 **A. Yes. On February 11th, I was on the**
23 **site to visit the site, get an understanding of the**
24 **work that was relatively unimpacted to develop the**
25 **measured mile, and to interview people on site.**

2154

1 Q. And approximately how many people did
2 you talk to on site?
3 **A. I interviewed five people on the site.**
4 **Fred Holderman was the general foreman and**
5 **superintendent for electrical work. Jason Ezell was**
6 **the construction manager. Leroy Gonzales was the**
7 **general foreman and superintendent for electrical**
8 **work, and Greg Cermah was piping general foreman on**
9 **the project, and one other ironworker general foreman.**
10 Q. And this list that you have -- that you
11 prepared and you have up here in addition to the
12 photographs and the site visit interviews that we've
13 talked about, does that make up the materials that you
14 relied upon in conducting your analysis?
15 **A. Yes. This was most of the information**
16 **that I utilized to do the analysis.**
17 Q. Did you also use quantitative and
18 qualitative information that you received from Shaw?
19 **A. Yes. I received a table that indicated**
20 **the earned hours for a work package and the actual**
21 **hours for a work package.**
22 Q. The materials that you reviewed in order
23 to conduct your analysis, what we've been discussing
24 here, did you find the information in those materials
25 to be reliable?

2155

1 **A. Yes. This was the typical information I**
2 **look at when I try to understand the cause of the**
3 **productivity loss. What I like to do is try to find**
4 **information close to the work, and usually the best**
5 **information are logs, diaries, or supervisory**
6 **notebooks.**
7 Q. And did you find that this information
8 was sufficient for purposes of your analysis?
9 **A. Yes, it was very useful information.**
10 Q. And based on your examination of these
11 materials, were you able to determine the causes of
12 Shaw's productivity loss on Comanche 3?
13 **A. Yes, I was able to determine the causes**
14 **of the productivity loss that Shaw experienced due to**
15 **problems caused by Xcel.**
16 Q. Okay. And you've prepared a slide
17 summarizing those issues. Can you look at
18 Demonstrative 131, please? Did you prepare this
19 slide, Dr. Borcherding, Demonstrative 131?
20 **A. Oh, yes.**
21 Q. And does this set forth the causes of
22 the productivity loss that you discovered?
23 **A. Yes. These are subheadings from my**
24 **report.**
25 MR. TUN: All right. Your Honor, at

2156

1 this time, I would offer Demonstrative 131. Right
2 now, we can do it as illustrative purposes.
3 MR. HARTNETT: Well, I object to the
4 offer at this time as lacking foundation. The exhibit
5 is a summary, but Ms. Tun has yet to lay any
6 foundation for the basis of his opinions.
7 MS. TUN: Your Honor, I believe I have
8 laid the appropriate foundation. Dr. Borcherding
9 testified that upon review of these materials, he was
10 able to conclude the causes of Shaw's productivity
11 loss and that he had prepared a slide summarizing what
12 those causes were.
13 MR. HARTNETT: If I may, Your Honor --
14 THE COURT: Well, I think that we're
15 spending too much time on this issue, respectfully.
16 I'm going to overrule the objection. It's not really
17 a 1006 issue because this is painting with very broad
18 strokes. It doesn't really go to the substance of any
19 of those underlying materials. So what number is this
20 again?
21 MS. TUN: It's Demonstrative 131.
22 THE COURT: Demonstrative 131 is in.
23 (Exhibit 131 was received in evidence.)
24 MS. TUN: If we could publish
25 Demonstrative 131.

2157

1 Q. (BY MS. TUN) Dr. Borcherding, could you
2 tell us what this slide shows?
3 **A. Yes, this slide shows the measured**
4 **causes of productivity loss that I feel caused Shaw to**
5 **suffer labor overrun on this project. And as you can**
6 **see, the root cause or the major cause in my mind is**
7 **Xcel never assumed the role they should have as the**
8 **construction manager of the project and they did not**
9 **coordinate the prime contractors, and this caused**
10 **difficulties that the contractors like Shaw**
11 **experienced on the project.**
12 Q. Did you find other causes of
13 productivity loss in addition to that?
14 **A. Yes. The interviews and the supervisory**
15 **reports indicated problems of congestion that created**
16 **interferences with one another, interferences with the**
17 **work, starting and stopping and moving because you**
18 **couldn't complete an activity. There was difficulties**
19 **with priority changes. The work force that I**
20 **interviewed and the supervisory notebooks indicated**
21 **that work became hot -- and that meant that plan work**
22 **that people were supposedly going to do wasn't going**
23 **to be done at that point -- and they had to move over**
24 **to other work, and that's the priority changes and**
25 **relocation of crews.**

2158

1 **If you stop planned work, you have to**
2 **store materials, and then you have to restart the new**
3 **work. So you've got to get the materials, the tools,**
4 **the equipment, and information, all that together to**
5 **do that work.**
6 Q. I know you have it listed here as four
7 separate bullet points, but are the major causes of
8 productivity losses that you found, are they
9 interrelated?
10 **A. Yes. For example, if there's**
11 **inefficiencies of congestion and crew interference and**
12 **you lose time and you're delayed, you have to overcome**
13 **that time by doing a schedule acceleration, and that**
14 **requires overtime or overmanning or shift work; and**
15 **it's also an inefficiency.**
16 Q. Were you able to determine what or who
17 was the causes -- or who caused these major issues
18 that resulted in productivity loss of Shaw's work?
19 **A. Yes. I felt that Xcel just didn't do**
20 **the work that they should. For example, they were to**
21 **schedule this whole project, and I read this**
22 **deposition comment from Jim Ransom, the scheduler,**
23 **that the schedule he put together was a cartoon.**
24 MR. HARTNETT: I'll object as hearsay.
25 THE COURT: Overruled. Go ahead.

2159

1 **A. That the schedule he put together was a**
2 **cartoon. This was in his deposition. And he**
3 **mentioned that about ten times there.**
4 Q. (BY MS. TUN) What is the problem with
5 not having a good integrated scheduler?
6 **A. The integrated schedule was needed by**
7 **Shaw so they could better plan their work. This was a**
8 **comment that was really driven home to me by Jason**
9 **Ezell in regard to not having a schedule. In my mind,**
10 **Xcel should have had a scheduling group, three or four**
11 **people, and they had one.**
12 Q. Are there other specific examples of the
13 causes of productivity loss that you found in your
14 review of the materials?
15 **A. Yes. For example, in the boiler area,**
16 **the congestion and the crew interference and the**
17 **starts, stops, and moves, problems with safety, there**
18 **you heard many, many times where areas were cordoned**
19 **off with red tape, preventing work. This delayed and**
20 **disrupted the Shaw work in that area.**
21 **There were problems in the turbine**
22 **building that Shaw experienced because of information**
23 **delays from Mitsubishi, the turbine manufacturer.**
24 Q. Let's talk specifically about some of
25 the effects on productivity that what you have up here

2188

1 productivity analysis in this case as well, didn't
2 you?
3 **A. Yes. I did a modified total cost**
4 **analysis.**
5 Q. Why did you do a modified total cost
6 analysis when you had already done a measured mile
7 analysis?
8 **A. I did the modified total cost to check**
9 **the reasonableness of the figure that was calculated**
10 **by the measured mile analysis.**
11 Q. And can you explain to us the
12 methodology you used for your modified total cost
13 analysis?
14 **A. Yes. The modified total cost analysis,**
15 **what you do is you look at the total hours that were**
16 **worked, you adjust those, and in this case, I adjusted**
17 **it for the subcontractor backcharges. Then you look**
18 **at your estimate for the work. In this case, the**
19 **estimate for the work from 2000 -- July of 2008**
20 **through December 2009, the performance factor was a**
21 **1.17. That's 17 percent greater than the original**
22 **estimate.**
23 Q. All right. So your modified total cost
24 analysis resulted in a productivity factor of 1.17 as
25 compared to the 1.13 in the measured mile analysis; is

2189

1 that correct?
2 **A. Yes.**
3 Q. For your modified total cost analysis,
4 does the comparability of the work -- Shaw's work play
5 any factor in that analysis?
6 **A. No.**
7 Q. That is only a factor in the measured
8 mile analysis; isn't that correct?
9 **A. That's correct.**
10 Q. If you could turn to Demonstrative 135.
11 And does this slide summarize the results of your two
12 productivity analyses?
13 **A. Yes. The modified total cost analysis**
14 **indicated about 655,649 hours lost, and then we**
15 **already talked about the measured mile analysis of**
16 **687,988 hours lost.**
17 MS. TUN: Your Honor, Plaintiffs offer
18 Demonstrative 135 into evidence.
19 THE COURT: Any objection?
20 MR. HARTNETT: No objection.
21 THE COURT: 135 is admitted.
22 (Exhibit 135 was received in evidence.)
23 MS. TUN: All right. If we could
24 publish -- thank you.
25 Q. (BY MS. TUN) Dr. Borcherding, you

2190

1 mentioned that you did the modified total cost
2 analysis as a check on the results of your measured
3 mile analysis. What was the result of that check?
4 **A. It was about a 30,000-hour difference,**
5 **which is about a 5 percent difference between the**
6 **measured mile analysis and the modified total cost**
7 **analysis.**
8 Q. And did that help you determine whether
9 the result of your measured mile analysis was or was
10 not reasonable?
11 **A. Yes, it indicated it was a reasonable**
12 **figure for the loss of productivity.**
13 Q. All right. Now, do you know which
14 analysis -- the results of which analysis that Shaw is
15 claiming loss of productivity hours for?
16 **A. Yes. They're using modified total cost**
17 **analysis, this 655,649 hours that were lost.**
18 Q. Do you know why they're using the
19 results of the modified total cost analysis instead of
20 the results of the measured mile analysis?
21 **A. Yes. They indicated to me that they**
22 **were going to take a more conservative figure, which**
23 **would be the smaller figure.**
24 Q. And is it your opinion that the results
25 of the measured mile analysis or the results of the

2191

1 modified total cost analysis are an appropriate amount
2 of hours to seek for loss of productivity as a result
3 of Xcel's mismanagement in this case?
4 **A. Yes. The modified total cost analysis**
5 **there is what another expert used to price the**
6 **productivity loss damages.**
7 Q. Do you know what that was priced at?
8 **A. Yes. It was around $27 million.**
9 Q. All right. And just to be clear, the
10 lost hours from the modified total cost analysis, does
11 that include any hours lost as a result of Shaw's own
12 issues?
13 **A. The modified total cost analysis, those**
14 **hours are hours that Shaw claimed as a result of**
15 **problems outside their control. So they don't include**
16 **their own issues other than it's not a 1.0**
17 **productivity factor; it's a 1.17, which is 17 percent**
18 **difference than a 1.0. And then they had this**
19 **deduction for subcontractor hours.**
20 Q. All right.
21 **A. Backcharges.**
22 Q. All right. But the 655,649 result from
23 your modified total cost, that doesn't include any
24 hours lost as a result of any issues attributable to
25 Shaw; is that correct?

1849

1 **recovering from our customers, and it really**
2 **depends -- whether we make more money or not depends**
3 **on their sales.**
4 Q: What about with regard to the cost
5 side of building a plant like Comanche 3? Is Xcel
6 guaranteed to recover its costs?
7 **A: Guaranteed? No.**
8 Q: Does Xcel expect to recover its
9 costs?
10 **A: Yes.**
11 Q: Okay.
12 **A: Again, you know, we set rates to**
13 **give us the opportunity to recover our costs.**
14 Q: And you intend to recover your
15 costs, correct?
16 **A: Yes. I'll continue to file cases**
17 **to give us the opportunity to recover our costs. Then**
18 **it's a matter of sales.**
19 Q: Okay. But is there a standard you
20 have to meet in order to recover costs when you go to
21 the PUC?
22 **A: Just for Comanche?**
23 Q: Generally. Or with regard to
24 Comanche.
25 **A: Yeah. You have to meet a standard**

1850

1 **that it was a prudent investment, basically.**
2 Q: Okay. So you have to show that
3 Xcel has acted prudently in the money it's spent,
4 correct?
5 **A: Yes. And for Comanche there's also**
6 **a cap on what we can recover.**
7 Q: Mm-hmm. What is that cap?
8 **A: I actually don't know. It was a**
9 **formula. I don't know the dollar value.**
10 Q: And what happens if your costs go
11 over that cap? Can you still seek to recover those
12 costs?
13 **A: I would have to look at the**
14 **settlement. Typically, we would have an opportunity**
15 **to, but I think the settlement and the endorsement by**
16 **the commission of the settlement was pretty strong so**
17 **that the cap is pretty firm.**
18 Q: What happens if Xcel causes,
19 because of its own action, resources to be spent
20 imprudently? Can it recover those costs?
21 **A: Can you give me an example of what**
22 **you mean by 'imprudent'?**
23 Q: Well, let me ask you -- you're sort
24 of the senior liaison for Xcel to the PUC, correct?
25 **A: Yes.**

1851

1 Q: That's your job?
2 **A: Yes.**
3 Q: Okay. And you understand the
4 prudence standard for cost recovery, correct?
5 **A: Yes.**
6 Q: And if you -- you understand that
7 if Xcel meets that standard, then the commission will
8 allow cost recovery, right?
9 **A: They should allow it, yes.**
10 Q: Okay. And what happens if Xcel
11 doesn't meet that standard?
12 **A: So if somebody challenged the**
13 **prudence?**
14 Q: Yes, or the commission challenged
15 prudence or the commission made a determination that
16 Xcel had expended resources imprudently, what would
17 happen?
18 **A: Well, the commission would then**
19 **tell us what happened associated with that. They**
20 **would probably pull some amount of money out of our**
21 **rate base and disallow recovery on some amount of**
22 **dollars.**
23 Q: So, in other words, the commission
24 would take back money from Xcel if it determined that
25 Xcel acted imprudently?

1852

1 **A: No, they wouldn't really take it.**
2 **It's not like we would give money to the commission.**
3 **They just wouldn't -- they would set our rates based**
4 **on a rate base that didn't include the -- those**
5 **dollars.**
6 Q: Yeah. And, I'm sorry, when I say
7 'take back,' I don't mean take back and give to the
8 commission, I mean take back and give to the rate
9 payers.
10 **A: No, they would just set the rates**
11 **that didn't reflect recovery of that investment.**
12 Q: Okay. So they would lower the
13 rates on rate payers?
14 **A: Or not raise them as high, as much.**
15 Q: Okay. Has that ever happened?
16 **A: That we've had anything found**
17 **imprudent? We have -- we have some assets that aren't**
18 **in rate base right now in Colorado, but I don't think**
19 **that the commission actually determined that they were**
20 **imprudent. I just think that they determined that**
21 **they were, like, plant held for future use that wasn't**
22 **currently suitable for rate recovery.**
23 Q: What's the definition of prudence?
24 **A: I would define it as that you took**
25 **reasonable actions in light of the circumstances known**

1805

1 **A. Yes, I was.**
2 Q. Now, let's just -- let's back up a
3 little bit here just for a moment, Mr. Gappa. You
4 mentioned this, but I want to just follow up on it.
5 There's a big tank, right, that water flows out of to
6 get to the boiler feed pumps?
7 **A. Yes.**
8 Q. How many gallons -- how big a tank is
9 that?
10 **A. It's a big tank. I think it was**
11 **probably 20 to 30 feet long, and it was probably about**
12 **10 feet in diameter. So it probably held more than**
13 **30,000 gallons.**
14 Q. More than 30,000 gallons?
15 **A. Yes.**
16 Q. And it's from there that the water
17 actually flows to the boiler feedwater pumps and they
18 pump it back to the boiler tubes?
19 **A. Yes.**
20 Q. And it flows, if I'm not mistaken,
21 through several pipes? And Shaw supplied that big
22 tank, right?
23 **A. Yes.**
24 Q. And the water flows from the tank to the
25 pumps through several big pipes, right?

1806

1 **A. Yes.**
2 Q. Do you remember how many? Is it three?
3 **A. Well, each pump has their own what we**
4 **call a suction pipe, so it's the supply to that pump,**
5 **yes.**
6 Q. So would there be three of them?
7 **A. Three?**
8 Q. Of these pipes that go from this huge
9 tank to the pumps.
10 **A. Yes.**
11 Q. And how big are those pipes?
12 **A. On the two big pumps, pumps A and B,**
13 **those pipes are probably 18-inch in diameter. For the**
14 **startup pump, that was a smaller pipe, and I don't**
15 **remember. I'd say that was probably in the vicinity**
16 **of 12 inches, maybe 16 inches in diameter.**
17 Q. Now, did anybody ever tell you that in
18 March of 2010, after you'd left the job site, large
19 quantities of dirt and debris were found on the sides
20 of those pipes that run from that big tank down to the
21 boiler feed pumps?
22 **A. It was found where?**
23 Q. In those 18-inch pipes that you just
24 described that run from the tank that Shaw supplied
25 down to the boiler feed pumps.

1807

1 **A. And did anybody -- please repeat your**
2 **question. I'm sorry.**
3 Q. Yes. Did anybody tell you that after
4 you left the job in January of 2010, in March of 2010,
5 large quantities of dirt and debris were found lining
6 those pipes that Shaw supplied that ran from the big
7 tank to the boiler feed pumps?
8 **A. No, nobody told me that.**
9 Q. So when you suggested to the jury this
10 morning that that peanut-butter-like debris must have
11 come from the boiler, nobody ever told you about the
12 dirt and debris that was found in those pipes?
13 **A. No, nobody told me that, but now this**
14 **picture is even better for me. As I said, we did**
15 **chemical flushes of our pipes, and we did steam blows**
16 **that would have removed any of that material in that**
17 **piping. And you do that to make sure everything is**
18 **clear. So what you're explaining to me is where did**
19 **that stuff come from if it was on the inside of the**
20 **pipe.**
21 **The only work that I know that occurred**
22 **after the steam blows and the chemical flush that**
23 **could have gotten that debris there is the work that**
24 **occurred at the boiler.**
25 Q. We'll take that up with other witnesses,

1808

1 Mr. Gappa.
2 **A. Sounds good.**
3 Q. Now, I think I asked you this before. I
4 apologize if I'm repeating myself. I want to make
5 sure I've covered it, though. With respect to the
6 water hammer -- I'm pretty sure I asked you -- Shaw
7 never submitted a change order request saying, "The
8 water hammer damaged the alignment to our pumps and,
9 therefore, we should be compensated"?
10 **A. You did ask that.**
11 Q. And the answer is no?
12 **A. As I said, I don't do change orders.**
13 **I'm not involved with the actual commercials ins.**
14 Q. Sure. The same with the peanut butter
15 debris that was found in one of those pumps. To your
16 knowledge, did Shaw ever submit a change order saying
17 that that peanut butter debris was somebody else's
18 fault and you should be compensated for the time and
19 expense for the repair of that pump?
20 **A. Again, I didn't have anything to do with**
21 **change orders, so I don't know if they did.**
22 Q. Let's take a look at Exhibit 4434. Do
23 you recognize Exhibit 4434 as one of the internal
24 monthly reports that Shaw people on the site would
25 prepare and send up the ladder to Shaw executives?

2551

1 **A. Those are based on the schedule analysis**
2 **prepared by Mr. Caruso.**
3 Q. If we could go back to Exhibit 1083.
4 It's behind tab 3 of the binder. Ms. Rice, you
5 mentioned markup and fee that you added to the direct
6 costs. Can you explain what markup and fee are?
7 **A. Yes. The contract has a provision for**
8 **markup and fee. The markup is 10 percent of direct**
9 **costs, and the fee is 5 percent.**
10 Q. And in your 10 years of doing damages
11 analysis, is it common to see a markup and fee in
12 contracts such as the one in this case?
13 **A. Yes, it is common.**
14 Q. And the amount of the markup and fee in
15 this case, was it an amount that you have seen that's
16 reasonable and common in contracts of this type?
17 **A. Yes. I've seen higher amounts, but this**
18 **is reasonable.**
19 Q. All right. Let's move on to the third
20 line here, additional changes. Can you tell us what
21 additional changes includes?
22 **A. Yes. These are scope changes that were**
23 **initiated as change order requests by Shaw. I**
24 **reviewed those changes and -- to determine any delay**
25 **claims included in those change orders. And the 3.3**

2552

1 **million represents the change order requests that**
2 **remain pending that exclude any prior claims for**
3 **delay.**
4 Q. Why did you exclude the delay portions of
5 those change order requests?
6 **A. Because we did an independent analysis;**
7 **Tom doing the schedule analysis, and on the cost side**
8 **I determined the costs associated with delay.**
9 Q. So you didn't want to double count.
10 **A. That's correct.**
11 Q. All right. Where did you get the
12 information for the costs on the additional change
13 order requests?
14 **A. These were pending change orders that**
15 **existed, I believe, before my involvement in the**
16 **project. Or they existed before they were provided to**
17 **me from Shaw.**
18 Q. All right. Let's move on to the next
19 line you have here titled "Unplanned Overtime Premium
20 Costs." Can you explain to us what you mean by
21 unplanned overtime premium costs?
22 **A. Yes. As of June of '08, Shaw planned to**
23 **incur overtime. They planned to work their crews**
24 **essentially an average five days a week, 10 hours a**
25 **day. So knowing the planned hours and comparing to**

2553

1 **the actual overtime that was incurred on the project,**
2 **I was able to determine the additional premium costs**
3 **that Shaw incurred above what it had planned.**
4 Q. And what methodology did you use to
5 determine those costs?
6 **A. I used a methodology where you -- I**
7 **extracted the actual premium -- or actual overtime**
8 **hours from Shaw's cost transaction detail, which Shaw**
9 **was very detailed into separating overtime, whether it**
10 **be time and a half or double time, from its regular**
11 **rates. Sometimes that's not -- information that's**
12 **unavailable, which makes it challenging.**
13 **But in this case, that information was**
14 **available. And I was able to take the total overtime,**
15 **subtract the planned overtime, and also deducted**
16 **rework that was incurred on an overtime basis to**
17 **determine an amount that would be included as the**
18 **premium costs claimed against Shaw, or -- excuse me --**
19 **against Xcel by Shaw.**
20 Q. So you first determined the amount of
21 unplanned overtime and then you determined the
22 premium. Can you explain to us how you determined the
23 premium on the overtime?
24 **A. Right. I can just give a perfect example**
25 **of -- or just an example would be, if you have a**

2554

1 **laborer who's paid 20 hours -- or is paid $20 an hour**
2 **to work eight-hour day, and then they incur overtime,**
3 **they're paid $30 an hour.**
4 **The overtime portion -- or the premium**
5 **portion is that additional $10 that they earn working**
6 **an overtime hour versus regular hours.**
7 **So the analysis of the overtime premium**
8 **costs only includes the portion that's in addition to**
9 **the regular wage rate.**
10 Q. So in your example, it only -- it only
11 includes that additional $10.
12 **A. That's correct.**
13 Q. All right. So once you determined the
14 premium on the overtime and the unplanned overtime
15 hours, what did you do with that information?
16 **A. I took the unplanned hours multiplied by**
17 **the premium portion of the hourly rates, and I**
18 **determined the unplanned premium costs.**
19 **I also added the 12.71 percent burden**
20 **associated with premium costs and the appropriate**
21 **markup and fee to determine unplanned overtime premium**
22 **cost of 4.2 million dollars.**
23 Q. All right. You mentioned that you added
24 a 12 percent burden. Can you explain to us what you
25 mean by that?

1 **A. Yes.**
2 Q. And the main steam, you show 22 field
3 welds, 6 with rework. So would that be a failure rate
4 of more than 25 percent?
5 **A. Yes.**
6 Q. Again, far above any acceptable level?
7 **A. Far above, yes.**
8 MR. HINDERAKER: Okay. Thank you, Tim.
9 Q. (BY MR. HINDERAKER) Now, was Alstom
10 responsible in any way for the problems that Shaw had
11 in getting its welding done on those critical lines?
12 **A. No.**
13 Q. And did Public Service do anything that
14 contributed in any way in Shaw's inability to get
15 those lines constructed and welded?
16 **A. We did not.**
17 Q. Now, were there other areas of the
18 project where the same poor quality of work by Shaw
19 caused major problems?
20 **A. Yes, there were.**
21 Q. What's another example?
22 **A. Another good example would be TED, the**
23 **turbine exhaust duct, the 30-foot diameter duct.**
24 Q. And just very briefly, why was that part
25 of the project beset by quality issues?

1 **A. Well, we had weld failures, we had poor**
2 **quality control. We'll see in a moment. One of the**
3 **glaring issues you'll see is it's a 30-foot diameter**
4 **weld, a piece of pipe. And Shaw erected like a**
5 **zipper, put one down, and you'll see this in**
6 **animation. So they set one of these 30-foot ducts**
7 **down next to its partner and welded up a 30-foot**
8 **diameter duct. I think it's 3/4-inch thick.**
9 **And later, they summoned one over and**
10 **put it in the wrong location. So they had to cut the**
11 **30-foot duct in half, move it to the right location,**
12 **and then put like a band-aid over the entire diameter**
13 **and make two welds on the outside and two on the**
14 **inside to fix it.**
15 Q. Now, these issues that arose with Shaw's
16 construction of the turbine exhaust duct, did you make
17 contemporaneous records of them in your logs as you've
18 described?
19 **A. Yes. I would walk this down every day.**
20 Q. And did you have an animation created
21 under your supervision that depicts Shaw's erection of
22 the turbine exhaust duct and notes the various
23 problems that Shaw encountered?
24 **A. I did.**
25 Q. And have you checked the animation

1 against your own records as well as against
2 contemporaneous photographs to verify its accuracy in
3 every respect?
4 **A. I did.**
5 Q. Let's take a look at Public Service's
6 Demonstrative Exhibit 33. And similarly here,
7 Mr. Kelly, just go ahead and narrate and ask
8 Mr. Piganelli to pause. Let's go back.
9 THE WITNESS: Yes, let's back up,
10 please, Tim.
11 **A. Okay. Shaw began this work, my**
12 **recollection is, in January of '07, and I did not**
13 **begin detail logs until I think the early summer of**
14 **2008, but I was able to use references I had before**
15 **and photographs to kind of back up to this April 2008**
16 **date.**
17 **The planned finish date is October 2008.**
18 **And understand, this is the planned date in Shaw's**
19 **June 2008 schedule. It's not the plan date from their**
20 **baseline schedule.**
21 Q. This is the postsettlement date?
22 **A. This is the postsettlement date. It's**
23 **in April, and in June, they're projecting to kick this**
24 **thing in four months.**
25 Q. Let's just pause for a moment longer.

1 What we're looking at there, is that the air-cooled
2 condenser?
3 **A. Yes.**
4 Q. And I think we may have said this, but I
5 know it's hard to remember all these things --
6 **A. I'll give you two minutes.**
7 Q. -- when it's coming at you, but the
8 turbine has steam that goes into that that spins the
9 turbine. That's what makes the electricity, right?
10 **A. Yes.**
11 Q. Now, the steam has to go somewhere,
12 right?
13 **A. Yes.**
14 Q. And where it goes is the turbine exhaust
15 duct? That's where the steam goes when it leaves the
16 turbine?
17 **A. Yes. And technically, it goes to here**
18 **and another area. The cooling tower -- Mr. Gappa**
19 **might have testified to the parallel or the hybrid**
20 **cooling system. So it goes to those two areas. And**
21 **in the summer -- sorry. In the wintertime, this is**
22 **where it primarily goes.**
23 Q. And the whole point of the air-cooled
24 condenser is simply to condense that steam back down
25 to water so that you can pump it back into the boiler?

2739

1 anymore, but out of those 35 hits, most of them, 30 or
2 31, were that sort of thing. They were reference to,
3 hey, we've got to get this tape thing under control,
4 and they were not directed to a particular contractor.
5 The other four, I found, yes, two were
6 cases where someone had put up red tape and blocked
7 Shaw and two were cases where Shaw had put up red tape
8 and was blocking someone else.
9 Q. Okay. Let's move on now and talk about
10 a new topic. That is access plans. Were access plans
11 another means that Public Service used to coordinate
12 the areas' base work on this job?
13 A. Yes. They are required by the contract.
14 Q. You anticipated my next question. This
15 is something specifically required by the contract; is
16 that right?
17 A. Yes.
18 Q. Let's take a look at Section 4.15.2.
19 And 4.15.2 A, it's titled Access Plan. Do you see
20 that, Mr. Kelly?
21 A. I do.
22 Q. And it says, "As part of an integrated
23 project schedule, Contractor" -- that would be Shaw in
24 this case -- and did the other contractors have
25 similar provisions in their contracts?

2740

1 A. I'm sorry. I don't know. I was not
2 familiar with their contracts.
3 Q. Okay. "As part of the integrated
4 project schedule, Contractor shall coordinate with the
5 Other Contractors to produce an access plan, which
6 will take into consideration the access necessary by
7 Contractor into areas under the care, custody and
8 control of Other Contractors in order to allow
9 Contractor to perform the portion of the work that
10 takes place in such areas."
11 And is that something that the
12 contractors would do, would cooperate on over the
13 course of this job?
14 A. Yes.
15 Q. And once the contractors had prepared
16 the access plan, what was Public Service's role?
17 A. To review it and approve it.
18 Q. And did you do that?
19 A. Yes, we did -- well, we didn't approve
20 them all. If there was an issue with it, we would
21 talk with -- I would talk with Shaw and say, "We don't
22 like this. Can you do something else to make it a
23 little safer," and most of the time they would comply.
24 So there was never any access plan that was
25 permanently rejected.

2741

1 Q. So you might say they needed to tweak it
2 before they approach?
3 A. Yes, put up a barricade so no one jumps
4 in a trench or something like that.
5 Q. Sure. And then at the end of Section
6 4.15. -- let's go to Section -- Subsection B, I think.
7 Yes. And then Subsection B says, "Pursuant to the
8 access plan, Contractor shall be provided the ability
9 and space to perform the work in question without any
10 unreasonable or material interference from Other
11 Contractors."
12 And in your experience, did that happen
13 when contractors would proceed under one of these
14 access plans?
15 A. Yes.
16 Q. And then it continues. "Unless
17 otherwise agreed in the access plan by the applicable
18 Other Contractors, access shall not mean exclusive use
19 by Contractor of an area where both Contractor and
20 such Other Contractors will be performing work at the
21 same time."
22 Now, let's talk about that for just a
23 moment. Is there anything unusual on a construction
24 site about having craftsmen from more than one
25 contractor working in the same general area of the

2742

1 plant or facility?
2 A. No.
3 Q. And under the contract, did any of these
4 contractors have a reasonable right to expect that if
5 they were in an area that there couldn't be anybody
6 else near them?
7 A. No.
8 Q. Let's talk a little more about how the
9 access plan system worked. Was underground piping one
10 of the first access plans?
11 A. Yes.
12 Q. How did that happen?
13 A. Why or how?
14 Q. Pardon me?
15 A. Why or how?
16 Q. Either one, both. You tell the story.
17 A. As I mentioned early on, through the end
18 of 2006, Shaw was on site doing foundations and
19 underground piping work. It's the rule that a
20 contractor on a construction site wants to get out of
21 the ground. You want to get the foundations in,
22 underground pipe in. If you can get electrical work
23 in, you want to get that done first before you start
24 the rest of your erection. No one wants, you know, a
25 trench in the middle of their front yard when they're

2763

1 keeping with the contract's requirements and you were
2 able to get it improved or upgraded?
3 **A. Yes, and I don't want to -- you guys to**
4 **think that I'm the guy. You know, as I mentioned**
5 **before, we have a team. We have foundation experts,**
6 **welding experts, rotating. If I went out there and I**
7 **saw something and I didn't understand what it was, I**
8 **would just go and get the Xcel guy to help educate me**
9 **on that, but -- and many times, that might have to**
10 **do -- like early on, I don't recall if I had been**
11 **involved in a concrete pour, but there were some of**
12 **the early concrete pours, standing next to John Bunten**
13 **and watching them happen, he would point out the**
14 **things that were required. So if he wasn't around,**
15 **now I'd go and look at the things he taught me to look**
16 **at and make note of that.**
17 **On the quality aspect, if you're not**
18 **familiar with welding, there are very specific**
19 **requirements about how you have to keep and store the**
20 **weld rod you use. Many times, we would find those**
21 **being violated from everyone, Alstom, B&W, but now**
22 **understanding what to look for, I could see those**
23 **things and then get Shaw to correct the issue.**
24 Q. If you saw something that wasn't in
25 compliance with the contract?

2764

1 **A. Right. At that point, we had reviewed**
2 **all the engineering drawings. So I wasn't going to go**
3 **out into the field and see a pump and say, "Wait a**
4 **second. That's the wrong kind of pump." We would**
5 **have caught that in the engineering review.**
6 Q. And was your background, having been
7 involved in developing the technical specifications to
8 the BOP contract, was that helpful to you in
9 monitoring Shaw's work and evaluating its compliance
10 with the specifications?
11 **A. Oh, yes. I started in late '04. The**
12 **bid for the contract was early '06, so I had read most**
13 **of it a few times at least in that year, and then -- I**
14 **don't have it memorized. Then as you go in the plant,**
15 **I know where things are in the contract. So I would**
16 **see something, and I could go to the contract and find**
17 **what section related to that particular event.**
18 Q. Now, as you'd walk around the site,
19 including the turbine building, if you observed Shaw's
20 work and you thought they weren't doing things in the
21 most efficient way or you thought they should take
22 this crew and put it over here and do that instead of
23 doing that, did you have the ability to tell Shaw how
24 to go about doing their work?
25 **A. No, the contract does not allow me to do**

2765

1 **that.**
2 Q. Let's take a look at Section 4.4.1 of
3 the BOP contract. This section is called Supervision,
4 Superintendents and Field Service, and it says,
5 "Contractor" -- that's Shaw here, right?
6 **A. Yes.**
7 Q. -- "shall supervise and direct the work
8 competently and efficiently, devoting such attention
9 thereto and applying such skills and expertise as may
10 be necessary to perform the work in accordance with
11 the agreement. Contractor shall be solely responsible
12 for and have control over construction means, methods,
13 techniques, sequences, procedures, and safety and
14 security programs and for coordinating all portions of
15 the Work."
16 And that capital W in Shaw's contract,
17 does that mean Shaw's work?
18 **A. Yes, it does.**
19 Q. So it's Shaw that's got control over the
20 schedule and over the means and methods of how they do
21 the construction?
22 **A. Yes, they do.**
23 Q. Now, that provision that Shaw gets to
24 control how it does its work, is that unusual in
25 construction contracts?

2766

1 **A. No. I'm sure you'll see those similar**
2 **words everywhere.**
3 Q. Everywhere. Is that pretty much
4 universal in construction contracts?
5 **A. Yes, it is.**
6 Q. Why is that?
7 **A. They bid the job fixed price, and they**
8 **had a plan for doing it a particular way. I can't**
9 **tell them how to do it. That's not my job. That's**
10 **theirs.**
11 Q. A contractor won't give you a fixed
12 price and then say, "But you can tell me how you want
13 me to do it"?
14 **A. No. That's not realistic. Correct.**
15 Q. Now, you spent pretty much every day for
16 four years observing Shaw do its work; is that right?
17 **A. Yes.**
18 Q. What did you observe about Shaw's
19 ability to maintain schedule?
20 **A. They couldn't. It just seemed like**
21 **everything would slip. There might be -- they might**
22 **offer an excuse or a reason, but it didn't solve the**
23 **root problem.**
24 Q. And that inability to maintain schedule,
25 did that apply to the entire course of the project?

1 this calculation.
2 **A. Yes. I took Dr. Borcherding's lost**
3 **productivity analysis and deducted the -- to be**
4 **conservative, deducted all the engineering rework, and**
5 **then multiplied it by the 34.1 percent. That's the**
6 **relationship -- the example I had given you as for**
7 **every 10 crew, you would have three or four indirect**
8 **laborers. And then I used that average rate to**
9 **compute the incremental field manual labor cost.**
10 **Now, there's impact -- there's -- these**
11 **are indirect costs that are part of our delay analysis**
12 **on delay days. And so I do an extraction to only**
13 **include the incremental component that's incurred on**
14 **planned days.**
15 **So then I determine that 5.4 million**
16 **dollars of the incremental costs occurred on planned**
17 **days, and applied the markup and fee to determine 6.3**
18 **million dollars of incremental field manual labor**
19 **costs incurred.**
20 Q. Okay. You explained that you only -- you
21 only calculated the costs on unplanned days. Where
22 are the costs for the planned days included in
23 already?
24 **A. This is the cost associated with the**
25 **planned days. The unplanned portion of the**

1 **incremental would be part of the delay costs.**
2 Q. All right. I think I got the two -- the
3 two reversed, so --
4 **A. Yes.**
5 Q. So thank you for that clarification.
6 And what was your final conclusion as to
7 what the indirect field manual overhead costs were
8 with markup and --
9 **A. The incremental labor cost on planned**
10 **days is 6.3 million dollars.**
11 Q. Let's look now at tab 15. Exhibit 1064,
12 page 1233. Ms. Rice, would you describe for us what
13 this calculation shows.
14 **A. Yes. This calculation shows the per diem**
15 **costs associated with the additional direct laborers**
16 **and indirect laborers, and the costs associated with**
17 **the small tools and consumables at the contract rate**
18 **of $4 per labor hour.**
19 Q. Where did you get the $4 per labor hour
20 for the tools?
21 **A. That was based on the contract.**
22 Q. And what was your conclusion as to what
23 the additional craft per diem and small tools and
24 consumables is due to Shaw?
25 **A. With markup and fee, 4 million dollars.**

1 Q. Let's go back to tab 3, Exhibit 1083.
2 This last category here, additional subcontractor
3 costs, would you explain what is included in that line
4 item.
5 **A. Yes. When I reviewed Shaw's cost report,**
6 **I identified that they had overran subcontractor**
7 **costs. And so I discussed that with Shaw and asked if**
8 **they had any subcontractor cost overruns or claims.**
9 **And I was told yes. And I had asked for the**
10 **supporting documentation to incorporate that into the**
11 **report.**
12 Q. Did you review supporting documentation?
13 **A. Yes, I did.**
14 Q. What kind of supporting documentation did
15 you review?
16 **A. Invoices, change orders, and pending**
17 **change orders from the subcontractors.**
18 Q. Let's look at tab 16 in your binder.
19 Exhibit 1064, page 1237. Did you prepare this
20 summary?
21 **A. That's correct.**
22 Q. Would you walk us through what your
23 summary shows.
24 **A. Yes. There were two subcontractors -- I**
25 **believe there may have been one or two others, but the**

1 **ones that are being included in the claim are Farwest**
2 **and Scheck. Farwest was impacted based on**
3 **acceleration and schedule delay. And Scheck was**
4 **additional supervision that was required as a result**
5 **of the impacts.**
6 **The total amount for Farwest and Shaw --**
7 **Farwest is 2 million, and Shaw -- Scheck -- excuse**
8 **me -- is 1.5. The total being 3.1. And I did**
9 **identify that some of this cost has actually been**
10 **paid.**
11 Q. Has already been paid by Shaw?
12 **A. That's correct. So the additional**
13 **subcontractor costs includes a portion that has been**
14 **paid, and a portion that is still due the sub as a**
15 **claim -- as a pass-through claim.**
16 Q. Let's go to tab 3, Exhibit 1083. What
17 was your opinion on the total amount of damages due to
18 Shaw as a result of Xcel -- disruption delays and
19 accelerations caused by Xcel in this case?
20 **A. The total is 87.25 million.**
21 Q. Let's look back at tab 1 of your binder.
22 Demonstrative 146. And this is a summary we looked at
23 yesterday. Can you tell us the total amount of cost,
24 damages and contract balance that is due to Shaw from
25 Xcel as a result of your expert analysis.

2559

1 **and the disruption to the direct laborers. This is**
2 **the -- Dr. Borcherding is the -- has the expertise on**
3 **lost productivity. I relied on his analysis of the**
4 **impact hours. And what I did is, I applied the**
5 **average wage rate for direct laborers to determine the**
6 **costs associated with Dr. Borcherding's analysis of**
7 **the lost productivity hours.**
8 Q. All right. Let's look at a summary of
9 your calculation, which is Exhibit 1064, page 103.
10 It's behind tab 9. Would you walk us through your
11 loss of productivity cost calculation that's on your
12 screen.
13 **A. Yes. The number that you depict, the**
14 **655,649, that is Dr. Borcherding's loss of**
15 **productivity direct labor hours. And then I applied**
16 **the average wage rate of $42.06. And that's the**
17 **average wage rate, excluding any overtime, because we**
18 **already picked up any claims associated with overtime**
19 **that was incurred in the premium costs. So we**
20 **didn't -- this is just the regular time. To come up**
21 **with 27.5 million dollars. We --**
22 Q. Let me interrupt you right there. Where
23 did you get the regular -- the weighted average
24 regular rate with burden of $42.06?
25 **A. I took the total labor cost -- direct**

2560

1 **labor costs paid -- the regular portion of the direct**
2 **labor costs incurred divided by the direct labor hours**
3 **incurred from the June '08 -- or July 1, 2008, time**
4 **period going forward, and applied that rate.**
5 Q. And the $42.06, did that appear
6 reasonable to you --
7 **A. Yes.**
8 Q. -- given your experience?
9 **A. Yes. In fact, I've seen rates between**
10 **the parties at closer to $44 an hour. So based on the**
11 **different rates that I've seen in the project**
12 **documents, 42 seemed reasonable.**
13 Q. All right. I'm sorry I interrupted you.
14 Why don't you go ahead and continue.
15 **A. Okay. So after applying**
16 **Dr. Borcherding -- or the wage rate that I determined**
17 **for direct laborers, when I multiplied by**
18 **Dr. Borcherding's loss of productivity hours, I**
19 **determined 27.57 million dollars of direct labor costs**
20 **related to the impacts.**
21 **Then I also did a deduction to remove**
22 **unplanned engineering rework.**
23 Q. Why did you do that deduction?
24 **A. To be more conservative. Shaw is not**
25 **claiming the unplanned engineering rework.**

2561

1 Q. Okay. What did you do next?
2 **A. I then applied the markup and fee for the**
3 **contract and determined the direct labor impacts to be**
4 **27.56 million, based on Dr. Borcherding's lost**
5 **productivity analysis.**
6 Q. Let's go back to Exhibit 1083, which is
7 behind tab 3.
8 **A. Okay. Thank you.**
9 Q. Moving on down the line, after loss of
10 productivity, you have incremental field overhead.
11 Can you explain what incremental field overhead is?
12 **A. Incremental field overhead represents the**
13 **additional indirect costs that Shaw incurred as a**
14 **result of disruption, resequencing of work and impacts**
15 **and acceleration. The --**
16 Q. What categories are included in
17 incremental field overhead?
18 **A. The categories that are included in**
19 **incremental field overhead is the indirect craft hours**
20 **associated with the impact, which I did an analysis of**
21 **that to determine the hours of additional indirect**
22 **craft. And then I also included the additional per**
23 **diem costs and small tools costs associated with the**
24 **additional direct laborers that are part of the**
25 **impact -- lost productivity analysis.**

2562

1 Q. All right. So we have the indirect craft
2 overhead, the additional per diem overhead, and the
3 small tools. Those are the three categories in the
4 incremental field overhead; is that correct?
5 **A. That's correct.**
6 Q. All right. Let's start with the indirect
7 field overhead. Would you explain what that means?
8 **A. As a result of the disruption, Shaw had**
9 **to increase its indirect support. There really**
10 **isn't -- I haven't seen where there's records to**
11 **really do -- that exist to substantiate exactly when**
12 **the increase of this indirect support occurs, but a**
13 **reasonable analysis to try to understand how this**
14 **impact of direct craft and how they're disrupted and**
15 **having issues with resequencing their work, they --**
16 **you need more indirects, because you're in different**
17 **places.**
18 **You might be working in more than one**
19 **area, so you can't have a safety -- you know, one**
20 **safety manager can't be supervising four locations at**
21 **the same time. So you're going to have to increase**
22 **the number of -- of safety personnel on the job. That**
23 **would be an example.**
24 Q. In addition to safety personnel, can you
25 give us one or two other examples of indirect --

2851

1 anything to interfere with Shaw's ability to get this
2 turbine erected?
3 **A. All we did was offer Todd every day to**
4 **help him out with the erection, but no, we did not.**
5 Q. Okay. Let's talk about some issues that
6 have come up over the last few days here in the
7 courtroom and get your thoughts on them. First, Shaw
8 has alleged that it was not able to complete its
9 piping systems in the turbine building until Alstom
10 completed their piping systems in the boiler building.
11 Is there any truth to that?
12 **A. I recall that testimony, and there's no**
13 **truth to that.**
14 Q. Why?
15 **A. When I heard the testimony, I believe it**
16 **was in reference to terminal points where Alstom had a**
17 **piping system to a terminal point and Shaw would take**
18 **that system back to the turbine building. And those**
19 **terminal points, tie points, interfaces, that would be**
20 **the things that Alstom handed off. And that's a fixed**
21 **point in space.**
22 **And the fact that Alstom has that or any**
23 **of the other 200 feet of their system in place has no**
24 **effect on Shaw being able to install from the turbine**
25 **building through the boiler building their 200 feet of**

2852

1 **pipe and come up and make that weld.**
2 Q. Okay. And can we go back into the
3 records and see when these tie points were handed over
4 by Alstom?
5 **A. Yes. We kept track of that.**
6 Q. All right. We'll save that for another
7 day. Now, when Public Service removed piping work
8 from Shaw's scope -- we talked about removing the
9 electrical work from Shaw's scope because they weren't
10 getting it done. You're aware of that generally?
11 **A. Generally.**
12 Q. And that was given to FPD Main?
13 **A. Yes.**
14 Q. But did Public Service also remove
15 certain piping work from Shaw's scope?
16 **A. Yes, in the boiler area.**
17 Q. And was that also because Shaw just
18 wasn't getting it done?
19 **A. Yes.**
20 Q. And to what contractor did Shaw (sic)
21 award that piping work that was removed from Shaw's
22 scope?
23 **A. Azco, A-z-c-o.**
24 Q. Were you involved in overseeing that
25 work in any way?

2853

1 **A. Yes, in the turnover of the superheat**
2 **pipe to Azco and in the turnover of the boiler drains**
3 **pipe to Azco. If you recall, I was trying to explain**
4 **how the boiler drains down to those two tanks. So**
5 **that drain piping as a system was handed over to Azco.**
6 Q. And those are both piping systems that
7 are located in the boiler building?
8 **A. Yes.**
9 Q. And what was your role?
10 **A. When we gave the boiler drain piping to**
11 **Azco, I was working with them in overseeing their work**
12 **and coordinating the transfer of the pipe equipment**
13 **and all the hangers from Shaw to Azco and then, you**
14 **know, helping them with access in the building.**
15 Q. And did you help with the coordination
16 between Azco and Alstom?
17 **A. I helped. It didn't take much help.**
18 **They worked pretty well together.**
19 Q. What did you observe during those weeks
20 when you had that role?
21 **A. Well, I had been watching Shaw install**
22 **that piping and other piping systems, and my immediate**
23 **impression when Azco started working under me or under**
24 **my observation was they worked much more efficiently,**
25 **they worked with smaller pipefitting crews, they**

2854

1 **worked in areas of the boiler that Shaw had refused to**
2 **work because Shaw said they were too congested. And**
3 **that's one of the reasons why Shaw was refusing to do**
4 **the work. And Azco just moved in, built their**
5 **schedule, and got it done.**
6 **Azco preplanned their work, and they**
7 **actually installed piping systems in the boiler before**
8 **Alstom handed it off to them. So they just**
9 **proactively said, "Well, we know sometime in the**
10 **future Alstom is going to have their pipe up there.**
11 **Let's just do all our stuff so when Alstom gets there,**
12 **we can make the final weld."**
13 **I found them very proactive in doing**
14 **work-arounds. If there was an area where Shaw had to**
15 **rework, if there was a bust or interference, instead**
16 **of coming to me and saying, "What do you want us to**
17 **do?" They would come up with a plan and say, "Is it**
18 **okay?" And Shaw would approve that or not.**
19 **But 3 o'clock meetings, I didn't hear**
20 **them complain about congestion. They just got in**
21 **there and knocked it out. I worked in there for about**
22 **three months, and then I handed over that**
23 **responsibility to another Shaw employee, Scott Eddy.**
24 Q. Another topic. You were here, I think,
25 when Rob Gappa testified that he thought the boiler

2906

1 Mr. Farmer, did you have some input into this letter?
2 **A. Yes, I did.**
3 Q. And I'm not going to go over it in
4 detail, but what's the gist of Exhibit 5108? And by
5 the way, the date is what?
6 **A. August 26 of 2010.**
7 Q. And just briefly, what's the gist of this
8 correspondence?
9 **A. We're just reaffirming our positions, the**
10 **things I just mentioned about substantial and**
11 **mechanical, that Shaw has not met those requirements.**
12 Q. And do you advise them here that you are
13 going to take over the remaining punch list items and
14 complete them?
15 **A. Yes. In item 3 on page 2.**
16 Q. Yeah. You say, "As a result of SSW's" --
17 that's Shaw/Stone & Webster?
18 **A. Yes.**
19 Q. -- "failure to make diligent progress on
20 the punch list, Xcel Energy hereby provides SSW with
21 30-day notice of Xcel's intent to take over all
22 remaining punch list work pursuant to paragraph 16.8
23 of the BOP contract."
24 Have you carried that out subsequent to
25 sending this letter?

