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Re: In the Matter of Otter Tail Power Company on Behalf of Big Stone II Co-owners for an Energy Conversion Facility Permit for the Construction of the Big Stone II Project
Civ. No. 06-399 **PUC Docket No. EL05-022**

Dear Addressees:

Enclosed and served upon you, please find the Reply Brief of Minnesota Center for Environmental Advocacy, Fresh Energy, Izaak Walton League and Union of Concerned Scientists and an Affidavit of Service by mail.

If you have any questions, please do not hesitate to call me.

Sincerely,

John H. Davidson

STATE OF SOUTH DAKOTA
HUGHES COUNTY

CIRCUIT COURT
SIXTH JUDICIAL DISTRICT

In the Matter of Otter Tail Power Company on behalf of Big Stone II Co-owners for an Energy Conversion Facility Permit for the Construction Of the Big Stone II Project

REPLY BRIEF OF MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, FRESH ENERGY, IZAAK WALTON LEAGUE, AND UNION OF CONCERNED SCIENTISTS

Civ. No. 06-399
PUC Docket No. EL05-022

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I. THE PUBLIC UTILITIES COMMISSION'S DECISION TO APPROVE THE BIG STONE II COAL-FIRED POWER PLANT IS CLEARLY ERRONEOUS AND CONTRARY TO LAW AND IS LARGELY REVIEWABLE DE NOVO AS A QUESTION OF LAW OR MIXED QUESTION OF LAW AND FACT.

Otter Tail Power Company and the Big Stone II Coal Plant Co-owners (collectively, the "The Coal Plant Owners"), wrongly argue that Appellants Minnesota Center for Environmental Advocacy, Fresh Energy, Izaak Walton League and Union of Concerned Scientists ("Appellants") fail to state the correct standard of review.[1] As set forth in Appellants' primary brief, a South Dakota reviewing court will reverse the decision of an administrative agency, when the decision is affected by an error of law, is clearly erroneous in light of the entire evidence in the record, is arbitrary or capricious, or is a clearly unwarranted exercise of

[1] The Coal Plant Owners also mistakenly argue that Appellants have failed to include a jurisdictional statement in accordance with the requirements of SDCL § 1-26-33.3(1) (2006). In fact, the information required by SDCL § 1-26-33.3(1) (2006) is included in Appellants' Statement of the Case, Appellants' Brief, p. 4.

discretion. SDCL § 1-26-36 (2006); *Wise v. Brooks Const. Services*, 721 N.W.2d 461, 466 (S.D. 2006); *Apland v. Butte County*, 716 N.W.2d 787, 791 (S.D. 2006). Appellants argue multiple grounds for reversal under this standard, not just one.

Appellants challenge the ultimate conclusion of the South Dakota Public Utilities Commission ("PUC") that the Big Stone II coal-fired power plant ("Big Stone II") will not pose a threat of serious injury to the environment as clearly erroneous based upon the record in its entirety. This application of the facts to the law for an ultimate finding represents a mixed question of fact and law reviewable de novo. *Schroeder v. Dept. of Social Services,* 545 N.W.2d 223, 226 (S.D. 1996) (*citing Schuck v. John Morrell & Co.,* 529 N.W.2d 894, 896 (S.D. 1995)). In its fresh review of such mixed question, where, as here, it is necessarily based on underlying findings of fact, a reviewing court will reverse a decision and set aside findings as clearly erroneous when the decision is "against the clear weight of the evidence or leaves the court with the firm and definite conviction that a mistake has been made." *Application of Nebraska Public Power Dist.*, 354 N.W.2d 713, 719 (S.D. 1984). *See also, Sopko v. C & R Transfer Co., Inc.*, 575 N.W.2d 225, 229 (S.D. 1998).

