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	)	**CIV16-20**
	)	**SOUTH DAKOTA PUBLIC UTILITIES COMMISSION'S MEMORANDUM IN RESPONSE TO YANKTON SIOUX TRIBE'S ALTERNATIVE MOTION FOR ENLARGEMENT OF TIME**

The South Dakota Public Utilities Commission (SDPUC), by and through its undersigned counsel, hereby submits its Memorandum in Response to Alternative Motion for Enlargement of Time.[1]

BACKGROUND

The Tribe claims that its appeal was timely filed notwithstanding the fact that it failed to file its notice of appeal with the Court through the Court's mandatory electronic filing system by the required due date, and instead faxed a notice of appeal to the Court.[2] In addition, the Tribe failed to file mandatory filing fees. In its Response to the Motion to Dismiss, the Tribe places the blame on the

[1] On the same day that the Yankton Sioux Tribe (the Tribe) filed its response to the Motion to Dismiss filed by Dakota Access, the Tribe filed an Alternative Motion for Enlargement of Time. The SDPUC notes that the Tribe's newly filed motion has not been noticed for hearing. However, in the event the Court would decide to hear this new motion at the same time that the Motion to Dismiss is scheduled to be heard, the SDPUC provides this response.

[2] In its brief, the Tribe claims it was unable to use the electronic system and it then faxed a filing after talking to a clerk from the Court. The Commission notes that electronic filing is mandatory and that the Court did not grant it leave to file paper documents pursuant to SDCL 16-21A-2(2). A clerk may not grant leave in place of the Court. A court clerk does not "act *as* the court." *Ned Chartering and Trading, Inc. v. Republic of Pakistan*, 130 F.Supp.2d 64, 66 (Dist. of Columbia 2001) (*emphasis in original*).

court clerk, stating that the court clerk gave it erroneous advice. Similarly, in its Alternative Motion for Enlargement of Time, the Tribe again attempts place the blame on the clerk for the Tribe's failure to perfect its appeal.

ARGUMENT

Yankton Sioux Tribe does not dispute that it was required to have filed its appeal with the Court by January 13, 2016. In its newly filed Alternative Motion for Enlargement of Time (filed over two months later) the Tribe now requests that if the Court finds that its notice of appeal was not timely, that the Court grant the Tribe an enlargement of time in which to file its notice of appeal. The Tribe concedes that a failure to timely serve notice is fatal to an appeal. However, the Tribe states that the Court can enlarge this time by finding "excusable neglect" pursuant to SDCL 15-6-6(b). The SDPUC opposes the motion.

I. The Court may not grant an enlargement of time pursuant to SDCL 15-6-6(b).

The Tribe contends that the Court can grant an enlargement of time for the Tribe to file its appeal pursuant to SDCL 15-6-6(b) and 1-26-32.1. The SDPUC disagrees. SDCL 15-6-6(b) by its own terms applies only to SDCL ch. 15-6. Further, SDCL 1-26-32.1 states that Title 15 can apply to the procedure for taking and conducting appeals, *if the procedure is consistent and applicable*. It is clear from South Dakota case law that the application of SDCL 15-6-6(b) to SDCL 1-26-31 is both inconsistent and inapplicable. The South Dakota Supreme Court has stated:

> 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. Failure to follow the plain language of the statute *deprives the circuit court of subject matter jurisdiction over the appeal and requires its dismissal. Id. See also Stark v.*

Munce Bros. Transfer & Storage, 461 N.W.2d 587, 589 (S.D.1990) (emphasis added).

Slama v. Landmann Jungman Hosp., 2002 S.D. 151, ¶ 4, 654 N.W. 2d 826, 827. Further the South Dakota Supreme Court has found that "[w]hen the legislature prescribes a procedure for circuit court review of the action of an administrative body, the conditions of the procedure must be complied with before jurisdiction is invoked." *Stark v. Muncie Bros. Transfer & Storage*, 461 N.W.2d 587, 588 (S.D. 1990) (citations omitted). The Tribe's failure to follow the plain language of the statute deprived this Court of jurisdiction. The Court, lacking jurisdiction over this administrative appeal, may not then proceed to use a civil procedure statute to essentially waive mandatory jurisdictional filing requirements.

The Tribe cites to no South Dakota case law to support its position. The Tribe instead relies on a case from Rhode Island. *See McAninch v. State of Rhode Island Dept. of Labor and Training*, 64 A.3d 84 (R.I. 2013). However, a close reading finds that this case lends more support to the SDPUC's position, rather than the Tribe's position. The Rhode Island court found that a civil procedure statute that sets forth how to *compute* the allowable time to file an appeal was applicable to an administrative action. *Id.* at 88. However, the court noted that in a prior case, the court had discussed a subdivision of the *same* rule regarding *extending* the time period and had stated, through dicta, that the civil procedure rule would *not have* applied and thus the time period to file *would not* have been extended. *Id.* at 90. It would not have applied because the law stated that an appeal from an administrative agency decision must be perfected within thirty days. *Id.* Of course, that is the issue here: the Tribe is seeking to *extend* its time to file with the Court despite the existence of the law that clearly sets forth the requirements for perfecting an appeal.