2907

1 **A. Yes. We began working on some of these**
2 **items.**
3 Q. Okay. I want to ask you about one last
4 thing, Mr. Kelly, and then we'll be done.
5 Now, we know that there were several
6 prime contractors on this site, and there's an exhibit
7 that plaintiff's counsel has put up a couple of times
8 that shows Public Service at the top and then, I
9 think, six contractors, Kiewit, Karrena and so forth.
10 But is it fair to say that there were three principal
11 contractors involved in this Comanche 3 project?
12 **A. Three principal contractors on-site.**
13 Q. On-site. And those were who?
14 **A. B&W, Alstom, and Shaw.**
15 Q. Now, we've heard a lot about Shaw and
16 Alstom in this trial so far, very little about Babcock
17 & Wilcox or B&W. And let's just make sure again
18 everybody remembers, you know, who they were and what
19 their role on the project was.
20 Is this blue area that is Babcock &
21 Wilcox?
22 **A. It is.**
23 Q. And what is that? What was the nature of
24 their work?
25 **A. You'll hear -- the back end is a lazy way**

2908

1 **to say it. It's the air quality control system. The**
2 **components that take the sulfur and the mercury and**
3 **things like that out of the flue gas before it goes up**
4 **the stack.**
5 Q. And Alstom's work is actually in the
6 middle of these three areas?
7 **A. Yeah. They're kind of pinched in there.**
8 Q. So the boiler would send steam this way
9 to the turbine; is that right?
10 **A. Yes.**
11 Q. To Shaw. And it would send flue gas from
12 the boiler, from burning all that coal, this way to
13 Babcock & Wilcox; is that right?
14 **A. Yes.**
15 Q. And so did Babcock & Wilcox have to
16 interface with Alstom as Shaw did?
17 **A. Yes.**
18 Q. And did Babcock & Wilcox also have to
19 interface with Shaw as Alstom did?
20 **A. Yes.**
21 Q. And why do you say that? What was the
22 nature of that?
23 **A. Shaw's relationship with Alstom was**
24 **similar to B&W. Piping tie points and wiring all the**
25 **electrical equipment and installing the foundations.**

2909

1 Q. Now, we've heard Shaw say over and over
2 in this trial that they couldn't get their work done
3 on time, because Alstom was late. Have you heard that
4 generally?
5 **A. I have heard that generally.**
6 Q. And, of course, Alstom said they couldn't
7 get their work done because Shaw was late.
8 MR. McCORMICK: Objection, Your Honor.
9 That's leading, argumentative, and completely
10 unsupported by the record.
11 THE COURT: Sustained on the first two
12 grounds.
13 Q. (BY MR. HINDERAKER) Now, what about
14 Babcock & Wilcox? What did they do?
15 **A. They got done on time.**
16 Q. They didn't -- they didn't wait for
17 Alstom?
18 **A. No. They had their plan and their craft**
19 **and, you know, their organization.**
20 Q. And they didn't wait for Shaw?
21 **A. No.**
22 Q. They got their work done on time? They
23 met their schedule?
24 **A. I believe so, yes.**
25 Q. What did they do when they got their work

3158

1 looking at the film would think.
2 MR. HARTNETT: I'll rephrase the
3 question.
4 THE COURT: All right.
5 Q. (BY MR. HARTNETT) Was it obvious to you
6 what we were seeing was rust and corrosion from the
7 wall of the pipe itself?
8 **A. I mean it seemed like the most obvious**
9 **source of the issue that we had going on, yes.**
10 Q. And no one from Shaw at that time made
11 any allegation that it was debris from the boiler that
12 had fouled their pump; isn't that true?
13 **A. That is true, yes.**
14 Q. Now, this particular pump that was
15 contaminated, it had to go off-site to be repaired; is
16 that right?
17 **A. Yes.**
18 Q. And then it was brought back; is that
19 right?
20 **A. Yes.**
21 Q. And what happened then?
22 **A. The pump was originally shipped off-site**
23 **after it had seized the first time in mid-January, and**
24 **there was a series of events during the time that the**
25 **pump was at the vendor's shop, which in this case was**

3159

1 **Sulzer. They actually managed to destroy the shaft in**
2 **the process of doing pump repairs. We had to get a**
3 **new shaft or they had to supply a new shaft and**
4 **rebuild the pump pretty much from scratch. So the**
5 **pump did come back to the site early March time frame.**
6 **We at that point then -- we were**
7 **running -- the plant was in service at that point,**
8 **operating at 50 percent load.**
9 Q. So let me pause there. So this is in
10 early March of this year, 2010?
11 **A. 2010, yes.**
12 Q. And the plant is running on one boiler
13 feed pump?
14 **A. That's correct.**
15 Q. And can the plant get to full load on
16 one boiler feed pump?
17 **A. No.**
18 Q. Okay. So what happened when the A pump
19 came back?
20 **A. A pump came back, and we -- once it was**
21 **reassembled into the casing and placed back on turning**
22 **gear, the vendor insisted that an overspeed test be**
23 **done, and that's normal procedure for commissioning a**
24 **brand-new pump. So the overspeed test was done, and**
25 **what that test does is it's a safety feature for the**

3160

1 **turbine driver so that if for some reason the pump**
2 **goes into a run-out condition or a run-away condition,**
3 **if you overspeed that pump beyond its design limits,**
4 **it will safely trip that pump.**
5 **So we did an overspeed test, and the**
6 **test was successful; and the pump appeared to be**
7 **working fine. And on the coast-down of the pump -- I**
8 **mean the overspeed test by definition will trip the**
9 **pump on coast-down. As the pump was coasting down,**
10 **when it gets down to about 100 rpm, it should go on**
11 **turning gear, and the pump failed to go on gear. It**
12 **attempted to go on gear, but did not stay on gear.**
13 **After that event, we investigated that, and it turned**
14 **out the pump seized yet again.**
15 Q. So the pump seized a second time?
16 **A. That's correct.**
17 Q. And what was the cause of this seizure
18 the second time?
19 **A. Well, it's -- in my opinion, it was the**
20 **same source.**
21 Q. More debris?
22 **A. Yes.**
23 Q. From the same pipe?
24 **A. From the same pipe.**
25 Q. So when was it that Shaw finally had two

3161

1 fully functional boiler feed pumps?
2 **A. March 26th.**
3 Q. Of this year?
4 **A. 2010.**
5 Q. And then how soon after that did the
6 plant achieve full load?
7 **A. March 31st.**
8 Q. So there was some ramp-up to full load
9 after Shaw got its pumps in full operation?
10 **A. Yes. We had some scrubbers to work on,**
11 **but yes. It doesn't happen instantaneously.**
12 Q. Now, you have been working at the plant
13 pretty much full time all the way through today; is
14 that right?
15 **A. That's correct.**
16 Q. Now, are there issues at the plant now
17 related to Shaw's design of the plant?
18 **A. Yes, we still have issues.**
19 Q. And so let's just briefly go through
20 those issues. What would you consider to be sort of
21 the most significant issue that -- with Shaw's design
22 that's impacted the plant today?
23 **A. Probably the most significant issue is**
24 **the fact that the performer's test demonstrated that**
25 **they could not make their back pressure guarantees.**

3162

1 **So as a result of that, the plant cannot run as**
2 **efficiently as it could otherwise run.**
3 MR. HARTNETT: Let's put up Schedule D.
4 (Document tendered.)
5 MR. HARTNETT: Now, let's zoom in --
6 just cut off that last column there. No, the other
7 way. One more. There we go.
8 Q. (BY MR. HARTNETT) All right. I'm going
9 to ask you some questions to try to explain this back
10 pressure concept. Is it true that the air-cooled
11 condenser and the surface steam condenser that uses
12 water from the cooling tower, do they create a vacuum?
13 **A. That's true.**
14 Q. Okay. So what's atmospheric pressure,
15 by the way, around here?
16 **A. Around here, it's about 12 pounds per**
17 **square inch. In terms of inches of mercury, which is**
18 **shown here on this document, it's 27 inches of**
19 **mercury.**
20 Q. So 27 inches of mercury is what we
21 experience in this courtroom, right?
22 **A. That's correct.**
23 Q. And the back pressure guarantee, for
24 case D, it's 3.7 inches of mercury; is that right?
25 **A. That's correct.**

3163

1 Q. So that's a pretty strong vacuum?
2 **A. Very strong vacuum.**
3 Q. So the idea here is that the air-cooled
4 condenser -- the air-cooled condenser and the surface
5 steam condenser that's supplied by the cooling tower,
6 they create a vacuum that helps suck steam out of the
7 turbine?
8 **A. Yes.**
9 Q. And the stronger the suction, the more
10 efficient the turbine is going to be?
11 **A. That's correct.**
12 Q. So Shaw in its contract guaranteed to
13 provide a certain amount of vacuum suction through --
14 coming out of the turbine; is that right?
15 **A. That's true.**
16 Q. And has Shaw been able to achieve the
17 guarantee that it promised in the contract?
18 **A. Not the conditions required by Case D.**
19 Q. Okay. So how far did they miss it by?
20 **A. Better than half an inch.**
21 Q. So a half an inch out of 3.7, so instead
22 of 3.7, it's 4.3?
23 **A. 4.3 and change.**
24 Q. So what impact does that have on the
25 overall performance of the plant?

3164

1 **A. Several impacts. One, if you can**
2 **operate at that back pressure at that load, it will**
3 **require more fuel to maintain the same output. So**
4 **that causes the efficiency of the plant to be**
5 **decreased. And there are cases where on a hot day,**
6 **for example -- case D represents a 97-degree day. So**
7 **if you have a day that's 97 degrees or higher and we**
8 **cannot make even 5 inches of back pressure, there are**
9 **limitations on the turbine operation where we cannot**
10 **operate at full load.**
11 Q. So because Shaw hasn't been able to
12 achieve its guaranteed back pressure, there are times
13 when this plant cannot achieve full load?
14 **A. There are times when we have not been**
15 **able to achieve full load, yes, due to back pressure**
16 **concerns.**
17 Q. So when Shaw told the jury that this
18 plant exceeds 750 megawatts of power, that's only true
19 some of the time; is that right?
20 **A. Well, if everything is operating**
21 **normally, we should be able to get 750 megawatts.**
22 Q. And sometimes you can do better than
23 that, and under some conditions, because of this back
24 pressure problem, you do worse than that?
25 **A. Yes. It's known as a D rate, and you**

3165

1 **can have a D rate of the plant for many reasons. And**
2 **so far, most of our issues have been really on the**
3 **air-cooled condenser affecting overall plant**
4 **performance.**
5 Q. The bottom line here is that the plant
6 that Shaw -- the air-cooled condenser and surface
7 steam condenser that Shaw provided result in a plant
8 that's less efficient than it otherwise would be?
9 **A. That's true.**
10 Q. There's been some testimony already
11 about the condensate pumps and the condensate system
12 that Shaw provided. Are there problems with that as
13 well?
14 **A. Yes.**
15 Q. What -- with regard to the condensate
16 pumps themselves, what was Shaw required to provide in
17 terms of performance?
18 **A. Well, the condensate pumps, they're**
19 **required to provide three what we call them -- three**
20 **50 percent pumps. So what that means is we should be**
21 **able to go to full-load capacity of the unit with two**
22 **pumps, with the third as a backup or standby pump.**
23 Q. So is that -- in your experience, is
24 that an industry standard?
25 **A. Commonly what you see is either a three**

3162

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2 **efficiently as it could otherwise run.**
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15 by the way, around here?
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17 **square inch. In terms of inches of mercury, which is**
18 **shown here on this document, it's 27 inches of**
19 **mercury.**
20 Q. So 27 inches of mercury is what we
21 experience in this courtroom, right?
22 **A. That's correct.**
23 Q. And the back pressure guarantee, for
24 case D, it's 3.7 inches of mercury; is that right?
25 **A. That's correct.**

3163

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2 **A. Very strong vacuum.**
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5 steam condenser that's supplied by the cooling tower,
6 they create a vacuum that helps suck steam out of the
7 turbine?
8 **A. Yes.**
9 Q. And the stronger the suction, the more
10 efficient the turbine is going to be?
11 **A. That's correct.**
12 Q. So Shaw in its contract guaranteed to
13 provide a certain amount of vacuum suction through --
14 coming out of the turbine; is that right?
15 **A. That's true.**
16 Q. And has Shaw been able to achieve the
17 guarantee that it promised in the contract?
18 **A. Not the conditions required by Case D.**
19 Q. Okay. So how far did they miss it by?
20 **A. Better than half an inch.**
21 Q. So a half an inch out of 3.7, so instead
22 of 3.7, it's 4.3?
23 **A. 4.3 and change.**
24 Q. So what impact does that have on the
25 overall performance of the plant?

3164

1 **A. Several impacts. One, if you can**
2 **operate at that back pressure at that load, it will**
3 **require more fuel to maintain the same output. So**
4 **that causes the efficiency of the plant to be**
5 **decreased. And there are cases where on a hot day,**
6 **for example -- case D represents a 97-degree day. So**
7 **if you have a day that's 97 degrees or higher and we**
8 **cannot make even 5 inches of back pressure, there are**
9 **limitations on the turbine operation where we cannot**
10 **operate at full load.**
11 Q. So because Shaw hasn't been able to
12 achieve its guaranteed back pressure, there are times
13 when this plant cannot achieve full load?
14 **A. There are times when we have not been**
15 **able to achieve full load, yes, due to back pressure**
16 **concerns.**
17 Q. So when Shaw told the jury that this
18 plant exceeds 750 megawatts of power, that's only true
19 some of the time; is that right?
20 **A. Well, if everything is operating**
21 **normally, we should be able to get 750 megawatts.**
22 Q. And sometimes you can do better than
23 that, and under some conditions, because of this back
24 pressure problem, you do worse than that?
25 **A. Yes. It's known as a D rate, and you**

3165

1 **can have a D rate of the plant for many reasons. And**
2 **so far, most of our issues have been really on the**
3 **air-cooled condenser affecting overall plant**
4 **performance.**
5 Q. The bottom line here is that the plant
6 that Shaw -- the air-cooled condenser and surface
7 steam condenser that Shaw provided result in a plant
8 that's less efficient than it otherwise would be?
9 **A. That's true.**
10 Q. There's been some testimony already
11 about the condensate pumps and the condensate system
12 that Shaw provided. Are there problems with that as
13 well?
14 **A. Yes.**
15 Q. What -- with regard to the condensate
16 pumps themselves, what was Shaw required to provide in
17 terms of performance?
18 **A. Well, the condensate pumps, they're**
19 **required to provide three what we call them -- three**
20 **50 percent pumps. So what that means is we should be**
21 **able to go to full-load capacity of the unit with two**
22 **pumps, with the third as a backup or standby pump.**
23 Q. So is that -- in your experience, is
24 that an industry standard?
25 **A. Commonly what you see is either a three**

2890

1 items, priority one items, that have still not been
2 corrected?
3 **A. Yes. And some of those -- you can see**
4 **they've told me they completed about 18 that, when**
5 **either myself or another Xcel employee went out to**
6 **review it, we determined it was not complete. And**
7 **then there's another subset of those that they're**
8 **refusing to do.**
9 Q. So based on at least your analysis and
10 your judgment, how many uncompleted priority one items
11 remain as of the present?
12 **A. That little box at the top shows 36.**
13 Q. Okay.
14 MR. HINDERAKER: And for the record, that
15 was Defendant's Demonstrative 35 rather than 3.
16 THE COURT: All right.
17 Q. (BY MR. HINDERAKER) Now, has Shaw ever
18 explained why they have failed to finish up these
19 priority one items?
20 **A. Well, I mentioned they said some, they**
21 **believe, are not required by the contract and refuse**
22 **to. Others, they mentioned they were just hard to do,**
23 **too much work.**
24 Q. Now, subsequent to this exchange that you
25 had with Shaw about the category one items, did you

2891

1 discover another problem that was relevant to
2 mechanical completion?
3 **A. Yes. The condensate pumps.**
4 MR. HINDERAKER: And before we talk about
5 that issue, let's just quickly, Tim, if we might, do
6 the flyover of the condensate pumps as a remainder of
7 what it is we're talking about.
8 Q. (BY MR. HINDERAKER) The condensate
9 pumps, are they located in the turbine building?
10 **A. Yes. On the north end. And I'll talk as**
11 **we're going. There are three condensate pumps. The**
12 **contract requires three. But the contract**
13 **specifically says that we need to be able to operate**
14 **at full load with only two pumps. So effectively, one**
15 **is a spare.**
16 **And you can operate them in any**
17 **combination. There's just always one spare.**
18 Q. And the contract -- does the contract say
19 that each one is supposed to be a 50 percent --
20 **A. Correct. So two at 50 percent. A**
21 **hundred percent, with one spare.**
22 Q. And let's leave that up there as we talk
23 about the condensate pumps until we have another
24 exhibit.
25 And what was it that caused Public

2892

1 Service to realize that these condensate pumps were
2 not furnished as required by the contract?
3 **A. After Shaw got to build a few pumps**
4 **working in March, and we able to -- March 2010 -- and**
5 **we were able to ramp up and load, we found that we**
6 **couldn't get to 750 megawatts with only two pumps. So**
7 **we'd always have to turn on a third pump to get us to**
8 **the contract value of 750.**
9 Q. Why did you need that third pump? Why
10 was that a problem?
11 **A. Well, it's amazing when you think it's**
12 **inexpensive. But these pumps are generally**
13 **inexpensive. And we put it in the contract to have**
14 **the spare, because we wanted -- we thought it was**
15 **cheap insurance to have a spare pump. If you only had**
16 **two 50 percent pumps and one went down, there would be**
17 **a significant hit to the electricity you put on the**
18 **grid.**
19 Q. And so this way, if one goes down, you
20 could repair it without having the plant all of a
21 sudden drop down to half capacity?
22 **A. Yes. There are controls in place. So if**
23 **the -- the computer system in the plant senses one**
24 **pump has failed, it will automatically turn the spare**
25 **pump on, and there wouldn't be a disruption.**

2893

1 Q. And has Public Service determined why it
2 is that the condensate pumps don't fulfill the
3 contractual requirement?
4 **A. Shaw didn't properly design them. When**
5 **Shaw did the calculations to size the pumps to**
6 **determine how big they were, they forgot three very**
7 **important flows that the pumps needed to serve.**
8 Q. Flows of?
9 **A. Water.**
10 Q. Water. And have you notified Shaw of the
11 problem with the condensate pumps?
12 **A. Yes. We obviously -- at the end of March**
13 **when we couldn't get the full load, we started talking**
14 **about it. We started testing on-site with Shaw, and**
15 **that testing confirms that they're not operating per**
16 **the contract.**
17 Q. What's the current status of that?
18 **A. Shaw has proposed to us taking one pump**
19 **out, sending it back to their manufacturer shop in**
20 **California. Then they'll do some inspecting --**
21 **inspections of their piping system too. And, you**
22 **know, when that test confirms the pumps aren't**
23 **operating as required, then they'll look at**
24 **reengineering and redesigning them.**
25 Q. Are these pumps required for mechanical

3414

1 **the island, it was truly an engineer. They did the**
2 **engineering for their particular scope of work. It**
3 **was a firm price contract. They also did the**
4 **procurement. They selected at least some of the**
5 **smaller minor equipment that was associated with that,**
6 **and they did the construction piece of that, the means**
7 **and methods as to how they would follow that**
8 **construction. That was also as part of their**
9 **individual contracts, and they did the individual**
10 **scheduling associated with that.**
11 **So clearly that was the outline as to**
12 **how we laid out those contracts.**
13 Q. So Xcel and Public Service Company chose
14 to use the island engineer, procure, and construct
15 contracting approach to Comanche 3?
16 **A. Yes, they did.**
17 Q. Was there a balance of plant island that
18 was going to be one of the EPC contracts for Comanche
19 3?
20 **A. Yes, it was. It was basically the**
21 **turbine generator building, the air-cooled condenser,**
22 **and the cooling towers associated with that project as**
23 **well as quite a bit of the piping and electrical work**
24 **associated with bringing everything together.**
25 **Emerson was the DCS provider that was**

3415

1 **also as part of that overall contract.**
2 Q. And did you bid the balance of plant
3 contract?
4 **A. Yes, we did. One of the requirements or**
5 **requests -- requirements that the Public Utilities**
6 **Commission in Colorado asked us to do was to**
7 **competitively bid as much of the work as we could or**
8 **all of the work, and this turnkey island concept**
9 **certainly enabled us to be more effective in that**
10 **bidding process because with a smaller scope of work,**
11 **we could get more people involved in it. So yes, they**
12 **were competitively bid.**
13 Q. And was it bid on a fixed-price contract
14 basis?
15 **A. Yes, it was.**
16 Q. Who was the successful bidder?
17 **A. Shaw Stone & Webster was.**
18 Q. And why were they the successful bidder?
19 **A. They were the successful bidder due to a**
20 **number of factors. As we take a look at the overall**
21 **bid analysis, as we evaluate contractors, we look at**
22 **price, we look at safety record, we look at previous**
23 **jobs that they've done, we look at team members**
24 **associated with it. So that overall matrix was why we**
25 **selected Shaw, and clearly they had a price advantage**

3416

1 **over their next competitor.**
2 Q. And did Shaw and Xcel engage in a
3 process by which they negotiated a written BOP
4 contract?
5 **A. Yes, we did. There was a series of**
6 **meetings. Basically what we ended up doing was**
7 **splitting into two groups; a technical group and a**
8 **contracts group. There was a series of conversations**
9 **in and around the response to the bid proposal, and**
10 **ultimately out of that, a contract was negotiated that**
11 **was mutually acceptable to both parties.**
12 Q. And were both parties represented by
13 counsel in these contract negotiations?
14 **A. Yes, they were.**
15 Q. And Exhibit 1, which I'll hand you -- I
16 believe counsel may have a copy, but for
17 convenience --
18 (Document tendered.)
19 MR. McCARTHY: Your Honor may have more
20 copies of this than you want at this point, but if I
21 may approach.
22 THE COURT: Thank you.
23 Q. (BY MR. McCARTHY) Handing you what's
24 been marked and already admitted into evidence as
25 Exhibit 1, that's the Shaw-Xcel-Public Service Company

3417

1 BOP contract, is it not, sir?
2 **A. Yes, it is.**
3 Q. And you are familiar -- in your role as
4 vice president of engineering and construction for
5 Xcel familiar with the terms of the BOP contract?
6 **A. Yes, I am.**
7 Q. What role did Public Service Company
8 have under the balance of plant EPC contract with
9 Shaw?
10 **A. Well, there's a couple roles, but**
11 **clearly a major role here as clearly identified in the**
12 **contract is as the owner, but also we were the project**
13 **manager associated with this project. There were**
14 **multiple phases to this particular project. In**
15 **addition to the Comanche 3, there was also Units 1 and**
16 **2 that were part of an overall emission improvement.**
17 **So we were responsible for managing that Unit 1 and 2**
18 **emissions control projects that were there.**
19 **As project manager, we had**
20 **responsibility primarily for the protection of the**
21 **interests of our customers, our shareholders, as well**
22 **as our partners that were associated on the project.**
23 **We had -- a project this large is $1.3 billion.**
24 **That's a lot of money. As a project team, as a**
25 **project manager, as a company, we are responsible for**

3945

1 expert with respect to a measured mile analysis,
2 correct?
3 **A. As I said in my deposition, I've used**
4 **measured miles. I have been involved in them. In my**
5 **40-plus years, I've even had some where I picked the**
6 **areas and had my staff develop a measured mile.**
7 Q. Have you ever developed -- done a
8 measured mile on your own, sir?
9 **A. Well, I think I testified under my**
10 **deposition that -- you know, if you're asking if over**
11 **40 years I've sat in the office and cranked out**
12 **measured miles every day, no, I have not. But I'm**
13 **familiar and I'm an expert in productivity-related**
14 **issues. A measured mile is only one technique or tool**
15 **that can be used in the measurement of productivity.**
16 **And I'm certainly familiar with measured**
17 **miles. And I've used them throughout my career.**
18 Q. Okay. You're not a schedule -- you're
19 not here to provide a schedule analysis or as a
20 schedule expert, correct?
21 **A. I was not -- I was not engaged as a**
22 **schedule expert on this job.**
23 Q. Okay. Opinion number 2, you intend to
24 tell the jury that Shaw's delays and increased costs
25 were Shaw's own fault, correct?

3946

1 **A. That's correct.**
2 Q. And that's -- but you did not conduct a
3 schedule analysis with respect to those delays,
4 correct?
5 **A. Not a formal schedule analysis. But in**
6 **reviewing the facts, I believe I have all of the**
7 **evidence that I need, as an expert, to testify to the**
8 **fact that that opinion is correct.**
9 Q. Okay. And your ultimate -- and with
10 respect to reliance on Mr. Solomon and Mr. Traynor, do
11 you intend to do that?
12 **A. Yes.**
13 Q. Do you intend to restate the opinions
14 they reached?
15 **A. I mean, I relied on their reports in me**
16 **stating my opinions. And certainly I'm familiar with**
17 **their reports. They did them under my direction. And**
18 **I intend to express the opinions that are in my**
19 **report.**
20 Q. And do you -- but in doing so, do you
21 intend to restate the opinions of Mr. Traynor and
22 Mr. Solomon's reports?
23 **A. I will intend to reference certain things**
24 **that they have in their report. But from the**
25 **standpoint of the opinions, for me to restate the**

3947

1 **opinions, I'm here to testify to the opinions in my**
2 **report.**
3 Q. Okay. And again turning to the last page
4 of your analysis. You intend to testify based on your
5 reading of the settlement agreement, and you intend to
6 express opinions about the provisions of those -- that
7 settlement agreement, correct?
8 **A. Where -- you said the last page.**
9 Q. Opinion number 4. Page 28, sir.
10 **A. Oh, 28. Okay. You said the last page.**
11 Q. Sorry.
12 **A. Opinion 4. Yes, I do.**
13 MR. CIPOLLONE: Okay. That's all I have
14 for now, Your Honor.
15 THE COURT: Mr. Hinderaker?
16 MR. HINDERAKER: Okay.
17 VOIR DIRE EXAMINATION
18 BY MR. HINDERAKER:
19 Q. Well, Mr. Harrington, I'm not going to go
20 through all your qualifications here unless the court
21 wants me to. Just very, very briefly, the way you've
22 phrased opinion number 4 in your report is that Shaw
23 did not make a good faith effort to honor the
24 settlement agreement. Just very briefly, what's your
25 basis for that opinion?

3948

1 **A. Well, the basis was right in advance of**
2 **the settlement agreement, Shaw, in a change order**
3 **request, admitted that they were 232 days behind**
4 **schedule.**
5 **And when I looked at the facts, that**
6 **you're 232 days behind schedule, which, you know,**
7 **depending on whether or not you calculate five or six**
8 **days, could be as much as eight months, in 40 or 45**
9 **years of experience, I know what -- on this size**
10 **project, what a Herculean task that is.**
11 **And the evidence coming out of the**
12 **settlement agreement, or the actions that Shaw took**
13 **subsequent to the settlement agreement, including some**
14 **e-mail chains that came days after the settlement**
15 **agreement, based on my experience, did not show a good**
16 **faith effort or that Shaw had an intention of honoring**
17 **what they committed to in the settlement agreement.**
18 Q. In order to carry out what they committed
19 to, that is, to make up those 232 days and finish the
20 job on schedule, what would they have had to do?
21 **A. Well, I think they would have had to add**
22 **staff. I think they would have had to have considered**
23 **working additional overtime. I mean, this is a major**
24 **undertaking to make up 232 days on a job this size.**
25 Q. And is it the fundamental basis for your

3628

1 to Rob Moran and others on March 17th, 2009. Do you
2 see that?
3 **A. Yes.**
4 MR. VOLLBRECHT: We'd move the admission
5 of 5616.
6 MR. FROST: Objection on the same
7 grounds. This characterizes the agreement made with
8 Shaw.
9 THE COURT: Well, I'm prepared to
10 address the main issue here, so why don't you come
11 forward and we'll complete the record on that and go
12 from there.
13 (The following proceedings were conducted
14 at the bench out of the hearing of the jury.)
15 THE COURT: How is this different
16 ultimately from the issues that the court had
17 addressed with respect to the motion for partial
18 summary judgment as to fraudulent misrepresentation
19 regarding change order 23?
20 I know the focal point there was the
21 actionability of estimates, but these issues at least
22 seem to dovetail to some extent. So help me
23 understand what case law you're referring to that
24 apparently is separate and apart from that on which
25 the court relied in denying the motion for partial

3629

1 summary judgment.
2 MR. FROST: Your Honor, I don't have it
3 at hand, and I apologize. But what I would say is
4 that if, in fact, the court is going to allow people
5 to talk about what happened beforehand with respect to
6 the contract to lay a foundation or to argue that
7 fraud has been committed, then it has to come in
8 through an Xcel witness, not this witness.
9 He wasn't party to the fraud. Nobody's
10 claiming that he's been defrauded. He's not claiming
11 that he's been defrauded. So I think, again, it's --
12 it really is very, very far afield.
13 MR. VOLLBRECHT: It's not far afield at
14 all, Your Honor. This witness has, I believe,
15 prepared to testify as to the impact of the fraudulent
16 representations on the numbers that they put in to
17 establish why -- the impact of the fraud and how it,
18 in fact, must viciate the change order, because all of
19 the assumptions and items that went into putting
20 together the numbers for change order 23 were based on
21 representations by Shaw which turned out to be untrue.
22 MR. FROST: Well, he can talk about the
23 impact, but he can't talk about the fraud.
24 MR. VOLLBRECHT: Certainly he can. He
25 was there. He was told the things, and he's the one

3630

1 on-site who can say whether, in fact, they turned out
2 to be right or wrong.
3 THE COURT: Well, I agree that he should
4 be able to testify as to whether they turned out to be
5 right or wrong, but without using the word "fraud" or
6 offering any legal conclusion. And to back up, the
7 court overrules the objection, finds that the
8 proffered evidence is admissible with respect to
9 fraudulent misrepresentation.
10 To the extent that there's any concern
11 about it violating the parol evidence rule or being
12 used concomitantly by the jury for an improper
13 purpose, we can address that through the jury
14 instructions. So there you have it.
15 (The following proceedings were conducted
16 in the presence and hearing of the jury.)
17 THE COURT: All right. So the
18 objection is overruled, in part, based on the record
19 we made at the bench. Therefore, you're welcome to
20 proceed accordingly, Mr. Vollbrecht.
21 MR. VOLLBRECHT: I'll try to put it back
22 together as best I can, Your Honor. Thank you very
23 much.
24 Q. (BY MR. VOLLBRECHT) Mr. Tate, I'd asked
25 you a question earlier with respect to discussions you

3631

1 had. I believe you said you talked with Mr. Ezell and
2 Mr. Follett, and you might have said others. What did
3 Mr. Ezell tell you?
4 **A. We discussed several issues as far as**
5 **materials being on-site, as far as our use of their**
6 **scaffolding and the way we were going to handle the**
7 **procurement of cable.**
8 **The agreement was that Shaw/Stone &**
9 **Webster was to, I guess, for lack of better terms,**
10 **deliver all of the cable and all of the cable tray and**
11 **all of the material that we needed to perform this**
12 **project.**
13 Q. Did --
14 **A. By November 21st.**
15 Q. Okay. So they represented to you that
16 all the material you needed to do the work would be
17 there by November 21st.
18 **A. And was on-site.**
19 Q. Okay. Did that turn out to be the case?
20 **A. It did not.**
21 Q. Did that have an impact on the
22 productivity of FPD's workers?
23 **A. Yes, it did. Because we were waiting**
24 **consistently for material.**
25 Q. Okay. You said you also talked to

3688

1 **A. Yes.**
2 Q. And the next bullet point says, "All
3 engineering and construction documents for nonfield
4 route items will be supplied by BOP contractor."
5 Do you see that?
6 **A. Yes, sir.**
7 Q. And was it your understanding it was
8 Shaw's job to provide all the engineering and provide
9 all the documents necessary for FPD Main to perform
10 its work under change order request 23?
11 **A. Yes, sir.**
12 Q. It does make a mention of field routing
13 there. In your experience, what portions of the work
14 are electricians normally expected to field route?
15 **A. Usually the last 10, 15 feet of the**
16 **conduit is what's field routing.**
17 Q. So from the cable tray to a device
18 perhaps?
19 **A. Correct, cable tray to a device, to the**
20 **motor, whatever it is. Like I said, it's usually the**
21 **last 15, 20 feet.**
22 Q. Now, is it your understanding that
23 change order 23 was based upon a quantity estimate
24 that was provided by Shaw?
25 **A. Yes, sir.**

3689

1 Q. And, in fact, Public Service and Shaw,
2 they disagreed over how much this work was going to
3 cost; is that right?
4 **A. Yes, sir.**
5 Q. Shaw provided an estimate of what they
6 thought it was going to cost, and Public Service had a
7 different estimate?
8 MR. FROST: Your Honor, this is leading.
9 THE COURT: Sustained.
10 Q. (BY MR. HARTNETT) Let's look at the
11 language here in Paragraph 2. It says, "Both parties
12 have prepared separate calculations of what they
13 believe the cost of the remaining boiler electrical
14 work is based upon the given quantities, shown in
15 Attachments 1 and 2 that have been provided by the BOP
16 contractor."
17 My first question for you, sir, is, are
18 you aware that Shaw provided a quantity estimate that
19 was provided as part of change order request 23?
20 **A. Yes, sir.**
21 Q. And as it says here, Shaw also provided
22 a calculation of what Shaw believed the cost of the
23 remaining boiler electric work was based upon their
24 quantity estimate?
25 **A. Yes, sir.**

3690

1 Q. Now, you had numerous discussions with
2 Shaw people about this change order as it was being
3 developed; isn't that right?
4 **A. Yes, sir.**
5 Q. Did anyone at Shaw, did Mr. Follett or
6 Mr. Ezell or anyone, ever tell you that the quantity
7 estimate that they used to prepare what they believed
8 the cost of the remaining boiler electric work was was
9 an incomplete quantity estimate?
10 **A. No, sir, they never did.**
11 Q. Did they ever tell you that the quantity
12 estimate that they provided that they used to prepare
13 what they believed the cost of the remaining boiler
14 electric work was was based on 50 percent engineering?
15 **A. No, sir.**
16 Q. Did anyone from Shaw ever tell you that
17 the quantity estimate that they provided as to what
18 they believed the cost of the remaining boiler
19 electric work would be was dependent upon them
20 receiving a whole bunch more information from Alstom
21 or anyone else?
22 **A. No, sir.**
23 Q. It was your understanding that the
24 electric engineering was complete at the time this
25 change order was entered into; isn't that --

3691

1 MR. FROST: Objection. Foundation and
2 leading.
3 THE COURT: Sustained.
4 **A. Yes, sir, it was --**
5 THE COURT: Hang on.
6 Q. (BY MR. HARTNETT) What was your
7 understanding of the status of boiler and electrical
8 engineering work at the time this request was entered
9 into?
10 MR. FROST: Same objection, Your Honor.
11 Foundation.
12 THE COURT: Overruled. You can answer
13 that question if you can.
14 **A. It was my understanding that the**
15 **engineering was finished 100 percent because we had --**
16 **during the negotiation of this contract, of change**
17 **order 23, Shaw made an agreement to us to turn over**
18 **all the cable on November 21st of 2008.**
19 Q. (BY MR. HARTNETT) You were in a meeting
20 with Mr. Follett and Mr. Ezell about this, were you
21 not, sir?
22 **A. Yes.**
23 Q. Tell me about that. This meeting where
24 the turnover of all the cable was discussed, what do
25 you recall about it?

3620

1 **A. Yes. But not to this magnitude.**
2 Q. What would be a standard, perhaps plus or
3 minus, that you'd see?
4 **A. Probably 20 percent.**
5 Q. And this was 150?
6 **A. Yes.**
7 Q. Did you have any difficulties obtaining
8 materials to complete the work?
9 **A. Yes, we did. When starting, the**
10 **agreement was that Xcel would have to approve our**
11 **material requisition sheets, and then they would have**
12 **to be approved by Shaw. And when filled out, there**
13 **was some questions asked by Shaw, and at some points**
14 **they would even mark stuff off of our material**
15 **requisition sheets, stating that they didn't feel like**
16 **we needed it.**
17 **So the material was an ongoing issue.**
18 **They had also stated that all the cable and cable tray**
19 **for this project was on-site, which was found to not**
20 **be true, and delayed us in several different ways.**
21 **In the beginning they had cable trays**
22 **stationed in several different areas of the work that**
23 **they were performing before we took over, and they had**
24 **removed all of that material back down to the ground**
25 **so, therefore, we had to restage it in areas.**

3621

1 Q. Okay.
2 **A. And just constant issues like that. The**
3 **wire was not on-site. The remainder of the cable**
4 **tray. We had to go in and give them a list of parts**
5 **and pieces that they were missing so that they could**
6 **order it. And in the beginning, the agreement was --**
7 MR. FROST: Objection, Your Honor.
8 Foundation. And there's not even a foundation laid as
9 to what the agreement is, first of all. Secondly,
10 it's parol evidence.
11 THE COURT: Well, response to the
12 foundation objection. Well, it is vague, so let's at
13 least establish what agreement we're talking about.
14 Q. (BY MR. VOLLBRECHT) What was the
15 agreement that you're discussing?
16 **A. The agreement --**
17 MR. FROST: Same objection, Your Honor.
18 There are two written contracts at issue. And what
19 this witness thinks the agreement is without referring
20 to the writings is irrelevant, it violates the best
21 evidence rule, it violates the parol evidence rule.
22 THE COURT: Well, I assumed he was
23 going to refer to the writings. So perhaps I was
24 wrong.
25 MR. VOLLBRECHT: Well, let's -- I

3622

1 understand you're still looking at that issue, so
2 we'll again try to maneuver in and around here, Your
3 Honor.
4 THE COURT: All right. Thank you.
5 Q. (BY MR. VOLLBRECHT) Let's go back to a
6 couple of the things you talked about. One, you
7 mentioned that there was cable tray -- I think you
8 said stationed? Was that in the boiler?
9 **A. It was located right outside of the**
10 **boiler on top of the STG building, which would give us**
11 **good access to material without going all the way down**
12 **seven floors to obtain material.**
13 Q. Okay. So that was there at the outset
14 when you were going to start your work?
15 **A. Yes.**
16 Q. And then when you actually started your
17 work, where was it?
18 **A. They had removed it back to their laydown**
19 **yard.**
20 Q. Did you ever get an explanation from Shaw
21 why they took material that was already staged to be
22 used and took it all the way down to their laydown
23 yard?
24 **A. I did not.**
25 Q. At the outset, was there also scaffolding

3623

1 that was going to be available for you to use?
2 **A. Yes, there was. Shaw told us that we**
3 **can -- we could use their scaffolding they had already**
4 **existing in the boiler. And within a week, it was all**
5 **removed.**
6 Q. Any understanding of why Shaw removed the
7 scaffolding they told you you could use?
8 MR. FROST: Objection, Your Honor.
9 Foundation and relevance.
10 Q. (BY MR. VOLLBRECHT) Did you talk to
11 anyone from Shaw as to why they removed that
12 scaffolding?
13 **A. I was told that they needed the**
14 **scaffolding in different areas of the project.**
15 Q. Okay. Mr. Tate, you now have in front of
16 you what's been marked as Trial Exhibit 5615. It's a
17 field change authorization signed by yourself on
18 November 21st, 2008.
19 MR. VOLLBRECHT: We'd offer this.
20 MR. FROST: No objection.
21 THE COURT: 5615 is admitted.
22 Q. (BY MR. VOLLBRECHT) Mr. Tate, can you
23 explain what this document is, sir?
24 **A. This is a field change authorization**
25 **provided to us by Xcel for a significant amount of**

1 Mr. Follett. What did Mr. Follett tell you?
2 **A. He was basically just reassuring us that**
3 **everything was there and -- and that what Jason had**
4 **told me was confirmed.**
5 Q. Okay. I want to turn back to 5616,
6 which -- which I offered, and I think Mr. Frost had an
7 objection to.
8 MR. FROST: Subject to my continuing
9 objection.
10 THE COURT: Understood. 5616 is
11 admitted.
12 MR. VOLLBRECHT: Okay. And let's blow
13 that up. Thanks, Tim.
14 THE COURT: Just so the record is
15 clear, the continuing objection is under the parol
16 evidence rule. Am I right?
17 MR. FROST: It goes well beyond that,
18 Your Honor.
19 THE COURT: All right. Foundational
20 concerns, as well? I just want to make sure that your
21 objections are preserved for the record. Remind me of
22 this point when we take the noon recess, and I'll let
23 you amplify at that point.
24 Any objection that's articulated then is
25 deemed preserved now.

1 MR. FROST: Thank you, Your Honor.
2 THE COURT: All right.
3 Q. (BY MR. VOLLBRECHT) Mr. Tate, this was
4 an e-mail from you to Rob Moran and others on March
5 17th, 2009, correct?
6 **A. Yes.**
7 Q. So you're now -- what are you? About
8 four months into the job?
9 **A. Yes.**
10 Q. Okay. And you wrote -- how do you
11 pronounce that guy's name?
12 **A. Roque.**
13 Q. Roque Chase. Who's Roque Chase?
14 **A. He was the Shaw foreman, I guess, for the**
15 **wire yard.**
16 Q. So Shaw's actually got a place on-site,
17 their wire yard, where all the materials would
18 normally be to do the type of work you're doing?
19 **A. Yes, they did.**
20 Q. And he was in charge of that yard?
21 **A. Yes, he was.**
22 Q. And you wrote, "Roque Chase of Shaw has
23 shut our spooling operation down until further notice.
24 When I confronted him, he said that he is going to
25 make sure that all of Shaw's wire orders were filled

1 for the next week before he releases anymore cable to
2 FPD Main. I don't feel that this is the agreement
3 made with Shaw. The agreement was for us to spool off
4 all the cable we were supposed to install. I
5 currently have 3 men and an operator down in the yard
6 waiting for direction from Brad or I, and they will
7 stay there until notified further."
8 So we're now four months into the job,
9 and you're still having trouble getting Shaw to
10 release materials for you?
11 **A. Yes, we were. But I must add that the**
12 **first agreement was that they delivered all the cable.**
13 **And when the cable finally arrived, it came in master**
14 **reels, which we had received another FCA to form a**
15 **cable spooling operation so that we could spool off**
16 **the cable and then deliver it -- then we would deliver**
17 **it to our yard?**
18 Q. You're going to have to unpack that a
19 little bit for all of us. The initial --
20 **A. The initial agreement was that Shaw was**
21 **going to deliver all the cable for the boiler project.**
22 Q. And what did that mean to you?
23 **A. It was supposed to be on-site. And by**
24 **November 21st of 2008, it was to be in our laydown**
25 **area.**

1 Q. That didn't happen?
2 **A. It did not happen. And when the cable**
3 **was finally ordered and arrived, it came in master**
4 **spools, which is -- a master spool is -- could be**
5 **anywhere from 10 to 20 thousand feet. And we might**
6 **have only needed 3,000 feet of that type of cable.**
7 **So what happened was, we had to go down**
8 **to Shaw's yard now with a group of guys and spool off**
9 **the cable that we needed and hire a forklift driver to**
10 **deliver that cable to our laydown area.**
11 Q. Okay. So initially the agreement was,
12 whatever wire you needed was going to be put in your
13 own laydown area. Then you could access it, use it
14 when you needed as you needed.
15 **A. That's correct.**
16 Q. And then that didn't happen. Eventually
17 wire shows up in these master spools. I take it these
18 master spools then get delivered to Roque in Shaw's
19 yard?
20 **A. Yes, it was.**
21 MR. FROST: I've been patient, but this
22 is really leading.
23 MR. VOLLBRECHT: Frankly, it's less
24 leading than -- I'm sorry, Your Honor.
25 THE COURT: Sustained.

DSTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

1437 Bannock Street
Denver, Colorado 80202
- - - - - - - - - - - - - - - - -x

STONE & WEBSTER, INC., :

Plaintiff, :

vs. : Case No. 09CV6913
Courtroom: 7

PUBLIC SERVICE COMPANY :

COLORADO d/b/a XCEL ENERGY, :

Defendant. :

- - - - - - - - - - - - - - - - -x

November 2, 2010

Volume XII

The trial in the above-entitled matter continued on Tuesday, November 2, 2010, at 1437 Bannock Street, Courtroom 7, Denver, Colorado 80202, before the Honorable William W. Hood III.

The transcript is a complete transcription of the proceedings that were had in the above-entitled matter on the aforesaid date.

Morning Session Reported by:

Sharon L. Szotak, CRR, RPR

Afternoon Session Reported by:

Sandra L. Bray, CRR, RDR

3636

1 Q. (BY MR. VOLLBRECHT) So where did those
2 master spools -- did they go to your yard or did they
3 go somewhere else?
4 **A. They were delivered to Shaw's yard.**
5 Q. Okay. And who had control over whether
6 FPD could get the wire off of those master spools?
7 **A. Once again, we had to procure it by the**
8 **foot, which changed from Craig Hill -- Craig Hill**
9 **would approve us to go down to the yard and spool off**
10 **cable. And by the time I sent men down there to spool**
11 **off cable, the decision that Craig Hill made had**
12 **changed through Roque Chase, so I don't know if Craig**
13 **Hill called Roque and told him, you know, hold off on**
14 **that, because we may need this cable for future**
15 **installations. But within a matter of minutes, the --**
16 **it changed whether we could have cable or not have**
17 **cable.**
18 Q. Okay. So you initially talked to Craig
19 Hill. He was -- was he, like, an electrical engineer?
20 **A. He was an electrical engineer.**
21 Q. For Shaw?
22 **A. Yes.**
23 Q. Okay. And so he's telling you that you
24 can go get what you need. And then you show up at the
25 yard, and what happens?

3637

1 **A. It had changed to where we couldn't have**
2 **anything.**
3 Q. Did that impact your ability to work
4 productively?
5 **A. Yes, it did.**
6 Q. Was there already cable tray and lighting
7 installed in the boiler when you took over the work?
8 **A. They had claimed footage on their**
9 **quantities, yes.**
10 Q. Okay. And did what they claimed on the
11 quantities turn out to be correct?
12 **A. They were not correct. Some of the**
13 **quantities that they had claimed that they had**
14 **installed -- in fact, all of the lighting was**
15 **installed incorrect, and we had to revisit these areas**
16 **again.**
17 **And the particular fixtures that I'm**
18 **talking about, they had installed 250 watt restrikes,**
19 **and they called for a 70 watt restrike, which is a --**
20 **a restrike is when you lose power to a fixture, the**
21 **restrike will come on, kinds of like an emergency**
22 **light and re -- reheat the ballast housing so that it**
23 **could restart.**
24 **With the 250 watt restrikes installed,**
25 **when the fixtures got condensation in them, they would**

3638

1 **touch the side of the glass globes, and the glass**
2 **globes would explode. So we had a lot of rework as**
3 **far as replacing glass globes.**
4 Q. Was that part of your original estimate?
5 **A. It was not. And as far as the cable tray**
6 **being installed and the footage that they had claimed,**
7 **we had to re -- revisit several feet of cable tray**
8 **that wasn't grounded. It was just sitting in support**
9 **brackets and not tied downment so there was numerous**
10 **amount of work that we had to perform to actually**
11 **complete the tray that they had claimed to be**
12 **installed.**
13 Q. Did all these issues we've discussed have
14 any impact on your planned labor productivity?
15 **A. Absolutely.**
16 Q. And what was that impact?
17 **A. The impact of having to revisit areas and**
18 **material that they said that was installed a hundred**
19 **percent, us having to go back and revisit those areas**
20 **just to make sure it was installed a hundred percent.**
21 Q. If what turned out to be the case with
22 respect to that had been known by you when you were
23 putting your estimate together, would your unit rates
24 have changed?
25 **A. Yes, they would have. We would have**

3639

1 **allowed for that waste.**
2 Q. We've talked a lot about Shaw. Let's
3 shift to Alstom for a moment. Did you have
4 significant problem with Alstom getting your work done
5 in the boiler?
6 **A. In the beginning, it was a learning**
7 **process with -- with Alstom. They had a**
8 **superintendent that was kind of gruff, that turned out**
9 **to be a very helpful person.**
10 **Shaw -- Alstom did not have a lot of**
11 **devices mounted when we first began. We developed a**
12 **missing device list, and updated it weekly. And I**
13 **think within a two or three-week period, they had all**
14 **the devices that was missing mounted.**
15 Q. Okay. So two or three weeks, the missing
16 device issue was taken care of?
17 **A. Yes.**
18 Q. You said there was some start-up -- I
19 don't know -- issues working with Alstom. Did those
20 go throughout, or were they taken care of?
21 **A. A lot of the -- a lot of the Alstom**
22 **issues were taken care of once they had found out that**
23 **they were issues.**
24 Q. Okay. You mentioned a gruff guy. Is
25 that Tank?

3696

1 **A. I started realizing that the engineering**
2 **wasn't complete.**
3 Q. Because Mr. Hill had to direct you to
4 Vinny in Denver in order to answer some of these
5 questions?
6 **A. Correct. He got to where he couldn't --**
7 **not only could he not pull up the circuits, but he**
8 **couldn't find the drawings.**
9 Q. Now, you were supervising FPD Main's
10 work in the boiler building; is that right?
11 **A. Yes, sir.**
12 Q. And did you observe that work on a daily
13 basis?
14 **A. Yes, sir.**
15 Q. And did FPD experience a very large
16 growth in the quantity of the work that they needed to
17 do to complete change order 23?
18 **A. Yes, sir. Almost double.**
19 Q. Now, was there a particular point in
20 time where Shaw gave FPD and you a whole bunch more
21 work to do?
22 **A. Yes, sir.**
23 Q. When was that?
24 **A. February of 2009.**
25 Q. And what happened in February 2009?

3697

1 What did you get?
2 **A. We got another cable schedule, which was**
3 **100 percent as much work as the original one they had**
4 **given us in November 2008.**
5 Q. So the one you had in November, this new
6 one in February had twice as much stuff in it?
7 **A. Correct.**
8 Q. Mr. Moran, I'm handing you what's been
9 identified as Plaintiff's Demonstrative 7. Do you
10 recognize this as a table that summarizes the quantity
11 overruns from change order 23?
12 **A. Yes, sir.**
13 Q. And this is something you monitored as
14 it was going on in progress; is that right, sir?
15 **A. Yes.**
16 Q. So as you look at the numbers on this
17 table, can you -- are they consistent with your
18 understanding of the types of quantity overruns that
19 FPD Main experienced?
20 **A. Yes, sir.**
21 MR. HARTNETT: I offer Plaintiff's
22 Demonstrative 7.
23 MR. FROST: No objection.
24 MR. HARTNETT: Let's put it up on the
25 screen.

3698

1 THE COURT: Demonstrative 7 is already
2 in.
3 MR. HARTNETT: It's already in. There
4 we go.
5 Q. (BY MR. HARTNETT) This table here, what
6 does it summarize?
7 **A. It goes through and tells us what the**
8 **baseline, the actual quantity, and what the overrun or**
9 **underrun was.**
10 Q. So for FPD Main's work on change order
11 23, they started out planning to install 325 (sic)
12 linear feet of cable and they ended up installing
13 751,000 linear feet. Is that right?
14 **A. Yes, sir.**
15 Q. So for all these, we see overruns of in
16 excess of 100 percent for many of them and some of
17 them well in excess of 100 percent?
18 **A. Yes, sir.**
19 Q. And that is consistent with your
20 observations as to how large the scope of work changed
21 for FPD Main when they came to do this work?
22 **A. Yes, sir.**
23 Q. Now, how did this increase in the scope
24 of work that FPD had to do, how did it affect their
25 ability to perform this work?

3699

1 **A. We had to hire a night shift. We had to**
2 **hire extra supervision, and along with your night**
3 **shift, we had to start working overtime.**
4 Q. Does something like having to hire the
5 night shift, does that increase the overall cost of
6 the work?
7 **A. Yes, sir.**
8 Q. Why is that?
9 **A. Night shift, when you hire a night**
10 **shift, they get 10 percent increase of pay than what**
11 **the day shift people get.**
12 Q. So night shift people get paid more
13 money?
14 **A. Yes, sir.**
15 Q. Are night shift people typically as
16 efficient as the day shift people?
17 **A. No, sir.**
18 Q. Why is that?
19 **A. One, they're working at night. You're**
20 **working under less light, and you don't have -- you do**
21 **not have the daylight, and you're having to light up**
22 **everywhere, the amount of people that you're having to**
23 **put to work.**
24 Q. So FPD Main's costs to complete this
25 work increased over and above just the cost of doing

3644

1 Q. Now, the work that we're talking about
2 here was performed on a time and material basis,
3 correct?
4 **A. Yes.**
5 Q. Why was it time and material instead of
6 fixed price?
7 **A. During the walk-through and entering into**
8 **the contract, in a lump sum that has already had**
9 **contractors performing on it, it was in our best**
10 **interests to offer Xcel the opportunity of a time and**
11 **material contract, because the materials and -- the**
12 **materials and information that was provided to us, I**
13 **guess, that would be the only way that we could**
14 **competitively do that for them.**
15 Q. Is there anything unusual, in your
16 experience, in using time and material when taking
17 over work from another contractor midstream?
18 **A. There is not. In fact, it's about the**
19 **only way that you can do work.**
20 **The problem with this was, it was such a**
21 **fast-track project, and the milestones that we needed**
22 **to reach, it was really the only way that we could do**
23 **the project.**
24 Q. In your experience, does using time and
25 materials as opposed to fixed price always result in

3645

1 more profit for you?
2 **A. No. In fact, we have made more money on**
3 **lump sum prices than we have time and material.**
4 Q. Now, did you do anything, Mr. Tate, to
5 try to ensure that hours getting recorded and charged
6 to Xcel for the work you were performing were
7 appropriate?
8 **A. I am the last stop, as far as time sheets**
9 **go, before they were reported to Xcel. And our time**
10 **sheets start at the foreman level. They record**
11 **quantities based on what their men have installed.**
12 **Then they go to the superintendent. He goes out and**
13 **verifies that the footages were actually installed.**
14 **And then when they get to me, I look at**
15 **the cost codes. And cost codes are the type of**
16 **material that are being installed. And make sure the**
17 **job numbers, the employees, and everything is correct**
18 **before I send them for evaluation to Xcel.**
19 Q. Based on being on-site for all this time,
20 do you have any reason to believe FPD did anything
21 other than to try to keep the costs as reasonable as
22 they could?
23 **A. No, I do not.**
24 Q. Did Xcel do anything itself with respect
25 to reviewing the time that was being charged on this?

