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The legal and scientific voice protecting and defending Minnesota's environment

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June 29, 2007

VIA U.S. MAIL

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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
Supreme Court File 24485
Circuit Court Civ. No. 06-399

Dear Messrs. Madsen, Welk, and Smith:

Enclosed and served upon you, please find two copies of the Reply Brief of Appellants Minnesota Center for Environmental Advocacy, Izaak Walton League of America – Midwest Office, Fresh Energy, 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,

Janette K. Brimmer
John H. Davidson

Enclosures

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June 29, 2007

Clerk of the Supreme Court
Supreme Court of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

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
Supreme Court No. 24485
Circuit Court Civ. No. 06-399

Dear Clerk:

Enclosed for filing in the above-referenced matter, please find 15 copies of the Reply Brief of Appellants Minnesota Center for Environmental Advocacy, Izaak Walton League of America – Midwest Office, Fresh Energy, and Union of Concerned Scientists as well as an Affidavit of Service by Mail.

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

Sincerely,

Janette K. Brimmer
John H. Davidson

Enclosures

cc: Christopher W. Madsen, Thomas J. Welk
John J. Smith

State of South Dakota

In the Supreme Court

No. 24485

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

Appeal from the Circuit Court for Hughes County
Sixth Judicial Circuit, Case No. CIV 06-399
The Honorable Lori S. Wilbur, Circuit Court Judge
Date of Judgment: February 27, 2007

REPLY BRIEF OF APPELLANTS MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, IZAAK WALTON LEAGUE OF AMERICA – MIDWEST OFFICE, FRESH ENERGY, AND UNION OF CONCERNED SCIENTISTS

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NOTICE OF APPEAL FILED: MARCH 27, 2007

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INTRODUCTION

The South Dakota Public Utilities Commission ("PUC") and the Big Stone Coal Plant Co-Owners (the "Coal Plant Proposers") fail to address the primary problem in this case: that the PUC's approval of the Big Stone II coal-fired power plant ("Big Stone II") is contrary to the plain language of SDCL § 49-41B-22 (2006) (the "Siting Statute"), and clearly erroneous in light of the evidence as a whole. Big Stone II's 4.7 million annual tons of carbon dioxide ("CO_2") pollution will single-handedly contribute an enormous amount to the very serious environmental problem of global warming and does so in the face of uncontroverted evidence that significant *reductions* in CO_2 are needed immediately to avoid the worst harms. (R. 4660; 7238; 7286 et seq.) Because the language of the statute is clear and the evidence of threat of serious harm unrefuted, the PUC relies on excuses for its decision that are outside the dictates of the statute. And, the Coal Plant Proposers suggest merely that the volume of information must mean that they carried their burden of demonstrating no threat of serious injury to the environment. The PUC's and Coal Plant Proposers' arguments must fail. In fact, Big Stone II is a threat of serious injury to the environment, and Appellants request that the decision of the PUC be reversed and remanded.

ARGUMENT

I. THE PUC IMPROPERLY APPLIED AND CONSIDERED FACTORS OUTSIDE THE PLAIN LANGUAGE OF THE SITING STATUTE IN APPROVING BIG STONE II.

The PUC's arguments must fail as legally incorrect application of the law in this case and must fail as an arbitrary abuse of discretion under the plain language of the Siting Statute. This Court reviews an agency's interpretation and application of law

under a de novo standard and will not uphold an agency interpretation that is contrary to the intent of the statute as set forth in the plain language. *In the Matter of Petition of West River Elec. Ass'n, Inc.*, 675 N.W.2d 222, 226, 2004 SD 11, at ¶ 15 and 21 (S.D. 2004); *In the Matter of Northwestern Public Service Company*, 560 N.W.2d 925, 927, 1997 SD 35, ¶ 13 (S.D. 1997) (*cites omitted*); *Whalen v. Whalen*, 490 N.W.2d 276, 280 (S.D. 1992); and *Permann v. Dept. of Labor*, 411 N.W.2d 113 (S.D. 1987). In this case, the PUC argues that its decision to allow a large new source of CO_2 pollution at a time when all experts on the matter, nationally and internationally, agree that immediate reductions of CO_2 pollution are needed from all sources, everywhere, to stem the worst effects of global warming, is excused through a broad exercise of discretion unwarranted under the Siting Statute. PUC's arguments are legally incorrect.