II. Even if SDCL 15-6-6(b) applied, the Tribe fails to meet the requirements.

Even if the Court applied SDCL 15-6-6(b), the Tribe clearly fails to meet the requirements for an enlargement of time. SDCL 15-6-6(b) refers to enlarging time if the failure to act was the result of excusable neglect. The Tribe argues that if the Court finds that its notice of appeal was late, the blame lies with the Hughes County Court official for giving "misleading statements." With all due respect, this Court would be setting a troubling precedent by finding excusable neglect under the circumstances as alleged by the Tribe in this case.

According to the Tribe, on the afternoon of January 13, 2016, the date the filing was due, a paralegal attempted to figure out how to make the filing with the Court. Klinglesmith Aff. ¶ 3. According to its affidavit, Yankton Sioux Tribe's attorney had not set up an electronic filing account prior to this time. *Id.* at ¶ 4. After asking the clerk how to file the appeal and being informed of the electronic process for filing, the paralegal claims that, while on hold with the clerk's office, she "quickly reviewed the site" and attempted to register the attorney but that the attorney's bar number could not be verified. *Id.* at ¶ 5. There is no indication that she contacted the Odyssey system for assistance.[3] The paralegal's research appears to have been conducted while the paralegal was on hold with her call to the clerk. When the clerk returned to the phone, the affidavit states that the paralegal asked about filing by fax. *Id.* at ¶ 7.

According to the affidavit, the paralegal was told "that the filing fee was $10.00 for the first ten pages and $1.00 for every subsequent page." *Id.* at ¶ 8. Although the affidavit uses the term "filing fee," this fee is obviously not the filing fee; it is the cost for the fax. That the paralegal incorrectly assumed this was the filing fee was not the fault of the clerk. The filing fees are clearly

[3]Technical support is available by telephone, email, and support chat. *See* Odyssey File and Serve User Guide.

listed on the Sixth Circuit webpage. Yankton Sioux Tribe mailed a check for the *fax costs*, allegedly on January 13, 2016, but its check for the mandatory $70.00 *filing fee* was sent later and not received until January 25, 2016, well past the January 13, 2016 deadline. As set forth in *Hansen v. S.D. Bd. of Pardons & Paroles*, 1999 S.D. 135, ¶ 8, 601 N.W.2d 617, 619, an administrative appeal to the circuit court is "not perfected unless and until the filing fee or appropriate waiver is *deposited with the clerk of the circuit court*." The alleged statements by a court's clerk cannot overcome the clear requirements of *Hansen*.

Throughout its response, the Tribe takes no responsibility for any of its errors, and, instead, attempts to place all of the blame on the clerk. Not surprisingly, courts look with disfavor on attorneys who attempt to excuse their errors by claiming reliance on a court clerk's advice. The United States Court for the Court of Appeals has found that "reliance on the advice of a Clerk's office employee cannot excuse plaintiff's counsel's failure to do basic research." *Gabriel v. U.S.*, 30 F.3d 75, 77 (7th Cir. 1994).

The Supreme Court has stated that "excusable neglect must be neglect of a nature that could cause a reasonable, prudent person to act similarly under similar circumstances." *Donald Bucklin Constr. v. McCormick Const. Co.*, 2013 S.D. 57, 835 N.W.2d 862, 867 (citations omitted). The SDPUC believes that there can be no question that a reasonable, prudent person would have researched how to file an appeal prior to the afternoon the appeal was due in court, instead of calling the clerk on that afternoon to inquire how to file an appeal. A reasonable, prudent person would have been registered on the electronic filing system prior to the day the filing was due. A reasonable, prudent person would have read the applicable statutes and Court rules to determine how to file an appeal. A reasonable, prudent person would have researched the amount of filing fees. The Tribe has clearly failed to show excusable neglect and its failure "to do basic research" should not be rewarded.

III. Failure to serve all adverse parties.

The SDPUC also points out that the Tribe's reliance on "excusable neglect" obviously has no application to its failure to serve all adverse parties as required by SDCL 1-26-31. This failure, on its own, requires the dismissal of the appeal. In this appeal, a *party who objects* to the construction of a pipeline has not even served those *parties who did not object* to the construction of the pipeline. This would seem to be the very definition of adverse parties. For example, not only did the City of Sioux Falls *not* object to the building of the Pipeline, the City of Sioux Falls and Dakota Access entered into a Stipulation in which they requested that certain stipulated conditions be included in the Permit Conditions. In addition, the Stipulation also relied on the *other* Permit Conditions as a basis for their Stipulation. A possible result of any appeal of an administrative agency's decision is that a court may remand the case back to the agency, with the result that the conditions contained in its decision could be deleted, conditions could be modified, or new conditions could be imposed.

The Supreme Court found that a case involving a *non-appearing, co-defendant* was an adverse party in an appeal brought by *other defendants*. *Morrell Livestock Co. v. Stockman's Comm'n Co.*, 77 S.D. 114, 86 N.W.2d 533 (S.D. 1957).The Court stated that because "a reversal or modification of the judgment appealed from could adversely affect the defendant," he was an adverse party. *Morrell*, 77 S.D. at 119, 86 N.W.2d at 536. The Court dismissed the appeal. The same applies here and the Tribe's failure to serve all adverse parties requires the dismissal of its appeal.

CONCLUSION

Accordingly, the SDPUC respectfully requests that the Court deny the Alternative Motion for Enlargement of Time and grant the Motion to Dismiss.

Dated this 6th day of April, 2016

South Dakota Public Utilities Commission

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