

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
) :SS
 2 COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

3 * * * * *

4 IN THE MATTER OF OTTER)
) TAIL POWER COMPANY ON)
 5 BEHALF OF BIG STONE II) File No. 06-399
) CO-OWNERS FOR AN ENERGY)
 6 CONVERSION FACILITY)
) PERMIT FOR THE) TRANSCRIPT OF ORAL
 7 CONSTRUCTION OF THE BIG) ARGUMENT
) STONE II PROJECT)

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SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

BEFORE: HONORABLE LORI S. WILBUR
 Pierre, South Dakota
 February 26, 2007
 commencing at 1:30 P.M.

* * * * *

APPEARANCES:

Ms. Janette K. Brimmer
 Minnesota Center for Environmental Advocacy
 26 E. Exchange St., Suite 206
 St. Paul, MN 55101
 FOR THE APPELLANT AND
 ENVIRONMENTAL ORGANIZATIONS

AND:

COPY

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18 APPEARANCES:

19 Ms. Janette K. Brimmer
 20 Minnesota Center for Environmental Advocacy
 21 26 E. Exchange St., Suite 206
 St. Paul, MN 55101
 22 FOR THE APPELLANT AND
 ENVIRONMENTAL ORGANIZATIONS
 23

24 AND:

25 *Lori J. Grade - (605) 223-7737*

1 PROCEEDINGS

2 THE COURT: All right. Good afternoon.
 3 We're here on Hughes County Civil File 06-399, in
 4 the matter of Otter Tail Power Company on behalf
 5 of Big Stone II, Co-Owners for an Energy
 6 Conversion Facility Permit for the Construction
 7 of the Big Stone II Project.

8 And if the parties want to enter their
 9 appearances, I'd appreciate that.

10 MS. BRIMMER: Thank you, Your Honor.
 11 Janette Brimmer on behalf of the Appellant and
 12 environmental organizations.

13 THE COURT: Thank you. With you?

14 MS. BRIMMER: John Davidson, local counsel
 15 for Ms. Brimmer.

16 THE COURT: Professor.

17 MR. SMITH: Tom Welk and Chris Madsen for
 18 the Applicant co-owners of Big Stone II. Also
 19 with me, Your Honor, today is Bruce Gerhardson,
 20 who's the associate general counsel for Otter
 21 Tail, which is the managing owner, and Mark
 22 Rolfes back to my left, who is the project
 23 manager for Big Stone II.

24 MR. SMITH: John Smith for the PUC.

25 THE COURT: Good afternoon. Before we get
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1 Mr. John H. Davidson, Jr.
 2 USD School of Law
 3 414 E. Clark Street
 Vermillion, SD 57069
 4 LOCAL COUNSEL FOR MS. BRIMMER
 5
 6 Mr. Thomas J. Welk and
 Christopher W. Madsen
 7 Boyce, Greenfield, Pashby & Welk
 PO Box 5015
 Sioux Falls, SD 57117-5015
 8 FOR APPELLEE BIG STONE II
 9
 10 Mr. John J. Smith
 Assistant Attorney General
 500 East Capitol Avenue
 Pierre, SD 57501
 11 FOR THE PUBLIC UTILITIES COMMISSION

12 ALSO PRESENT:

13 Mr. Bruce Gerhardson
 14 PO Box 496
 Fergus Falls, MN 56538
 15 Associate General Counsel for Otter Tail
 16
 17 Mr. Mark Rolfes
 Project Manager for Big Stone II
 18
 19
 20
 21
 22
 23
 24
 25

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1 under way, as I sat down to read through these
 2 briefs, I realized that I needed to make a
 3 disclosure here today. I like to trap shoot, and
 4 I am a member of the local Izaak Walton League
 5 for the purposes of shooting trap. I can get a
 6 cheaper rate.

7 So I need to tell you that when I read this;
 8 and if any party objects, obviously we can
 9 reschedule this matter and you can have a judge
 10 who's not a member of the Ike's Club deciding
 11 your case.

12 MR. WELK: On behalf of the co-owners, Your
 13 Honor, we have no objection.

14 MR. SMITH: Likewise from the PUC.

15 THE COURT: Thanks. How do we want to
 16 proceed today? I've got an hour. I don't know
 17 if you're going to need that entire hour. How
 18 much time are you thinking that you need? And
 19 you're going to be arguing?

20 MS. BRIMMER: I think I can do it in
 21 15 minutes, Your Honor, for our side.

22 THE COURT: And then?

23 MR. WELK: We'll be within that same amount
 24 or less.

25 THE COURT: Are you going to argue?
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1 MR. WELK: Yes, I am.
2 THE COURT: Mr. Smith, do you want another
3 15?

MR. SMITH: I suppose.

THE COURT: I'll give you five minutes at
6 the end. Ms. Brimmer, you may begin.

MS. BRIMMER: Do you prefer standing or
8 seated, Your Honor?

THE COURT: Whatever you're comfortable
10 with.

MS. BRIMMER: I'll remain seated. Thank
12 you, Your Honor.

Again, my name is Janette Brimmer. I
14 represent the Appellant and environmental
15 organizations here today. And this is really a
16 fairly simple case.

We have a discreet issue on appeal, as the
18 Court is aware, and it really is a matter of
19 administrative law and proper legal
20 interpretation of statutory law.

The statute at issue is South Dakota
22 Statutes 49-41B-22, which are the siting
23 requirements for power plants in the State of
24 South Dakota.

Appellants come before the Court simply
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1 relative to carbon dioxide pollution -- and that
2 is the piece of the record we are most concerned
3 with here -- we do not take issue with those
4 specific Findings of Fact. For example, how much
5 carbon dioxide pollution that Big Stone II would
6 produce.

The issue really comes down to sort of the
8 ultimate finding, if you will, which is whether
9 Big Stone II will pose a threat of serious injury
10 to the environment.

And on that basis, the Court -- or, excuse
12 me, the PUC found that because its share was a
13 small, or a perceived small share, that that
14 was -- that meant it was not a threat of serious
15 injury to the environment. That specific finding
16 we do take issue with.

Also on the other side of the equation we've
18 got the standard of review for mixed questions of
19 law or fact, conclusions based on the facts and
20 statutory interpretation, all of which under
21 South Dakota law are subject to de novo review by
22 this Court without the need for deference to the
23 PUC.

Briefly, we won't spend a lot of time on the
25 facts, Your Honor. This is -- obviously this is
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1 asking that South Dakota Public Utilities
2 Commission apply its own law and its own rules as
3 they are written consistent with the evidence in
4 this case and as intended by the South Dakota
5 legislature.

Under the statute at issue the Big Stone II
7 coal fire power plant permit should be denied.
8 Big Stone II represents a threat of serious
9 injury to the environment, which is a grounds for
10 denial of their permit. We come before the Court
11 asking for reversal of the PUC's decision.

THE COURT: So can you through the course of
13 your argument address which specific findings or
14 conclusions you're addressing? Is this a clearly
15 erroneous review, first of all?

MS. BRIMMER: Thank you, Your Honor. There
17 is actually two standards of review that I think
18 apply here. On one level there is a clearly
19 erroneous standard of review where the Court will
20 reverse upon looking at the entire record if the
21 conclusions of the PUC, the findings and
22 conclusions, are not supported by the evidence,
23 and if the Court is left with the conclusion that
24 a mistake has been made.

Now, the specific findings that are outlined
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1 a voluminous record, but we'd like to emphasize
2 some of the important facts that are uncontested
3 in this case.

The Court is probably aware that Appellants
5 put on quite a bit of expert evidence, but the
6 most important one for the purposes here today is
7 Doctor Ezra Hausman. Doctor Hausman is an
8 atmospheric scientist, and he provided testimony
9 which I would like to note was not contested, and
10 he was not cross-examined during the course of
11 the hearing before the PUC.

So it's uncontested that the Big Stone II
13 plant will meet a very large amount, 4.5 to
14 4.7 -- depending on whose numbers we're using --
15 million tons of carbon dioxide pollution each
16 year of its operation, which I think 50 years is
17 the rule of thumb operation that has been in use
18 in this case.

