

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF SOUTH DAKOTA

)	DOCKET NO. EL05-022
)	
In the Matter of Otter Tail Power)	MARY JO STUEVE'S BRIEF IN
Company on Behalf of Big Stone II)	OPPOSITION TO CO-OWNERS
Co-owners for an Energy Conversion)	APPLICATION FOR AN ENERGY
Facility Permit for the Construction)	CONVERSION FACILITY PERMIT FOR
Of the Big Stone II Project)	THE CONSTRUCTION OF THE BIG
)	STONE II PROJECT

In opposition to the application by Co-owners for an Energy Conversion Facility Permit for the construction of the Big Stone II Project, I, Mary Jo Stueve, Pro Se, pursuant to ARSD 20:10:01:25 offer the following: statement of the case, specific and general citations to facts contained in the record and evidence relied upon, arguments including references to decisions of the commission, other commissions, or the courts, and request for specific findings stated separately and numbered.

ABSTRACT OF EVIDENCE

Evidence relied upon includes evidentiary material submitted and filed in Docket EL05-022 applicable to South Dakota Codified Law (SDCL) and the Administrative Rules of South Dakota (ARSD) as well as reference to evidence lacking.

FACTS

On July 21, 2005, Otter Tail Power Company (Otter Tail) on behalf of the Project Co-Owners Central Minnesota Municipal Power Agency, Great River Energy, Heartland Consumers Power District, Montana-Dakota Utilities Co., a Division of MDU Resources group, Inc., Otter Tail Corporation d/b/a Otter Tail Power Company, Southern Minnesota Municipal Power Agency and Western Minnesota Municipal Power Agency submitted to the Public Utilities Commission (Commission) an application for a permit for an energy conversion facility. The Commission has jurisdiction over this matter pursuant to SDCL Chapter 49-41 B, and ARSD Chapter 20:10:22 and will decide whether the permit should be granted, denied, or granted upon such terms, conditions or modifications of the construction, operation or maintenance as the Commission finds appropriate. The Commission found that good cause existed to schedule a

public input hearing pursuant to SDCL 49-41B-15 and 49-41B-16 and ordered it held September 13, 2005, Milbank South Dakota. The Commission further ordered pursuant to SDCL 49-41B-17 and ARSD 20:10:22:40, that application for party status be filed within 60 days from the date Otter Tail's application was filed with the Commission; therefore, on or before September 19, 2005. On September 27, 2005 at its regularly scheduled meeting, the Commission found that Petition to Intervene and Applications for Party Status were timely filed and demonstrated good cause to grant intervention <http://www.state.sd.us/puc/commission/dockets/electric/2005/EL05-022/EL05-022.htm> (Orders).

ISSUE

Did Otter Tail show that the proposed energy conversion facility will comply with all applicable laws and rules; that the energy conversion facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area; that the energy conversion facility will not substantially impair the health, safety or welfare of the inhabitants; and that the energy conversion facility will not unduly interfere with the orderly development of the region?

ARGUMENT AND AUTHORITIES

Staff made preliminary recommendations in the Direct Testimony of Dr. Denney (Exhibit Staff's 2, p. 56-58) that Otter Tail application be approved (subject to issuance of all applicable permits) in that the project "generally satisfied" the criteria contained in SDCL 49-41B and ARSD 20:10:22 and that although the main negative concerns were environmental, the net benefits of the project would likely be greater. Staff *also* supported recommendations (*ibid*) contained in the Draft Environmental Impact Statement (DEIS) (Exhibit Applicant's 53; Staff's 2, p. 58) *additionally* recommending that Applicants implement the record with all missing information identified in Table 2 (Staff's 2, p. 7) and that "Absent the complete implementation of these conditions, Staff would recommend that the Application be denied (Staff's 2, p. 58, 1 14-15)."

In Prefiled Rebuttal Testimony of Mark Rolfes (Applicant's 33, p.6, 1 19-21), Applicants agreed to adopt the 'specific' recommendations contained in the DEIS concerning plant construction and operation as listed in Dr. Denney's testimony at page 58, lines 1-11.

Surrebuttal Testimony of Dr. Denney (Staff's 3, p. 17, l 19-21; p.18 l 1-2) shows that the Applicants did not supplement the record in areas where they disagreed with Staff regarding the interpretation of the Rules, such as the calculation of the environmental impacts (ARSD 20:10:22:13) or the required level of detail such as the requirement to provide demand information (ARSD 20:10:22:10). Furthermore, Denney Surrebuttal (Staff's 3, p. 15-16) indicates that neither the Applicants' rebuttal testimony, nor Mr. Grauman's Letter to the South Dakota Department of Environment and Natural Resources (Applicant's 34 A) explain how the Applicants plan to achieve the mercury 'goal'. Dr. Denney specifically labels this lack of a plan a "gamble" that "adds to the risk of the project." (Staff's 3, p.16, l 8).

