Dustin Johnson, Chair
Gary Hanson, Vice Chair
Steve Kolbeck, Commissioner

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
www.puc.sd.gov

Capitol Office
(605) 773-3201
1-866-757-6031 fax

Warehouse
(605) 773-5280
(605) 773-3225 fax

Consumer Hotline
1-800-332-1782

June 15, 2007

Ms. Shirley A. Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol
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 Appeal #24485

Dear Clerk Jameson-Fergel:

Enclosed you will find original and 14 copies of Brief of Appellee South Dakota Public Utilities Commission with reference to the above captioned matter.

Thank you very much.

Very truly yours,

John Smith
Assistant Attorney General

Enc.

Dustin Johnson, Chair
Gary Hanson, Vice Chair
Steve Kolbeck, Commissioner

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

500 East Capitol Avenue
Pierre, South Dakota 57501-5070
www.puc.sd.gov

Capitol Office
(605) 773-3201
1-866-757-6031 fax

Warehouse
(605) 773-5280
(605) 773-3225 fax

Consumer Hotline
1-800-332-1782

June 15, 2007

Mr. John H. Davidson
Attorney at Law
School of Law
University of South Dakota
213 Law Building
414 East Clark Street
Vermillion, SD 57069-2390

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

Ms. Janette K. Brimmer
Attorney at Law
Minnesota Center for Environmental Advocacy
26 East Exchange Street, Suite 206
St. Paul, MN 55101-1667

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 Appeal #24485

Dear Counsel:

Enclosed you will each find two copies of Brief of Appellee South Dakota Public Utilities Commission with reference to the above captioned matter. This is intended as service upon you by mail.

Thank you very much.

Very truly yours,

John Smith
Assistant Attorney General

Enc.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

*****

NO. 24485

*****

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

*****

APPEAL FROM THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

*****

THE HONORABLE LORI S. WILBUR
CIRCUIT COURT JUDGE PRESIDING

*****

BRIEF OF APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

*****

Janette K. Brimmer
Attorney at Law
Minnesota Center for Environmental Advocacy
26 East Exchange Street, Suite 206
St. Paul, MN 55101-1667
(651) 223-5969

John H. Davidson
Attorney at Law
School of Law
University of South Dakota
213 Law Building
414 East Clark Street
Vermillion, SD 57069-2390
(605) 677-6341

ATTORNEYS FOR APPELLANTS

John J. Smith
Assistant Attorney General
South Dakota Public Utilities Commission
500 East Capitol
Pierre, SD 57501
(605) 773-3201
ATTORNEY FOR APPELLEE SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

Christopher W. Madsen
Thomas J. Welk
Attorneys at Law
Boyce, Greenfield, Pashby & Welk, LLP
P. O. Box 5015
Sioux Falls, SD 57117-5015
(605) 336-2424
ATTORNEYS FOR APPELLEE BIG STONE II CO-OWNERS

*****

NOTICE OF APPEAL FILED MARCH 27, 2007

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
REFERENCES	1
JURISDICTIONAL STATEMENT	2
STATEMENT OF ISSUES	2
1. WHETHER THE COMMISSION'S FINDINGS OF FACT AND RULING ON MINNESOTA CENTER'S PROPOSED FINDINGS OF FACT REGARDING CARBON EMISSIONS FROM BIG STONE II ARE SUPPORTED BY THE RECORD AND ARE NOT CLEARLY ERRONEOUS.	2
2. WHETHER THE GENERAL ACADEMIC OPINION EVIDENCE IN THE RECORD REGARDING THE POTENTIAL IMPACTS OF CUMULATIVE CARBON DIOXIDE AND OTHER "GREENHOUSE GAS" EMISSIONS WORLDWIDE ON GLOBAL CLIMATE COMPELLED THE COMMISSION, UNDER SDCL 49-41B-22(2), TO DENY A CONSTRUCTION PERMIT FOR BIG STONE II.	2
3. WHETHER THE COMMISSION'S DECISION TO GRANT THE PERMIT WAS IN VIOLATION OF STATUTE, AFFECTED BY OTHER ERROR OF LAW OR ARBITRARY, CAPRICIOUS OR CHARACTERIZED BY AN ABUSE OF DISCRETION.	3
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT AND AUTHORITIES	5
I. STANDARDS OF REVIEW	5
II. DISCUSSION OF ISSUES PRESENTED	6

A. The Commission's Findings of Fact regarding CO_2 emissions are supported by the record and are not clearly erroneous. 7

B. The Commission properly found and concluded that the evidence in the record regarding the potential impacts of cumulative carbon dioxide and other "greenhouse gas" emissions worldwide did not compel the Commission to deny a construction permit for Big Stone II. 11

C. The issues of the cumulative effects of global CO_2 emissions and the "irreversibility"of the global climate effects from Big Stone II's CO_2 emissions are subsumed within the Commission's findings of fact and conclusions of law regarding CO_2 emissions and the preceding discussion in Section II.B of this argument. 19

D. The Commission properly interpreted SDCL 49-41B-22(2), including the meaning of the word "threat." 21

E. The Commission did not balance the "threat" posed by Big Stone II's CO_2 emissions against the economic benefits of the project. 23

CONCLUSION 24

CERTIFICATE OF SERVICE 25

CERTIFICATE OF COMPLIANCE 26

APPENDIX 27

TABLE OF AUTHORITIES

	PAGE
STATE STATUTES CITED:	
SDCL 1-26-35	5
SDCL 1-26-36	5, 6
SDCL Ch. 1-40	18
SDCL 1-40-4.1	2, 18
SDCL 1-40-24	17
SDCL 15-26A-53	7
SDCL Ch. 34A-1	2, 17, 18
SDCL ch. 49-34A	6
SDCL Ch. 49-41B	13, 17, 22
SDCL 49-41B-2(9)	14
SDCL 49-41B-5	3
SDCL 49-41B-6	14
SDCL 49-41B-15	4
SDCL 49-41B-22	17, 23
SDCL 49-41B-22(2)	2, 3, 10, 13, 14, 16, 17, 21
SDCL 49-41B-24	17
CASES CITED:	
Affiliated Distillers Brands Corp. v. Gillis, 81 SD 44, 50, 130 N.W.2d 597, 600 (1964)	16