3646

1 **A. We had a contract lead in Robin Rand that**
2 **reviewed time sheets and signed off on them daily.**
3 Q. Okay. I think those are all my
4 questions. Thank you, sir.
5 THE COURT: Thank you.
6 THE COURT: Cross-examination.
7 CROSS-EXAMINATION
8 BY MR. FROST:
9 Q. Let's make sure that we're on the same
10 page here, Mr. Tate.
11 Shaw didn't engineer the boiler, did it?
12 Alstom engineered the boiler.
13 **A. Alstom was the EPC contractor, but Shaw**
14 **was inevitably designed for the systems that they were**
15 **installing in the boiler.**
16 Q. But my question was, the boiler itself
17 was designed by Alstom; isn't that correct?
18 **A. Yes, it was.**
19 Q. Okay. And the lines -- the utility lines
20 going into the boiler, then, were the responsibility
21 of Shaw; isn't that correct?
22 **A. Yes. For their systems.**
23 Q. And in order for Shaw to do their design,
24 they have to know what devices and what instruments
25 and what motors and what machines are in the boiler;

3647

1 isn't that true?
2 **A. That's affirmative.**
3 Q. Okay. And you don't know when Alstom or
4 when Xcel sent their drawings to Shaw, do you?
5 **A. No, I don't.**
6 Q. Okay. It could have been late, it could
7 have been early. You just don't know, do you?
8 **A. Once again, I have my assumptions, but,**
9 **no, I do not know the exact date.**
10 Q. Okay. And, in fact, you wouldn't be in a
11 position to argue with me if I told you that Shaw
12 complained repeatedly to Xcel about getting late
13 drawings for their own work from Alstom and B&W and
14 Xcel, would you?
15 **A. I would not know that information, no.**
16 Q. Okay. Very well.
17 Now, let's clear up one other thing. You
18 didn't have a contract with Shaw. You had a contract
19 with Xcel, didn't you?
20 **A. Yes, I did.**
21 Q. And Shaw's contract was with Xcel, right?
22 **A. As far as I know.**
23 Q. And the work that was moved from Shaw's
24 scope in the boiler, the electrical work, was the
25 subject of change order 23, right?

3708

1 **A. The BA was called. The business agent**
2 **was called for them. Came out. They gathered all the**
3 **electricians into the break area and were talking to**
4 **them. And the BA talked them into working the weekend**
5 **in the best interests of Xcel Energy, and the craft**
6 **ended up agreeing to it and worked that weekend.**
7 Q. You're a member of that union, are you
8 not, sir?
9 **A. I'm a member of the IBEW, but not that**
10 **particular union, no, sir.**
11 Q. So you were involved -- you witnessed
12 these conversations?
13 **A. Yes, sir.**
14 MR. FROST: Objection, leading. It's
15 just going on and on.
16 THE COURT: Sustained.
17 Q. (BY MR. HARTNETT) Following this
18 meeting, did you have conversations with some of the
19 craft workers themselves?
20 **A. Yes, sir.**
21 Q. And did you report in this e-mail your
22 observations from that discussion?
23 **A. Yes, sir, I did.**
24 Q. And if we look down in the middle
25 here -- let's see. It starts with, "To be honest."

3709

1 You wrote here --
2 MR. HARTNETT: You're on the right line.
3 Just highlight it for the jury. Up, up. You had it
4 before. Go right in two words.
5 Q. (BY MR. HARTNETT) "to be honest" --
6 keep going -- "we had a few little complaints about
7 crazy everyday items, but the biggest complaints we
8 had are the same issues that Xcel and FPD Main dealt
9 with while installing the boiler work."
10 Keep going.
11 "Engineering issues."
12 Let's go down a little bit.
13 "The other complaint was material," a
14 couple lines down.
15 MR. HARTNETT: You're almost there.
16 Q. (BY MR. HARTNETT) "They either do not
17 have the material or it takes forever to get it or are
18 promised material in a few days and it takes weeks to
19 get it in."
20 That's what you wrote at the time, sir;
21 is that right?
22 **A. Yes, sir.**
23 Q. That's based upon the things the craft
24 told you following that meeting?
25 **A. Yes, sir.**

3710

1 Q. Those observations by Shaw's craft
2 laborers, are those, in fact, consistent with problems
3 you encountered with FPD Main's work?
4 **A. Yes, sir.**
5 Q. Finally, sir, part of your job was
6 reviewing FPD Main's invoices in connection with the
7 change order 23 work; is that right?
8 **A. Yes, sir.**
9 Q. Tell the jury. What did you do to
10 satisfy yourself that FPD Main was charging properly
11 for its work?
12 **A. On a day-to-day basis, I was out in the**
13 **field. I walked around, got to know the guys, got the**
14 **areas they were working. We'd look to see what they**
15 **were working on and worked with FPD's management on a**
16 **day-to-day basis as far as scheduling the work ahead**
17 **of the guys and then also making sure that they filled**
18 **out material req sheets to get the material ordered so**
19 **hopefully we'd get it in in time to start the new task**
20 **of work that was coming up on hand.**
21 Q. Now, every day, were time sheets
22 submitted?
23 **A. Yes, sir.**
24 Q. What did you do with those time sheets?
25 **A. I would review the time sheets and sign**

3711

1 **them.**
2 Q. And how often were invoices submitted?
3 **A. Every two weeks.**
4 Q. And what did you do with those?
5 **A. I would take the invoices and review the**
6 **invoices. I kept a copy of the time sheets in my**
7 **office. So I would take the invoices FPD had to**
8 **submit, the time sheets for that invoice with it, and**
9 **I would review those against the ones that I signed to**
10 **make sure the hours, the personnel, everything, the**
11 **quantities, everything was the same before I signed**
12 **off on the time sheet -- before I signed off on the**
13 **invoice.**
14 Q. Mr. Moran, I'm going to hand you what's
15 been identified as Defendant's Exhibit 2460A, which is
16 an excerpt from a much more voluminous exhibit. On
17 the first page of the exhibit, do you recognize your
18 signature?
19 **A. Yes, sir.**
20 Q. Is this -- the first page of 2460A, is
21 this one of FPD Main's invoices with respect to change
22 order request 23?
23 **A. Yes, sir.**
24 Q. And did you review the invoice and sign
25 it on the bottom?

3672

1 BY MR. HARTNETT:
2 Q. Mr. Moran, could you please state your
3 full name for the record, please?
4 **A. Robert Gregory Moran.**
5 Q. And where do you currently live, sir?
6 **A. Pueblo, Colorado.**
7 Q. And, Mr. Moran, can you describe for the
8 jury your professional experience, what you do for a
9 living?
10 **A. Electrical superintendent. I hold a**
11 **master's license, electrical license. I'm in IBEW,**
12 **and I build power plants for a living.**
13 Q. And can you just describe for the jury
14 generally your experience as an electrician working on
15 power plants? What types of things have you done in
16 terms of power plant construction?
17 **A. I've worked on nuclear power plants.**
18 **I've worked on fossil plants and gas plants.**
19 Q. And what types of roles have you played
20 in those projects?
21 **A. I've been a craft, work with my tools,**
22 **to a foreman, a general foreman, and a site manager.**
23 Q. So foreman, general foreman. Have you
24 also been a superintendent?
25 **A. I've been -- yes, sir, superintendent**

3673

1 **too.**
2 Q. And a site manager, is a site manager --
3 well, that's a site manager for an electrical
4 contractor on a power plant project?
5 **A. You oversee the whole project. You're**
6 **in control of the budget, the graph, the scheduling,**
7 **the whole nine yards.**
8 Q. And for what company were you the site
9 manager for a power plant project?
10 **A. MEI.**
11 Q. And what's MEI stand for?
12 **A. Mechanical Electrical Instrumentation.**
13 Q. And where did you serve in that capacity
14 on a power plant?
15 **A. Mankato Energy Center out of Mankato,**
16 **Minnesota.**
17 Q. And when was that?
18 **A. Late '05, '06.**
19 Q. And what kind of power plant project was
20 that, sir?
21 **A. It was a combined cycle.**
22 Q. Okay. Now, you performed work in
23 connection with the Comanche 3 project; is that right,
24 sir?
25 **A. Yes, sir.**

3674

1 Q. And on Comanche 3, what company did you
2 work for?
3 **A. The electrical -- The Energy**
4 **Corporation.**
5 Q. Is that Mr. Stecker's company?
6 **A. Yes, sir.**
7 Q. And on Comanche 3, what role did you
8 play?
9 **A. I overseen the BOP electrical, and I was**
10 **the construction manager for FPD Main.**
11 Q. So when FPD Main took over the BOP
12 electrical scope -- or the BOP electrical scope of the
13 boiler, you supervised that work?
14 **A. Yes, sir.**
15 Q. On behalf of Public Service?
16 **A. Yes, sir.**
17 Q. Mr. Moran, one of Shaw's claims in this
18 case is a claim for in excess of a million dollars
19 with respect to a collapsed duct bank that they said
20 caused some cable damage. Are you generally familiar
21 with that issue?
22 **A. Yes, sir.**
23 Q. Were you working at Comanche 3 when the
24 duct bank that Shaw claims collapsed was installed?
25 **A. Yes, sir.**

3675

1 Q. Did you -- were you observing the
2 installation of that duct bank as it was constructed?
3 **A. Yes, sir.**
4 Q. And just so the jury understands, I'm
5 going to hand you what's been identified as
6 Defendant's Trial Exhibit 3087. Do you recognize this
7 as a photograph of what a duct bank looks like on
8 Comanche 3?
9 **A. Yes, sir.**
10 Q. This is not the duct bank that actually
11 collapsed, is it, sir?
12 **A. No.**
13 Q. But it is representative of what a duct
14 bank is?
15 **A. Yes, sir.**
16 MR. HARTNETT: I offer 3087.
17 MR. FROST: No objection.
18 THE COURT: 3087 is admitted.
19 (Exhibit 3087 was received in evidence.)
20 Q. (BY MR. HARTNETT) Mr. Moran, what is a
21 duct bank?
22 **A. A duct bank is PVC tubes surrounded by**
23 **concrete that we use to pull cables from Point A to**
24 **Point B underground.**
25 Q. So point at the screen there. Where are

3696

1 **A. I started realizing that the engineering**
2 **wasn't complete.**
3 Q. Because Mr. Hill had to direct you to
4 Vinny in Denver in order to answer some of these
5 questions?
6 **A. Correct. He got to where he couldn't --**
7 **not only could he not pull up the circuits, but he**
8 **couldn't find the drawings.**
9 Q. Now, you were supervising FPD Main's
10 work in the boiler building; is that right?
11 **A. Yes, sir.**
12 Q. And did you observe that work on a daily
13 basis?
14 **A. Yes, sir.**
15 Q. And did FPD experience a very large
16 growth in the quantity of the work that they needed to
17 do to complete change order 23?
18 **A. Yes, sir. Almost double.**
19 Q. Now, was there a particular point in
20 time where Shaw gave FPD and you a whole bunch more
21 work to do?
22 **A. Yes, sir.**
23 Q. When was that?
24 **A. February of 2009.**
25 Q. And what happened in February 2009?

3697

1 What did you get?
2 **A. We got another cable schedule, which was**
3 **100 percent as much work as the original one they had**
4 **given us in November 2008.**
5 Q. So the one you had in November, this new
6 one in February had twice as much stuff in it?
7 **A. Correct.**
8 Q. Mr. Moran, I'm handing you what's been
9 identified as Plaintiff's Demonstrative 7. Do you
10 recognize this as a table that summarizes the quantity
11 overruns from change order 23?
12 **A. Yes, sir.**
13 Q. And this is something you monitored as
14 it was going on in progress; is that right, sir?
15 **A. Yes.**
16 Q. So as you look at the numbers on this
17 table, can you -- are they consistent with your
18 understanding of the types of quantity overruns that
19 FPD Main experienced?
20 **A. Yes, sir.**
21 MR. HARTNETT: I offer Plaintiff's
22 Demonstrative 7.
23 MR. FROST: No objection.
24 MR. HARTNETT: Let's put it up on the
25 screen.

3698

1 THE COURT: Demonstrative 7 is already
2 in.
3 MR. HARTNETT: It's already in. There
4 we go.
5 Q. (BY MR. HARTNETT) This table here, what
6 does it summarize?
7 **A. It goes through and tells us what the**
8 **baseline, the actual quantity, and what the overrun or**
9 **underrun was.**
10 Q. So for FPD Main's work on change order
11 23, they started out planning to install 325 (sic)
12 linear feet of cable and they ended up installing
13 751,000 linear feet. Is that right?
14 **A. Yes, sir.**
15 Q. So for all these, we see overruns of in
16 excess of 100 percent for many of them and some of
17 them well in excess of 100 percent?
18 **A. Yes, sir.**
19 Q. And that is consistent with your
20 observations as to how large the scope of work changed
21 for FPD Main when they came to do this work?
22 **A. Yes, sir.**
23 Q. Now, how did this increase in the scope
24 of work that FPD had to do, how did it affect their
25 ability to perform this work?

3699

1 **A. We had to hire a night shift. We had to**
2 **hire extra supervision, and along with your night**
3 **shift, we had to start working overtime.**
4 Q. Does something like having to hire the
5 night shift, does that increase the overall cost of
6 the work?
7 **A. Yes, sir.**
8 Q. Why is that?
9 **A. Night shift, when you hire a night**
10 **shift, they get 10 percent increase of pay than what**
11 **the day shift people get.**
12 Q. So night shift people get paid more
13 money?
14 **A. Yes, sir.**
15 Q. Are night shift people typically as
16 efficient as the day shift people?
17 **A. No, sir.**
18 Q. Why is that?
19 **A. One, they're working at night. You're**
20 **working under less light, and you don't have -- you do**
21 **not have the daylight, and you're having to light up**
22 **everywhere, the amount of people that you're having to**
23 **put to work.**
24 Q. So FPD Main's costs to complete this
25 work increased over and above just the cost of doing

3708

1 **A. The BA was called. The business agent**
2 **was called for them. Came out. They gathered all the**
3 **electricians into the break area and were talking to**
4 **them. And the BA talked them into working the weekend**
5 **in the best interests of Xcel Energy, and the craft**
6 **ended up agreeing to it and worked that weekend.**
7 Q. You're a member of that union, are you
8 not, sir?
9 **A. I'm a member of the IBEW, but not that**
10 **particular union, no, sir.**
11 Q. So you were involved -- you witnessed
12 these conversations?
13 **A. Yes, sir.**
14 MR. FROST: Objection, leading. It's
15 just going on and on.
16 THE COURT: Sustained.
17 Q. (BY MR. HARTNETT) Following this
18 meeting, did you have conversations with some of the
19 craft workers themselves?
20 **A. Yes, sir.**
21 Q. And did you report in this e-mail your
22 observations from that discussion?
23 **A. Yes, sir, I did.**
24 Q. And if we look down in the middle
25 here -- let's see. It starts with, "To be honest."

3709

1 You wrote here --
2 MR. HARTNETT: You're on the right line.
3 Just highlight it for the jury. Up, up. You had it
4 before. Go right in two words.
5 Q. (BY MR. HARTNETT) "to be honest" --
6 keep going -- "we had a few little complaints about
7 crazy everyday items, but the biggest complaints we
8 had are the same issues that Xcel and FPD Main dealt
9 with while installing the boiler work."
10 Keep going.
11 "Engineering issues."
12 Let's go down a little bit.
13 "The other complaint was material," a
14 couple lines down.
15 MR. HARTNETT: You're almost there.
16 Q. (BY MR. HARTNETT) "They either do not
17 have the material or it takes forever to get it or are
18 promised material in a few days and it takes weeks to
19 get it in."
20 That's what you wrote at the time, sir;
21 is that right?
22 **A. Yes, sir.**
23 Q. That's based upon the things the craft
24 told you following that meeting?
25 **A. Yes, sir.**

3710

1 Q. Those observations by Shaw's craft
2 laborers, are those, in fact, consistent with problems
3 you encountered with FPD Main's work?
4 **A. Yes, sir.**
5 Q. Finally, sir, part of your job was
6 reviewing FPD Main's invoices in connection with the
7 change order 23 work; is that right?
8 **A. Yes, sir.**
9 Q. Tell the jury. What did you do to
10 satisfy yourself that FPD Main was charging properly
11 for its work?
12 **A. On a day-to-day basis, I was out in the**
13 **field. I walked around, got to know the guys, got the**
14 **areas they were working. We'd look to see what they**
15 **were working on and worked with FPD's management on a**
16 **day-to-day basis as far as scheduling the work ahead**
17 **of the guys and then also making sure that they filled**
18 **out material req sheets to get the material ordered so**
19 **hopefully we'd get it in in time to start the new task**
20 **of work that was coming up on hand.**
21 Q. Now, every day, were time sheets
22 submitted?
23 **A. Yes, sir.**
24 Q. What did you do with those time sheets?
25 **A. I would review the time sheets and sign**

3711

1 **them.**
2 Q. And how often were invoices submitted?
3 **A. Every two weeks.**
4 Q. And what did you do with those?
5 **A. I would take the invoices and review the**
6 **invoices. I kept a copy of the time sheets in my**
7 **office. So I would take the invoices FPD had to**
8 **submit, the time sheets for that invoice with it, and**
9 **I would review those against the ones that I signed to**
10 **make sure the hours, the personnel, everything, the**
11 **quantities, everything was the same before I signed**
12 **off on the time sheet -- before I signed off on the**
13 **invoice.**
14 Q. Mr. Moran, I'm going to hand you what's
15 been identified as Defendant's Exhibit 2460A, which is
16 an excerpt from a much more voluminous exhibit. On
17 the first page of the exhibit, do you recognize your
18 signature?
19 **A. Yes, sir.**
20 Q. Is this -- the first page of 2460A, is
21 this one of FPD Main's invoices with respect to change
22 order request 23?
23 **A. Yes, sir.**
24 Q. And did you review the invoice and sign
25 it on the bottom?

DSTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

1437 Bannock Street
Denver, Colorado 80202
- - - - - - - - - - - - - - - - -x

STONE & WEBSTER, INC., :

Plaintiff, :

vs. : Case No. 09CV6913
Courtroom: 7

PUBLIC SERVICE COMPANY :

COLORADO d/b/a XCEL ENERGY, :

Defendant. :

- - - - - - - - - - - - - - - - -x

November 2, 2010

Volume XII

The trial in the above-entitled matter continued on Tuesday, November 2, 2010, at 1437 Bannock Street, Courtroom 7, Denver, Colorado 80202, before the Honorable William W. Hood III.

The transcript is a complete transcription of the proceedings that were had in the above-entitled matter on the aforesaid date.

Morning Session Reported by:

Sharon L. Szotak, CRR, RPR

Afternoon Session Reported by:

Sandra L. Bray, CRR, RDR

3644

1 Q. Now, the work that we're talking about
2 here was performed on a time and material basis,
3 correct?
4 **A. Yes.**
5 Q. Why was it time and material instead of
6 fixed price?
7 **A. During the walk-through and entering into**
8 **the contract, in a lump sum that has already had**
9 **contractors performing on it, it was in our best**
10 **interests to offer Xcel the opportunity of a time and**
11 **material contract, because the materials and -- the**
12 **materials and information that was provided to us, I**
13 **guess, that would be the only way that we could**
14 **competitively do that for them.**
15 Q. Is there anything unusual, in your
16 experience, in using time and material when taking
17 over work from another contractor midstream?
18 **A. There is not. In fact, it's about the**
19 **only way that you can do work.**
20 **The problem with this was, it was such a**
21 **fast-track project, and the milestones that we needed**
22 **to reach, it was really the only way that we could do**
23 **the project.**
24 Q. In your experience, does using time and
25 materials as opposed to fixed price always result in

3645

1 more profit for you?
2 **A. No. In fact, we have made more money on**
3 **lump sum prices than we have time and material.**
4 Q. Now, did you do anything, Mr. Tate, to
5 try to ensure that hours getting recorded and charged
6 to Xcel for the work you were performing were
7 appropriate?
8 **A. I am the last stop, as far as time sheets**
9 **go, before they were reported to Xcel. And our time**
10 **sheets start at the foreman level. They record**
11 **quantities based on what their men have installed.**
12 **Then they go to the superintendent. He goes out and**
13 **verifies that the footages were actually installed.**
14 **And then when they get to me, I look at**
15 **the cost codes. And cost codes are the type of**
16 **material that are being installed. And make sure the**
17 **job numbers, the employees, and everything is correct**
18 **before I send them for evaluation to Xcel.**
19 Q. Based on being on-site for all this time,
20 do you have any reason to believe FPD did anything
21 other than to try to keep the costs as reasonable as
22 they could?
23 **A. No, I do not.**
24 Q. Did Xcel do anything itself with respect
25 to reviewing the time that was being charged on this?

3646

1 **A. We had a contract lead in Robin Rand that**
2 **reviewed time sheets and signed off on them daily.**
3 Q. Okay. I think those are all my
4 questions. Thank you, sir.
5 THE COURT: Thank you.
6 THE COURT: Cross-examination.
7 CROSS-EXAMINATION
8 BY MR. FROST:
9 Q. Let's make sure that we're on the same
10 page here, Mr. Tate.
11 Shaw didn't engineer the boiler, did it?
12 Alstom engineered the boiler.
13 **A. Alstom was the EPC contractor, but Shaw**
14 **was inevitably designed for the systems that they were**
15 **installing in the boiler.**
16 Q. But my question was, the boiler itself
17 was designed by Alstom; isn't that correct?
18 **A. Yes, it was.**
19 Q. Okay. And the lines -- the utility lines
20 going into the boiler, then, were the responsibility
21 of Shaw; isn't that correct?
22 **A. Yes. For their systems.**
23 Q. And in order for Shaw to do their design,
24 they have to know what devices and what instruments
25 and what motors and what machines are in the boiler;

3647

1 isn't that true?
2 **A. That's affirmative.**
3 Q. Okay. And you don't know when Alstom or
4 when Xcel sent their drawings to Shaw, do you?
5 **A. No, I don't.**
6 Q. Okay. It could have been late, it could
7 have been early. You just don't know, do you?
8 **A. Once again, I have my assumptions, but,**
9 **no, I do not know the exact date.**
10 Q. Okay. And, in fact, you wouldn't be in a
11 position to argue with me if I told you that Shaw
12 complained repeatedly to Xcel about getting late
13 drawings for their own work from Alstom and B&W and
14 Xcel, would you?
15 **A. I would not know that information, no.**
16 Q. Okay. Very well.
17 Now, let's clear up one other thing. You
18 didn't have a contract with Shaw. You had a contract
19 with Xcel, didn't you?
20 **A. Yes, I did.**
21 Q. And Shaw's contract was with Xcel, right?
22 **A. As far as I know.**
23 Q. And the work that was moved from Shaw's
24 scope in the boiler, the electrical work, was the
25 subject of change order 23, right?

3712

1 **A. Yes, sir.**
2 Q. And if you flip back through the
3 document that is 2460A, are there time sheets that you
4 signed?
5 **A. Yes, sir.**
6 Q. So the time sheets that support this
7 invoice, you would have reviewed those time sheets on
8 a daily basis?
9 **A. Yes, sir.**
10 Q. And signed them?
11 **A. Yes.**
12 MR. HARTNETT: All right. I'll offer
13 2460A.
14 MR. FROST: No objection.
15 THE COURT: 2460A is admitted.
16 (Exhibit 2460A was received in
17 evidence.)
18 Q. (BY MR. HARTNETT) Mr. Moran, did you
19 view it as your job to make sure that FPD's charges
20 were reasonable and appropriate?
21 **A. Yes, sir.**
22 Q. And in reviewing the time sheets and the
23 invoices, did you try to identify any problems with
24 the way FPD was accounting for its time?
25 **A. Yes, sir, I did.**

3713

1 Q. If you identified those problems, would
2 you correct them?
3 **A. I would talk to Trevor Tate about them**
4 **and have him correct them, yes, sir.**
5 Q. Were there circumstance where FPD had to
6 do rework?
7 **A. Yes, sir.**
8 Q. Because of its own mistakes?
9 **A. Yes.**
10 Q. Did those get charged to Shaw under
11 change order request 23?
12 **A. No, sir.**
13 Q. Was there some work that FPD did in the
14 boiler that was outside change order request 23?
15 **A. Yes, sir.**
16 Q. How was that tracked?
17 **A. I had a miscellaneous contract to track**
18 **those issues with our -- there was some work that was**
19 **done that was backcharged to Alstom that we would have**
20 **to implement FCA, field change authorization, for.**
21 Q. So there were some issues with Alstom in
22 terms of the boiler electrical work?
23 **A. Yes, sir.**
24 Q. So there were backcharges to Alstom that
25 you accounted for?

3714

1 **A. Yes, sir.**
2 Q. And those were tracked separately via
3 the FCA process?
4 **A. Yes, sir.**
5 Q. So in terms of identifying costs that
6 were chargeable to Shaw under change order request 23,
7 do you believe that you did an appropriate job of
8 tracking those costs?
9 **A. Yes, sir.**
10 Q. Was Shaw given the opportunity, if they
11 wanted to, to come into your office and look at the
12 time sheets?
13 **A. Yes, sir, any day.**
14 Q. Did you tell that to the Shaw people?
15 **A. I told them verbally, and I told them**
16 **via e-mail.**
17 Q. One last thing, sir. We talked about
18 how Joe Livingston was hired to help FPD Main with its
19 work on the boiler by engineering. Was somebody else
20 brought in to help with procurement?
21 **A. Dave Turner was.**
22 Q. So Dave Turner was brought in to help
23 FPD Main get its materials?
24 **A. Yes, sir.**
25 Q. Did he help get some of the materials

3715

1 from Shaw?
2 **A. Yes, sir.**
3 Q. Where else did he get materials from?
4 **A. Wesco and Rexel.**
5 Q. And why did some materials have to come
6 from someone other than Shaw?
7 **A. Some of them, Shaw denied purchasing,**
8 **and the other ones, we could get it from another**
9 **contractor that Shaw used or Xcel also, and they would**
10 **come up and said they couldn't get it within a timely**
11 **manner, but we could get it from Wesco in a timely**
12 **manner.**
13 Q. Now, did you -- in your review of Shaw's
14 electrical work, did you from time to time try to
15 suggest ways that Shaw could improve its electrical
16 productivity?
17 **A. Yes, sir.**
18 Q. Is there a specific instance that you
19 can recall about that?
20 **A. Number one was the duct bank pull. I**
21 **told them -- I suggested to Jason Ezell and Craig Hill**
22 **several times on that, how to -- a better way to pull**
23 **that cable.**
24 Q. Did they take your advice?
25 **A. For three of the pulls, they did.**

1 invoices at all?
2 **A. No, sir.**
3 **(End of videotape deposition excerpt.)**
4 MR. FROST: And from the testimony of
5 this witness, Your Honor, there is nobody in this
6 courtroom, including the witness, who knows really
7 what are in those invoices.
8 And the -- the foundational nexus, the
9 foundational crux, is documents are made at or near
10 the time, by or from information transmitted by a
11 person with knowledge, kept in the course of the
12 regularly conducted activity.
13 And what he's saying, based on this
14 testimony we just saw, is pure assumption, because he
15 had nothing to do with the assembly of it.
16 THE COURT: But he knows the general
17 way in which such invoices are generated. And that is
18 a matter about which he's just testified, right? So
19 doesn't that provide a sufficient foundation when he's
20 talking about how it typically occurs in his
21 experience, and he obviously has a basis with which to
22 be familiar with how it occurs?
23 MR. FROST: Well, what's typical is not
24 what's in the rule. He has to say this was -- this
25 data was compiled at or near the time from information

1 transmitted by personal knowledge. He can't assume.
2 He can't say, this is generally the way it's done.
3 He's got to have some involvement in
4 this. He just can't take a stack of documents, come
5 in and say, here it is, I don't know what it is, but
6 it sure looks good to me, and there's a really big
7 number, and I like that number real well, too. Which
8 is essentially what's happening here, Your Honor.
9 THE COURT: Fair observation.
10 Mr. Vollbrecht?
11 MR. VOLLBRECHT: Sure. Well, one --
12 THE COURT: Is there anybody else who
13 can provide additional foundation? Are we spending
14 more time than we need to on this when there is a
15 record custodian who has more direct familiarity with
16 the underlying -- with the records?
17 MR. VOLLBRECHT: Well, I mean, I guess we
18 could -- we believe that this is the person to do it
19 in this case, given, you know, his ability to testify
20 on this and the fact that we don't want to be here for
21 six months. And I believe that's -- you know, as you
22 appropriately pointed out, we have satisfied the rule.
23 He testified this is how they always do
24 it, this is what they do here. It's not a question --
25 and I don't think there's a legitimate basis to say

1 it's not at or near the time, because the invoices, as
2 he testified to, were put together weekly, reviewed
3 weekly. You can look at the time sheets. The time is
4 is there.
5 If they want to try to say that somehow
6 these aren't at or near the time, they got the
7 documents. They've had the documents for months. If
8 they think there's something legitimate about that,
9 they could have raised that. But there isn't anything
10 legitimate about that.
11 MR. FROST: Your Honor --
12 MR. VOLLBRECHT: And again -- I'm sorry.
13 MR. FROST: Please go ahead.
14 MR. VOLLBRECHT: Your point that you were
15 quoting from also addressed Mr. Frost's issue of, he
16 didn't have any hand in putting it together. He
17 doesn't have to, under the rule.
18 MR. FROST: Well, we would disagree. And
19 if they wanted these documents in, then they should
20 have brought a real custodian.
21 THE COURT: Well, it does seem a little
22 tenuous, and I think that your concerns are well
23 placed. But I'm going to admit 54 -- 5614 based on
24 the court's previous statements.
25 Anything else that we need to address

1 now?
2 MR. VOLLBRECHT: No from Public Service.
3 THE COURT: All right. Mr. Hephner,
4 you want to come back up, sir.
5 Go ahead and bring them in. You can just
6 bring them straight into the box.
7 THE COURT: Off the record.
8 (Discussion off the record.)
9 (The following proceedings were conducted
10 in the presence and hearing of the jury.)
11 THE COURT: Ladies and gentlemen, thank
12 you for your patience.
13 And, Mr. Hephner, I'll remind you that
14 you remain under oath. Redirect examination.
15 MR. VOLLBRECHT: Thank you, Your Honor.
16 Just a couple of questions of Mr. Hephner.
17 REDIRECT EXAMINATION
18 BY MR. VOLLBRECHT:
19 Q. You were asked, towards the end of your
20 cross-examination by Mr. Frost, about some questions
21 with respect to milestones and substantial completion
22 and payments.
23 I'd like to address your attention and
24 the jury's attention -- this is Plaintiff's 716. This
25 is the B&W contract. If we go back to -- it's Bates

4369

1 **your groove.**
2 Q. Did that result in high rates of weld
3 rejection for these welds for Shaw?
4 **A. Undoubtedly, yes.**
5 MR. HARTNETT: Perhaps we could put up
6 the Defendant's demonstrative that the jurors have
7 seen previously, the last piece of it that shows the
8 weld rejection in the main steam lines.
9 MR. PIGANELLI: 27.
10 Q. (BY MR. HARTNETT) Defendant's
11 Demonstrative 27. You've seen this before, this
12 slide?
13 **A. Yes.**
14 Q. And take a look at those -- the little
15 tables there that summarize the rates of weld
16 rejection for hot reheat and main steam. Do you see
17 those?
18 **A. Yes, I do.**
19 Q. Are those consistent with your
20 observations of the rates of weld rejection Shaw had
21 trying to get these narrow groove welds completed?
22 **A. Yes.**
23 Q. And those weld reject rates, where do
24 they fit in in terms of industry standards for weld
25 rejection?

4370

1 **A. They're so astronomically high, I've**
2 **never seen anything that bad in my life, in my**
3 **experience.**
4 Q. You've been in QA/QC for how many years,
5 sir?
6 **A. Almost 35 years.**
7 Q. Where does Shaw's welding on this
8 project rate in terms of the best or the worst welding
9 you've seen on a project of this type?
10 **A. It's the worst welding I've ever seen.**
11 Q. So here we see some of these welds were
12 done three or more times; is that right?
13 **A. Yes.**
14 Q. And several were done -- had to be
15 redone two or more times?
16 **A. Correct.**
17 Q. When these types of welds have to be
18 redone, what -- how difficult is that? What does that
19 entail?
20 **A. It's tremendously difficult. This**
21 **material is a very hard material so that when you find**
22 **that you've got a weld defect, what you have to do**
23 **then is to heat the material up in order to soften it**
24 **before you can even cut it and machine it out to**
25 **re-establish a weld groove.**

4371

1 **Then after you get the initial defect**
2 **weld cut out, which takes quite a bit of time -- it**
3 **takes a couple of hours just to heat the piece up to**
4 **soften it. Then it takes another couple of hours to**
5 **cut it out. Then after that, you have to remachine**
6 **the weld preparations and re-establish the weld**
7 **groove, the bevel angles and all.**
8 **Then after that, you have to establish**
9 **your fitup again, your alignment of the two adjoining**
10 **ends, and ensure that your gaps are correct and your**
11 **alignment is correct and that everything is within the**
12 **dimensional tolerances prescribed by the weld**
13 **procedure.**
14 Q. Let me hand you a photo, if I may,
15 Defendant's Exhibit 3033. Do you recognize this
16 photo?
17 **A. Yes, I do.**
18 Q. What's this a photo of, sir?
19 **A. This is a photo of a machining template**
20 **for cutting the new weld preps into the ends of the**
21 **pipe.**
22 Q. Is this weld repair in progress?
23 **A. This is weld repair in progress.**
24 MR. HARTNETT: We offer 3033.
25 MR. McCORMICK: There's no objection,

4372

1 Your Honor.
2 THE COURT: 3033 is admitted.
3 (Exhibit 3033 was received in evidence.)
4 Q. (BY MR. HARTNETT) Now, the jurors have
5 seen it here. Can you explain what they're looking at
6 here?
7 **A. The ring around the bottom pipe is the**
8 **template upon which the machine tool sits, and it will**
9 **cut --**
10 Q. You can use the pointer.
11 **A. It will cut this bevel into the end of**
12 **the pipe, and it has to be done in a specific**
13 **configuration that provides for being able to weld the**
14 **pipe. You can actually see a little lip that**
15 **protrudes on the end, and that provides some landing**
16 **upon which you can put your weld metal as it melts and**
17 **provides an area to fuse your weld material into.**
18 Q. So let me ask a question of you, sir, if
19 I may. Assuming that one of Shaw's pipefitters was
20 asked to hand-weld one of those narrow grooves at the
21 beginning, how long would it take to do that first --
22 get that first root pass done?
23 **A. Oh, that would take possibly a day, and**
24 **if the fitup was unfavorable, which was the time that**
25 **they did do their manual welding, it would take a lot**

4261

1 **commissioned and able to run because now we're**
2 **operating on coal. So there -- and then also the**
3 **scrubbers would need to be commissioned and working so**
4 **we can do SO2 controls. So each of the milestones**
5 **means additional work that that contractor is supposed**
6 **to do, needs to be placed in service.**
7 Q. Now, if we go ahead to substantial
8 completion, is it possible for a contractor to have
9 done all that it can do but not be able to complete
10 its substantial completion requirements because
11 another contractor is late?
12 **A. That is true, and that actually occurred**
13 **on this project.**
14 Q. That happened on this project?
15 **A. Yes, it did.**
16 Q. Tell us about that.
17 **A. B&W was able to complete all their work**
18 **ahead of time, and the other two contractors were not**
19 **ready for doing the performance testing for Stone &**
20 **Webster. And there is -- so what happened is they**
21 **completed their work, so they met their contractual**
22 **obligations. They ended up demobing their**
23 **construction from the site and then coming back later**
24 **to finish startup and doing the performance testing.**
25 Q. Demobing means demobilizing?

4262

1 **A. Yes, removing their construction crews**
2 **from the site.**
3 Q. So after finishing their work, they went
4 home?
5 **A. Correct.**
6 Q. And then did they bring back whatever
7 crew was necessary for startup?
8 **A. Yes, they did.**
9 Q. And then once Shaw had caught up and
10 Alstom had caught up, were -- the performance tests
11 that B&W had to pass, could you do those?
12 **A. Yes, and we proceeded on with activities**
13 **on the site, yes.**
14 Q. So were any liquidated damages assessed
15 against B&W?
16 **A. No. They met their contractual**
17 **obligations, so LDs weren't assessed with them.**
18 Q. And are there provisions of these three,
19 A, B, C, contracts that specifically provide for that,
20 if you get your work but can't be tested because
21 somebody else was behind?
22 **A. Yes, there are provisions. This was a**
23 **delay in the performance testing, which is addressed**
24 **in the contracts.**
25 Q. Could Shaw have done the same thing that

4263

1 B&W did, that is, finish all its work and gone home?
2 **A. If they would have met all their work**
3 **requirements up to that point, yes. They would have**
4 **not had -- they would have met their contractual**
5 **requirements and not been assessed LDs.**
6 Q. How about Alstom and Shaw? How was
7 their situation different from B&W's? Let's say
8 specifically with respect to first fire on gas.
9 **A. Both of them were behind schedule. So**
10 **Alstom was behind their schedule, which you may say**
11 **they delayed themself, and Shaw was also behind their**
12 **schedule, which was delaying their schedule from**
13 **proceeding.**
14 Q. And did that same failure of those two
15 contractors to make their respective schedules, get
16 their respective scopes of work done, did that
17 continue up to substantial completion?
18 **A. It continued on, so they didn't catch up**
19 **between any of the major milestones. So they were**
20 **delayed throughout, from first fire, through first**
21 **coal, through full load, and on through substantial.**
22 Q. And as a result of that, were liquidated
23 damages assessed against both of those contractors,
24 that is, Shaw and Alstom?
25 **A. That is correct. Each contractor was**

4264

1 **behind in their work, so LDs were assessed.**
2 Q. Okay. Let's take a look at Plaintiff's
3 Demonstrative Exhibit 103 just for a moment. This is
4 just kind of a simple graphic that was intended to
5 show the contract structure for Comanche 3. And do
6 you generally recognize what's going on there?
7 **A. Yeah. I don't know that I've ever seen**
8 **this before, but I know the contractors, yes.**
9 Q. Sure. I just want to go through very
10 quickly and ask you about each of them. How would you
11 evaluate Mitsubishi's performance on Comanche 3?
12 **A. Mitsubishi did really good. They did**
13 **have a one-month delay, but -- and they filed for it.**
14 **There was a typhoon that went through Japan.**
15 Q. A typhoon?
16 **A. A typhoon. Excuse me. That went**
17 **through Japan, and they were delayed on delivery, but**
18 **that delay didn't impact any of the contractors, so --**
19 Q. Because they were even farther behind?
20 **A. Right.**
21 Q. How about Kiewit? They're the earth
22 movers, right?
23 **A. Kiewit was up front. They did all the**
24 **earthwork on the site. They also installed the**
25 **construction power and stormwater, and they completed**

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

1437 Bannock Street
Denver, Colorado 80202
- - - - - - - - - - - - - - - - -x

STONE & WEBSTER, INC., :

Plaintiff, :

vs : Case No. 09CV6913
Courtroom: 7

PUBLIC SERVICE COMPANY :

COLORADO d/b/a XCEL ENERGY, :

Defendant. :

- - - - - - - - - - - - - - - - -x

November 4, 2010

Volume XIV

The trial in the above-entitled matter continued on Thursday, November 4, 2010, at 1437 Bannock Street, Courtroom 7, Denver, Colorado 80202, before the Honorable William W. Hood III.

The transcript is a complete transcription of the proceedings that were had in the above-entitled matter on the aforesaid date.

Morning Session Reported by:

Sharon L. Szotak, CRR, RPR

Afternoon Session Reported by:

Sandra L. Bray, CRR, RDR

4201

1 their milestone dates and misexecute the contract.
2 And later on, we actually saw them
3 starting to destaff. And our understanding is that
4 they were trying to cut their costs.
5 Q. What did you see happening with their per
6 diem plan, the incentive plan for attracting labor?
7 A. They ended up dropping it. And I don't
8 know if that was to cut their costs or for whatever
9 reason.
10 Q. How about other contractors on the site?
11 Did other contractors on the site cut back on their --
12 A. No. My -- I believe B&W and Alstom
13 continued the per diem. I'm not sure it went through
14 the entire project, but it was through the
15 construction phase, to ensure that they had the labor
16 they needed.
17 Q. What did you do when you realized that
18 you weren't seeing the effort that you thought you
19 paid for in the settlement agreement?
20 A. So, you know, we continue on a weekly
21 basis to monitor schedule and see that they're falling
22 behind. I did at times talk to Jason Ezell and Bob
23 Follett to discuss the issues going on.
24 Jason -- several times I talked to him in
25 his office, and Bob Follett was present in I believe a

4202

1 couple of those meetings. But he indicated his hands
2 were tight, because management wouldn't allow him to
3 staff up or work additional overtime. They were only
4 allotted a certain amount of overtime to work on the
5 project.
6 So at that point, I found out that Shaw
7 was not going to succeed in the project. Their
8 management was not allowing them to. So that's when
9 we decided to work with them on seeing if we could
10 take work away.
11 We ended up taking, under change order
12 23, the boiler electrical work away from them, and get
13 a contractor that was proven. And it was FPD. They
14 had already done all the electrical work on 1 and 2.
15 Xcel had a good relationship with them. And they're a
16 very well disciplined and organized contractor. So
17 they went in and did the boiler electrical work.
18 Then we also looked at other areas that
19 we could take away. And some of those we took away
20 under 16.8 of the contract.
21 Some of the areas we did take away, Bob
22 Follett discussed those areas with me and recommend
23 that we did take them away under 16.8. He did
24 indicate that this is off-the-record communication,
25 and I don't want, you know, it to go anywhere. But I

4203

1 did get all -- you know, we did talk about certain
2 areas.
3 Some of those areas we did take away that
4 he felt were worthwhile were back in the air quality
5 control system. We took away mechanical piping. We
6 did take away the boiler drain systems. And there's
7 multiple areas in the change orders that you can see
8 that we did take away.
9 Q. What's an example of an area that Bob
10 Follett suggested that Public Service take out of
11 Shaw's contract that you decided not to take out of
12 the contract?
13 A. He wanted -- the erection of the
14 air-cooled condenser was taking an awful long time.
15 Both the structural steel erection and then the
16 boilermaker stuff, on fabricating the fins. And
17 that's one of the areas he wanted us to take away.
18 Xcel --
19 Q. Let me stop you for a second. When you
20 say ACC, did you understand that to include the
21 turbine exhaust duct or not?
22 A. It does. Okay. The air-cooled condenser
23 is -- comes off -- what happens is, the low pressure
24 turbine has this exhaust steam coming off of it, and
25 you've got to condense it back to water. And it goes

4204

1 through a turbine exhaust duct out to the air-cooled
2 condenser. So that turbine exhaust duct was an
3 area -- and finishing up the air-cooled condenser was
4 an area he wanted us to work on.
5 Q. But you declined to do that.
6 A. Yeah. The trouble is, the areas that we
7 agreed to take off were areas that were not in Shaw's
8 control area. Okay. Everything from the boiler north
9 was in their control area. And we didn't want a
10 dispute that we were interrupting any of Shaw's work.
11 So we decided to leave that in their court.
12 Q. I want to go back to something. You gave
13 kind of a long answer there, and I want to just go
14 back over a couple parts of it.
15 I think you testified that in
16 conversation with Jason Ezell, he told you that his
17 hands were tied, and his management just wouldn't
18 allow him to hire more men or work longer hours. Is
19 that correct?
20 A. That is correct. I don't know if he used
21 the words "my hands are tied." He said, there's a
22 limit to how many hours and how much overtime I can
23 work, so --
24 Q. Is that exchange that you had with
25 Mr. Ezell on one occasion or more than one occasion?

4205

1 **A. I think I can remember distinctly at**
2 **least two times that we talked about that. One was,**
3 **they were -- they shut down their nighttime shift. We**
4 **had -- going around the clock during the piping part,**
5 **the main steam, hot reheat, cold reheat, they would**
6 **try to have a crew working during the daytime. And**
7 **then for efficiency reasons, it would be nice to hand**
8 **off to a crew at night, so that you could continue**
9 **with that process, instead of shutting everything**
10 **down. And then you have that time in the morning**
11 **or between shifts that you got to gear back up again.**
12 **Well, they had a night shift that we**
13 **thought was very productive. And they ended up**
14 **shutting the night shift totally down. And we believe**
15 **that's just because of -- to reduce costs on the**
16 **project.**
17 Q. Okay. So you had a conversation with
18 Jason Ezell about why are you closing --
19 **A. Why are you doing that, yeah.**
20 Q. Now, in these conversations that you had
21 with Jason Ezell in which he said that the management
22 of Shaw had tied his hands or words to that effect,
23 was Bob Follett ever present during these
24 conversations?
25 **A. I believe he was. I know he was in a**

4206

1 **couple of the meetings I had with Jason. So I'm going**
2 **to say yes. That's my recollection.**
3 Q. Did Bob Follett voice any disagreement
4 with the statement that management had tied their
5 hands?
6 **A. No.**
7 Q. Okay. Now, then you went on to talk
8 about removing various portions of the work from
9 Shaw's contract and giving it to other contractors so
10 that it would get done. Is that right?
11 **A. Correct.**
12 Q. And --
13 **A. If you think about what's going on here,**
14 **is, I have a limited amount of man -- excuse me. Shaw**
15 **has a limited amount of manpower that they have**
16 **on-site and a minimum amount of oversight. And to**
17 **make them as efficient and productive as possible, it**
18 **would be nice to eliminate some of that scope, so they**
19 **can be more efficient. Because they just don't have**
20 **the resources to get it all done at one time.**
21 **So what we did is, we tried to reduce the**
22 **amount of area that they had to coordinate the work**
23 **in. So if we took over the back end work, then their**
24 **oversight and their management could better work, be**
25 **more efficient and more productive in what work**

4207

1 **remained. And so we tried to tie that down to one**
2 **distinct area, which was north of the boiler.**
3 Q. And Bob Follett agreed with that
4 approach, and even asked you to take over more work
5 than you did.
6 **A. Yes, he did.**
7 Q. Okay. So the contractors, then, who took
8 over the work that was removed from Shaw's scope --
9 you mentioned FPD Main. They did electrical work,
10 right?
11 **A. Right. Azco was another contractor. And**
12 **B&W ended up doing some of the mechanical on the back**
13 **end.**
14 Q. So those are the three companies, FPD,
15 Azco, and B&W, who did the work that was taken out of
16 Shaw's scope, right?
17 **A. Correct.**
18 Q. And would those contractors, then, bill
19 Public Service on a monthly basis, or whatever, for
20 doing that work?
21 **A. Yes. They billed Xcel on a monthly**
22 **basis. And we went ahead and paid those bills when**
23 **they were due. And then we ended up taking that**
24 **paperwork and invoicing Shaw for those costs under**
25 **16.8, with no markups.**

4208

1 Q. Okay. And the work that was done by the
2 three contractors that you named, was that done on a
3 time and materials basis?
4 **A. Correct. It was.**
5 Q. Is it unusual in your experience in the
6 world of construction if you have a company who's
7 going to come in and pick up work that had originally
8 been bid and be able to start it by another company --
9 is it unusual in those circumstances for it to be done
10 on a time and materials?
11 **A. Typically, when we go to a time and**
12 **material contract, if the scope is real firm and there**
13 **are no unknowns, you would like to get a firm price,**
14 **because you know what the end result should be.**
15 **These contracts we ended up doing as T&M**
16 **because Shaw had started doing some of the work, and**
17 **they were in control of the documents and the**
18 **materials. And since the contractors coming onboard**
19 **didn't know what the entire scope was, because we**
20 **didn't know how much of Shaw's work was done or how**
21 **much of it has to be redone because it wasn't done**
22 **properly -- and because of that, the best way to do it**
23 **was T&M. Otherwise, you're facing change orders**
24 **throughout, because what you told them doesn't**
25 **actually happen.**

5637

1 nothing Your Honor suggested to them in the -- in any
2 instruction is to the contrary. They could hang on
3 one question, not another. That's, I believe, just a
4 legally accurate statement, and my only concern would
5 be because this jury has had so much difficulty over
6 the course of the last two days, is simply to
7 communicate that fact. To avoid the proposition that
8 if they can't -- if there's one of the two questions
9 on the special verdict form they can't answer, that
10 leads them to conclude that they cannot return a
11 verdict.
12 MR. McCARTHY: I simply fear that we're
13 anticipating a question that hasn't been asked. The
14 question has been -- if there's a specific question, I
15 think we answer the specific question.
16 THE COURT: Well, I agree with
17 Mr. McCarthy. As much as I would like to add what
18 Mr. McCormick is suggesting, I do think it's
19 premature. So I'm just going to say no and see where
20 they take us next.
21 (Recess taken, 2:51 p.m. to 3:13 p.m.)
22 (The following proceedings were
23 conducted in the presence and hearing of the jury.)
24 THE COURT: All right. The jury has
25 returned. Mr. Chavez is, obviously, the foreperson.

5638

1 We've learned that through the notes that we got
2 earlier. The Court's in receipt of the original jury
3 instructions and verdict forms.
4 Mr. Chavez, am I correct in
5 understanding that the jury has reached a verdict?
6 MR. CHAVEZ: Yes, we have, Your Honor.
7 THE COURT: I'll go ahead and take a
8 look at the paperwork now. Give me just a moment,
9 please.
10 (Pause in the proceedings.)
11 THE COURT: All right. The special
12 verdict forms reads as follows. Number 1, "On
13 Plaintiff Shaw's claims against Defendant Public
14 Service for breach of the BOP contract, we, the jury,
15 find in favor of Plaintiff Shaw. If in favor of
16 Plaintiff Shaw, we find delay in disruption damages
17 owed to Shaw in the amount of $43 million, and if in
18 favor of Plaintiff Shaw, we find unpaid contract
19 amounts owed to Plaintiff Shaw to be $41,529,031.13."
20 Number 2, "On the Defendant Public
21 Service's claim against Plaintiff Shaw for breach of
22 the BOP contract, we, the jury, find in favor of
23 Defendant Public Service. If in favor of Defendant
24 Public Service, we find liquidated damages owed to
25 Defendant Public Service in the amount of $43 million,

5639

1 and if in favor of Defendant Public Service, we find
2 damages for unpaid replacement contractor costs owed
3 to Defendant Public Service to be $27 million."
4 The special interrogatory form reads as
5 follows: "Was a delay in achieving the full load
6 pursuant to the June 2008 settlement agreement,
7 Exhibit 2, due in whole or in part to the fault of
8 Public Service or any party you find to be Public
9 Service's agent as defined in Instruction Number 15?"
10 "Answer: No.
11 "Number 2, was any delay in achieving
12 substantial completion, et cetera?
13 "Answer: No."
14 And could counsel please approach on one
15 issue?
16 (The following proceedings were
17 conducted at the bench out of the hearing of the
18 jury.)
19 THE COURT: What I'm questioning is the
20 use of the abbreviation M.
21 MR. McCARTHY: I'm sorry.
22 THE COURT: I'm just wondering about the
23 use of the abbreviation M and whether I need to verify
24 that my understanding of the abbreviation is correct.
25 And if so, how would you like me to do that?

5640

1 MR. McCARTHY: My sense would be that it
2 wouldn't hurt to confirm that your interpretation is
3 correct.
4 MR. McCORMICK: I agree.
5 THE COURT: Should I simply do that on
6 behalf of the jury or poll them? I think asking
7 Mr. Chavez should suffice. Do you agree?
8 MR. McCORMICK: I do agree.
9 MR. McCARTHY: Yes, Your Honor.
10 (The following proceedings were
11 conducted in the presence and hearing of the jury.)
12 THE COURT: Mr. Chavez, I don't know if
13 you could hear me. What I was just asking the lawyers
14 is whether it would be appropriate for me to make
15 inquiry to confirm that the reference M -- the
16 shorthand M in the special verdict forms means
17 millions.
18 MR. CHAVEZ: Yes, Your Honor.
19 THE COURT: And it does?
20 MR. CHAVEZ: Yes, Your Honor.
21 THE COURT: And you're stating this on
22 behalf of the entire jury?
23 MR. CHAVEZ: Yes, I am.
24 THE COURT: Does either side wish to
25 have the jury polled?