SDCL 49-41B-22 requires that Applicant show that facility will not pose a threat of serious injury to the environment nor to the social and economic conditions of inhabitants or expected inhabitants in the siting area, nor that said facility will not substantially impair the health, safety or welfare of the inhabitants or unduly interfere with the orderly development of the region; **SDCL 49-41B-22 does not require** showing that the 'supposed' economic benefits *outweigh* the threat of serious injury to the environment or risk of impairment to the health, safety or welfare of the inhabitants in order for the Commission to make its determination that Applicants have met the requirements, as suggested by Staff's recommendation to grant the permit (see above).

SDCL 49-41B-24 requires that the Commission shall make complete findings in rendering a **decision within twelve months** of receipt of the initial application. This would require a decision due preceding the Final Environmental Impact Statement. On the other hand, **SDCL 49-41B-21 requires that prior to the issuance of a permit; the Public Utilities Commission shall comply with the provisions of chapter 34A-9** relating to an environmental impact statement.

Early on, the Commission pursuant to SDCL 34A-9-11 deemed a 'duplicate' EIS unnecessary in that a federal statement was required; thus it would seem the Commission must also consider the provisions and fulfillment of Chapter 34A-9 pursuant to 49-41-B21. In other words, which holds more sway, and the Commission must decide, the requirement to make complete findings in rendering a decision within twelve months pursuant to 49-41B-24 *without* having access to the Final EIS; or, the requirement to meet SDCL *Chapter* 34A-9-13, South Dakota Environmental Policy?

Big Stone II Project will both directly and indirectly affect **Big Stone Lake** in more ways than one. For example, from testimony this week and in prefiled testimony, to name a few; water draw, economic activity, recreation, fish and wildlife habitat, air deposition of toxins. Upon my cross examination of Mr. Lee, Mr. Stuefen and Mr. Madden, none had addressed, or analyzed economic impact or studies related to *future* real estate value, property value or economic impact to the area related to environmental degradation of Big Stone Lake. Notably, Mr. Madden stated “I did not take into any consideration the possibility of an environmental degradation that would destroy, you know, the lake. I made the assumption that these commissioners wouldn’t approve of a system that would do that (Transcript, Vol. 3, June 28th 2006, p. 628).” Further, Mr. Lee, upon cross admitted his previous work did not include water analysis appropriations on shallow lakes similar to Big Stone Lake and that a back-up plan for drawing water to supply Big Stone II if limitation restrictions had been reached “would be looking for groundwater sources” (Transcript, Volume 2, June 27th, 2006 pp. 277-290), an option DEIS reported as no longer under consideration.

Appendix D, **Water Quality** D1-6 (Applicant’s 53) lists and quantifies water **standards** (including those for mercury, a Schedule A highly toxic poison pursuant to SDCL 34-20-(1)(2); ARSD 74:51:01) for domestic water supply, ground waters qualifying as drinking water supplies, for fisheries and wildlife, recreation, agricultural uses, domestic consumption and common beneficial uses in the proposed Project area, for South Dakota and Minnesota because Big Stone Lake is a shared resource. Appendix D also describes monitoring and management, anti-degradation programs and federal authority mandates including those related to Total Maximum Daily Loads (TMDLs) although it does not reference such in regards to Big Stone II. Why? It appears; even with all the evidence submitted and studies performed we lack any for this particular Project with regard to mercury, which poses grave risk to human populations (Exhibit Stueve’s 1E, 1b).

CONCLUSIONS

In light of arguments and authorities mentioned above, lack of important evidence pertinent to permitting this Project, I, Mary Jo Stueve, Pro Se, make the following:

REQUEST FOR SPECIFIC FINDINGS

Before the Permit is granted

In light of Applicants Burden of Proof SDCL in this matter pursuant to SDCL 49-41B-22, I respectfully ask the Commission to:

1. Find whether SDCL 49-41B-24, which requires a decision within 12 months, holds precedence over 49-41B-21, which requires prior to the issuance of a permit, the Public Utilities Commission shall comply with the provisions of chapter 34A-9 relating to an environmental impact statement.
2. Find whether Applicants have met their requirement to submit calculation of the environmental impacts.
3. Find whether and how Applicants will comply with Clean Air Mercury Rule without posing a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area and that the energy conversion facility will not substantially impair the health, safety or welfare of the inhabitants nor unduly interfere with the orderly development of the region.

Dated this 9th day of July, 2006

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CERTIFICATE OF SERVICE

I, Mary Jo Stueve, do hereby certify that a true and correct copy of Stueve's Brief was served to the following on the Legal Service List electronically on this 9th day of July 2006 with the original and ten copies to be mailed postage paid via United States Mail to the commission and a copy to each party July 10th, 2006.

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