Application of Nebraska Public Power District for a Permit to Construct and Operate the Proposed Mandan Nominal 500 KV Transmission Facility, 354 N.W.2d 713 (S.D. 1984) 2, 3, 17

Arneson v. Arneson, 2003 SD 125, ¶ 14, 670 N.W.2d 904, 910 6

Barnes v. Spearfish School Dist. No. 40-2, 2006 SD 108, ¶ 7, 725 N.W.2d 226, 228 3, 6

Boe v. Foss, 76 SD 295, N.W.2d 1, 11, 12, 13 (1956) 16

Brown v. Douglas School Dist., 2002 SD 92, 650 N.W.2d 264 6

Clean Wisconsin, Inc. Public Service Com'n of Wisconsin, 282 Wis.2d 250, 700 N.W.2d 768 (2005) 12

Haynes v. Ford, 2004 SD 99, 686 N.W.2d 657, 661 7

Hogen v. South Dakota State Bd. of Transp. 245 N.W.2d 493, 497 (S.D. 1976) 16

Horn v. Dakota Pork, 2006 SD 5, 709 N.W.2d 38 6

In re Adoption of C.D.B., 2005 SD 115, ¶ 11, 706 N.W.2d 809, 814 6

In re B.Y. Development Inc., 2000 SD 102, ¶ 6, 615 N.W.2d 604, 607, 608 5

In the Matter of Northern States Power Co., 489 N.W.2d 365, 370 (S.D. 1992) 6

Korzan v. City of Mitchell, 2006 SD 4, ¶ 7, 708 N.W.2d 683, 686 5, 7

MGA Ins. Co. v. Goodsell, 2005 SD 118, ¶ 9, 707 N.W.2d 483, 485 6

Oahe Conservancy Subdistrict v. Janklow, 308 N.W.2d 559, 563, 564 (S.D. 1981) 16

O'Toole v. Board of Trustees of the South Dakota Retirement System, 2002 SD 15, 77, 648 N.W.2d 342, 346 (2002) 2, 15

Permann v. Department of Labor, Unemp. Ins. Div., 411 N.W.2d 113, 119 (S.D. 1987) 6

Schryver v. Schirmer, 84 SD 352, 171 N.W.2d 634 (1969) 16

Sopko v. C & R Transfer Co., 1998 SD 8, ¶ 7, N.W.2d 225, 228-29 2, 9

State v. Moschell, 2004 SD 35, 677 N.W.2d 551 16

Thies v. Renner, 78 SD 617, 106 N.W.2d 253 (1960) 15

Wall v. Fenner, 76 SD 252, 76 N.W.2d 722 (1956) 16

State Rules:

ARSD 20:10:22:12 20

ARSD 20:10:22:13 20, 21

ARSD 20:10:22:14 20

ARSD 20:10:22:21 20, 21

ARSD Art. 74:36 18

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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

24485

REFERENCES

Intervenors and Appellants Minnesota Center for Environmental Advocacy, Fresh Energy (f/k/a Minnesotans for an Energy Efficient Economy), Izaak Walton League of America – Midwest Office, and the Union of Concerned Scientists will be referred to collectively as "Minnesota Center." Applicants and Appellees, Otter Tail Power Company and the six other co-owners will be referred to collectively as "Applicants." Appellee South Dakota Public Utilities Commission will be referred to as the "PUC" or "Commission." References to the administrative record will be with the letters "AR" followed by the page number(s) to which reference is made. The Final Decision and Order issued by the PUC in Docket EL05-022 on July 21, 2006, will be referred to as the "Decision." The Decision, including the Findings of Fact and Conclusions of Law, is attached as Appendix A. References to the administrative hearing transcript will be with the letters TR followed by the page number. References to Findings of Fact will be denoted by "Finding" or "Findings" and the finding number. The entirety of the administrative record for Docket EL05-022, except for confidential documents, may be accessed electronically on the Commission's web site at www.puc.sd.gov under

Commission Actions, Commission Dockets, 2006 Civil Dockets, CIV06-399 or 2005 Electric Dockets, EL05-022.

JURISDICTIONAL STATEMENT

The Commission concurs with the jurisdictional statement as set forth in Minnesota Center's Brief.

STATEMENT OF ISSUES

1. **WHETHER THE COMMISSION'S FINDINGS OF FACT AND RULING ON MINNESOTA CENTER'S PROPOSED FINDINGS OF FACT REGARDING CARBON EMISSIONS FROM BIG STONE II ARE SUPPORTED BY THE RECORD AND ARE NOT CLEARLY ERRONEOUS.**

The Commission issued its Findings based on its evaluation of the evidence in the record and granted Applicants' application for a construction permit. The Circuit Court answered this issue in the affirmative and affirmed the decision of the Commission. *Sopko v. C & R Transfer Co.*, 1998 SD 8, ¶ 7, 575 N.W.2d 225, 228-29.

2. **WHETHER THE GENERAL ACADEMIC OPINION EVIDENCE IN THE RECORD REGARDING THE POTENTIAL IMPACTS OF CUMULATIVE CARBON DIOXIDE AND OTHER "GREENHOUSE GAS" EMISSIONS WORLDWIDE ON GLOBAL CLIMATE COMPELLED THE COMMISSION, UNDER SDCL 49-41B-22(2), TO DENY A CONSTRUCTION PERMIT FOR BIG STONE II.**

The Commission decided this issue in the negative and granted Applicants' application for a construction permit for Big Stone II. The Circuit Court affirmed the Commission's decision. *Application of Nebraska Public Power District for a Permit to Construct and Operate the Proposed Mandan Nominal 500 KV Transmission Facility*, 354 N.W. 2d 713 (S.D. 1984); *O'Toole v. Board of Trustees of the South Dakota Retirement System*, 2002 SD 77, 648 N.W.2d 342 (2002); SDCL 1-40-4.1; Ch. 34A-1; 49-41B-22(2).

3. **WHETHER THE COMMISSION'S DECISION TO GRANT THE PERMIT WAS IN VIOLATION OF STATUTE, AFFECTED BY OTHER ERROR OF LAW OR ARBITRARY, CAPRICIOUS OR CHARACTERIZED BY AN ABUSE OF DISCRETION.**

The Commission issued its Decision based upon reasoned interpretations of the applicable statutes and exercise of discretion and granted Applicants' application for a construction permit for Big Stone II. The Circuit Court answered this issue in the negative and affirmed the Commission's decision. *Barnes v. Spearfish School Dist. No. 40-2*, 2006 SD 108, ¶ 7, 725 N.W.2d 226, 228; *Application of Nebraska Public Power District for a Permit to Construct and Operate the Proposed Mandan Nominal 500 KV Transmission Facility*, 354 N.W.2d 713 (S.D. 1984); SDCL 49-41B-22(2).