Appellants further argue that the PUC's decision must be reversed as it is affected by error of law and represents an unwarranted exercise of the PUC's discretion under the plain language of SDCL § 49-41B-22 (2006) (the "siting statute".) As set forth in the initial brief and below, the PUC's decision limits or qualifies the application of the siting statute in a manner inconsistent with the siting statute's plain language. Therefore, the PUC's decision is legal error, contrary to the stated intent of the South Dakota legislature and outside the limits of the PUC's discretion in issuing a permit for Big Stone II. Such questions of law are reviewable de novo by this court without deference to the PUC. *In the Matter of Northwestern Public Service*

Company, 560 N.W.2d 925, 927 (S.D. 1997) (*citing Egemo v. Flores*, 470 N.W.2d 817 (S.D. 1991) and *Permann v. Dept. of Labor*, 411 N.W.2d 113 (S.D. 1997)).

II. THE PUC'S CONCLUSION THAT BIG STONE II DOES NOT POSE A THREAT OF SERIOUS INJURY TO THE ENVIRONMENT FROM GLOBAL WARMING IS CLEARLY ERRONEOUS.

The briefs of the Appellees fail to address the clear and great weight of the evidence of Big Stone II's threat of serious injury to the environment. Rather, the briefs focus on arguments for blind deference to the PUC's unsupported or clearly erroneous findings and invent an inverted burden of proof of actual harm to the environment of a particular magnitude as opposed to the standard set forth in the siting statute. Appellees do not and cannot point to evidence in this record that Big Stone II will not pose a threat of serious injury to the environment, and therefore the PUC's conclusion to the contrary is clearly erroneous.

A. The Undisputed Evidence In This Case Is That Global Warming Is A Real And Serious Injury To Which Big Stone II Will Measurably Contribute.

The burden of proof is on the Coal Plant Owners to demonstrate that Big Stone II will, among other things, not pose a threat of serious injury to the environment. SDCL § 49-41B-22 (2006). The burden is not on Appellants to show that Big Stone II will not cause actual harm to the environment of a particular magnitude. Yet, that is the result of PUC's decision in this case.

It must be emphasized that almost all of the evidence regarding the issue of global warming was presented by Appellants' experts. That evidence shows an enormous environmental problem that will affect citizens of South Dakota, the region, and the world, in significantly adverse ways for many years to come. (R. 7216-17, 7222, 7230-35, 7238, 7249, 7269; App. 72-73, 78, 86-91, 94, 105, 125.) The magnitude of the environmental problem of global warming is entirely attributable to the emission of greenhouse gases with carbon dioxide ("CO_2") emissions from power plants being one of the primary sources of those gases. (R. 7215-

16, 7224-25; App. 71-72, 80-81.) Big Stone II will emit millions of tons of CO_2 annually and hundreds of millions of tons over its lifetime. (R. 4660, 7237-39; App. 93-95.) Global warming is a cumulative problem and all experts agree that immediate and sharp *reductions* in CO_2 from all sources everywhere are needed simply to prevent the worst case environmental scenarios from occurring and that adding Big Stone II's 4.7 million tons of CO_2 just makes that job all the more difficult. (R. 7214, 7225, 7286 et seq.; App. 70, 81, 142 et seq.) As pointed out by Dr. Hausmann, Big Stone II's contribution of CO_2 to global warming is considerable relative to the hundreds of millions of sources of greenhouse gases, many of which are as small as a single car. (R. 7214, 7238, 7564; App. 70, 94, 146.) The mere fact that it is measurable, is itself significant.

None of the specific evidence presented by Appellants was refuted by the PUC staff or by the Coal Plant Owners. Appellees did not even cross-examine Appellants' primary witness on the topic, Dr. Ezra Hausmann. This is apparent again in Appellees' briefs here, where the only evidence they can point to as supportive of the PUC's conclusions of no threat of harm, is the minimal and unqualified[2] statements of Ward Uggerud, that while Big Stone II will undoubtedly add 4.7 million tons of CO_2 to the atmosphere per year of operation, it just isn't that big of a deal as related to the overall global warming problem. (R. 4660-61.) The Coal Plant Owners offered no other evidence of any quality regarding the serious environmental injury of global warming. This in the face of highly-qualified expert evidence accompanied by extensive documentary evidence, of the very real harm to the environment from global warming pollutants, including in South Dakota, and the extensive contribution Big Stone II will make in worsening the problem,

[2] As noted in Appellants' initial brief, Mr. Uggerud has no educational or professional qualifications in atmospheric or meteorological science, biological science, or the problems of global warming, (R. 3803-05), which is likely why his statements on this topic were very limited.

moving in the opposite direction of where the best minds in the world tell us we need to go. None of this was contested by Appellees.