5262

1 gentlemen, the plaintiff, having rested their rebuttal
2 case, Xcel is now entitled to put on -- with the small
3 amount of time they have remaining, they're entitled
4 to put on a rebuttal case in support of their
5 counterclaims.
6 So how much time do we generally have
7 left at this point? Am I correct in assuming that
8 it's probably more than an hour?
9 MR. HARTNETT: 20 minutes.
10 THE COURT: For both sides? What do
11 you have, Derek, as a total amount? Roughly.
12 MR. HEHN: An hour and 25 minutes.
13 THE COURT: Right. Let's do this.
14 Let's go ahead and take the lunch recess, and then
15 we'll have you come back for the remainder.
16 So why don't we confine it to an hour
17 under the circumstances, and have you come back at
18 1:00 o'clock. Does that work for counsel, as well?
19 MR. McCORMICK: That's fine with the
20 plaintiff, Your Honor.
21 MR. HINDERAKER: Yes, that's fine.
22 THE COURT: With the understanding
23 again that all of the legal issues that we need to
24 discuss we'll take up after the jury leaves today.
25 All right. So we're in recess until 1:00

5263

1 o'clock. Please remember the court's admonitions, and
2 please reassemble in the jury room.
3 (Noon recess taken.)
4 WHEREUPON, this concludes the morning
5 session reported by Sharon Szotak.
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5264

1 WHEREUPON, this starts the afternoon
2 session reported by Sandra Bray.
3 THE COURT: Good afternoon. Please be
4 seated.
5 You have to do that occasionally just to
6 keep everybody on their toes, right? All right,
7 Ladies and Gentlemen. Welcome back. We're ready to
8 proceed with Xcel's rebuttal case.
9 Xcel's first witness.
10 MR. HARTNETT: Thank you, Your Honor.
11 Good afternoon, members of the jury. Xcel calls Jerry
12 Kelly as its one and only rebuttal witness.
13 JERRY KELLY,
14 was called as a witness, and having been sworn or
15 affirmed, was examined and testified as follows:
16 THE COURT: Thank you. Please have a
17 seat.
18 DIRECT EXAMINATION
19 BY MR. HARTNETT:
20 Q. Mr. Kelly, good afternoon.
21 **A. Good afternoon.**
22 Q. What was one of the primary reasons that
23 Shaw failed to achieve substantial completion on
24 Comanche 3 and was assessed liquidated damages?
25 **A. The condensate pumps do not comply with**

5265

1 **the contract.**
2 Q. And you are a mechanical engineer, are
3 you not, sir?
4 **A. I am.**
5 Q. Have you designed pumps for power
6 plants?
7 **A. I have.**
8 Q. Is Charlie King a mechanical engineer?
9 **A. No.**
10 Q. You sat here and heard Mr. King testify
11 about the condensate pumps, did you, sir?
12 **A. Yes, I did.**
13 Q. Was that testimony accurate?
14 **A. No, it was not.**
15 Q. Those condensate pumps are
16 underdesigned; is that right?
17 **A. Excuse me?**
18 Q. Are they underdesigned?
19 **A. They are underdesigned.**
20 Q. Let's take a look at 5624, which was
21 shown to Mr. King. Are these the design calculations
22 that Shaw did for the condensate pumps?
23 **A. They are.**
24 Q. And this calculation is in July of 2006;
25 is that right?

5314

1 MR. FROST: No, Mr. Cipollone is going
2 to handle the Rule 50 motion that hasn't been argued
3 yet. Let me go find him. We'll go and retrieve him.
4 THE COURT: All right. So I had denied
5 the replacement contractor cost motion.
6 MR. FROST: Right, Your Honor.
7 THE COURT: And we had addressed the
8 economic loss rule argument. The Court held that in
9 abeyance. I'll tell you what. While Mr. Cipollone is
10 gathering his documents, let me turn back to the
11 economic loss issue for a moment.
12 Perhaps I'm just losing track of all the
13 forest for the trees, but am I right in understanding
14 that the counterclaim by Xcel that includes what we've
15 termed the fraudulent misrepresentation claim is a
16 contract claim?
17 MR. FROST: It's a contract claim for
18 recision. It's not based on tort at all in the way
19 it's pled, but the secondary argument that we made
20 yesterday, Your Honor, on this point was simply that
21 those contractual requirements have not been met
22 either. There's got to be some kind of mutual
23 mistake. There's got to be a basis for recision, and
24 we pointed out there's no time for mutual mistakes and
25 the time for recision is done and over.

5315

1 THE COURT: Let me just step back and
2 say, as Mr. McCormick would say, let's come back to my
3 question.
4 MR. FROST: I apologize, Your Honor.
5 THE COURT: No, I mean no disrespect. I
6 just want to make sure that I'm looking at this
7 correctly because doesn't that render the economic
8 loss rule argument moot because it is, indeed, a
9 contract claim? It's not a claim that sounds in tort?
10 MR. FROST: Well, Your Honor, I would
11 agree with that, going back to your question, but the
12 jury instructions that have been submitted by Public
13 Service Company are pure tort. They have a string of
14 misrepresentation claims that have nothing to do with
15 contract. They're tort.
16 THE COURT: Right, right. Well, perhaps
17 a solution then to address whether it's appropriate to
18 instruct them in tort, and based on the way the
19 complaint is -- I'm sorry, the counterclaim is framed,
20 it seems to me that it's not appropriate. It's a
21 contract claim.
22 MR. FROST: That would be our position,
23 Your Honor.
24 THE COURT: Mr. Hartnett, do you want to
25 weigh in on this?

5316

1 MR. HARTNETT: Certainly, Your Honor.
2 We did file a bench memo on this topic. Actually, I
3 think whether the misrepresentation claim -- it's
4 misrepresentation related to change order request 23,
5 which if the jury were to find in our favor would
6 result in us recovering the damages that we would
7 otherwise be entitled to under the contract. It
8 basically falls back to 16.8.
9 So I don't view it as -- I think we can
10 get to where we need to do -- whether it's pled as a
11 contract claim or misrepresentation claim, I think we
12 can get to the same spot.
13 THE COURT: Right, but without needing
14 to address the economic loss rule argument, it seems
15 to me.
16 MR. HARTNETT: That's correct.
17 THE COURT: So it really becomes an
18 instructional issue. The Court has already indicated
19 that it's --
20 MR. HARTNETT: In our bench memo, the
21 last point, we note that, you know, alternatively we
22 should be permitted to confirm the claim to the
23 evidence and assert it as a breach of contract claim.
24 THE COURT: But you have is my point.
25 There's no need to confirm anything. That's the way

5317

1 the claim was originally framed. So it seems to me we
2 don't need to get into the economic loss rule issue at
3 all. So the Court deems that moot. The Court had
4 otherwise denied the motion.
5 So that turns us then to the entitlement
6 to substantial completion certificate, the third
7 argument that Mr. Cipollone -- you had addressed that
8 yesterday. We'd gone through that one, right? It was
9 just the final argument on liquidated damages we
10 needed to address?
11 MR. CIPOLLONE: Correct.
12 MR. FROST: If I might, Your Honor, I
13 want to make sure that the Court is clear that to the
14 extent that the misrepresentation and concurrent -- or
15 concomitant recision claim is based on contract, we
16 think it should be dismissed because it still doesn't
17 satisfy the standards for recision based on breach of
18 contract in Colorado.
19 THE COURT: And help me understand that
20 more specifically.
21 MR. FROST: There has to be some sort of
22 mutual mistake. There's no evidence of mutual
23 mistake. There's no evidence of what our folks were
24 thinking that would support a mutual mistake argument,
25 none whatsoever, and not enough certainly to get over

4663

1 Q. Meeting minutes?
2 **A. Yes.**
3 Q. Now, we're going to be talking about
4 Shaw's critical path. What is the definition of a
5 contractor's critical path?
6 **A. Well, there's a definition of the**
7 **critical path in the BOP contract and --**
8 Q. Let's take a look at it.
9 MR. HINDERAKER: Can we put that up from
10 Schedule T? I think at the bottom of the first page,
11 Tim, is where we saw it. Yes. The last thing. No,
12 no, the very last item, Tim.
13 **A. It's the longest continuous chain of**
14 **activities through the schedule network that**
15 **establishes the minimum overall duration of the**
16 **project from the project conception to actual**
17 **completion or acceptance. And basically --**
18 Q. (BY MR. HINDERAKER) Only you said
19 project, but in this case, Shaw's work?
20 **A. Yes.**
21 Q. Is this a pretty typical definition of
22 the term "critical path"?
23 **A. Essentially what it's describing is the**
24 **longest continuous stream of activities through a**
25 **schedule that describes how long that schedule is**

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1 **going to take, and what it means is that if any of**
2 **those activities is delayed, then the end date is**
3 **delayed.**
4 Q. Now, have you prepared a simple exhibit
5 to help explain the concept of critical path to the
6 jury?
7 **A. Yes.**
8 Q. Let's take a look at Defendant's
9 Demonstrative Number 13. Just very briefly,
10 Mr. Hill -- Mr. Rose, how does this illustrate
11 critical path?
12 **A. Well, this is an incredibly simple**
13 **construction project, four activities, and I'm sure by**
14 **now you've been well educated on critical path, so**
15 **this might be incredibly simplistic, but what this**
16 **describes is the construction of a slab on grade. The**
17 **first activity is preparing the subgrade, which would**
18 **be levelling the grade, compacting that grade.**
19 **The second two activities are done in**
20 **parallel. That would be installing the underground**
21 **electrical, which takes five days, and installing the**
22 **underground piping, which requires three days.**
23 **Pouring the slab again then requires**
24 **five days. The critical path through this job is**
25 **through the red activities; the subgrade, the**

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1 **underground electrical, and the pour slab, 15 days.**
2 **If any of those activities takes longer,**
3 **the overall schedule takes longer.**
4 Q. And activities that are not on the
5 critical path have something called float; is that
6 right?
7 **A. Yes. The --**
8 Q. And how do we see that illustrated here?
9 **A. The plumbing activity, the blue activity**
10 **up there, has two days of float because it could move**
11 **two days forward and still the job would be finished**
12 **on time. The pour slab on grade would finish on time.**
13 Q. So if the installation of the
14 underground plumbing took four days instead of three
15 days, assuming it started where you show it there, it
16 wouldn't affect the overall completion --
17 **A. No, it would not.**
18 Q. -- of this particular project? Now,
19 let's go to your analysis of Shaw's critical path.
20 Did you divide your analysis of that critical path
21 into several discrete periods of time?
22 **A. Yes, I divided the schedule into four**
23 **distinct periods.**
24 Q. Why did you do that?
25 **A. We picked time periods where the**

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1 **contractors' schedules intersected in common**
2 **milestones, and this was to allow us to see how Shaw's**
3 **critical path impacted those milestones, but also see**
4 **how the other contractors' critical paths impacted**
5 **those milestones.**
6 Q. Is this a technique that is common among
7 scheduling experts?
8 **A. Yes. This is typically called a windows**
9 **analysis, and in that windows analysis, you look at**
10 **what the plan is at the beginning of the window or the**
11 **period and you look at what actually happened at the**
12 **end of the period and you define an as-planned**
13 **critical path and you see what happened.**
14 Q. Okay. What was the first of the four
15 periods that you analyzed?
16 **A. The first period was from the settlement**
17 **agreement on June 19th, 2008, to first fire on gas for**
18 **steam blows. That was July 7th of 2009.**
19 Q. Now, why do you say first fire on gas
20 for steam blows?
21 **A. Well, first fire on gas for steam blows**
22 **is when the contractors' schedules actually**
23 **intersected. It was the first time that Alstom**
24 **actually produced steam out of their boiler. Shaw was**
25 **required to have the steam turbine on turning gear,**

1 **A. As I mentioned, liquidated damages are**
2 **based on a number of days of delay times a rate,**
3 **according to the contract. So if you could look at**
4 **the bottom line where I say, "Substantial Completion**
5 **Delay," this is a simple comparison between the 338**
6 **days that you'll hear from Mr. Rose that he determined**
7 **were Shaw's responsibility -- that's his analysis --**
8 **times the daily rate contained in the contract of**
9 **150,000.**
10 **So this part of the calculation was very**
11 **straightforward. I didn't have to do a lot of work.**
12 **I just took the days from Mr. Rose and multiplied it**
13 **by the rate in the contract.**
14 **But then that would have provided an**
15 **amount of 50,700,000 even before other liquidated**
16 **damages related to full load. But I determined that**
17 **in the contract there was a cap or a limitation on how**
18 **much could be charged. So I went and did a**
19 **calculation, which is the top part of the chart, to**
20 **say, although the calculation comes to 50 million,**
21 **what is the limit in the contract? What's the most**
22 **that could be claimed against Public Service of**
23 **Colorado?**
24 **And the way that the contract reads is,**
25 **you start with the original contract and you adjust it**

1 **for change orders. Because when you have a change**
2 **order on a construction project, it increases the**
3 **contract value.**
4 **So the parties had agreed to 42,214,000**
5 **of change orders. I added that to the original**
6 **contract value of 412 million. Now, when I show you**
7 **the claim for replacement contractors of about 25**
8 **million, that's, in a sense, a reduction of Shaw's**
9 **contract value. So I needed to reduce the contract**
10 **value for Shaw's claim related to replacement**
11 **contractors.**
12 **So I took the 412, increased it by 42**
13 **million, and deducted the 25 million to get what I've**
14 **referred to as an updated contract value. Because the**
15 **contract says that Shaw cannot be charged more than 10**
16 **percent of the contract value. So then I determined,**
17 **just with math, that 10 percent of the contract value**
18 **of 429 million would be 42,949,000. That's the**
19 **maximum that could be charged under the contract. And**
20 **so that's the amount that has been included for Public**
21 **Service's liquidated damage claim.**
22 Q. Just to orient the jury, I'd like to put
23 up on the screen the Exhibit 1, the contract, and ask
24 you, sir, is the foundation for the substantial
25 completion schedule liquidated damages claim found in

1 11.2.3.3 of the contract?
2 **A. I remember section 11, yes. I think**
3 **that's right.**
4 MR. McCARTHY: If we could blow up the
5 point.
6 Q. (BY MR. McCARTHY) And so it's 11 -- it's
7 hard to see the periods, but -- 2.3.3. That's the
8 foundation for the substantial completion liquidated
9 damages calculation that you discussed, correct?
10 **A. The beginning part. The $150,000 a day.**
11 **But the cap is actually in the next section.**
12 Q. Okay. And then 11.2.3.4 is the language
13 of the contract that imposes a cap on the total amount
14 of substantial -- of schedule liquidated damages that
15 Public Service Company can seek from Shaw.
16 **A. That's the maximum amount, yes.**
17 Q. And it's 10 percent of the contract.
18 **A. Correct.**
19 Q. Now, one of the things that the jury's
20 heard a lot about in the case is actually a second
21 category of liquidated damages that was imposed by the
22 June 2008 settlement agreement, the full load
23 liquidated damages.
24 MR. McCARTHY: And if we could go back to
25 chart 3, Tim.

1 Q. Can you explain why, in terms of this
2 calculation of the overall schedule liquidated
3 damages, you haven't on this chart broken out the full
4 load liquidated damages?
5 **A. Okay. I also studied the full load**
6 **liquidated damages. But because there's a cap, if I**
7 **were to add any more liquidated damages to the 50**
8 **million seven, it would make that number higher, but**
9 **it wouldn't change how much should be claimed against**
10 **Shaw, because that's limited by the contract.**
11 **So while there was delays related to full**
12 **load, at least in Public Service's opinion, it wasn't**
13 **necessarily to include them in my calculation because**
14 **of the contractual limit.**
15 Q. Okay. Let's turn to the replacement
16 contractor and other costs aspect of your testimony
17 and opinions in this matter, Mr. Tucker.
18 And did you prepare a chart, chart 4,
19 that explains Public Service's replacement contractor
20 and other cost damages?
21 **A. Yes.**
22 Q. And just again, could you reiterate for
23 the jury what are these replacement cost damages?
24 **A. Again, this is where Public Service felt**
25 **that work needed to be done by someone other than**

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1 solve this problem with the condensate pumps?
2 **A. No, there is not.**
3 Q. Now, have you added up the total number
4 of days of delay that you attribute to -- this is
5 delay to Shaw's critical path, right?
6 **A. Yes.**
7 Q. -- the total number of days of delay to
8 Shaw's critical path that you attribute to Shaw?
9 **A. The total delay attributed to Shaw as of**
10 **August 19th, the end of my analysis, is 338 days.**
11 Q. Now, do you have another exhibit that
12 puts the four windows together and shows Shaw's
13 progress of work?
14 **A. Yes, we do. This exhibit pulls all the**
15 **critical paths together. I think you've actually seen**
16 **this before. It's been presented before.**
17 **The vertical lines describe, well, the**
18 **four periods, starting at the first period, going down**
19 **to the second, third, and fourth period. The red bars**
20 **are the critical path, the blue bars are Alstom**
21 **activities, and the green bars are noncritical Shaw**
22 **activities.**
23 **If we walk through this, it shows how**
24 **the critical path flows through the entire job and how**
25 **Shaw's delays drove the entire job.**

4688

1 Q. Let's clarify one thing, Mr. Rose. Are
2 we looking here at Shaw's critical path or the
3 project's critical path or both?
4 **A. We're looking at both. We're looking at**
5 **both Shaw's critical path and the other impacts on the**
6 **job.**
7 Q. Why don't you just quickly walk through
8 the diagram and use the laser pointer, if that's
9 helpful, to point.
10 THE WITNESS: Where is it?
11 THE COURT: Right there.
12 **A. Okay. If we start up at window 1, you**
13 **can see the longest path through that is this red bar**
14 **here, which is Shaw bringing the turbine on to turning**
15 **gear, which happens at that spot June -- July 3rd.**
16 **Then there's an additional three-day delay for the**
17 **temporary line for the boiler swell out to the cooling**
18 **water basin.**
19 **Then the critical path jumps down to**
20 **pulling vacuum on the condenser on the turbine, and**
21 **that's controlled by this EAC system to be able to**
22 **stroke the valves at the top of the turbine.**
23 Q. (BY MR. HINDERAKER) Let me just stop
24 you there for a second. That blue bar, is that
25 Alstom?

4689

1 **A. Yes.**
2 Q. So Alstom had some --
3 **A. Actually, that blue bar is -- yes, it**
4 **is. It's Alstom. It's Alstom loading catalyst in the**
5 **SCR, yes, it is.**
6 Q. So Alstom had some work to do in that
7 window, but does the relative length of the bars show
8 us which contractor represents the critical path?
9 **A. Yes, it is. In the case of the first**
10 **window, the Alstom bar is just a little bit shorter,**
11 **but in the successive bars, the Shaw bar is**
12 **considerably longer than the other bars of critical**
13 **path.**
14 **In this case, we're talking about the**
15 **SCR, so Shaw was -- excuse me, Alstom was ready for**
16 **vacuum considerably earlier than Shaw. And we pull**
17 **vacuum.**
18 **Then this long bar here is all the work**
19 **on the boiler feedwater pumps. This work started, in**
20 **fact, way before this. These boiler feed pumps**
21 **were -- I don't even know the date, but it was**
22 **extremely long before this. This is when the work on**
23 **those pumps was done to try to make them operational,**
24 **and it extends from October through the end of March;**
25 **and they were never able to make two pumps operational**

4690

1 **during that entire time.**
2 Q. Now, let me just stop you there for a
3 second, Mr. Rose. We've heard an enormous amount of
4 testimony in this trial about boiler tube leaks. And
5 do we see periods when the boiler was out of
6 commission because of boiler tube leaks in that
7 window?
8 **A. The long period that the boiler was out**
9 **of commission regarding tube leaks was October 9th to**
10 **December 27th or 28th. During that period, Shaw**
11 **was -- excuse me, Alstom was repairing tube leaks.**
12 **You can see how short that bar is relative to this**
13 **long bar relative to the boiler feed pumps.**
14 Q. Do we see during this window a second
15 period when the boiler was down for tube repairs?
16 **A. Then, most of the tube repair duration,**
17 **I think it was between January 21 and February 4th,**
18 **2004, when the boiler tubes were being repaired.**
19 Q. So as we look through that whole period
20 of time as have been covered by your scheduling
21 analysis, are there any days of delay to the critical
22 path of Shaw's work that were caused by another party?
23 **A. No, there aren't. They have not**
24 **demonstrated that anybody else impacted their critical**
25 **path throughout the job.**

4571

1 accounting and construction claims analysis.
2 THE COURT: Any objection or voir dire?
3 MR. McCORMICK: No objection, Your Honor.
4 THE COURT: He's so qualified.
5 MR. McCARTHY: Thank you, Your Honor.
6 Q. (BY MR. McCARTHY) Mr. Tucker, can you
7 tell the jury what the rates are that your firm has
8 charged for the work that your firm has done on this
9 matter?
10 **A. You mean the rates or firm charges?**
11 Q. The rates that your firm charges.
12 **A. Sure. We use hourly rates based on the**
13 **amount of work we do. It would probably average about**
14 **$350 an hour. My individual rate is $550 an hour.**
15 **That's how much my firm charges for my time.**
16 Q. And, Mr. Tucker, did you prepare some
17 demonstrative charts to assist in your testimony today
18 and to explain what your testimony is to the jury?
19 **A. Yes. I thought it would be helpful.**
20 MR. McCARTHY: Your Honor, these have
21 been exchanged previously with counsel for Shaw. I'm
22 proposing to refer to them as Tucker 1 through 12.
23 And I believe that I can correctly state that counsel
24 for Shaw has looked at those and said that it's
25 acceptable for us to proceed to use these as

4572

1 illustratives.
2 I may move for their admission at the
3 conclusion of the testimony. But I'm going to -- but
4 I think, for purposes of walking the witness through
5 the testimony, I'd like to use Tucker 1 through 12.
6 MR. McCORMICK: There's no objection to
7 that, Your Honor.
8 THE COURT: All right.
9 MR. McCARTHY: And we're going to display
10 them. But I'd like to actually tender a set to the
11 court, if I may, Your Honor.
12 THE COURT: Yes. Thank you.
13 MR. McCARTHY: Thank you very much.
14 THE COURT: Thank you.
15 Q. (BY MR. McCARTHY) Mr. Tucker, did you
16 prepare a chart that summarized the scope of your work
17 in this case?
18 **A. Yes. One that's titled "Testimony**
19 **Topics." It would be chart 1.**
20 MR. McCARTHY: Tim, could we put Tucker
21 number 1 up.
22 Q. (BY MR. McCARTHY) And specifically, does
23 this summarize your testimony topics? And if you can
24 please elaborate on that, sir.
25 **A. Sure. There's two general areas of work**

4573

1 **that I did on this case. As you know, there are**
2 **claims that Public Service has made against Shaw and**
3 **then claims that Shaw has made against Public Service.**
4 **And I did work on both those areas. For**
5 **Public Service claims, I looked at the liquidated**
6 **damage claims and also the replacement contractor**
7 **claims. For Shaw, I studied the claims set forth by**
8 **Shaw's experts on extended overhead or what we refer**
9 **to as a delay claim, and also on the loss of**
10 **productivity claim.**
11 **The amount of work I did in any**
12 **particular area depended on what my scope was and**
13 **whether other experts were also involved, or other**
14 **individuals.**
15 Q. So let's turn first to Public Service's
16 claims against Shaw. And in particular, I would ask
17 if you could put chart number 2 -- Tucker 2 up.
18 And can you please summarize, sir, what
19 Public Service's claims are against Shaw in this
20 matter.
21 **A. All right. There's two claims -- two**
22 **types of claims or categories. One is schedule**
23 **liquidated damages, and that's 42,949,000. And the**
24 **other is for replacement contractor and other costs**
25 **for 26,940,000. For a total of about 69,900,000.**

4574

1 **The schedule liquidated damages relates**
2 **to Public Service's view that there were delays on**
3 **this project that were Shaw's responsibility. I'm not**
4 **actually testifying on whether that's true or not, or**
5 **the amount of the delay, but if there is a delay**
6 **that's Shaw's responsibility, the contract calls for a**
7 **daily amount to be paid to Public Service.**
8 **And I'll show you the calculation in a**
9 **moment of how I get 42,900,000.**
10 **Public Service also felt that there was**
11 **certain work that Shaw did not complete or was not**
12 **completing it properly. And they went and got other**
13 **contractors to finish the work, which we've referred**
14 **to as replacement contractors.**
15 **And this category is the costs of the**
16 **work to complete Shaw's work, the 26,940,000. About a**
17 **little under 2 million of that is Public Service's own**
18 **costs related to interacting with the replacement**
19 **contractors.**
20 Q. So did you also prepare a chart
21 summarizing your analysis of that -- the first
22 category, liquidated damages?
23 **A. Yes. That's on chart 3.**
24 Q. On chart 3? Can you please explain to
25 the jury what chart 3 shows, Mr. Tucker.

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1 solve this problem with the condensate pumps?
2 **A. No, there is not.**
3 Q. Now, have you added up the total number
4 of days of delay that you attribute to -- this is
5 delay to Shaw's critical path, right?
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4688

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4689

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20 of time as have been covered by your scheduling
21 analysis, are there any days of delay to the critical
22 path of Shaw's work that were caused by another party?
23 **A. No, there aren't. They have not**
24 **demonstrated that anybody else impacted their critical**
25 **path throughout the job.**

4691

1 Q. Now, let's take a look at Section 13.3
2 of the BOP contract. Is Section 13.3 the section of
3 the contract that governs any change order on behalf
4 of Shaw that involves a schedule extension?
5 **A. Yes. This talks about changes that**
6 **involve time extensions.**
7 Q. And it says that Shaw can get a time
8 extension "to the extent that it demonstrates a
9 certain number of calendar days of delay in the
10 critical path progress of the work reasonably
11 demonstrated by Contractor as resulting from"
12 something like -- something that the owner did or
13 something that another contractor did?
14 **A. Basically what this is saying is if**
15 **someone else impacted Shaw's critical path and made**
16 **Shaw's critical path -- impacted Shaw's critical path,**
17 **they would be entitled to a time extension, but just**
18 **because someone else is late on the job does not**
19 **entitle them to a time extension.**
20 Q. So applying the criteria under Section
21 13.3 to Shaw's work on this project, did you see any
22 basis for a time extension in their schedule?
23 **A. No, we did not.**
24 Q. Okay. Have you also reviewed Tom
25 Caruso's report as well as his testimony here at

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1 trial?
2 **A. Yes, I have.**
3 Q. And we've just looked at Section 13.3,
4 which says that to get a time extension, Shaw has to
5 show that someone else delayed the critical path of
6 its work, right?
7 **A. That's correct.**
8 Q. Now, did Mr. Caruso make any attempt to
9 analyze the critical path of Shaw's work and determine
10 whether anyone delayed it?
11 **A. I believe that in his analysis, for the**
12 **most part, he ignored Shaw's delays. For instance, in**
13 **the turbine on turning gear delay, by the time we got**
14 **to those alleged change orders that were 10 or 15**
15 **days, Shaw was five months behind on its own. We're**
16 **talking about a couple of weeks in those five months.**
17 **The analysis ignored those five months.**
18 Q. But to be clear, did Mr. Caruso make any
19 attempt to analyze Shaw's critical path and assess
20 impacts to that critical path?
21 **A. No, I don't think so. I think he**
22 **ignored Shaw's own delays. He also -- in the boiler**
23 **feedwater pumps, he indicates some small amount of**
24 **delay in 2010, but he ignores the fact that the work**
25 **was going on from October on and the two boiler**

4693

1 **feedwater pumps were never made operational, and**
2 **therefore, that was what pushed full load out to**
3 **March 31st.**
4 Q. Did Mr. Caruso assume that if another
5 contractor was late, that justified Shaw in being late
6 too?
7 **A. It appears that what he's done is allow**
8 **Shaw to take the delays that were made by other**
9 **contractors. So that if another contractor was three**
10 **months late, Shaw could be three months late. That's**
11 **what it looked like.**
12 Q. Now, are you aware of anything in Shaw's
13 contract that says that if another contractor is late,
14 then Shaw gets to be late too?
15 **A. No, I'm not.**
16 Q. Or anything that says that if another
17 contractor is late and Shaw's late, Shaw gets to be
18 paid extra for being late?
19 **A. No. In fact, the contract has**
20 **provisions of schedule recovery. If you're behind**
21 **schedule, you have an obligation to recover schedule.**
22 Q. Now, have you read Mr. Caruso's trial
23 testimony where he said that under his approach, if
24 there are two contractors -- let's say Shaw and Alstom
25 by way of example -- and they both do a terrible job

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1 on this project and they're both six months late, not
2 because they interfered with one another but because
3 they have bad management and they just don't care
4 about the project, that happens and they're both six
5 months late, that happens, in his opinion, both
6 contractors are excused from liquidated damages and
7 both contractors are paid extra for being late? Do
8 you recall that testimony?
9 THE COURT: Go ahead.
10 MR. CIPOLLONE: Objection, Your Honor.
11 It's argumentative, it's misleading, and it misstates
12 Mr. Caruso's testimony.
13 THE COURT: Well, it's certainly
14 leading, so it's sustained.
15 MR. HINDERAKER: My question, Your
16 Honor, is does he recall the testimony.
17 THE COURT: That objection is still
18 sustained.
19 Q. (BY MR. HINDERAKER) Well, do you recall
20 Mr. Caruso's testimony about what happens if two
21 contractors are late simply because they did a poor
22 job?
23 MR. CIPOLLONE: Objection, Your Honor.
24 That's also leading, and it also misstates
25 Mr. Caruso's testimony.

4663

1 Q. Meeting minutes?
2 **A. Yes.**
3 Q. Now, we're going to be talking about
4 Shaw's critical path. What is the definition of a
5 contractor's critical path?
6 **A. Well, there's a definition of the**
7 **critical path in the BOP contract and --**
8 Q. Let's take a look at it.
9 MR. HINDERAKER: Can we put that up from
10 Schedule T? I think at the bottom of the first page,
11 Tim, is where we saw it. Yes. The last thing. No,
12 no, the very last item, Tim.
13 **A. It's the longest continuous chain of**
14 **activities through the schedule network that**
15 **establishes the minimum overall duration of the**
16 **project from the project conception to actual**
17 **completion or acceptance. And basically --**
18 Q. (BY MR. HINDERAKER) Only you said
19 project, but in this case, Shaw's work?
20 **A. Yes.**
21 Q. Is this a pretty typical definition of
22 the term "critical path"?
23 **A. Essentially what it's describing is the**
24 **longest continuous stream of activities through a**
25 **schedule that describes how long that schedule is**

4664

1 **going to take, and what it means is that if any of**
2 **those activities is delayed, then the end date is**
3 **delayed.**
4 Q. Now, have you prepared a simple exhibit
5 to help explain the concept of critical path to the
6 jury?
7 **A. Yes.**
8 Q. Let's take a look at Defendant's
9 Demonstrative Number 13. Just very briefly,
10 Mr. Hill -- Mr. Rose, how does this illustrate
11 critical path?
12 **A. Well, this is an incredibly simple**
13 **construction project, four activities, and I'm sure by**
14 **now you've been well educated on critical path, so**
15 **this might be incredibly simplistic, but what this**
16 **describes is the construction of a slab on grade. The**
17 **first activity is preparing the subgrade, which would**
18 **be levelling the grade, compacting that grade.**
19 **The second two activities are done in**
20 **parallel. That would be installing the underground**
21 **electrical, which takes five days, and installing the**
22 **underground piping, which requires three days.**
23 **Pouring the slab again then requires**
24 **five days. The critical path through this job is**
25 **through the red activities; the subgrade, the**

4665

1 **underground electrical, and the pour slab, 15 days.**
2 **If any of those activities takes longer,**
3 **the overall schedule takes longer.**
4 Q. And activities that are not on the
5 critical path have something called float; is that
6 right?
7 **A. Yes. The --**
8 Q. And how do we see that illustrated here?
9 **A. The plumbing activity, the blue activity**
10 **up there, has two days of float because it could move**
11 **two days forward and still the job would be finished**
12 **on time. The pour slab on grade would finish on time.**
13 Q. So if the installation of the
14 underground plumbing took four days instead of three
15 days, assuming it started where you show it there, it
16 wouldn't affect the overall completion --
17 **A. No, it would not.**
18 Q. -- of this particular project? Now,
19 let's go to your analysis of Shaw's critical path.
20 Did you divide your analysis of that critical path
21 into several discrete periods of time?
22 **A. Yes, I divided the schedule into four**
23 **distinct periods.**
24 Q. Why did you do that?
25 **A. We picked time periods where the**

4666

1 **contractors' schedules intersected in common**
2 **milestones, and this was to allow us to see how Shaw's**
3 **critical path impacted those milestones, but also see**
4 **how the other contractors' critical paths impacted**
5 **those milestones.**
6 Q. Is this a technique that is common among
7 scheduling experts?
8 **A. Yes. This is typically called a windows**
9 **analysis, and in that windows analysis, you look at**
10 **what the plan is at the beginning of the window or the**
11 **period and you look at what actually happened at the**
12 **end of the period and you define an as-planned**
13 **critical path and you see what happened.**
14 Q. Okay. What was the first of the four
15 periods that you analyzed?
16 **A. The first period was from the settlement**
17 **agreement on June 19th, 2008, to first fire on gas for**
18 **steam blows. That was July 7th of 2009.**
19 Q. Now, why do you say first fire on gas
20 for steam blows?
21 **A. Well, first fire on gas for steam blows**
22 **is when the contractors' schedules actually**
23 **intersected. It was the first time that Alstom**
24 **actually produced steam out of their boiler. Shaw was**
25 **required to have the steam turbine on turning gear,**

4667

1 **and B&W was required to have a gas path to exhaust the**
2 **combusted materials from the boiler out through the**
3 **stack.**
4 Q. So those three contractors' work had to
5 come together at that point?
6 **A. Yes, they did.**
7 Q. Now, do you have an exhibit that shows
8 Shaw's work during this first window that you've
9 described?
10 **A. Yes, I do.**
11 MR. HINDERAKER: Let me see that,
12 please.
13 Q. (BY MR. HINDERAKER) Go ahead and
14 narrate. But as you're narrating, be sure to do it
15 into the microphone.
16 **A. Yes, I know it's hard. The first**
17 **activity up there -- first of all, this exhibit shows**
18 **Shaw's plan at the beginning of the period and shows**
19 **what actually happened at the end of the period to**
20 **Shaw's critical path.**
21 **The green bars are the plan. The red**
22 **bars that will come in behind are what actually**
23 **happened.**
24 **The first activity up there is F and D,**
25 **is fabrication of delivery, of -- this is the lube oil**

4668

1 **piping, and it shows that the plan was to have this**
2 **complete on July 7.**
3 Q. So now we see what actually happened?
4 **A. And what actually happened is the**
5 **fabrication and delivery of that pipe slipped a couple**
6 **of months and was actually completed on**
7 **September 16th.**
8 **As you can see here, based on that**
9 **delivery of the pipe, all that pipe was going to be**
10 **installed by October 1st of 2008.**
11 Q. That was the plan?
12 **A. Yes. Here's where the big delay**
13 **happened in the turbine lube oil system. That piping**
14 **that was to be installed by October 1st wasn't**
15 **installed until April 24th, more than six months**
16 **later.**
17 Q. And was that due in part to the incident
18 where Shaw misread a Mitsubishi drawing and had to
19 rework the turbine lube oil system?
20 **A. Actually a lot of --**
21 MR. CIPOLLONE: Objection, Your Honor.
22 Argumentative and misleading.
23 MR. HINDERAKER: I'm just quoting from
24 the Shaw rework log, Your Honor.
25 THE COURT: Overruled.

4669

1 **A. Actually, the daily reports indicate a**
2 **lot of problems, including design rework, construction**
3 **rework, interference with other Shaw trades. It**
4 **identifies periods when there was no craft working on**
5 **this job -- working on this particular work. So there**
6 **were a lot of problems with erection.**
7 Q. (BY MR. HINDERAKER) Okay. Continue on,
8 please.
9 **A. The next activity in green is the**
10 **planned oil flush dates, and the oil flush was**
11 **expected to be completed in just about two weeks and**
12 **was expected to be finished by January 12th of 2009.**
13 **The oil flush was actually completed on July 3rd of**
14 **2009, six months later.**
15 Q. Next?
16 **A. Turbine on turning gear was agreed to in**
17 **the settlement agreement, Attachment 2, as**
18 **January 28th. The forecasting in Shaw's schedule as**
19 **of June had this already late on February 18th.**
20 **These dates that I've given you here are**
21 **for the most part directly out of Shaw's schedules.**
22 **And turbine on turning gear was**
23 **accomplished after the oil flush on 7/3.**
24 Q. And is that the work that Shaw had to do
25 to be ready to commence steam blows?

4670

1 **A. Yes, it was most of it, but not all of**
2 **it.**
3 Q. Is there more on this slide or is that
4 the end?
5 **A. Oh, the additional three-day delay from**
6 **June 3rd to June 6th --**
7 Q. July 3rd to July 6th?
8 **A. Excuse me, July 3rd to July 6th, is**
9 **included in the bottom line. That is about the boiler**
10 **swell piping that we've heard so much about. The**
11 **boiler swell piping was the overflow from the boiler**
12 **when it was being filled and powered up. That boiler**
13 **drain line was to drain into the air-cooled condenser,**
14 **but as of July 3rd, that air-cooled condenser was not**
15 **complete. In fact, the air-cooled condenser was not**
16 **complete until sometime in September.**
17 **Public Service Colorado installed a**
18 **temporary line from the boiler drain to the cooling**
19 **water basin, approximately a quarter of a mile, over**
20 **that 4th of July weekend, to enable the first fire --**
21 **excuse me, steam blows to actually happen on July 6th.**
22 **What I might note --**
23 Q. Let me just stop you there for a moment,
24 Mr. Rose. So what this is showing, among other
25 things, is that Shaw was more than five months late

4471

1 **turbine rotating slowly while you're performing steam**
2 **blows, so that if there's any leakage into the steam**
3 **turbine, that the steam turbine will still be heated**
4 **uniformly and that the water will eventually be**
5 **drained off and not cause damage to the very expensive**
6 **turbine blades and other turbine parts.**
7 Q. Now, when was Alstom ready to make steam
8 in its boiler at Comanche 3?
9 **A. Well, we know that the -- that the**
10 **igniters were fired on the -- on June the 24th and the**
11 **main burners on the 25th. So they were ready to make**
12 **steam on -- on the 25th of June.**
13 Q. Now, as of that point, would B&W have
14 already been in a position to receive those flue
15 gases?
16 **A. Yes, they were. B&W had had completed**
17 **their work and were ready to receive flue gas. And,**
18 **in fact, had quit the job site, because they -- their**
19 **work was done. They were waiting for the next -- next**
20 **interface point, which is receiving flue gas. And had**
21 **to be called back for this period. So they were done**
22 **with their work at this point.**
23 Q. Now, on June 25th, 2009, was Shaw ready
24 to receive steam?
25 **A. No, they were not.**

4472

1 Q. What activities was Shaw working on that
2 were preventing them from being ready to receive the
3 steam at that time?
4 **A. Well, Shaw -- in order to put the turbine**
5 **up on turning gear -- and this is a big, big piece of**
6 **equipment. All of this needs to be turning. And**
7 **there's -- you can picture, like, a starting motor in**
8 **your automobile. The turning gear is a big -- big one**
9 **of those that just turns the steam turbine slowly.**
10 **In order to accomplish that, the turbine**
11 **lube oil piping, the turbine lube oil flush -- the**
12 **lube oil has to be cleaned to a condition that**
13 **satisfies the turbine manufacturer. It has to be --**
14 **it has to have all the microscopic particles removed.**
15 **And they have very fine strainers.**
16 **So you flush the oil. So oil flush has**
17 **to be done to the satisfaction of the steam turbine**
18 **manufacturer, and also other appurtenances, like the**
19 **instrument racks have to be complete as required**
20 **for -- for the steam blows.**
21 **So those were the main things, the**
22 **turbine lube oil flush, the turbine bearing system has**
23 **to be complete and -- and done, ready for turning**
24 **gear.**
25 Q. Now, when was Shaw, in fact, ready with

4473

1 its turbine on turning gear in this case?
2 **A. We know that the turbine was put up on**
3 **turning gear on July the 3rd.**
4 Q. Now, at that point, was Shaw ready to
5 immediately commence steam blows?
6 **A. No, they -- Shaw was not ready at that**
7 **point. The main problem was that Shaw -- if we look**
8 **at this -- this equipment, there is a big, big duct**
9 **between the air-cooled condenser and the steam turbine**
10 **underneath this LP turbine. And that duct was not**
11 **complete and buttoned up.**
12 **Now, all the drains from the boiler drain**
13 **into that duct system. And those drains, when you**
14 **light off the boiler, are very hot and they're**
15 **flashing steam. And so the air-cooled condenser was**
16 **not complete and buttoned up. So the boiler start-up**
17 **drains didn't have any place to go.**
18 **So reading the documentation, it**
19 **indicates that Shaw and Xcel, on the 3rd of July, had**
20 **a discussion. Shaw threw up their hands and didn't**
21 **know what to do with those drains. Xcel took that**
22 **opportunity to install a drain pipe to accommodate the**
23 **drains over to the cooling tower basin. There's a**
24 **concrete well under this cooling tower called a**
25 **cooling tower basin. And Xcel ran the drain pipes**

4474

1 **over to this cooling tower basin by themselves over**
2 **the 4th of July weekend in order to allow Shaw to**
3 **begin the steam blows on July the 6th.**
4 Q. And that temporary piping that you just
5 discussed, why was that necessary?
6 **A. It was necessary because the -- this is**
7 **very hot flashing liquid. And when you start up a**
8 **boiler, you have boiler drains that have to have**
9 **somewhere to go. You can't dump them on the ground.**
10 **And the normal drain area in a power**
11 **plant of this type is the condenser hot wells. So**
12 **most -- all of the drains go into the condenser hot**
13 **well. And as I said, the air-cooled condenser**
14 **ductwork was not complete at this time, and so those**
15 **drains could not be piped to that location and an**
16 **alternative location had to be developed.**
17 Q. So an additional temporary piping to
18 support steam blows had to be installed, because Shaw
19 was not done with its work in the air-cooled
20 condensers?
21 **A. That's correct.**
22 Q. Now, this work that you described
23 about -- to get the turbine on turning gear, is that
24 work in any respect dependent upon Alstom do anything?
25 **A. No, it is not.**

4671

1 compared to its Attachment 2 date in June of 2008 in
2 getting its turbine on turning gear?
3 **A. Yes, turbine on turning gear was over**
4 **five months late.**
5 **In addition, the air-cooled condenser**
6 **that I just discussed should have been completed in**
7 **November of the previous year. The Attachment 2 that**
8 **was signed back in June indicated that the condensate**
9 **system, that we'll talk about later, I believe, the**
10 **condensate system was to be operational on**
11 **November 17th. Shaw committed to that date in June of**
12 **2008, that it would be finished with the condensate**
13 **system -- in fact, operational with the condensate**
14 **system on November 17th.**
15 **Now, we're in July of the next year,**
16 **more than seven months later, and the air-cooled**
17 **condenser is not done and still will not be done for**
18 **another two months.**
19 Q. So you found a total delay in this first
20 window of 133 days?
21 **A. That's correct.**
22 Q. At any time during this period, did
23 anyone else do anything that delayed Shaw or prevented
24 it from getting its work done?
25 **A. No, no one delayed Shaw.**

4672

1 Q. Now, did Shaw submit a change order
2 request claiming that another party had interfered
3 with its work during this time?
4 **A. There were two change orders submitted**
5 **that would have affected the work in this time period.**
6 **There was change order 103 for the instrument racks**
7 **and change order 107 regarding the thrust bearing**
8 **shims.**
9 Q. Did you evaluate whether the facts
10 underlying those two change order requests entitled
11 Shaw to a time extension?
12 **A. Yes, we did.**
13 Q. What was your conclusion?
14 **A. Change order 103 was rejected because**
15 **Shaw installed the instrument racks in the wrong**
16 **location. I know there's a discussion as to whether**
17 **they got verbal direction to do that, but, as**
18 **Mr. Zanetti described, that's not how things are done**
19 **on a complex construction project. And, in fact, you**
20 **would not expect a sophisticated contractor like Shaw**
21 **to take verbal direction because it puts them at risk.**
22 Q. Now, is the analysis that you have just
23 laid out for the jury, and specifically with respect
24 to those -- one of those two change order requests, an
25 analysis that you have revised over time?

4673

1 **A. Yes, I did.**
2 Q. And Mr. Zanetti has already told us
3 about that, but why don't you just briefly explain to
4 the jury the one time here when you changed your mind?
5 **A. In my initial analysis, I looked at each**
6 **of the change orders individually, and when I looked**
7 **at the change order associated with the thrust**
8 **bearings, I thought in my mind that perhaps Shaw would**
9 **be -- could have completed the oil flush or started**
10 **the oil flush again a little bit earlier had it gotten**
11 **the shims back.**
12 **So what I was going to allot them was 3**
13 **days of the 15 days they'd asked for, and that 3 days**
14 **would have been from the end of that period, since the**
15 **thrust bearing work was done on June 26th. It would**
16 **have been from June 24th to June 26th, excuse me,**
17 **those days.**
18 **When I went back and talked to Bob about**
19 **these things, Bob agreed with me on all the change**
20 **orders except this one, and we went over the specifics**
21 **associated with the bearing work on the turbine, the**
22 **instrument work that was being changed, the proximity**
23 **probes that it was talking about, some of the**
24 **vibration instrumentation. And Bob is our power plant**
25 **expert. I look to him for advice on the technical**

4674

1 **issues, and I have to bow to his opinion on those**
2 **issues.**
3 **But in addition, as we looked at these**
4 **things in context in a delay analysis, we saw that the**
5 **instrument rack work wasn't finished until July 2nd.**
6 **So even if they were delayed for three days, from**
7 **June 24th to June 22nd -- 26th --**
8 Q. On the shims?
9 **A. -- on the shims, the delay associated**
10 **with the instrument racks would have been the**
11 **controlling delay. So I corrected my 3 days.**
12 Q. Okay. In addition to bowing to
13 Mr. Zanetti, were you convinced that that was a
14 mistake about those three days?
15 **A. Yes, I was. He's more technically**
16 **competent than I am.**
17 Q. So when all this work was done, steam
18 blows proceeded on, what, July 7th?
19 **A. July 6th.**
20 Q. July 6th, okay. Now, did anyone keep
21 Shaw waiting for steam blows?
22 **A. No, I don't believe so.**
23 Q. Did Shaw keep anyone waiting for steam
24 blows?
25 **A. We believed that Alstom was ready for**

4675

1 **steam blows on June 27th.**
2 Q. And Babcock & Wilcox as well?
3 **A. Babcock & Wilcox was finished probably**
4 **the end of 2008. They had already done their work and**
5 **demobilized at that time.**
6 Q. Okay. Now, did the joint boiler main
7 steam hydro test take place during this time period
8 that we've been talking about?
9 **A. The hydro tests were performed in about**
10 **mid-March of this year.**
11 Q. And was that joint hydro on Shaw's
12 critical path?
13 **A. No, it was not.**
14 Q. How can you be sure that the joint hydro
15 was not on Shaw's critical path?
16 **A. Well, the only Shaw activity after the**
17 **hydro was chemical cleaning, which was performed in**
18 **early April of 2009. That was about a four or**
19 **five-day activity.**
20 **And after that was complete, the boiler**
21 **was put into dry layup, meaning nothing was done to**
22 **it. It was put under a nitrogen blanket for almost a**
23 **month. So that period of a month shows that that was**
24 **not on a critical path.**
25 Q. And during that entire period of time,

4676

1 the boiler was just waiting for Shaw to be ready?
2 **A. The boiler was just waiting for them.**
3 Q. Now, did Mr. Caruso agree with your view
4 that boiler hydro was not on Shaw's critical path?
5 **A. Yes, he did.**
6 Q. If that is the case, can a delay in the
7 joint hydro be the basis for a time extension?
8 **A. In order to have a time extension, you**
9 **must show that your critical path -- the critical path**
10 **I've described is delayed. If this is an activity**
11 **that has float in it, it can't impact the critical**
12 **path.**
13 Q. Let's now go to the second period that
14 you have described. What was that?
15 **A. The second period was from first fire on**
16 **gas for steam blows to steam bypass operation.**
17 Q. And what are the dates there?
18 **A. July 7th of 2009 to September 30th of**
19 **2009.**
20 Q. And why did you select this period as
21 your next window?
22 **A. This was the next time when there was a**
23 **major milestone where the contractors intersected.**
24 Q. What is a steam bypass operation?
25 **A. I think it's been described in detail by**

4677

1 **others, but just to reiterate, excuse me, during steam**
2 **bypass, the boiler, Alstom, produces steam which**
3 **bypasses the turbine. It goes through a bypass**
4 **system, through an attemperator, which cools the steam**
5 **slightly and then dumps that into the air-cooled**
6 **condenser, back for recirculation through the**
7 **condenser.**
8 Q. Do you have an exhibit which shows this
9 second period?
10 **A. Yes, I do. The critical path in the**
11 **second period, Shaw's critical path, was through its**
12 **electric-hydraulic control system. The electric-**
13 **hydraulic control system is the system that operates**
14 **the valves at the top of the steam turbine.**
15 **This is the plan at the beginning of**
16 **this period, and Shaw had forecasted being done on**
17 **September 1.**
18 Q. What's next?
19 **A. They were actually complete on**
20 **September 29th, 28 days later. Their plan in the**
21 **original schedule in this period was to be done on**
22 **September 1st.**
23 Q. To be ready to pull vacuum?
24 **A. Right. And they were actually ready to**
25 **pull vacuum on 9/29, September 29th. Steam bypass was**

4678

1 **planned to start on September 2nd. It actually**
2 **started on September 30th. This was an overall delay**
3 **of 25 days in this period due to the electric-**
4 **hydraulic control system.**
5 Q. Now, the main delay you're talking about
6 there is completing the EHC?
7 **A. Yes, it is.**
8 Q. Why was that work done?
9 **A. Well, the electric-hydraulic control**
10 **system was required to operate the valves at the top**
11 **of the steam turbine. In order to pull vacuum -- I**
12 **think pulling vacuum has been described before. In**
13 **order to pull vacuum, you need to seal the top of the**
14 **turbine so that, along with -- excuse me. You need to**
15 **seal the valves at the top of the turbine in order to**
16 **pull a vacuum through the IP section, the low-pressure**
17 **section of the turbine, the condenser and the**
18 **air-cooled condenser. The EHC, or the**
19 **electric-hydraulic control, system operates those**
20 **valves at the top of the turbine.**
21 Q. Now, did anyone interfere with Shaw's
22 ability to get that work done?
23 **A. No. This work is in the steam turbine**
24 **building, and it's a building that is completely under**
25 **the control of Shaw. None of the other contractors**

1 Q. This work that you described to get the
2 air-cooled condenser complete to receive these drain
3 lines, is that work dependent upon Alstom doing
4 anything?
5 **A. No, it is not. It's all Shaw work.**
6 Q. So what date was it that steam blows were
7 able to commence?
8 **A. On July the 6th.**
9 Q. And then the steam blows -- what's the
10 main purpose of those steam blows?
11 **A. Well, the main -- the main purpose of**
12 **steam blows is to clean the hot and cold reheat and**
13 **main steam lines. There's a marginal cleaning of some**
14 **parts of the boiler, as well, but the main reason is**
15 **to clean the steam lines.**
16 Q. Now, the jurors have seen this photo
17 before of this big cloud of rusty steam. Where does
18 most of that rust come from?
19 **A. Well, that is -- is probably iron oxide.**
20 **It's mill scale. It's coming from the inside of the**
21 **main steam hot and cold reheat piping. And you always**
22 **see this on the initial steam blows. I mean, it's --**
23 **it's the material that you're trying to remove from**
24 **the piping. And just the fact that you see it there**
25 **means that the blow is being successful in removing**

1 **that material.**
2 Q. And this is the main reason you do steam
3 blows, right?
4 **A. Pardon me? That's the reason you do**
5 **steam blows, yes.**
6 Q. Now, following the steam blow interface
7 that you just described, what was the next major
8 interface between Alstom and Shaw to move the progress
9 of the work forward?
10 **A. Well, the next critical point, in my**
11 **opinion, is getting the bypass steam into operation.**
12 **And in order to get that into operation, you have to**
13 **pull vacuum on the steam turbine.**
14 **And by pull vacuum, vacuum is pulled on**
15 **all of this equipment and all of the ductwork between**
16 **that equipment, so that you -- you need to be able to**
17 **pull almost an absolute vacuum on all that ductwork in**
18 **order to generate steam from the boiler and put it**
19 **into the condensing system. You have to have some way**
20 **to suck the steam into the condensing system.**
21 **So in order to achieve that, the**
22 **air-cooled condenser has to be -- has to be done, and**
23 **the -- the steam turbine interceptor control valve,**
24 **the electrohydraulic control system for all of these**
25 **valves have to be done, because those have to be held**

