STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
IN THE MATTER OF PUBLIC UTILITIES COMMISSION DOCKET NO. HP14-002, DAKOTA ACCESS PIPELINE LLC	)	**CIV. 16-20**
	)	
	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
	)	

This matter came to be heard on April 12, 2016, before the Honorable Mark Barnett on Dakota Access' Motion to Dismiss the administrative appeal. The motion was based on the file in this case, the pleadings herein, the affidavits on file herein, and on all of the papers and documents filed in support of the motion. Dakota Access, LLC, appeared by its attorneys of record, Brett Koenecke, Kara C. Semmler and Justin L. Bell of May, Adam, Gerdes and Thompson, LLP. The South Dakota Public Utilities Commission appeared by its attorney of record, Rolayne Ailts Wiest. Yankton Sioux Tribe appeared by its attorney of record, Thomasina Real Bird of Fredericks Peebles & Morgan LLP. The Court heard the argument and admissions of the parties, considered the affidavits offered, and considered all the written and oral arguments of the parties and counsel. Based upon the record in its entirety, and good cause appearing therefore, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Petitioner, Dakota Access, LLC, (Dakota Access) is a Delaware limited liability company having its principal place of business in Dallas, Texas. *See* Notice of Appeal, Exhibit A at 5 ¶ 1.

2. Dakota Access filed an application for a construction permit with the Commission on December 15, 2014, and a revised application on December 23, 2014. *Id.* at ¶ 4.

3. On December 14, 2015, the South Dakota Public Utilities Commission entered a Final Decision and Order granting a permit to construct the Dakota Access Project subject to conditions. *See generally* Notice of Appeal, Exhibit A at 5 ¶ 1.

4. It is undisputed, and stipulated to by the parties at the hearing, that the South Dakota Public Utilities Commission served notice of its final decision December 14, 2015. *See Id*. at 25.

5. Counsel for Yankton Sioux Tribe did not attempt to set up an Odyssey File and Serve Account until her secretary called the Hughes County Clerk of Court's office to inquire about the filing process the afternoon of January 13, 2016. *See* Affidavit of Ashley Klinglesmith at ¶ 5.

6. Yankton Sioux Tribe faxed a copy of a Notice of Appeal to 605-773-3875 at 3:52 CST on January 13, 2016. *Id* at ¶ 10.

7. On January 13, 2016, Yankton Sioux Tribe placed an original Notice of Appeal and a check for $48 in US Mail addressed to the Hughes County Clerk. *Id.* at ¶ 11.

8. The package placed in US Mail on January 13, 2016 did not include a case filing statement or filing fee of $70. *Id.* at ¶ 13.

9. No case filing statement was received until at least January 19, 2016. *Id at* ¶ 13.

10. A check for filing fees of $70 was not received by the Hughes County Clerk of Court's office until January 25, 2016. *Id.* at ¶ 15.

11. Yankton Sioux Tribe or their counsel did not have a charge account set up prior to filing the Notice of Appeal, as was admitted during at the hearing on the motion.

12. The PUC docket in this matter included a total of 54 separate parties, including interveners. Notice of Appeal at page 1-54; Exh. A. at page 5, ¶¶ 1-3.

13. Yankton Sioux Tribe did not serve its Notice of Appeal on any party other than Dakota Access, LLC, and Public Utilities Commission Staff.

CONCLUSIONS OF LAW

1. In appeals to circuit court from decisions of administrative agencies, "SDCL 1-26-31 clearly delineates who must be served with a notice of appeal and when and where it must be filed in order to transfer jurisdiction from the executive to the judicial branch." *Schreifels v. Kottke Trucking*, 2001 SD 90, ¶ 12, 631 N.W.2d 186, 189. Accordingly, Dakota Access is not required to show prejudice as a prerequisite to dismissal.

2. "Failure to follow the plain language of the statute deprives the circuit court of subject matter jurisdiction over the appeal and requires its dismissal." *Slama v. Landmann Jungman Hosp*., 2002 S.D. 151, ¶ 4, 654 N.W.2d 826.

3. SDCL 1-26-31 provides the following:

> An appeal shall be taken by serving a copy of a notice of appeal upon the adverse party, upon the agency, and upon the hearing examiner, if any, who rendered the decision, and by filing the original with proof of such service in the office of the clerk of courts of the county in which the venue of the appeal is set, within thirty days after the agency served notice of the final decision or, if a rehearing is authorized by law and is requested, within thirty days after notice has been served of the decision thereon. Failure to serve notice of the appeal upon the hearing examiner does not constitute a jurisdictional bar to the appeal.

4. As applicable in the instant case, there are two requirements which must be met to invoke jurisdiction of the judiciary in an administrative appeal. First, the appealing party must "fil[e] the original [Notice of Appeal] . . . within thirty days after the agency served notice of the final decision[.]" *Id.* Second, the appealing party must "serv[e] a copy of a notice of appeal upon the adverse party, upon the agency, and upon the hearing examiner, . . . within thirty days after the agency served notice of the final decision[.]" *Id.*

5. January 13, 2016 was the deadline for Yankton Sioux Tribe to file an original Notice of Appeal and serve the Notice of Appeal on adverse parties.

