



Minnesota Center for Environmental Advocacy

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

RECEIVED

MAY 03 2007

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

26 East Exchange Street - Suite 206  
Saint Paul, MN 55101-1667

651.223.5969  
651.223.5967 fax

mcea@mncenter.org  
www.mncenter.org

May 1, 2007

Founding Director  
Sigurd F. Olson  
(1899-1982)

Board of Directors  
Vanya S. Hogen  
Chair

Kent White  
Treasurer

Mary Horak Binger  
Kim Carlson

Merritt Clapp-Smith

Charles K. Dayton

Robert G. Dunn

Janet C. Green

Cecily Hines

Roger Holmes

Douglas A. Kelley

Michael Kleber-Diggs

Dee Long

Steve Piragis

Nancy Speer

Byron Starns

Martha C. Brand  
Executive Director

VIA U.S. MAIL

John J. Smith  
S.D. Public Utilities Commission  
500 East Capitol Avenue  
Pierre, SD 57501

Christopher W. Madsen  
Thomas J. Welk  
Boyce Greenfield Pashby & Welk, LLP  
P.O. Box 5015  
Sioux Falls, SD 57117-5015

**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 Brief of Appellants Minnesota Center for Environmental Advocacy, Izaak Walton League of America - Midwest Office, Fresh Energy, and Union of Concerned Scientists and a copy of Affidavit of Service by Mail. You are being served with these new copies as Tab 4 of the Appendix has been amended to include two additional pages.

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

Sincerely,

Janette K. Brimmer  
John H. Davidson

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

3 \* \* \* \* \* )  
4 IN THE MATTER OF OTTER )  
5 TAIL POWER COMPANY ON )  
6 BEHALF OF BIG STONE II ) File No. 06-399  
7 CO-OWNERS FOR AN ENERGY )  
8 CONVERSION FACILITY )  
9 PERMIT FOR THE ) TRANSCRIPT OF ORAL  
10 CONSTRUCTION OF THE BIG ) ARGUMENT  
11 STONE II PROJECT )  
12 )  
13 )  
14 )  
15 )  
16 )  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )

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**

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  
*Lori J. Grode -- (605) 223-7737*

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

*Lori J. Grode -- (605) 223-7737*

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  
*Lori J. Grode -- (605) 223-7737*

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  
*Lori J. Grode -- (605) 223-7737*

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  
*Lori J. Grode -- (605) 223-7737*

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  
*Lori J. Grode -- (605) 223-7737*

58  
 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.  
*Lori J. Grode -- (605) 223-7737*

60  
 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  
*Lori J. Grode -- (605) 223-7737*

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

*Lori J. Grode -- (605) 223-7737*

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?

*Lori J. Grode -- (605) 223-7737*

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.

*Lori J. Grode -- (605) 223-7737*

1 MS. BRIMMER: No, Your Honor.

2 THE COURT: Thank you.

3 (The hearing concluded at 2:40 p.m.)  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

*Lori J. Grode -- (605) 223-7737*

PROCEEDINGS

THE COURT: All right. Good afternoon. We're here on Hughes County Civil File 06-399, 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.

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

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

THE COURT: Thank you. With you?

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

THE COURT: Professor.

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

MR. SMITH: John Smith for the PUC.

THE COURT: Good afternoon. Before we get

Lori J. Grode -- (605) 223-7737

STATE OF SOUTH DAKOTA ) IN CIRCUIT COURT
COUNTY OF HUGHES ) SIXTH JUDICIAL CIRCUIT
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

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:

Lori J. Grode -- (605) 223-7737

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

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

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

MR. SMITH: Likewise from the PUC.

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

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

THE COURT: And then?

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

THE COURT: Are you going to argue?

Lori J. Grode -- (605) 223-7737

Mr. John H. Davidson, Jr.
USD School of Law
414 E. Clark Street
Vermillion, SD 57069
LOCAL COUNSEL FOR MS. BRIMMER
Mr. Thomas J. Welk and Christopher W. Madsen
Boyce, Greenfield, Pashby & Welk
PO Box 5015
Sioux Falls, SD 57117-5015
FOR APPELLEE BIG STONE II
Mr. John J. Smith
Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501
FOR THE PUBLIC UTILITIES COMMISSION

ALSO PRESENT:

Mr. Bruce Gerhardson
PO Box 496
Fergus Falls, MN 56538
Associate General Counsel for Otter Tail
Mr. Mark Rolles
Project Manager for Big Stone II

Lori J. Grode -- (605) 223-7737

RECEIVED  
MAY 03 2007

STATE OF SOUTH DAKOTA  
HUGHES COUNTY

SOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION  
CIRCUIT COURT  
SIXTH JUDICIAL DISTRICT

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

**AFFIDAVIT OF SERVICE**

Circuit Court Civ. No. 06-399  
PUC Docket No. EL05-022  
Supreme Court No. \_\_\_\_\_

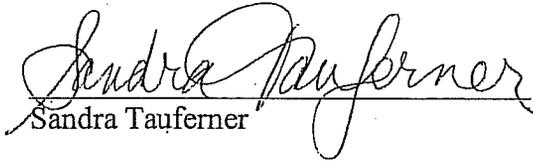
Sandra Tauferner, being duly sworn, says that on the 1st day of May, 2007, she delivered via U.S. Mail the following:

Brief of Appellants with Tab 4 of the Appendix Amended to  
Include Two Additional Pages

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

Christopher W. Madsen  
Thomas J. Welk  
Boyce Greenfield Pashby & Welk, LLP  
P.O. Box 5015  
Sioux Falls, SD 57117-5015

John J. Smith  
S.D. Public Utilities Commission  
500 East Capitol Avenue  
Pierre, SD 57105

  
Sandra Tauferner

Subscribed and sworn to before me  
this 1st day of May, 2007.



Notary Public