A. The PUC's General Rationale For Its Decision To Permit Big Stone II Regarding Delegation of Authority Is An Inconsistent And Arbitrary Application Of The Siting Statute.

The PUC argues that it is required to permit Big Stone II despite Big Stone II's large contribution to the serious environmental injury of global warming, and that in so doing, it must consider matters outside the plain language of the Siting Statute. The PUC asserts that to do otherwise would constitute an improper delegation of authority from the Legislature. The PUC's argument about delegation of authority employs tortured reasoning and it is not supported by case law and the text of the Siting Statute.

The South Dakota Legislature has given adequate guidance and direction to the PUC in delegating authority under the Siting Statute. *See, State v. Moschell*, 677 N.W.2d 551, 559, 2004 SD 34, ¶¶16-18 (S.D. 2004), (where the Legislature gave adequate guidance to an agency in identifying activity as a crime, but allowing the agency to

implement the details of the statute through regulation). Here, and in accordance with the guidance set forth in the *Moschell* case, the Legislature has given adequate guidance by directing the PUC to deny a power plant permit unless the power plant can demonstrate that it will not be a threat of serious injury to the environment. The Legislature did not give unfettered discretion to the PUC to permit whomever and whenever it wishes. The PUC appears to agree that the Siting Statute is not an improper delegation by the Legislature when it states in its brief that it is not challenging its constitutionality. Obviously, a challenge by the PUC to its authority under the Siting Statute would throw the validity of the entire permitting proceeding of Big Stone II into question.

However, the PUC cannot have it both ways. Assuming it agrees that the Siting Statute is not an improper delegation, then the PUC must follow the dictates of the Legislature and apply the law as written. The PUC cannot argue that the Siting Statute gives adequate guidance for other pollutants such as sulfur dioxide, nitrogen oxides, mercury, or for any other environmental injury that might be the subject of the PUC's consideration, but that for CO_2, the PUC must stray from the plain language of the Siting Statute and find reasons to limits its own discretion. The inconsistency inherent in that argument demonstrates the arbitrary and capricious nature of the PUC's decision.

B. Other Regulation Of CO_2 Pollution Is Irrelevant To The PUC's Consideration Of The Threat Of Serious Injury From Big Stone II.

The PUC's argument that its decision to allow Big Stone II to increase South Dakota's contribution to the serious environmental problem of global warming by 34% over existing levels is supported by the lack of regulation of CO_2 emissions is entirely without foundation in the Siting Statute and outside the PUC's authority. As set forth in Appellants' initial brief, the plain language of the Siting Statute does not limit the

environmental injuries to be avoided to those that are caused solely by "regulated" emissions or pollutants. Rather, the South Dakota Legislature plainly instructed the PUC to permit only facilities that demonstrate they will not be a threat of serious injury to the environment, without limitation on what form the threat or injury might take. Obviously, environmental harms can arise from emissions or source of pollutants that are currently unregulated,[1] and the South Dakota Legislature chose to cast a wider net than simply regulated pollutants. The Legislature gave independent authority and obligation to the PUC to do the job of analyzing and avoiding environmental harms from new power plants without reference to what other states or other agencies may or may not be doing.

Ignoring Big Stone II's significant contribution to a very serious and dangerous environmental problem because other states or governments do not set limits for CO_2,[2] is not, as PUC argues, a careful exercise of discretion. Rather, it is an arbitrary abandonment and avoidance of its obligations to consider all threats of serious environmental injury. While an agency may exercise judgment on a matter within its authority, it "is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits." *Massachusetts*, ___ U.S. at ___, 127 S.Ct. at 1462. The PUC must ground its decisions and reasons for inaction (if any) in the Siting Statute. *See, Massachusetts*, ___ U.S. at ___, 127 S.Ct. at 1463. The PUC's decision to consider whether and to what extent CO_2 is regulated elsewhere is arbitrary

[1] In fact, during the pendency of this appeal, the U.S. Supreme Court found that CO_2 is a pollutant subject to regulation under the Clean Air Act, and in so finding, the Supreme Court discussed the extensive evidence regarding the very serious environmental problem of global warming and the contribution of CO_2 pollution to that problem. *Massachusetts v. U.S. Environmental Protection Agency*, __ U.S. __, 127 S.Ct. 1438, 1447-48 (2007).