STATEMENT OF THE CASE AND FACTS

This appeal is from the Judgment of Affirmance entered on February 27, 2007, by Judge Lori S. Wilbur, Circuit Judge of the Sixth Judicial Circuit, affirming the Decision. AR 8286-8321. The Decision granted a permit to Applicants to construct the Big Stone II Project, a nominal 600 megawatt ("MW") super-critical pulverized coal fired electric generation facility to be located adjacent to the existing Big Stone Unit I power plant east of Milbank and northwest of Big Stone City in Grant County, South Dakota ("Big Stone II"). Minnesota Center's Notice of Appeal, dated March 26, 2007, was filed with the Circuit Court on March 27, 2007.

On November 8, 2004, Applicants submitted to the Commission a notice of intent to submit an application for a permit to construct an energy conversion facility pursuant to SDCL 49-41B-5 for Big Stone II. On December 10, 2004, the Commission entered an

Order Designating Affected Area and Local Review Committee in Docket EL04-034. Appendix B.

On July 21, 2005, Applicants filed an application with the Commission for a permit to construct an energy conversion facility for Big Stone II. AR 1-435. On September 13, 2005, following notice as provided in SDCL 49-41B-15, the Commission held a public input hearing in Milbank, South Dakota, which was attended by approximately 50 people. AR 525-570D. On October 4, 2006, the Commission granted an Order Granting Intervention to Minnesota Center and certain other parties who are not parties to this appeal. All parties to the proceeding, including Commission Staff, submitted pre-filed testimony. AR 1114-2186; 2256-2427; 2438-2752; 2762-2919; 2946-3167; 3188-3640; 3711-3745; 3754-3758. The formal evidentiary hearing was held as scheduled on June 26-29, 2006. TR 1-866; AR 3801-7958. After notice, a second public input hearing was held on the evening of June 29, 2006, at the Capitol Building in Pierre and was attended by approximately 20 people. TR 794-865; AR 3800. All parties to the proceeding submitted briefs, and Applicants and Minnesota Center submitted proposed Findings of Fact and Conclusions of Law. AR 8075-8112; 8157-8160; 8171-8173. The Commission heard oral argument by all parties on July 11, 2006. On July 14, 2006, at a duly noticed open meeting, the Commission voted unanimously to grant an energy facility construction permit for Big Stone II, subject to conditions. AR 8264-8283. On July 21, 2006, the Commission issued its Final Decision and Order and Notice of Entry. Appendix A; AR 8286-8321. The Commission's Findings of Fact regarding the proposed facility are set forth in the Decision and will not be repeated here. On August 24, 2006, the Commission issued an Order Denying Application for Reconsideration and Order

Denying Application for Reconsideration Second Application submitted by intervenor, Mary Jo Stueve, who is not a party to this appeal. AR 8372-8373.

ARGUMENT AND AUTHORITIES

I. STANDARDS OF REVIEW

SDCL 1-26-36 sets forth the standards of review of an agency's decision. The statute provides in pertinent part:

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. . . . The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> * * *
>
> (4) Affected by other error of law;
>
> (5) Clearly erroneous in light of the entire evidence in the record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

In *Korzan v. City of Mitchell*, 2006 SD 4, ¶ 708 N.W.2d 683, 686, this Court recently set forth the general principles governing its review of agency decisions on appeal:

> We review an agency's decision the same as the circuit court, "unaided by any presumptions of the correctness of the circuit court's determination." *In re B.Y. Development Inc.*, 2000 SD 102, ¶ 6, 615 N.W.2d 604, 607. Our review is confined to the record. SDCL 1-26-35. Questions of law and statutory construction are fully reviewable. *B.Y. Development*, 2000 SD 102, ¶ 6, 615 N.W.2d at 608. This Court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. SDCL 1-26-36. The court may reverse or modify the decision if the administrative findings, inferences, conclusions, or decisions are clearly erroneous in light of the entire evidence in the record or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Id.

The standard of review of an agency's decision is governed by SDCL 1-26-36 and ordinarily requires de novo review of questions of law and clearly erroneous review of findings of fact. *Horn v. Dakota Pork*, 2006 SD 5, 709 N.W.2d 38; *Brown v. Douglas School Dist.*, 2002 SD 92, 650 N.W.2d 264. "Decision makers abuse their discretion only when they make 'a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.' *Barnes v. Spearfish School Dist. No. 40-2*, 2006 SD 108, ¶ 7, 725 N.W.2d 226, 228." *In re Adoption of C.D.B.*, 2005 SD 115, ¶ 11, 706 N.W.2d 809, 814; Arneson *v. Arneson*, 2003 SD 125, ¶ 14, 670 N.W.2d 904, 910. The interpretation of a statute is a question of law subject to de novo review. *MGA Ins. Co. v. Goodsell*, 2005 SD 118, ¶ 9, 707 N.W.2d 483, 485. Mixed questions of fact and law that require the Court to apply a legal standard are reviewed de novo. *Permann v. Department of Labor, Unemp. Ins. Div.*, 411 N.W.2d 113, 119 (S.D. 1987). The Supreme Court has stated that "SDCL ch. 49-34A evidences a legislative intent for PUC to have broad inherent authority in matters involving utilities in this state." *In the Matter of Northern States Power Co.*, 489 N.W.2d 365, 370. (S.D. 1992).

