

EXHIBIT

[4]

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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