STATE OF SOUTH DAKOTA	)	IN THE 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 **MEMORANDUM IN RESPONSE TO MOTION TO DISMISS**

COMES NOW the Yankton Sioux Tribe (the "Tribe"), by and through its attorney, Thomasina Real Bird (Fredericks Peebles & Morgan LLP), and hereby submits its Memorandum in Response to the Motion to Dismiss.

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 Klinglesmith, 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 Klinglesmith, attached hereto as **Exhibit A**, at 1. Klinglesmith 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.

ARGUMENT

The Hughes County Court has jurisdiction over the case at hand. The Tribe perfected the filing of its notice of appeal to the Court on January 13, 2016, and it should be considered filed on that day. If the Court finds that the notice of appeal was not perfected until after January 13, 2016, the Court should grant the Tribe an enlargement of time under SDCL § 15-6-6(b) for untimely filing due to excusable neglect as requested in the accompanying alternative motion.

I. THE NOTICE OF APPEAL WAS TIMELY FILED.

The Tribe timely perfected filing its notice of appeal on January 13, 2016, within the statutory deadline. Dakota Access incorrectly asserts that a facsimile submittal cannot constitute proper filing and that the check had to be in the hands of the clerk of the Court on January 13, 2013.

A. THE FACSIMILE TRANSMISSION HAS THE SAME FORCE AND EFFECT AS THE ORIGINAL.

The Court can accept a facsimile transmittal for filing purposes. Although the South Dakota legislature amended SDCL Chapter 16-21A to require document submittal to district courts via the South Dakota Odyssey electronic filing system instead of facsimile, the courts allow exceptions. SDCL § 16-21A-2(2) states that "[o]n a showing of good cause, an attorney required to file electronically may be granted leave of court to file paper documents with the clerk of the court."

In this instance, the Court used its discretion under SDCL § 16-21A-2(2), and allowed the Tribe to file via facsimile. The Tribe could not file using the Odyssey system on January 13, 2016 because its attorney, by no fault of her own, was unable to register in the Odyssey system. Once Klinglesmith explained to a court clerk that counsel did not have an electronic filing account in place, the clerk informed Ms. Klinglesmith that she could fax the notice of appeal. *See* **Exhibit A** at 2 ("I was advised by the clerk that the filing date would be the date of the fax."). Thus, pursuant to SDCL § 16-21A-2(2), the Tribe made a showing of good cause and received confirmation from the court clerk that she could submit the notice of appeal by facsimile instead of through Odyssey. The Tribe has further shown good cause through the information regarding fax filing made publicly available on the Court's website. *See* **Exhibit B**.

According to SDCL § 1-26-31, "[a]n appeal shall be taken by...*filing the original*...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." Though SDCL § 1-26-31 requires *the original*, South Dakota courts allow digital copies of administrative notices of appeal to be filed electronically via Odyssey. While SDCL § 15-6-5(d) states that electronic versions of any paper "shall have *the same force and effect as the original*" (emphasis added), this does not mean that these documents are deemed *the* original, as Dakota Access asserts. An electronic copy of a document is no more "original" than a faxed paper copy. Moreover, prior to being printed, a faxed copy, too, is an electronic or digital copy. Because the courts and the legislature accept documents via Odyssey with the same force and effect as the original under SDCL § 1-26-31, this shows that SDCL § 1-26-31 does not strictly require *the* original for filing. For the foregoing reasons, the facsimile transmission of the notice of appeal should be given the same force and effect as an original document under SDCL § 1-26-31.

B. The Filing Fee was Timely.

Next, the notice of appeal was timely filed even though the $48.00 check was not received by the clerk until sometime between January 13, 2016, and January 19, 2016. In *Waterdown Coop. Elevator Ass'n v. S.D. Dep't of Revenue*, 2001 S.D. 56, 627 N.W.2d 167, appellants filed a notice of appeal in the Hughes County Circuit Court and charged the filing fee to a firm account maintained by the clerk's office prior to the thirty-day deadline for an appeal under SDCL § 1-26-31. The clerk, however, did not bill the firm until after the thirty-day deadline had passed. The appellant therefore did not pay the court prior to the deadline. Until the clerk billed the account and the transaction went through, all the appellant had to do to prevent payment was cancel the charge or the account. The court was therefore more concerned with the assurance of payment, rather than actual payment. By this logic, putting a check in the mail and informing the court of one's action is similar to charging an account— while it is not a complete guarantee of payment, the action shows an intent to pay the fees. It would be arbitrary to hold that charging an account is sufficient but mailing a check and informing the court is not because the court's lack of control over the funds is the same—in both instances payment is indicated but not fully assured. Finally, under the same logic, it would be arbitrary to hold that a check in the hands of the court is sufficient but that a check in the mail and an assurance by the attorney to the court that it is postmarked and on its way is not sufficient because in both cases payment is not assured until the court submits the check and actually receives payment. Following *Watertown Coop.*, it is unclear what "deposited with the clerk" requires. However, the logic of *Watertown Coop.*, supports a finding that by informing the clerk that payment was in the mail, and by mailing the check the same day, the requirement of providing the filing fee was fulfilled.