It's uncontested that this single course of
20 carbon dioxide pollution is the equivalent of
21 670,000 cars, which I think is useful for just
22 getting a grip on how much we are talking about
23 and how large the source is, which is about
24 two-thirds more cars than we have in the State of
25 South Dakota.

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1 CO₂ is, of course, a primary cause of global
2 warming, which is the environmental injury with
3 which we are concerned. And power plants are a
4 primary source of that carbon dioxide pollution.

And that global warming with which we are
6 concerned, which is a problem worldwide -- we
7 hear a lot about that, but also in South
8 Dakota -- Doctor Hausman did testify at length
9 about what kind of regional impacts might be
10 expected, things like disruption of the
11 agricultural economy, increases in severe
12 droughts, things of that nature.

We heard testimony from Doctor Denney, an
14 expert witness that was presented by the staff of
15 PUC, that the carbon dioxide pollution from Big
16 Stone II will cost society, including citizens of
17 South Dakota, a range of costs, but most of them
18 in the hundreds of millions of dollars annually.
19 And that's for externalities, meaning
20 environmental things that happen that cost
21 citizens money that are a result of the operation
22 of the plant as opposed to regulatory costs,
23 something else that was referred to. Those are
24 not at issue in this appeal so much. We are
25 talking about the externality costs.

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1 in his surrebuttal testimony, which is fairly
2 short. Page six of that testimony, several
3 lines, was really the testimony that they used to
4 contest Doctor Ezra Hausman's testimony. And, in
5 fact, this became almost the single cornerstone
6 ultimately for the PUC's decision.

And that's where Mr. Uggerud did fairly
8 simple division relative to the carbon dioxide
9 pollution before Big Stone II compared it to the
10 worldwide percentage and said it's just not that
11 much. It's a fraction of a percent, hundreds of
12 a fraction of a percent, and therefore we feel
13 that this is just not something that we should be
14 concerned about in the larger picture.

THE COURT: Doctor Hausman didn't disagree
16 with those calculations, though, did he?

MS. BRIMMER: That's correct, Your Honor,
18 Doctor Hausman did not disagree with those
19 calculations, but he did strongly disagree in his
20 testimony about what to take from those
21 calculations.

THE COURT: Isn't that the dispute that the
23 commission resolved then in their granting of the
24 permit?

MS. BRIMMER: The commission did resolve
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1 So there are two grounds upon which -- two
2 basic grounds upon which Appellants ask this
3 Court to reverse the PUC. We will address first
4 some of the factual grounds, the fact that we
5 believe that the decision of the PUC is clearly
6 erroneous, particularly that decision about this
7 is a small amount of pollution so not to worry
8 about it when viewing the entire record as a
9 whole.

Second, we will address what we believe is
11 the legal error in this case, which concerns
12 statutory interpretation and the PUC's authority
13 under the siting statute.

As noted by the evidence in this case with
15 respect to carbon dioxide pollution, global
16 warming is fairly voluminous and it is for the
17 most part uncontested. It is even supported by
18 the PUC staff's excellent expert evidence from
19 Doctor Denney regarding the externality costs, so
20 we've got both sort of the physical damage and we
21 have the environmental damage reduced to a dollar
22 figure in the record.

The only contest offered by primarily the
24 coal plant owners, the Big Stone co-owners, is
25 Mr. Ward Uggerud's testimony. That was supplied

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1 that dispute in the sense that they decided to
2 side with Mr. Uggerud. And it is our position
3 that that was a clearly erroneous decision given
4 the great weight of the evidence and Doctor
5 Hausman's response. Doctor Hausman's response,
6 of course, was that sounds like a small number.
7 It sounds like seven-hundredths of one percent
8 seems small. But he also said the mere fact that
9 you can measure a single source when you are
10 talking about a worldwide problem is itself very
11 significant.

As he pointed out, you have carbon dioxide
13 pollution from a myriad of sources, possibly in
14 the hundreds of millions of sources. Even in the
15 U.S. if you're counting all industries, every
16 home, every car, there are, of course, natural
17 sources of carbon dioxide. Even things as small
18 as lawnmowers, snowmobiles. The fact Doctor
19 Hausman notes that you can actually hang a
20 percentage on this single source is itself very
21 significant and does demonstrate a contribution.

So Appellants in this instance believe that
23 when viewing the record as a whole, that for the
24 PUC to rely on this fairly thin, fairly small
25 piece of information from Mr. Uggerud is itself

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1 clearly erroneous and that the Court will be left
2 with the firm and definite conviction that a
3 mistake has been made in that regard.

4 Turning to the portion of the case that
Appellants argue constitutes legal error, we
6 believe that the PUC has failed to apply their
7 own statute, the siting statute, and their own
8 rules as they are written; and that in doing so,
9 and in discussing it within their briefs before
10 this Court, that the PUC applies qualifiers on
11 their decision that don't exist in the plain
12 language of the statute and demonstrate that the
13 PUC has exceeded its authority in making its
14 decision in this case.

15 Again, the plain language of the statute in
16 this case is that the power plant must not
17 present a threat of serious injury to the
18 environment. And that word "threat" obviously
19 indicates an intent of the legislature to be
20 proactive, to be forward-looking, and to make
21 sure that the PUC is examining power plants
22 before they become a problem for the environment.

23 And that's exactly what we are calling upon
24 the PUC to do here. Not wait for some
25 particularized threshold of environmental harm,
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1 the statute by saying will not pose a threat of
2 serious injury, that any threat is a reading of
3 that as well. If it's a threat, a single threat,
4 on a single pollutant that could cause injury,
5 yes, I think that is indeed a reasonable reading
6 of that statute.

7 The statute does not seem to indicate that
8 there has to be a broad-based or multiple
9 pollutant threat. It does indicate that it must
10 be serious, that it can't be just --

11 THE COURT: So that's a qualifier.

12 MS. BRIMMER: Yes. I agree that that is a
13 qualifier. And I think that the parties would
14 agree that global warming is a serious
15 economic -- or, excuse me, environmental injury.

16 So serious does qualify environmental injury
17 definitely as opposed to -- and I don't know what
18 might be considered not serious. Assault on the
19 roads as a result of being able to transport back
20 and forth to the plant may have some
21 environmental impact, but may not be considered
22 serious under the plain language of the statute.

23 The PUC does offer some qualifiers, if you
24 will, or reasons for ruling as they did in
25 finding that Big Stone II will not present a
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1 but instead to really examine the problem of
2 carbon dioxide from Big Stone II and what that
3 could mean for the warming earth.

4 We also note that the plain language of the
5 statute provides that a power plant shouldn't be
6 permitted if it will represent a threat of
7 serious injury to the environment. And I really
8 think that the parties, in effect, the PUC in
9 this case, do agree global warming is a serious
10 injury to the environment. There is significant
11 concern. The PUC expressed that concern and
12 acknowledged that CO₂ is a large problem with
13 respect to global warming.

14 And so on those grounds, the record clearly
15 shows under the plain language of the statute
16 that this is a threat of serious injury and there
17 are no qualifiers.

18 THE COURT: Doesn't your interpretation,
19 though, of that particular subdivision of the
20 siting statute require some rewriting to insert
21 the word the facility will not pose any threat of
22 serious injury? Is that what you're asking the
23 Court basically to interpret that subdivision of
24 the statute to mean?

25 MS. BRIMMER: I think -- well, I think that
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1 threat. We believe that none of them are really
2 found within the plain language of the statute,
3 and some of them would indicate that they are --
4 that the PUC exceeds its authority in this case.

5 First, the PUC says that, well, our
6 examination is limited by the siting area, the
7 siting area being a 20-mile radius around the
8 plant. The plain language of the statute does
9 include the phrase siting area at the very end of
10 that provision that we're concerned with here
11 today.

12 But it is clear from the use of the words --
13 it is clear from that provision and the way that
14 it is worded and the grammar that siting area is
15 not modifying the portion concerning
16 environmental injury, but is, in fact, modifying
17 just the social and economic consequences that
18 should be examined.