II. DISCUSSION OF ISSUES PRESENTED

The Commission notes at the outset that a great deal of Minnesota Center's brief is devoted to characterizations – and mischaracterizations – of arguments made in the briefs submitted to the Circuit Court in the appeal proceeding below and not to the Commission's Decision itself or the administrative record. Under South Dakota law, lower court briefs are not part of the record to this Court on appeal unless ordered by this Court, are not before the Court for decision and are not relevant or appropriate bases for

argument in the Supreme Court. SDCL 15-26A-53. As noted above, this Court reviews the administrative decision in this appeal the same as the circuit court, "unaided by any presumptions of the correctness of the circuit court's determination." *Korzan, supra*; *Haynes v. Ford*, 2004 SD 99, 686 N.W.2d 657, 661. Accordingly, the Commission will attempt in this brief to minimize re-hashing the arguments below except where necessary to fairly respond to Minnesota Center's substantive contentions in its brief before this Court

A. The Commission's Findings of Fact regarding CO_2 emissions are supported by the record and are not clearly erroneous.

In the Decision, the Commission made the following Findings of Fact regarding CO_2 emissions, Appendix A; AR 8286-8321:

> 90. Assuming the Applicants comply with the environmental conditions of this decision and permit and the air quality, water quality, solid waste and water appropriation permits which Applicants must obtain in order to construct and operate the facility, no serious long-term effects to the environment or to health have been demonstrated as probable of occurrence from operation of Big Stone Unit II.
>
> * * *
>
> 133. The combustion of fossil fuels including coal results in the formation of carbon dioxide. Carbon dioxide is a greenhouse gas. Big Stone Unit II is projected to emit 4.7 million tons of CO_2 per year. App. Ex. 53, p. 4-10- 4-11. Assuming an operating lifetime for Big Stone II of 50 years and no installation of CO_2 capture system, the plant will emit over 225 million tons of CO_2 before it closes. Ex. JI-2 at 26.
>
> 134. The Energy Information Administration reports that anthropogenic carbon dioxide emissions in 2010 are project to be 6,365 million metric tons in the United States alone. Worldwide, the projected 2010 CO_2 emissions figure is 30,005 million metric tons. App. Ex. 29, p. 6.
>
> 135. Based on projected annual emissions of 4.7 million tons, Big Stone Unit II would increase U.S. emissions of carbon dioxide by approximately 0.0007, or seven-hundredths of one percent. As a result, the proposed Big Stone Unit II

plant will not contribute materially to increases in the production of anthropogenic carbon dioxide. App. Ex. 29, p. 6.

136. Big Stone Unit II will produce about 18% less CO_2 than other existing coal-fired plants because the super-critical boiler proposed here is more efficient than other forms of coal-fired technologies. App. Ex. 2, p. 7.

137. Issues arose at the hearing as to whether costs should be imputed to the project for possible future regulation of CO_2 emissions. Neither federal government regulations nor South Dakota regulations have been established for CO_2 emissions. Minnesota has established environmental cost values for CO_2 emissions from electric generation, but these values do not apply to generation located outside of Minnesota. App. Ex. 30, p. 7, 5; App. Ex. 34, p. 2; HTr 737-39. It is speculative whether Congress or South Dakota will regulate CO_2, and, if either does so, what the timing and stringency of those regulations will be. App. Ex. 30, p. 9; 19-20; HTr 89-90, 523, 737-43. Quantifying the cost of future CO_2 regulations is therefore a speculative undertaking, and the evidence shows that only a small minority of states utilize quantified values to approximate the cost of future regulation. App. Ex. 30, p. 12.

138. Evidence adduced at the hearing shows that only a few states have required CO_2 emission reductions from electric generators. A group of Northeastern states is currently examining such regulations; however, the cost of the program (projected CO_2 allowance prices of $1-$3) is expected to be relatively modest. States either implementing or considering CO_2 reduction programs generally utilize far less coal generation than South Dakota (and the United States) as a percentage of their total electric generation portfolios. Such states also have higher electric rates than South Dakota. Hence, these states do not furnish a model for South Dakota for purposes of examining the CO_2 issue. App. Ex. 30, pp. 10-28.

139. Evidence was also adduced at the hearing concerning various bills introduced in Congress that would regulate CO_2 emissions. These bills do not furnish support for Intervenors' contention that there should be a cost imputed to Big Stone Unit II for future CO_2 regulation in an amount equal to $7.80-$30.50, with a mid-case range of $19.10 per ton. None of these bills passed either branch of Congress. One proposal that appeared to have the best chance of passing the Senate last year, but was never voted on, had a maximum "safety valve" allowance price cap of less than $6.36 per ton. Various planning numbers were discussed at the hearing in the $5-$6 range, and Minnesota has a CO_2 environmental cost value for use in electric generation resource planning of between $.35 and $3.64 for in-state generation. In any event, all reasonable planning numbers for possible future CO_2 regulation were substantially less than the Intervenors' $19.10 mid-case number, and none appeared to affect the cost-effectiveness of the Big Stone Unit II project as compared to alternatives. App. Ex. 30, pp. 4-28.

* * *

193. Applicants have applied for various federal, state and local permits in connection with Big Stone Unit II and will require additional zoning and other permits as the project progresses. These permits include but are not limited to the Water Appropriation Permit, PSD Air Quality Construction Permit, Solid Waste Permit and Section 404 Permit. The Commission finds that in order to comply with SDCL 49-41B-22(1), the permit must be conditioned on the receipt of and compliance with all applicable federal, state and local permits.

* * *

199. Because there does not yet exist any federal or state regulation of CO_2 emissions, and because we do not yet know what effect such regulation may have on ratepayers in the future, the Commission finds that it is important for Applicants to keep the Commission informed of developments relative to the project involving CO_2 and that a condition so requiring is appropriate. The Applicants shall submit an annual report to the Commission on CO_2 with the first such report to be filed on or before July 1, 2008. Such report shall review any federal or state action taken to regulate carbon dioxide, how the operator plans to act to come into compliance with those regulations, the expected costs of those compliance efforts and the estimated effect of such compliance on rate-payers. The report should also evaluate operational techniques and commercially-available equipment being used to control CO_2 emissions at pulverized coal plants, the cost of those techniques or equipment, and whether or not the operator has evaluated the prudence of implementing those techniques or equipment.

The record evidence upon which the Commission based each of these Findings is noted in the Finding. These Findings are supported by the evidence in the record, are not clearly erroneous and should be affirmed. "If after careful review of the entire record we are definitely and firmly convinced a mistake has been committed, only then will we reverse." *Sopko v. C & R Transfer Co.*, 1998 SD 8, ¶ 7, 575 N.W.2d 225, 228-29.

Except for the second sentence of Finding 135, Minnesota Center does not really point to any particulars in which the Findings made by the Commission regarding CO_2 emissions are clearly erroneous in a factual sense. Rather, Minnesota Center's assertions of clear error focus on what the Commission did not find and conclude and on findings that Minnesota Center contends included facts that the Commission should not have

considered. These latter contentions are really more assertions of error of law or abuse of discretion than factual challenges and are addressed in II.B. and C. below.