[2] Although, the U.S. Supreme Court has stated that it has "little trouble" concluding that the U.S. Environmental Protection Agency has authority to regulate CO_2 as a pollutant under the Clean Air Act. *Massachusetts*, __ U.S. at__, 127 S.Ct. at 1459.

because it relies on factors not intended to be considered. *See, Smith v. Canton School Dist. No. 41-1*, 599 N.W.2d 637, 640, 1999 SD 111 ¶ 9, n. 2 (S.D. 1999) (*citing Motor Vehicle Mfr.'s Ass'n v. State Farm Mut. Auto Ins. Co.* , 463 U.S. 29, 43, 103 S.Ct. 2856, 2867 (1983)), (finding the agency decision arbitrary and capricious where the record indicated the board rewrote or ignored the factors that were to be applied to the decision in question). Similarly here, the PUC has admitted that it rewrote the Siting Statute and considered the fact that neither the federal government nor other states set limits for CO_2 emissions when it decided to permit Big Stone II, in spite of Big Stone II's 34% increase in South Dakota's annual CO_2 pollution emissions. This Court has rejected such arbitrary agency decision-making in the past and Appellants urge it to do so here.

C. The PUC's Arguments Regarding Conformity Requirements For South Dakota Environmental Standards Are Immaterial, A Diversion, And Demonstrate That The PUC's Decision To Permit Big Stone II Is Arbitrary And Capricious.

The PUC also admits improper consideration of factors outside the Siting Statute when it argues that the decision to permit Big Stone II is supported by direction from the Legislature to a sister agency, the Department of Environment and Natural Resources ("DENR"), to set various environmental limits so that they are consistent with those set by the federal government. SDCL § 1-4-4.1 (2006), *cited in PUC's brief,* p. 18. It is unclear to Appellants how this relates to the matter under consideration, as it concerns direction to an entirely different agency on entirely different regulatory matters.[3] The PUC appears to agree, at least half-heartedly, that SDCL § 1-4-4.1 (2006) doesn't apply

[3] It also appears to be a case of post-hoc rationalization by the PUC, it having not made this argument at any time below. Post-hoc rationalization or so-called "litigating positions" of agencies are not entitled to any deference by the courts. *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).

when, on page 18 of its brief PUC notes that the restriction on DENR is "not, strictly speaking, applicable here." It is not applicable, strictly, leniently, or in any fashion.

DENR is the agency responsible for setting pollutant limits in South Dakota and for setting standards for resource use, such as for water. *See, e.g.,* SDCL Titles 34, 45, 46, and 46A (2006). These are the only titles the Legislature designates as required to conform to standards set in federal law. SDCL § 1-4-4.1 (2006). This is a specific enumeration by the Legislature that does *not* include the PUC statutes. It is entirely inappropriate for the PUC to claim that this specific enumeration of environmental standards under the authority of a separate agency limits the PUC's obligations under the Siting Statute. And the PUC takes this improper consideration further when it uses the DENR statute to argue that because the federal government does not currently regulate CO_2, the South Dakota Legislature has prohibited the PUC from considering the harms from CO_2 that will be emitted by Big Stone II.[4] Appellants urge the court to reject the PUC's faulty reasoning.

D. The PUC's Arguments Regarding Fuel Technologies Do Not Excuse Its Arbitrary Considerations Outside The Boundaries Of The Siting Statute.

The PUC argues that it must permit Big Stone II even though Big Stone II will contribute 34% more CO_2 to the problem of global warming than all of South Dakota currently, because all fuel-based generating facilities emit CO_2. In making this argument the PUC demonstrates yet another way in which it considered factors outside the scope of its authority in the Siting Statute. The Siting Statute contains no limitations or

[4] Again, the U.S. Supreme Court found the Environmental Protection Agency's arguments for failing to regulate CO_2 are not supported by the Clean Air Act. *Massachusetts,* __ U.S. at__, 127 S.Ct.at 1463.

exemptions for particular types of generating facilities. Moreover, the PUC's arguments on this point demonstrate a complete disregard of the evidence in the record regarding cleaner alternatives to the Big Stone II plant, such as wind and demand-side management, and which included the use of carbon dioxide offsets that would allow a facility, fuel-based or otherwise, to be permitted without a threat of serious injury to the environment. (*See, e.g.*, R. 2470-71; 2509-2541; 2773-2790).

