

STATE OF SOUTH DAKOTA)
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COUNTY OF HUGHES)

IN THE CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

IN THE MATTER OF PUBLIC UTILITIES
COMMISSION DOCKET NO. HP14-002,
DAKOTA ACCESS PIPELINE LLC

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CIV. 16-20

**ALTERNATIVE MOTION FOR
ENLARGEMENT OF TIME**

COMES NOW the Yankton Sioux Tribe (the “Tribe”), by and through its attorney, Thomasina Real Bird (Fredericks Peebles & Morgan LLP), and hereby alternatively moves the Court for an enlargement of time in which a notice of appeal regarding Docket No. HP14-002 may be filed. In support of this alternative motion, the Tribe asserts as follows.

BACKGROUND

On December 14, 2015, the South Dakota Public Utilities Commission (“PUC”) entered a Final Decision and Order in Docket No. HP14-002 granting Dakota Access, LLC, (“Dakota Access”) a permit to construct the South Dakota portion of the proposed Dakota Access Pipeline. The Final Decision and Order was served on December 14, 2015.

Counsel for the Tribe drafted a notice of appeal which Ashley Klingsmith, legal assistant at Fredericks Peebles & Morgan LLP (“FPM”), was preparing to file on January 13, 2016 (within thirty days of the Final Decision and Order). *See* Affidavit of Ashley Klingsmith, attached hereto as **Exhibit A**, at 1. Klingsmith discovered that she would not be able to file via the Odyssey System when she attempted to register Thomasina Real Bird, counsel for the Tribe, and received an error message that Real Bird’s bar number could not be verified despite the fact

that Real Bird is licensed and in good standing to practice law in South Dakota. *Id.* at 2. Reviewing the Hughes County Court website, Klinglesmith saw under the “frequently asked questions” section that the Court accepts faxed documents if followed up by mailing the original document. *Id.*; *see also* **Exhibit B**. Klinglesmith spoke with a Hughes County Court clerk and asked whether it would be acceptable to file the notice of appeal by fax. **Exhibit A** at 2. The clerk replied that fax filings are allowed and that the filing fee is \$10.00 for the first ten pages and \$1.00 for each subsequent page. *Id.* Upon receiving this information, Klinglesmith asked the clerk whether, if she faxed the filing and put the original hard copy in the mail with a check for the filing fee, the filing date would be the date of the fax. *Id.* The clerk told her that the filing date would be the date of the fax. *Id.*

With this information from the Court, Klinglesmith faxed the notice of appeal to the Court on January 13, 2016. *Id.* That same day, Klinglesmith mailed the original hard copy of the notice of appeal and a check for \$48.00 to the Court in accordance with the instruction provided by the clerk. *Id.* at 3.

FPM was never told prior to the filing deadline that the Court had not accepted the notice of appeal for filing on January 13, 2016. *Id.* FPM was therefore provided no opportunity to cure. The Court’s failure to file the notice of appeal on January 13, 2016, was not conveyed to FPM until January 19, 2016, when Tracy Frost, Deputy Clerk of Courts of Hughes County, emailed Klinglesmith the following:

We received the paperwork in the mail for your appeal, however, we are unable to open the case as we are missing some documents. We are in need of case filing statements for the Appellee/Appellant and the filing fee of \$70. Once we receive those, we will be able to open the case and provide a case number.

A copy of this email is attached hereto as **Exhibit C**.

Later that same day, Klinglesmith mailed a second check – this time in the amount of \$70.00 - to the Court. Because this check was not received promptly by the Court, Klinglesmith sent a third check (in the amount of \$70) via FedEx priority overnight delivery on January 22, 2016. This check was deposited by the Court on January 25, 2016. A copy of the endorsed \$70.00 check (the third and final check submitted to the Court) is attached hereto as **Exhibit D**. On January 25, 2016, the Court marked the notice of appeal as filed.

Dakota Access filed a motion to dismiss the appeal and a memorandum in support on February 1, 2016. Dakota Access then filed an amended memorandum in support of its motion to dismiss on February 9, 2016. The Tribe has filed a response to Dakota Access' motion to dismiss concurrently with this alternative motion. The Tribe requests that the alternate relief sought herein be granted in the event that the Court finds that the Tribe's notice of appeal was not timely filed and has not been perfected.

