



# Minnesota Center for Environmental Advocacy

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

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March 30, 2006

VIA EMAIL

Peter L. Tester  
Lindquist and Vennum  
4200 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402

Dear Peter,

We are in receipt of Big Stone II Co-owners' responses to our last set of discovery requests (Nos. 25-49) in the Minnesota Big Stone II docket. After reviewing your responses, we request that you more fully respond as is required under the rules and applicable law. Pursuant to Minn. R. Civ. P. 37.01 (2006) and General Rules of Practice, Rule 115.10 (2006), consider this our good faith attempt to resolve any issues without involvement of the Commission. We have the following comments and requests regarding your initial discovery responses:

## RESPONSES TO IR NOS. 25-30

This group of information requests sought details of graphs submitted to the South Dakota Public Utilities Commission regarding Big Stone II Co-owners' claimed forecasts and projections air emissions from the proposed project.

Big Stone II Co-owners' state objections to IR Nos. 25, 26, 28, and 30 on relevance grounds, that state "the information sought concerns air emission issues from the Big Stone power plant located in South Dakota, which are primarily and exclusively within the purview of the air quality proceedings before the South Dakota Department of Environment and Natural Resources ("DENR"). This information is not relevant to the subject matters of this hearing."

Your relevance objections to these requests, which amount to refusal to substantively respond, are unfounded. These air emission issues are not exclusively within the purview of the South Dakota air permit proceedings, and are relevant to the Minnesota Certificate of Need docket.

As you know, the Certificate of Need statute requires a comparison of the costs of the proposed project, including environmental costs, to the cost of renewable energy sources. Minn. Stat. §216B.243, subd. 3a provides that renewable energy sources must be examined, including a comparison of the costs of renewable energy to the selected alternative.<sup>1</sup> Air emissions are part the environmental costs to be factored into this analysis.

As the Commission ruled in December, the need for the power line and the need for the generation are "inextricably linked." Several provisions of the Commission's Certificate of Need rules also require a consideration of environmental impacts, including Minn. R. 7849.0120(B)(3)(relating to the effects of the proposed facility upon the natural and socioeconomic environments"), and Minn. R. 7849.7849.0120(C)(relating to whether the projects benefits are "compatible with protecting the natural and socioeconomic environments, including human health").

Moreover, the rules require consideration of whether the project would comply with federal laws (Minn. R. 7849.0120(D)). Our Information Request No. 26 in particular relates directly to how the Applicants interpret and plan to comply with federal mercury emission laws and regulations.

In addition, the "Environmental Impact Scoping Decision" of the Minnesota Department of Commerce ("DOC"), of February 28, 2006, states that its EIS will address environmental and human impacts of the proposed project and alternatives, including emissions of hazardous air pollutants such as mercury. The Scoping Decision further elaborates that the analysis of alternatives to the proposed project includes analysis of human and environmental impacts of the proposed power Big Stone II power plant expansion.<sup>2</sup> Disclosure of the impacts of the project, and the comparison of the impacts of the project with alternatives such as renewable energy sources obviously requires and analysis of the air quality impacts of each. Our information requests relating to air emissions, and how the Big Stone II project plans to control its mercury emissions, CO2 and other emissions, go directly to the issues of human and environmental impacts associated with the size, type, and timing of the proposed project.

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<sup>1</sup> Minn. Stat. §216B.243, subd. 3a ("Use of renewable resource. The commission may not issue a certificate of need under this section for a large energy facility that generates electric power by means of a nonrenewable energy source, or that transmits electric power generated by means of a nonrenewable energy source, unless the applicant for the certificate has demonstrated to the commission's satisfaction that it has explored the possibility of generating power by means of renewable energy sources and has demonstrated that the alternative selected is less expensive (including environmental costs) than power generated by a renewable energy source.").

<sup>2</sup> Minnesota Department of Commerce Environmental Impact Statement Scoping Decision, PUC Docket No. E017, et al./CN-05-619, page 3 (The EIS will "review impacts and mitigation measures for . . . the proposed transmission project in the application , including the assumption of the Big Stone II Plant expansion.")

The relevance objection is especially perplexing with regard to Information Request No. 28, which specifically seeks information related to Big Stone II claims regarding the interplay between the project's "CO2 intensity" and the transmission lines proposed to be built in Minnesota. It seems highly unlikely that the South Dakota DENR will be evaluating these Big Stone II claims in its federal Clean Air Act permitting proceeding.

You also imply in your responses to IR Nos. 25, 26, 28, and 30 that it matters that "the document referenced was produced by Applicants in a separate proceeding before the South Dakota Public Services [sic] Commission, involving the Applicants' application for an energy conversion facility permit under South Dakota law." The fact that Big Stone II Co-owners submitted this document to the South Dakota Public Utilities Commission at the request of one of the Commissioners has no bearing on whether we can seek discovery regarding what are now public documents and party admissions.