Evidence submitted by the PUC staff also shows injury to the environment from Big Stone II, measured in economic terms. The PUC staff offered evidence of what the additional CO_2 from Big Stone II would cost using a range of "externality" figures. Even in PUC staff's most minimal cost scenarios, Big Stone II's CO_2 pollution will cost citizens millions of dollars in adverse environmental impacts.[3] (R. 7252, 7256, 7260, 7865-68.) Again, the Coal Plant Owners provided no evidence to the contrary.

Even using the PUC's approach of determining whether Big Stone II "contributes materially" to a threat of serious injury (which Appellants strongly contest below as the proper legal standard), the PUC's decision is clearly erroneous given the great weight of the evidence. Appellees did not contest that global warming is a very serious injury to the environment. The Coal Plant Owners and the PUC argue only that Big Stone II doesn't contribute that much to the serious injury, relative to the rest of the world. In fact, the evidence clearly demonstrates that Big Stone II will materially contribute to global warming. While the Coal Plant Owners and the

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[3] The PUC's decision is confused on this economic evidence. (*See,* Finding 137.) Two distinct types of economic evidence were presented in the proceeding before the PUC. One was the potential for future regulatory costs on emissions of CO_2 pollution such as would come from federal regulation. This is a direct cost that would be "billed" to Big Stone II like a fee or a cost associated with a cap and trade program. It is a potential cost of doing business for Big Stone II. That is *not* the type of cost referenced by PUC staff in assessing the environmental damage from Big Stone II in economic terms. PUC's findings appear to confuse and conflate potential CO_2 direct regulatory fees or costs with that of environmental externalities costs---a completely different concept. Externalities are not direct fees or costs paid by the generator of the pollution. Rather, they are actual costs borne by society due to the actual damage caused by the pollution generated by Big Stone II the very day it starts up and they are not speculative and not dependent upon regulation. This is the type of cost figures used by PUC staff from the Environmental Protection Agency, State of Minnesota or other state entities, to place an economic measure on Big Stone II's CO_2 pollution. It is these very real, actual environmental damage costs, that Big Stone II will never pay, that are most relevant to this appeal.

PUC argue in some parts of this case, for drawing a tight twenty mile circle around the plant, in this instance the Coal Plant Owners compare Big Stone II to world sources of CO_2. In making that comparison, Coal Plant Owners and the PUC must admit global sources of CO_2 include millions of sources, from as small as a single car to large industrial complexes, to natural sources. In that regard, the mere fact that the PUC and the Coal Plant Owners can identify Big Stone II as a measurable amount of CO_2 pollution *in the world* is significant. When compared to man-made sources of CO_2, those that are actually causing the problem, Big Stone II's share obviously grows even more.

B. The PUC's Findings Acknowledge The Threat And Seriousness Of Global Warming But Wrongly Conclude Big Stone II Does Not Play A Part.

The PUC's brief appears to suggest that the facts related to global warming are only those "found" by the PUC in its ultimate ruling. PUC brief, pp. 5-7. This is completely incorrect. The PUC does not "make" facts in its ruling and such an argument would entirely insulate an administrative decision from any review and comparison to the evidence before it. This is clearly not the law in South Dakota. Rather, even when given deference in its findings, an administrative agency must refer to the evidence in the record before it.