LEGAL STANDARD

Pursuant to SDCL 15-6-6(b), when an act is required to be done within a specified time, “the court for good cause shown may at any time in its discretion...(2) Upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect...” If the Court finds that the Tribe failed to timely file its notice of appeal, based on the facts contained herein, *supra*, that alleged failure was the result of excusable neglect and justifies an expansion of time for filing under SDCL 15-6-6(b).

ARGUMENT

If the Court determines that the notice of appeal was not timely filed, the Court should exercise its discretion to grant the Tribe an enlargement of time in which to file its notice of appeal. Because the “taking of an appeal within the time fixed for the purpose is jurisdictional in nature,” *Kulesa v. Dep't of Pub. Safety*, 278 N.W.2d 637, 638 (S.D. 1979), failure to serve notice

before the time for the taking of an appeal expires is “fatal to the appeal.” *Long v. Knight Const. Co.*, 262 N.W.2d 207, 208-09 (S.D. 1978). However, the thirty-day timeframe can be enlarged by the Court under SDCL § 15-6-6(b). According to § 15-6-6(b), “[w]hen by this chapter or by a notice given thereunder¹ or by an order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:… (2) Upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.”

Although a South Dakota court has never ruled on whether a late administrative appeal can be allowed for excusable neglect, there is precedent from the Supreme Court of Rhode Island indicating that a state’s civil rules of procedure can be applied to the question of the timeliness of an administrative appeal. *McAninch v. State of Rhode Island Dept. of Labor and Training*, 64 A.3d 84 (R.I. 2013). In *McAninch*, the plaintiff filed her administrative appeal thirty-one days after the clock began running, when the applicable statute required her to file within thirty days. Although the statute stated that she had to file within thirty days, the court stated that “statutes are not the only ‘law’ to which this Court must look; case law as well as court rules also provide guidance.” *Id.* at 88. The court then explained that Rule of Civil Procedure 6(a) should be applied. Rule 6(a) states that it applies “[i]n computing *any period of time prescribed or allowed...by any applicable statute.*” *Id.* (emphases added) (quoting Superior Court Rules of Civil Procedure 6(a)). Rule 6(a) requires that in computing the last day of any time period, the last day cannot be a Saturday, Sunday or holiday. Under Rule 6(a) therefore, the petitioner’s appeal was considered within the thirty-day timeframe. Thus, even though the statute prescribing the process of administrative appeals appeared to unambiguously state that the complaint had to

¹ According to dictionary.com thereunder means “under the authority of or in accordance with that.” *Thereunder*, DICTIONARY.COM, (last visited Mar. 16, 2016). Because SDCL § 1-26-32.1 states that the S.D. Rules of Civ. Pro “apply to *procedure for taking* and conducting appeals under [SDCL § 1-26-31],” § 15-6-6(b) applies to deadlines under South Dakota’s Administrative Procedure and Rules. SDCL § 1-26 (emphasis added).

be within thirty days of the agency decision, the court was entitled to look at the Rules of Civil Procedure to determine whether it had jurisdiction over the case despite the “late” filing.

If the Court finds that the Tribe’s notice of appeal was not filed until January 19, 2016, upon receipt of the hard copy of the notice of appeal, or January 25, 2016, upon receipt of the Tribe’s second check for the filing fee, the Court can still exercise jurisdiction over this case by allowing a late notice of appeal due to excusable neglect. SDCL § 15-6-6(b). SDCL § 1-26-32.1 states that the

sections of Title 15 [South Dakota’s Rules of Procedure in Circuit Court] relating to practice and procedure in the circuit courts shall apply to *procedure for taking* and conducting appeals under this chapter so far as the same may be consistent and applicable, and unless a different provision is specifically made by this chapter or by the statute allowing such appeal.

SDCL § 1-26-32.1 (emphasis added). The statute thus makes it clear that the South Dakota Rules of Civil Procedure apply to the taking of appeals under SDCL § 1-26-31 as long as they are not inconsistent with SDCL § 1-26-31. Applying SDCL § 15-6-6(b) to the requirement under SDCL § 1-26-31 that notices of appeal be filed within thirty days is still consistent with SDCL § 1-26-31 because SDCL § 1-26-31 does not specifically state that enlarging time is not allowed. Similarly to *McAninch*, where the court applied the Rules of Civil Procedure to interpreting “thirty days,” a seemingly unambiguous phrase, the Rules of Civil Procedure can be applied in this context. Because SDCL § 1-26-31 does not specifically prevent a court from accepting a late notice of appeal for excusable neglect, and SDCL § 1-26-32.1 states that the Rules of Procedure in Circuit Court shall apply to the procedure for taking appeals under the Administrative Procedure and Rules, the Court should apply SDCL § 15-6-6(b).