1 **shut when you pull vacuum on this equipment.**
2 **And so the two major things that need to**
3 **be complete to achieve pulling vacuum were completion**
4 **of the wiring for the EHC system and completing the**
5 **commissioning of the EHC system, and completing the --**
6 **the ductwork for the air-cooled condenser system.**
7 Q. Now, let me -- let me follow up on that a
8 little bit.
9 The pulling of vacuum. Where does the
10 steam go at that point?
11 **A. Well, when you pull a vacuum, you have**
12 **what's called hiding and holding ejectors that pull a**
13 **vacuum on this ductwork. When the steam goes into the**
14 **condensing space, it turns into water. It condenses**
15 **into water, and the steam goes into the -- what's**
16 **called a condenser hot well. And a hot well is just a**
17 **steel tank at the bottom of the -- just under the --**
18 **this LP -- LP turbine area. And that tank holds all**
19 **of the condensed water that -- steam and water that**
20 **drains into that area.**
21 Q. Let me ask a slightly different question.
22 In this pull vacuum interface, is steam -- is power
23 being generated? Is steam going through the steam
24 turbine yet?
25 **A. No, it is not at this point. These**

1 **plants have what's called a -- a bypass system that**
2 **takes the steam from the boiler and runs it around in**
3 **circles through -- condenses it in the condensing**
4 **system, dumps it into the hot well. The condensate**
5 **pumps take it from the hot well and pump it through a**
6 **demineralizer system. And that demin system cleans up**
7 **the water. Takes all of the chemical pollutants out**
8 **of the water, and you just keep pumping the water**
9 **around and around, making steam, until it gets to a**
10 **purity level that is acceptable to the steam turbine**
11 **manufacturer.**
12 Q. So if I understand what you're saying,
13 the turbine is very sensitive about the kind of steam
14 that it receives?
15 **A. That is right. The chemistry for the**
16 **boiler water and the chemistry for the steam has to be**
17 **at a purity level that will not allow any coating out**
18 **of any chemicals onto the turbine blading or the**
19 **piping in the boiler.**
20 **So, you know, you -- water in your home,**
21 **you get plate out of -- out of some white materials.**
22 **You can't have any plate in a power plant. The water**
23 **has to be absolutely pure, so you need the bypass**
24 **system to recirculate the water until it's at a purity**
25 **level where you can emit the steam to the steam**

1 **were working in this building.**
2 Q. Did anyone else keep Shaw waiting to
3 begin the steam to bypass operation?
4 **A. No, no one was holding them up.**
5 Q. And how about Shaw? Did Shaw keep
6 others waiting?
7 **A. Alstom was ready to go to steam to**
8 **bypass earlier than this.**
9 Q. Okay. So that was window number 2.
10 What's window number 3?
11 **A. Window number 3 is from steam to bypass**
12 **to full load.**
13 Q. And do you recall the dates?
14 **A. The dates are September 30th of 2008 to**
15 **March 31st, 2010.**
16 Q. Would that be 2009, September 30th,
17 2009?
18 **A. I'm sorry. Yes.**
19 Q. Okay. Tell us, if you would, what we
20 see in this third window.
21 **A. Well, I first wanted to say that we've**
22 **talked about -- we could have picked a different**
23 **window here, and one of the windows we could have**
24 **picked would have been first steam to turbine. That**
25 **was another time when the parties intersected, but in**

1 **looking at the schedules, we determined that first**
2 **steam to turbine was not the critical path. The**
3 **critical path was through the boiler feedwater pumps.**
4 **So first steam to turbine was not a critical path**
5 **milestone.**
6 Q. So that's why you selected the window
7 that you did as your third window?
8 **A. That's why we selected this window.**
9 Q. Why don't you go ahead and show us what
10 this window shows?
11 **A. In the plan for this window, Shaw**
12 **planned to put first steam to turbine on November 30th**
13 **of 2009. This was based on a projection of delays**
14 **basically for Alstom's tube repairs. It had**
15 **forecasted an amount of days of delay for Alstom and**
16 **said that Alstom would be complete with its tube**
17 **repairs and they could put first steam to turbine on**
18 **November 30th.**
19 **They actually put first steam to turbine**
20 **on January 4th, and here we see the steam to turbine**
21 **delay I was talking about. That would have been the**
22 **delay associated with Alstom's tube repairs.**
23 **Based on the November 30th date for the**
24 **first steam to turbine, they planned to have full load**
25 **on January 8th.**

1 Q. Let me just stop you there for a second,
2 Mr. Rose. Now, full load was one of the dates that
3 was in the Attachment 2 to the June 2008 settlement
4 agreement, right?
5 **A. Yes, it was.**
6 Q. And what was the full load date that
7 Shaw committed to in Attachment 2?
8 **A. The Attachment 2 full load date was**
9 **July 6th.**
10 Q. July 6th. So their projection, their
11 plan at the beginning of this window was to be, what,
12 six months late?
13 **A. That's correct.**
14 Q. Okay. Go ahead.
15 **A. So they're six months late at the outset**
16 **of this window. What's important to note on this**
17 **slide here, they had planned to have first steam to**
18 **turbine on November 30th and be able to go to full**
19 **load on January 8th, nominally about 40 days between**
20 **those activities.**
21 **What actually happened was first steam**
22 **to turbine happened on January 4th, but full load**
23 **didn't occur until March 31st, almost four months**
24 **later. So that's why I said that first steam to**
25 **turbine is not critical.**

1 **The days to the turbine -- the delays to**
2 **the turbine boiler feedwater pump delayed the job by**
3 **110 days, and that's essentially because they couldn't**
4 **bring the A boiler feedwater pump operational.**
5 Q. And have you reviewed the various -- we
6 won't go through them all now, but have you reviewed
7 the various project records that detailed the various
8 problems Shaw had in trying to get those boiler
9 feedwater pumps working?
10 **A. Yes. We looked at mostly the daily**
11 **reports but also looked at some of the monthly**
12 **reports, some of Shaw's monthly reports, identified**
13 **problems that they had with the boiler feedwater**
14 **pumps. They had alignment problems. They had piping**
15 **problems where they had to cut and rework piping.**
16 **They had to rework hangers for the piping. They had**
17 **lube oil lift pumps that failed. They had pumps that**
18 **seized, and, in fact, the lube oil lift pump for the A**
19 **pump failed the day after first steam to turbine on**
20 **January 5th.**
21 **After that, they described how the A**
22 **boiler feedwater pump became harder and harder to**
23 **turn, and ultimately they said that pump was seized.**
24 **I think it was January 19th. Then it was sent out to**
25 **a shop. It was returned from the shop. They tried to**

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1 put it in operation again. It seized again. And
2 ultimately, the pump wasn't returned back to the site
3 until March 22nd. It was made operational on
4 March 26th.
5 Q. And once it was operational, did the
6 plant immediately start ramping up to full load?
7 A. Yes, the plant ramped up during that
8 period. There's a normal startup operation when
9 you're operating a big power plant like this. It
10 isn't a matter of just flipping a switch. Plants are
11 ramped up slowly so things aren't damaged, and
12 ultimately we got to full load within five days, which
13 seems very reasonable.
14 Q. Now, based upon your review and your
15 analysis, did anybody else do anything that prevented
16 Shaw from getting its work done during this window?
17 A. No, they didn't.
18 Q. And did anyone else keep Shaw waiting
19 for full load?
20 A. No.
21 Q. Did Shaw, however, keep the other
22 contractors waiting for full load?
23 A. Alstom was ready to bring the plant to
24 full load in early to mid-February. There's a letter
25 to Shaw on I think it's February 16th that puts them

4684

1 on notice that the plant is now operating at its
2 maximum load based on having one boiler feedwater
3 pump. He goes on to say how Alstom is ready to go to
4 full load, B&W is ready to go to full load, and what
5 is missing is the second boiler feedwater pump to
6 bring them up to full load.
7 Q. Now, the period we're looking at here is
8 the time during which the leaks were discovered in
9 Alstom's boiler; is that right?
10 A. Yes, that's correct.
11 Q. Did those leaks in any way impact Shaw's
12 critical path?
13 A. No, they didn't. The critical path went
14 in through the boiler feedwater pumps, and they were
15 never able to make them operational.
16 Q. Okay. What was the fourth window that
17 you analyzed?
18 THE COURT: Before we go to the fourth
19 window, why don't we take our midafternoon recess.
20 So, Ladies and Gentlemen, 15 minutes.
21 Please remember the Court's admonitions, and please
22 reassemble in the jury room.
23 You're welcome to step down, sir. Thank
24 you.
25 (Recess taken, 2:53 p.m. to 3:11 p.m.)

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1 THE COURT: All right. We're ready to
2 resume.
3 Mr. Rose, I remind you you remain under
4 oath.
5 Continued examination, Mr. Hinderaker.
6 MR. HINDERAKER: Thank you.
7 Q. (BY MR. HINDERAKER) Mr. Rose, I believe
8 when we broke you were about to introduce us to the
9 fourth window.
10 A. The fourth period in my analysis is from
11 full load on March 31st to the end of my analysis,
12 which is August 19th, 2010.
13 Q. So Shaw has now achieved full load.
14 What is the milestone that they are aiming toward at
15 this point?
16 A. The next milestone to achieve is
17 substantial completion.
18 Q. Do you want to show us the fourth
19 window?
20 A. Sure. During this period, there was
21 very little in the way of detailed schedules because
22 most of the work is done. What we used to do our
23 analysis here was monthly reports, daily reports,
24 and -- for the most part daily reports to see what was
25 going on.

4686

1 What we found from the daily reports was
2 that the plant never seemed to be able to be operated
3 on two condensate pumps. We've heard testimony from
4 Bill Stecker and from Bob Zanetti about how the plant
5 is designed to operate on the two 50 percent
6 condensate pumps with the other 50 percent pump
7 obviously being for a spare when one of the other ones
8 is damaged or goes down, and it seems obvious that
9 when you have three 50 percent units, that the plant
10 should operate on two 50 percent units.
11 We've heard a lot of discussion about
12 the design, about the design being proper, but there's
13 no evidence that the plant I've seen has been able to
14 operate on two 50 percent pumps. And since Shaw is
15 responsible for the design for those condensate pumps,
16 it would seem that they're responsible to demonstrate
17 that that plant can operate on two 50 percent pumps.
18 Q. And as long as we don't have condensate
19 pumps functioning at the 50 percent specification,
20 what significance does that have for Shaw reaching
21 mechanical or substantial completion?
22 A. Well, they can't reach mechanical or
23 substantial completion.
24 Q. Now, during this fourth window, was
25 there anybody who interfered with Shaw's ability to

4491

1 **feet. Because this water is at a very, very low**
2 **pressure. Basically, a complete vacuum.**
3 **So the pumps have a long, long pumping**
4 **tube that pumps the water up. And you have three**
5 **half-size condensate pumps, because this is one of the**
6 **most difficult duties in the plant. Condensate pumps**
7 **are pumping flashing water, water that's flashing into**
8 **steam. And they're notoriously unreliable. So you**
9 **have three half-size pumps, because condensate pumps**
10 **are troublesome and shut down from time to time. So**
11 **you need a backup pump to bring online so that you can**
12 **maintain full capacity on the plant.**
13 **We know that Shaw had never achieved**
14 **substantial completion, because the criteria for**
15 **substantial completion is that the plant has to be --**
16 **reach full load, specified load, and it has to be**
17 **operating normally as specified with the equipment**
18 **installed in the plant.**
19 **And the normal as-specified configuration**
20 **is two condensate pumps running. This plant cannot**
21 **achieve full load unless all three condensate pumps**
22 **are running, which is not in accordance with the**
23 **design of the plant. And I know from my own**
24 **experience that -- because I set up a lot of the**
25 **design standards for power plants. And all of Stone &**

4492

1 **Webster plants that I'm familiar with have three**
2 **condensate pumps, 50 percent condensate pumps. And**
3 **that's pretty much the industry standard throughout**
4 **the world.**
5 **If you see a power plant that only has**
6 **two, you know that they're saving on money, because**
7 **it's not a reliable way to design a power plant. You**
8 **need to have three. You need to have one full-size**
9 **backup.**
10 Q. (BY MR. HARTNETT) Now, this plant has
11 been running on three condensate pumps for some time,
12 hasn't it?
13 **A. Yes, it has.**
14 Q. So it can get to full load using the
15 three condensate pumps; is that right?
16 **A. Yes, it does.**
17 Q. It can function on a day-to-day basis
18 using three condensate pumps?
19 **A. Yes. It can run -- it can run normally**
20 **on the three condensate pumps, but it's not within the**
21 **design specifications for the plant.**
22 Q. And finally, Mr. Zanetti, I want to touch
23 on a couple of -- a couple change order issues that
24 Shaw has raised in this case, particularly related to
25 some MHI issues. Did you review those as part of the

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1 analysis you did for your report?
2 **A. Yes, I did.**
3 Q. Okay. So -- well, tell me, which ones
4 did you review?
5 **A. Well, I reviewed the change order that**
6 **relates to the relocation of the instrument racks, the**
7 **change order that relates to the -- the**
8 **instrumentation and low boil flushing and the thrust**
9 **bearing shim rework on the steam turbine prior to**
10 **turning gear operation of the steam turbine.**
11 Q. So let's take those one at a time, then.
12 This instrument rack claim. Shaw claims that someone
13 told them to put the instrument racks in the wrong
14 spot?
15 **A. That's -- that's -- from what I've read,**
16 **that's the claim. And, you know, just to make a**
17 **point, these plants are completely and thoroughly**
18 **designed down to the minutest detail. And the**
19 **location of something like the instrument racks is**
20 **something that's a definite design requirement.**
21 **And for -- for Shaw to say that they**
22 **talked to somebody in the corridor and they told them**
23 **to locate the racks up on the operating floor is a**
24 **ridiculous statement. I mean, they had the drawings**
25 **in the spring of '06 and should have looked at the**

4494

1 **drawings and properly located the instrument racks.**
2 **And at least one of those racks had to be**
3 **fully functional in order for turning gear operation**
4 **and steam blows.**
5 Q. Well, let me -- let me be clear here.
6 Let's imagine that Shaw's claim is, someone from
7 Mitsubishi told us where to put the racks. Does that
8 make a difference?
9 **A. No, it does not. It does not make a**
10 **difference for a number of reasons. Number one,**
11 **you're supposed to follow the drawings, not -- not**
12 **some verbalization from a person.**
13 **And secondly, Xcel was the interface with**
14 **Mitsubishi, not Shaw. That doesn't say that Shaw**
15 **couldn't talk to Mitsubishi, but they shouldn't be**
16 **taking technical direction on where to locate things**
17 **from Mitsubishi. Xcel was the direct contact with**
18 **Mitsubishi.**
19 Q. So if there was some conflict between
20 what the drawings showed and what this Mitsubishi
21 technician said, what should Shaw have done?
22 **A. Shaw should have gone to Xcel, and Xcel**
23 **should have ironed it out with Mitsubishi in a very**
24 **formalized way. And there is a formalized way of**
25 **doing it. It's called an RFI. It's a request for**

1 work -- in this example, it's a company called FPD --
2 then they send invoices to Public Service. And I
3 reviewed those invoices -- most of the invoices -- in
4 determining that there was underlying support from the
5 contractors for the amounts claimed.
6 I did some tests beneath the invoice. I
7 looked at some time sheets. I had my team obtain
8 additional support from the replacement contractors.
9 And then finally, I saw that it was
10 consistent with the amounts that were invoiced from
11 Public Service to Shaw. So again, more of an audit of
12 the underlying documentation.
13 Q. And did that audit of the underlying
14 documentation, in fact, confirm the accuracy of the
15 numbers that are included in the replacement
16 contractors costs?
17 A. Yes. The claims had been fairly well
18 organized and kept together, the records. So while it
19 took a lot of time, it was a pretty straightforward
20 analysis and it did support the costs included in the
21 claim.
22 Q. And then let's move to your analysis and
23 work with respect to Shaw's claims against Public
24 Service Company. And did you also prepare a chart --
25 and this will be 6 -- that presents the focus of your

1 work with respect to Shaw's claims against Public
2 Service Company?
3 A. Yes. This chart 6 is a summary of both
4 my evaluation of the extended overhead claim that was
5 put forth by Ms. Angela Rice and also Shaw's loss of
6 productivity claim, which was also put forth by
7 Ms. Rice but with input from Dr. Borcherding.
8 Q. So can you summarize your evaluation of
9 Shaw's extended overhead claims?
10 A. Yes. I thought Ms. Rice did a very
11 detailed analysis, and I think her approach of trying
12 to look at a daily rate for delay is a proper
13 approach. But I think, in applying that approach, she
14 made two or three fundamental mistakes or errors that
15 I've identified here.
16 First, on construction projects, some
17 costs increase with time. If you pay a thousand
18 dollars a month for a trailer rental and you're out
19 there another month, you pay another thousand dollars.
20 So that's what we call a time-related or delay cost.
21 But some costs are more related to
22 activity. They might be called variable or activity.
23 The more effort there is, the more cost there is, and
24 the less effort, the less cost.
25 In a delay claim, you only want to

1 include in those that extend with time and not those
2 that are activity related. Those might be properly
3 claimable, but they wouldn't be in a delay claim. And
4 so I identified a substantial amount of costs that I
5 believe were not time related. And I think, in fact,
6 some of Ms. Rice's analyses actually also demonstrate
7 that. So they shouldn't have been included in a delay
8 claim.
9 The second is that she based her claim
10 for home office supervision on some billing rates, and
11 it resulted in a claim that was substantially higher
12 than what was actually recorded in Shaw's costs for
13 home office supervision. Excuse me. In Shaw's job
14 costs. So using these billing rates, came to a much
15 higher than Shaw's costs.
16 And the third is, she did use a very
17 unconventional method. Typically, if you think of
18 cost as part time related and part activity related,
19 you split it, 50 percent here, 50 percent here, or
20 75/25. What she did is, she included a hundred
21 percent of the costs in both calculations. And then
22 she tried to correct it, but I don't think she fully
23 corrected it. And I've never seen that approach.
24 Typically, it's either all time related
25 or all activity or you try and split it up. But you

1 don't include a hundred percent in both of the claims
2 and then try and adjust it separately.
3 Q. Now, in respect of this extended overhead
4 delay claim and the daily rate that was used by
5 Ms. Rice, let me ask you to look at Tucker chart
6 number 7 and ask you, have you recalculated Shaw's
7 daily rate for -- in order to correct for the problems
8 that you identified?
9 A. Yes. Chart -- as I think maybe from
10 Ms. Rice's testimony you know, she analyzed two
11 different periods. And she came up with a daily rate
12 for both -- for each period. And this is the amount
13 of the daily rate on the first line from Ms. Rice's
14 report. That's before any markups for other costs or
15 profit.
16 She found there was 174,000 in her
17 analysis in the first period per day, and 113 or
18 almost 114,000 in the second period.
19 Now, I went through and looked at the
20 specific costs that she included in there and
21 determined that there were substantial costs that are
22 activity related that should not be in there. And
23 I'll give you an example. But it resulted in a
24 reduction of her claim of $88,510 in the first period
25 and $56,339 in the second period.

4559

1 RECROSS-EXAMINATION
2 BY MR. CIPOLLONE:
3 Q. Mr. Zanetti, in terms of your analysis,
4 your analysis was limited to what you provided in the
5 August 19th report, correct?
6 **A. That's correct.**
7 Q. And you didn't analyze, for example, any
8 of the Alstom documents or Alstom's performance on the
9 job, correct?
10 **A. No, I did not.**
11 Q. And you didn't analyze any of the MHI
12 performance or MHI -- MHI's issues on the job,
13 correct?
14 MR. HARTNETT: I'm going to object. That
15 misstates the testimony.
16 THE COURT: Overruled. You may answer
17 the question.
18 **A. I looked at some MHI information, but**
19 **only as it regards the issue of the thrust bearing.**
20 **But only anecdotal from what other people indicated**
21 **about the MHI.**
22 Q. (BY MR. CIPOLLONE) Right. With respect
23 to the specific change orders that you've delineated
24 in your report, correct?
25 **A. That's correct.**

4560

1 Q. And that was the scope of your work here?
2 **A. That's correct.**
3 MR. CIPOLLONE: Thank you.
4 THE COURT: You're welcome to step
5 down. Thank you, Mr. Zanetti. And I assume he can be
6 excused from any subpoena at this time?
7 MR. HARTNETT: Yes.
8 THE COURT: All right. So you're
9 excused. And thank you.
10 Defendant's next witness.
11 MR. McCARTHY: Your Honor, Public Service
12 calls Av Tucker.
13 THE COURT: All right. Mr. Tucker, how
14 are you, sir?
15 THE WITNESS: Good. How are you doing,
16 sir?
17 THE COURT: Good. I'll let you get
18 settled there.
19 THE WITNESS: Thank you.
20 THE COURT: It might be better to move
21 that water away from the --
22 THE WITNESS: That's a good idea.
23 MR. McCARTHY: Your Honor, may I move the
24 easel off to one side?
25 THE COURT: Sure.

4561

1 AVRAM TUCKER
2 was called as a witness and, having been sworn, was
3 examined and testified as follows:
4 THE COURT: Thank you. Please have a
5 seat. And you've been in the courtroom enough to
6 realize that we have poor acoustics in here. So if
7 you would also just lean forward and speak into that
8 microphone for us, I'd appreciate it.
9 THE WITNESS: All right.
10 THE COURT: Mr. McCarthy.
11 DIRECT EXAMINATION
12 BY MR. McCARTHY:
13 Sir, could you please state your full
14 name.
15 **A. Avram Seth Tucker.**
16 Q. And by whom are you employed, Mr. Tucker?
17 **A. I work for a company called TM Financial**
18 **Forensics.**
19 Q. And what is your position at TM Financial
20 Forensics?
21 **A. I'm the chief executive officer of the**
22 **company.**
23 Q. And how long have you been employed by TM
24 Financial Forensics?
25 **A. I started the firm in January of this**

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1 **year with a number of other employees after I left a**
2 **larger firm that was doing similar type of work.**
3 Q. What are your responsibilities at TM
4 Financial Forensics?
5 **A. As the chief executive officer, I have**
6 **two responsibilities. One is to oversee the**
7 **operations of the company, all of the work that we do.**
8 **And then the other is to work on client consulting**
9 **matters, which I, frankly, spend most of my time**
10 **doing. So I have a number of different consulting**
11 **engagements at any point in time.**
12 Q. Do you have any academic affiliations?
13 **A. Yes. I'm a consulting professor at**
14 **Stanford University in California. I teach two**
15 **graduate level courses in the school of engineering,**
16 **the department of construction management. Consulting**
17 **professors are professors that come from the industry**
18 **where the school wants their students to learn from**
19 **people that have both an academic background and an**
20 **industry background.**
21 **So I teach two courses to civil and other**
22 **engineers who are -- they've typically worked for a**
23 **construction type firm, and now they're getting a**
24 **master's degree in construction management. They come**
25 **back to get the master's degree. They learn a lot of**

4567

1 **officer, the number three person in the 500-person**
2 **firm. And I worked there till 1984.**
3 **At that time, I left and, along with**
4 **others, started a company called Tucker Allen, doing**
5 **similar type of work in a variety of industries. And**
6 **Tucker Allen operated for about 10 years, at which**
7 **time the entire company moved into a larger public**
8 **company called Navigant Consulting that had 45 offices**
9 **around the world.**
10 **I was on the executive committee, a group**
11 **of five of us that oversaw the 2,000 professionals.**
12 **And I worked there until January of this year when I**
13 **decided a smaller shop of about 50 or 60 would be**
14 **good, so I can focus on client work.**
15 Q. So over the course of that work, up to
16 the present time, what's been the focus of your
17 professional career?
18 **A. It's been three things: Management and**
19 **business consulting, where you're helping companies**
20 **improve their systems. It's been forensic accounting**
21 **and economic investigations where you study what**
22 **happened to companies, why did they do well, why did**
23 **they fail. And a lot of my work has been on**
24 **litigation matters like this, where I'm typically**
25 **either preparing a claim or reviewing a claim.**

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1 Q. And can you also briefly describe the
2 power plant experience that you have. Power plant
3 construction experience specifically that you have,
4 Mr. Tucker.
5 **A. In the last 30 years, I've worked on many**
6 **different types of power plants. Hydroelectric,**
7 **geothermal, fossil fuel, including gas, oil, and**
8 **others. Alternative energy and nuclear power plants.**
9 **Probably about 75 or more power plant**
10 **cases within the United States and some international.**
11 Q. Have you consulted on other types of
12 construction projects?
13 **A. I've worked on many other types. A lot**
14 **of large civil projects. I've worked on wastewater**
15 **treatment plants. I've worked on buildings. I've**
16 **worked on hotels. I've worked on oil refineries and**
17 **other manufacturing facilities.**
18 Q. And have you consulted to various parties
19 concerning construction claims like we're dealing with
20 in this case?
21 **A. You mean the types of parties that are**
22 **involved in claims?**
23 Q. Correct. The types of parties that are
24 involved in construction claims.
25 **A. Yes. I've regularly worked for**

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1 **contractors, subcontractors, architects, engineers,**
2 **sometimes sureties or insurance companies, and**
3 **sometimes banks if they've loaned money out on large**
4 **projects.**
5 Q. Now, without breaching any duties of
6 confidentiality that you may have to clients that
7 you've worked for, can you tell us some of the
8 contractors with whom you've worked on power plant and
9 other related construction projects?
10 **A. I've worked for a number of the large and**
11 **also small contractors. I've worked for Bechtel**
12 **around the world, who builds a lot of power plants.**
13 **I've worked for Raytheon when they had a construction**
14 **group. I worked for Fluor around the world on various**
15 **construction matters, as well.**
16 Q. And are you experienced in the analysis
17 of contractors' delay and productivity claims?
18 **A. Yes. Again, it's been part of what I**
19 **teach at Stanford. And over the 30 years, I've either**
20 **helped contractors prepare claims or reviewed claims**
21 **from others if I was working for an owner or an**
22 **engineer.**
23 Q. Do you also have experience in preparing
24 and analyzing claims for owners' damages on major
25 construction projects?

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1 **A. I have done that many times. Probably**
2 **not as many, because they don't happen quite as often.**
3 **But I have experience on that, as well.**
4 Q. Have you testified as an expert and been
5 accepted and qualified as an expert on construction
6 and contract matters?
7 **A. Many times.**
8 Q. Could you give us some of the examples of
9 your experience in being qualified as an expert on
10 such matters?
11 **A. I've testified over the last 30 or so**
12 **years in state and federal civil courts like this one.**
13 **I've testified on cases involving state and federal**
14 **administrative proceedings like government contract**
15 **matters or utility matters.**
16 **I've testified in what's called the**
17 **United States Court of Federal Claims, which deals**
18 **with construction and other matters involving**
19 **government contractors.**
20 **And I've testified in a lot of**
21 **arbitrations in the United States, in Australia, in**
22 **South Africa, in Switzerland, in France, and in**
23 **London.**
24 MR. McCARTHY: Your Honor, we would
25 proffer Mr. Tucker as an expert in construction

1 **Shaw. So it was work that was originally required to**
2 **be done by Shaw but then was done by another**
3 **contractor through a contract with Public Service.**
4 Q. And this was consistent with the
5 provision of the contract that allowed Public Service
6 to take work away from Shaw and give it to other
7 contractors if it was dissatisfied -- I'll
8 paraphrase -- if it was dissatisfied with Shaw's work
9 or the pace at which that work was proceeding?
10 MR. McCORMICK: I'm going to object to
11 that paraphrase, Your Honor. That is not consistent
12 with the contract language.
13 MR. McCARTHY: I'll restate, Your Honor.
14 Can we put 16.6 and 16.8 of the contract, Exhibit 1,
15 on the screen.
16 Q. (BY MR. McCARTHY) And is 16.8, in your
17 understanding, sir, the contractual provision that
18 Public Service Company used in order to bring in
19 replacement contractors?
20 **A. It is, yes.**
21 Q. And, in fact, did you proceed to do an
22 analysis of Public Service Company's replacement
23 contractor costs that were incurred when it exercised
24 its rights under this provision?
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3 Q. And you prepared a chart, that's I think
4 chart 4, Tucker chart 4 --
5 **A. Yes.**
6 Q. -- that displays these replacement
7 contractor costs -- let me ask you, Mr. Tucker, to
8 explain to the jury what chart 4 shows.
9 **A. This is a summary of Public Service's**
10 **replacement contractor and other cost claim against**
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20 **contractor work on Wheeler electrical work. And**
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3 what this witness has said was the focus of his
4 testimony.
5 THE COURT: Overruled. You may answer.
6 **A. Could I hear the question again? I**
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17 **believe maybe Messrs. Kelly, Moran, and Farmer. It**
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21 MR. McCORMICK: Okay. And if we could
22 bring back up Item 4 or Tab 4 from the demonstratives.
23 Q. (BY MR. McCORMICK) I believe you
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20 **They would have to be reasonable costs.**
21 Q. Let's come back to my question. All
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16 **to tell what the right amount would be.**
17 MR. McCARTHY: Your Honor, I have no
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19 admission of Tucker 1 through 12. I think both sides
20 have actually moved the admission and allowed into
21 evidence the illustratives that have been used. And I
22 would move the admission of those slides into
23 evidence.
24 MR. McCORMICK: No objection, Your
25 Honor.

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1 THE COURT: 1 through 12 are admitted.
2 Well, to be clear, Tucker 1 through 12 are admitted.
3 MR. McCARTHY: Thank you.
4 (Tucker Exhibits 1 through
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7 THE COURT: In the interests of keeping
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12 Your Honor. The list may have ended at Demonstrative
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17 run on through 49. I think that's -- so Tucker Number
18 1 would be 38, Tucker Number 2 would be 39, and so on.
19 THE COURT: And so on. We'll do that
20 then.
21 MR. McCARTHY: Thanks, Your Honor.
22 THE COURT: You're welcome.
23 Mr. McCormick, cross-examination.
24 MR. McCORMICK: Thank you, Your Honor.
25 THE COURT: I apologize for the

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1 interruption.
2 MR. McCORMICK: No problem.
3 CROSS-EXAMINATION
4 BY MR. McCORMICK:
5 Q. Good afternoon, Mr. Tucker.
6 **A. Good afternoon.**
7 Q. Mr. Tucker, at the beginning of this
8 trial two and a half weeks ago, there was a claim in
9 the case, as the jury was told and as we've heard
10 several times from the witnesses, for a second type of
11 liquidated damages, liquidated damages on what's
12 referred to as full load.
13 **A. Yes.**
14 Q. And you're aware of that, aren't you,
15 sir?
16 **A. I am.**
17 Q. In other words, the claim you've
18 presented to the jury is a claim on behalf of Xcel for
19 liquidated damages in connection with the substantial
20 completion milestone, correct?
21 **A. That's not entirely correct. Public**
22 **Service still has a claim for both, but because the**
23 **quantification wouldn't be different if I added in the**
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25 **it in the quantification, but my understanding is**

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3 Q. But there have been no damages then
4 presented to the jury in connection with Xcel's claim
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6 is that right?
7 **A. That's true through my calculations, but**
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9 **liquidated damages under full load and not the entire**
10 **amount under the substantial completion, they could**
11 **figure out the total days, multiply by the 150,000,**
12 **and then make sure it's not over 42 million.**
13 Q. But you haven't presented those figures
14 for the jury?
15 **A. That's correct.**
16 Q. All right. And you actually had
17 prepared -- you understand under the rules that each
18 side exchanged the demonstratives that the other side
19 was going to use at a designated time, correct?
20 **A. Yes.**
21 Q. You actually prepared a demonstrative,
22 the one that had been furnished to us originally,
23 where you itemized the full load liquidated damages
24 and the substantial completion liquidated damages,
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1 **Shaw. So it was work that was originally required to**
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Chapter
15. RISKS OF CONSTRUCTION TIME: DELAY, SUSPENSION, ACCELERATION AND DISRUPTION

References

§ 15:103. "Disruption": Reduction in expected productivity—"Disruption" distinguished from delay and suspension

"Disruption" is a claim distinct from delay, suspension, and acceleration because it results from loss of efficiency indiscriminately to both critical and noncritical work activities.[1] Although reduction in expected productivity infers reduced job progress and can result in delay to the contract end date, disruption is concerned only with unanticipated compensable increases in costs incurred to perform any given work activity or activities. Reduced productivity in the completion of work activities, whether critical or not, is a real cost to the contractor and is an element of virtually all contract claims. Although disruption to work activities and delay to the critical path occasionally are confused as one and the same, particularly when one time impacting event both disrupts and delays a critical path activity, the claim of "disruption" is not dependent upon proof of impact to the critical path. Illustrative is *L & A Contracting Co. v. Southern Concrete Services, Inc.*,[2] in which a contractor's disruption claim against its subcontractor was upheld over the subcontractor's strenuous objection that it could not have disrupted the contractor's performance because the contractor completed its contract on time. The contractor had argued that disruption of its scheduled work activities caused by the subcontractor's untimely performance of its subcontract was compensable, notwithstanding that the contractor had completed its contract on time. In siding with the contractor, the United States Court of Appeals for the Fifth Circuit concluded that the contractor properly should recover for disruption caused by the subcontractor's untimely performance "regardless of whether [the contractor] timely completed its own obligation to [the owner]."[3]

The fundamental distinction[4] between "disruption" and "delay" was grasped by the United States Court of Appeals for the District of Columbia Circuit in *U.S. Industries Inc. v. Blake Construction Co., Inc.*,[5] in which a subcontractor was awarded substantial damages for delay and disruption arising out of the construction of Walter Reed General Hospital in Washington D.C. in the early 1970s. Although this project was contracted to be completed within 3 1/2 years, the project was delivered two years late. The subcontractor sought to recover substantial damages for delay and disruption arising out of the contractor's alleged failure to (1) schedule the work properly, (2) cause materials to be delivered timely, and (3) make payment when due. A jury awarded the subcontractor $9.6 million in damages, consisting of $3.3 million in delay damages and $4.8 million in disruption damages. On appeal, the contractor sought to overturn the awarded disruption damages by contending that the award constituted a "double recovery," which overlapped the award for delay damages incurred during the same period of time. In rejecting the contractor's argument, the court recognized the fundamental distinction between the disruption claim and delay claim as follows:

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Bruner and O'Connor on Construction Law
Database updated June 2011

Philip L. Bruner and Patrick J. O'Connor, Jr.

Chapter
15. RISKS OF CONSTRUCTION TIME: DELAY, SUSPENSION, ACCELERATION AND DISRUPTION

References

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West's Colorado Revised Statutes Annotated Currentness
West's Colorado Court Rules Annotated
Appellate Rules
Chapter 32. Colorado Appellate Rules
General Provisions (Refs & Annos)
RULE 28. BRIEFS

(a) Brief of the Appellant. The brief of the appellant, which shall be entitled "opening brief," shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with references to the pages of the brief where they are cited;

(2) A statement of the issues presented for review;

(3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see section (e));

(4) An argument. The argument must be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on;

(5) A short conclusion stating the precise relief sought.

(6) Any request for Attorney Fees.

(b) Brief of the Appellee. Request for or opposition to Request for Attorney Fees. The brief of the appellee, which shall be entitled "answer brief," shall conform to the requirements of subsections (a)(1) through (a)(6) of this Rule, except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant and appellee must in its answer brief make its request for attorney fees or state any opposition it may have to attorney fees requested in appellant's brief.

(c) Reply Brief. -- Opposition to Attorney Fees Request. The appellant may file a brief which shall be entitled "reply brief," in reply to the answer brief. Any opposition to attorney fees requested in appellee's answer brief must be set forth in the reply brief. No further briefs may be filed except with leave of court.

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(6) Any request for Attorney Fees.

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From: Cunha, Dave
Sent: Thursday, June 11, 2009 10:02 PM
To: Nick Pearson (cadvette47@gmail.com)
Subject: Comanche

I think construction is doing as best they can for the current situation. That is they work towards lists provided for specific goals, but most of the time they don't make it.

I my opinion the biggest problem here is two fold, first being late engineering or incomplete engineering followed closely by poor craft supervision from the GF level to the Superintendents. Work was not (to some degree is not now) planned well in regard to fittings, gaskets, tools.

Much time has been lost waiting for the small tools subcontractor to provide tools or the min/max guy to get fittings and gaskets. On the other hand gang boxes are full of small tools that don't get returned (foreman and GF issue).

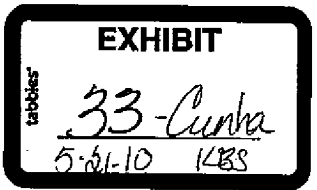
Turnovers are a side line activity all startup (electrical systems, transformers and buses being the exception) has been done without them as the systems are not ready for punchlist/walkdowns. Eventually, all supports and hangers are installed and turnovers are presented to startup.

Regarding getting alone, I think Jason, Bob and myself all have the save goals.

Hope this answers your questions.

David Cunha PE
Startup Manager for Comanche
Shaw Power Group -- Fossil Division
2001 Lime Road
Pueblo, CO 81006

719-296-5025 direct phone
719-296-5023 voice mail
719-296-5032 FAX



From: Follett, Robert
Sent: Tuesday, September 30, 2008 1:49 PM
To: Nayak, Ram
Subject: Re: Electrical Field Engineers/Designers

EXHIBIT
34
AGREN BLANDO REPORTING
7-8-10 nD

Thanks, we are working on the pro blem.
Bob Follett
Director, Construction Operations
Shaw, Fossil Power Division
Centennial, CO 80112
Office: 303-741-7448
Cell: 303-570-3595

From: Nayak, Ram
To: Follett, Robert
Sent: Tue Sep 30 07:47:10 2008
Subject: FW: Electrical Field Engineers/Designers

Bob,
I do not have anyone available at present to send. Engg needs to complete their work. It is much worse than what Rob is saying. Craig tells me that there are all kinds of errors and omissions in the design. Please have Engineering complete deliverables accurately. I will try to hire 1 or 2 field engineers asap to help.
Regards

Ram Nayak, PhD, PE
Director, Construction Technical Services
Fossil - Construction
Shaw Power Group
1401 Enclave Parkway
Houston, TX 77077
281 368 3193 (office)
713 591 5329 (cell)
281 368 3801 (fax)
Shaw™ a world of Solutions™
www.shawgrp.com

From: Gappa, Rob
Sent: Thursday, September 25, 2008 4:11 PM
To: Pixton, Mark; Follett, Robert; Donmoyer, Michael; Nayak, Ram
Cc: Sowers, Richard; Ezell, Jason; Hill, Craig; Prentice, Charles
Subject: Electrical Field Engineers/Designers

Guys
We are in desperate need of help down here. We need at least 4 electrical field engineers/designers to do the details of field routing conduit and cabling (i.e. routing the final length of aboveground conduit to the equipment) and help with any remaining engineering issues. They must be experienced and capable of working with the craft. A lot of this work is typically done in the field, but we do not have the skilled foremen/craft capable of this. Craig and Charles are swamped with the day to day issues and do not have the time to support every effort. Jason and I just discussed this and feel the best option is to get help immediately.

Can you **please** pull engineers/designers off of jobs to make this work? Ram, do you have any coming off jobs that can get down here asap? We can't let this get any worse!

Thanks
Gappa

SW 02280216

From: Glover, Monty
Sent: Friday, July 10, 2009 5:13 PM
To: Ezell, Jason
Cc: Follett, Robert
Subject: Re: Force Report 07/09/09

Thanks guys for the explanation.

From: Ezell, Jason
To: Glover, Monty
Cc: Follett, Robert
Sent: Fri Jul 10 10:18:55 2009
Subject: RE: Force Report 07/09/09

I agree with Richards's comments from an engineering standpoint; however I believe we need to bring to light the impacts this has had on construction. We have seen an average of 35,000 feet of cable growth per month for a year. Not only has this growth greatly affected our ability to forecast, but it has also caused us to work in a continuous fire drill to try to complete systems as needed to support startup. This in itself has had a significant impact on productivity as we have had to go back to systems after we thought they were done and pull more wire or change terminations. This has been a major problem in the area of forecasting manpower and staffing, not to mention the equipment needed to do the work. The other side of this issue is the additional conduit, cable tray, and hardware to support this growth. We have had to purchase and install distribution panels, junction boxes, transformers, and install duct banks that we never knew existed due to the incomplete engineering. The number below is close, we have at this moment, approximately 500,000 feet of cable to pull that has been designed and routed, which doesn't sound like much, but when you break it down by system or area, you realize that the only area left where we can do bulk pulling is the ACC and some of the AQCS. This means that around 300,000 feet of this cable will have to be pulled by system in small quantities, in some cases, one at a time as required to complete a system. These numbers also do not include lighting or plant communication systems. We have been re-evaluating our needs on a system by system basis to determine the construction impacts. We have reorganized some of the wire pulling crews to try to close the gap, we are currently averaging 175,000 feet pulled per month and we are considering a night shift pulling wire in the ACC and AQCS to try to double production in the bulk areas, but as the quantities go up, especially the one and two cable pulls to complete systems, our productivity goes down and the schedule slips.

Jason Ezell
Construction Site Manager
Shaw/Stone&Webster Construction
Comanche Unit 3 BOP Project
2001 Lime Road
Pueblo Co. 81006
409-284-2650 - Mobile
719-296-5005 - Office
www.shawgrp.com

From: Glover, Monty
Sent: Friday, July 10, 2009 5:18 AM
To: Follett, Robert; Ezell, Jason
Subject: FW: Force Report 07/09/09
Importance: High

SW 02327867

873; *Collier v. Wagner Castings Co.* (1980), 81 Ill.2d 229, 241, 41 Ill.Dec. 776, 782, 408 N.E.2d 198, 204.) As the court explained in *Collier*, "where an employee injured by a coemployee has collected compensation under the [Worker's Compensation] Act, the injured employee cannot then allege that those injuries fall outside the Act's provisions." (*Collier*, 81 Ill.2d at 241, 41 Ill.Dec. at 782, 408 N.E.2d at 204.) This is precisely what the plaintiff in this case is seeking to do. Here, the plaintiff was receiving worker's compensation benefits at the time he instituted the present suit. Therefore, the trial court correctly held that plaintiff's action was barred by the Worker's Compensation Act and did not err in dismissing plaintiff's cause of action for this reason also.

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

AFFIRMED.

MANNING and O'CONNOR, JJ., concur.

178 Ill.App.3d 415
127 Ill.Dec. 581

CALUMET CONSTRUCTION CORPORATION, Plaintiff-Appellee, Cross-Appellant,

v.

The METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, Defendant-Appellant, Cross-Appellee.

No. 88-0823.

Appellate Court of Illinois, First District, First Division.

Dec. 30, 1988.

Contractor brought suit against sanitary district for breach of contract and for return of liquidated damages withheld by sanitary district for alleged delays in contractor's performance under construction contract. The Circuit Court, Cook County, Robert L. Sklodowski, J., granted contractor's motion for partial summary judgment on liquidated damages issue, but refused to assess prejudgment interest against sanitary district. Sanitary district appealed and contractor cross-appealed. The Appellate Court, Quinlan, J., held that: (1) trial court was required to apportion fault for mutual delay between contracting parties pursuant to liquidated damages clause, rather than precluding owner from recovery of any liquidated damages if it contributed to delay, and (2) in absence of express agreement, prejudgment interest for wrongful withholding of funds pursuant to liquidated damages clause could not be awarded, since funds had not been wrongfully obtained.

Reversed and remanded.

1. Damages ⚷76

Liquidated damages clauses are enforceable if actual contractual damages are difficult to ascertain and if liquidated damages provision is reasonable estimate of damages which would actually result from breach of contract.

2. Damages ⚷85

Fault for mutual delay should be apportioned between contracting parties pursuant to liquidated damages clause contained in construction contract, rather than precluding owner from recovery of any liquidated damages in instances in which owner contributed to delay; however, apportionment should not be permitted where owner has acted in bad faith or where owner has substantially contributed to delay by making it practically impossible for contractor to complete work as scheduled.

3. Interest ⚷39(2.5, 2.30)

Prejudgment interest may be awarded on funds only if they are both wrongfully obtained and illegally withheld; thus, finding that owner illegally withheld funds from contractor pursuant to liquidated damages clause in construction contract could not support award of prejudgment

as appropriate in circumstances where the complexity of contractual relationships make damages difficult to determine, since reasonably related, agreed upon liquidated damage amounts are easy to apply in such situations and satisfy the needs of the parties. See *Aetna Casualty & Surety Co. v. Butte-Meade Sanitary Water District* (D.S.D.1980), 500 F.Supp. 193; *Structural Sales, Inc. v. Vavrus* (1985), 132 Ill.App.3d 718, 87 Ill.Dec. 619, 477 N.E.2d 745; *Northern Illinois Gas Co. v. Energy Co-operative, Inc.* (1984), 122 Ill.App.3d 940, 947, 78 Ill.Dec. 215, 221–22, 461 N.E.2d 1049, 1055–56.

[2] Specifically, the issue presented on appeal here concerns whether courts can apportion fault for mutual delay between two contracting parties pursuant to a liquidated damages clause. This issue has never been squarely addressed by Illinois courts, and courts of other jurisdictions presented with this issue generally follow either the so-called more "modern rule" of apportionment [2] concerning liquidated damages, or the "older view" which prohibits apportionment under such provisions. (See Sobel, *Owner Delay Damages Chargeable to Performance Bond Surety* (1984), 21 Cal.W.L.Rev. 128, 133–34.) The older view is that, in construction contracts, if the owner contributed to the delay at all, the owner could not recover any liquidated damages, and the liquidated damages clause would be abrogated in those circumstances. (See *General Insurance Co. of America v. Commerce Hyatt House* (1970), 5 Cal.App.3d 460, 85 Cal.Rptr. 317; *State v. Jack B. Parson Construction* (1969), 93 Idaho 118, 456 P.2d 762; *L.A. Reynolds Co. v. State Highway Commission* (1967), 271 N.C. 40, 155 S.E.2d 473; *Lee Turzillo Contracting Co. v. Frank Messer & Sons, Inc.* (1969), 23 Ohio App.2d 179, 261 N.E.2d 675.) The older rule of non-apportionment, however, is now being abandoned by a growing number of courts in favor of the more modern rule of apportionment because of the increasing popularity of liquidated damages clauses, in part, due to the increasing complexity of contractual relationships, and, in part due to the fact that the older rule is too harsh in its application. (See *E.C. Ernst, Inc. v. Manhattan Construction Co.* (5th Cir.1977), 551 F.2d 1026, *cert. denied sub nom, Providence Hospital v. Manhattan Construction Co.* (1978), 434 U.S. 1067, 98 S.Ct. 1246, 55 L.Ed.2d 769.) This trend in favor of apportionment is similar in nature to the trend in the courts to apply a comparative negligence standard in tort cases, *i.e.*, recovery is based on apportionment of the responsibility of the parties rather than on the disqualification of a party merely because he was guilty of some fault. (See Sobel, 21 Cal.W.L.Rev. 128, 133.) Under the modern rule concerning liquidated damages, courts (including the Supreme Court of the United States, as noted) will determine the amount of fault attributable to each party, and, as long as the owner has not delayed in bad faith, they then award liquidated damages according to that finding. *Robinson v. United States* (1923), 261 U.S. 486, 43 S.Ct. 420, 67 L.Ed. 760; *E.C. Ernst, Inc. v. Manhattan Construction Co.* (5th Cir.1977), 551 F.2d 1026; *U.S. ex rel. Thorleif Larsen & Son, Inc. v. B.R. Abbot Construction Co.* (7th Cir.1972), 466 F.2d 712; *Aetna Casualty & Surety Co. v. Butte-Meade Sanitary Water District* (D.S.D.1980), 500 F.Supp. 193; *Nomellini Construction v. State of California* (1971), 19 Cal.App.3d 240, 96 Cal.Rptr. 682.

As stated above, this issue has never been squarely addressed in Illinois. The MSD contends that this court should adopt the modern rule of apportionment, and enforce the liquidated damages provision accordingly. It argues that the policy behind the rule of apportionment is sound, especially in complex construction contracts such as the one presented here, because in these types of cases there will always be at least some delay, albeit unintentional, attributable to the owner, as here, the MSD.

2. Although we refer to the rule of apportionment as the "modern rule", we note that in 1923, the United States Supreme Court applied the rule of apportionment under a liquidated damages clause. (*Robinson v. United States* (1923), 261 U.S. 486, 43 S.Ct. 420, 67 L.Ed. 760.) Other courts and commentators, nevertheless, refer to the rule as the "modern rule" because it is only recently that more jurisdictions have begun to apply the rule.

Contractor Name Shaw Stone & Webster	**XCEL RFI** **REQUEST FOR INFORMATION**	
PO# 170608		
PROJECT: Comanche Plant Expansion Project Location: ☐ Unit 1 ☐ Unit 2 ☑ Unit 3	RFI #	SSW-00008
		(Assigned by Xcel)

SUBMITTED TO:

Name:	Jerry Kelly
Company:	Xcel Energy
Reference:	Contract Schedule A – Appendix G (Boiler)

CONTRACTOR QUESTIONS/COMMENTS:

1. Alstom information identifying the required pressures as functions of required flows at superheater and reheater attemperator terminal points. Please state pressure/flow requirements for upset and/or unequal flow distribution.

DATE SUBMITTED: 02/08/2006	DATE RESPONSE REQ'D: 02/10/2006
SUBMITTED BY: (Print/Type Name) Rob Gappa	SIGNED: Transmitted via email 02/15/2006

COMPANY ANSWER:

1. Refer to email forwarded on 2/13/076.

1. Concerning Spray water conditions:

SH Desuperheating

Econ feedwater line Design conditions - 4515 psig & 657 °F

Operating conditions - 4217 psig & 580 °F @ Econ Inlet header

SH DSH Design flow - 556,000 lb/hr total at MCR

Operating - 222,400 lb/hr total at MCR

Required pressure to Alstom Block Valve -3940 psig for Design

RH Desuperheating

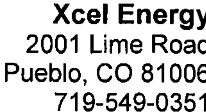
RH DSH Design flow - 269,424 lb/hr total at MCR

Operating - 0 lb/hr total at MCR

Required pressure to Alstom Block Valve -1350 psig for Design

Note: The RH DSH piping is currently designed for 1600 psig & 650 °F.

Issued [AD]



Xcel Energy
2001 Lime Road
Pueblo, CO 81006
719-549-0351

Shaw Stone & Webster
9201 E. Dry Creek Road
Centennial, CO 80112

September 30, 2010
BOP-10-030

Subject: Response to SSW letter re. Condensate Pump Plan

Reference:
1. SSW letter (S. Reschly to T. Farmer) dated September 16, 2010; Plan for Condensate Pump Warranty Claim.
2. SSW letter (R. Follett to T. Farmer) dated September 16, 2010; No Subject
3. SSW letter (R. Follett to T. Farmer) dated July 21, 2010; PSCo Default Notice for Condensate Pumps.
4. Balance of Plant Engineering, Procurement and Construction Contract (the "BOP Contract") dated February 1, 2006 between Public Service Company of Colorado d/b/a Xcel Energy and Stone & Webster, Inc. ("SSW") for the Comanche Unit 3 Project (the "Project")

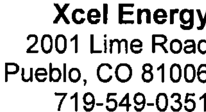
Attention: Robert Follett
Tel: 303-741-7448
Email: Robert.Follett@SSWgrp.com

Dear Mr. Follett:

Xcel is in receipt of your recently transmitted Condensate Pump Plan. Our comments and concerns are outlined below which include additional comments to your July 21, 2010 letter titled "PSCo Default Notice for Condensate Pumps".