The PUC's ruling acknowledges the uncontested facts of Big Stone II's very large amount of CO_2 emissions—4.7 million tons per year, 225 millions tons over 50 years, a conservative estimate. The PUC's ruling also acknowledges CO_2 is a pollutant of concern (Finding 119) and implicitly that global warming from greenhouse gases such as CO_2 is an environmental problem. It is interesting that the PUC chose to ignore the specifics of the global warming problem and not explicitly explain why CO_2 is a pollutant of concern or why greenhouse gases are relevant, despite copious evidence of the environmental problem, including how it will affect South Dakota. Contrary to what the PUC appears to argue in its brief, the fact

that the PUC chose not to make a finding on evidence of environmental harm clearly before it, does not eliminate the copious evidence, nor insulate the PUC's decision from review.

Examining the evidence in its entirety, the only conclusion is that Big Stone II will pose a threat of serious injury to the environment. The PUC's decision to the contrary is so against the clear weight of the evidence in this case that Appellants' argue it will leave the court with the firm and definite conviction that a mistake has been made. This case is very much like the situation addressed by the South Dakota Supreme Court in *Schroeder v. Dept. of Social Services* where the reviewing court noted that the evidence and specific findings clearly demonstrated insubordination, yet the agency found none, making the agency's conclusion based on the evidence completely unsupported and clearly erroneous. *Schroeder*, 545 N.W.2d at 228. Similarly here, the evidence before the PUC and specific findings the PUC made regarding Big Stone II's emissions of CO_2 lead to the conclusion that Big Stone II poses a threat of serious injury to the environment. The PUC's conclusion to the contrary is simply wrong. Appellants' request the court to reverse the PUC's conclusion and the issuance of the Big Stone II permit.

III. THE PUC'S CONCLUSION THAT BIG STONE II DOES NOT POSE A THREAT OF SERIOUS INJURY TO THE ENVIRONMENT BASED UPON BIG STONE II'S "SHARE" OF GLOBAL WARMING POLLUTANTS IS CLEAR ERROR OF LAW, AND EXCEEDS THE PUC'S DISCRETION UNDER THE SITING STATUTE.

A. Statutes Must Be Interpreted In Accordance With Their Plain And Ordinary Meaning.

Appellees wrongly argue for a narrowing and limiting of the South Dakota power plant siting requirements, contrary to the clear intent of the South Dakota Legislature as demonstrated by the plain language of SDCL § 49-41B-22 (2006). The first rule of statutory construction is that the language expressed in the statute is of paramount consideration, while the second is that if the words and phrases used have a plain meaning and effect, a court should simply declare

their meaning and not resort to statutory construction. *In the Matter of the Petition of West River Electric Ass'n, Inc.*, 675 N.W.2d 222, 226 (S.D. 2004). Moreover, should statutory construction be necessary, legislative intent is derived from the plain, ordinary and popular meaning of the language used. *Id.*; *In the Matter of Northwestern Public Service Company*, 560 N.W.2d at 927.

An examination of the plain language of the siting statute demonstrates a forward-thinking and protective intent by the legislature, contrary to the approach the PUC has taken in this case. The specific language protects against the threat of injury, evincing an intent to identify and protect the environment *prior* to any harm occurring. SDCL § 49-41B-22(2) (2006). The legislature also chose not to enumerate the types of threats or potential injury, choosing wisely to enact a statute that can identify and address environmental harms of which we may learn or be concerned with well into the future as our knowledge and the science advances. *Id.* The legislature also chose not to limit the siting statute's application to those environmental injuries or pollutants that are subject to regulation, again wisely recognizing that regulation can often lag behind the science and understanding of injury to the environment and that the need to protect the environment and public are broader. *Id.* The plain language of the siting statute sets forth a broad and protective obligation for the Coal Plant Owners and the PUC to prevent the siting of any plant that poses even a threat of serious injury to the environment generally.

B. The PUC Improperly Narrows The Statutory Standard For Protecting The Environment By Imposing Requirements For Only Particular Magnitudes of Actual Harm.

