

AUG 21 2006



Boyce, Greenfield, Pashby & Welk, LLP

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

cwmadsen@bgpw.com

Direct Dial: 605-731-0205

August 18, 2006

Attorneys at Law

VIA UPS OVERNIGHT

101 N. Phillips Ave., Suite 600

Patty VanGerpen, Ex. Director  
SD Public Utilities Commission  
500 E Capitol  
Pierre SD 57501

Sioux Falls, SD 57104

Re: 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 (EL05-022)  
Our File No. 11402.000

P.O. Box 5015

Sioux Falls, SD 57117-5015

Dear Ms. Van Gerpen:

P: 605-336-2424

Please find enclosed the original and four (4) copies of the Applicant's Answer to Second Petition for Rehearing. By copy of this letter the same is being served on the other parties.

F: 605-334-0618

www.bgpw.com

Sincerely yours,

BOYCE, GREENFIELD, PASHBY & WELK, L.L.P.

Russell R. Greenfield

Gary J. Pashby

Thomas J. Welk

Michael S. McKnight

Gregg S. Greenfield

Roger A. Sudbeck

Lisa K. Marso

Heather R. Springer\*

Darin W. Larson

Michael F. Tobin

Christopher W. Madsen

Sherri L. Rotert\*\*

Charles A. Larson

Joanne M. Haase+

Christopher W. Madsen

CWM/vjj

Enclosure

cc (via email): John J. Smith

John Davidson

Lesley J. Adam

Michael D. O'Neill

Elizabeth Goodpaster

Mary Jo Stueve

Karen Cremer

Todd Guerrero/David Sasseville

Bruce Gerhardson

Persons named on the Interested Persons List in this docket who are not parties.

\*Also licensed in Kansas

\*\*Also licensed in Colorado

+Also licensed in Minnesota

J.W. Boyce (1884-1915)

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTASOUTH DAKOTA PUBLIC  
UTILITIES COMMISSION

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

Docket No. EL 05-022

APPLICANTS' ANSWER TO SECOND  
PETITION FOR REHEARING

Pursuant to ARSD 20:10:01:30.02, Big Stone II Co-Owners ("Applicants"), by and through their undersigned attorneys of record, make this answer to the second petition for rehearing submitted by Intervenor Mary Jo Stueve ("Intervenor Stueve") dated August 14, 2006. Applicants respectfully submit that Intervenor Stueve's second petition should be denied.

Intervenor Stueve claims the following two matters constitute newly discovered evidence that justify rehearing in this matter: (1) the existence of the Chicago Climate Exchange, a voluntary carbon emission trading market, and (2) the fact that the United States Supreme Court granted certiorari to review a decision issued by the United States Court of Appeals for the D.C. Circuit, *Massachusetts et al v. Environmental Protection Agency*, 415 F3d 50 (DC Cir. 2005).

Review of Intervenor Stueve's second petition and the sources referred to therein clearly indicate that the matters raised by Intervenor Stueve do not constitute newly discovered evidence under South Dakota law. ARSD 20:10:01:29 and 20:10:01:30.01 permit the Commission to grant rehearing based on newly discovered evidence. These rules are similar to SDCL 15-6-59(a)(4) that permits a new trial based on newly discovered evidence. However, the test under these rules is not whether a party has simply discovered more information that the party might have attempted to present at the hearing. According to the South Dakota Supreme Court, a party moving for a new trial based on the discovery of new evidence must demonstrate the following:

1. The evidence was discovered after trial;
2. The moving party exercised due diligence to obtain the evidence for trial;
3. The evidence is not merely cumulative or impeaching;
4. The evidence is material; and
5. The evidence is such that a new trial would probably produce a different result.

See *Fullmer v. State Farm Ins. Co.*, 498 NW2d 357, 361 (SD 1993).

Neither the information regarding CCX nor the Supreme Court's decision to review the *Massachusetts* decision meet the criteria set forth above. A review of the CCX internet site referenced in footnote 1 of Intervenor Stueve's second petition indicates that voluntary trading on the Chicago Climate Exchange began in December 2003. See Exhibit 1, attached. Information regarding CCX and judicial activity regarding the *Massachusetts* case is widely available to the general public. See Exhibit 2, attached.