19 And this is borne out by the PUC itself
20 really in its actions in this case. The siting
21 order that set the 20-mile radius occurred very
22 early in the case before the Appellants were
23 involved. And that was then referred to a local
24 review committee. And the local review committee
25 does have a report in the record. A review of

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1 that siting order and the work of the local
2 review committee shows that the PUC itself and
3 the folks doing the work on the committee were
4 examining only the social and economic aspects.
5 There was no review and no discussion in those
6 documents of the environmental provisions in this
7 statute.

8 Instead, they reviewed things like road
9 infrastructure and housing and school district
10 needs, things of that nature. So clearly the PUC
11 itself wasn't really thinking of the siting area
12 as a limit on its review at the time of the
13 environmental consequences.

14 But also by using this circumscribed siting
15 area, it appears to be internally inconsistent
16 then within the PUC findings. The PUC findings,
17 when they are talking about air quality issues,
18 whether it's carbon dioxide or mercury is another
19 example, drew a pretty large circle. They
20 recognized that these are issues of much larger
21 magnitude. That these are quality impacts can
22 travel for a distance and so to do the proper
23 examination of potential environmental injury, it
24 had to expand beyond that 20-mile radius.

25 And finally that's borne out also by the PUC
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1 environment injury. It doesn't designate
2 particular pollutants.

3 We would submit, in fact, the legislature
4 was fairly forward-thinking in that recognizing
5 that regulation doesn't keep up with science very
6 well; that we often understand things about
7 environmental consequences or environmental
8 injury even before we take action and regulate a
9 particular pollutant as is the case here.

10 Also, it's not really relevant to this
11 proceeding. This is not a permit proceeding
12 where the parties are arguing how much of a
13 particular pollutant should or can come out of
14 the stacks, or come out of somewhere in the
15 plant, and what should those permit limits be.
16 That's going to occur. It's going to occur in a
17 different forum. This is a much broader forum
18 under the statute where we examine the
19 environmental consequences generally.

20 And we submit that to the extent that the
21 PUC is saying that they considered whether other
22 states regulate CO₂ as a pollutant, that in regard
23 then the PUC is saying that they were considering
24 things outside the four corners of the statute
25 and that that would exceed the PUC's authority.

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1 staff evidence from Doctor Denney. Doctor
2 Denny's testimony is fairly clear in indicating
3 that particularly when looking at air quality
4 issues, it is appropriate and proper to extend
5 the review beyond the immediate vicinity of the
6 plant and that really anything else -- and
7 subscribing it very tightly would render full
8 examination of air quality issues fairly
9 meaningless under the statute and that would not
10 be a reasonable application.

11 I would like to turn to three other,
12 quickly, reasons the PUC makes for disregarding
13 some of the -- a lot of the environmental
14 evidence in this case and ruling instead that
15 this is not a threat of serious injury that is
16 set forth in some of the briefing.

17 First, the PUC notes that no other state
18 regulates carbon dioxide; and, therefore, that
19 entered into their decision that this was not a
20 serious environmental injury or threat of a
21 serious injury.

22 Pollution regulation or regulation of any
23 particular pollutant is clearly not part of the
24 siting statute. It again uses very broad
25 language with respect to a threat of serious

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1 Similar arguments with respect to another
2 concern that the PUC voiced, that to deny the
3 siting permit to the Big Stone II power plant
4 would amount to a complete ban. And we would --
5 we are assuming that they are referring to a
6 complete ban on old-fashioned pulverized coal
7 plants. In other words, a ban on a particular
8 power technology.

9 But, again, that is not something in this
10 statute. The statute does not say we want to
11 know whether there's a threat of serious injury
12 to the environment unless that would affect a
13 particular technology negatively or ban that
14 technology, then we will allow it to go forward.

15 There is no such balancing set forth in the
16 statute. There is no such balancing set forth in
17 PUC's rules. And to the extent that they did so
18 in order to maintain a particular technology,
19 Appellants would submit that again that's an
20 improper consideration outside of the PUC
21 statutory authority.

22 And, last, there's the issue of cost balance
23 that we raised in our brief. The PUC talked
24 about the fact that it did not regard the carbon
25 dioxide pollution to be a serious environmental

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1 threat; that it did not reach a particular
2 magnitude that it felt they should deny
3 permitting under the statute. They then went in
4 their findings and said there are also economic
benefits to the area.

6 It is correct, as PUC states in their brief,
7 that the PUC findings don't draw a direct
8 connection. In other words, there is no finding
9 that says we're willing to accept environmental
10 consequences in exchange for economic benefit.
11 They do not say it that clearly.

12 However, we believe that it appears that
13 that may have been going on nonetheless. And I
14 think some good evidence of that is again Doctor
15 Denney's testimony, the testimony submitted by
16 the PUC staff.

17 And I marked just a few pages. There's
18 maybe a half dozen, maybe ten pages in Doctor
19 Denney's testimony, starting on page 34, where
20 Doctor Denney says the proper context for the
21 environmental effects which are negative external
22 effects of Big Stone II to society and the
23 environment is to compare them to positive
24 socioeconomic effects of Big Stone II.

25 There follows a couple of questions where
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1 the PUC staff elicit testimony with questions
2 saying please compare the negative environmental
3 effects to the positive economic effects. And,
4 in fact, on pages 38 and 39 of Doctor Denney's
5 testimony there are tables where Doctor Denney,
6 in response to those questions, does just that,
7 provides a comparison of negative environmental
8 and positive local economic impacts from Big
9 Stone II.

10 All of this would appear to indicate that
11 there is at least a possibility that the PUC's
12 findings were tainted in this regard; that they
13 were engaging in an improper balancing test of
14 the environmental consequences.

15 THE COURT: You don't dispute, though, that
16 the siting statute in subdivision two reference
17 social and economic condition of inhabitants or
18 expected inhabitants to economic conditions enter
19 into the decision? You're just saying the
20 balancing shouldn't have happened?

21 MS. BRIMMER: That's correct, Your Honor.

22 THE COURT: Pitting one against the other.

23 MS. BRIMMER: That's correct. That they are
24 absolutely a relevant consideration that one does
25 not balance out the other, that's correct.

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1 So, in conclusion, Appellants argue simply
2 for application and interpretation of South
3 Dakota's law consistent with its plain language
4 and really the great weight of the evidence in
5 this case.

6 Let me be clear, Appellants do not wish for
7 South Dakota to solve a significant problem like
8 global warming. That is not South Dakota's role.
9 We don't want to them to take one for the team.
10 But South Dakota does have its own responsibility
11 for application of its own rules and law into its
12 own power plants and what contribution those
13 power plants may make to this serious problem, as
14 all states do.

15 And so we ask the Court to apply the plain
16 language of the statute, to review the great
17 weight of the evidence, and to reverse the PUC's
18 decision on this point. Thank you.

19 THE COURT: All right. Thank you.
20 Mr. Welk.

21 MR. WELK: Thank you, Your Honor. As
22 Appellants' counsel indicated, the issue is
23 posited relatively simply in this case of whether
24 the commission's decision to grant Big Stone II a
25 siting permit should be reversed.

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1 The single ground in which all of the
2 arguments is based, that is that they contend
3 that the CO₂ emission, the carbon dioxide
4 emissions from the plant, prevent the Appellants
5 from meeting its burden of proof under 49-41B-22.
6 That is simply what their argument is, is that we
7 have failed in the proof to meet that burden of
8 proof.

9 But as we sit here today, the burden has
10 shifted back to the Appellants under 1-26-36,
11 which Appellants' counsel has failed to
12 recognize. And as the Court is well aware of the
13 first sentence of 1-26-36 says the Court shall
14 give great weight to the findings made and
15 inferences drawn by an agency on questions of
16 fact.

17 And before we analyze the essential factual
18 findings and inferences, I think it's important
19 for the Court to know what the proceedings were
20 below.

21 I believe and I would be safe in saying that
22 this is probably one of the more extensive
23 records made before an agency regarding a
24 decision. The commission has entered over 203
25 Findings of Fact, 22 Conclusions of Law, and

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1 issued several conditions to the issuance of this
2 permit. There were public input hearings before
3 and after the contested case proceedings in the
4 affected area of the proposed plant as well as in
Pierre.