It is important to note that the Tribe did mail the check on January 13, 2016. On January 13, 2016, FPM mailed a $48.00 check to the Court based on the instruction of the court clerk.

Upon subsequently receiving an email from a court clerk requesting a $70.00 filing fee on January 19, FPM then mailed a $70.00 check to the Court. However, the $48.00 check was more than sufficient to cover the statutorily required filing fee. According to SDCL § 16-2-29(3)(j), the clerk of courts charges $25.00 for "[a]ppeals to the circuit court from an action…of the state or its officers, boards, agencies, and commissions." Thus, on January 13, 2016, the Tribe had sent the statutorily required filing fee.

Additionally, *Hansen v. S.D. Bd. of Pardons & Paroles*, 1999 S.D. 135, ¶ 8, 601 N.W.2d 617, relied on by Dakota Access, is distinguishable from the present situation as it did not have to address the intricacies of what "depositing with the clerk" requires since Hansen failed to address the issue of payment in his notice of appeal. In that case, Hansen attempted to file a notice of appeal but did not include a filing fee or waiver, or even indicate that such payment was on its way. *Id.* at ¶ 3. The clerk of the circuit court thus "refused to file Hansen's appeal and returned Hansen's notice." *Id.* By the time Hansen had sent an amended appeal with a waiver of the filing fee, the thirty-day deadline had passed. *Id.* The court therefore only addressed whether the first notice of appeal, mailed without a fee or application for a waiver, and without any indication that a fee or waiver would be provided, was timely. The general question posed in *Hansen* thus was only "whether a filing fee or waiver thereof is required to perfect an appeal under the Administrative Procedures Act?" *Id.* at ¶ 5. The court did not have to address what exactly constitutes depositing a filing fee with the court as the issue in *Hansen* did not in any way address the issue of payment in his first appeal. Moreover, in the instant case, the Court did file the appeal and accept the filing fee rather than returning the notice.

C. Serving Intervening Parties was Not Required

Dakota Access incorrectly asserts that the Tribe was required to serve the notice of appeal on all 52 of the other intervenors in the PUC case. SDCL § 1-26-31 requires that "[a]n appeal

shall be taken by serving a copy of a notice of appeal upon the adverse party." Dakota Access asserts that, because the Tribe did not serve the fifty-two interveners to the PUC proceeding, the Tribe's notice of appeal should be dismissed. Dakota Access improperly interprets what an "adverse party" is in an administrative appeal. The PUC proceeding concerned whether the PUC should grant Dakota Access a permit to construct a pipeline. Parties then intervened in the proceedings to voice their views on the permit.

This situation is easily distinguished from the situation presented in *Morrell Livestock Co. v. Stockman's Comm'n Co.*, 77 S.D. 114, 115, 86 N.W.2d 533, 534 (1975), the case cited by Dakota Access, where a defendant's appeal was dismissed for failing to serve a co-defendant. In that case, the co-defendant would be adversely affected in by a change in the judgment because he was involved in a joint adventure with defendants and a "reversal or modification of the judgment as to the appellants would adversely affect the defendant Keith Levy in that it could deprive him of his right of contribution." *Id.* at 115, 534. Should the Court reverse or modify the judgment of the PUC in this case, no intervening parties would be deprived of any right and no intervening parties would be adversely affected.

Dakota Access appears to suggest that each party to the PUC case is entitled to service of the notice of appeal in this case. However, the statute plainly states that service is required "upon the adverse party, upon the agency, and upon the hearing officer..." SDCL 1-26-31 (emphasis added). Service on each adverse party and service on each party are two different things, as the South Dakota Supreme Court found in *In re Estate of Flaws*, 811 N.W.2d 749 (S.D. 2011). In that case, an action was commenced as a formal probate proceeding and, on appeal, the Supreme Court was required to determine whether all proper parties had been served. Notice of the appeal had not been served on one of the interested persons in the estate at issue, and the Supreme Court found that "the law on service of the notice of appeal requires service on

'each' party, not just 'adverse' parties..." *Estate of Flaws*, 811 N.W.2d at 751. The Supreme Court clearly distinguished between a requirement to serve "each" party and a requirement to serve "adverse" parties. Here, the statute required the Tribe to serve "just 'adverse' parties" (*Id.*). The Tribe was therefore not required to serve *each* party and its failure to serve the intervenors does not constitute grounds for dismissal.