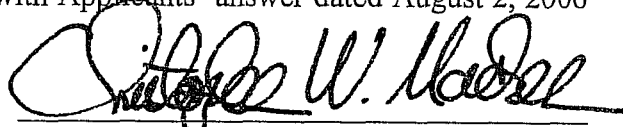
Furthermore, the CCX information and the activity in the *Massachusetts* case is not material to the issues decided by the Commission. At the hearing, there was extensive testimony and other

evidence regarding the likelihood of future carbon regulation. (Joint Intervenor cross examined numerous witnesses, including Thomas Hewson on the subject, and presented the testimony of witnesses Schlissel and Sommer.) Based on this evidence, the Commission entered findings of fact 137 through 139. Intervenor Stueve's reliance on the prices generated in a voluntary carbon trading market is misplaced because these prices are not the result of any government-mandated program. Likewise, Intervenor Stueve's reliance on the Supreme Court's review of the *Massachusetts* case is also misplaced because the question before the Supreme Court involves the ability of the EPA to decline to issue emission standards for motor vehicles. Although the United States Supreme Court has the ability to review a decision of the EPA in the context of the *Massachusetts* case, the Court does not have the authority to implement a carbon regulation program that might affect the Big Stone II project. That authority is vested in Congress and the South Dakota Legislature. Therefore, it is not possible for Intervenor Stueve to demonstrate that even if the newly discovered information cited in her second petition was presented to the Commission, a different result would have been reached.

In conclusion, based on the evidence presented at the hearing, the Final Decision and Order entered by the Commission on July 21, 2006 and the foregoing answer, Applicants respectfully request that the Commission deny Intervenor Stueve's second petition for rehearing.

Applicants also join in Staff's Answer To Petitions For Reconsideration to the extent that any arguments advanced by Staff are not inconsistent with Applicants' answer dated August 2, 2006 or this answer.

Dated this 18th day of August, 2006



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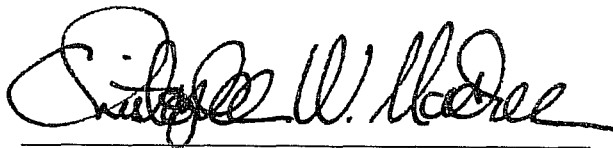
David L. Sasseville (156000)  
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Minneapolis, MN 55402  
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Attorneys for Co-owners

## CERTIFICATE OF SERVICE

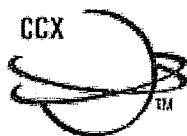
I, Christopher W. Madsen, do hereby certify that I am a member of the law firm of Boyce, Greenfield, Pashby & Welk, L.L.P., attorneys for the Co-owners of Big Stone II Project and that on the 18<sup>th</sup> day of August, 2006, true and correct copies of the Applicant's Answer to Second Petition for Rehearing were served via email to the following addresses listed on the E-Service List and by regular mail:

John Smith	<a href="mailto:john.j.smith@state.sd.us">john.j.smith@state.sd.us</a>
John Davidson	<a href="mailto:john.davidson@usd.edu">john.davidson@usd.edu</a>
Elizabeth I. Goodpaster	<a href="mailto:bgoodpaster@mncenter.org">bgoodpaster@mncenter.org</a>
Karen Cremer	<a href="mailto:karen.cremer@state.sd.us">karen.cremer@state.sd.us</a>
Lesley Adam	<a href="mailto:adam.lesley@johnsonpetersenlaw.com">adam.lesley@johnsonpetersenlaw.com</a>
Michael O'Neill	<a href="mailto:oneill.michael@johnsonpetersenlaw.com">oneill.michael@johnsonpetersenlaw.com</a>
Mary Jo. Stueve	<a href="mailto:mj_stueve@hotmail.com">mj_stueve@hotmail.com</a>