6 I think it's important for the Court to
7 realize -- and it's sort of a small point, but a
8 significant point -- that Big Stone II is going
9 to be located adjacent to Big Stone I. So in the
10 area in which this plant is proposed to be
11 situated the people in this area have had a power
12 plant for over 25 years. So this wasn't
13 something that was new to the inhabitants of the
14 area.

15 Prior to the contested case hearing there
16 was extensive discovery. In fact, the Applicants
17 answered over 500 discovery requests. We
18 produced over 47,000 pages of documents, and we
19 had over 2,000 pages of testimony and exhibits
20 introduced. There was expensive prefiled
21 testimony by the Applicants, the intervenors, the
22 PUC staff. There was a five-day contested
23 hearing, which all cross-examination was
24 available to all parties.

25 And I think it's important for the Court,
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1 demand. They haven't challenged that this is the
2 best site. They haven't challenged the myriad of
3 findings the commission made on geology,
4 hydrology, land use, plants, animals, aquatic
5 ecosystems, water quality, community impact.

6 In addition, they made no challenge to the
7 project benefits that seek to reduce sulfur
8 dioxide, nitrous oxide, carbon dioxide, mercury
9 emissions, and sulfuric acid mist. The
10 commission did not look at just CO₂ emissions,
11 Your Honor, they looked at all of these. And as
12 you see through the extensive findings, that CO₂
13 is just one of the emissions that was looked at.

14 In addition, there is an extensive EIS that
15 the federal government has been doing for years,
16 and all of these findings on all of these
17 emissions were looked at, as you can see from
18 these rather extensive records, each looked at in
19 detail as to what their effects may be.

20 The commission has carefully considered all
21 of these issues. And when they got to the CO₂
22 issues, Your Honor, there's a specific area that
23 was -- that the commission went through that
24 starts at about 133 on the carbon dioxide
25 emissions. And they made a finding that no South
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1 when looking at review of this record, to look at
2 the findings that were not challenged by the
3 Appellants. And obviously by their failure to
4 challenge those findings they waived those issues
5 of fact. But just to let the Court kind of step
6 back, go to the top of the mountain and say,
7 what's not being contested at this voluminous
8 record?

9 First of all, there's no contest as to the
10 need of electricity generation by these project
11 participants. And there's no challenge in this
12 proceeding that the PUC looked at alternative
13 energy sources for the project and determined
14 that this is an appropriate base load generation.
15 Which means, Your Honor, it's an energy source
16 that must be available 24/7.

17 It's the basic power that operates for these
18 utilities. And there is no challenge that this
19 need exists in a service area to these
20 participants which is essentially rural areas in
21 several states. They haven't challenged what the
22 consequences would be delayed in the failing to
provide this basic need.

24 They haven't proposed any alternative way to
25 satisfy this deficient electricity generation
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1 Dakota or federal regulations exist today
2 regarding CO₂.

3 And I'm sure Mr. Smith is going to bring up
4 the resolution of the South Dakota commission --
5 or the South Dakota legislature that said that
6 they did not -- that they supported certain
7 legislation, but they did not want to have any
8 standards or regulations as to carbon dioxide
9 emissions. Clearly what our legislature has been
10 stating to the commission.

11 The commission also found in finding of fact
12 135 that the emissions would not significantly
13 contribute to global warming. As counsel
14 indicated, one-seventh of one percent. In
15 addition, the emission made by the Big Stone II
16 will produce 18 percent less CO₂ than the existing
17 plant because of a supercritical boiler.

18 The commission looked at future costs for CO₂
19 controls because an argument was made by the
20 staff and by the intervenors that these need to
21 be considered. Even though there isn't anything
22 in our South Dakota statutes that arguably deals
23 with externalities and those type of subjects,
the commission did look at that evidence.

25 And they looked at the future costs of CO₂
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1 controls and whether they should be imputed to
2 the project. And they found that the imputation
3 of such costs was speculative because South
4 Dakota and Congress had not yet enacted laws or
5 regulations requiring such imputation. That's in
6 finding of fact 137.

7 However, in finding 139, the commission
8 considered costs from a variety of sources and
9 found that the intervenors proffered costs not to
10 be reasonable. And if reasonable planning
11 numbers were considered, that such numbers would
12 not affect the cost-effectiveness of the project
13 compared to the alternative.

14 So even though the commission didn't have to
15 look at those, they did, and they did take a look
16 carefully at those potential costs even though
17 the regulations may not have required a specific
18 consideration.

19 In addition, Your Honor, if you look at
20 condition six that was put on the permit
21 applications, the commission is requiring the
22 Applicants to continue to report to the
23 commission on the status of CO₂ regulations, the
24 technologies that are available, and the cost
25 controls. They have already -- they have

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1 Court hasn't had a chance to look at that so,
2 briefly -- because I think this case is helpful
3 to the Court in discerning what the scope of
4 review is in this case.

5 This involved a case where I was
6 representing a trust company in Sioux Falls that
7 was opposing the establishment by Dorsey &
8 Whitney, a law firm in Minneapolis, as to a trust
9 company in South Dakota. And we challenged the
10 application because we believed that the standard
11 of review was not appropriate, that it should
12 have been de novo.

13 And the Court -- and in this instance I
14 believe was Justice Miller, if I was correct --
15 Justice Miller, Former Chief Justice, went into
16 some detail. And it's -- if you look on pages
17 four and five on the scope of review, I think he
18 clearly delineated how we approached this
19 somewhat quagmire as a step back.

20 And read Dorsey & Whitney, Your Honor. What
21 we have are certain standards of a statute to be
22 made -- to be satisfied similarly as in Dorsey &
23 Whitney. And the Court is faced with is this a
24 mixed request and how do we look at this.

25 And what Justice Miller said is that if it's
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1 considered all of the arguments that have been
2 made by the intervenors and, Your Honor, I submit
3 respectfully that this is the quintessential case
4 that the intervenors are asking this Court to
5 substitute its judgment for the commission.

6 I do want to talk about the scope of review.
7 And counsel has talked about that a little bit.
8 And in their briefs it's somewhat unclear as to
9 what they believe the scope of review to be.

10 They have indicated that this record
11 presents a mixed question of law or fact that
12 needs to be reviewed. They contend it's a
13 de novo review, and they've also added whether
14 it's clearly erroneous and arbitrary and
15 capricious. We believe, Your Honor, as the
16 Applicants, no matter what standard of review you
17 select, that it should be affirmed. However, I
18 want to talk about a particular case that I don't
19 believe was cited, and I'll have Mr. Madsen
20 provide it to you and to counsel.

21 Sometimes cases you're involved in, even
22 when you lose, come back to help you. That's
23 what this case is. This case involves Dorsey &
24 Whitney, that is being handed out by Mr. Madsen.
25 That's cited at 623 NW2d 468. And I know the

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1 something where essentially the question is
2 factual in nature, it's a clearly erroneous
3 statute or standard of review. If it's something
4 that goes to the statutory requirements, that is
5 more policy making. That is something that's de
6 novo.

7 And this case, Your Honor, is clearly just
8 as in Dorsey & Whitney when we were arguing a
9 public need had not been shown is clearly
10 inherently factual inquiry that is subject to a
11 clearly erroneous standard. But we believe under
12 any standard that the record supports it. And
13 it's hard to believe, Your Honor, that a more
14 extensive record and well-reasoned decision could
15 be made.

16 The commission in this instance does not
17 accept our proposed findings, but rather took the
18 findings, looked at even the intervenors'
19 findings and arrived at a considered and well-
20 reasoned decision. They did look at the basic
21 deficit in electricity generation needs and the
22 environmental concerns and around the plant.

23 The testimony that counsel is talking about
24 came from a single witness, Ezra Hausman, who
25 didn't show up and we didn't cross-examine, who

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1 essentially set forth the global warming issue
2 that's in America and the world that exists.

3 As I started when I made my opening
4 statement, this proceeding is not a proceeding on
5 global warming. The federal government can't
6 solve it; the states can't solve it. The world
7 hasn't solved it yet, and that's not -- this
8 isn't the forum to determine that policy issue.

