



Minnesota Center for
Environmental Advocacy

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

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Sigurd F. Olson
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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

November 2, 2007

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

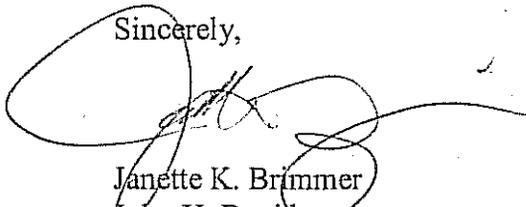
**Re: In the Matter of Otter Tail Power Company on Behalf of Big Stone II
Co-owners for an Energy Conversion Facility Permit for the
Construction of the Big Stone II Project
Supreme Court No. 24485
Circuit Court Civ. No. 06-399**

Dear Clerk:

Enclosed for filing in the above-referenced matter, please find 15 copies of the Supplemental 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



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November 2, 2007

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

VIA FED EX

John J. Smith
South Dakota Public Utilities
Commission
500 East Capitol Avenue
Pierre, SD 57501

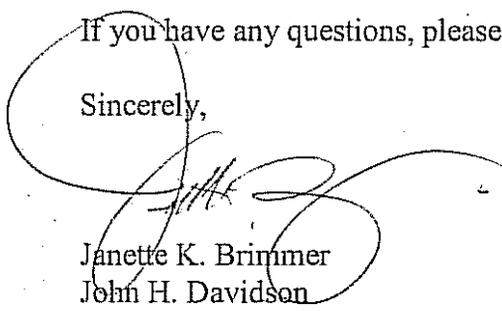
**Re: In the Matter of Otter Tail Power Company on Behalf of Big Stone II
Co-owners for an Energy Conversion Facility Permit for the
Construction of the Big Stone II Project
Supreme Court File 24485
Circuit Court Civ. No. 06-399**

Dear Messrs. Madsen, Welk, and Smith:

Enclosed and served upon you, please find two copies of the Supplemental 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

State of South Dakota

**SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION**

In the Supreme Court

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

CIV 06-399

The Honorable Lori S. Wilbur, Circuit Court Judge

Date of Judgment: February 27, 2007

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

South Dakota Public Utilities Commission and Otter Tail Power Company
on behalf of Big Stone II Co-owners,
Appellees

APPELLANTS' SUPPLEMENTAL BRIEF

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*Attorneys for Appellee Big Stone II Co-
Owners*

Appellants file this Supplemental Brief in accordance with SDCL § 15-26A-73 (2007). At the end of October, 2007, an administrative decision of the Kansas Department of Health and Environment came to the attention of Apellants. A true and correct copy of the decision dated October 18, 2007, is attached as the appendix to this supplemental brief. The decision is relevant to the consideration of whether carbon dioxide emissions from a coal-fired power plant would be considered a pollutant that is injurious to the environment.

In the matter addressed in the attached administrative decision, the Secretary of the Kansas Department of Health and Environment denied a permit to Sunflower Electric Power Corporation on the grounds that emissions of carbon dioxide from the plant meet the definition of air pollution, that it has a deleterious impact on the environment, and that emission of carbon dioxide from the proposed power plant “presents a substantial endangerment to the health of persons or to the environment.” The Secretary notes that he is denying the permit under his authority and obligation to protect citizens and the environment, K.S.A. 65-3012 which specifically provides:

(a) Notwithstanding any other provision of this act, the secretary may take such actions as may be necessary to protect the health of persons or the environment: (1) Upon receipt of information that the emission of air pollution presents a substantial endangerment to the health of persons or to the environment....

As this Court addresses the issue of whether carbon dioxide emissions from the Big Stone Unit II Coal-Fired Power Plant pose a threat of serious injury to the environment under SDCL § 49-41B-22(2), Appellants request that the court consider that the state of Kansas has made a

decision and interpretation of its permitting statutes that finds carbon dioxide emissions from a coal-fired power plant to be an endangerment to the health of persons and the environment.

RESPECTFULLY SUBMITTED

Date: 11/2/07



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



K A N S A S

RODERICK L. BREMBY, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

DEPARTMENT OF HEALTH AND ENVIRONMENT

October 18, 2007

Sunflower Electric Power Corporation
Mr. Wayne Penrod
Senior Manager
301 W. 13th
Hays, KS 67601

Dear Mr. Penrod:

It is my duty as Secretary of the Kansas Department of Health and Environment, as authorized by the Kansas air quality act, K.S.A. 65-3001 *et seq.* to protect the public health and environment from actual, threatened or potential harm from air pollution.

The secretary has broad authority under the act and the regulations adopted thereunder to achieve protection of the health of the people and the environment. . The secretary has authority under K.S.A. 65-3008a(b) to affirm, modify or reverse a decision on an air quality permit after the public comment period or public hearing. The secretary also has authority under K.S.A. 65-3012 as interpreted by the Attorney General of the state of Kansas, to take such action as is necessary to protect the health of persons or the environment, notwithstanding a permit applicant's compliance with all other existing provisions of the Kansas air quality act, upon receipt of information that the emission of air pollution presents a substantial endangerment to the health of person or the environment. The endangerment may be a threatened or potential harm as well as an actual harm.

The Supreme Court of the United States found in Massachusetts v. E.P.A., 127 S.Ct. 1438 (April 2, 2007) that carbon dioxide, a greenhouse gas, meets the broad definition of air pollutant under the Clean Air Act. The Kansas air quality act similarly has a broad definition of what constitutes air pollution. The Court also recognized the significant existing national and international information available on the deleterious impact of greenhouse gases on the environment in which we live.

I have given due consideration to the scientific and technical information related to carbon dioxide including but not limited to many oral and written comments submitted in the public hearing and comment period. The information provides support for the position that emission of air pollution from the proposed coal fired plant, specifically

OFFICE OF THE SECRETARY

CURTIS STATE OFFICE BUILDING, 1000 SW JACKSDN ST., STE. 540, TOPEKA, KS 66612-1368

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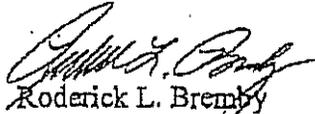
<http://www.kdhe.state.ks.us>

10-18-07
Wayne Penrod
Page -2-

carbon dioxide emissions, presents a substantial endangerment to the health of persons or to the environment.

Based on this information, the permit is denied. Pursuant to K.S.A. 65-3008b(e), the permit applicant has the right to appeal this decision within fifteen (15) days and request an administrative hearing under the Kansas administrative procedures act set forth at K.S.A. 77-501 *et seq.*

Sincerely,


Roderick L. Bremby
Secretary

STATE OF SOUTH DAKOTA

SUPREME COURT

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

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

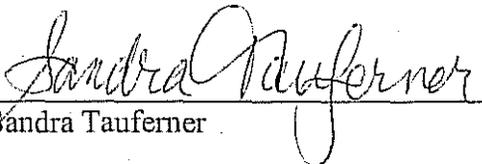
Sandra Tauferner, being duly sworn, says that on the 2nd day of November, 2007, she delivered via mailing FedEx the following:

Appellants' Supplemental Brief

on the following persons, in this action by mailing to them a copy thereof, enclosed in a FedEx overnight envelope, postage prepaid, and by depositing the same in the FedEx drop box 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
101 N. Phillips Avenue, Suite 600
Sioux Falls, SD 57140

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


Sandra Tauferner

Subscribed and sworn to before me
this 2nd day of November, 2007.


Notary Public