Especially in view of the overarching requirements of the Minnesota Environmental Policy Act ("MEPA") and Minnesota Environmental Rights Act ("MERA"), substantive responses to our information requests regarding the emissions of the Big Stone II power plant are required.<sup>3</sup> Indeed, the fact that the plant that would produce the emissions is proposed to be located in South Dakota is irrelevant, since MERA extends Minnesota jurisdiction to acts occurring outside the state, when the actions threaten pollution, impairment or destruction of natural resources within Minnesota.<sup>4</sup>

Some of your objections are "vagueness" objections, and though we do not concur that the terms are ambiguous, we offer the following alternate terms to assist you in responding to the requests. "Source documents", in IR No. 25, 28 and 29, can be read as "supporting documents". "Calculations", in IR Nos. 25 and 28, can be read as "supporting calculations and workpapers". "Allowance allocations", in IR No. 26, refers to those mercury emission allowance allocations expected to be made under the federal Clean Air Mercury Rule, and "allowance costs", can be read as "the cost of allowances that the Co-owners anticipate will need to be procured in order to maintain projected-operation of Big Stone Unit II." In IR No. 29, you question the applicable time period for which Co-owners' "efforts" should be described, and thus we would limit this request to "efforts made in the past five years"; also you question what is meant by "other evidence", and that term can be read as "supporting documentation". Finally, you object to IR No. 28(e) on the basis that "any Communication" is overly broad and burdensome;

<sup>3</sup> See, *People for Environmental Enlightenment & Responsibility (PEER)*, 266 N.W.2d 858, 865 (Minn. 1978) ("To ensure that the MEQC would not sacrifice environmental protection in its attempt to site power plants and HVTLs as efficiently as possible, [the legislature] required that 'to the fullest extent practicable the policies, regulations and public laws of the state shall be interpreted and administered in accordance with the policies set forth in [MEPA].' . . . Recently, in *No Power Line, Inc. v. Minnesota EQC*, Minn., 262 N.W.2d 312, 323 (1977), we decided that the legislature did not intend the PPSA [Power Plant Siting Act] to preempt MEPA and make it superfluous. Today we reach a similar conclusion regarding MERA. Rather than intending the PPSA to supersede MERA, the legislature passed all these statutes to ensure that administrative agencies would discharge fully their environmental responsibilities.")

<sup>4</sup> Minn. Stat. §116B.11, subd. 1(b).

we can limit this request to "written communications" that address the subject of utilization of the "\$25 million dollar investment in additional regional transmission capacity" to transmit electricity generated by wind power.

**RESPONSE TO IR No. 31:** The question specifically asks Big Stone II Co-owners to explain in detail what DSM "assumptions" GRE is referring to in its 2005 Resource Plan and how they "weaken the forecast." Your response states that the request is vague and ambiguous with respect to where in the Resource Plan GRE makes these statements. This information can be found on page 78 of the 2005 Resource Plan. The response also states that the information concerning GRE's 2005 Resource Plan is not relevant to the subject matter of this hearing. As you know, DSM is squarely presented as an issue in this proceeding under Minn. Stat. §216B.243 subd. 3, and GRE's admissions regarding the subject of DSM in its Resource Plan are fair subjects of discovery in this docket as well as in the Resource Plan docket itself.

**RESPONSE TO IR No. 32(b):** Big Stone II Co-owners' response states that two CMMPA planning studies prepared by R.W. Beck have previously been provided to Intervenor. We have checked our records, and do not believe that the 2004 analysis has been provided to us previously.

**RESPONSE TO IR No. 34:** This information request asked both an interrogatory and asked Big Stone II Co-owners to provide supporting documentation for the response. Your response did not provide supporting documentation, and on that basis, is partially non-responsive.

**RESPONSE TO IR No. 36:** The response states that the "Big Stone Unit II Participation Agreement defines the rights and obligations of the Applicants, including circumstances whereby one or more participant alters the amount of its share of Big Stone Unit II." If the information requested is in the Big Stone Unit II Participation Agreement, a copy of that agreement should be provided as we specifically asked for supporting documentation in IR No. 36(c).

**RESPONSE TO IR No. 37:** After reviewing the response to IR No. 37, we think it is non-responsive. The question specifically asks "what *criteria* were used to pick the average annual compound growth rate," not what process was used.

**RESPONSE TO IR No. 48:** This IR sought the responses to GRE's recent request for proposals for 120 MW of power; we understand that this was a request for proposals in 2005 for power from renewable energy sources. Big Stone II Co-owners stated objection to IR No. 48 is that "it is not reasonably calculated to lead to the discovery of admissible evidence." The responses to GRE's 2005 request for proposals for renewable resources is directly relevant to evaluating GRE's claims regarding the relative costs of renewable energy sources such as wind power, a subject that is at issue in this proceeding. Moreover, when we asked a similar question in the Third Set of Request for Production of Documents in SD PUC Docket No. EL05-022, regarding the responses to a GRE

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request for proposals it issued in late 2004, Big Stone II provided us responsive documents without objection.

I would like to schedule a conference call with you Monday, April 3, 2006 to discuss the above matters, in addition to the discovery issues that I've raised with respect to our Third Set of Interrogatories in the South Dakota proceeding and our Information Request Nos. 3-24 in the Minnesota proceeding.

Thank you very much for your attention to these matters.

Sincerely,



Beth Goodpaster