9 The commission looked at the issue and the
10 context of what exists today and that is there is
11 no regulation for these emissions. They looked
12 at how to control it. They looked at everything
13 that exists. And they said, yes, we are
14 concerned, we want you to report about it, we
15 want to know about cost controls, but they did
16 not determine it to be a serious threat to the
17 environment so as to deny the permit.

18 I believe that I can say safely, Your Honor,
19 that the commission looked much broader than what
20 the Appellants are suggesting the Court ought to
21 look at as to this project; and they arrived,
22 after an extensive review, that the commission
23 should issue the permit on certain terms and
24 conditions.

25 And I'm going to return back to where I
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1 Doctor Hausman. And so their argument
2 essentially was on a de novo review of written
3 testimony. The commission didn't look at any
4 credibility. That's what was submitted.

5 And then you had -- they had two experts
6 that actually testified as a team regarding what
7 I'd call the economic regulation of CO₂. And we
8 had a person who came in that testified about the
9 economic regulation of CO₂.

10 And essentially it became, Your Honor, a
11 battle of telling us what is out there.
12 Everybody agreed there's no regulation. You
13 know, they submitted that some of these costs
14 need to be considered. The staff had its own
15 expert that came in with these costs that should
16 be considered, whether they're externalities or
17 regulatory costs.

18 The bottom line is their argument is that
19 these are damages that should be considered.
20 And, essentially, everybody said this is
21 something that is so speculative, we cannot -- at
22 least the witnesses in which they relied on, the
23 commission. And that's what we're dealing with.

24 Is there evidence to support what they said?
25 The answer is yes. We brought in a witness,
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1 started from, Your Honor, and that is under the
2 1-26-36 review this Court is obligated to give
3 great weight to the findings and inferences
4 drawn. And we believe, Your Honor, when the
5 Court looks at this extensive and voluminous
6 record, that it will affirm. And we would ask
7 that the Court affirm in total the Findings of
8 Facts, Conclusions of Law, and Decision that have
9 been entered by the commission.

10 THE COURT: Going back to what you started
11 off with, which was that the standard of review
12 at the original hearing put the burden on the
13 Appellant to establish that the facility would
14 not pose a threat of serious injury to the
15 environment and on -- the intervenors had Doctor
16 Hausman as their expert who was -- and what was
17 the evidence upon which the PUC based their
18 decision that the facility will not pose a
19 threat?

20 MR. WELK: In regard to CO₂ or all the other
21 matters?

22 THE COURT: In regard to CO₂.

23 MR. WELK: There's only about three people
24 that testified. Doctor Hausman, he submitted his
25 testimony. Nobody cross-examined him. That was
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1 Mr. Hewson, I believe was his name, Hewson, who
2 was the primary one who went through all of the
3 regulation, state, federal status, the whole nine
4 yards, as to what's going on. What are these
5 various costs? They had people about various
6 costs.

7 And that's why the commission, when it made
8 its finding, looking at all they had, they said
9 this is all speculative. Even look at what
10 you're doing, intervenors, your proffered costs
11 and that's what it ended up being, your costs of
12 this are not reasonable. It's more reasonable to
13 look at these. And if we look at these costs and
14 we look at what the alternatives for this deficit
15 of electricity, it isn't a good alternative.

16 So this is still the best alternative to
17 satisfy the deficit. And we're sitting here
18 looking at a narrow need, Your Honor, a narrow
19 environmental argument. Nobody has disputed the
20 tremendous need that exists out there for these
21 seven companies that need electricity. Where are
22 we going to get it? I mean if you don't approve
23 this plant, where are you going to get it? And
24 that's essentially the way they looked at that.

25 They didn't balance as Appellate counsel
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1 suggests.

2 I ask in 200 findings, tell me where they

3 balance that. There wasn't any balance. They

4 had to agree. They had to by statute address

5 certain statutory obligations, which they did.

6 And the one point that she brought up about the

7 local review committee that has a specific

8 purpose, that's 49-41B-7 on what the local review

9 has to address, and those aren't -- those are

10 housing supplies, educational facilities and

11 manpower, waste supply and distribution, waste

12 water treatment and collection, solid waste

13 disposal and collection, and law enforcement.

14 That's what -- oh, and there's transportation,

15 fire protection, health, recreation, government

16 and energy.

17 Those are what the local review committee

18 was supposed to do. They're required by statute

19 to go look at those. They weren't charged with

20 the environmental piece. That was the job of the

21 PUC. And as Mr. Smith has also indicated in his

22 brief, the PUC is not a many environmental

23 protection agency. It can't adopt standards that

24 other environmental agencies have not adopted.

25 So the PUC, I believe, discharged their

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1 responsibility seriously under a voluminous

2 record, Your Honor, and I think it should be

3 affirmed.

4 THE COURT: Thank you. Mr. Smith.

5 MR. SMITH: Thank you, Your Honor. There's

6 a word -- and when we look at plain language of

7 the statute, there's one word that has been

8 omitted really from our decision here today. And

9 that word -- at least I think you'll see if you

10 look at the commission's proposed rulings -- on

11 Appellants' proposed findings regarding global

12 warming was a very important word, and that word

13 is the word facility. The word facility. The

14 facility will not pose a threat of serious injury

15 to the environment.

16 If you look at the testimony of Doctor

17 Hausman, if you look at the briefs submitted by

18 Appellants and recall the argument made here this

19 morning, Appellants never really do argue that

20 this particular facility will cause the harm that

21 they believe will be caused out there. The

22 culprit is always global warming.

23 And as Doctor Hausman's testimony clearly

24 indicated, that phenomenon of CO₂ buildup and

25 global warming, assuming it's happening, is

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1 literally, in his own words, it's caused by

2 millions of CO₂ emission sources, millions. And

3 tens of thousands of significant sources of the

4 same general magnitude as Big Stone II.

5 You know, I think what it boils down to --

6 really this whole case boils down to then is with

7 the words this facility will not pose. Was it an

8 abuse of the commission's discretion, if you

9 will, to both read the statute as it reads and to

10 apply it that way?

11 If you take a look at the ruling on proposed

12 findings, what we did find is that there is

13 insufficient evidence in the record to conclude

14 -- to find that Big Stone II itself will pose a

15 serious threat or a threat of serious injury to

16 the environment via global warming.

17 Now, does that mean the commission isn't

18 concerned necessarily about global warming and

19 didn't consider Doctor Hausman's evidence about

20 that? The answer is no. The problem is it gets

21 down to one of how do you address a problem like

22 that?

23 And I think as Ms. Brimmer has acknowledged,

24 we can't solve the global warming issue here. We

25 can't solve it at the PUC. The global warming

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1 issue is absolutely the epitome of a macro

2 environmental and macro economic issue. It

3 really is. It's a global issue. Millions of

4 sources contribute to it. And there's still

5 significant debate at the national level, as I'm

6 sure you're aware of even, what the causes of

7 temperature increase on earth are.

8 That isn't resolved yet. It's debated over

9 and over again with Congress, and they haven't

10 come to a conclusion. The EPA itself has

11 declined. Federal EPA has declined to pass

12 rules. And that non-exercise of their authority

13 of their discretion has been upheld by the

14 Federal Court of Appeals for exactly that reason.

15 For exactly the reason that until we have a

16 policy, until we have a policy to single out one

17 particular source. I mean, to me, that's just

18 arbitrary action to say, okay, this particular

19 source here, we're going to chop you off at the

20 same time as millions of other sources.

21 Among those sources are you and me. We now

22 have three billion people on the planet. That's

23 a couple billion more than we had, you know, at

24 the beginning of the last century. Every one of

25 those human beings inhales air, removes the

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1 oxygen from it and exhales CO₂. Those two billion
2 people are a major contributor to the global
3 warming problem.

4 And I think the real issue is here when we
5 look at the statute the way it reads in terms of
6 will this facility pose a serious -- or a threat
7 of serious harm, the commission just didn't find
8 any evidence in the record to show that. We
9 didn't.

10 And that goes, I think, to my next point and
11 it's addressing her point about the ban. And,
12 again, we certainly didn't say in our brief that
13 there should be a ban on coal plants. I didn't
14 say that. What I said, I quoted this passage
15 from their initial brief, that doesn't mean limit
16 further buildup of all sources except ones of a
17 certain size or limit and further buildup from
18 all sources except those in South Dakota.

