

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
IN THE MATTER OF PUBLIC	)	<b>CIV. 16-20</b>
UTILITIES COMMISSION DOCKET	)	
NO. HP14-002, DAKOTA ACCESS	)	<b>MEMORANDUM IN OPPOSITION TO</b>
PIPELINE LLC	)	<b>MOTION FOR ENLARGEMENT OF TIME</b>
	)	

Dakota Access, LLC, by and through its undersigned counsel, hereby submits its Memorandum in Opposition to Motion for Enlargement of Time.<sup>1</sup>

**BACKGROUND**

The South Dakota Public Utilities Commission (“PUC”) entered a Final Decision and Order granting Dakota Access, LLC, (“Dakota Access”) a permit to construct the South Dakota portion of the proposed Dakota Access Pipeline on December 14, 2015 and served said Final Decision on December 14, 2015. According to the Certificate of Service on the Notice of Appeal, Yankton Sioux Tribe placed a Notice of Appeal in US Mail on January 13, 2016 and such was only sent to the attorneys for Dakota Access, the PUC, and the Hearing Examiner. The Certificate of Service also states that the Notice of Appeal was faxed to the Hughes County Clerk of Courts on January 13, 2016. Eventually, an original was received by the Clerk of Courts. No Case Filing Statement was included in the fax or the original mailing. The Notice of Appeal was not filed until an original was sent to the Hughes County Clerk of Courts and payment of filing fees was received on January 25, 2016.<sup>2</sup>

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<sup>1</sup> This matter is also briefed in relation to Dakota Access’ Motion to Dismiss. Dakota Access hereby incorporates such herein by reference.

## ARGUMENT

Yankton Sioux Tribe states that SDCL 15-6-6(b) can be used to extend the timeframe required to file a notice of appeal. Such an argument is without merit. As a starting point, Yankton Sioux Tribe cites no cases in which Rule 6(b) was applied to extend a deadline found outside the Rules of Civil Procedure. Indeed, the only case cited by Yankton Sioux Tribe stands for the proposition that one may use the Rule 6(a) computation rules, but does not state that Rule 6(b) can be used to extend deadlines found elsewhere in code.

The plain language of SDCL 15-6-6(b) states that it can only serve to extend deadlines found in SDCL ch. 15-6. SDCL ch. 1-26 has no such provision. To counsel's knowledge, no Court in South Dakota has extended SDCL 15-6-6(b) to apply to timeframes set in code elsewhere, specifically SDCL 1-26-31, and courts have consistently held that 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. In fact, the South Dakota Supreme Court has held that Rule 6 cannot expand agency deadlines, reasoning:

Proceedings for appeal or review must be instituted within the period of time prescribed by statute, since such statutory provision is mandatory and jurisdictional. A failure to comply with the statutory requirements subjects an appeal to dismissal. In the absence of specified conditions, the requirement may not be waived by the administrative appellate tribunal, or by the opposing parties by agreement or failure to object, and an assumption of jurisdiction by the appellate tribunal on its own motion must comply with the statutory time limitations.

*Perrine v. S.D. Dep't of Labor*, 431 N.W.2d 156, 158-59 (S.D. 1988). 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.

For example, the Supreme Court of Maine reasoned that “Rule 6(b), which governs generally the enlargement of time prescribed by the *Maine 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.” *Reed v. Halperin*, 393 A.2d 160, 162 (Me. 1978); *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”). Nearly identical limiting language is found in SDCL 15-6-6(b). Unlike Rule 6(a), which some courts have extended to administrative appeals once in trial court, Rule 6(b) specifically limits application to deadlines set forth within the Rules of Civil Procedure. Counsel for Dakota Access is unaware of any case law which would authorize use of Rule 6(b) in an administrative appeal. Accordingly, Rule 6(b) is not applicable.

However, even if Rule 6(b) was applicable, this situation does not rise to the level of excusable neglect. Yankton Sioux Tribe seems to indicate that the Odyssey system did not accept Ms. Real Bird’s bar number when they attempted to file, the negligence is not mere unfamiliarity with South Dakota law or the Odyssey system. However, the act of waiting until 2 hours before the filing deadline before beginning the process figuring out how to file 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.”).

Rule 6(b) cannot be used to extend a statutory deadline found outside the SDCL ch. 15-6. Even if it could, Yankton Sioux Tribe’s accepted the risk of waiting until the last minute to file a notice of appeal. Such actions are not excusable neglect. Accordingly, the Court should deny this motion.

### **CONCLUSION**

Accordingly, Dakota Access, LLC, respectfully requests that that the Court dismiss the appeal pursuant to SDCL 15-6-12(b)(1).

Dated this 5<sup>th</sup> day of April, 2016.

MAY, ADAM, GERDES & THOMPSON LLP

BY:       /s/ Justin L. Bell        
BRETT KOENECKE  
JUSTIN L. BELL  
KARA C. SEMMLER  
Attorneys for Dakota Access, LLC  
P.O. Box 160  
Pierre, South Dakota 57501-0160  
Telephone: (605)224-8803

Telefax: (605)224-6289  
[jlb@magt.com](mailto:jlb@magt.com)

**CERTIFICATE OF SERVICE**

Justin L. Bell of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 5<sup>th</sup> day of April, 2016, he either gave notice by electronically filing or mailing by United States mail, first class postage thereon prepaid, a true and correct copy of the foregoing in the above-captioned action to the following at his or her last known address, to-wit:

Thomasina Real Bird  
[TRealBird@ndnlaw.com]  
(by electronic filing)

Rolayne Ailts Wiest, Hearing Examiner  
[rolayne.wiest@state.sd.us]  
(by electronic filing)

Patricia Van Gerpen  
[patty.vangerpen@state.sd.us]  
(by electronic filing)

/s/ Justin L. Bell

Justin L. Bell