6. SDCL 1-26-31 requires that the "original" be filed. Although documents filed electronically through the Odyssey system are deemed originals pursuant to Supreme Court Rule 13-12(B)(5), faxing a copy would not meet the plain language of the SDCL 1-26-31, SDCL 15-6-5(d), or Supreme Court Rule 13-12(B)(5).

7. Although filing by facsimile was authorized prior to July 1, 2014, pursuant to Supreme Court Rule 13-12(B)(5) that ability was specifically removed effective July 1, 2014.

8. This Court and the Clerk of Court lacks the authority to change the plain language of SDCL 1-26-31 and SDCL 15-6-5(d), and neither may authorize filing by fax when statute does not authorize such. *Fed. Land Bank v. Le Mars Mut. Ins. Co.*, 65 S.D. 143, 272 N.W. 285 (1937) ("Clearly, any agreement between the clerk and counsel for appellant with regard to the filing of this notice of appeal did not extend the statutory time within which the notice of appeal must be filed.").

9. Even if filing by facsimile was authorized under statute, Yankton Sioux Tribe still failed to timely file the Notice of Appeal because, by its own admission, did not include the required Civil Case Filing Statement. The Court concludes that SDCL 15-6-5(h) statutorily requires that a Civil Case Filing Statement be sent along with the Notice of Appeal to appeal an administrative decision. In this case, that was not done until at least after January 19, 2016.

10. An administrative appeal to the circuit court is "is not perfected unless and until the filing fee or appropriate waiver is deposited with the clerk of the circuit court." *Hansen v. S.D. Bd. of Pardons & Paroles*, 1999 S.D. 135, ¶ 8, 601 N.W.2d 617.

11. The required filing fees for opening an administrative appeal file is $70.

12. The $70 filing fee was not timely received when it was received on January 25, 2016.

13. The $48 placed in the mail on January 13, 2016 was insufficient to satisfy the required filing fees of $70.

14. Failure to timely submit the required filing fees is jurisdictional and requires dismissal under *Hansen v. S.D. Bd. Of Pardons & Paroles*, 1999 S.D. 135, ¶ 8, 601 N.W.2d 617,

and *AEG Processing Ctr. No. 58, Inc. v. S.D. Dep't of Revenue & Regulation*, 2013 S.D. 75, 838 N.W.2d 843.

15. A charge to a firm's account at the time of filing is equivalent to depositing a fee. *Watertown Coop. Elevator Ass'n v. S.D. Dep't of Revenue*, 2001 S.D. 56, ¶¶7-9, 627 N.W.2d 167.

16. The firm representing Yankton Sioux Tribe did not have a charge account set up with the Hughes County Clerk of Court and a representation that a check is in the mail is not equivalent to a charge to a firm's previously established account.

17. SDCL 1-26-31 provides that an appellant must serve a copy of a notice of appeal upon each "adverse party . . . within thirty days."

18. "The term 'adverse party' includes every party whose interest in the subject matter is adverse to or will be adversely affected by a reversal or modification of the judgment appealed from." *Morrell Livestock Co. v. Stockman's Comm'n Co*., 77 S.D. 114, 115, 86 N.W.2d 533, 534 (1957) (*quoting Millard v. Baker*, 76 S.D. 529 81 N.W.2d 892). This has been construed to include situations where reversal or modification of the judgment *could* adversely impact a party. *Id.* ("We are of the opinion that a reversal or modification of the judgment appealed from could adversely affect the defendant Keith Levy. He is, therefore, an adverse party[.]").

19. Non-appearing adverse parties are required to be served a Notice of Appeal *See generally Morrell Livestock Co. v. Stockman's Comm'n Co*., 77 S.D. 114, 115, 86 N.W.2d 533, 534 (1957); *Lake Hendricks Improvement Ass'n v. Brookings Cnty. Planning & Zoning Comm'n*, 2016 S.D. 17, ___ NW2d ____.

20. The requirement to serve notice to an "adverse party" has been broadly construed, including the requirement to serve: non-appearing co-defendants, such as was the case in *Morrell* and *Lake*. *Id.* Broad construction is appropriate, in part, because if one is going to err regarding service, one should err in the favor of giving parties notice.

21. At hearing, Yankton Sioux Tribe did not dispute that the Intervenors were parties in the Public Utilities Commission Docket No. HP14-002, and the Notice of Appeal listed each as parties on the Notice of Appeal. *See also* SDCL 1-26-17.1 ("A person who is not an original party . . . may become a party to the hearing by intervention.") The Yankton Sioux Tribe disputed the characterization of Intervenors as adverse parties in this appeal.

22. Several conditions found in the Final Decision and Order granting a Permit to construct the Dakota Access Project were entered into for the benefit of all or most the parties.

23. Several conditions were entered into for the benefit of landowners on the pipeline route, including, but not limited to, requirements for a public liaison officer, certain environmental protections, notice requirements, agricultural remediation and reclamation, and cultural protection.