19 The uncontested evidence in this case is
20 that the scientific consensus is to stop
21 increasing and start decreasing all CO₂.

22 And as Doctor Hausman testified in the --
23 just even the generation context, gas, natural
24 gas, CO₂ emitter, coal CO₂ emitter, oil CO₂
25 emitter. And so if we were to -- and I would

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1 efficient than the older plants like you see up
2 in North Dakota and those other old plants. It's
3 the state of the art. We can't do any better
4 than that and use coal at all at this point in
5 time.

6 There's an unproven technology called IGCC
7 that may hold some potential for that, but it's
8 not at the commercial roll-out phase yet. And,
9 in fact, the U.S. Department of Energy reasonably
10 denied the application of Basin Electric for a
11 pilot IGCC plant here because they felt the
12 testing that had been done using sub-bituminous
13 coals, which is the kind we have around here,
14 they didn't feel it was worth the risk. And so I
15 think that's really at the heart of this issue.

16 Right now we have a gas plant permit
17 proceeding going on for Groton II. We just
18 permitted Groton I back in March. Those are each
19 a hundred megawatt gas plants. Now, if we step
20 in here and we say we have to ban Big Stone II,
21 we have to deny a permit for Big Stone II because
22 it emits CO₂, how are we going to -- can we then
23 turn around and permit the Groton I plant, the
24 Groton II plant?

25 We just approved two years ago, three years

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1 submit the suggestion is really made by
2 Appellants that we should single out coal plants
3 as the bogey man, if you want to call it that.
4 And based on what? Do they emit more CO₂ per unit
5 of generation output than gas? Yes, they do by
6 some percentage. But what is that? What's the
7 standard? What is the standard that we would
8 look to to say above this level, if you emit
9 above this level per megawatt hour, then you're
10 banned.

11 THE COURT: If you emit above the salt on
12 the road level.

13 MR. SMITH: Right. If you emit that at any
14 level. You know, what the -- on a per unit of
15 energy basis, the largest emitters of CO₂ in South
16 Dakota are ethanol plants, not -- that's just a
17 fact. That's a fact. And we don't have
18 jurisdiction over that. But that's the truth.
19 And I think that's the dilemma we're faced with
20 here.

21 For us to -- without any standards at all,
22 for us to step in and single out one particular
23 type of facility, which happens to be the most
24 efficient type of coal-burning facility that
25 exists at this point if time, highly more

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1 ago, we approved Angus Anson, too, even a larger
2 gas plant. Now, admittedly, they don't emit
3 quite as much. They don't emit quite as much CO₂
4 per unit of electric output as the coal plant,
5 but they still emit a heck of a lot of CO₂.

6 And if the co-owners were to substitute a
7 600 megawatt gas plant, for example, for Big
8 Stone II, it will emit around approximately
9 60 percent as much CO₂.

10 They point to Doctor Hausman's statement
11 about the measurability of Big Stone II's output.
12 Yes, it's measurable, in the ten-thousands, ten-
13 thousands. A gas plant will be similar. The
14 evidence showed Big Stone will be somewhere
15 between 1 and 2 percent -- or 1 and 2
16 ten-thousands of global anthropogenic emissions.

17 So you take -- we look at a 600 megawatt gas
18 plant as a substitute. Well, then that means
19 it's one ten-thousands. That's still measurable.
20 And that means when you really look at it -- and
21 that's why I made the -- I guess I made it a
22 little bit tongue in cheek. But about the total
23 ban is the bottom line without standards without
24 any way to differentiate on the basis of degree.

25 We have no basis for allowing one and disallowing

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1 another.
2 And I think that's the dilemma we were faced
3 with and why we focused on the precise language
4 in statute, which is this facility. And the
5 bottom line, I think, for us is a very diffuse --
6 one other comment, too, and that's the use of the
7 word pollutant in connection with CO₂.

8 CO₂ isn't a pollutant in the typical sense
9 like SO₂, you know, sulfur dioxides, nitrogen
10 oxides, nitrous oxides, carbon monoxide,
11 particulate matter, mercury, and so on and on.
12 It's not like that. Those are all toxic. Those
13 are toxic chemicals. They're foreign chemicals
14 really to the environment by and large. Not
15 totally SO₂ and NO_x because of volcanos I know can
16 emit that so on and so on. But they're foreign
17 in the context of our living environment.

18 Not so with CO₂. CO₂ is a gas we produce
19 right in our own bodies. You do it. We do it
20 with metabolism. And CO₂ is essential for life.
21 It is. Life can't exist on earth without CO₂.
22 That's what plants use to produce nutrients. So
23 CO₂ regulation requires even -- it requires -- and
24 all things, all living things produce it. Just
25 about everything we do produces some level of CO₂.

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1 They've been the strongest supporters of all the
2 active energy in South Dakota that I know of.
3 And the issue isn't that. It's just what is
4 a reasonable, a reasoned and permissible exercise
5 of the commission's jurisdiction within the legal
6 context we find ourselves in? And that's what we
7 did here, and we did a good job of it, and I
8 think you should affirm the decision.

9 THE COURT: Thank you, Mr. Smith. Wrap-up?

10 MS. BRIMMER: Thank you, Your Honor,
11 gentlemen, very briefly: I think this was made
12 clear, but just in case -- Mr. Hausman, I think,
13 didn't show up for the hearing. Well, in fact,
14 he wasn't called by any of the parties. All the
15 direct testimony was submitted in writing, as
16 requested by the PUC. And it was clear that no
17 one wanted to cross-examine him, so there was no
18 need for him to appear. So I just want that to
19 be clear that there was not some delinquency on
20 his part.

21 A couple of things on standard of review.
22 Questions I think we've clearly stated. The
23 standard of review in both of our briefs, I think
24 we've clearly stated it here. I actually don't
25 here the parties are disagreeing about what the

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1 The regulatory challenge posed by CO₂ is of an
2 order that is unprecedented on the planet.

3 And it just isn't reasonable. And I would
4 submit to you that it would be an abuse. It
5 would be an unwarranted exercise of discretion by
6 the commission to go down that road in this
7 particular case.

8 Does that mean Big Stone II's carbon
9 emissions will not be regulated? I think the
10 answer to that is clearly no. They probably will
11 be, along with the emissions from all other
12 carbon-emitting sources in this country. But
13 that will be done via a national policy that I
14 believe is coming in the near future from the
15 Congress. And that's the right place for it to
16 come from.

17 Again, I would submit that the decision that
18 we made was a well-reasoned decision. It was the
19 proper exercise of discretion by the commission.
20 And I would urge that -- I recognize -- I mean
21 you know the commissioners. These are not
22 Neanderthals. These are smart people. At the
23 time it was Commissioners Bob Sahr, Gary Hanson,
24 and Dusty Johnson. They're highly intelligent
25 people. They do care about the environment.

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1 standard of review is. I think different pieces
2 of the case call for different standards, and I
3 think that we've made that clear.

4 I would like to note on the question of fact
5 failure of the PUC to make a finding on a fact or
6 possibly just choosing not to look at a piece of
7 evidence does not necessarily insulate that
8 evidence from this Court's review. And I want
9 that to be made clear. The Court may be applying
10 a clearly erroneous standard, but in doing so and
11 in determining whether that is the case whether
12 it's clearly erroneous the Court does review the
13 record as a whole.

14 I would submit that the largeness of the
15 record here, while it was voluminous, there
16 was -- there were a lot of issues up for review.
17 And I'm sure the Court knows that the physical
18 size of the record does not always dictate the
19 quality of the record or the outcome.

20 Many of those issues have not been
21 challenged on appeal, but they were clearly
22 challenged below. And, in fact, a lot of the
23 issues that we heard from the coal plant
24 co-owners such as need for the plant and things
25 of that nature are not relevant here. Again,

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1 that is not something that is to be balanced
2 against the threat of serious environmental
3 injury.