With respect to Finding 135, Minnesota Center argues that the Commission's finding that Big Stone II will not contribute "materially" to global CO_2 is clearly erroneous. Minnesota Center argues that because Big Stone II's CO_2 emissions will be "measurable," they must constitute a material contribution to U.S. CO_2. The Commission disagrees. The context of the Commission's finding is the statutory language of 49-41B-22(2) that "the facility will not pose a threat of serious injury to the environment." Minnesota Center's own expert on this issue testified that there are tens or hundreds of thousands of point source facilities such as Big Stone II and hundreds of millions of non-point sources that contribute CO_2 to the atmosphere. AR 3745. There is, however, no evidence in the record to indicate that Big Stone II's CO_2 emissions will alone pose a threat of serious environmental harm. If Minnesota Center's position is correct, then no fuel burning generator could be permitted in this state because the CO_2 emissions of natural gas generators, oil generators and all other fuel burning generators will also be "measurable." Those of us who have practiced in the commercial area are well accustomed to quibbling over whether something is "material," and seldom is it a black and white issue. In the context of the statute at issue in this case, the Commission's finding in this regard is supported by the evidence, is an apt and reasonable characterization, is not clearly erroneous and does not justify reversal of the Decision.

B. The Commission properly found and concluded that the evidence in the record regarding the potential impacts of cumulative carbon dioxide and other "greenhouse gas" emissions worldwide did not compel the Commission to deny a construction permit for Big Stone II.

In section II.[second] B.2. of its brief on pages 17 and 18, Minnesota Center states:

> The PUC also argues that its decision against the great weight of evidence on global warming must be excused because to find Big Stone II poses a threat of injury to the environment would amount to a 'complete ban.' (PUC circuit court brief, pp. 7-8.) The rhetorical questions asked in the PUC's circuit court brief suggest the complete ban would be on pulverized coal plants."

First of all as noted above, prior to the submission of this brief, the PUC hasn't argued anything. The Commission's brief in the Circuit Court is not part of the Decision and is not part of the record before this Court. More important, however, the statement that the Commission's rhetorical questions "suggest the complete ban would be on pulverized coal power plants" is an inaccurate characterization of what the Commission said. The following is the actual passage from the Commission's brief below:

> The essence of Appellant's argument is stated in section II.B.1. of their Brief on page 14 as follows:
>
> > That doesn't mean 'limit further buildup of all sources except ones of a certain size,' or 'limit further buildup from all sources except those in South Dakota'. The uncontested evidence in this case is that the scientific consensus is [sic] to stop increasing and start decreasing *all* CO_2 and to do it now.
>
> In effect, what Appellants asked of the Commission and now ask of this Court is to render a judgment on the global warming debate that has gone on in this country and around the world for well over a decade at the highest levels of government and academia and to ban all future construction of fossil fuel generation in this state. We are asked to do this not in a policy-setting forum such as the Congress, the Legislature, an EPA or DENR rule-making proceeding or even a PUC rule-making

> proceeding, but in an adjudicatory proceeding involving the permitting of a particular generation facility. Furthermore, as the quoted statement of Appellants tacitly acknowledges, we are asked to do this in an utter vacuum of guiding policies or standards. The only option Appellants can offer is a complete ban because what other alternative is there? Is there an emissions level below which we could allow a facility? A boiler or turbine efficiency level?[1] What are these levels? The fact is such standards don't exist.
>
> ---
>
> [1] The Commission did find that the super-critical boiler technology to be employed at Big Stone II will be significantly more efficient than current coal-fired plants and will accordingly emit significantly less CO_2 per watt-hour than the existing fleet of coal plants. Findings 136 and 188.

As the Commission points out above in II.A., Minnesota Center's own evidence states that all fuel-based generation emits CO_2, and there is no standard in existence for the Commission to apply to differentiate between which CO_2 emitting facilities should be permitted and which should not. The Commission most assuredly did not suggest in the Decision, or in its brief below, that coal-fired plants should be banned. The Commission suggested that, if applied non-arbitrarily, the inescapable consequence of what Minnesota Center argued for would be to deny applications for all fuel-fired generating facilities.

As the Commission noted in Findings 137 and 199, there are no regulations or standards governing CO_2 emissions at either the state or federal level for either the Commission or DENR to apply. Only a handful of states have regulations pertaining to CO_2 emissions, AR 2969, et seq., and coal-fired power plants continue to be built around the country. *Clean Wisconsin, Inc. v. Public Service Com'n of Wisconsin*, 282 Wis.2d 250, 700 N.W.2d 768 (2005). CO_2 regulations may very well be enacted that apply to Big Stone II, and, if so, the facility will have to conform to them. Findings 193 and 199. The Commission did not, however, believe that subjecting South Dakota to a unilateral, ad

hoc ban on traditional forms of electric generation was within the scope of what the Legislature intended in enacting SDCL Ch. 49-41B or was a proper, or even permissible, exercise of the discretion vested in the Commission under SDCL Ch. 49-41B, particularly when this state currently hosts only one coal-fired generating plant and a mere handful of other natural gas and oil fired generators.

Invoking the plain meaning canon of statutory construction, however, Minnesota Center argues that SDCL 49-41B-22(2) was intended to be a very broad grant of authority to the Commission, empowering and even requiring the Commission to deny a permit for a CO_2 emitting facility based upon evidence concerning the potential environmental effects of global warming. The Commission contends that the statutory language itself, this Court's decisions, the statutory framework established by the Legislature for air emissions regulation and the Legislature's own recent expression of policy regarding CO_2 regulation support both the Commission's more circumspect construction of the statute and exercise of any discretion vested in it by the statute.

First, when read in its entirety, SDCL 49-41B contains language suggesting that the grant of authority to the Commission was not intended to be either as broad or as unfettered as Minnesota Center contends. Obviously, as discussed above, the most compelling of these suggestions is the plain language of SDCL 49-41B-22(2) itself: "The facility will not pose a threat of serious injury to the environment. . . ." The section does not state, for example, "the facility together with all other facilities in the world." Although the Commission's Decision did not, as Minnesota Center argues, limit its Findings regarding CO_2 to the 20 mile "siting area," the language of both SDCL 49-41B-22(2) and Chapter 49-41B as a whole do contain language suggesting that the statute's

intent is to address issues typical of siting proceedings and not to serve as a broad, global environmental regulatory statute. The subdivision at issue states in its entirety: "The 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; . . ." SDCL 49-41B-2(9) contains the following definition:

> "Siting area," that area within ten miles in any direction of a proposed energy conversion facility, AC/DC conversion facility, or which is determined by the commission to be affected by a proposed energy conversion facility; . . .