24. The City of Sioux Falls did not oppose a permit being granted, but sought several conditions regarding the permit. Those conditions were specifically included within ¶¶ 53-70 of the Permit Conditions.

25. The Permit Conditions included several conditions which related to road protection and bonding. *See* Permit Conditions ¶ 25. Those conditions protect important pecuniary interests of several governmental entities who are parties, including counties and South Dakota Department of Transportation.

26. The Court takes judicial notice of files Hughes County Civ. 15-255 and Hughes County Civ. 15-263. Counties have a pecuniary interest in the permit and construction of the Dakota Access Pipeline through taxes received through the centrally assessed system.

27. Reversal or modification of the conditions would, or at a minimum could, adversely affect the Intervenors.

28. The statement of issues filed by Yankton Sioux Tribe specifically challenges the ability of the South Dakota Public Utilities Commission to grant the permit conditions cited herein. Entering an order preventing the entry of permit conditions would adversely affect the Intervenors.

29. Failure to serve the Notice of Appeal on the 52 parties that were Intervenors in the Public Utilities Commission Docket No. HP 14-002 was a jurisdictional error under SDCL 1-26-31.

30. The plain language of SDCL 15-6-6(b) states that it can only serve to extend deadlines found in SDCL ch. 15-6. It does not authorize modification of jurisdictional deadlines. *See Reed v. Halperin*, 393 A.2d 160, 162 (Me. 1978) ("Rule 6(b), which governs generally the enlargement of time prescribed by the . . . Rules of Court Procedure or an order of court, clearly does not by itself contain language that would allow an enlargement of a period prescribed expressly by statute."); *see also Brown v. State, Dep't of Manpower Affairs*, 426 A.2d 880, 887-888 (Me. 1981) ("judicial enlargement of a statutorily provided period of appeal is not possible").

31. Failure to file an appeal in a timely fashion under SDCL 1-26-31 is a jurisdictional defect. *See Slama v. Landmann Jungman Hosp.*, 2002 S.D. 151, ¶ 4, 654 N.W.2d 826.

32. Incorrect advice regarding the ability to file by facsimile provided by the clerk of court does not lift the jurisdictional requirements of SDCL 1-26-31.

33. The basic reason for that is a separation of powers issue, as "SDCL 1-26-31 clearly delineates who must be served with a notice of appeal and when and where it must be filed in order to transfer jurisdiction from the executive to the judicial branch." *Schreifels v. Kottke Trucking*, 2001 SD 90, ¶ 12, 631 N.W.2d 186, 189. If the Court, or the judiciary as a whole, has the authority to extend statutorily imposed jurisdictional

deadlines, the Court would undermine the separation of powers embodied in SDCL ch. 1-26.

34. Even if Rule 6(b) was applicable, this situation does not rise to the level of excusable neglect. Yankton Sioux Tribe submits that the Odyssey system did not accept Ms. Real Bird's bar number when a secretary attempted to file on afternoon of the filing deadline. However, the act of waiting until 2 hours before the filing deadline before beginning the process of figuring out how to file a Notice of Appeal is not worthy of excusable neglect status. Several courts have found the same, reasoning "[w]hen one waits until the very last minute to file, one accepts the risk that are incurred through that act." *Martinelli v. Farm-Rite, Inc*., 785 A.2d 33, 36 (Super. Ct. App. Div. 2001) ("Computer technology has been embraced by the courts. . . . But the fact that computers will be routinely used to file electronically, in what may ultimately become a paperless court, does not excuse the late electronic filing of documents or notices. On the contrary, with an increase in electronic filings, permitting a computer failure to justify a late submission would open the proverbial floodgates for violations of deadlines imposed by statutes, court rules and court orders and expecting to benefit from any glitches in the system. When one waits until the very last minute to file, one accepts the risk that are incurred through that act."); *Fox v. Am. Airlines, Inc*., 363 U.S. App. D.C. 459, 462, 389 F.3d 1291, 1294 (2004) ("In defending their failure to comply with Local Rule 7(b), the appellants offer nothing but an updated version of the classic 'my dog ate my homework' line. They claim that, as the result of a malfunction in the district court's CM/ECF electronic case filing system, their counsel never received an e-mail notifying him of American's motion to dismiss their amended complaint. Imperfect technology may make a better scapegoat than the family dog in today's world, but not so here. Their counsel's effort at explanation, even taken at face value, is plainly unacceptable.").

35. Yankton Sioux Tribe, prior to filing its Notice of Appeal or thereafter, had not filed a motion for an exemption to electronic filing pursuant to SDCL 16-21A-2(2).

36. Even if they did, SDCL 16-21A-2(2) cannot be used to get leave of court to file by fax or to file after a jurisdictional deadline has passed. It simply would authorize filing of an original.

37. In the event any Finding of Fact above should properly be a Conclusion of Law or a Conclusion of Law should properly be a Finding of Fact, each shall be treated as such irrespective of its improper classification.

Dated this ____ day of April, 2016.

BY THE COURT:

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HONORABLE MARK BARNETT
CIRCUIT COURT JUDGE