4 The statute does not set forth that kind of
balancing test. Those things are considered.
6 They are required to be considered by the PUC.
7 But they are considered separate and apart and
8 not balanced against the environmental issues.

9 Again, whether or not this pollutant is
10 regulated does not matter here. It is not
11 relevant. It is not a condition of the statute.
12 In fact, all air pollutants were unregulated just
13 a little more than 30 years ago. It didn't mean
14 that they weren't causing significant
15 environmental harm. It didn't mean that they
16 weren't pollutants. So whether or not CO₂ is
17 regulated at this point in time is not relevant
18 to the Court's consideration.

19 I'm afraid that co-owners -- the Big Stone
20 co-owners continue to confuse externality regs
21 and regulatory costs. There was a lot of
22 discussion and argument about costs and a lot of
23 discussion about the dispute between some
24 witnesses for the environmental organizations and
25 witnesses on the other side. Will the federal
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1 often environmental harms in air quality is so --
2 this is so true for air quality, whether it's
3 mercury or sulfur dioxide or carbon dioxide.
4 THE COURT: Isn't that analysis that you
5 refer to limited to in this comparing with
6 facilities in the siting area, isn't there a part
7 of that rule that would somewhat limit that
8 analysis?

9 MS. BRIMMER: It compares both within and
10 without. That rule does not limit it. If you
11 will see there are two separate pieces of that
12 rule, two separate sentences. In the siting area
13 is attached only to the sentence about some
14 materials that are supposed to be provided by the
15 co-owners. And it says please provide a list of
16 industries in the siting area.

17 But prior to that it says you should provide
18 a review, an assessment of what might be the
19 cumulative synergistic effects generally of the
20 plant on the environment. Obviously, it would be
21 difficult for the plant to provide a list of
22 industries in California that may, in fact, be
23 contributing to an issue or even in industries
24 out of a neighboring state. So it's our position
25 that when you read that, it only limits that part
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1 government regulate? Will it not?

2 Those are not the costs at issue in this
3 appeal. Those -- that was all testimony about
4 whether the federal government would step in.
5 And what did that mean to cost of operating the
6 plant and whether it was the low cost
7 alternative? Absolutely not relevant here.

8 The only relevant cost consideration here is
9 primarily the testimony of Doctor Denney, which
10 goes to the externalities. Externality costs are
11 environmental costs. They are the costs borne by
12 society if the climate is dryer or wetter or if
13 there is some health issue associated with them.
14 That is the cost to look at on this appeal.

15 I'd like to address a couple of the points
16 made by Mr. Smith in his argument. The facility
17 will not pose a threat of serious environmental
18 harm. I think, in fact, that the facility will.
19 And I think even the PUC itself acknowledges the
20 different ways that that can happen.

21 The facility itself does have a significant
22 impact, a measurable impact in terms of carbon
dioxide. But also the PUC's own rules require
24 review of cumulative synergistic effects in the
25 environment. The PUC wisely understands that
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1 of the rule.

2 All of these pollutants can have an impact.
3 Yes, carbon dioxide does pose some interesting
4 problems. But all of the pollutants that were
5 regulated under the Clean Air Act occur
6 naturally. None of them are so-called foreign
7 pollutants. All of them, including mercury occur
8 in nature. Ozone is an excellent example of
9 something that is -- in fact, I would say roughly
10 60 percent, I think it is, or something like
11 that, of ozone in the atmosphere is naturally
12 occurring. But when we create ozone on a hot day
13 with internal combustion engines, we're causing
14 an environmental problem. And since carbon
15 dioxide doesn't really present anything that is
16 so radically different than other air pollution
17 that we deal with.

18 While I am sympathetic to the difficulty of
19 the PUC's job in this case, it does have to
20 concern itself with need. It has to concern
21 itself with what is best for the citizens of the
22 state. And it can be an incredibly difficult
23 task and must be done within the boundaries of
24 reason.

25 However, the arguments that Mr. Smith
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1 advances are largely policy arguments for
 2 ignoring the clear language of the statute.
 3 That's the role of the legislature. And it would
 4 be appropriate for the legislature to step in, if
 5 the legislature thought that was appropriate, and
 6 write a balancing test or write a reasonableness
 7 test into the statute more along the lines of
 8 what the PUC appears to have done here.

9 But right now under the language of the
 10 statute, the PUC has exceeded those legislative
 11 boundaries, and that's not really appropriate in
 12 this case.

13 And, finally, let me just be clear, we are
 14 not arguing the Big Stone II fails the siting
 15 requirements because it emits carbon dioxide. We
 16 agree there is a serious, seriousness test, a
 17 seriousness modifier. There may be other plants
 18 that emit carbon dioxide, but those are not
 19 before the Court right now. This one is, and we
 20 believe that it does pose a threat of serious
 21 injury, and we would ask the Court to reverse on
 22 that grounds. Thank you.

23 THE COURT: All right. Thank you. Does
 24 anyone have anything further?

25 MR. WELK: I don't think -- I don't have
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1 anything further.

2 MR. SMITH: No.

3 THE COURT: I think I'm going to be able to
 4 give you a decision here. This case is a
 5 complicated case, a large record. It presents a
 6 lot of complicated factual issues.

7 As Mr. Welk mentioned, the decision
 8 contained over 200 Findings of Fact. It was a
 9 decision from the PUC that was 34-some pages
 10 long.

11 And in the end, though, the legal issue
 12 that's before the Court today on appeal is a
 13 rather simple legal issue whether or not the PUC
 14 should have granted Otter Tail Power's
 15 application to build Big Stone II, a coal-fired
 16 power plant near Big Stone City.

17 The PUC did grant that application after
 18 allowing a variety of intervenors to present
 19 evidence and testimony in opposition to the
 20 application during a four or five-day hearing.
 21 Some of those intervenors ultimately withdrew
 22 from the litigation, and others are Appellants in
 23 this case.

24 I've had a chance to review the record, to
 25 review the briefs that have been submitted, and
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1 to listen to the oral arguments that have been
 2 made here today. And I will give you my decision
 3 here.

4 Big Stone II is a project that's a proposed
 5 600 megawatt coal-fired power plant to be built
 6 adjacent to the Big Stone plant on the eastern
 7 border of South Dakota. In this project will
 8 also include the construction of transmission
 9 lines extending from the plant through South
 10 Dakota and into Minnesota.

11 The decision to build the plant was based on
 12 Otter Tail Power's and their other co-owners'
 13 analysis of the demand for reliable, economical
 14 electrical energy. The individual assessments of
 15 the co-owners indicated that this project is the
 16 best resource, among other alternatives, to
 17 supply the base load energy needs of their
 18 customers.

19 Their decision to build Big Stone II was on
 20 a site adjacent to Big Stone I was based on a
 21 variety of factors such as rail facilities, solid
 22 waste disposal, water supply systems and electric
 23 transmission corridors needed for and that were
 24 already in existence at the location of Big Stone
 25 I. The location allows both plants to share

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1 facilities and technology. Furthermore, area
 2 residents are already accustomed to the presence
 3 of the Big Stone I plant.

4 These facts led Otter Tail Power to the
 5 conclusion that the most appropriate site for Big
 6 Stone II's was nearby the already existing Big
 7 Stone I plant.

8 And there were a lot of factual details that
 9 the PUC delved into in the application process,
 10 but it appears to this Court that there were no
 11 procedural irregularities in any of the
 12 proceedings below. PUC followed all procedural
 13 rules regarding the application process.

14 A variety of intervenors were allowed, some
 15 of whom have withdrawn. Evidence was submitted
 16 both before and during the hearing process, and
 17 all sides had the opportunity to file proposed
 18 findings and conclusions.

19 Ultimately, PUC granted the application in
 20 an order that was accompanied by an extremely
 21 detailed set of Findings of Fact and Conclusions
 22 of Law.

23 In addition, the order placed certain
 24 conditions on Big Stone II that Otter Tail Power
 25 did not necessarily desire, but Otter Tail hasn't

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1 appealed any of those conditions.