The plain language of SDCL § 49-41B-22 (2006) directs the PUC to deny a permit for a power facility unless the facility demonstrates it will not be a threat of serious injury to the environment. Big Stone II did not and cannot so demonstrate, and the PUC's explanations of how it interpreted the Siting Statute to allow the Big Stone II permit are contrary to the plain statutory language and outside the PUC's authority and obligations under the statute. The PUC's decision should be reversed as legal error.

II. RESPONDENTS' ARGUMENT THAT BIG STONE II'S CONTRIBUTION TO GLOBAL WARMING IS "NOT THAT MUCH" HAS NO BASIS IN THE EVIDENCE.

A. There Is No Evidence To Support The PUC's Dismissal Of Big Stone II's CO_2 Pollution As Immaterial.

The Coal Plant Proposers did not offer any evidence to refute the well-supported testimony of Dr. Ezra Hausman regarding Big Stone II's threat of serious injury to the environment. The unrefuted evidence clearly demonstrates that Big Stone II will significantly *increase* CO_2 pollution from South Dakota, by 4.7 million tons annually for over 50 years, at a time when the best scientific minds in the world agree that all existing sources of CO_2 everywhere must begin *reducing* immediately to avoid the worst harms

from global warming.[5] Dr. Hausman unequivocally states that while the number may look small in terms of percentage share of global CO_2, Big Stone II's emissions are in fact large and significant, characterizing it as an enormous increase in South Dakota's global warming emissions and testifying that Big Stone II will exacerbate a problem that is likely to cause dramatic environmental and economic harm to communities in South Dakota and throughout the world. (R. 7214; 7238). Not only is Big Stone II alone a large, measurable source of CO_2, as pointed out by Dr. Hausman, Big Stone II's threat and contribution is magnified in that it is an *increase* in the face of needed decreases. Despite all of this highly-qualified and important evidence, the PUC relies on the self-serving statements of one individual with a 1971 bachelors degree in an unrelated field.

The unqualified and inexpert statements of Ward Uggerud are argument and characterization of evidence, not evidence itself. Mr. Uggerud simply stated that his arithmetic based on the evidence demonstrated that Big Stone II would represent .0007 percent of global greenhouse gases. There was no testimony from Mr. Uggerud or anyone else for the Coal Plant Owners that supported the assertion that this percentage was immaterial or "no big deal." There was no evidence of how much would constitute a big deal or material contribution, nor what scientific or technological basis Mr. Uggerud might have to opine that .0007 percent from just one single source of CO_2 was not a significant increase to global warming. Mr. Uggerud, the Coal Plant Proposers and ultimately the PUC rested on appearances only--that .0007 percent seems small. The

[5] Again, in addition to the testimony of Dr. Hausman, the PUC had before it the work of the National Academies of Science ("NAS") which includes Nobel prize winners, and the work of the Intergovernmental Panel on Climate Change ("IPCC"), an organization of the world's eminent scholars and researchers on the issue of climate change and its causes. All of this evidence supports the statements and conclusions of Dr. Hausman and refutes the arguments of the Coal Plant Proposers and the PUC here.

PUC's reliance on this thin argument and characterization is so implausible and unsupported by the evidence, that Appellants believe the court will be left with the clear impression that a mistake has been made.

Further demonstration that the PUC's conclusion is wholly unsupported by the evidence, is found in the briefs of the PUC and the Coal Plant Proposers when they set forth the list of findings related to CO_2 and the global warming issue. The list of quoted findings in the Coal Plant Proposers' brief on pages 18 and 19 actually reads like a list of factors indicating that Big Stone II will be a significant source of CO_2 pollution and will contribute to the very serious environmental harm of global warming. The PUC's findings are that global warming is a serious injury and that CO_2, including that from Big Stone II, is a contributor to that injury. These findings clearly support denial of the permit.