Regarding your recent pump plan item numbers:

1. Xcel is working with plant operations to select a date when the unit can operate at reduced load while one pump is removed from service. Xcel will communicate that date to SSW as soon as it is confirmed. Please provide Xcel with a schedule reflecting all expediting options.
2. Please identify the SSW tasks you wish to perform while the pump is removed.
3. What is SSW's schedule for reporting back to Xcel both the results of the proposed test, and a final pump disposition? Xcel and SSW have shared data on the August 12, 2010 pump tests. This data shows that the pumps are underperforming between 15 ft and 40 ft when compared with the certified curves.
4. See Xcel Energy's comments above
5. Xcel disagrees with SSW on the point that the plant is operating in excess of MCR conditions. After the SSW/Gould's pump performance test on Aug 12, 2010, Xcel tested the unit's capacity with two pumps in service. That data was reviewed by Xcel's Performance group, and those calculations show that the Case D net capacity cannot be met with the contractually required two pumps in service. Xcel will forward those test results to SSW shortly. The Case D Net MW value is 777 MW. This requirement was confirmed by SSW site Management. The as-tested two pump corrected MW value was 740 MW, almost 5% lower than required. In addition to this, the BOP contract requires that the condensate pumps be supplied with 10% margin on flow. This closely relates to



Xcel Energy
2001 Lime Road
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Re-work Item #	Description	Root Cause	Reference Documents	Subcon - tract #	Date Identified	Date Rework Started	Date Rework Complete	Estimate Cost	Estimate M-Hrs	Backcharge # (if applicable)	CP #	Cost Code	WP #	Cost Responsibility
0001	Drilled pier #BO-25 was rejected and abandoned. Two new piers were re-designed and installed to replace the abandoned pier.	Delay of concrete supply caused the concrete material inside the pump to set and the tremie pipe to get stuck inside the pier.	NCR-001	103179	2-May-06	31-Jul-06	28-Aug-06	$ 22,565	255	SWI/AND/13L (for engineering re-design of piers)	Eng		0200000	Anderson Drilling Inc
0002	Chip down piers in south boiler mat due to re-design - Change Order due to Alstom Crane loading	Redesign of the south mat foundation due to Alstom crane loading	SIMBS13002-05-4	Self perfom	8-Jul-06	24-Aug-06	31-Aug-06	$ 8,600	156	Change order to Xcel	CP08		0801003	Xcel
0003	6" waste water line in pulverizer mat relocated in elev due to material size cahnge	Design change by engineering after the MTO was issued	SIUGL1-010-3-0	Self perform	30-Jul-06	1-Aug-06	3-Aug-06	$ 1,600	30	NA	CP18		1835001	SSW
0004	Re-work SIWW-6-MKAS-3190 line inside pulverizer mat	Interference with pulverizer anchor bolts	RFI-SWCI-007	Self Perform	26-Jul-06	31-Jul-06	3-Aug-06	$ 3,000	55	NA	CP18		1835001	SSW
0005	Formwork and re-bar in north boiler mat had to be re-worked since stub ups under the slab were on hold and work proceeded for the foundaton.	Stub ups were on hold - construction did not allow for space for the stub-ups while doing the formwork and re-abr.	NA	Self Perform	3-Aug-06	8-Aug-06	12-Aug-06	$ 1,500	27	NA	CP08		1835001	SSW (50%) - SWCI (50%)
0006	Tackwelding to rebar was performed as a measure to secure the heavy pulverizer anchor bolts - had to add rebar to compensate for the welded rebar	No template was being used to set and hold the large pulverizer mat anchor bolts	NCR-009	Self Perform	6-Aug-06	10-Aug-06	11-Aug-06	$ 2,100	38	NA	CP08		0801005	SWCI
0007	Rework the bottom ash bedding for the CW line excavation and rewok the 8" french drain: clean excavated trench areas from all clay wash down material and restore erosion around french drain. Also rework french drain to new design that includes french drain being placed lower inside a trench box and other new design requirements.	Hard rain during during week end of 8/19 and 8/20 caused clay material to run off in the excavation and contamination of the bottom ash and the french drain. Further design requirments were not clearly understood after bottom of excavation was changed from V shape to just side slope.	FCR# SWCI-002	Self Perform	18-Aug-06	22-Aug-06	8/25/006	$ 16,000	290	NA	CP07		0701001	SSW (50%) - SWCI (50%)
0008	Rework the bottom ash bedding for the CW line bedding that was contaminated with clay erosion due to hard rain.	Hard rain that fell on Sat 8/27/06 cuased another wash out and erosion of embankment of the 84" CW piping trench	none (caaused by weather)	Self Perform	28-Aug-06	30-Aug-06	31-Aug-06	$ 8,000	145	NA	CP07		0701001	SWCI
0009	Chip down pier under the Ash Sump in the Boiler area	Design change. Drawing was revised after drilled pier was installed.	NA	Self Perform	4-Sep-06	12-Oct-06	16-Oct-06	$ 1,200	22	NA	CP08		0801008	SSW
0010	Damaged drilled piers: ACC and AQCS(baghouse) areas	Damaged caused by construction vehicles in the area but connot identified who did the damage.	NCR-015; NCR-020; and NCR-032	Self perform	29-Aug-06	20-Dec-06	5-Jan-07	$ 3,800	69	NA	CP08		0200000	SWCI
0011	Remove and re-install the bottom mat rebar and formwork for the Lime unloading Pit in order to re-excate the area an additional 5ft	Additional 5 ft of excavation and re-installation of conditioned on-site clay soil was necessary to comply with geotechnical requirments. This requirment was not specified in Specs nor in drawings.	SIMBS13010-01-1	Self Perform	27-Sep-06	28-Sep-06	4-Oct-06	$ 12,000	220	NA	CP08		0810001	SSW
0012	Lime Unloading Pit Sump wall had to be repaired with spaecail grout. The sump wall was poured together with the pit wall.	The formwork was placed incorrectly into the wall of the Lime Unloading Pit.	NCR-018	Self-perform	16-Oct-06	30-Oct-06	3-Nov-06	$ 2,000	22	NA	CP08		0810001	SWCI
0013	Repairs to damaged dowells for Drilled Piers in AQCS area that were damaged. Rework included drilling and doweling in new re-bar (10 piers involved)	Construction equipment damaged the drilled piers in AQCS area	NCR-015 and NCR-020	Sel-perform	8-31-06 and 10-30-06	5-Jul-07	5-Sep-07	$ 2,500	36	NA	CP08		0200000	SWCI
0014	Remove rebar from duct bank trench and re-fabricate rebar and re-install (east fo Boiler area) due to hazardous waste contamination. Work was stopped to allow Xcel to clean up the area	Hazardous waste was found caused by Xcel operation.	Letter to Xcel	Self perform	12-Oct-06	30-Oct-06	4-Nov-06	$ 15,000	272	Backcharge to Xcel	CP08		0401009	Xcel
0015	Pulverizer pedestals(2) poured too high by approx 1" - bush down to proper elevation	Error in shooting elevation on the forms	NA	Self perfom	2-Nov-06	7-Nov-06	8-Nov-06	$ 825	15	NA	CP08		0801005	SWCI
0016	Rework the MJ fittings (29 each) that were placed backwards	Foremen misinterpreted instruction from Vendor and did not properly review the technical documentqtion that provided instructions as to how to install the MJ fittings.	Work Package documentation	Self Perform	5-Nov-06	6-Nov-06	20-Dec-06	$ 6,500	118	NA	CP08		0901001	SWCI
0017	Raise grout formwork for pulverizer pedestals to 1/2" above the high point of the bottom of the plate to assure that the grout fills to the bottom of the base plates as requested by Xcel. Additional grout was also required.	Bottom of base plates installed by Alstom were not flat so if grout would have been poured to bottom of plates, there may have been some air pockets under the plates. (Note that Alstom drawing shows grout to the bottom of the plates)	E-mail from PJ dated 11/16/06	Self performed	16-Nov-06	17-Nov-06	1-Dec-06	$ 8,000	145	Xcel change order?	CP08	09101	0830002	Xcel
0018	Rework (break out) electrical manhole windows to make then wider or higher in order to allow ductbanks to fit into the manholes.	Changes required due to engineering design that did not get incorporated into the manhole construction	various electrical drawing revisions	Self perform	3-Nov-06	6-Nov-06	5-Feb-07	$ 12,000	218	NA	CP04		0401009	SSW
0019	Install new 30" storm water sewers where it was broken when excavating for fire water line at NW corner of the STG Bldg.	There is an interference at at this area (with fire water line) but storm water sewer should have been located first.	As built UE drawings and SSW fire water piping drwgs	Self perform	22-Nov-06	27-Nov-06	5-Dec-06	$ 8,000	110	NA	CP05		0901001	SWCI
0020	Relocate Catch Basin CB#5	CB#5 was initially installed per original issue (rev 1) of site grading drawing and then due to the re-design of the railroad tracks (interference with duct supports), the catch basin had to be relocated to the new location shown on the drawing (rev 2).	SIGRS0300-05-01;	Self perform	29-Nov-06	1-Dec-06	12-Dec-06	$ 15,000	180	NA	CP05		0501001	SSW
0021	Rework manholes and ductbanks to add ducts to correct for the 15% spares	15% spares needs to be allocated to the ductwork design.	DCN #SSW-013E; DCN #SSW-016E	Self Perform	15-Nov-06	6-Dec-06	15-May-07	$ 18,000	275	NA	CP04		0401009	SSW

HUTTON CONTRACTING COMPANY, INC., Plaintiff–Appellant,

v.

CITY OF COFFEYVILLE, Defendant–Appellee.

No. 05–3223.

United States Court of Appeals, Tenth Circuit.

April 30, 2007.

Background: Contractor sued city to recover retainage on contract to construct power line and fiber-optic line. Following jury trial, the United States District Court for the District of Kansas, Julie A. Robinson, J., 2005 WL 1118127, ordered city to pay contractor the contract retainage of $110,159.47 minus $85,500.00 in liquidated damages. Contractor appealed.

Holdings: The Court of Appeals, Hartz, Circuit Judge, held that:

(1) force majeure clause did not relieve contractor of its responsibility for delays of its supplier under contract making time of the essence;

(2) any delay by city in approving specifications for construction contract did not excuse contractor's failure to timely perform under force majeure clause;

(3) liquidated damages provision was reasonable;

(4) liquidated damages for delay may be apportioned based on fault of parties;

(5) refusal to award construction contractor prejudgment interest on $24,659 awarded it from $110,159 retainage after setoff was made for delay damages was not abuse of discretion; and

(6) court did not abuse its discretion in responding to jury questions about special interrogatories.

Affirmed.

1. Municipal Corporations ⚷375

Under Kansas law, contractor was not relieved of responsibility to city for delay damages for its supplier's delays under force majeure clause in contract that made time of the essence when those delays were not themselves excused by a force majeure; delays attributable to "fault of" contractor, for which contractor was responsible under force majeure clause, included delays by its subcontractors or suppliers even when those delays arose without fault of contractor and were beyond its control.

2. Contracts ⚷198(1)

Under Kansas law as predicted by district court, a contractor assumes the risk that its subcontractor or supplier will fail, at least when its contract with the owner does not call for a specific supplier or subcontractor to complete a task.

3. Municipal Corporations ⚷364

Under Kansas law, municipal construction contract, by providing that commencement date would be set after "notice in writing from [contractor] that [it] had sufficient materials to warrant" contract commencement, could not be construed as excusing delay thereafter caused by supplier defaults, but more likely made delay caused by lack of materials responsibility of contractor where contract made time of essence and did not make reference to availability of materials in its force majeure clause.

4. Municipal Corporations ⚷362(1), 375

Under Kansas law, any delay by city in approving specifications for construction contract might affect amount of delay damages to which city was entitled under contract that made time of essence, but did not excuse contractor's failure to timely perform under force majeure clause, which

to rely, as was common for opinions of the time, on the notion that decisions followed naturally from axioms that were presumed to be self-evident—for example, the axiom that once a party has violated the terms of a contract, it has abrogated all terms in the same contract and cannot then enforce rights under it. Thus, *Tahlequah,* 245 P. at 996, cited by Hutton, quotes favorably the following language from a hoary authority known as *Ruling Case Law:*

> The plaintiff cannot recover liquidated damages for a breach for which he himself is responsible or to which he has contributed, and as a rule there can be no apportionment of liquidated damages where both parties are at fault. Hence, if the parties are mutually responsible for the delays because of which the date fixed by the contract for completion is passed, the obligation for liquidated damages is annulled, and in the absence of some provision under which another date can be substituted, it cannot be revived. And so it has been held that a provision in a contract to the effect that deviations may be made at the instance of the owner without annulling or invalidating the contract, does not operate to renew a right to liquidated damages for delay in completing the work after the provision therefor has been abrogated by delay to which the owner materially contributed.

Id. at 996. It then summarizes this principle as follows: "The right to recover liquidated damages being once abrogated cannot be renewed or revived except by subsequent agreement." *Id.*

[8] For some time now, however, Kansas contract law has followed the parties' intentions rather than formalism. *See Koepp v. Pribyl,* 207 Kan. 478, 485 P.2d 1388, 1390 (1971) ("The purpose of the contract, so as to carry out the intention of the parties, is to be arrived at by considering and construing the instrument in its entirety."). And when there are gaps in the contract, Kansas courts will fill them with terms that are "reasonable in the circumstances." *NEA–Coffeyville v. Unified Sch. Dist. No. 445,* 268 Kan. 384, 996 P.2d 821, 829 (2000) (quoting Restatement, *supra,* § 204). We believe that whether we surmise what the parties' views would have been when the contract was executed or whether we simply insert a reasonable term in that contract, damages for delay should be imposed for those delays, and only those delays, for which the contractor is responsible. Apportionment of damages based on fault comports with modern notions of fairness, as reflected, for example, in the near-universal adoption of comparative responsibility in tort actions. And such apportionment can encourage efficient behavior. *See Stop Loss Ins. Brokers, Inc. v. Brown & Toland Med. Group,* 143 Cal.App.4th 1036, 1052, 49 Cal.Rptr.3d 609 (2006). Persuasive authority supports this approach.

The Supreme Court long ago so interpreted a government contract. In *Robinson v. United States,* 261 U.S. 486, 488, 43 S.Ct. 420, 67 L.Ed. 760 (1923), the Court held that damages could be apportioned under a contract that it described as follows:

> The original contract provided that the contractor "shall be allowed one day, additional to the time herein stated, for each and every day of … delay [that may be caused by the Government]"; "that no claim shall be made or allowed to [the contractor] for any damages which may arise out of any delay caused by [the Government]," and that the contractor shall pay $420 for each and every day's delay not caused by the United States.

Id. at 487–88, 43 S.Ct. 420. In an opinion by Justice Brandeis, the Court reasoned:

liability. By ordering a new trial on damages,[34] in the alternative, the trial court did not abuse its discretion. The case is therefore remanded to the district court for a new trial on damages.

REVERSED in part and AFFIRMED in part and REMANDED.

E. C. ERNST, INC., Plaintiff-Appellant Appellee,

v.

MANHATTAN CONSTRUCTION COMPANY OF TEXAS, Providence Hospital, Fairbanks-Morse, Inc., Charles H. McCauley Associates, Inc., Defendants-Appellees Appellants.

No. 75-1794.

United States Court of Appeals, Fifth Circuit.

May 9, 1977.

Parties to a diversity action arising from a series of disputes concerning difficulties encountered during construction and renovation of a hospital appealed from a judgment entered in the United States District Court for the Southern District of Alabama, at Mobile, 387 F.Supp. 1001, Daniel Holcombe Thomas, J. The Court of Appeals, Godbold, Circuit Judge, held, inter alia, that the subcontractor was precluded from recovering from the contractor because of the "no damage" clause in the subcontract and that the subcontractor likewise could not recover from the owner under third-party beneficiary principles.

Affirmed in part, vacated in part and remanded for further proceedings.

1. Contracts ⟹299(2)

"No damage" clause in construction contracts, whereby one party contractually limits its own liability for delay damages, although strictly construed, will be generally enforced absent delay not contemplated by parties, amounting to abandonment of contract, caused by bad faith, or amounting to active interference.

2. Contracts ⟹299(2)

Subcontractor on hospital construction project was precluded by "no damage" clause in subcontract from recovering from contractor for delays encountered in work.

3. Contracts ⟹299(2)

Construction contractor did not waive its defenses under "no damage" clause of subcontract by breaching agreement to assert subcontractor's claims for delay damage caused by owner or any subcontractor to extent permissible under contractor's contracts with such parties.

4. Contracts ⟹187(1)

Subcontractor on hospital construction project was not entitled, under third-party beneficiary theory, to recover delay damages from owner by virtue of owner's alleged abortive attempt to change to gravity sewage ejection system after contractor had begun work on pump system and its refusal to accept lighting fixtures in violation of federal regulations incorporated into contract. Code of Ala., Tit. 7A, §§ 2-102, 2-106.

5. Contracts ⟹186(1)

Construction subcontractor, by purchasing copy of plans and specifications prepared by owner's architect, did not come

34. As part of his argument for a new trial, the appellee challenges the scienter instruction of the trial court. Because the appellee did not cross-appeal, however, this issue is not properly before the Court and is not included in our remand for a new trial. The district court ordered a new trial only on damages. To award a new trial on liability, then, would alter substantially the rights of the parties under the lower court ruling. Such a change may occur only on cross-appeal. *See United States v. American Ry. Exp. Co.*, 1924, 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087; *Lettsome v. United States*, 5 Cir. 1970, 434 F.2d 907.

show were related to its litigation of the generator matter.[30] This leaves the question whether Ernst can recover fees expended in pursuit of delay damages against Fairbanks itself. This is not precisely what the rule contemplates when it denies a right of recovery for fees expended in pursuit of indemnity itself. However, we still find recovery for this portion of the fees inappropriate. The terms of the agreement speak of indemnity for "liabilities." To us, this seems to refer to the classic indemnity situation whereby one party agrees to pay a second for all the consequences of legal action concerning a third. It does not mean indemnity against all financial damage suffered.

In sum, Ernst may recover for attorney's fees expended only in connection with the generator litigation, excluding that part of such litigation involving Ernst's claims against Fairbanks. The district court ruled that such apportionment would be impossible, given the vast number of claims in this suit. But it did so without allowing any proof about attorney's fees at all, that matter being reserved for post-trial consideration. On remand, the court should consider evidence on this issue, with due regard to the reasonable certainty standard articulated above.

II. *Ernst's challenge to Providence's liquidated damage recovery*

At an early stage of this proceeding, the district court ordered Providence to pay over an added portion of the contract price (through Manhattan) despite the existence of various disputes concerning the work. The court then framed by a subsequent pre-trial order the question of Providence's entitlement to liquidated damages under its contract with Manhattan, at the rate of $250 per day of delay. As we have noted, the court then proceeded to the difficult task of ascertaining which parties were responsible for which parts of the delays. It ordered McCauley to pay its share and ordered the three other parties (through Manhattan) to pay their shares, deducting these from the balance of the contract price which Providence had yet to pay.

[14] Liquidated damage provisions in contracts are enforceable under Alabama law as long as the contractual stipulation is reasonable and the measure of damages at the time of the contract was conjectural and uncertain. This rule has been applied to provisions against delay in performance on construction contracts. *Otinger v. Water Works & Sanitary Sewer Board,* 278 Ala. 213, 177 So.2d 320 (1965). None of the parties disputes the conjectural nature of delay damage in a case like this one or the lack of disproportion in the $250 per day damage formula.

[15] However, Ernst seeks to avoid an assessment of liquidated damages by the so-called rule against apportionment.[31] This rule states that under a liquidated damage provision against delay, where the owner has contributed to delays on the project he may not apportion the fault but forfeits all right to recover under the provision. The rule has been adopted by some jurisdictions but rejected by others.[32] The Alabama courts have never been presented with the decision of whether to adopt it or allow apportionment. *Cf. Kershaw Mining Co., supra* (concerning apportionment for actual damages).

Like the Alabama district judge, we believe that Alabama would permit apportionment of fault. The opposing rule is an old one whose underlying policies do not remain in full force. One of the dominant reasons underlying it is early judicial hostility to the use of privately agreed upon contract damage remedies. See, *e. g., Mosler Safe*

30. These would include the original declaratory judgment action Ernst brought against Manhattan insisting that the Fairbanks generator conformed to the specifications. Application of the general rule does not depend upon who was the plaintiff in the third-party litigation.

31. Ironically, Ernst seeks a recovery based on proportional fault of actual damages but opposes Providence's attempt to so recover by way of a damage formula provided for in the contract.

32. *See* Annot., 152 A.L.R. 1349, 1359–78 (1944).

(bullet ½ inch below skin); *Creamer v. State,* 229 *Ga.* 511, 192 *S.E.*2d 350 (Sup.Ct. 1972) (bullet in fatty, subcutaneous tissue in chest); *Allison v. State,* 129 *Ga.App.* 364, 199 *S.E.*2d 587 (Ct.App.1973) (superficially lodged beneath skin); *State v. Richards,* 585 *S.W.*2d 505 (Mo.Ct.App.1979) (bullet in hip flesh four inches below surface); *contra, Adams v. State,* 260 *Ind.* 663, 299 *N.E.*2d 834 (Sup.Ct.1973), *cert.* den. 415 *U.S.* 935, 94 *S.Ct.* 1452, 39 *L.Ed.*2d 494 (1974) (*per se* rule against any surgical intrusion established by a 3–2 decision). Where serious or major surgery was required, judicial permission for surgery has been refused. See *Bowden v. State,* 256 *Ark.* 820, 510 *S.W.*2d 879 (Sup. Ct.1974) (bullet in spinal canal); *People v. Smith,* 80 *Misc.*2d 210, 362 *N.Y.S.*2d 909 (Sup.Ct.1974) (bullet lodged underneath the muscles of the chest wall); *see also State v. Allen,* 291 *S.E.*2d 459 (S.C.1982).

We are satisfied that the Law Division order entered by Judge Martino adequately protects defendant's rights in the circumstances of this proposed minor surgical procedure. His order is affirmed.

187 N.J.Super. 30

UTICA MUTUAL INSURANCE COMPANY, a Corporation of the State of New York, Plaintiff-Appellant,

v.

S. Leonard DiDONATO, as Director, Division of Building and Construction, Department of the Treasury of the State of New Jersey; Defendant,

and

The State of New Jersey, Defendant-Respondent.

Superior Court of New Jersey, Appellate Division.

Argued Oct. 4, 1982.

Decided Nov. 1, 1982.

Surety for defaulting electrical contractor brought action against state seeking to recover balance of the sums expended for completion of contract for construction of certain state facilities. The Superior Court, Law Division, Mercer County, dismissed the surety's complaint and entered judgment in favor of state on its counterclaim seeking liquidated damages for surety's failure to complete contract within the time allowed, and surety appealed. The Superior Court, Appellate Division, Bischoff, P.J.A.D., held that: (1) surety was not entitled to recover from state, which paid surety the balance of moneys remaining under electrical contractor's contract with state at time of contractor's default, the balance of sums expended by surety for completion of the contract; (2) award of liquidated damages to state for delay in completion of construction contract would be reversed where reviewing court was unable to ascertain from the record from opinion of trial judge exactly what standard he applied in determining liability for and assessing the amount of liquidated damages; and (3) where parties have agreed upon measure of liquidated damages for delay in completion of construction contract, and where their agreement did not include imposition of interest, trial court could not award interest upon the liquidated damages.

Judgment dismissing plaintiff's complaint affirmed; judgment awarding liquidated damages with interest thereon on counterclaim reversed and remanded.

1. States ⚷108

Electrical contractor's surety, which alleged that state knowingly paid for work not done and materials not supplied contrary to terms of contract, that state improperly reduced amount of retainage provided by the contract and that state failed to notify surety of improprieties and default of contractor, was not entitled to recover from state, which paid surety the balance of moneys remaining under electrical contractor's contract with state at time of contractor's default, the balance of sums

compensation for the harm caused by the delay." *Ibid; see, also 218–220 Market St. Corp. v. Krich-Radisco, Inc.* 124 *N.J.L.* 302, 305, 11 *A.*2d 109 (E & A 1939). We are not informed when the State occupied the theater building. We do know that the Director testified that there was substantial completion of the entire project, including the theater, around June of 1975, but we are not informed whether the entire project was occupied or used for the September 1975 term of the college and, if not, was that nonuse the result of delay on the part of Utica or the State—or other contractors or a combination thereof? The trial judge made no findings on the relevant basic inquiries relating to the validity of the liquidated damage clause and the reasonableness of the damages claimed by the State for the delay. In short, we are not informed of the magnitude of the harm suffered by the State. If the liquidated damages provided by the contract are not a reasonable forecast, it would amount to a penalty and be unenforceable. *Barr and Sons, Inc. v. Cherry Hill Center, Inc.*, 90 *N.J.Super.* 358, 377, 217 *A.*2d 631 (App.Div. 1966).

The Colino contract contained a provision for the grant of an extension of time for completion. Where such a clause appears in a contract providing liquidated damages for delay, "authorities permit the contractee to recover liquidated damages but only to the extent that the delay is not caused by the contractee himself." *Buckley & Co., Inc. v. State,* 140 *N.J.Super.* 289, 314, 356 *A.*2d 56 (Law Div.1975), and see cases cited therein.

Here there is no dispute as to the fact of delay but the parties dispute its cause and duration. The record contains evidence of delay in the furnishing of a CPM. We do not know what effect, if any, that omission had on the total delay in completion. There was also proof and stipulations of delay due to other contractors. This is significant, for the contract imposes liquidated damages only for delays not due to the acts of the State or of other contractors.

[5] The trial judge made no findings as to whether or not a portion of the delay was due to delay on the part of the State or another contractor. Furthermore, the State made no attempt to prove its entitlement to liquidated damages other than to rely on an alleged late completion date as its right to damages. The trial judge found "[t]he plaintiff offered no defense to the counterclaim but only alleged in its trial brief that the delays were caused by the State. No evidence on this allegation was presented. . . ." We assume this refers to a failure on the part of Utica to produce proof on that issue. This suggests that the trial judge assumed the burden of proof was on Utica to prove that the State caused or contributed to the delays in order to avoid the imposition of liquidated damages. We disagree that that is so, both as a general rule and under the facts of this case. In *General Ins. Co. of America v. Commerce Hyatt House,* 5 *Cal.App.*3d 460, 85 *Cal.Rptr.* 317 (D.Ct.App.1970), the general rule was stated to be as follows:

> It is well established that where the owners seek liquidated damages pursuant to the provisions of a contract, they must show that they have strictly complied with all requisites to the enforcement of that contractual provision. An owner whose acts have contributed substantially to the delayed performance of a construction contract may not recover liquidated damages on the basis of such delay. "Liquidated damages are a penalty not favored in equity and should be enforced only after he who seeks to enforce them has shown that he has strictly complied with the contractual requisite to such enforcement [citations]." (*Aetna Cas., etc., Co. v. Bd. of Trustees,* 223 *Cal.App.*2d 337, 340, 35 *Cal.Rptr.* 765, 767.) "The correct rule is that where such delays are occasioned by the mutual fault of the parties the court will not attempt to apportion them but will refuse to enforce the provision for liquidated damages."

See, also, Kent v. United States, 343 *F.*2d 349, 351 (2 Cir.1965); *Wunderlich Contracting Co. v. United States,* 351 *F.*2d 956, 968, 173 *Ct.Cl.* 180 (1965).

104 A.D.2d 181
(Cite as: 104 A.D.2d 181, 482 N.Y.S.2d 476)

X.L.O. Concrete Corp. v Brady & Co.
104 A.D.2d 181, 482 N.Y.S.2d 476
N.Y.A.D.,1984.

104 A.D.2d 181, 482 N.Y.S.2d 476, 21 Ed. Law Rep. 1327

X.L.O. Concrete Corp., Plaintiff,
v.
John T. Brady and Company et al., Appellants-Respondents.
John T. Brady and Company, Third-Party Plaintiff-Appellant-Respondent,
v.
New York University, Third-Party Defendant-Respondent-Appellant, et al., Third-Party Defendant.
Supreme Court, Appellate Division, First Department, New York

December 6, 1984

CITE TITLE AS: X.L.O. Concrete Corp. v Brady & Co.

SUMMARY

Cross appeals from so much of an order of the Supreme Court at Special Term (David H. Edwards, Jr., J.), entered May 9, 1983 in New York County, as (1) denied a motion by defendants and third-party plaintiff to dismiss a counterclaim against defendant John T. Brady and Company and a cross claim against defendant Federal Insurance Company, and (2) denied a cross motion by third-party defendant New York University for a default judgment.

HEADNOTES

Damages--Liquidated Damages--Construction Contract--Delay in Performance Caused by Both Parties--Recovery of Actual Damages
(1) A construction contract clause providing recompense to the owner at a stipulated amount per day for the contractor's delay in completing the project is not vitiated by the owner's own culpability in causing at least some of the delay, so that the owner is free to seek actual delay damages in excess of the sum stipulated. Since the liquidated damage clause contained in the contract is clearly enforceable, and since a valid provision for liquidated damages fixes the amount recoverable at the sum stipulated, irrespective of actual damage, the owner's claims for actual and consequential delay damages must be dismissed. The contract contained a mechanism to preserve by extension the date fixed by the parties for completion and, therefore, the obligation to pay liquidated damages could have been preserved and its commencement deferred to a new date to be determined by crediting the contractor with those delay days attributable to the owner; thus, although the owner is at fault in contributing to the delay, the obligation to pay liquidated damages is not obviated and the owner is not relegated to an action at law in which it may recover its actual loss for the contractor's delay.

Judgments--Default Judgment--Excusable Default
(2) It was not error to deny a cross motion for a default judgment on third-party defendant's counterclaim based on third-party plaintiff's neglect over one and one-half years to interpose a reply to the counterclaim, and in permitting third-party plaintiff to reply, where third-party plaintiff carried its burden of showing both excusable default and merit.

APPEARANCES OF COUNSEL

Frederick Cohen of counsel (*Andrea Popik Taber* and *Charles Fastenberg* with him on the brief; *Ross & Cohen*, attorneys), for ***182** appellants-respondents and third-party plaintiff-appellant-respondent.
Robert P. Walton of counsel (*S. Andrew Schaffer*, attorney), for third-party defendant-respondent-appellant.

OPINION OF THE COURT

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feitures contravenes public policy. (*City of Rye v. Public Serv. Mut. Ins. Co.*, 34 NY2d 470, 472-473.) If the amount stipulated in the liquidated damage clause is manifestly disproportionate to the actual damage, then its purpose is not to "provide fair compensation but to secure performance by the compulsion of the very disproportion." (*Truck Rent-A-Center v. Puritan Farms 2nd*, 41 NY2d 420, 424.)Thus, the rule has evolved that when the damages flowing from the breach of a contract are easily ascertainable, or the damages fixed are plainly disproportionate to the injury, the stipulated sum will be treated as a penalty (*Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, supra., p 485), but, where they are uncertain, or difficult, if not incapable, of ascertainment, then a provision liquidating them in advance of loss will be enforced, if the ***184** amount liquidated bears a reasonable proportion to the probable loss. (*City of Rye v. Public Serv. Mut. Ins. Co.*, supra., p 473;*Wirth & Hamid Fair Booking v. Wirth*, 265 NY 214, 223.)Whether the sum stipulated represents a liquidation of the anticipated damages or a penalty is a question of law, with due consideration for the nature of the contract and the attendant circumstances. (*Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, supra., p 485.)Moreover, the agreement should be interpreted as of the date of its execution, not the date of its breach. (See *Seidlitz v. Auerbach*, 230 NY 167, 172.)

In light of these principles, we conclude that the liquidated damage clause is valid. It should be noted that N.Y.U. has not challenged, nor could it, the validity of the clause on the ground that the amount specified bears no rational relationship to the amount of actual delay damages which it reasonably anticipated at the time the contract was executed. In any event, N.Y.U., which prepared and drafted the contract and imposed both the liquidated damage provision and the $2,000 per day figure, could hardly argue that the provision constituted a penalty designed to induce performance rather than a means of providing "just compensation for loss" (*Truck Rent-A-Center v. Puritan Farms 2nd*, supra., p 424). Nor can N.Y.U., which, alone, was in the best position to estimate the harm to be caused by delay, and the amount of compensation needed to redress that harm, now argue that the liquidated damage clause is invalid because it does not adequately compensate for the alleged actual delay damages.

The rule is well established that a valid contractual provision for liquidated damages controls the rights of the parties in the event of a breach, notwithstanding that the stipulated sum may be less than the actual damages allegedly sustained by the injured party. (*General Supply & Constr. Co. v. Goelet*, 241 NY 28, 37-38;*Estate of Richter v. Novo Corp.*, 43 AD2d 1;*Sulyok v. Penzintezeti Kozpont Budapest*, 279 app. div 528.) As early as 1902, the Court of Appeals recognized that "when the parties by their contract provide for the consequences of a breach, lay down a rule to admeasure the damages and agree when they are to be paid, the remedy thus provided must be exclusively followed." (*McCready v. Lindenborn*, 172 NY 400, 409.)Thus, where the contract contains a legally enforceable provision for the payment of stipulated damages to a party for a breach, since the provision's sole purpose is to prevent, in the event of breach, any question as to the amount that shall be recovered therefor, actual damages are not at issue and the only question is as to the ***185** breach. (*City of New York v. Seely-Taylor Co.*, 149 app. div 98, 103, affd 208 NY 548.)Hence, even though its actual delay damages may, in fact, be greater than $2,000 per day, N.Y.U. is, as a matter of law, limited to the sum for which it bargained.

In seeking to avoid the limitation of the liquidated damage clause for which it bargained, *N.Y.U., citing Mosler* (supra.), argues that where both the owner and contractor are ultimately found to have contributed to a delay in completing a project, the injured party is relegated to the remedy of an action at law in which it may recover its actual loss for the contractor's delay.

The apparent rationale for the holding to that effect

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The judgment of the district court is affirmed.[7]

U. S. INDUSTRIES, INC.

v.

BLAKE CONSTRUCTION CO., INC., Appellant.

U. S. INDUSTRIES, INC., Appellant,

v.

BLAKE CONSTRUCTION CO., INC.

Nos. 80–1581, 80–1644.

United States Court of Appeals, District of Columbia Circuit.

Argued Sept. 17, 1981.

Decided Jan. 26, 1982.

Rehearing Denied March 23, 1982.

Cross appeals were taken from an order of the United States District Court for the District of Columbia, Gerhard A. Gesell, J., which disposed of claims raised in suit for breach of contract for construction of the new Walter Reed General Hospital in Washington, D. C. The Court of Appeals, Friedman, Chief Judge, sitting by designation, held that: (1) provision of a mechanical work subcontract for construction of hospital, which exculpated contractor from liability for delay on part of other contractors or subcontractors involved in the work or furnishing of materials, did not immunize the prime contractor from damages for delay in erecting the steel structure of the building and its outer shell, which was allegedly caused by failure of prime contractor's supplier to timely deliver the steel to the jobsite; (2) evidence supported award for damages against prime contractor for disruption of subcontractor's work on government project; and (3) trial court did not err in granting judgment n. o. v. in favor of prime contractor after jury found it liable for $400,000 for indirect expenses of subcontractor attributable to extra or different work ordered by government on the construction project where jury could not have arrived at a specific damages figure without resorting to impermissible conjecture or speculation.

Affirmed in part, reversed in part and remanded.

1. Contracts ⚷299(2)

Provision of a mechanical work subcontract for construction of hospital, which exculpated prime contractor from liability for delay on part of other contractors or subcontractors involved in the work or furnishing of materials, did not immunize the prime contractor from damages for delay in erecting the steel structure of the building and its outer shell, which was allegedly caused by failure of prime contractor's supplier to timely deliver the steel to the jobsite.

2. Contracts ⚷114

Since exculpatory clauses generally are not favored, they are strictly construed.

3. Joint Adventures ⚷4(1)

Although cojoint venturer on hospital construction project could bind joint venture in its dealings with government, it could not by such action determine rights between itself and other cojoint venturer; thus, agreement between the joint venturer and the government that other causes were responsible for most of the delay in construction did not preclude one cojoint venturer, which sought to recover delay damages from other cojoint venturer, from showing that the latter had caused all or most of the delay.

7. In view of our decision, it is unnecessary to consider the Commissioner's argument that Smith had not exhausted his administrative remedies because, as noted by the district court, there was a "substitute application" pending before the PTO.

In any event, Blake has not been prejudiced by the district court's refusal to give the instruction Blake argues should have been given. Presumably, Blake wanted an instruction on change orders similar to the one the court gave on bad weather and strikes. "[D]elay or extra work attributable to severe weather amounting to an act of God or to strikes cannot be attributed to Blake." However, in substance, the court so instructed the jury. The court told it that USI had been compensated for the direct costs of change order delays by the Corps of Engineers and that it could award USI only the additional indirect expenses the change orders caused. Further, the court instructed it to avoid double recoveries. In view of these instructions and the judgment n. o. v., none of the damages assessed against Blake covered change orders.

[6] B. *Disruption Damages.* The other major element of the jury award was the $4.8 million for the damages USI suffered from Blake's disruption of its work.

There were two kinds of disruption. First, USI asserts that Blake ripped out and damaged its work, forcing USI to redo the work. Second, it claims that Blake failed to schedule and coordinate the work, causing USI's productivity to be diminished. According to USI, this latter kind of disruption occurred, for example, through Blake's failure (1) to schedule USI's and other subcontractors' work so that the work could be done smoothly and quickly, (2) to give USI notice of work to be done, (3) to provide USI with work space and storage space, and (4) to give USI use of a hoist.

Unlike the delay claim, the disruption claim is intended not to redress USI's loss from being unable to work, but to compensate USI for the damages it suffered from Blake's actions that made its work more difficult and expensive than USI anticipated and than it should have been.

Blake challenges the disruption award on two grounds. First, it contends that the award gave USI a double recovery because the award overlapped the award for delay damages. Second, it challenges the theory upon which damages were calculated and the sufficiency of the evidence to support the award.

1. The district court instructed the jury separately with respect to the disruption and delay claims. With respect to the "alleged disruption," the court told the jury that as the general contractor Blake had a duty "not to interfere with the work of a subcontractor, like Federal Sheet Metal, if at the time Blake could have foreseen that such interference would unreasonably hinder or unreasonably disrupt the contractor's completion of its work by requiring Federal Sheet Metal to perform its work in an unnecessarily disorderly or inefficient manner" and that "[i]f you find by a preponderance of the evidence that Blake failed to schedule and coordinate Federal Sheet Metal's work as required by the contract and custom of the trade, or that Blake disrupted Federal Sheet Metal's work in violation of the subcontract, then you must consider the extent of the harm, if any, which resulted as the direct and natural consequence of Blake's breach." The court also gave the following instruction regarding double recovery:

> Any damages you may find to have been caused by Blake due to scheduling or coordination violations or to disruption must be determined eliminating any and all duplication. There cannot be double recovery. If a particular delay resulting in extra costs to Federal Sheet Metal and caused by Blake is found to be attributable to more than one of these three causes, only a single damage may be assessed by you to cover the resulting harm.

USI presented extensive evidence showing the damages it had suffered from Blake's disruption of its work, and that those damages were separate from and in addition to the delay damages. Both parties argued to the jury the question of duplication of damages.

The court submitted the question of disruption damages to the jury under instructions that dealt with the issue separately from delay damages. The court told the

Comanche BOP Unit #3 Weekly PF/Average Attendance

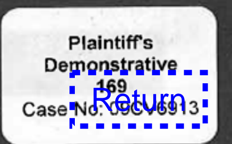
WE 11/22/09 Average Attendance 144, PF With Rework 3.14

PF With Rework

Average Attendance

Total PF With Rework — Average Attendance

SW 05955172



Comanche BOP Unit #3 Weekly PF/Average Attendance

WE 11/22/09 Average Attendance 144, PF With Rework 3.14

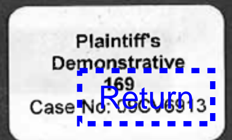
PF With Rework: 0.00 0.10 0.20 0.30 0.40 0.50 0.60 0.70 0.80 0.90 1.00 1.10 1.20 1.30 1.40 1.50 1.60 1.70 1.80 1.90 2.00 2.10 2.20 2.30 2.40 2.50 2.60 2.70 2.80 2.90 3.00 3.10 3.20 3.30 3.40 3.50 3.60 3.70 3.80 3.90 4.00 4.10 4.20 4.30 4.40 4.50 4.60

Average Attendance: 0 100 200 300 400 500 600 700 800 900 1,000

WE 01-06-08, WE 01-13-08, WE 01-20-08, WE 01-27-08, WE 02-03-08, WE 02-10-08, WE 02-17-08, WE 02-24-08, WE 03-02-08, WE 03-09-08, WE 03-16-08, WE 03-23-08, WE 03-30-08, WE 04-06-08, WE 04-13-08, WE 04-20-08, WE 04-27-08, WE 05-04-08, WE 05-11-08, WE 05-18-08, WE 05-25-08, WE 06-01-08, WE 06-08-08, WE 06-15-08, WE 06-22-08, WE 06-29-08, WE 07-06-08, WE 07-13-08, WE 07-20-08, WE 07-27-08, WE 08-03-08, WE 08-10-08, WE 08-17-08, WE 08-24-08, WE 08-31-08, WE 09-07-08, WE 09-14-08, WE 09-21-08, WE 09-28-08, WE 10-05-08, WE 10-12-08, WE 10-19-08, WE 10-26-08, WE 11-02-08, WE 11-09-08, WE 11-16-08, WE 11-23-08, WE 11-30-08, WE 12-07-08, WE 12-14-08, WE 12-21-08, WE 12-28-08, WE 01-04-09, WE 01-11-09, WE 01-18-09, WE 01-25-09, WE 02-01-09, WE 02-08-09, WE 02-15-09, WE 02-22-09, WE 03-01-09, WE 03-08-09, WE 03-15-09, WE 03-22-09, WE 03-29-09, WE 04-05-09, WE 04-12-09, WE 04-19-09, WE 04-26-09, WE 05-03-09, WE 05-10-09, WE 05-17-09, WE 05-24-09, WE 05-31-09, WE 06-07-09, WE 06-14-09, WE 06-21-09, WE 06-28-09, WE 07-05-09, WE 07-12-09, WE 07-19-09, WE 07-26-09, WE 08-02-09, WE 08-09-09, WE 08-16-09, WE 08-23-09, WE 08-30-09, WE 09-06-09, WE 09-13-09, WE 09-20-09, WE 09-27-09, WE 10-04-09, WE 10-12-09, WE 10-18-09, WE 10-25-09, WE 11-01-09, WE 11-08-09, WE 11-15-09, WE 11-22-09

Total PF With Rework — Average Attendance

SW 05955172



REQUEST FOR PAYMENT

From: FPD Power Development, LLC
2850 Anthony Lane South
Minneapolis, MN 55418
Phone 612-782-3100

To: Xcel Energy-Accounts Payable
Facility Code: 688-3
P.O. Box 46504
DENVER, CO 80202 US
Requested By: Tim Farmer
Phone No: 719-549-0350

Invoice No.: 08021-040
Invoice Date: 6/14/2010
Invoice for Work Through: 6/2/2010

Request For Payment		
Baseline Estimated Cost	$5,954,162.00	
Estimated Changes	$5,843,539.42	
Total Estimated Cost		$11,797,701.42
Total PO Amount		$16,139,581.00
Time and Materials to Date		$15,420,938.09
Less previous requests		$15,302,383.05
Current request for payment		$118,555.04
Current Amount Due		$118,555.04 ✓
Remaining PO to bill		$718,642.91

Purchase Order: M356270

Project: Unit 3 Boiler Electrical Work
Construction - Time & Materials
Comanche Expansion Project
Architect:

WIRE TRANSFER PAYMENT INFORMATION:

Bank: United Bankers Bank
Bank Address: Bloomington, MN 55431
Account No.: Pro Growth Bank, Account #02503077
ABA No.: 91001322
Credit: FPD Power Development, LLC Account 024619

I hereby certify that the work performed and the materials supplied to date, as shown on the above represent that actual value of the accomplishment under the terms of the Contract (and all authorized changes thereof) between the undersigned and relating to the above referenced project.

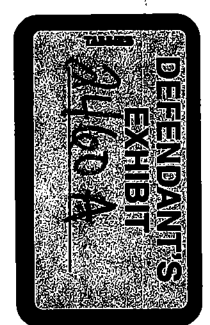
CONTRACTOR: FPD Power Development, LLC

By: *Paul Hoefer*
Paul Hoefer its Project Controller

Date June 14, 2010

Appr. T Farmer Date 6/21/10
Appr. [illegible] Appr. RMD 6/17/10 File#
PO Ln ___ WO ___ $ ___ Tax Id ___
PO Ln ___ WO ___ $ ___ Tax Id ___
PO Ln 1 WO 3099813 118,555.04 Tax Id 688104
PO Ln ___ WO ___ $ ___ Tax Id ___
PO# 356270 Rel# 455330
Rel# 00- 658230

RECEIVED 10-11-10



Return

2449

1 **draft fans for Alstom, oh, approximately June,**
2 **June 16th, just before first fire, and that was done**
3 **for Alstom.**
4 Q. Do you know how late Shaw was in turning
5 over those fan foundations to Alstom?
6 **A. Oh, you're going way back. I don't**
7 **know. The foundation? No, I don't know.**
8 Q. Would it surprise you to learn that Shaw
9 was 266 days late in turning those foundations over?
10 **A. I don't know. That wasn't critical to**
11 **first fire.**
12 Q. You didn't take that into account in
13 saying that it was entirely Alstom or FPD Main's fault
14 that the burner management system was ready on
15 June 25th, 2009?
16 **A. Oh, sure, I did. That becomes what's**
17 **determined as what is the critical path to first fire**
18 **gas.**
19 Q. Now, once Alstom had fired their
20 igniters, they were ready for first fire on gas,
21 right?
22 **A. Well, no, that was -- based on Xcel's**
23 **definition, that was first fire on gas.**
24 Q. That was first fire on gas?
25 **A. Correct.**

2450

1 Q. And having done that, they were ready
2 for steam blows, right?
3 **A. Yes.**
4 Q. And normally, steam blows take place
5 right after first fire on gas?
6 **A. As the schedule we saw, correct.**
7 Q. In the baseline schedule, you might
8 remember they're scheduled for the same day?
9 **A. Xcel had them scheduled for the same**
10 **day, right.**
11 Q. In the normal course, that's how you
12 would do it?
13 **A. Except in this case, Attachment 2 and**
14 **Alstom's schedule had them separated. That's why we**
15 **have a March 17th date for steam blows.**
16 Q. Sure. But Alstom was ready for steam
17 blows on June 25th, 2009, correct?
18 **A. I think it actually shows June 27th, but**
19 **I won't quibble. I think it's the 27th.**
20 Q. We'll say the 27th. If Shaw had been
21 ready for steam blows on June 27th, they could have
22 proceeded at that time, right?
23 **A. If Shaw had been ready and if there**
24 **hadn't been a problem with the shims in the turbine**
25 **and if there hadn't been a problem with the MHI**

2451

1 **instrument racks, yes, indeed, they would have gained**
2 **28 days instead of 18.**
3 Q. Okay. So the reason they didn't proceed
4 on June 25th or June 27th with steam blows is Shaw
5 wasn't ready, correct?
6 **A. Shaw wasn't ready because of those**
7 **changes -- they couldn't be ready because of those**
8 **changes of turbine on turning gear, and that would**
9 **have allowed more gain.**
10 Q. And when you say "ready," what Shaw had
11 to do for steam blows was to get the turbine on
12 turning gear, right?
13 **A. Yes.**
14 Q. So at least in this instance, it was the
15 bride, Alstom, that got to the church before the
16 groom, Shaw, right? They were ready for steam blows
17 first?
18 **A. They were, but they were both ahead of**
19 **the schedule that was needed to start the ceremony.**
20 Q. They were both ahead of the schedule.
21 Let's take a look at Attachment 2. Now, when under
22 Attachment 2 was Shaw supposed to have its turbine on
23 turning gear?
24 **A. It said January 28th, 2009.**
25 Q. I'm sorry. January 28, 2009. And when

2452

1 did Shaw actually have its turbine on turning gear?
2 **A. July 3rd, 2009.**
3 Q. So it slipped from January to July?
4 **A. It wasn't done until July 3rd, 2009.**
5 Q. Sure. So that was more than five months
6 after the date that Shaw committed to in Attachment 2,
7 right?
8 **A. It is.**
9 Q. Now, did Alstom do anything to prevent
10 Shaw from getting its turbine on turning gear?
11 **A. Alstom? No, it was just -- I guess it**
12 **would be MHI. It would be MHI.**
13 Q. Of the five-month delay between January
14 and July that Shaw experienced in getting its turbine
15 on turning gear, how much of that five months do you
16 blame somebody other than Shaw for?
17 **A. I believe I have that 10 days in that**
18 **gain period that's the responsibility of MHI.**
19 Q. Okay. So out of five months, you
20 attribute 10 days to MHI, right?
21 **A. During the time it's critical, that's**
22 **correct. It wasn't critical before.**
23 Q. But you've also testified, haven't you,
24 sir, that the shim work that you've referred to
25 several times now this afternoon didn't impact Shaw's

2457

1 **A. Yes, just before seeing the turbine,**
2 **correct.**
3 Q. A total of 85 days, is that right?
4 **A. Well, 85 days specifically for the**
5 **boiler tube leaks, that's correct.**
6 Q. Was the boiler down during that whole
7 time?
8 **A. I'd have to check -- I believe it came**
9 **up, went down. There could be two or three days in**
10 **there when it was up and down, when they found more**
11 **leaks. Actually started up, found more, shut it down,**
12 **started it up. I think it was just a reoccurring**
13 **problem.**
14 Q. And what was the status of Shaw's boiler
15 feed pumps during all that time?
16 **A. I believe they were being aligned and**
17 **worked on.**
18 Q. Do you know over what period of time?
19 **A. Oh, I think -- I don't know exactly, but**
20 **they were all the way through to December probably of**
21 **'09.**
22 Q. Are you aware that one or more pumps got
23 placed in the wrong location, had to be modified?
24 **A. I heard your cross-examination or**
25 **someone's cross-examination about that, so yes.**

2458

1 Q. Okay. And you're aware that there was
2 an issue with debris getting into some of the pumps?
3 **A. I know about that issue, sure.**
4 Q. And an issue with the shaft on the main
5 A pump being damaged?
6 **A. Yes.**
7 Q. And it's true, is it not, sir, that you
8 have to have both of those big turbine-driven
9 feedwater pumps to get the boiler up to full load?
10 **A. You are correct to full load, and not to**
11 **be out of context, but I thought we were talking about**
12 **steam to turbine, so you're a little apples to**
13 **oranges.**
14 Q. I've moved on. I've moved on to the
15 direction of full load.
16 **A. With respect to the full load, I agree.**
17 **With steam to turbine, no.**
18 Q. For full load, both of those big pumps
19 need to operate?
20 **A. For full load, correct.**
21 Q. Now, when was Alstom ready for full
22 load?
23 **A. It would have been right after they came**
24 **up with the boiler, so it's the end of December of --**
25 **end of December 2009, first of January 2010.**

2459

1 Q. Wasn't it later than that, March 3rd,
2 2010?
3 **A. I was taking the steam to turbine date,**
4 **so about steam to turbine, since that's one of the**
5 **Shaw markers in the Attachment 2, that's what I took.**
6 Q. There was another small period of boiler
7 2 repair subsequent to that, wasn't there?
8 **A. The one I had in my report, sure.**
9 Q. And haven't you testified that
10 March 3rd, 2010 is when Alstom was ready for full
11 load?
12 **A. March?**
13 Q. March 3rd, 2010.
14 **A. I don't think I said that. It's**
15 **whenever those last boiler tube leaks were done, and I**
16 **don't think those were necessary regarding fuel load.**
17 **Whatever date I had for the completion of the last of**
18 **the boiler tube leaks, sure.**
19 Q. Take a look at Page 131 of your
20 deposition. The question is at line 6. I asked you,
21 "When was Alstom ready for full load?"
22 And you indicated that it would be
23 March 3rd, right?
24 **A. Yes, that's fair enough. Sure.**
25 Q. And you meant March 3rd, 2010, correct?

2460

1 **A. That's right.**
2 Q. Now, what was the status of Shaw's
3 boiler feed pumps as of March 3rd, 2010?
4 **A. I think boiler feed pump A was still in**
5 **the shop.**
6 Q. Do you know -- well, let's just maybe
7 put up that. This is Exhibit 4987. Let's just take a
8 quick look at the first page. This is the daily log
9 for March of 2010.
10 MR. HINDERAKER: We'll offer it.
11 THE COURT: Any objection or voir dire?
12 MR. FROST: No objection, Your Honor.
13 THE COURT: All right. Exhibit is
14 admitted.
15 (Exhibit 4987 was received in evidence.)
16 Q. (BY MR. HINDERAKER) If you look at the
17 second bullet point there, BFPs -- that's boiler feed
18 pumps -- required work for full load?
19 **A. Yes, I do.**
20 Q. And as you said, "A boiler feed pump in
21 Sulzer shop in Denver, significant failure upon
22 reassembly."
23 So apparently, they got it back from the
24 shop, they reassembled, and it failed again. Is that
25 the way you understand it?