2 So the only appeal in this case is the one
3 brought by Appellant environmental organizations.

4 The issues the Court is considering here
5 today that the Appellants have raised are whether
6 Otter Tail Power met its burden under SDCL
7 49-41B-22(2) of proving that Big Stone II will
8 not pose a threat of serious injury to the
9 environment; and, secondly, whether the PUC
10 engaged in an improper balancing of environmental
11 harm versus economic benefit in its decision to
12 grant that application for Big Stone II.

13 SDCL 1-26-36 sets forth the standard of
14 review to be applied in an administrative appeal.
15 Findings of Fact are reviewed for clear error.
16 Conclusions of Law are reviewed de novo. Mixed
17 questions of fact and law are reviewed de novo.

18 The South Dakota Supreme Court, in addition,
19 has stated that the statutes applicable in this
20 case demonstrate a legislative intent for the PUC
21 to have broad inherent authority in matters
22 involving utilities in this state.

23 The Appellants' case appears to challenge
24 the PUC's factual determination that based on the
25 evidence presented, the construction of Big Stone

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1 II would not pose a threat of serious injury to
2 the environment. To this Court, that would
3 indicate a clearly erroneous review.

4 Appellants argue that the PUC was in error
5 in granting the application because, in the
6 Appellants' words, the record establishes that
7 global warming poses a threat of serious injury
8 to the environment globally and in South Dakota.

9 Specifically, Appellants argue that if
10 built, Big Stone II will emit over 4.5 million
11 tons of carbon dioxide into the atmosphere per
12 year. And more carbon dioxide compounds the
13 global warming problem; therefore, Big Stone II
14 will pose a threat of serious injury to the
15 environment.

16 The Appellants' main expert witness, Doctor
17 Ezra Hausman, is a Harvard-trained expert on
18 global warming. The Appellees in this matter do
19 not quarrel with the figures used, but note that
20 Big Stone II's share of the total U.S. human-
21 caused carbon dioxide production will be
22 seven-hundredths of one percent.

23 In terms of global human-caused carbon
24 dioxide production, Big Stone II's shares would
25 be less than two-hundredths of one percent.

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1 Appellees argue that this is an insubstantial
2 amount of carbon dioxide production; and,
3 consequently, the facility does not pose a threat
4 of serious injury to the environment.

5 Clearly, Doctor Hausman's testimony
6 indicates that he believes in global warming. He
7 believes that human beings are causing it, and
8 that more coal-fired power plants are a major
9 problem.

10 In his surrebuttal testimony he agreed with
11 Otter Tail's witness regarding that witness's
12 calculation of Big Stone II's future carbon
13 dioxide emissions. However, there was
14 disagreement between the intervenors and Otter
15 Tail as to the effect of those calculations and
16 the effect of the emissions and whether the
17 facility truly posed a serious threat of injury
18 to the environment. PUC resolved that
19 disagreement in its decision in this case when it
20 determined that the facility will not pose a
21 threat of serious injury to the environment.

22 And I think everybody in this room agrees
23 that the fact is the jury is still out with
24 respect to global warming. And that this Court's
25 view that the answer on global warming must come

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1 from state and federal legislatures, from
2 policy-making bodies, not from regulatory
3 agencies like the PUC or this Court.

4 As the PUC has noted, there aren't any
5 regulations or standards governing carbon dioxide
6 emissions at either the state or federal level
7 for either the PUC or Department of Natural
8 Resources to apply.

9 The Appellants' argument that the statute
10 requires only that there be a threat of serious
11 injury to the environment indicates to the Court
12 that, well, to read the statute the way that the
13 Appellants do would effectively, in this Court's
14 view, rewrite subdivision two to read that the
15 entity applying to build a power plant has the
16 burden of proof to establish that the facility
17 will not pose any threat of serious injury to the
18 environment.

19 And since any alternative to this project
20 would result in some amount of carbon dioxide
21 emissions, under Appellants' theory, no project
22 could ever be without a threat of serious injury
23 to the environment. And that particular statute
24 then would be meaningless.

25 In any event, in this Court's view, such a
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1 revision of the statute is for the legislature
2 and not the PUC or this Court.

3 It's this Court's view that the PUC properly
4 exercised its discretion to determine and rule
5 based on its interpretation of the quality of the
6 threat, that being that the facility did not pose
7 a threat of serious injury.

8 The Appellant also argued that PUC should
9 have denied the permit because the Applicants
10 didn't adequately address the cumulative carbon
11 effects and their irreversibility in their
12 application as provided by ARSD 20:10:22:13 or in
13 their evidence. This argument really fails to
14 recognize the findings that PUC did make,
15 specifically findings 133 to 136 and 139.

16 In addition, to this Court this rule appears
17 to be limited both by its last sentence which
18 contains language limiting the effect of the
19 required analysis to cumulative or synergistic
20 effects of the proposed facility with other
21 facilities in this siting area.

22 Plus, there is a more specific rule at a
23 different location in that same set of rules
24 which requires the Applicant provide evidence of
25 compliance with all air quality standards and

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1 regulations of federal or state agencies. So
2 that subsequent rule, which is Rule 21, is more
3 specific in its application to air quality.

4 In its brief Appellants argue one last
5 point: That the PUC was duty-bound to accept
6 Appellants' global warming expert because
7 appellees didn't cross-examine him when he
8 testified.

9 However, the PUC, as a finder of fact, was
10 free to reasonably accept or reject all or parts
11 or none of an expert's opinion. The PUC acted
12 entirely within the scope of their authority in
13 rejecting Doctor Hausman's testimony even though
14 it wasn't cross-examined.

15 On the issue of improper balancing, the
16 argument has been made. Evidence of benefits
17 was, in fact, presented at the hearing, but there
18 was nothing in the findings to suggest that PUC
19 actually considered this evidence in their
20 decision. The PUC was under no obligation to
21 adopt evidence or any calculations proposed by
22 the PUC lawyers, or any lawyers for that matter.

23 So as to that particular issue, I think the
24 record is clear -- or is not clear that there was
25 an improper balancing in any regard.

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1 This Court's conclusion is that this case
2 should be affirmed. The PUC's Findings of Fact
3 are not clearly erroneous. The PUC's ruling that
4 Otter Tail Power met its burden of proving that
5 Big Stone II would not pose a threat of serious
6 economic harm is clearly supported in the record
7 and is not clearly erroneous.

8 Therefore, this Court affirms the final
9 decision and Order of the PUC in this matter.

10 Counsel for PUC, do you want to draft an
11 order for the Court's signature, Order of
12 Affirmance?

13 MR. SMITH: I will, Your Honor. I actually
14 have one here. I don't know -- Your Honor, the
15 one thing I didn't do in here is -- this is just
16 the form we always use. I didn't note your
17 verbal reasoning, verbal decision. I don't know
18 whether you feel that's a problem.

19 THE COURT: I think that should probably
20 indicate that I've given an oral decision. That
21 should be reflected in the Judgment of Affirmance
22 so it's clear that there isn't a written decision
23 and when the Supreme Court is looking at it.

24 MR. SMITH: I'll do that.

25 THE COURT: Anything further?

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1 MS. BRIMMER: No, Your Honor.
2 THE COURT: Thank you.
3 (The hearing concluded at 2:40 p.m.)
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1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2 COUNTY OF STANLEY) :SS
3) SIXTH JUDICIAL CIRCUIT

4 I, Lori J. Grode, Registered Merit Reporter and
5 Registered Professional Reporter and Notary Public in
6 and for the State of South Dakota:

7 DO HEREBY CERTIFY that the above hearing pages 1
8 through 64, inclusive, was recorded stenographically by
9 me and reduced to typewriting.

10 I FURTHER CERTIFY that the foregoing transcript of
11 the said hearing is a true and correct transcript of the
12 stenographic notes at the time and place specified
13 hereinbefore.

14 I FURTHER CERTIFY that I am not a relative or
15 employee or attorney or counsel of any of the parties,
16 nor a relative or employee of such attorney or counsel,
17 or financially interested directly or indirectly in this
18 action.

19 IN WITNESS WHEREOF, I have hereunto set my hand and
20 seal of office at Ft. Pierre, South Dakota, this 2nd day
21 of April 2007.

22 
23 _____
24 Lori J. Grode, RMR/RPR
25 Notary Public
My Commission Expires 08-01-07

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