Conversely, the PUC's decision imposes an obligation on Appellants to prove that harm from Big Stone II will actually occur and that it will occur at a particular level or magnitude. The PUC argues for complete deference on its application of the statute. While an agency's expertise is recognized in situations like this, it does not give the agency latitude to ignore the

dictates of the statute. "The agency must lend credence to the guidelines established by the statute". *West River Electric Ass'n, Inc.*, 675 N.W.2d at 230; *Northwestern Public Service Company*, 560 N.W.2d at 929-930. None of the limitations applied by the PUC in its findings and decision are found in the language of the statute and they run contrary to the clear intent of the South Dakota Legislature as set forth in the plain language of the statute.

For example, the PUC's brief effectively equates threat of injury with actual injury. PUC brief, p. 17. This is contrary to the plain language of the siting statute. The word used by the legislature is threat of injury. If the legislature wanted proof of actual injury by public interest parties such as Appellants, the legislature would have said so. It did not. Rather, the legislature directed the Coal Plant Owners to demonstrate to the PUC that Big Stone II will not pose a threat of serious injury to the environment. Imposing the requirement of Appellants showing actual harm particular to Big Stone II, is clear legal error by the PUC and should be reversed.

The PUC's findings and its brief in this appeal also contravene the plain statutory language and attendant legislative intent in finding that Big Stone II will not "contribute materially" to the problem of global warming so therefore the permit must be issued. Again, the standard of "material contribution" to serious injury to the environment is not a qualifier that is present in the actual statutory language. This qualifier substantially narrows and limits the reach of the siting statute protections for the environment and the public and is contrary to the clear legislative intent that even threats of serious injury must be considered and avoided. Again, imposition of this additional qualifier is clear legal error and should be reversed.

Finally, Appellees now argue that Appellants must demonstrate materially significant actual harm in a twenty mile radius of the plant, because prior to the time Appellants became parties, the PUC defined a twenty mile radius as the "affected area" for other purposes under the

South Dakota power plant permitting laws and procedures.[4] Again, this constriction is contrary to the language of the siting statute. "Affected area" is not defined in the siting statute nor is that phrase used in reference to threat of serious injury to the environment. The words "in the siting area" occurring at the end of § 49-41B-22(2) clearly do not modify the consideration of threat of serious injury to the environment as there is no comma after the word "inhabitants". Rather, there are two distinct concepts in this subpart of the siting statute. The first concerns the subject of this appeal—whether Big Stone II will pose a threat of serious injury to the environment. The second concept concerns impacts to the social and economic conditions to inhabitants in the siting area. The two are connected with a "nor", and "in the siting area" is not set apart grammatically clearly only modifying the second concept of social and economic conditions of inhabitants to which is it grammatically connected. There is simply no statutory authority for the PUC to now argue that the consideration of threats to the environment be limited to a twenty mile radius around a proposed power plant site.

Moreover, such limitation is unreasonable given the pollutants or threat under examination. The PUC identifies an "affected area" under its authority in SDCL § 49-41B-2 (2006). Under the PUC's own regulations for defining the "affected area", it is that which may be affected environmentally, socially, or economically. ARSD 20:10:22:01 (2006). The area of environment affected by CO_2, if not global, should at a minimum be regional due to the nature of air pollution and the obvious impacts therefrom. The PUC appears to recognize this approach given what it says, for example, about mercury and state-wide limits and sources for that air

[4] The twenty mile constriction does not appear to be part of the PUC's actual findings or considerations on the global warming issue as the PUC's findings clearly reference the problem of CO_2 worldwide and Big Stone II's contributions to that larger problem. The twenty mile constriction arguments also seem like post-hac rationalizations or litigating positions of the agency. *See* post-hac rationalization argument, p. 14, *supra.*

pollutant (which is also a global problem.) The PUC's current argument that threats to the environment must only be considered if they occur within twenty miles of Big Stone II is a last minute post-hac rationalization for ignoring the great volume of evidence of injury from global warming and is contrary to the plain language and intent of the siting statute.

