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**
	)	**AMENDED MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Dakota Access, LLC, by and through its undersigned counsel, hereby submits its Memorandum in Support of Motion to Dismiss.

BACKGROUND

As it relates to this motion, the relevant background is minimal and cannot be disputed. Appellant Yankton Sioux Tribe filed a Notice of Appeal, which is attached hereto as Exhibit 1. As shown in Exhibit A to the Notice of Appeal, 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. 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.

LEGAL STANDARD

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." *Slama v. Landmann Jungman Hosp*., 2002 S.D. 151, ¶ 4, 654 N.W.2d 826.

ARGUMENT

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.

There are two requirements which must be met to invoke jurisdiction of the judiciary in an administrative appeal. First, 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.* Dakota Access does not dispute that Yankton Sioux Tribe met this requirement solely as it relates to Dakota Access, the Agency, and the Hearing Examiner, by placing the Notice of Appeal in the US Mail on January 13, 2016. However, the Yankton Sioux Tribe served none of the 52 other parties who had intervened in the PUC docket. Further, the appealing party must also "fil[e] the original [Notice of Appeal] . . . within thirty days after the agency served notice of the final decision[.]" The PUC served said Final Decision on December 14, 2015, and Yankton Sioux Tribe did not file the Notice of

Appeal until January 25, 2016, 12 days after the statutory deadline. Because Yankton Sioux Tribe filed to meet either requirement to invoke jurisdiction of this Court, this appeal must be dismissed.

As a primary matter, even if the original Notice of Appeal with filing fees was placed in the US Mail to the Hughes County Clerk of Courts for filing on January 13, 2016, such was not timely filed. Unlike service, when a statute includes a filing deadline, it means filed, not mailed. Such has been the holding of the Supreme Court for nearly a century. In *Fed. Land Bank v. Le Mars Mut. Ins. Co*., 65 S.D. 143, 272 N.W. 285 (1937), the Court held:

> Appellant contends that depositing in the mail on October 1st constituted a filing[.] . . . [T]he authority for service of papers by mail is found in the statutes, . . . [but] [t]here is no statutory provision regarding filing by mail, and it seems clear to us that the paper is not filed at least until such time as it is in the hands of the officer who is charged with that duty. In this case the notice of appeal was not in the hands of the clerk or in the clerk's office until after the time for appeal had expired.

Id. at 145.

To the extent Yankton Sioux Tribe claims faxing was sufficient, there is no support for such. 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 statute or Supreme Court Rule 13-12(B)(5).

Lastly, even if mailing or faxing did constitute filing, which is not the case, it cannot be disputed that payment was not received by the Hughes County Clerk of Courts until January 25, 201. Under clear precedent, 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. The

only exception is if the law firm has a charge account previously established with the Clerk of Courts. *See Watertown Coop. Elevator Ass'n v. S.D. Dep't of Revenue*, 2001 S.D. 56, ¶¶7-9, 627 N.W.2d 167 ("A charge to a firm's account at the time of filing is equivalent to depositing a fee"). Since payment was not included with the Notice of Appeal that was faxed or mailed, the faxed or mailed notice of appeal was not complete and would not be timely even if mailing or faxing was proper filing.

Lastly, even if timely filed, Yankton Sioux Tribe only served the Hearing Examiner, PUC staff, and Dakota Access. The Notice of Appeal was not served on the other 52 parties who intervened in this PUC Docket. SDCL 1-26-31 provides that an appellant must serve a copy of a notice of appeal upon each "adverse party . . . within thirty days." "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). 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*. *Id.* In this case, several of the intervening parties did not oppose a permit being granted to Dakota Access, but, rather, sought certain conditions be included in the permit to construct the South Dakota portion of the proposed Dakota Access Pipeline. Those proposed conditions were largely incorporated into the permit. *See* Exhibit A, Permit Conditions. Although far from the only example, the City of Sioux Falls sought several conditions regarding the permit. Those conditions were specifically included within pages 15-17 of the Permit Conditions found in Exhibit 1. Certainly modification or reversal of those conditions would adversely affect the City of Sioux Falls. In addition, even if no specific

conditions were sought by each intervening party, those permit conditions were entered in large part to the benefit of the intervening parties. In accordance, reversal or modification of the permit or its conditions could adversely affect each of the intervening parties. The potential for such to adversely affect a party is enough to require notice of an appeal. *See Morrell*, 86 N.W.2d at 536 ("reversal or modification of the judgment appealed from *could* adversely affect the defendant Keith Levy. He is, therefore, an adverse party" (emphasis added)). In accordance, service of the Notice of Appeal was required under SDCL 1-26-31 was required. Since service was not timely accomplished, the appeal must be dismissed. *In re Eunice Thomas Reese Tr. v. Cortrust Bank, N.A.*, 2009 S.D. 111, ¶ 5, 776 N.W.2d 832 ("Failure to serve a notice of appeal on a party before the time for taking an appeal has expired is fatal to the appeal and requires its dismissal.").

CONCLUSION

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

Dated this 9th day of February, 2016.

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