This definition in turn ties into SDCL 49-41B-6 which specifies that the first action the Commission is to take in the process is the designation of the "affected area." The Commission made this designation in its Order Designating Affected Area and Local Review Committee issued on December 10, 2004, in Docket EL04-034 (See Appendix B). The affected area designated by the Commission was the area within twenty miles of the proposed facility and certain outlying communities that were expected to experience influxes of labor and other community impacts. There were no parties to this proceeding other than the Applicants and the Commission, and this decision was not appealed.

Given this context, one must question whether the Legislature intended in SDCL 49-41B-22(2) to require an individual energy facility in South Dakota to shoulder the burden of cumulative CO_2 emissions from all fuel-burning power plants, industrial facilities, livestock operations, vehicles and all other sources on the planet earth. The Commission determined that such a construction of the statute and such an exercise of its discretion, to the extent it possesses it, was unwarranted in this case. The Commission's reasoning on this issue is set forth in its ruling on Minnesota Center's Proposed Findings

6 through 16 dealing with CO_2 emissions and global warming (Appendix A; AR 8286-8321):

> Proposed Findings 6 through 16 – Rejected. In Finding 135, the Commission finds that even though the emissions of CO_2 seem significant on a tonnage basis, they will represent only a minute fraction of total U.S. anthropogenic emissions and a much more minute fraction of global emissions. The Commission is only called upon to determine whether this particular facility will have a serious adverse impact on the environment, and there is insufficient evidence in this record on which to base a finding that Big Stone Unit II will have any appreciable effect on the global climate. It is clear from this record that if a consensus is ever reached at the national level concerning global warming and the contribution of CO_2 to the problem, regulation of carbon emissions will have to occur in a national or even global context. In Findings 139 and 199, the Commission notes that there is no federal or state regulation of CO_2, and thus far the debate at the Federal level over such regulation has yet to result in a bill that passed either house. EPA at the Federal level and DENR at the state level are charged with regulation of air pollutants, and neither agency has yet seen fit to implement regulations. The Commission acknowledges the concerns about CO_2 in Finding 199, and believes that the approach it has taken in that Finding and in Condition 6 is a proper approach given the current record and absence of regulations or standards.

Did the Commission misconstrue the statutory intent or abuse its discretion in taking this approach toward CO_2 emissions? A review of some general principals of administrative law in this state is helpful in this analysis. First, the jurisdiction of an administrative agency is limited to the powers granted to it by statute. *Thies v. Renner*, 78 SD 617, 106 N.W.2d 253 (1960). In *O'Toole v. Board of Trustees of the South Dakota Retirement System*, 2002 SD 77, 648 N.W.2d 342, the Supreme Court further explained the general limits of administrative authority in South Dakota:

> The general rule is that administrative agencies have only such adjudicatory jurisdiction as is conferred upon them by statute. . . . An agency has only such power as expressly or by necessary implication is granted by legislative enactment; agency may not increase its own jurisdiction and, as a creature of statute, has no common-law jurisdiction nor inherent power such as might reside in a court of general jurisdiction. [citations omitted] 2002 SD at 15, 648 N.W.2d at 346.

The Legislative power to confer authority on administrative agencies is itself not unfettered. The Court recently engaged in a thorough recitation of these limitations and principles in *State v. Moschell*, 2004 SD 35, 677 N.W.2d 551:

> This provision encompasses three prohibitions: (1) no branch may encroach on the powers of another, (2) no branch may delegate to another branch its essential constitutionally assigned functions, and (3) quasi-legislative powers may only be delegated to another branch with sufficient standards. *Boe v. Foss*, 76 SD 295, 77 N.W.2d 1 (1956).
>
> Under this doctrine, the Legislature cannot abdicate its essential power to enact basic policies into law or delegate such power to any other department. However, once the Legislature has created broad policy through its enactments, it may delegate in the execution of that policy certain quasi-legislative powers or functions to executive or administrative officers or agencies, provided it adopts standards to guide those officers or agencies in the exercise of such powers. *Id.* At 11.
>
> The test is to examine the challenged legislation to learn whether it delegates the power to create basic policy or fails to supply intelligible standards as guides in the exercise of the power delegated. *Id.* At 12-13. In *Hogen v. South Dakota State Bd. Of Transp.*, 245 N.W.2d 493 (S.D.1976), the Court considered standards that allowed a delegation of power if it was determined to be "necessary" or "reasonable." The Court concluded that "[a] statute or ordinance which in effect reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers." Id., at 497 (quoting *Affiliated Distillers Brands Corp. v. Gillis*, 81 SD 44, 50, 130 N.W.2d 597, 600 (1964)).
>
> In *Oahe Conservancy Subdistrict v. Janklow*, 308 N.W.2d 559 (S.D.1981), the Court described the test as one of sufficiency. Did the delegation sufficiently prescribe a policy, standard, or rule for carrying out the legislative objective? *Id.* At 563. A delegation will not stand if it grants "unlimited or absolute discretion." Id. At 564 (citing *Wall v. Fenner*, 76 SD 252, 76 N.W.2d 722 (1956)); see also *Schryver v. Schirmer*, 84 SD 352, 171 N.W.2d 634 (1969).

In this case, we are not confronted with the issue of whether the grant of authority to the Commission under SDCL 49-41B-22(2) is unconstitutionally broad. However, in considering whether the Commission committed reversible error in its construction of,

and exercise of discretion in applying, the statute, it is appropriate for the Court to consider these principles in gauging the propriety of the Commission's reluctance to engage in an overly liberal interpretation and exercise of the discretion conferred upon it by SDCL 49-41B-22(2). This circumspect exercise of discretion is supported by the only case to reach the Supreme Court involving a permit proceeding under SDCL Ch. 49-41B, by the statutes governing air quality regulation in South Dakota and by the most recent expression regarding regulation of CO_2 emissions by the Legislature.