“The determination as to what sort of neglect is considered excusable is an equitable one, taking account of all relevant circumstances surrounding the party’s own omission.” *Donald Bucklin Const. v. McCormick Const. Co.*, 2013 S.D. 57, ¶22, 835 N.W.2d 862, 867

(quoting *Hawks v. J.P. Morgan Chase Bank*, 591 F.3d 1043, 1048 (8th Cir.2010)). “Excusable neglect must be neglect of a nature that would cause a reasonable, prudent person to act similarly under similar circumstances.” *Id.* at ¶ 22 (quoting *Elliott v. Cartwright*, 1998 S.D. 53, ¶ 9, 580 N.W.2d 603, 604–05). Further, excusable neglect should be interpreted liberally to ensure that cases can be tried on the merits. *Id.*

The Tribe’s notice of appeal, if deemed late, was excusably late. In this instance, a Hughes County Court official gave misleading statements that directly led to the Tribe’s relying on the date of the fax as the date of the filing. Specifically, the clerk told Ashley Klingsmith, legal assistant at FPM, that if she faxed the notice of appeal, the filing date would be the date of the fax, as long as Ms. Klingsmith also sent in a hard copy of the notice along with the filing fee. **Exhibit A** at 2. This is consistent with the webpage Klingsmith reviewed on the Court’s website, *Frequently Asked Questions*, ujs.sd.gov, http://ujs.sd.gov/Sixth_Circuit/FAQ/ (last visited Mar. 29, 2016). *See Exhibit B*. Klingsmith and FPM were not notified of any defect with the filing upon the Court’s receipt of the notice of appeal. Although FPM filed as instructed by the clerk on January 13, 2016, the clerk did not process the appeal until January 25, 2016, when she received a check for \$70.00. FPM reasonably relied on the clerk’s statement that faxing the notice of appeal followed by mailing the actual hard copy with payment would be acceptable and the Hughes County Court website that states the Court permits fax filings. The clerk, however, did not inform the Tribe that she had not filed the appeal until January 19, 2016, after the filing deadline.

Lastly, another factor considered in the evaluation of granting an enlargement of time is whether there is prejudice to the party opposing the enlargement of time. *Donald Bucklin Const. Donald Bucklin Const.*, 2013 S.D. at ¶ 21. Because FPM did appropriately serve Dakota Access and the PUC on January 13, 2016, Dakota Access and the PUC had proper notice of the appeal.

There is therefore no prejudice to Dakota Access or the PUC. In light of the entire circumstances, FPM's decision to file by fax was reasonable and excusable, and a reasonable, prudent person would have acted similarly under similar circumstances. An enlargement of time pursuant to SDCL § 15-6-6(b) would thus be the only appropriate remedy, should the Court find that the Tribe's notice of appeal was not timely filed.

CONCLUSION

If the Court finds that the Tribe's notice of appeal was not timely filed and has not been perfected, the Court should grant the Tribe an enlargement of time in which to file pursuant to SDCL 15-6-6(b) because its actions were excusable. As the facts described herein demonstrate, the circumstances of the Tribe's filing were such that any reasonable, prudent person would have relied on the statement of the court clerk and the information contained on the Hughes County Court website and, due to the inability to file electronically, filed by fax as the Tribe did. Because it was reasonable and justifiable under the circumstances for the Tribe to rely on the information received by the court clerk, the Court should grant the Tribe an enlargement of time in which to file its notice of appeal and accept the Tribe's notice of appeal, received by mail in hard copy by the Court on January 19, 2016.

WHEREFORE, the Yankton Sioux Tribe hereby alternatively moves the Court for an order granting the Tribe an extension of time in which to file its notice of appeal, accepting the Tribe's notice of appeal, and taking jurisdiction over the appeal of the final decision in Docket No. HP14-002.

Respectfully submitted this 20th day of March, 2016.

FREDERICKS PEEBLES & MORGAN LLP

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2016, the foregoing **Motion for Enlargement of Time** was filed via Odyssey File and Serve with the Office of the Clerk of Hughes County Circuit Court; and a true and correct copy of the same was served upon the following via first class mail, postage pre-paid:

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