II. THE COURT SHOULD DENY THE MOTION TO DISMISS BECAUSE THE CLERK DID NOT NOTIFY THE TRIBE OR RETURN THE NOTICE OF APPEAL TO THE TRIBE

Even if the Court finds that the notice of appeal was not timely filed, the Court must deny the Motion to Dismiss because the clerk did not inform the Tribe that she was refusing to file papers until after the statutory deadline had passed. If a clerk refuses to file a document, he must return the document to the source from which it came, or "immediately" notify the concerned party that the court will not accept the documents for filing without payment. *Mitchell Fruit & Grocery Co. v. Nicholl*, 35 S.D. 160, 151 N.W. 279, 280 (1915). Here, the clerk did not inform the Tribe that she had not filed the documents until January 19, 2016, after the statutory deadline. Nor did the clerk return the faxed notice of appeal. After telling the Tribe that the filing date would be January 13, 2016, the clerk did nothing to inform the Tribe otherwise. The clerk therefore deprived the Tribe of any opportunity to cure any filing defect. In *Mitchell Fruit*, the court held that the transcript should be treated as filed because the clerk had not notified anyone of his refusal to file the papers or returned the papers to the appealing party. Similarly, in this situation, the notice of appeal should be treated as filed because the papers were never returned to the Tribe and because the clerk did not notify the Tribe of her refusal to file the papers until after the statutory deadline had passed.

III. IF THE COURT FINDS THAT THE TRIBE DID NOT PERFECT THE FILING OF THE NOTICE OF APPEAL ON JANUARY 13, 2016, THE COURT SHOULD ENLARGE THE TIME PERIOD FOR FILING DUE TO EXCUSABLE NEGLECT

Finally, if the Court determines that the notice of appeal was not timely filed, the Court should exercise its discretion to grant the Tribe's motion for an enlargement of time. 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 thereunder[1] 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." A motion for enlargement of time pursuant to SDCL 15-6-6(b) has been filed concurrently with this response and is pending before the Court.

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

[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).

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

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 could 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 Klinglesmith, 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 Klinglesmith also sent in a hard copy of the notice along with the filing fee. **Exhibit A** at 2. This is consistent with the webpage Klinglesmith 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**. Klinglesmith and FPM were not notified of any defect with the filing upon the Court's receipt of the notice of appeal. <u>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</u>

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 on January 13, 2016, Dakota Access had proper notice of the appeal. 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 an appropriate remedy under the circumstances.

CONCLUSION

The Court should deny the Motion to Dismiss because Appellant's notice of appeal and the filing fee were timely filed and all adverse parties have been properly served. Should the Court find that the notice of appeal was not timely filed notwithstanding the arguments contained herein, the Court should deny the Motion to Dismiss because the Court accepted the notice of appeal and the filing fee without promptly notifying Appellant of any defect in the filing. Finally, if the Court finds that the notice of appeal was not timely filed and further does not accept the Court's actions as an effective filing of the notice, the Court should grant Appellant's Alternative Motion for Enlargement of Time filed concurrently with this response due to Appellant's reasonable and justifiable reliance on the word of the court clerk and should therefore deny the Motion to Dismiss.

Respectfully submitted this 29th day of March, 2016.

FREDERICKS PEEBLES & MORGAN LLP

Thomasina Real Bird, SD Bar No. 4415
FREDERICKS PEEBLES & MORGAN LLP
1900 Plaza Drive
Louisville, Colorado 80027
Telephone: (303) 673-9600
Facsimile: (303) 673-9155
Email: trealbird@ndnlaw.com
Attorney for Yankton Sioux Tribe

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2016, the foregoing **Response to Motion to Dismiss** 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:

Brett Koenecke
503 South Pierre Street
P.O. Box 160
Pierre, SD 57501
Attorney for Petitioner Dakota Access, LLC

Kara C. Semmler
503 South Pierre Street
P.O. Box 160
Pierre, SD 57501
Attorney for Petitioner Dakota Access, LLC

Rolayne Wiest, Hearing Examiner
Capitol Building, 1st floor
500 E. Capitol Ave.
Pierre, SD 57501-5070

Patricia Van Gerpen, Executive Director
Public Utilities Commission
Capitol Building, 1st floor
500 E. Capitol Ave.
Pierre, SD 57501-5070

Justin Bell
503 South Pierre Street
P.O. Box 160
Pierre, SD 57501
Attorney for Petitioner Dakota Access, LLC

____
Ashley Klinglesmith
Legal Assistant