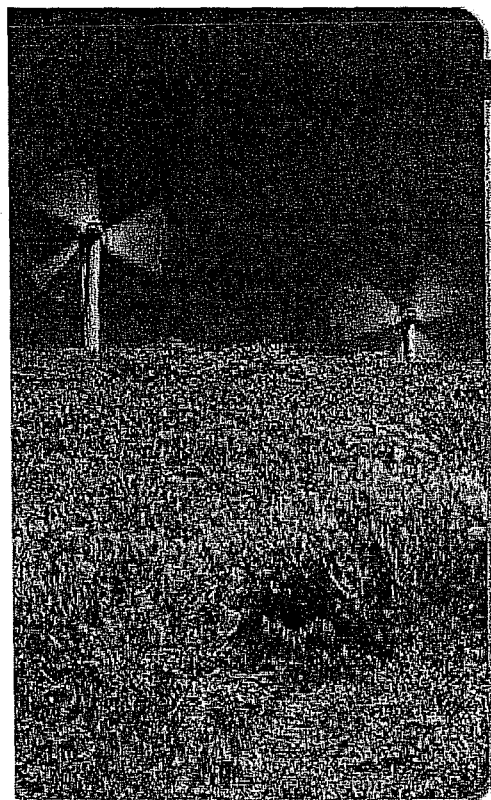
Courtesy copies sent by email to those persons named on the Interested Persons List in this docket who are not parties.

A handwritten signature in black ink, appearing to read "Christopher W. Madsen", written over a horizontal line.

Christopher W. Madsen



Chicago Climate Exchange



About	Trading	Environment	News
Program	Key Features	Members	People
			FAQ

### Pilot Market Time Period

Continuous electronic trading of greenhouse gas (GHG) emission allowances and offsets began on December 12, 2003. CCX reduction commitments and trading apply for years 2003 through 2010.

### Gases Covered

GHG Emissions of the following six GHGs from facilities owned by CCX Members will be included, as applicable:

- carbon dioxide (CO<sub>2</sub>);
- methane (CH<sub>4</sub>);
- nitrous oxide (N<sub>2</sub>O);
- hydrofluorocarbons (HFCs);
- perfluorocarbons (PFCs); and
- sulfur hexafluoride (SF<sub>6</sub>).

Emissions of all non-CO<sub>2</sub> GHGs are converted to metric tons CO<sub>2</sub> equivalent using the one-hundred-year Global Warming Potential (GWP) values established by the Intergovernmental Panel on Climate Change. A CO<sub>2</sub> common unit of emissions quantification based on the GWP of each non-CO<sub>2</sub> gas.

### CCX Carbon Financial Instrument (CFI) Contracts, Vintages and Bank

The unit of emissions measurement, reporting, price quotation and trading in CCX is metric tons carbon dioxide equivalent. Each CFI is one hundred metric tons of CO<sub>2</sub> equivalent. CFI contracts employed in CCX are Exchange Allowances and Exchange Offsets. Exchange Allowances are issued to Exchange Members in accordance with each Member's Emission Baseline and Emission Reduction Schedule, subject to provisions in the CCX Rulebook. They are also issued on the basis of forest carbon sequestration and reductions in electricity use. Exchange Offsets are issued for qualifying mitigation projects and registered with CCX by Exchange Participant Members (Offset Providers and Offset Aggregators).

Each CFI contract resides in the CCX Registry in a manner that designates the contract's annual Vintage. All CFI contracts are recognized when surrendered for compliance. They may be used for compliance in their designated vintage year or banked for use in later years, outlined in the CCX Rulebook. CFI contracts may not be used for Compliance in years that precede the vintage of an instrument.

### CCX Emission Baseline Period

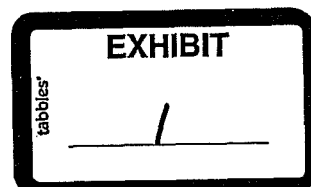
CCX emitting Members make a voluntary but legally binding commitment to reduce direct emissions below an emissions baseline. An emissions baseline ("baseline") is calculated by taking the average of emissions inventories from a specific timeframe, or "baseline period". Baselines are established upon the acquisition or disposition of facilities.