Yet suddenly, similar to the agency action rejected by the court in the case *Schroeder v. Dept. of Social Services,* 545 N.W.2d 223, 228, 1996 SD 34, ¶ 11 (S.D. 1996), the PUC veers off of the evidence and finds, with no scientific or technical support in the record, that the CO_2 from Big Stone II is "not that much" relative to the global problem, apparently going to the "threat" portion of the Siting Statute. The PUC failed to take into consideration that gravity of the injury in this case and the need for immediate reductions. An analogy using an example other than CO_2 is instructive. Assume the PUC had found that Big Stone II was proposing to increase a toxin in the air that had been amply demonstrated to the PUC's satisfaction, to be killing people or destroying crops in the surrounding area and that the consensus is that the toxin must be greatly reduced in order to avoid increasing injury. Further assume the PUC decided that

the increase in toxin was small relative to the amount of toxin already in the environment, even though the toxin was having a demonstrated injurious effect. A PUC decision to allow the increased toxin would be entirely unsupportable given the facts regarding the gravity of the injury and the need to reduce the toxin. Similarly here, all the evidence in the record supports a conclusion that Big Stone II represents a threat of serious injury to the environment and the PUC's decision is clear error.

B. The PUC's Discretion To Judge Witnesses Is Not A Substitute For Substantial Evidence To Support Its Decision.

The Coal Plant Proposers and the PUC's arguments regarding agency discretion to choose between experts is misplaced. The cases cited by the Coal Plant Proposers to support this unfettered discretion argument actually show that the PUC's decision is not supportable here. *Great Western Bank v. H&E Enterprises, LLP*, 731 N.W.2d 207, 209-210, 2007 SD 38, ¶ 10 (S.D. 2007), does not inform the issue here. In *Great Western Bank*, this Court found that the lower court erred when it opined that it must choose one of two competing expert property valuations as opposed to having discretion to choose or fashion its own valuation based upon all the evidence before it. The situation in *Great Western Bank* is very different from that in this case. Here, there are no experts for the Coal Plant Proposers from which the PUC might synthesize a finding. Rather, the PUC failed to base its decision upon a consideration of all of the evidence before it on the contributions of Big Stone II to global warming.

In *Sauer v. Tiffany Laundry & Dry Cleaners,* 622 N.W.2d 741, 745, 2001 SD 24, ¶14 (S.D. 2001), there was competing true expert testimony and ultimately, the plaintiff's expert conceded important points to the defense regarding causation of injury. Here,

there are no experts for the Coal Plant Proposers, and Dr. Hausman's expert testimony was clear and consistent.

In *Goebel v. Warner Transp.*, 612 N.W.2d 18, 27, 2000 SD 79, ¶ 33 (S.D. 2000), the court found that the witness whose testimony the court discarded was extremely incredible, changing numerous parts of his story regarding his own drug use several times throughout the trial. The situation in *Goebel* has no relationship to the situation here, where Dr. Hausman is an extremely credible and qualified witness and the documentary evidence he relies upon from the NAS and IPCC is recognized world-wide as the leading authorities on the issue of global warming.[6] There is no qualified witness that offers any evidence that "competes" with the evidence presented by Appellants in this case. The PUC's conclusion of no threat of serious environmental injury from Big Stone II is entirely unsupported by the record, and Appellants request that it be reversed.

CONCLUSION

Appellants request reversal of the PUC's decision to grant Big Stone II a permit under SDCL § 49-41B-22 (2006).

RESPECTFULLY SUBMITTED

Dated: 6/07, 2007

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[6] Coal Plant Proposers also cite to *Matter of Davis*, 524 N.W.2d 125 (S.D. 1994), but *Davis* is of minimal application here. The principle cited appears only in the dissent and then is merely a restatement of the basic law that a lower court has the discretion to choose among competing witnesses.

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Attorneys for Fresh Energy, Izaak Walton League of Amercia – Midwest Office, Union of Concerned Scientists, and Minnesota Center for Environmental Advocacy

STATEMENT AS TO ORAL ARGUMENT

Appellants are willing to waive oral argument in this case as the matter has been extensively briefed. Should the Court desire oral argument in this case, Appellants respectfully inform the Court that counsel is unavailable for oral argument from August 16 through and including August 31, 2007 and request that oral argument not be scheduled during that period of time.

CERTIFICATE OF COMPLIANCE

Janette K. Brimmer, attorney for Appellants, certifies that the Reply Brief of Appellants in this matter complies with the page and word limit requirements of South Dakota Rules of Court, SDCL 15-26A-66(b) as follows: Microsoft Word, 12 pages, 3,220 words, 16, 314 characters (no spaces).

Dated: 6/29, 2007

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