The Appellants amply demonstrate a threat of serious injury to the environment, the actual standard under the siting statute. Global warming represents very serious injury indeed and Big Stone II represents more than just a small threat. Big Stone II will contribute significantly to global warming worsening the problem both locally and worldwide. The PUC's use of qualifiers and artificial limitations should be reversed as clear legal error.

C. The PUC's Litigation Explanations Or Excuses For Disregarding The Weight Of Evidence Of Injury To The Environment Exceed The Authority And Discretion Of The PUC Under SDCL § 49-41B-22 (2006).

The PUC excuses its disregard of the great weight of evidence on global warming, by making two new arguments based on a rationale that it is simply not South Dakota's responsibility to consider and address its part in a global environmental problem. This rationale is not found in the plain language of the siting statute. This is not the "circumspect exercise of discretion" the PUC argues, but rather its polar opposite: the wholesale, unfettered exercise of the PUC's *will* outside the boundaries of its authority in § 49-41B-22 (2006).

First, the PUC argues that it must permit Big Stone II even in the face of the threat of serious injury from global warming, because no other states are imposing regulatory or permit limits for CO_2. This does not even go to the actual issue under consideration in this appeal. This is not an air permit proceeding, the venue where specific permit or regulatory limits for Big Stone II on CO_2 would be addressed. Rather, the matter under review is whether the evidence in its entirety demonstrates that Big Stone II will pose a threat of serious injury to the environment

such that it must affect the issuance of a power plant siting permit for the Big Stone II facility. It is immaterial whether other plants in other states have permit limits for CO_2 or not. Any such consideration is entirely outside the consideration to be made under the plain language of the siting statute, and if the PUC is now arguing that it indeed considered the fact that other states do not regulate or impose permit limits for CO_2, then the PUC has admitted that it engaged in improper and extra-legal considerations in reaching its conclusion that Big Stone II does not pose a threat of serious injury to the environment. On that ground, the PUC's decision should be reversed as an unwarranted exercise of discretion.

Second, the PUC argues that its decision against the weight of evidence on global warming must be excused, because to find Big Stone II poses a threat of injury to the environment would amount to a "complete ban". PUC brief, pp. 7-8. A "complete ban" of what, the PUC does not explain, although the rhetorical questions asked in the brief suggest the complete ban would be on pulverized coal power plants. *Id.* The PUC's consideration of this possibility is outside the authority and direction of SDCL § 49-41B-22 (2006). The power plant siting statute does not say allow a power plant that will pose a threat of serious injury to the environment in order to avoid a ban on that specific technology or type of power plant. There is no authority for the PUC to engage in the kind of ad hoc policy analysis and decision-making that it now admits it did.[5] The PUC's decision to permit the Big Stone II plant should be

[5] The PUC's complaint about a "complete ban" on pulverized coal power plants is also so narrow and unreasonable as to suggest that the PUC believes its sole role is to permit pulverized coal power plants because nothing else is available. This appears to indicate another problem with the PUC's decision in this case, not under consideration in this appeal, which is the need for, and ample evidence to support, the PUC considering other cleaner ways to supply power in this case, such as requiring carbon offsets for a coal plant, demand side controls and wind power. If the PUC does not consider those to be "real" sources of power, it explains its disregard of that evidence as well.

reversed as admittedly engaging in considerations and discarding evidence on those considerations that are not authorized under the statute.

Finally, both arguments appear as post-hac rationalizations or litigating positions in an attempt to justify the PUC's decision after the fact. Courts do not apply the principle of deference to agency litigation positions inconsistent with the law, wholly unsupported by regulations, or not in keeping with consistent administrative practice and rulings. *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 213, 109 S.Ct. 468, 474 (1988) (*cites omitted*); *Brewster on Behalf of Keller v. Sullivan*, 972 F.2d 898, 901 (8th Cir. 1992). The PUC's justifications for disregarding evidence deserve no deference and its decision should be reversed.