First, in *Application of Nebraska Public Power District for a Permit to Construct and Operate the Proposed Mandan Nominal 500 KV Transmission Facility*, 354 N.W. 2d 713 (S.D. 1984), the Court very narrowly construed the definition of "construction" in SDCL 49-41B-24 to reverse a Commission imposed condition regarding tower design and very narrowly construed the discretion vested in the Commission regarding such a mundane matter as topsoil handling and restoration. This decision does not support the view that the Commission is to expansively interpret and exercise its discretion under the statute.

Second, the statutes enacted by the Legislature to govern air quality regulation support the Commission's measured interpretation and exercise of what discretion it may have under SDCL 49-41B-22 to not, in effect, impose a de facto prohibition on construction of CO_2 emitting facilities in the absence of a more explicit legislative delegation. First, the authority to regulate air emissions in this state has been delegated to the Department of Environment and Natural Resources and Board of Minerals and Environment (DENR). SDCL 1-40-24; Ch. 34A-1. Pursuant to this delegation the DENR has promulgated a comprehensive program of air quality regulation and emissions source

permitting. ARSD Art. 74:36. This program dovetails with the U.S. Environmental Protection Agency's (EPA) air emissions control programs. In addition, and importantly, the Legislature has made its policy choice perfectly clear with respect to the regulatory philosophy and limits on its delegation under SDCL Chs. 1-40 and 34A-1. SDCL 1-40-4.1 provides as follows:

> No rule that has been promulgated pursuant to Title 34A, 45, 46, or 46A may be more stringent than any corresponding federal law, rule, or regulation governing an essentially similar subject or issue.

As noted above, EPA has not promulgated any regulations at this point governing carbon dioxide emissions. Not surprisingly then, neither has the DENR. It is difficult to imagine how the Commission could be held to have abused its discretion in electing not to engage in ad hoc carbon dioxide emissions regulation given this statutory and regulatory framework. Although the above cited environmental statutes and rules (or the intentional absence thereof) and the doctrine of primary jurisdiction may not, strictly speaking, be applicable here, the Commission's deference to the clearly evinced legislative and regulatory policy embodied in these enactments, and to the expertise and primary administrative responsibility of EPA and DENR over air emissions, clearly was not an abuse of discretion.

Finally, the most recent expression by the Legislature on carbon dioxide emissions supports the Commission's exercise of discretion relative to CO_2 emissions in this case. In House Concurrent Resolution No. 1018 of the 2005 Legislative Session (see Appendix C), the Legislature expressed its support to the South Dakota Delegation and the Congress for federal multi-emission reduction legislation. The final paragraph of the Resolution states as follows:

> BE IT FURTHER RESOLVED, that the South Dakota Legislature supports the Clear Skies Initiative if the final version does not contain carbon dioxide emission regulations or standards, and that the goal of carbon dioxide emission reductions instead be supported through research and encouraged on a voluntary basis. (emphasis supplied)

There is little doubt how the Legislature felt about CO_2 regulation just two years ago.

The evidence in this case demonstrated that Big Stone II will result in numerous significant air quality improvements. Findings 122-132; 194; 198. It will also result in more than a doubling of generation capacity at the site with either reduced or static emissions for almost all regulated pollutants and will generate at a significantly higher efficiency than existing generators and, hence emit less CO_2 per unit of output than the existing fleet of plants, including Big Stone Unit I. The Commission's Findings of Fact, including those relating to CO_2 emissions were not clearly erroneous, and its decision was not characterized by error of law or an abuse of discretion and should be affirmed.

C. The issues of the cumulative effects of global CO_2 emissions and the "irreversibility"of the global climate effects from Big Stone II's CO_2 emissions are subsumed within the Commission's findings of fact and conclusions of law regarding CO_2 emissions and the preceding discussion in Section II.B of this argument.

The issues Minnesota Center raises regarding the cumulative effects of global CO_2 emissions and the irreversibility of the effects of Big Stone II's CO_2 emissions on global climate are part and parcel of the argument regarding the Commission's treatment of CO_2 emissions that is dealt with in Section II.B. of this Brief. It again really boils down to whether this particular energy facility permitting proceeding is the proper forum for resolution of the global warming issue. The Commission concluded that it was not and limited its findings and conclusions to the effects of the Big Stone II facility itself.

The Commission found and concluded that Big Stone II would not have a material effect on global CO_2 emissions and would not pose a serious threat to the environment.

As far as Minnesota Center's assertion that the Commission should have denied the permit because Applicants did not adequately address the cumulative carbon effects and their irreversibility in their application as provided in ARSD 20:10:22:13 or in their evidence, the Commission would submit that it made specific findings on anticipated cumulative CO_2 emissions in the year 2010, Big Stone II's expected emissions and the relative contribution Big Stone II would make to total U.S. and global anthropogenic emissions. The Commission further made findings on the absence of a national or a state policy or standards on CO_2 emissions and the inappropriateness of the Commission holding a particular project in this state hostage to that absence of standards or policy.

Lastly, the Commission would further submit that Minnesota Center's reliance on ARSD 20:10:22:13 is misplaced. Minnesota Center failed to include in their brief the last sentence of the rule which states:

> . . . The applicant shall provide a list of other major industrial facilities under regulation which may have an adverse effect on the environment as a result of their construction or operation in the transmission site, wind energy site, or siting area. (emphasis supplied).

This rule is bounded by rules that deal with very site-specific issues such as "Alternative Sites," ARSD 20:10:22:12 and "Effect on Physical Environment," ARSD 20:10:22:14. Eight rules later, air quality is expressly and separately dealt with in ARSD 20:10:22:21, which provides:

> **20:10:22:21. Air quality.** The applicant shall provide evidence that the proposed facility will comply with all air quality standards and regulations of any federal or state agency having jurisdiction and any variances permitted.

The Commission would argue that ARSD 20:10:22:13 is intended to deal with the cumulative or synergistic effects of the proposed facility with other industrial facilities, including other power plants, in the siting area on plant, animal and human communities in the siting area and that general air quality issues are dealt with in ARSD 20:10:22:21. This is not to say that air quality issues might not be appropriately considered under ARSD 20:10:22:13 where cumulative or synergistic effects could be expected in the siting area. For example, such an issue was dealt with extensively and appropriately at the hearing with respect to local mercury deposition, with the evidence ultimately demonstrating that local mercury deposition should not be expected to increase and could even decrease following operation of Big Stone II due to the much more effective particulate capture systems that will be installed at the combined Big Stone facilities in connection with Big Stone II's construction. TR 573-591.