2241

1 **people identified to me that were relatively**
2 **unimpacted.**
3 Q. Right. Those are the easiest ones on the
4 job. That's why they're in your measured mile, right?
5 **A. No, not necessarily. They didn't have**
6 **the crew interference, the crowding that occurred**
7 **there. In fact, when I walked on the site, that was**
8 **the first thing they talked to as being efficient.**
9 **Initially, they talked about the piping, and then they**
10 **talked about the electrical both being efficient.**
11 Q. Right. It's efficient in the cooling
12 tower because of these long, straight runs. It's easy
13 work to do, right?
14 **A. No. It's because it wasn't disrupted.**
15 **You know, if you're working in the boiler or some of**
16 **the other buildings, you're constantly starting,**
17 **stopping, and moving. That's why you have impacts in**
18 **productivity. They didn't have that in the cooling**
19 **tower.**
20 Q. Dr. Borcherding, I'm handing you what's
21 been previously admitted as Exhibit 2185. Did you
22 read Jason Ezell's deposition?
23 **A. Yes.**
24 Q. Did you review the exhibits to Jason
25 Ezell's deposition?

2242

1 **A. Yes.**
2 Q. Did you -- do you recall seeing this
3 document, which is an exhibit to Jason Ezell's
4 deposition?
5 **A. I may have seen it. I'd have to read it**
6 **before I would generally recall what was written in**
7 **there.**
8 Q. Okay. Well, we're going to go over it
9 here.
10 In this document dated July 10, 2009,
11 Mr. Ezell is explaining to the president of Shaw's
12 power group, Monty Glover, what impacts electrical
13 quantity overruns had on construction. Do you see
14 that?
15 **A. Yes.**
16 Q. Okay. And he goes through and explains
17 several things. First he notes, "We see an average of
18 35,000 feet of cable growth per month for a year." Do
19 you see that?
20 **A. Yes.**
21 Q. And that is part of what we see here
22 related to these very large quantity overruns that
23 Shaw experienced with these various cable and conduit
24 activities, right?
25 **A. That's an indication why the -- there**

2243

1 **were overruns there. This is something I've seen on**
2 **other projects.**
3 Q. Now, in the next sentence Mr. Ezell
4 writes to Mr. Glover, "Not only has this growth
5 greatly affected our ability to forecast, but it has
6 also caused us to work in a continuous fire drill to
7 try and complete systems as needed to support
8 startup."
9 You described, on direct examination,
10 that in your interviews workers complained about
11 starting and stopping, hopping around, right?
12 **A. Yes.**
13 Q. And that's very disruptive to their
14 productivity, isn't it?
15 **A. Yes.**
16 Q. And Mr. Ezell is telling Mr. Glover that
17 this cable growth is causing this continuous fire
18 drill to complete systems needed to support system
19 start-up; isn't that right?
20 **A. That's one of the things. When Jason**
21 **Ezell talked to me about this, he indicated that there**
22 **were priority changes in the systems that were also**
23 **causing productivity loss.**
24 Q. He goes on to say, "This, in itself, has
25 had a significant impact on our productivity as we've

2244

1 had to go back to systems after we thought they were
2 done and pull more wire and change terminations." Did
3 I read that right?
4 **A. Yes.**
5 Q. And that would, in fact, significantly
6 impact the productivity of those workers, if they had
7 to go back to an area that they thought was complete
8 and pull more wire, right?
9 **A. It may. It depends on the work that they**
10 **have to do. And, in general, if you're putting in**
11 **more cable and you've done it over and over, you get**
12 **the advantage of the learning curve. So productivity**
13 **is improved when you get more quantities.**
14 Q. I'm going to go back to the systems after
15 they thought they were completed and pulled more wire.
16 That has a negative impact on productivity, does it
17 not, sir?
18 **A. It may or may not. It depends on the**
19 **work. Going back means that you have to reset up.**
20 **But the work has been done before, and you do it**
21 **again, your productivity could be better.**
22 Q. Regardless of your current opinion about
23 that, Mr. Ezell was telling Mr. Glover that this
24 requirement of being in a continuous fire drill has
25 had a significant impact on productivity, as we've had

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1 the last portion of each sentence that says, "Agent is
2 defined in Instruction Number 17," also say, "and in
3 accordance with the BOP contract."
4 MR. McCARTHY: We object to that, Your
5 Honor. This is a rehash of what we've already
6 discussed, Your Honor, surrounding agency, and we
7 think the definition of "agency" as is set forth in
8 CJI should control. "Agent" isn't a defined term in
9 the contract.
10 THE COURT: I'll allow you to argue that
11 in closing, but I'm not going to make that change.
12 You do need to remind me to make the change in the
13 interrogatory to reflect the change in the numbering.
14 MR. FROST: Okay. Your Honor, I assume
15 we'll get another copy of it so we can be consistent
16 in closing to the reference numbers?
17 THE COURT: Yes.
18 MR. FROST: Okay. Thank you, Your
19 Honor.
20 MR. McCARTHY: Your Honor, we stand on
21 the objections that we previously made, and with that
22 and the typographical correction we made off the
23 record, nothing further from Defendant on the
24 instructions.
25 THE COURT: Okay. Thank you.

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1 (Pause in the proceedings.)
2 THE COURT: All right. With respect to
3 what's now Jury Instruction Number 17 -- we've just
4 referred to it as 19 under the old numbering -- it
5 states, "If you find for either party on more than one
6 claim for relief, you may award that party damages
7 only once for the same losses." Okay.
8 (Pause in the proceedings.)
9 THE COURT: We're off the record right
10 now.
11 (The Court and counsel had a discussion
12 off the record out of the hearing of the jury.)
13 (Recess taken, 3:00 p.m. to 3:09 p.m.)
14 THE COURT: I'll note on the record now
15 that the parties have stipulated to not reporting --
16 or not having the court reporter report the Court's
17 reading of the jury instructions. Is that right? In
18 other words, she's not going to report what we have
19 typed up, that I simply read to the jury.
20 Mr. McCormick?
21 MR. McCORMICK: Well, Your Honor, that's
22 fine. In other words, the instructions themselves
23 will be filed as part of the court record?
24 THE COURT: Absolutely. And even though
25 there's been kind of a flurry of activity around that,

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1 the final version of it, we will scan in and make it
2 part of the record so there won't be a question what's
3 being read.
4 MR. McCORMICK: Can I ask, when the
5 final instructions come out, will we have a minute to
6 look at them before we begin the closings?
7 THE COURT: I will read them so you'll
8 have the benefit --
9 MR. McCORMICK: No, I'm saying right now
10 when the final version you're intending to read after
11 the closings come out, will we have a minute to look
12 at them -- you're charging them now?
13 THE COURT: Yes.
14 MR. McCORMICK: I'm sorry. I missed
15 that. I'm sorry.
16 (The following proceedings were
17 conducted in the presence and hearing of the jury.)
18 THE COURT: Please have a seat,
19 everyone.
20 MR. NUNN: What's the occasion?
21 THE COURT: We're going to go off the
22 record right now.
23 (The Court and counsel had a discussion
24 off the record.)
25 (Jury Instructions 1 through 24 were

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1 read to the jury and not reported pursuant to
2 agreement of the Court and counsel.)
3 THE COURT: Instructions Number 25 and
4 26, I'll read to you at the conclusion of the closing
5 arguments of counsel. I'll also review the verdict
6 forms with you at that time.
7 So, Ladies and Gentlemen, without
8 further ado, we'll proceed to the closing arguments of
9 counsel.
10 Closing argument for the Plaintiff.
11 MR. McCORMICK: Thank you very much,
12 Your Honor, and may it please the Court, counsel.
13 Members of the Jury, good afternoon once
14 again. Once again, my name is Steve McCormick. I'm
15 here on behalf of Plaintiff, Shaw Stone & Webster.
16 And I have an opportunity to speak to
17 you this afternoon two times, in two different parts.
18 I'm going to spend initially about 45 minutes in the
19 first part of my argument here, and following
20 Mr. Hinderaker's argument on behalf of the Defendant,
21 I'll have an opportunity to respond to his comments.
22 And I want to organize the first part of
23 my presentation to you here today exactly the same way
24 I organized my opening statement about three and a
25 half weeks ago, and I want to organize it according to

1 heavy weight when you start deliberating. It's also
2 interesting there was not a single neutral party, no
3 third party, no representatives of any other company
4 that testified on Shaw's behalf in this trial. Every
5 single witness for Shaw was either a Shaw employee on
6 the job or else a paid expert. That was all. No
7 third parties. No neutrals.
8 Now, Shaw admits that they made a lot of
9 mistakes on this project, and you heard Mr. McCormick
10 say it just a few minutes ago, but they claim that the
11 cost of those mistakes is not included in their claim
12 against Public Service, but I don't think that's true.
13 They are asking for $87 million plus the $41 million
14 contract balance, which adds up to $128 million. If
15 we look at the same slide that we were shown just a
16 few minutes ago, it looks to me that when you add the
17 41 million they're asking for on top of the 87
18 million, the residue not being claimed drops all the
19 way down to 19 million.
20 Now, that amount isn't even enough to
21 cover Shaw's $24 million material overrun, and all the
22 rest of Shaw's errors, the rework, the cost of
23 installing the extra material, the late engineering,
24 the mismanagement, all the costs of the delays that
25 resulted from Shaw's own errors and deliberate

1 business decisions, as far as I can tell, those
2 dollars are all included in the claim against Public
3 Service.
4 So I think if you look at this case in a
5 very fundamental way and you look at where -- it's not
6 rhetoric, not generalization, but facts, what you find
7 is that it was Shaw that was responsible for Shaw's
8 delays and Shaw's extra costs on the Comanche 3
9 project. And I would submit that that conclusion
10 pretty well dictates how the various questions on the
11 special verdict form should be answered.
12 I'm going to move on now and talk about
13 the questions on the verdict form, and I'm going to
14 start with Question Number 2, which asks you to find
15 whether Shaw breached its contract with Public
16 Service. You should find, I think, that Shaw did
17 breach the balance of plant contract that we've heard
18 so much about. Shaw committed in the BOP contract to
19 achieve substantial completion by September 15, 2009.
20 In the settlement agreement, it added a commitment to
21 do the BOP work necessary to achieve full load on coal
22 by July 6th, 2009. It agreed that it would pay
23 $150,000 per day in liquidated damages for each day
24 that it missed those deadlines.
25 There's no question about the fact that

1 Shaw was late. It was months late. And we've already
2 seen how Shaw's own business decision to slow down its
3 work and its own mismanagement contributed to those
4 delays.
5 Now, Shaw argues that it didn't breach
6 its contract because it should be entitled to a time
7 extension that excuses its delays, so let's talk about
8 that. Shaw bases its claim for an extension of time
9 on the fact that Alstom was late. It says the fact
10 that Alstom was late means that it can be late too.
11 Not only can it be excused for being late, but should
12 be paid extra for being late. That's its claim.
13 Of course, if Alstom were here, Alstom
14 could make exactly the same argument. Alstom could
15 say, "Since Shaw was late, we couldn't get our work
16 done and we get to be late too. Not only that, we
17 should be paid extra for doing less and going slower."
18 And if Alstom were here making that argument,
19 Mr. Caruso, Shaw's expert witness, you remember him,
20 would testify for Alstom too. Remember what he said
21 about what would happen if two contractors like Shaw
22 and Alstom were both late, not because they were
23 interfered with, but simply because they both did a
24 lousy job. I asked him, "Under your theory, what
25 happens if two contractors are late simply because

1 they both do a poor job, no interference by anybody,
2 neither one delays the other, they both just
3 mismanaged their work?"
4 "Well," Mr. Caruso said, "they would
5 each get a six months' time extension and they would
6 both be entitled to compensation for being on the job
7 later." That's the answer he gave here in this
8 courtroom.
9 Now, I think that is kind of an absurd
10 theory, both contractors being rewarded for doing a
11 poor job, but that wasn't just an off-the-wall comment
12 by Mr. Caruso. It is, in fact, the whole basis for
13 Shaw's case. He had to say it to be consistent
14 because Shaw's whole case is, "If Alstom is late, we
15 can be late too."
16 But that is not what the contract says.
17 The contract says that Shaw has to stick to its
18 schedule. It says that Shaw has to substantially
19 complete its work, its scope of work, not the boiler,
20 not Alstom's work, not B&W's work, not the stack, but
21 it has to substantially complete its scope of work by
22 September 15, 2009, or else be liable for liquidated
23 damages. Shaw can get a schedule extension, but it
24 can't get an extension just because another contractor
25 is late.

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1 THE COURT: Meaning, as modified?
2 MR. McCARTHY: We have no objection in
3 the form that you've now put it in.
4 THE COURT: All right. Plaintiff's
5 objections are overruled. I'll give 2 as the court's
6 modified it.
7 Instruction number 3, burden of proof and
8 preponderance of the evidence defined. Any objection
9 by the plaintiff?
10 MR. FROST: No objection, Your Honor.
11 THE COURT: Any objection by the
12 defense?
13 MR. McCARTHY: No objection, Your Honor.
14 THE COURT: Instruction number 4, no
15 speculation. Any objection by the plaintiff?
16 MR. FROST: No objection.
17 THE COURT: Any by the defendant?
18 MR. McCARTHY: None, Your Honor.
19 THE COURT: Instruction number 5,
20 inferences and evidence. Any objection by the
21 plaintiff?
22 MR. FROST: No objection, Your Honor.
23 MR. McCARTHY: None by the defendant,
24 Your Honor.
25 THE COURT: Okay. Just to repeat, jury

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1 instruction 5, inferences and evidence. Any objection
2 by the plaintiff?
3 MR. FROST: No, Your Honor.
4 THE COURT: Any by the defense?
5 MR. McCARTHY: No, Your Honor.
6 THE COURT: Instruction number 6,
7 preponderance not determined. Any objection by the
8 plaintiff?
9 MR. FROST: No, Your Honor.
10 THE COURT: Any by the defense?
11 MR. McCARTHY: None, Your Honor.
12 THE COURT: Instruction number 7,
13 sympathy and experts. Any objection by the plaintiff?
14 MR. FROST: No, Your Honor.
15 THE COURT: Any by the defense?
16 MR. McCARTHY: None, Your Honor.
17 THE COURT: Instruction number 8,
18 credibility. Any objection by the plaintiff?
19 MR. FROST: No objection, Your Honor.
20 THE COURT: Any by the defense?
21 MR. McCARTHY: None, Your Honor.
22 THE COURT: Instruction number 9,
23 applying law to the evidence. Any objection by the
24 plaintiff?
25 MR. FROST: No, Your Honor.

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1 THE COURT: Any by the defense?
2 MR. McCARTHY: None, Your Honor.
3 THE COURT: Instruction number 10,
4 Shaw's claims for breach of BOP contract. Any
5 objection by the plaintiff?
6 MR. FROST: No, Your Honor.
7 THE COURT: Any by the defense?
8 MR. McCARTHY: None, with the
9 understanding that the affirmative defenses include
10 both the reason and failure to mitigate.
11 THE COURT: Right. And I will give you
12 a final set to review that includes that change and
13 the other changes that we went through off the record
14 that were of a more typographical nature. And I'll
15 give you the time to verify that the final set
16 comports with all those changes.
17 All right. So instruction number 11.
18 I'm sorry. Yes, instruction number 11, Shaw's claim
19 for breach of the June 2008 settlement agreement. Any
20 objection by the plaintiff?
21 MR. FROST: No Your Honor.
22 THE COURT: Any by the defense?
23 MR. McCARTHY: None, Your Honor, with
24 failure to mitigate added.
25 THE COURT: Understood.

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1 Instruction number 12, Public Service's
2 claim for breach of the BOP contract. Any objection
3 by the plaintiff?
4 MR. FROST: No, Your Honor. Subject to
5 an instruction on release as an affirmative defense in
6 favor of Shaw.
7 THE COURT: And this is the one that
8 you just tendered?
9 MR. FROST: Yes, Your Honor.
10 THE COURT: All right.
11 MR. McCARTHY: I'm not -- I don't want to
12 swear to anything at this point, Your Honor. But I'm
13 not absolutely certain that I've seen it. It could be
14 my oversight.
15 THE COURT: Take a moment to look at
16 that now. They just provided this to the court, as
17 well, this new version.
18 MR. FROST: It is the mirror image of the
19 one we provided. And I think I did provide a copy to
20 you. It's the mirror image of the one you did.
21 MR. McCARTHY: Let me just say it for the
22 record, Your Honor, knowing what your ruling would
23 almost certainly be. I would object to an inclusion
24 of a release affirmative defense for Shaw, because it
25 would not conform to the evidence in the record.

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1 vacuum that you heard about. There you see it.
2 Everybody is waiting for Shaw to pull vacuum.
3 Now we drop down here. Here are the
4 famous boiler tube leaks, and they are a problem. For
5 us, for Public Service, they are a huge problem, and
6 we are dealing hard with respect to those leaks and
7 the future warranty on that boiler, but those repairs
8 were done, and there was a second batch of repairs
9 right down here long before, long before Shaw
10 succeeded in getting both of its boiler feed pumps
11 working. So once again, it's the same thing over and
12 over and over again. Shaw isn't waiting for Alstom or
13 B&W; Alstom is waiting for Shaw.
14 I think that's a very important exhibit
15 that really sums up visually why it is that Shaw just
16 cannot show that anybody else impacted its critical
17 path.
18 Now, I want to talk for just a moment
19 about this claim. We heard it again from
20 Mr. McCormick. This idea that if one contractor
21 doesn't get its work done, it's all over, the others
22 can't get their work done either simply isn't true.
23 Tim Farmer testified that every activity on
24 Attachment 2, with the single exception of the boiler
25 chemical clean which was done by a Shaw subcontractor

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1 and had to be done after boiler hydro, every other
2 activity Shaw could get its work done, its work ready
3 regardless of what the status of the boiler was. That
4 is the one exception, and it's the one that Shaw
5 always points to.
6 But the real proof is B&W. B&W did it.
7 B&W didn't pay any attention to the fact that Shaw was
8 late and Alstom was late. B&W finished up its work
9 and went home, and months later when Shaw finally
10 caught up, Shaw finally had been hooking up B&W
11 equipment, B&W sent a startup crew, and they ran their
12 equipment through its tests, but they'd been gone for
13 months, did their work and went home. As Tim Farmer
14 testified, Shaw could have done exactly the same
15 thing.
16 So continuing now with the special
17 verdict form, by -- as of August 19, 2010, Shaw was
18 338 days late in achieving substantial completion. We
19 don't think that the evidence justifies a finding that
20 Alstom or anybody else delayed Shaw's critical path by
21 even a day. If you look at that exhibit, I don't see
22 where the day is, but in any event, unless there was a
23 338-day delay to the critical path, which is certainly
24 not in the evidence, you should answer Question Number
25 2 by finding that Shaw breached its contract with

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1 Public Service by failing to complete its work on
2 time.
3 You may also find that Shaw breached the
4 implied covenant of good faith and fair dealing, which
5 the Court has instructed you. It's part of every
6 contract under the law of Colorado, and you should ask
7 yourselves whether Shaw's conduct in this case is
8 consistent with good faith and fair dealing. Shaw
9 took Public Service's $35 million and cut back their
10 forces rather than increasing them as promised. Shaw
11 submitted invoices for payment of milestones they
12 hadn't achieved. Instead of trying to achieve its
13 work on time, Shaw gave priority to making claims over
14 getting work done by adjusting its completion
15 strategy. "We need to be sure our completion strategy
16 supports our claim strategy." Jason Ezell said, "Yes,
17 that is very unusual, very unusual to give your claim
18 strategy priority over your construction strategy."
19 Shaw by the admission of its site
20 construction manager, Jason Ezell, played cat and
21 mouse games on this project. Shaw sued Public Service
22 when more than a year remained on project completion.
23 I think you could put all those facts together and ask
24 yourself whether Shaw did comply with that duty of
25 good faith and fair dealing. That might be another

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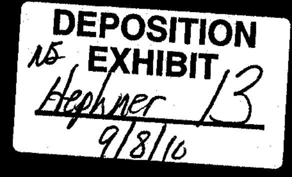
1 ground to find that Shaw breached the BOP contract.
2 Now, the first subpart of Question 2
3 asks, "What amount of liquidated damages do you award
4 to Public Service for Shaw's breach of contract?" And
5 as you all heard, the settlement agreement says that
6 from July 6th until September 15 -- that's full load
7 liquidated damages -- $150,000 a day. The BOP
8 contract says that for every day after September 15,
9 2009, that Shaw fails to achieve substantial
10 completion, Public Service is entitled to liquidated
11 damages of $150,000 a day. Shaw wasn't ready for full
12 load until March 26th, 2010, so all of the full load
13 liquidated damages are due. That's the time from
14 July 6th to September 15. 71 days times $150,000 a
15 day equals $10,650,000. That's the full load
16 liquidated damages.
17 Now, the Hill International analysis
18 showed that as of August 19, 2010, Shaw was
19 responsible for 338 days of delay in achieving
20 substantial completion, from September 15, 2009 until
21 that date, but under the contract, the maximum amount
22 of liquidated damages Shaw can be liable for is
23 10 percent of the total contract price, or
24 $42,949,051. You may remember Mr. Tucker did that
25 calculation, and that's the amount that you should

Xcel Comanche

B&W Invoices – Change Order 28

1 of 3



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THIS BALANCE OF PLANT ENGINEERING, PROCUREMENT AND CONSTRUCTION CONTRACT ("Agreement") is entered into as of the 1st day of February, 2006 (the "**Effective Date**"), by and between Public Service Company of Colorado, a corporation organized under the laws of the State of Colorado ("**Company**") d/b/a Xcel Energy, and Stone & Webster, Inc , a corporation organized under the laws of the State of Louisiana ("**Contractor**"). Company and Contractor are sometimes individually referred to herein as a "**Party**" and collectively as the "**Parties**."

W I T N E S S E T H:

WHEREAS, Company desires to purchase from Contractor certain necessary work and services required in connection with the engineering, design, procurement, construction, testing and commissioning for the Facility, as defined below, on a lump sum price basis; and

WHEREAS, Contractor desires to sell such engineering, design, procurement, construction and related services for the Facility, all of which shall be provided on a lump sum price basis upon the terms and subject to the conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties covenant and agree as follows

ARTICLE 1 - DEFINED TERMS; INTERPRETATION

1.1 Defined Terms As used in this Agreement, the following capitalized terms shall have the following meanings (such meanings as necessary to be equally applicable to both the singular and plural forms of the terms defined unless the context otherwise requires).

"**Acceptance**" means the satisfaction of the requirements set forth in Section 9.5.1.

"**Acceptance Date**" means the date determined in accordance with Section 9.5.3 as the date on which Acceptance occurs.

"**Access Plan**" has the meaning set forth in Section 4.15.2.

"**Affected Party**" has the meaning set forth in Section 14.1

"**Affiliate**" means, with respect to any Person, any other Person which (a) such first Person directly or indirectly, in whole or in part, owns, is owned by or is in common ownership with, or (b) such first Person directly or indirectly controls, is controlled by or is under common control with. The term "control" shall mean, with respect to a Person, the possession, directly or indirectly, of the ability to influence management decisions regarding the business of such a Person, including the ability to block or otherwise limit major decisions of the Person (e.g , increased debt, sale or transfer of share capital (initial or transfer of existing), operation and maintenance decisions, mergers or other restructuring, determination of business plans or budgets, entering into significant contracts or transactions, etc).

"**Agreement**" means this Balance of Plant Engineering, Procurement and Construction Contract, all Schedules hereto, and all written amendments hereto.

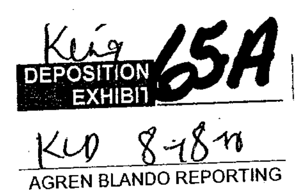
COMANCHE UNIT 3

BALANCE OF PLANT

Engineering, Procurement, and Construction Contract

Book 1 of 4

(Through Schedule A and Tables)



PLAINTIFF'S EXHIBIT
1
Case No. 09CV6913

Controlled Copy No. R00

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9.2 Start-Up and Turnover.

9.2.1 General. Start-up and commissioning of the BOP Facility, as more fully described in Schedule C, shall commence promptly following the Mechanical Completion Date. Contractor shall perform all testing relating to the start-up, commissioning, tuning and testing of the BOP Facility following Mechanical Completion as may be necessary to make the BOP Facility ready for performance testing pursuant to Article 10 This portion of the Work shall include the performance of start-up, commissioning and testing activities set forth in Schedule C

9.2.2 Training and Technical Direction of Company Personnel. As provided in Section 5.8.3, Company shall supply operating and maintenance Personnel to perform the start-up and commissioning activities described in Schedule C under Contractor's technical direction. Such operating Personnel shall have previous plant experience or power plant fundamentals training Contractor shall have completed that portion of any classroom or other training of Company's Personnel prior to the commencement of start-up and commissioning activities, as may be necessary to prepare Company's Personnel for such activities. Contractor shall provide Personnel meeting the qualification requirements of this Agreement to administer the training and to provide technical direction to personnel staffed by Company for the start-up, commissioning or performance testing activities under this Agreement Contractor shall be responsible for the technical direction of Company's operation and maintenance personnel until the Care, Custody and Control Transfer Date.

9.2.3 Transfer of Care, Custody and Control to Company Company shall be solely responsible for the care, custody, control, operation and maintenance of the BOP Facility and bear the risk of loss, damage or destruction thereto, subject to Company's rights against Contractor hereunder, upon the earlier of (i) the date of Substantial Completion of the Facility or (ii) the termination of this Agreement in accordance with Article 16 (the "Care, Custody and Control Transfer Date"). Following transfer of possession and control of the BOP Facility to Company, Contractor shall have access to the Facility Site in Company's reasonable discretion and cooperation in Company's reasonable discretion as may be necessary for Contractor to complete any Work, including Warranty Work, still remaining to be performed hereunder. If Contractor's performance of its remaining Work hereunder requires a shutdown or reduction of the Facility's operation, the Parties shall cooperate to minimize any impacts on the operation of the Facility. At its discretion, Company may elect to accept care, custody and control of individual systems prior to the Care, Custody and Control Transfer Date once Contractor has performed the turnover activities for such system provided in Schedule C.

9.3 Substantial Completion.

9.3.1 Criteria for Substantial Completion. "Substantial Completion" of the Facility shall occur when all of the following conditions have been satisfied:

(a) Mechanical Completion for the Facility has been achieved;

(b) The most recent Completed Substantial Completion Test demonstrates achievement of the Minimum Performance Standards while meeting all requirements of Permits;

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(c) Substantial Completion Date Contractor guarantees that it shall cause the Substantial Completion Date to occur on or before the date shown on the Milestone Work Schedule (the "Guaranteed Substantial Completion Date").

(d) Acceptance Date. Contractor guarantees that it shall cause the Acceptance Date to occur on or before the date that is one-hundred and eighty (180) Days after the Substantial Completion Date (the "Guaranteed Acceptance Date").

11 2. Liquidated Damages.

11.2.1 Performance Liquidated Damages. If Contractor has failed to demonstrate compliance with the applicable Performance Guarantees in accordance with Schedule D by the Guaranteed Acceptance Date and such failure is not attributable to delay or obstruction of the Work caused by an Other Contractor or Company, Contractor shall pay Liquidated Damages to Company in accordance with Schedule D

11.2.2 Performance Liquidated Damages Cap. The aggregate amount of Performance Liquidated Damages payable under this Agreement shall not exceed ten percent (10%) of the Agreement Price, as amended by all Change Orders, as applicable.

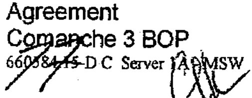
11.2.3 Schedule Liquidated Damages.

11 2 3.1 [Not Used.]

11 2 3.2 Foundation Turnover Liquidated Damages. If Contractor fails to complete the foundations for the Boiler Facility Site, the SDA Area or the Balance of AQCS Area in accordance with the requirements of Schedule A and make the foundations for such Other Contractor Area available to Company or to the applicable Other Contractor by the respective date for such Other Contractor Area set forth in the Milestone Work Schedule and as provided in Section 11.1.2(b), Contractor shall pay to Company the sum of (i) fifteen thousand dollars ($15,000) per Day for the first fourteen (14) Days that the date of turnover of any such Other Contractor Area is later than the applicable date set forth in the Milestone Work Schedule and (ii) the sum of thirty thousand dollars ($30,000) per Day thereafter (the "Foundation Turnover Liquidated Damages").

11 2 3 3 Substantial Completion Liquidated Damages If the Substantial Completion Date is after the Guaranteed Substantial Completion Date, Contractor shall pay to Company the sum of one hundred fifty thousand dollars ($150,000 00) per Day for each Day the Substantial Completion Date is later than the Guaranteed Substantial Completion Date (the "Substantial Completion Liquidated Damages").

11 2.3.4 Schedule Liquidated Damages Cap. The Liquidated Damages provided in this Section 11.2.3 shall be collectively referred to as the "Schedule Liquidated Damages." The aggregate amount of Schedule Liquidated Damages under this Agreement shall not exceed ten



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action against any Co-Owner or any Financing Party to any of their respective assets in connection with any matter arising out of or in connection with the Agreement.

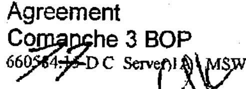
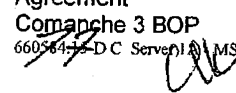
ARTICLE 6 - OTHER CONTRACTS AND CONTRACTORS; DAMAGE TO OTHER PROPERTY.

6.1 Other Contractors Company reserves the right to award other contracts in connection with the engineering, procurement and construction of the Facility and in connection with the operation and maintenance of the Facility and the Existing Facility Contractor acknowledges that Company's Personnel and Other Contractors, and their subcontractors, shall be performing work on the Facility Site and the Site during Contractor's performance of the Work. Contractor shall reasonably cooperate, schedule and coordinate performance of the Work on and off the Facility Site with the work of Company's Personnel and any other contractors retained by Company, and their respective subcontractors, with the goal to avoid delay or interference with their work, Contractor's Work or with the timely completion of the Facility. This cooperation and coordination shall include compliance with the Access Plan provided under Section 4.15. Contractor shall not raise any reasonable cooperation and coordination as the basis for any Change Order Request or delay of its performance under this Agreement. If an Other Contractor's actions or inactions cause significant delay or cost increases to Contractor that could not reasonably be avoided or otherwise mitigated without significant cost or delay, such cost or delay may form the basis of a Change Order.

6.2 Damage to Existing Facility or Other Contractors' Work

6.2.1 Should Contractor's work or property be damaged by the acts or neglect of any other contractor(s), or should Contractor cause damage to the work or property of any other contractor(s), Contractor shall endeavor to resolve separately such matter with the other contractor(s) without involving Company and without impeding the Work or that of other contractors. Should Contractor be unable to resolve such matter with the relevant contractor(s) within a reasonable period of time, Contractor shall refer the matter in writing to Company and Company shall make reasonable efforts to assist in resolving the matter. In no event shall Company be liable to Contractor as a result of damage to Contractor's property or injury or death suffered by Contractor's Personnel that is caused by another contractor.

6.2.2 Contractor shall be responsible for (i) any damage Contractor or its Subcontractors cause to the property of Other Contractors and contractors retained by Company to work at the Existing Facility, to the extent Company's Industrial All Risk insurance policy, as provided in Schedule N, or its operating property insurance policies do not cover such damage and (ii) any personal injury, including death, caused by Contractor or its Subcontractors to Personnel of Other Contractors or contractors retained by Company to work at the Existing Facility. Contractor shall resolve any resulting claims directly with the affected contractor or Other Contractor Contractor shall indemnify Company against any Claims imposed on, incurred by or asserted against Company as a result of such property damage or personal injury, including death, caused by Contractor or its Subcontractors to the extent that Company is not protected against such Claims under its own insurance policies.

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terms of the Agreement. Based upon such information, Company may, but shall not be obligated to, issue a Change Order making a Change based upon such Change Order Notice. If Company does issue such Change Order, but Company and Contractor cannot promptly reach agreement on the value of such Change, and Company orders Contractor by Notice to promptly proceed to complete the Change in accordance with Company's interpretation of the matter but under protest, Company shall pay Contractor for the amounts associated with such Change Order on a time and materials basis in accordance with Schedule AE. In the event Company and Contractor cannot reach agreement on the schedule change or estimated cost or other impacts of the Change within fifteen (15) Days after Contractor is ordered to proceed under protest, either Party may submit the matter for dispute resolution pursuant to Article 20.

13.3 Changes Involving Schedule Extensions. To the extent that Contractor demonstrates, to Company's reasonable satisfaction, that a Change or the Change Event necessitating a Change, as described in Sections 13.2 shall delay Contractor in complying with the Work Schedule, then Company shall cause the Change Order directing such Change (or resulting from such Change Event) to extend the dates in the Work Schedule, including the Guaranteed Contract Date(s), by the number of Days, at a maximum, equal to the number of calendar Days of delay in the critical path progress of the Work reasonably demonstrated by Contractor as resulting from the event necessitating the Change.

13.4 Changes to the Agreement Price. In the event a Change Order issued pursuant to Section 13.2 shall increase or decrease the Work, the Agreement Price shall be increased or decreased by Change Order, and the value of the increase or decrease shall be established in one of two ways: a) Contractors' actual, verifiable total direct costs associated with such Change in accordance with Schedule AE or b) negotiated lump sum value; provided, however, that any adjustment to the Agreement Price due to an event of Force Majeure shall be as provided in Section 14.5. It shall be at the sole discretion of Company as to which such method shall be employed. All costs associated with such Change that are not included in Schedule AE or not encompassed in the lump sum quote shall be borne entirely by Contractor, and Company shall have no liability therefor. Each Change Order shall specify the amount and timing of payments, the sum of which shall equal the amount of the change to the Agreement Price.

13.5 Continued Performance Pending Resolution of Disputes. Notwithstanding and pending resolution of any dispute with respect to a Change, Contractor shall proceed, upon Notice from Company, with the performance of any Change Order issued by Company in accordance with Article 13.

13.6 Company's Right to Select Changes. Whenever there are different possible Changes that can be made in response to a Change Event and those Changes have different effects on the Work Schedule, Agreement Price and Performance Guarantees, Company may in its sole discretion, but after consultation with Contractor, select from among such Changes, with the concomitant adjustments to the Work Schedule, Agreement Price, and Performance Guarantees in accordance with Sections 13.3 and 13.4, as applicable.

13.7 Company's Right to Utilize Other Contractors. Whenever it is determined by Company that the work to be performed under a proposed Change Order can best be accomplished by a Person other than the Contractor, Company may invoke such rights without impeding or damaging this Agreement. Contractor agrees to reasonably cooperate with Company's endeavors and with such Person, and Company for itself and such Person agrees to cooperate with Contractor.

(c) Substantial Completion Date Contractor guarantees that it shall cause the Substantial Completion Date to occur on or before the date shown on the Milestone Work Schedule (the "Guaranteed Substantial Completion Date").

(d) Acceptance Date. Contractor guarantees that it shall cause the Acceptance Date to occur on or before the date that is one-hundred and eighty (180) Days after the Substantial Completion Date (the "Guaranteed Acceptance Date").

11 2. Liquidated Damages.

11.2.1 Performance Liquidated Damages. If Contractor has failed to demonstrate compliance with the applicable Performance Guarantees in accordance with Schedule D by the Guaranteed Acceptance Date and such failure is not attributable to delay or obstruction of the Work caused by an Other Contractor or Company, Contractor shall pay Liquidated Damages to Company in accordance with Schedule D

11.2.2 Performance Liquidated Damages Cap. The aggregate amount of Performance Liquidated Damages payable under this Agreement shall not exceed ten percent (10%) of the Agreement Price, as amended by all Change Orders, as applicable.

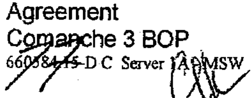
11.2.3 Schedule Liquidated Damages.

11 2 3.1 [Not Used.]

11 2 3.2 Foundation Turnover Liquidated Damages. If Contractor fails to complete the foundations for the Boiler Facility Site, the SDA Area or the Balance of AQCS Area in accordance with the requirements of Schedule A and make the foundations for such Other Contractor Area available to Company or to the applicable Other Contractor by the respective date for such Other Contractor Area set forth in the Milestone Work Schedule and as provided in Section 11.1.2(b), Contractor shall pay to Company the sum of (i) fifteen thousand dollars ($15,000) per Day for the first fourteen (14) Days that the date of turnover of any such Other Contractor Area is later than the applicable date set forth in the Milestone Work Schedule and (ii) the sum of thirty thousand dollars ($30,000) per Day thereafter (the "Foundation Turnover Liquidated Damages").

11.2.3 3 Substantial Completion Liquidated Damages If the Substantial Completion Date is after the Guaranteed Substantial Completion Date, Contractor shall pay to Company the sum of one hundred fifty thousand dollars ($150,000 00) per Day for each Day the Substantial Completion Date is later than the Guaranteed Substantial Completion Date (the "Substantial Completion Liquidated Damages").

11 2.3.4 Schedule Liquidated Damages Cap. The Liquidated Damages provided in this Section 11.2.3 shall be collectively referred to as the "Schedule Liquidated Damages." The aggregate amount of Schedule Liquidated Damages under this Agreement shall not exceed ten



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16.5.2 If Company is in material default of non-monetary obligations under this Agreement, and, if Company fails to diligently commence reasonable efforts to correct such conditions within ten (10) Days Notice from Contractor thereof and to complete the correction of such condition within thirty (30) Days (or such longer period as is reasonably required), Contractor may, if such default prevents Contractor from performing the Work, upon fifteen (15) Business Days' prior written notice to Company stop the affected portion of the Work until Company completes the correction of such condition, at which time Contractor shall immediately re-commence performance of the Work. Contractor shall be entitled to be reimbursed for reasonably incurred suspension and resumption expenses. If Company fails to correct such condition within sixty (60) Days after Contractor provides Notice under this Section 16.5 (or such longer period as is reasonably required to cure such default), Contractor may terminate this Agreement if such default materially interferes with Contractor's performance of the Work. In the event of such termination, Contractor shall be compensated for its costs in accordance with the provisions of Section 16 1 1.

16.6 Surviving Obligations. Termination of this Agreement: (a) shall not relieve either Party of any obligation hereunder which expressly or by implication survives termination hereof; (b) except as otherwise provided in any provision of this Agreement expressly limiting the liability of either Party, shall not relieve either Party of any obligations or liabilities for loss or damage to the other Party arising out of or caused by acts or omissions of such Party prior to the effectiveness of such termination or arising out of such termination, to the extent provided under this Agreement; and (c) shall not relieve Contractor of its obligations as to portions of the Work already performed or of obligations assumed by Contractor prior to the date of termination.

16.7 Duty to Mitigate Damages Each Party shall have the duty to mitigate damages to it arising from any default hereunder by the other Party.

16.8 Partial Replacement without Termination. If at any time during the Term of this Agreement, Company determines that Contractor is not proceeding with all due diligence to complete the Work in order to cause the Substantial Completion Date or the Acceptance Date to occur on or before the Guaranteed Substantial Completion Date or the Guaranteed Acceptance Date, and Company has not terminated the Agreement, then Company may, after thirty (30) Days' Notice, engage another contractor in addition to or in lieu of Contractor, to complete such unfinished Work by whatever reasonable method Company deems expedient and shall issue a Change Order as reasonably determined by Company to reflect the decrease in Contractor's scope of Work and corresponding reduction in Contractor's compensation in accordance with Section 13.4. To the extent the sum of (a) the amounts paid to Contractor and/or retained by Company plus (b) the costs incurred by Company as a result of such other contractor's performance of the Work exceeds the Agreement Price, Contractor shall pay the difference to Company promptly upon demand Contractor shall not in any way interfere with such other contractor's performance of such services and Work.

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action against any Co-Owner or any Financing Party to any of their respective assets in connection with any matter arising out of or in connection with the Agreement.

ARTICLE 6 - OTHER CONTRACTS AND CONTRACTORS; DAMAGE TO OTHER PROPERTY.

6.1 Other Contractors Company reserves the right to award other contracts in connection with the engineering, procurement and construction of the Facility and in connection with the operation and maintenance of the Facility and the Existing Facility Contractor acknowledges that Company's Personnel and Other Contractors, and their subcontractors, shall be performing work on the Facility Site and the Site during Contractor's performance of the Work. Contractor shall reasonably cooperate, schedule and coordinate performance of the Work on and off the Facility Site with the work of Company's Personnel and any other contractors retained by Company, and their respective subcontractors, with the goal to avoid delay or interference with their work, Contractor's Work or with the timely completion of the Facility. This cooperation and coordination shall include compliance with the Access Plan provided under Section 4.15. Contractor shall not raise any reasonable cooperation and coordination as the basis for any Change Order Request or delay of its performance under this Agreement. If an Other Contractor's actions or inactions cause significant delay or cost increases to Contractor that could not reasonably be avoided or otherwise mitigated without significant cost or delay, such cost or delay may form the basis of a Change Order.

6.2 Damage to Existing Facility or Other Contractors' Work

6.2.1 Should Contractor's work or property be damaged by the acts or neglect of any other contractor(s), or should Contractor cause damage to the work or property of any other contractor(s), Contractor shall endeavor to resolve separately such matter with the other contractor(s) without involving Company and without impeding the Work or that of other contractors. Should Contractor be unable to resolve such matter with the relevant contractor(s) within a reasonable period of time, Contractor shall refer the matter in writing to Company and Company shall make reasonable efforts to assist in resolving the matter. In no event shall Company be liable to Contractor as a result of damage to Contractor's property or injury or death suffered by Contractor's Personnel that is caused by another contractor.

6.2.2 Contractor shall be responsible for (i) any damage Contractor or its Subcontractors cause to the property of Other Contractors and contractors retained by Company to work at the Existing Facility, to the extent Company's Industrial All Risk insurance policy, as provided in Schedule N, or its operating property insurance policies do not cover such damage and (ii) any personal injury, including death, caused by Contractor or its Subcontractors to Personnel of Other Contractors or contractors retained by Company to work at the Existing Facility. Contractor shall resolve any resulting claims directly with the affected contractor or Other Contractor Contractor shall indemnify Company against any Claims imposed on, incurred by or asserted against Company as a result of such property damage or personal injury, including death, caused by Contractor or its Subcontractors to the extent that Company is not protected against such Claims under its own insurance policies.

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terms of the Agreement. Based upon such information, Company may, but shall not be obligated to, issue a Change Order making a Change based upon such Change Order Notice If Company does issue such Change Order, but Company and Contractor cannot promptly reach agreement on the value of such Change, and Company orders Contractor by Notice to promptly proceed to complete the Change in accordance with Company's interpretation of the matter but under protest, Company shall pay Contractor for the amounts associated with such Change Order on a time and materials basis in accordance with Schedule AE. In the event Company and Contractor cannot reach agreement on the schedule change or estimated cost or other impacts of the Change within fifteen (15) Days after Contractor is ordered to proceed under protest, either Party may submit the matter for dispute resolution pursuant to Article 20.

13 3 Changes Involving Schedule Extensions. To the extent that Contractor demonstrates, to Company's reasonable satisfaction, that a Change or the Change Event necessitating a Change, as described in Sections 13.2 shall delay Contractor in complying with the Work Schedule, then Company shall cause the Change Order directing such Change (or resulting from such Change Event) to extend the dates in the Work Schedule, including the Guaranteed Contract Date(s), by the number of Days, at a maximum, equal to the number of calendar Days of delay in the critical path progress of the Work reasonably demonstrated by Contractor as resulting from the event necessitating the Change.

13.4 Changes to the Agreement Price. In the event a Change Order issued pursuant to Section 13.2 shall increase or decrease the Work, the Agreement Price shall be increased or decreased by Change Order, and the value of the increase or decrease shall be established in one of two ways: a) Contractors' actual, verifiable total direct costs associated with such Change in accordance with Schedule AE or b) negotiated lump sum value; provided, however, that any adjustment to the Agreement Price due to an event of Force Majeure shall be as provided in Section 14.5. It shall be at the sole discretion of Company as to which such method shall be employed. All costs associated with such Change that are not included in Schedule AE or not encompassed in the lump sum quote shall be borne entirely by Contractor, and Company shall have no liability therefor Each Change Order shall specify the amount and timing of payments, the sum of which shall equal the amount of the change to the Agreement Price.

13.5 Continued Performance Pending Resolution of Disputes Notwithstanding and pending resolution of any dispute with respect to a Change, Contractor shall proceed, upon Notice from Company, with the performance of any Change Order issued by Company in accordance with Article 13.

13 6 Company's Right to Select Changes. Whenever there are different possible Changes that can be made in response to a Change Event and those Changes have different effects on the Work Schedule, Agreement Price and Performance Guarantees, Company may in its sole discretion, but after consultation with Contractor, select from among such Changes, with the concomitant adjustments to the Work Schedule, Agreement Price, and Performance Guarantees in accordance with Sections 13 3 and 13.4, as applicable

13.7 Company's Right to Utilize Other Contractors. Whenever it is determined by Company that the work to be performed under a proposed Change Order can best be accomplished by a Person other than the Contractor, Company may invoke such rights without impeding or damaging this Agreement Contractor agrees to reasonably cooperate with Company's endeavors and with such Person, and Company for itself and such Person agrees to cooperate with Contractor

13 8 Exclusive Remedy. Except as set forth in this Article 13 or as expressly provided elsewhere in this Agreement, Contractor shall not be entitled to payment, damages, monies, or compensation from Company for changes of any kind (whether arising because of hindrance or delay or any other cause whatsoever) whether such hindrances or delays be reasonable or unreasonable, foreseeable or unforeseeable, contemplated or not contemplated, or avoidable or unavoidable. Contractor shall be entitled to extensions in the Work Schedule only as specifically provided in this Agreement. Change Orders shall constitute the exclusive remedy to Contractor for any Changes once agreed to in a Change Order executed by both Parties.

13.9 Documentation. All claims by Contractor for adjustments to the Agreement Price, Performance Guarantees and/or the Work Schedule as a result of Changes under this Article 13 shall be supported by such documentation as Company may reasonably require to verify the accuracy thereof

ARTICLE 14 - FORCE MAJEURE

14.1 Force Majeure Event. As used in this Agreement, an event of "Force Majeure" shall mean any event that: (a) prevents or materially hinders the affected Party (the "Affected Party") from performing its obligations under this Agreement or complying with any conditions required by the other Party under this Agreement; and (b) is beyond the reasonable control of and not the result of the fault or negligence of the Affected Party (including such Affected Party's Personnel and subcontractors); and (c) could not have been prevented or avoided by the exercise of reasonable diligence by the Affected Party or its Personnel or subcontractors. For purposes of subsection (b) above, the events that may be considered to be beyond the reasonable control of an Affected Party include: war, civil insurrection, governmental expropriation, Acts of God, hurricanes, earthquakes, fires, tornadoes, typhoons, lightning strikes at the Facility Site before lightning protection systems are in service, epidemics, quarantines, riots, industry-wide or region-wide strikes or strikes in violation of the PLA, acts of terrorism and the results thereof and acts of sabotage. In no instance shall the following be considered events beyond Contractor's reasonable control or constitute a Force Majeure event: (i) strikes or labor disturbances, except to the extent provided in the previous sentence; (ii) availability of, or price levels or fluctuations with respect to labor, Materials, Services, supplies or components of Equipment related to items to be supplied by Contractor under this Agreement, unless due to Force Majeure; (iii) economic hardship; (iv) normal climatic conditions (based upon twenty-five (25) year minimums and maximums) at the Facility Site, (v) lightning strikes on buildings or structures or associated equipment (except as provided above); (vi) any delay or failure of Contractor to obtain Equipment due to the delay or failure of any Subcontractor to perform any obligation to Contractors, unless such delay or failure is caused by an event of Force Majeure; (vii) fires at the BOP Facility Site due to the fault of Contractor; or (viii) Equipment failure due to Contractor

14 2 Burden of Proof. The burden of proof as to whether a Force Majeure event has occurred shall be upon the Party claiming a Force Majeure event

14 3 Excused Performance. If the Affected Party is rendered wholly or partly unable to perform its obligations under this Agreement because of a Force Majeure event, such Affected Party shall be excused from whatever performance is affected by the Force Majeure event to the extent so affected. The Affected Party shall give the other Party initial Notice of the Force Majeure event within three (3) Business Days after becoming aware of any impact from the event in question, describing the particulars of the occurrence and the impact. As

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soon as possible but in any event within fifteen (15) days after giving initial Notice of the Force Majeure event, the affected Party shall give the other Party an estimate of its expected duration and probable impact on the performance of such Party's obligations. Contractor shall submit to Company for its approval a preliminary plan to cure or abate the event (the "Preliminary Mitigation Plan") as soon as practicable but not later than five (5) Business Days after giving or receiving (as the case may be) the Notice described in the preceding sentence. In the Preliminary Mitigation Plan, Contractor shall detail: (i) the losses it has suffered to date, if any, directly as a result of such event of Force Majeure and provide satisfactory evidence of such losses; (ii) the out of pocket costs it has incurred to date, if any, to mitigate and recover from such event; and (iii) an estimate of the additional costs and details on the types of costs it expects to incur, if any, in further mitigating and completing its recovery. Contractor shall continue to furnish timely regular reports, but no less than weekly, with respect to the duration, impact and Contractor's plan to cure/abate during the continuation of the Force Majeure event.

14 4 Suspension Duration The suspension of performance resulting from such Force Majeure event shall be of no greater scope and of no longer duration than is reasonably required by the Force Majeure event Any extension of Guaranteed Contract Dates or the Work Schedule arising from a Force Majeure event shall exclude any delay caused by delay that is not due to Force Majeure.

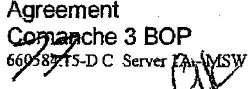
14 5 Compensation for Events of Force Majeure. Company will compensate Contractor for the direct costs Contractor incurs as a result of an event of Force Majeure, to the extent that Company is satisfied that such costs (i) are provided for in the Preliminary Mitigation Plan approved by Company pursuant to Section 14 3 and (ii) are reasonable and do not include any profit or fee. Contractor shall reimburse to Company amounts paid to Contractor due to an event of Force Majeure to the extent that such amounts are recovered directly or indirectly by Contractor from the proceeds of insurance policies.

14 6 Prior Obligations. No obligations or liability of either Party that arose before the occurrence of the Force Majeure event causing the suspension of performance are excused as a result of the occurrence of such Force Majeure event; provided, however, that during any period of delay caused by a Force Majeure event that occurs after the Guaranteed Substantial Completion Date and Substantial Completion has not been achieved by such date, the Schedule Completion Liquidated Damages otherwise accruing and payable during such time shall be suspended until such event of Force Majeure ceases to exist. In addition, if Performance Tests are delayed by an event of Force Majeure, the Guaranteed Acceptance Date shall be extended on a day for day basis until such Performance Tests are conducted.

14 7 Mitigation The Affected Party shall continue to perform its obligations under this Agreement to the extent possible, and the Affected Party must use all reasonable efforts to overcome, mitigate and remedy the damages, delays and effects of the Force Majeure event and its inability to perform its obligations under this Agreement as a result thereof.

14.8 Notice of Resumption. When the Affected Party is able to resume performance of its obligations hereunder, that Party shall give the other Party Notice to that effect and shall promptly resume such performance

14.9 Continued Payment Obligations. Under no circumstance shall an event of Force Majeure excuse a Party's obligations to make payments when due under this Agreement



23.10 Amendments No amendments or modifications of this Agreement shall be valid unless evidenced in writing and signed by a duly authorized representative of the Party against which enforcement is sought.

23.11 No Third-Party Rights. This Agreement and all rights hereunder are intended for the sole benefit of the Parties and, to the extent expressly provided, for the benefit of the Financing Parties and the Company Indemnitees and shall not imply or create any rights on the part of, or obligations to, any other Person.

23.12 Company's Obligations Non-recourse. The Parties acknowledge that Company has entered into this Agreement on its own behalf as an owner of the Facility and, if applicable, as agent for the Co-Owners, but in no manner on behalf of its Affiliates. The Parties acknowledge that Contractor shall not have any recourse against any of Company's Affiliates, members, partners, joint venturers, officers, directors, employees, any Financing Party or any Co-Owner for any reason.