IV. THE PUC FAILED TO FOLLOW THE REQUIREMENTS OF ITS OWN RULE REGARDING CUMULATIVE IMPACTS AND THE ROLE OF CUMULATIVE IMPACTS IN GLOBAL WARMING.

The PUC's rules related to its examination of potential environmental injury, require the Coal Plant Owners to provide information regarding environmental effects of Big Stone II and:

> The environmental effects shall be calculated to reveal and assess demonstrated or suspected hazards to the health and welfare of human, plant and animal communities which may be cumulative or synergistic consequences of siting the proposed facility in combination with operating energy conversion facilities, existing or under construction.

ARSD 20:10:22:13 (2006). The language of the rule is evidence of its intent; that environmental injury can come in one large dose from a single source, or, much more commonly, as an accumulation of insults, often interacting with, and adding to, each other with disastrous consequences. As clearly recognized by the PUC in enacting its rule, if not properly analyzed at the outset, cumulative environmental effects may be recognized only after the damage is done. This in turn comports with the plain language and intent of the siting statute to assess threats to the environment prior to siting. As noted in Appellants' initial brief, the Coal Plant Owners provided no such calculation. (R. 4801-4802.) Conversely, Appellants presented significant

evidence showing that Big Stone II will have cumulative effects---that the cumulative impact of America's coal plants is "staggering". (R. 7239; App. 95.)

While the expertise of an agency in applying its rules is recognized, an agency is not free to ignore application of its rules. An agency must apply the law before it, including its own rules. *Schroeder*, 545 N.W.2d at 229 (*citing Hartpence v. Youth Forestry Camp*, 325 N.W.2d 292, 297 (S.D. 1982)). Failure to do so may demonstrate a clear error of law and/or arbitrary and capricious decision-making driven by the agency's will, not by its reasoned judgment.

In the response to the cumulative impacts issue and failure to address it under the PUC's rule, Appellees recycle the same arguments as noted above. The Coal Plant Owners argue that Appellants must show[6] this "particular facility will have a serious adverse impact" and because that particularized harm was not found by the PUC, there are no cumulative impacts. The Coal Plant Owners' argument seems not to even understand the very concept of cumulative. (Coal Plant Owners' brief, p. 20.) The dictionary definition of cumulative is "increasing in effect, size, quantity, etc. by successive additions," *Webster's New World Dictionary*, College ed. This could not better describe the situation with global warming and CO_2 pollution from Big Stone II.

South Dakota does not define the term cumulative impacts or cumulative effects anywhere in its statutes or regulations, but there is some guidance of the same term in federal environmental law that may be helpful to the court's analysis. The same concept and term is used in the National Environmental Policy Act regulations and guidance governing when a government action requires analysis in an environmental impact statement. In that context, federal regulations provide that an agency must consider as cumulative, actions that "when viewed with other proposed actions, have cumulatively significant impacts". 40 C.F.R. §

[6] Again, the burdens here are not Appellants'.

1508.25(a)(2) and *Muckleshoot Indian Tribe v. U.S. Forest Service,* 177 F.3d 800, 809 (9th Cir. 1999). The Council on Environmental Quality's ("CEQ") *Considering Cumulative Effects Under the National Environmental Policy Act*, http:ceq.eh.does.gove/nepa/ccenepa/ccenepa.htm, Table 1-2, sets forth principles of cumulative effects analysis including analyzing effects of all actions taken, no matter who takes them, analyzing effects on an ecosystem basis, and that cumulative effects to be analyzed are rarely aligned with political or administrative boundaries. Chapter 2 of the CEQ Guidance provides that when analyzing the contribution of a specific project to cumulative environmental effects, "the geographic boundaries of the analysis almost always should be expanded." In *Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985), the court held that the CEQ's cumulative impact regulation required consideration of past, present and foreseeable projects in the relevant environmental area, even including projects that were not yet at the stage of proposals requiring an impact statement. *Fritiofson,* 772 F.2d at 1244-45.