### Phase I Members

By the end of Phase I (December 2006) all Members will have reduced direct emissions 4% below a baseline period of 1998-2001. Members participating in Phase II will reduce emissions an additional 2% below baseline by 2010 to achieve the Phase II reduction target of 6% below baseline. Members were issued Exchange Allowances at the inception of the program for the four-year period (2003-2006) in an amount reflecting their emission reduction schedule.

### CCX Emission Reduction Target

Phase I	CCX Emission Reduction Target
---------	-------------------------------



Phase I	CCX Emission Reduction Target
2003	1% below Member's baseline
2004	2% below Member's baseline
2005	3% below Member's baseline
2006	4% below Member's baseline
Phase II	CCX Emission Reduction Target
2007	4.25% below Member's baseline
2008	4.5% below Member's baseline
2009	5% below Member's baseline
2010	6% below Member's baseline

### Phase II Members Joining in 2006

New Phase II Members' emission baseline is the annual average of emissions from facilities included in the baseline during 1998, 1999; data is insufficient, new Phase II Members may use a year 2000 baseline. The Phase II reduction target is 6% below baseline by 2010. Members will be issued Greenhouse Gas Emission Allowances in an amount reflecting the CCX emission reduction schedule:

Phase II	CCX Emission Reduction Target
2006	1.2% below Member's baseline
2007	2.4% below Member's baseline
2008	3.6% below Member's baseline
2009	4.8% below Member's baseline
2010	6% below Member's baseline

### CCX Offset Projects

Eligible Offset Projects are recorded in the CCX Registry and are issued Exchange Offsets on the basis of mitigation tonnage realized. Offsets are issued after mitigation occurs and required documentation is presented to CCX. Project eligibility, project baselines, quantity monitoring and verification protocols are specified in the CCX Rulebook. The initial categories of eligible Offset Project categories are:

- Methane destruction
- Agricultural practices
- Forestry practices
- Other GHG emission mitigation in Brazil
- Renewable energy
- Clean Development Mechanism Eligible Projects

No. 05-1120

Title: Massachusetts, et al., Petitioners  
v.  
Environmental Protection Agency, et al.

Docketed: March 7, 2006

Lower Ct: United States Court of Appeals for the District of Columbia Circuit

Case Nos.: (03-1361)

Decision Date: July 15, 2005

Rehearing Denied: December 2, 2005

Questions Presented

~~~~Date~~~~ ~~~~~Proceedings and Orders~~~~~

Mar 2 2006 Petition for a writ of certiorari filed. (Response due April 6, 2006)

Mar 29 2006 Order extending time to file response to petition to and including May 8, 2006, for all respondents.

Apr 5 2006 Brief of respondents Michigan, et al. in opposition filed.

May 5 2006 Order further extending time to file response to petition to and including May 15, 2006, for all respondents.

May 8 2006 Brief of respondent Utility Air Regulatory Group in opposition filed.

May 12 2006 Waiver of right of respondent CO2 Litigation Group to respond filed.

May 15 2006 Brief of Federal Respondent in opposition filed.

May 15 2006 Brief amici curiae of Alaska Inter-Tribal Council, et al. filed.

May 15 2006 Brief amici curiae of Climate Scientists David Battisti, et al. filed.

May 15 2006 Brief amici curiae of U.S. Conference of Mayors, et al. filed.

May 24 2006 Reply of petitioners Massachusetts, et al. filed. (Distributed)

May 30 2006 DISTRIBUTED for Conference of June 15, 2006.

Jun 19 2006 .DISTRIBUTED for Conference of June 22, 2006.

Jun 26 2006 Petition GRANTED.

Jul 3 2006 Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including August 31, 2006.

~~~~Name~~~~ ~~~~~Address~~~~~ ~~~~~Phone~~~~~

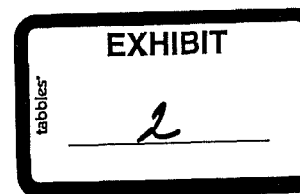
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**Attorneys for Respondents:**

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Lansing, MI 48909

Party name: Michigan, et al.

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Party name: Utility Air Regulatory Group

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Party name: Climate Scientists David Battisti, et al.

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Party name: U.S. Conference of Mayors, et al.



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Party name: Alaska Inter-Tribal Council, et al.