D. The Commission properly interpreted SDCL 49-41B-22(2), including the meaning of the word "threat."

Minnesota Center argues the Commission improperly narrowed the reach of the statute in two respects. Minnesota Center argues that the Commission improperly construed SDCL 49-41B-22(2) with respect to the meaning of the word "threat." Minnesota Center argues that the correct construction is that if a facility has any potential whatsoever to contribute to environmental harm, the Commission must deny the permit. One must ask whether, taken at face value, Minnesota Center's view of the statute would permit the construction of anything at all in this state. This does not comport with the ordinary meaning of the word "threat." The American Heritage College dictionary contains the following definitions for "threat" as that term could be argued to be used in SDCL 49-41B-22(2):

> . . . 2. An indication of impending danger or harm. 3. One that is regarded as a possible danger; a menace.

The Commission contends that the distinction urged by Minnesota Center between the "threat" of serious environmental injury and a finding of "actual" harm to the environment is artificial. Obviously, if one does not think something is likely to lead to actual harm, one will not consider it a threat. The Commission further contends that its consideration of the evidence and its Findings regarding the "threat" to the global climate posed by Big Stone II comport with the term "threat" as that term is used in the statute.

The second aspect of Minnesota Center's argument is that the Commission improperly subjected the term "threat" to a threshold analysis. This argument is flawed on two levels. First, the statute itself subjects the term "threat" to a qualitative threshold modifier, through the use of the phrase "of serious injury." This means not only that a significant probability of harm be demonstrable but also that the harm caused by the facility will be serious. The evidence did not demonstrate that either of these was present for Big Stone II.

Second, this argument of Minnesota Center again rests on the harm that global CO_2 emissions will cause in the form of global warming and the Commission's failure to attribute the entirety of global greenhouse gas emissions and their potential effects on climate to Big Stone II. The Commission would submit this is in reality merely a reiteration of the argument that a facility that emits any CO_2 at all may not be granted a permit under our statute because global greenhouse gas emissions may pose a threat to the environment. As discussed above in Section II.B., however, this kind of sweeping policy decision is not within the scope of what the Commission is called upon to decide in an adjudication under SDCL Ch. 49-41B.

E. The Commission did not balance the "threat" posed by Big Stone II's CO_2 emissions against the economic benefits of the project.

The Findings of Fact and Conclusions of Law in the Decision regarding the environmental effects of Big Stone II and, in particular, those from the facility's CO_2 emissions, do not reflect a balancing of these effects against the economic benefits of the project. This does not mean that the Commission did not consider economic and social evidence and make findings of fact and conclusions of law regarding these matters in rendering its decision. Of course it did. One only need take a cursory glance at SDCL 49-41B-22 to know why. While Minnesota Center's appeal focuses on the one particular issue of concern to them, the fact is that the statute and the Commission's rules implementing it also deal explicitly with "the social and economic condition of inhabitants," the "welfare of the inhabitants" and "the orderly development of the region."

There is absolutely nothing, however, in the Commission's Findings regarding CO_2 emissions reflecting a balancing of potential harm from Big Stone II's carbon emissions and economic gain from the project. Rather, as has been discussed at length in Section II.A. and B. of this Brief, the Commission's Findings deal with the amount of CO_2 emissions to be anticipated from the plant, the total emissions from other sources expected at or near the time of its construction and operation, the magnitude of the facility's emissions in comparison to national and global emissions, the efficiency of the plant and its relationship to carbon emissions and the current state of regulation, or rather the lack thereof, of CO_2. The Commission does not here address whether such a balancing might ever be appropriate because the Decision rendered by the Commission simply does not place that issue before the Court in this appeal.

CONCLUSION

There is a right way and a wrong way to regulate cumulative emissions from widespread sources. The right way is demonstrated in the objective air quality standards and regulatory programs currently in place for SOx, NOx, CO, mercury, particulate matter and other regulated pollutants. Facilities know the standards they must plan and design for and regulators have objective criteria against which to measure compliance. Ad hoc prohibition in the absence of policy or standards is the wrong way. For the reasons stated above, the Commission respectfully requests the Court to affirm its Final Decision and Order in Docket EL05-022 and the Judgment of Affirmance issued by the Circuit Court on appeal.

Dated this 15th day of June, 2007.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

John J. Smith
Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501
Ph. (605) 773-3201
Fax (866)757-6031

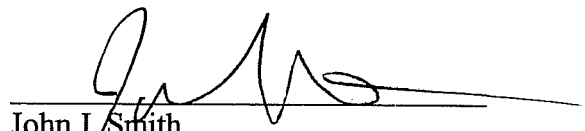
CERTIFICATE OF SERVICE

I hereby certify that copies of Brief of Appellee South Dakota Public Utilities Commission were served on the following by mailing the same to them by United States first class mail, postage thereon prepaid, at the address shown below on this the 15th day of June, 2007.

Mr. John H. Davidson
Attorney at Law
School of Law
University of South Dakota
213 Law Building
414 East Clark Street
Vermillion, SD 57069-2390

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

Ms. Janette K. Brimmer
Attorney at Law
Minnesota Center for Environmental Advocacy
26 East Exchange Street, Suite 206
St. Paul, MN 55101-1667



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

CERTIFICATE OF COMPLIANCE

John J. Smith, attorney for the Commission, hereby certifies that the foregoing Brief of Appellee South Dakota Public Utilities Commission complies with the page and type volume limitations established by SDCL 15-26A-66(b). Proportionally spaced Times New Roman font was used in this Brief. Excluding the cover pages, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, the Commission's Brief contains 7,549 words or 39,627 characters and 24 pages. Microsoft Word was the program used in preparing this Brief.

Dated this 15th day of June, 2007.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION

John J. Smith, Assistant Attorney General
500 East Capitol Avenue
Pierre, SD 57501
Ph. (605) 773-3201
Fax (866)757-6031

APPENDIX

TABLE OF CONTENTS

Final Decision and Order; Notice of Entry dated July 21, 2006, in Docket EL05-022	App A
Order Designating Affected Area and Local Review Committee dated December 10, 2004, in Docket EL04-034	App B
House Concurrent Resolution No. 1018	App C