Here, analysis of cumulative impacts on the problem of global warming, the single biggest potential injury to the environment that Big Stone II poses, must at a minimum concern itself with regional, if not worldwide, cumulative impacts of CO_2 pollution on global warming. Following the guidance of CEQ, the PUC should have considered the cumulative impacts of CO_2 emissions over a much broader area and ranges of sources relevant to the actual potential environmental injury under consideration. For a mobile air pollutant like CO_2, this necessarily involves a broader analysis than simply "Big Stone II plus Big Stone I", as argued by the Coal Plant Owners.

The PUC's brief makes the same policy-type arguments it makes for other portions of the brief that it should not be South Dakota's responsibility to address the global problem of CO_2 pollution and global warming. That is not Appellants' argument. The PUC's responsibility is

not for the entire global problem, but for Big Stone II's proposed contribution to the problem and whether that is the correct choice under South Dakota's power plant siting statutes. To the extent that South Dakota sources contribute to this very serious problem, South Dakota PUC is responsible for them. It is what the siting statute demands.

Finally, the PUC makes an argument that even the cumulative impacts analysis must be confined to the constricted twenty mile radius "siting area". This is not a correct reading of its own regulation and is legal error. Regulations are subject to the same plain language analysis and interpretation requirements as statutes. *Schroeder*, 545 N.W.2d at 227-28; (*citing Hieb v. Opp*, 458 N.W.2d 797, 800 (S.D. 1990) and *Hartpence*, 325 N.W.2d at 295.) ARSD 20:10:22:13 (2006) provides that cumulative environmental impacts must be analyzed and does not provide any modification of area. The last sentence in the regulation, distinct from the obligation to analyze cumulative impacts, requires a permit applicant to provide a list of major industrial facilities under regulation that "may have an adverse effect on the environment as a result of their construction or operation in the transmission site, wind energy site, or siting area." This sentence is the only place in the regulation where "siting area" modified the information to be provided or considered. Clearly it refers only to the list of major industrial facilities under regulation, a reasonable limitation given that actually listing national or regional (multi-state) facilities would be onerous for the applicant. It does not relieve the applicant or the PUC from generally considering the relevant cumulative environmental impacts of the Big Stone II plant in a broader context. Again, while the PUC is to be accorded some deference in interpreting its own regulation, such deference does not extend to ignoring the regulation's plain language.

And again, the PUC's arguments appear as litigating positions amounting to justifications for failure to follow the regulations because it seemed difficult to do so. Appellants request that the PUC not be allowed to ignore its rule, as to do so is an unwarranted exercise of discretion.

CONCLUSION

Appellants request this Court to reverse the decision of the PUC approving the Big Stone II permit as the PUC's conclusion is clearly erroneous and its actions and arguments in defense of its decision demonstrate clear legal error and an unwarranted exercise of discretion.

Dated: June 25, 2007

Respectfully submitted,

John Davidson
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STATE OF SOUTH DAKOTA
HUGHES COUNTY

CIRCUIT COURT
SIXTH JUDICIAL DISTRICT

In the Matter of the Application by Otter Tail Power Company on Behalf of Big Stone II Co-owners for an Energy Conversion Facility Permit for the Construction of Big Stone II Project

AFFIDAVIT OF SERVICE

Civ. No. 06-399
PUC Docket No. EL05-022

John Davidson, being duly sworn, says that on the 25th day of January, 2007, he delivered via U.S. Mail the following:

> Reply Brief of Minnesota Center for Environmental Advocacy, Fresh Energy, Izaak Walton League, and Union of Concerned Scientists

on the following persons, in this action by mailing to them a copy thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the post office at Vermillion, South Dakota, directed to said persons at the last known mailing address of said persons:

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John Davidson

Subscribed and sworn to before me
this 25th day of January, 2007.

Brenda L. Walker
Notary Public
My Comm. Exp: 12/23/2011