23.13 Relationship of the Parties Contractor shall be an independent contractor with respect to the BOP Facility, each part thereof, and the Work, and neither Contractor nor its Subcontractors nor the Personnel of either shall be deemed to be agents, representatives, employees or servants of Company in the performance of the Work, or any part thereof, or in any manner dealt with in this Agreement. Company shall have neither the right to control, nor have any actual, potential or other control over, the methods and means by which Contractor or any of its Personnel or Subcontractors conducts its independent business operations. Contractor shall not perform any act or make any representation to any Person to the effect that Contractor, or any of its Personnel or Subcontractors is the agent, representative, employee or servant of Company

23 14 Publicity. All public relations matters arising out of or in connection with this Agreement shall be Company's responsibility. Contractor shall obtain prior approval of the text of any advertising or promotional literature or material, news or press release or any other publication or publicity in any form or medium concerning this Agreement, the Facility or the Work prior to any dissemination or release by Contractor or any Subcontractors. Contractor shall not use or include Company's or Xcel Energy's name or the name of any Co-Owner (other than Company) of any part of the Facility in any customer or client lists or references without the prior written permission of Company. Contractor shall refer all media inquiries with respect to this Agreement, the Work or the Facility to Company Contractor shall include in each first tier Subcontract a provision requiring such Subcontractor to adhere to the requirements of this Section 23 14.

23.15 Joint Preparation. The Parties acknowledge and agree that the terms and conditions of this Agreement, including but not limited to those relating to allocations of, releases from, exclusions against and limitation of liability, have been freely and fairly negotiated. Each Party acknowledges that in executing this Agreement they rely solely on their own judgment, belief, and knowledge, and such advice as they may have received from their own counsel, and they have not been influenced by any representation or statements made by any other Party or its counsel. No provision in this Agreement is to be interpreted for or against any Party because that Party or its counsel drafted such provisions.

23 16 Counterparts This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

ARTICLE 13 - CHANGES

13.1 Changes. Without invalidating this Agreement, Company may, by issuance of a written order executed by Company and the Contractor substantially in the form of item 3 to Schedule U (each such order, a "Change Order"): (a) instruct Contractor to make certain changes to the Work, including any addition to, deletion from, suspension of or other modification to the quality, function or intent of the Work; and (b) to the extent specifically provided for in this Article 13, adjust the Work Schedule, Performance Guarantees and/or the Agreement Price (all of the foregoing, "Changes"). Changes may only be authorized by Change Orders issued in accordance with this Article 13. Subject to each Party's rights under Article 20, Change Orders shall constitute the exclusive remedy to Contractor for any Changes. In no event shall Contractor undertake a Change until (i) a Change Order has been approved and signed by Company, and (ii) if a disagreement exists as described in Section 13.2.2, Contractor has received Notice from Company to proceed under protest; provided, that nothing herein shall require Contractor to seek a Change Order prior to taking steps to mitigate an emergency or an event of Force Majeure

13.2 Procedure for Changes.

13.2.1 Changes Initiated by Contractor. As soon as Contractor becomes aware of any circumstances which Contractor has reason to believe may necessitate a Change, including a Change in Law, delay by Other Contractor as provided in Section 6.1 or Owner Caused Delay, Contractor shall promptly issue to Company a "Change Order Request" substantially in the form attached as item 3 to Schedule U All Change Order Requests shall include documentation sufficient to enable Company to determine: (a) the factors necessitating the possibility of a Change; (b) the impact which the Change is likely to have on the Agreement Price; (c) the impact which the Change is likely to have on the timely achievement of the milestones set forth on the Milestone Work Schedule (including the Guaranteed Substantial Completion Date and Guaranteed Acceptance Date); and (d) such other information which Company may reasonably request in connection with such Change. Company may, but shall not be obligated to, issue a Change Order pursuant to a Change Order Request If Company agrees that a Change Order will be necessary and that such Change Order will require an adjustment to the Agreement Price, but Company and Contractor cannot promptly reach agreement on the value of such Change, Company shall pay Contractor for the amounts associated with such Change Order on a time and materials basis in accordance with Schedule AE. Unless otherwise stated by Company in writing, any work outside the Work described in the Agreement performed by Contractor prior to its having received a Change Order from Company shall be considered unauthorized work and shall be at Contractor's sole risk and expense. For the avoidance of doubt, Contractor's efforts to mitigate an emergency or an event of Force Majeure is authorized Work

13.2.2 Changes Initiated by Company. If Company desires to make a Change constituting a modification to the quality, function, intent or scope of the Work, it shall submit a "Change Order Notice" to Contractor. Contractor shall promptly review the Change Order Notice and notify Company in writing within ten (10) Business Days of the options for implementing the proposed Change (including, if possible, any option that does not involve an extension of time or additional cost) and the estimated effect(s), if any, that each such option would have on the Performance Guarantees, Agreement Price, Work Schedule and other applicable

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action against any Co-Owner or any Financing Party to any of their respective assets in connection with any matter arising out of or in connection with the Agreement.

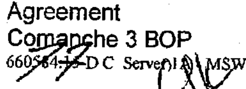
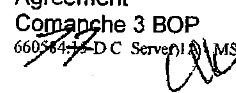
ARTICLE 6 - OTHER CONTRACTS AND CONTRACTORS; DAMAGE TO OTHER PROPERTY.

6.1 Other Contractors Company reserves the right to award other contracts in connection with the engineering, procurement and construction of the Facility and in connection with the operation and maintenance of the Facility and the Existing Facility Contractor acknowledges that Company's Personnel and Other Contractors, and their subcontractors, shall be performing work on the Facility Site and the Site during Contractor's performance of the Work. Contractor shall reasonably cooperate, schedule and coordinate performance of the Work on and off the Facility Site with the work of Company's Personnel and any other contractors retained by Company, and their respective subcontractors, with the goal to avoid delay or interference with their work, Contractor's Work or with the timely completion of the Facility. This cooperation and coordination shall include compliance with the Access Plan provided under Section 4.15. Contractor shall not raise any reasonable cooperation and coordination as the basis for any Change Order Request or delay of its performance under this Agreement. If an Other Contractor's actions or inactions cause significant delay or cost increases to Contractor that could not reasonably be avoided or otherwise mitigated without significant cost or delay, such cost or delay may form the basis of a Change Order.

6.2 Damage to Existing Facility or Other Contractors' Work

6.2.1 Should Contractor's work or property be damaged by the acts or neglect of any other contractor(s), or should Contractor cause damage to the work or property of any other contractor(s), Contractor shall endeavor to resolve separately such matter with the other contractor(s) without involving Company and without impeding the Work or that of other contractors. Should Contractor be unable to resolve such matter with the relevant contractor(s) within a reasonable period of time, Contractor shall refer the matter in writing to Company and Company shall make reasonable efforts to assist in resolving the matter. In no event shall Company be liable to Contractor as a result of damage to Contractor's property or injury or death suffered by Contractor's Personnel that is caused by another contractor.

6.2.2 Contractor shall be responsible for (i) any damage Contractor or its Subcontractors cause to the property of Other Contractors and contractors retained by Company to work at the Existing Facility, to the extent Company's Industrial All Risk insurance policy, as provided in Schedule N, or its operating property insurance policies do not cover such damage and (ii) any personal injury, including death, caused by Contractor or its Subcontractors to Personnel of Other Contractors or contractors retained by Company to work at the Existing Facility. Contractor shall resolve any resulting claims directly with the affected contractor or Other Contractor Contractor shall indemnify Company against any Claims imposed on, incurred by or asserted against Company as a result of such property damage or personal injury, including death, caused by Contractor or its Subcontractors to the extent that Company is not protected against such Claims under its own insurance policies.

Return

terms of the Agreement. Based upon such information, Company may, but shall not be obligated to, issue a Change Order making a Change based upon such Change Order Notice If Company does issue such Change Order, but Company and Contractor cannot promptly reach agreement on the value of such Change, and Company orders Contractor by Notice to promptly proceed to complete the Change in accordance with Company's interpretation of the matter but under protest, Company shall pay Contractor for the amounts associated with such Change Order on a time and materials basis in accordance with Schedule AE. In the event Company and Contractor cannot reach agreement on the schedule change or estimated cost or other impacts of the Change within fifteen (15) Days after Contractor is ordered to proceed under protest, either Party may submit the matter for dispute resolution pursuant to Article 20.

13 3 Changes Involving Schedule Extensions. To the extent that Contractor demonstrates, to Company's reasonable satisfaction, that a Change or the Change Event necessitating a Change, as described in Sections 13.2 shall delay Contractor in complying with the Work Schedule, then Company shall cause the Change Order directing such Change (or resulting from such Change Event) to extend the dates in the Work Schedule, including the Guaranteed Contract Date(s), by the number of Days, at a maximum, equal to the number of calendar Days of delay in the critical path progress of the Work reasonably demonstrated by Contractor as resulting from the event necessitating the Change.

13.4 Changes to the Agreement Price. In the event a Change Order issued pursuant to Section 13.2 shall increase or decrease the Work, the Agreement Price shall be increased or decreased by Change Order, and the value of the increase or decrease shall be established in one of two ways: a) Contractors' actual, verifiable total direct costs associated with such Change in accordance with Schedule AE or b) negotiated lump sum value; provided, however, that any adjustment to the Agreement Price due to an event of Force Majeure shall be as provided in Section 14.5. It shall be at the sole discretion of Company as to which such method shall be employed. All costs associated with such Change that are not included in Schedule AE or not encompassed in the lump sum quote shall be borne entirely by Contractor, and Company shall have no liability therefor Each Change Order shall specify the amount and timing of payments, the sum of which shall equal the amount of the change to the Agreement Price.

13.5 Continued Performance Pending Resolution of Disputes Notwithstanding and pending resolution of any dispute with respect to a Change, Contractor shall proceed, upon Notice from Company, with the performance of any Change Order issued by Company in accordance with Article 13.

13 6 Company's Right to Select Changes. Whenever there are different possible Changes that can be made in response to a Change Event and those Changes have different effects on the Work Schedule, Agreement Price and Performance Guarantees, Company may in its sole discretion, but after consultation with Contractor, select from among such Changes, with the concomitant adjustments to the Work Schedule, Agreement Price, and Performance Guarantees in accordance with Sections 13 3 and 13.4, as applicable

13.7 Company's Right to Utilize Other Contractors. Whenever it is determined by Company that the work to be performed under a proposed Change Order can best be accomplished by a Person other than the Contractor, Company may invoke such rights without impeding or damaging this Agreement Contractor agrees to reasonably cooperate with Company's endeavors and with such Person, and Company for itself and such Person agrees to cooperate with Contractor

THIS BALANCE OF PLANT ENGINEERING, PROCUREMENT AND CONSTRUCTION CONTRACT ("Agreement") is entered into as of the 1st day of February, 2006 (the "**Effective Date**"), by and between Public Service Company of Colorado, a corporation organized under the laws of the State of Colorado ("**Company**") d/b/a Xcel Energy, and Stone & Webster, Inc , a corporation organized under the laws of the State of Louisiana ("**Contractor**"). Company and Contractor are sometimes individually referred to herein as a "**Party**" and collectively as the "**Parties**."

W I T N E S S E T H:

WHEREAS, Company desires to purchase from Contractor certain necessary work and services required in connection with the engineering, design, procurement, construction, testing and commissioning for the Facility, as defined below, on a lump sum price basis; and

WHEREAS, Contractor desires to sell such engineering, design, procurement, construction and related services for the Facility, all of which shall be provided on a lump sum price basis upon the terms and subject to the conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties covenant and agree as follows

ARTICLE 1 - DEFINED TERMS; INTERPRETATION

1.1 Defined Terms As used in this Agreement, the following capitalized terms shall have the following meanings (such meanings as necessary to be equally applicable to both the singular and plural forms of the terms defined unless the context otherwise requires).

"**Acceptance**" means the satisfaction of the requirements set forth in Section 9.5.1.

"**Acceptance Date**" means the date determined in accordance with Section 9.5.3 as the date on which Acceptance occurs.

"**Access Plan**" has the meaning set forth in Section 4.15.2.

"**Affected Party**" has the meaning set forth in Section 14.1

"**Affiliate**" means, with respect to any Person, any other Person which (a) such first Person directly or indirectly, in whole or in part, owns, is owned by or is in common ownership with, or (b) such first Person directly or indirectly controls, is controlled by or is under common control with. The term "control" shall mean, with respect to a Person, the possession, directly or indirectly, of the ability to influence management decisions regarding the business of such a Person, including the ability to block or otherwise limit major decisions of the Person (e.g , increased debt, sale or transfer of share capital (initial or transfer of existing), operation and maintenance decisions, mergers or other restructuring, determination of business plans or budgets, entering into significant contracts or transactions, etc).

"**Agreement**" means this Balance of Plant Engineering, Procurement and Construction Contract, all Schedules hereto, and all written amendments hereto.

23.10 Amendments No amendments or modifications of this Agreement shall be valid unless evidenced in writing and signed by a duly authorized representative of the Party against which enforcement is sought.

23.11 No Third-Party Rights. This Agreement and all rights hereunder are intended for the sole benefit of the Parties and, to the extent expressly provided, for the benefit of the Financing Parties and the Company Indemnitees and shall not imply or create any rights on the part of, or obligations to, any other Person.

23.12 Company's Obligations Non-recourse. The Parties acknowledge that Company has entered into this Agreement on its own behalf as an owner of the Facility and, if applicable, as agent for the Co-Owners, but in no manner on behalf of its Affiliates. The Parties acknowledge that Contractor shall not have any recourse against any of Company's Affiliates, members, partners, joint venturers, officers, directors, employees, any Financing Party or any Co-Owner for any reason.

23.13 Relationship of the Parties Contractor shall be an independent contractor with respect to the BOP Facility, each part thereof, and the Work, and neither Contractor nor its Subcontractors nor the Personnel of either shall be deemed to be agents, representatives, employees or servants of Company in the performance of the Work, or any part thereof, or in any manner dealt with in this Agreement. Company shall have neither the right to control, nor have any actual, potential or other control over, the methods and means by which Contractor or any of its Personnel or Subcontractors conducts its independent business operations. Contractor shall not perform any act or make any representation to any Person to the effect that Contractor, or any of its Personnel or Subcontractors is the agent, representative, employee or servant of Company

23 14 Publicity. All public relations matters arising out of or in connection with this Agreement shall be Company's responsibility. Contractor shall obtain prior approval of the text of any advertising or promotional literature or material, news or press release or any other publication or publicity in any form or medium concerning this Agreement, the Facility or the Work prior to any dissemination or release by Contractor or any Subcontractors. Contractor shall not use or include Company's or Xcel Energy's name or the name of any Co-Owner (other than Company) of any part of the Facility in any customer or client lists or references without the prior written permission of Company. Contractor shall refer all media inquiries with respect to this Agreement, the Work or the Facility to Company Contractor shall include in each first tier Subcontract a provision requiring such Subcontractor to adhere to the requirements of this Section 23 14.

23.15 Joint Preparation. The Parties acknowledge and agree that the terms and conditions of this Agreement, including but not limited to those relating to allocations of, releases from, exclusions against and limitation of liability, have been freely and fairly negotiated. Each Party acknowledges that in executing this Agreement they rely solely on their own judgment, belief, and knowledge, and such advice as they may have received from their own counsel, and they have not been influenced by any representation or statements made by any other Party or its counsel. No provision in this Agreement is to be interpreted for or against any Party because that Party or its counsel drafted such provisions.

23 16 Counterparts This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

JURY INSTRUCTION NO. 34

Liquidated Damages

If you find in favor of Public Service on its claims that Shaw failed to complete its work on the Comanche 3 Project by the dates agreed to in the BOP Contract and the 2008 Settlement Agreement, and if you also find that the parties agreed on an amount to be paid to Public Service in the event that Shaw failed to timely complete its work, then you shall award that amount to Public Service as damages.

Public Service is entitled to liquidated damages only if it or any of its agents did not contribute to the delays for which it seeks liquidated damages. If you find that Public Service or any of its agents contributed in whole or in part to those delays, then you may not award liquidated damages to Public Service.

JURY INSTRUCTION NO. 15

Agency – Definition

An agency is created by an agreement, written or oral, express or implied, by which the entities agree that one of them is to act for, or in the place of, the other. The entity which agrees to act for another is called the agent, and the other is called the principal.

IN THE DISTRICT COURT IN AND FOR THE COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 2009 CV 6913

Plaintiff: STONE & WEBSTER, INC., v. **Defendant:** PUBLIC SERVICE COMPANY COLORADO d/b/a XCEL ENERGY.	))))))))))	**SPECIAL INTERROGATORY FORM**

1. Was any delay in achieving Full Load, pursuant to the June 2008 Settlement Agreement (Exhibit 2), due in whole or in part to the fault of Public Service or any party you find to be Public Service's agent as defined in Instruction No. 15 ?

☐ Yes

☑ No

2. Was any delay in achieving Substantial Completion, pursuant to the BOP Contract (Exhibit 1), due in whole or in part to the fault of Public Service or any party you find to be Public Service's agent as defined in Instruction No. 15 ?

☐ Yes

☑ No

JURY INSTRUCTION NO. 10

Shaw's Claims for Breach of BOP Contract

For Shaw to recover from Public Service on Shaw's claim of breach of the BOP Contract, you must find all of the following have been proved by a preponderance of the evidence:

1. Shaw entered into the BOP Contract with Public Service to perform work on the Comanche 3 Project; and
2. Public Service failed to perform its obligations on the Comanche 3 Project in a proper and timely manner as required by the BOP Contract; and
3. Shaw substantially performed its part of the BOP Contract.

If you find that any of these three statements has not been proved, then your verdict must be for Public Service.

On the other hand, if you find that all of these three statements have been proved, then you must consider Public Service's affirmative defenses of release and failure to mitigate as defined in Instructions No. 30 + 33

If you find that either of these affirmative defenses has been proved by a preponderance of the evidence, then your verdict must be for Public Service as to this claim.

However, if you find that these affirmative defenses have not been proved by a preponderance of the evidence, then your verdict must be for Shaw as to this claim.

JURY INSTRUCTION NO. 16

Breach of Contract – Actual Damages

If actual damages (as opposed to the liquidated damages claimed by Public Service) have been proved by either party on their claims for breach of contract, then you may award these damages if you find that they were a natural and probable consequence of the breach of contract and the party in breach reasonably could have foreseen at the time the parties entered into the contract that the damages would probably occur if it breached the contract.

IN THE DISTRICT COURT IN AND FOR THE COUNTY OF DENVER,
STATE OF COLORADO

Civil Action No. 2009 CV 6913

Plaintiff: STONE & WEBSTER, INC., v. **Defendant:** PUBLIC SERVICE COMPANY COLORADO d/b/a XCEL ENERGY.	)))))))))	**SPECIAL VERDICT FORM**

1. On Plaintiff Shaw's Claims against Defendant Public Service for breach of the BOP Contract, we the jury find in favor of:

X Plaintiff Shaw

☐ Defendant Public Service

- If in favor of Plaintiff Shaw, we find delay and disruption damages owed to Plaintiff Shaw in the amount of $ 43m .

and

- If in favor of Plaintiff Shaw, we find unpaid contract amounts owed to Plaintiff Shaw to be $ 41,529,031.13 ~~xx~~

JURY INSTRUCTION NO. 7

Claims and Counterclaims

I will now explain the claims and defenses of each party to the case and the law governing the case. Please pay close attention to these instructions. These instructions include both general instructions and instructions specific to the claims and defenses in this case. You must consider all the general and specific instructions together. You must all agree on your verdict, applying the law (as you are now instructed) to the facts as you find them to be.

Each party to this action claims to be entitled to damages from the other. The parties to this case are: Stone & Webster, Inc., the Plaintiff, who is referred to as Shaw, and Public Service Company of Colorado, doing business as Xcel Energy, who is referred to as Public Service. Shaw and Public Service entered into a written contract on February 1, 2006 relating to the construction of the Comanche 3 Power plant near Pueblo, Colorado. I will call that contract the BOP Contract in the rest of these instructions. The BOP Contract was amended from time to time by documents called change orders.

Shaw and Public Service entered into a Settlement Agreement which was dated and effective as of June 18, 2008. That Settlement Agreement was incorporated into and became a part of the BOP Contract through change order 22.

Shaw claims that Public Service breached the BOP Contract and the June 2008 Settlement Agreement by delaying and interfering with its work. Shaw claims that these delays and interferences caused Shaw to incur damages. Shaw also claims that Public Service has failed to pay Shaw for work Shaw has performed on the BOP Contract.

Public Service denies that it breached any aspects of the BOP Contract. Public Service also has certain affirmative defenses, which will be the subject of a later instruction.

IN THE DISTRICT COURT IN AND FOR THE COUNTY OF DENVER, STATE OF COLORADO

Civil Action No. 2009 CV 6913

Plaintiff: STONE & WEBSTER, INC., v. **Defendant:** PUBLIC SERVICE COMPANY COLORADO d/b/a XCEL ENERGY.	)))))))))	**SPECIAL VERDICT FORM**

1. On Plaintiff Shaw's Claims against Defendant Public Service for breach of the BOP Contract, we the jury find in favor of:

X Plaintiff Shaw

☐ Defendant Public Service

- If in favor of Plaintiff Shaw, we find delay and disruption damages owed to Plaintiff Shaw in the amount of $ 43m.

and

- If in favor of Plaintiff Shaw, we find unpaid contract amounts owed to Plaintiff Shaw to be $ 41,529,031.13 xx

d. Failing to effectively coordinate its work with Other Contractors;

e. Failing to effectively implement Access Plans that would allow the Project to meet the requirements of the Milestone Work Schedule;

f. Failing to sequence its work in an efficient manner so as to allow the Project to meet the requirements of the Milestone Work Schedule;

g. Failing to understand the nature of the local labor market and to develop a plan for the effective management of the local labor force;

h. Failing to effectively supervise and manage its labor force;

i. Failing to supply sufficient supplies, tools, and equipment to its labor force to allow for the completion of the work in accordance with the Milestone Work Schedule;

j. Failing to provide a consistent and effective Project management team;

k. Failing to perform its work with sufficient diligence to meet the requirements of the Milestone Work Schedule;

l. Failing to develop and implement a Baseline Work Schedule that would allow for the successful completion of the work to meet the requirements of the Milestone Work Schedule;

m. Unilaterally modifying and changing the logic of its work schedules so as to impede accurate comparison of monthly schedule updates with the Baseline Work Schedule;

n. Failing to properly document change order requests;

o. Submitting change order requests for items that were plainly within Shaw's contractual scope of work;

p. Requesting extensions to the Project schedule without performing the required critical path schedule analysis;

q. Misrepresenting the quantities of work covered by Change Order 23 thereby entitling PSCo to rescind Change Order 23 and recover all costs expended in completing the work covered by the Change Order; and

r. Failing to properly and fairly estimate and price work that was removed from Shaw's work scope pursuant to paragraph 16.8 of the Contract.

JURY INSTRUCTION NO. 11

Public Service's Claim for Breach of the BOP Contract

For Public Service to recover from Shaw on Public Service's claim of breach of the BOP Contract, you must find all of the following have been proved by a preponderance of the evidence:

1. Public Service entered into the BOP Contract with Shaw to perform work on the Comanche 3 Project; and
2. Shaw failed to perform its obligations on the Comanche 3 Project in a proper and timely manner as required by the BOP Contract; and
3. Public Service substantially performed its part of the BOP Contract.

If you find that any of these three statements has not been proved, then you verdict must be for Shaw.

On the other hand, if you find that all of these three statements have been proved, then you must consider Shaw's affirmative defenses of waiver, failure to mitigate, prevention of performance and release as defined in Instructions No. 19, 20, 21 + + 23A.

If you find that any one or more of these affirmative defenses have been proved by a preponderance of the evidence, then your verdict must be for Shaw.

However, if you find that none of these affirmative defenses has been proved by a preponderance of the evidence, then your verdict must be for Public Service.

JURY INSTRUCTION NO. 11

Public Service's Claim for Breach of the BOP Contract

For Public Service to recover from Shaw on Public Service's claim of breach of the BOP Contract, you must find all of the following have been proved by a preponderance of the evidence:

1. Public Service entered into the BOP Contract with Shaw to perform work on the Comanche 3 Project; and
2. Shaw failed to perform its obligations on the Comanche 3 Project in a proper and timely manner as required by the BOP Contract; and
3. Public Service substantially performed its part of the BOP Contract.

If you find that any of these three statements has not been proved, then you verdict must be for Shaw.

On the other hand, if you find that all of these three statements have been proved, then you must consider Shaw's affirmative defenses of waiver, failure to mitigate, prevention of performance and release as defined in Instructions No. 19, 20, 21 + + 23A.

If you find that any one or more of these affirmative defenses have been proved by a preponderance of the evidence, then your verdict must be for Shaw.

However, if you find that none of these affirmative defenses has been proved by a preponderance of the evidence, then your verdict must be for Public Service.

JURY INSTRUCTION NO. 13

Implied Duty of Good Faith and Fair Dealing - Elements

For either party to recover from the other on a claim of breach of contract based upon the implied duty of good faith and fair dealing, you must find by a preponderance of the evidence that the party failed to act in good faith and to deal fairly with the other in performing its obligations under the BOP Contract and/or June 2008 Settlement Agreement.

If you find that this claim has not been proved by a preponderance of the evidence, then your verdict must be against the party asserting a breach of the implied duty of good faith and fair dealing.

On the other hand, if you find that this claim has been proved by a preponderance of the evidence, then you must consider the parties' affirmative defenses.

JURY INSTRUCTION NO. 14

Implied Duty of Good Faith and Fair Dealing - Defined

Every contract requires the parties to act in good faith and to deal fairly with each other in performing or enforcing the express terms of the contract.

A party performs a contract in good faith when its actions are consistent with the agreed common purpose and with the reasonable expectations of the parties. The duty of good faith and fair dealing is breached when a party acts contrary to that agreed common purpose and the parties' reasonable expectations.

JURY INSTRUCTION NO. 28

Replacement Contractor Work/Change Order

Public Service claims that it is entitled to recover the costs of work done by replacement contractors when it removed certain work from Shaw's scope of work. Public Service bears the burden of proving this claim by a preponderance of the evidence. If Public Service proves that it is entitled to costs which have been reasonably incurred under Change Order 23 or Article 16 of the BOP contract then you must consider Shaw's affirmative defenses with respect to this claim. If you find that Shaw has not proven any affirmative defenses with respect to this issue, then you shall calculate and award Public Service's replacement damages in accordance with the provisions of the BOP Contract or Change Orders.

JURY INSTRUCTION NO. 23A

Shaw's Affirmative Defense –Release as to Change Order 23

Shaw's liability to Public Service on Public Service's claim of breach of contract as to Change Order 23 is reduced or eliminated if the affirmative defense of release is proved. This defense is proved if you find all the following:

1. After Shaw and Public Service entered into the BOP Contract, Shaw and Public Service entered into another contract, referred to as "Change Order 23";

2. Change Order 23 released and discharged certain claims asserted by Public Service in this lawsuit according to its express terms;

3. Shaw has fully performed its duties under Change Order 23.

If you find that Shaw has proved this affirmative defense by a preponderance of the evidence, then you must reduce or eliminate Shaw's liability depending on your findings.

JURY INSTRUCTION NO. 17

Multiple Recovery Prohibited

The parties have sued for damages on different claims for relief. The claims for relief on which the parties have sued and on which you have been instructed are:

1. Breach of the BOP Contract;
2. Breach of the 2008 Settlement Agreement;
3. Breach of the Implied Duty of Good Faith and Fair Dealing.

If you find for either party on more than one claim for relief, you may award that party damages only once for the same losses.

<table>
<tr><td>DISTRICT COURT
CITY AND COUNTY OF DENVER, COLORADO

1437 Bannock St.
Denver, CO 80202</td><td>EFILED Document
CO Denver County District Court 2nd JD
Filing Date: Feb 7 2011 4:02PM MST
Filing ID: 35807770
Review Clerk: Nancy E Magdaleno</td></tr>
<tr><td>Plaintiff: STONE & WEBSTER INC.

Defendant: PUBLIC SERVICE COMPANY COLORADO d/b/a XCEL ENGERY</td><td>Case Number: 09CV6913

Courtroom 215</td></tr>
<tr><td colspan="2">Order Regarding Alleged Juror Misconduct</td></tr>
</table>

THIS MATTER comes before me pursuant to Shaw Stone & Webster, Inc.'s (Shaw's) Motion For A Mistrial (the Motion). Having considered all relevant pleadings, I **DENY** the Motion based on the following findings and conclusions.

I. Introduction

The jury returned their verdict in this case on November 12, 2010. On December 14, 2010, I entered judgment (1) for Shaw and against Public Service in the amount of $84,529,031.13 and (2) for Public Service and against Shaw in the amount of $70,000,000.

Shaw has submitted post-trial deposition testimony from four jurors, Mr. Chavez, Mr. Nunn, Ms. Richardson and Ms. Rossina, asserting that another juror, Mr. Craig, made comments during deliberations about disliking Shaw and his willingness to hang the jury if need be. Mr. Craig also allegedly referred to a negative experience he had with a construction contractor who worked on an addition to Mr. Craig's home. At least two of the deposed jurors testified that they reached a compromise verdict because of Mr. Craig's threat to hang the jury.

During *voir dire*, counsel for Shaw asked: "How many of you have ever hired a construction company or contractor to build or fix something?" Exh. 1 at p. 92, ll 1-3. It is unclear whether Mr. Craig raised his hand. At least two other jurors did and they responded to follow up questions. *Id.* at pp. 92-93. Counsel for Shaw also asked: "Is there anything at all that I haven't asked that you think might be important or needs to be disclosed in this context?" *Id.* at p. 135, l. 13. There is no recorded response.

During a post-trial deposition, one of the jurors described the following exchange during deliberations:

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 1437 Bannock Street, Room 256 Denver, Colorado 80202 Telephone: (720) 865-7800	EFILED Document CO Denver County District Court 2nd JD Filing Date: Nov 17 2010 2:35PM MST Filing ID: 34405483 Review Clerk: Imran Sufi
Plaintiff: STONE & WEBSTER, INC. v. **Defendant:** PUBLIC SERVICE COMPANY OF COLORADO d/b/a XCEL ENERGY	▲ COURT USE ONLY ▲
ATTORNEYS FOR PLAINTIFF: Daniel R. Frost, Atty. Reg. #8977 Snell & Wilmer LLP 1200 Seventeenth Street, Suite 1900 Denver, Colorado 80202-5854 Telephone: (303) 634-2000 Facsimile: (303) 634-2020 E-mail: dfrost@swlaw.com Steven D. McCormick, P.C. Pat Cipollone, P.C. Kirkland & Ellis LLP 655 Fifteenth Street, N.W. Washington, D.C. 20005-5793 Telephone: (202) 879-5000 Facsimile: (202) 879-5200	Case Number: 2009-CV-6913 Div. 7 Ctrm:

SHAW STONE & WEBSTER, INC.'S MOTION FOR A MISTRIAL

Plaintiff Shaw Stone & Webster, Inc. ("Shaw") respectfully requests a mistrial.[1] Following the announcement of the verdict on November 12, 2010, counsel for Shaw, like counsel for Xcel and the Court, had the opportunity to speak with several jurors. Based on these conversations, it is now apparent that one juror, Martin Craig, failed to disclose relevant information requested during *voir dire* concerning a personal, adverse experience with a construction contractor. According to these jurors, this experience biased Mr. Craig against

[1] Shaw will shortly file a motion for a new trial and a motion for judgment notwithstanding the verdict concerning a number of additional issues not raised herein, but separately necessitating a new trial or judgment notwithstanding the verdict.

DISTRICT COURT, CITY AND COUNTY OF
DENVER, COLORADO
1437 Bannock Street, Rm. 256, Denver, CO 80202

EFILED Document
CO Denver County District Court 2nd JD
Filing Date: Nov 17 2010 2:35PM MST
Filing ID: 34405483
Review Clerk: Imran Sufi

CIVIL ACTION NO. 2009-CV-6913

EXAMINATION UNDER OATH OF MICHAEL CHAVEZ
EXAMINATION DATE: NOVEMBER 13, 2010

STONE & WEBSTER, INC.,

Plaintiff,

v.

PUBLIC SERVICE COMPANY COLORADO d/b/a XCEL ENERGY,

Defendant.

PURSUANT TO NOTICE, the examination under oath of MICHAEL CHAVEZ was taken at 2:08 p.m. on November 13, 2010, at 1314 West Oxford, Englewood, Colorado, before Nathan Stormo, Registered Professional Reporter and Notary Public in and for the State of Colorado, said examination under oath being taken pursuant to the Colorado Rules of Civil Procedure.

Nathan Stormo
Registered Professional Reporter

B. Extraneous Influence

This leaves the question of whether any of the juror statements nonetheless fall within any exception to the general prohibition of C.R.E. 606(b). Shaw urges me to invoke the "extraneous prejudicial information" exception in support of its claim that Mr. Craig's alleged statements contaminated jury deliberations. I decline.

First, the exception on its face only potentially seems to apply to the "personal contractor" story Mr. Chavez attributes to Mr. Craig, because that is the only statement that refers to any extraneous personal experience. Mr. Craig's alleged statements of antipathy towards Shaw and threats to hang the jury may have been "prejudicial" to Shaw, as most adverse statements tend to be, but they were not "extraneous" to the process of deliberation. On the contrary, they strike me as a predictable byproduct of deliberation. The road to unanimity is no doubt sometimes paved with cathartic fits of pique and threats to stand one's ground.

Second, there has been no showing by Shaw that this extraneous information was actually prejudicial, other than perhaps as to Mr. Craig himself. The only person with whom Mr. Craig shared the "personal contractor" story was Mr. Chavez, who claims he also immediately rebuffed Mr. Craig for going outside the record in the case. "At that point right there I told him, I go, Martin [Craig], I says, now you're bringing your personal experience with a contractor in here into the jury room." Motion, Exh. 2, p. 7, l. 25 and p. 8, ll. 1-3. Mr. Chavez also testified that he shared "what [Craig] told me in that jury room" with Mr. Nunn. *Id.* at p. 8, ll. 7-10. Neither Mr. Chavez nor Mr. Nunn, however, seemed to be influenced by the extraneous information. Moreover, there is nothing indicating that Mr. Chavez or Mr. Nunn shared the story with other jurors. On the contrary, Mr. Chavez, the foreperson, seemed to believe that would have been improper. Even as to Mr. Craig, it is not at all clear to me that he allowed his own negative experience to dictate his verdict in this case. Throughout the month-long trial, Mr. Craig was the most conspicuously attentive juror. He took voluminous notes at all times. His body language betrayed no feelings for either party. Such behavior seems flatly at odds with the notion that he harbored a desire to torpedo Shaw simply in order to avenge his own difficulty with a residential construction contractor.

This still begs the question of whether reference to, or even Mr. Craig's alleged individual reliance upon, a personal experience implicates the "extraneous prejudicial information" exception at all. Colorado case law provides no clear answer. Because C.R.E. 606(b) is substantially similar to its federal counterpart, F.R.E. 606(b), it is appropriate to look to federal authority for guidance. *Stewart,* 47 P.3d at 321.

The Tenth Circuit has held that a juror's reference to personal experience does not constitute "extraneous prejudicial information." *Marquez v. City of Albuquerque*, 399

Harlan, 109 P.3d 616, 624 (Colo. 2005) ("Colorado Rule of Evidence 606(b) strongly disfavors any juror testimony impeaching a verdict, even on grounds such as . . . failure to follow instructions . . . .").

606(b)? (2) Even if Rule 606(b) applies, does any of the information at issue fall within the "extraneous prejudicial information" exception?

A. Statements Outside Of Deliberations

There is no evidence to suggest that Mr. Craig made comments to the jurors denigrating contractors or about disliking Shaw or planning to hang the jury or referring to his own experience with a construction contractor *before* deliberations began.

The testimony of Mr. Chavez, Ms. Richardson and Ms. Rossina addresses matters or statements plainly occurring during the course of the jury's collective process of deliberation. For example, the jury foreperson, Mr. Chavez, stated "Mr. Craig never verbalized it [not liking Shaw or contractors] up until the deliberations stage of the jury process. I mean, you know, that – he never vocalized it." Motion, Exh. 2 at p. 6, ll. 20-22. Therefore, all of the statements Mr. Craig allegedly made to these jurors fall squarely within the Rule 606(b) and may not be considered absent an applicable exception.

Mr. Nunn's testimony falls into a bit of a grey area. The following post-trial colloquy occurred between counsel for Shaw and Mr. Nunn:

> Q. Let me ask you about some of your experiences as a juror particularly with respect to some of the comments that Mr. Craig may have made during or before deliberations. Did Mr. Craig ever express strong feelings about Shaw to you?
> A. Yes, he did.
> Q. Can you explain, please.
> A. We were in the jury room and --
> *Q. Was this prior to deliberations?*
> *A. Yes, it was. It was Friday morning, probably somewhere around 8 o'clock.* We were the only two in there, and he told me he hated Shaw. It's like his exact words were, "I hate Shaw. They're a big corporation. They come in and try to push people around."

Motion, Exh. 7 at pp. 3-4 (emphasis added).

I find Mr. Nunn's reference to "Friday" to mean the second morning of deliberations, which was Friday, November 12, 2010, shortly before all of the jurors arrived. This inference follows from his subsequent reference to "Friday" as the day Mr. Martin came to "hang the jury." *Id.* at p. 4.

The scenario described by Mr. Nunn begs the following threshold legal question: Does a statement made by one juror to another, occurring after a case has been submitted to a jury for deliberations and verdict, fall outside of the scope of C.R.E. 606(b), when

1 P R O C E E D I N G S
2 MICHAEL CHAVEZ
3 The witness herein, being first duly sworn to
4 testify to the truth in the above cause was examined and
5 testified on his oath as follows:
6 E X A M I N A T I O N
7 BY MR. FROST:
8 Q My name is Daniel Frost. I'm one of the
9 attorneys for Stone & Webster, Inc. in this case. We
10 are here at 1314 West Oxford, Englewood, Colorado on
11 Saturday, November 13, 2010, with the court reporter,
12 Nathan Stormo, and Michael Chavez. We are here to ask
13 Mr. Chavez a few questions about the -- his experience
14 in the Stone & Webster, Inc. versus Public Service
15 Company of Colorado case.
16 Mr. Chavez, I appreciate your being here this
17 afternoon. I have just a few questions for you. First
18 of all, are you here of your own free will?
19 A Yes.
20 Q And are you speaking with me of your own free
21 will?
22 A Yes, I am.
23 Q I first of all would like to ask you about
24 certain statements that Martin Craig, another one of the
25 jurors in this case, made to you prior to jury

1 worked out.
2 He had said -- he had said previously, Thursday
3 night before we left, that he was -- he wanted to hang
4 the jury; that he saw it no other way than against Shaw
5 and for Public Service.
6 And I said -- I then asked Martin, I said,
7 Martin, I says, Me and you -- I says, this is really
8 between me and you, Martin, because everybody on this
9 jury, it's now 6 to 1 for Shaw -- or for Shaw against
10 Public Service, you being the only one holding out here.
11 I says, Isn't there some middle ground that me and you
12 can reach? I says, What is it, Martin?
13 He says, he told me that he doesn't like
14 contractors; that he didn't like Shaw.
15 Q Was that clear from the outset?
16 A It was apparent through the jury process. He
17 was always bringing up everything that he didn't like
18 about Shaw.
19 Q Okay.
20 A But he never verbalized it up until the
21 deliberations stage of the jury process. I mean, you
22 know, that -- he never vocalized it. He would always
23 make comments and everything else.
24 But then, again, I never really asked anybody
25 where they were at with the case. We never did that.

1 you understand that -- or we understand that you're not
2 being asked to do anything against your will.
3 A Correct.
4 Q And you're not being forced to do anything
5 you don't want to do?
6 A Correct.
7 Q You're giving these statements
8 voluntarily?
9 A Correct.
10 Q And you're not being harassed in any way?
11 A Correct.
12 Q Okay. Just a few questions, ma'am. And,
13 again, I appreciate your service as a juror and you
14 coming here today.
15 I understand that during one point in the
16 juror deliberations in this case, Mr. Craig said, I will
17 hang the jury.
18 A Yes. He said that and -- can I elaborate?
19 Q Please elaborate.
20 A Basically what happened was, when we got
21 back into deliberations, we were trying to come up with a
22 decision that was going to be equitable for all. He
23 said, I want Shaw to get nothing. I'll hang this jury
24 before I let them get anything. So that's when we
25 decided let's try to get to a compromising position.

1 P R O C E E D I N G S

2 RITA ROSSINA

3 The witness herein, being first duly sworn to

4 testify to the truth in the above cause was examined and

5 testified on her oath as follows:

6 E X A M I N A T I O N

7 BY MR. FROST:

8 Q We are here in the lobby of the Sheraton Hotel

9 in Denver, Colorado on 16th Street at Court, 16th and

10 Court, on Sunday, November 14, 2010. We are here with

11 Ms. Rita Rossina to ask her some brief questions about

12 the trial of Stone & Webster versus Public Service

13 Company.

14 First of all, Ms. Rossina, are you here of your

15 own free will?

16 A Yes.

17 Q You're not being forced to do anything?

18 A No.

19 Q And have you been told what to say in any way?

20 A No.

21 Q With that, let me ask you just a few questions

22 about your experience as a juror in the Stone & Webster

23 versus Public Service Company case. Was that a

24 difficult experience for you?

25 A Yes.

1 feelings about Shaw to you?
2 A. Yes, he did.
3 Q. Can you explain, please.
4 A. We were in the jury room and --
5 Q. Was this prior to deliberations?
6 A. Yes, it was. It was Friday morning, probably
7 somewhere around 8 o'clock. We were the only two in
8 there, and he told me he hated Shaw. It's like his
9 exact words were, "I hate Shaw. They're a big
10 corporation. They come in and try to push people
11 around."
12 Q. Okay. Did he ever tell you that he was there
13 to hang the jury?
14 A. Friday -- sometime during Friday, during
15 deliberations, he got up and said, "Yes, I came here
16 today to hang this jury."
17 Q. Okay. Do you agree with the verdict that was
18 entered in this case?
19 A. No.
20 Q. Okay. Thank you very much. Appreciate you
21 being here today.
22 (Proceedings concluded at 9:07 a.m.)
23
24
25

50. PSCo breached its implied duty of good faith and fair dealing by, among other things,

a. Failing to provide Shaw unrestricted access to perform Shaw's work and failing to prevent other contractors from interfering with Shaw's work or access to Shaw's work;

b. Failing to provide Shaw with the appropriate time and space to perform the work without any unreasonable or material interference from PSCo's other contractors;

c. Failing to properly maintain and update an integrated, accurate Project Schedule;

d. Delaying the completion of Boiler Hydro beyond November 13, 2008 to April 2, 2009;

e. Directing Shaw to accelerate to meet milestone dates that PSCo was not ready for and could not support;

f. Directing Shaw to work out of sequence, without regard to the efficiency of Shaw's work;

g. Failing to coordinate the work of PSCo's other contractors with Shaw's work;

h. Refusing to recognize the extension of the milestone and other construction dates in the June 2008 Settlement Agreement and directing Shaw to achieve different dates;

i. Refusing to pay Shaw's additional costs due to PSCo's mismanagement;

j. Failing to grant an appropriate extension of time to allow Shaw to plan and execute its work in a manner that would mitigate Shaw's damages arising from PSCo's mismanagement;

k. Removing work from Shaw's scope without granting appropriate time and compensation adjustments;

l. Preventing or delaying Shaw from achieving payment milestones under the Contract; and

m. Providing inconsistent directives to Shaw about work that PSCo desired Shaw to complete, or the time when Shaw's work was to be complete in various areas.

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1 Tucker, if what they really thought that
2 Dr. Borcherding had done in their study was not
3 correct, I would suggest to you they would have had
4 him do one, and they didn't.
5 Now, let's just look briefly at what the
6 damages are from this. Mr. Caruso and Ms. Rice took
7 Dr. Borcherding's productivity losses, translated them
8 into dollar amounts in these four categories. We're
9 not going to review them again. They've gone over
10 them in their testimony. And these totals -- each one
11 of these is totaled out here, and the total of these
12 disruption damages is added into the other claims we
13 have for a total of $87 million. Now -- and this is
14 PX 1083. You'll have this as well as the other
15 damages summaries with you during your deliberations.
16 Now, I also want to talk briefly about
17 the exhibit that Mr. Caruso put into evidence
18 yesterday, which is Plaintiff's Demonstrative Exhibit
19 216. The importance of this, Members of the Jury, is
20 that it is this exhibit which shows you exactly how
21 much money -- how much of the overruns -- how much of
22 the cost overrun on this job we're taking
23 responsibility for because do you remember that in the
24 opening statement I told you that we were not
25 contending that everything that went wrong on this job

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1 was the result of Xcel, not by any means. I told you
2 in the opening statement Shaw had some problems on
3 this job, they surely did, and I told you we would
4 account for those.
5 And as Mr. Caruso sets out in this,
6 compared to their estimate at the beginning, Shaw had
7 a total cost overrun of $136 million, almost 137, of
8 which $60 million is not being claimed. That's on our
9 tab. So there's $76 million, with the contractual
10 markup of $10 million -- and let me comment on that
11 $10 million number. Mr. Tucker came in, and he
12 criticized some of these numbers as not appropriate,
13 some of these numbers over here that are being claimed
14 against Xcel as not appropriate. Neither Mr. Tucker
15 nor any other witness questioned that under the
16 contract there's a provision -- a normal provision in
17 these kinds of cases that on top of the damages, the
18 contractor gets a reasonable markup of 10 million --
19 in this case, $10 million.
20 And I want to say one other thing. I
21 told you in opening that Shaw had made mistakes.
22 Every witness that came here from Shaw conceded that
23 they had made mistakes. And that's why they are going
24 to walk away from this project after four and a half
25 years, after 5 million hours of effort, after spending

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1 $550 million, and no matter what you do, even if you
2 require them, as we believe you should, to force them
3 to pay the contract balance and to pay us for the
4 delay and disruption damages, even if you do all that,
5 Shaw Stone & Webster is walking away without the
6 $44 million that they had planned for, and they're
7 walking away $17 million in the hole.
8 And I want to ask you about one of the
9 things to think about now that the case is over.
10 Which Xcel witness got on this witness stand and took
11 responsibility for anything on this project?
12 Certainly not Mr. Kelly. Certainly not Mr. Farmer.
13 Who was it from Xcel that stepped into this witness
14 stand and acknowledged that Xcel made any mistakes or
15 that Shaw Stone & Webster was affected in any way?
16 Nobody did that from that company. Their view -- in
17 their view of the world, they did nothing wrong.
18 Remember Hill International, their
19 expert witness? He submitted an expert report, the
20 first expert report submitted at the time designated
21 by the Court for expert reports to be filed. Remember
22 it said Shaw may be entitled to three days of delay,
23 maybe we held them up for three days. They were
24 willing to make that little concession. And then what
25 happened to that? A month later, out of the blue, we

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1 get another expert report. Why? We get another
2 expert report from Hill International, "Forget about
3 that. They weren't affected a single day." Nobody
4 from Xcel has stepped up to take responsibility for
5 what happened at that plant.
6 Now, Members of the Jury, that brings me
7 to the third and last section of my statement here
8 this morning -- this afternoon, and that is the unpaid
9 contract amounts. I'll be brief on this.
10 The fact of the matter is that there
11 have been no payments of milestones since January. It
12 is crystal clear that Xcel Energy is never going to
13 make a milestone payment on this contract. They're
14 going to hold onto this money until you tell them they
15 can't, and they've made that absolutely clear. Shaw
16 Stone & Webster has a thousand pieces -- just short,
17 950 and change pieces of equipment installed in that
18 plant. They can't for as long as they need to or as
19 long as they want to go around and find something that
20 they say isn't working. If it isn't the condensate
21 pumps or something else, they will always be able to
22 find it.
23 And, Ladies and Gentlemen, I think
24 everybody -- certainly most people -- have found
25 themselves at the mercy of somebody in a position of

2481

1 Q. Okay. This is your July 2010 report,
2 and I want to refer you to Page 73, where it says
3 Unplanned Direct Rework Hours. Do you see that?
4 **A. I do.**
5 Q. And you say that studies have been done
6 that indicate that on most projects the rework will be
7 3 or 4 percent, something in that range, right?
8 **A. That's correct.**
9 Q. And you say, "Shaw, however, experienced
10 more than that," right?
11 **A. They did, that's right.**
12 Q. And you say, "Actual engineering and
13 construction-related rework from July 1, 2008 through
14 December 31, 2009 totaled 88,000 and 81,900 hours,
15 respectively, a total of 179" -- did I do that right,
16 179,000 hours? Is that right?
17 **A. Almost 180, that's right.**
18 Q. And then you put that in a chart on Page
19 74, and the planned rework, which represents the
20 3 percent, right?
21 **A. Correct.**
22 Q. The 3 percent would be like an industry
23 norm, right?
24 **A. That's close.**
25 Q. But instead of 24,000 rework hours, what

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1 you found was that Shaw had 179 -- am I saying that
2 right -- 179,000 rework hours, right?
3 **A. Yes, and the delta being what's over to**
4 **the right, which would be 145,000.**
5 Q. Correct. And what did you do with that
6 145,000 hours? Did you take them out of the
7 calculation?
8 **A. I didn't -- there's no damages -- I**
9 **don't have a damage number for rework.**
10 Q. That's what I'm trying to say. You
11 didn't try to claim that against us, did you?
12 **A. No, I didn't claim it at all.**
13 Q. That's my point. What you found on this
14 job was Shaw had approximately six times as much
15 rework as you'd normally see in this kind of a
16 project?
17 **A. Well, just based on the hours that were**
18 **charged, you can do the math. It's 145 -- excuse me,**
19 **180 divided by 24, whatever that math is.**
20 Q. It's about six times as much, isn't it?
21 **A. Okay.**
22 Q. And where did you get those numbers
23 from, the rework log?
24 **A. Ms. Rice got them out of the accounting**
25 **system.**

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1 Q. Out of the accounting system. If there
2 was work that was actually rework and didn't get
3 written down in the accounting system as rework, the
4 numbers would be even worse?
5 **A. If it didn't get written down, I assume**
6 **it didn't occur.**
7 Q. Now, rework has impact, doesn't it?
8 **A. Maybe.**
9 Q. Rework can cause disruption, can't it?
10 **A. Maybe.**
11 Q. Rework can make you jump around from
12 place to place, go back to a place where you thought
13 you were finished, right? Have to work in an area
14 where you wanted to get somebody else in working,
15 right?
16 **A. It can. It depends on how it's**
17 **performed. It could be a second crew. It could be a**
18 **night shift. Could be a lot of things to make sure**
19 **it's not a problem.**
20 Q. In any event, one thing that you found
21 in your review of this case is that Shaw had an
22 extraordinarily high amount of rework on this project?
23 **A. Extraordinarily high -- they're just**
24 **numbers. We just pull them out, and that's what they**
25 **were.**

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1 MR. HINDERAKER: That's all the
2 questions I have. Thank you very much, Mr. Caruso.
3 THE COURT: Redirect.
4 REDIRECT EXAMINATION
5 BY MR. FROST:
6 Q. Just a little bit of follow-up,
7 Mr. Caruso. I promise not to be long. You've been on
8 the stand for some time.
9 One of the things Mr. Hinderaker asked
10 you was about whether we had worked together in the
11 past. And that's true, isn't it?
12 **A. You bet.**
13 Q. And you have also worked for
14 Mr. Hinderaker's firm in the past, haven't you?
15 **A. Yes, and I do now.**
16 Q. Thank you. Mr. Hinderaker also asked
17 you about the target dates. He referred to the dates
18 in Attachment 2 as target dates?
19 **A. Yes.**
20 Q. Were they more than target dates?
21 MR. HINDERAKER: Objection, lack of
22 foundation.
23 MR. FROST: He's been testifying about
24 the dates in Attachment 2 for four hours.
25 THE COURT: Overruled. He may answer if

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2 Dr. Borcherding had done in their study was not
3 correct, I would suggest to you they would have had
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