

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF GRANT)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

25CIV.18-070

IN THE MATTER OF THE APPLICATION BY *
DAKOTA RANGE I, LLC AND DAKOTA *
RANGE II, LLC FOR A PERMIT OF A WIND *
ENERGY FACILITY IN GRANT COUNTY AND *
CODINGTON COUNTY, SOUTH DAKOTA, *
FOR THE DAKOTA RANGE WIND PROJECT *
PUC DOCKET EL18-003 *
*
*

BRIEF IN OPPOSITION TO
DAKOTA RANGE I, LLC, DAKOTA
RANGE II, LLC, and PUC'S
MOTION TO DISMISS

Teresa Kaaz and Kristi Mogen (“Appellants”), interveners in PUC Docket EL18-003, by and through their attorney, John C. Wiles, Wiles & Rylance, 3 East Kemp #200, Watertown, South Dakota, submit this Brief in Opposition of the Dakota Range I, LLC, Dakota Range II, LLC, and the PUC’s Motion to Dismiss.

FACTS

On July 23, 2018, the South Dakota Public Utilities Commission (“PUC”) entered a Final Decision and Order Granting Permit to Construct Wind Energy Facility (Docket EL18-003). The order granted Dakota Range I, LLC and Dakota Range II, LLC (hereinafter jointly referred to as “Dakota Range”) a permit to construct the Dakota Range Project. On August 22, 2018, Appellants filed a Notice of Appeal and Certificate of Service in Grant County (see Exhibit 1).

The PUC and the Applicants Dakota Range have filed a Motion to Dismiss Appellants’ Appeal alleging that the Appellants failed to timely serve their Notice of Appeal and that they did not serve counsel for Dakota Range or the PUC Staff.

The procedural rules of the circuit court found in SDCL 15-6 apply to the taking and conducting of administrative appeals under SDCL 1-26. See SDCL 1-26-32.1 and SDCL 15-6-1.

ARGUMENT

1. **Appellants properly and timely filed and served the Notice of Appeal.**

Failure to timely file an appeal in circuit court is jurisdictional. *Upell v. Dewey Cty. Comm'n*, ¶14, 2016 S.D. 42.

SDCL 1-26-30.2 provides, "An appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling, or action of an agency."

SDCL 1-26-31 establishes the appeal procedure to be followed:

"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." (Emphasis added).

SDCL 15-6-5(b) provides how to establish proof of service:

"Whenever under this chapter service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Service upon a party represented by an attorney may also be made by facsimile transmission as provided in § 15-6-5(f). Delivery of a copy within § 15-6-5 means: Handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person over the age of fourteen years then residing therein. Service by mail shall be by first class mail and is complete upon mailing. Service by facsimile transmission is complete upon receipt by the attorney

receiving service. An attorney's certificate of service, the written admission of service by the party or his attorney or an affidavit shall be sufficient proof of service. In the case of service by facsimile transmission, proof of service shall state the date and time of service and the facsimile telephone number or identifying symbol of the receiving attorney. The provisions of § 15-6-5 shall not apply to the service of a summons or other process or of any paper to bring a party into contempt." (Emphasis added).

An attorney's certificate of service is sufficient proof of service of process, and service is complete upon mailing. *State v. Waters*, 472 N.W.2d 524 (S.D. 1991).

The Appeal was filed in Grant County. In this case, either Grant or Codington County was the proper venue because these are the counties effected by the PUC permit. *Schreifels v. Kotte Trucking*, ¶17, 2001 S.D. 90, 631 N.W.2d 186.

The PUC's decision was served on July 23, 2018. Thirty days from that date is August 22, 2018. As provided by statute, Notice of Appeal was properly filed and venued in Grant County and was served upon the agency, the adverse parties and all other potential adverse parties listed in the PUC Order Granting Party Status dated April 6, 2018. Per statute (SDCL 1-26-31), Appellants' Notice of Appeal was not required to be served upon counsel for Dakota Range or the PUC.

The PUC was the agency that made the decision from which this appeal stems. On August 22, 2018, the executive director of the PUC, Patricia Van Gerpen, was served by Admission of Service (see Exhibit 2 and Exhibit 3). Therefore, the agency was properly served within the statutory deadline. Also, the counties of Grant and Codington were timely served by Admission of Service (see Exhibit 4 and Exhibit 5). These two counties were included for purposes of establishing venue pursuant to SDCL 1-26-31 and SDCL 49-41B-17(2).

Dakota Range I, LLC and Dakota Range II, LLC were served through their registered service agent, Cogency Global, Inc., located in Pierre, South Dakota. A letter

signed by counsel for Appellants, John C. Wiles, was mailed by first class mail on August 22, 2018 to the Hughes County Sheriff's Office (see Exhibit 6). SDCL 15-6-5(b) provides that service by mail is complete upon mailing. *Bison Township v. Perkins County*, ¶12, 2002 S.D. 22, 640 N.W.2d 503. Therefore, service upon Dakota Range was made within the statutory period, notwithstanding that the Hughes County Sheriff did not complete service upon the registered agent until August 28, 2018 (see Exhibit 7 and Exhibit 8).

Counsel for Dakota Range, Mollie M. Smith, also alleges that service was not properly made upon either her or Kristen Edwards, counsel for PUC staff. As appropriately noted by Ms. Smith in her Memorandum, "...this 'case' did not exist until the Notice of Appeal was filed..." Therefore, Ms. Smith was not counsel of record for Dakota Range when the Appeal was filed. Neither was the "commission staff" or Ms. Edwards a party under SDCL 49-41B-17(1) which provides in part:

Parties to a proceeding under this chapter unless otherwise provided include:

- (1) The Public Utilities Commission and applicant;
- (2) Each municipality, county and governmental agency in the area where the facility is proposed to be sited, if timely application therefore is made as determined by the commission pursuant to rule; and
- (3) Any person residing in the area where the facility is proposed to be sited, any nonprofit organization, formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, represent commercial and industrial groups, or to promote the orderly development of the areas in which the facility is to be sited or any interested person, if timely application therefore is made as determined by the commission pursuant to rule. A statement filed by a party to a permit proceeding shall become part of the record and shall be available to the public.

The above statute makes no reference to commission staff. Further, the PUC did not grant "party status" to commission staff pursuant to its April 6, 2018, Order (Exhibit 9). Dakota Range's counsel and PUC's staff counsel were provided complimentary

copies of Appellants' pleadings by an email as a courtesy, not as a statutory requirement (see Smith Memorandum Exhibit B).

2. Appellants properly filed proof of service with the Notice of Appeal in the Office of the clerk within the statutory deadline.

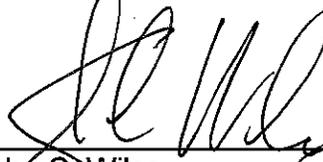
Ms. Smith alleges that Appellants failed to file proof of service of their Notice of Appeal prior to the statutory deadline. Here, the Notice of Appeal was filed in the Court on August 22, 2018. Appellants' Certificate of Service signed by Appellant's counsel, John C. Wiles, was attached to the Notice of Appeal (Exhibit 1). Admissions of Service were filed on behalf of the PUC, Codington County, Grant County and all named potential interveners. Therefore, the Notice of Appeal and Proof of Service was timely filed within the statutory requirements for an administrative appeal in the circuit court.

CONCLUSION

The Appellants' Certificate of Service is prima facie evidence that Appellants' counsel served their Notice of Appeal on all interested parties. For the foregoing reasons, Dakota Range's Motion to Dismiss should be denied.

Dated this 15th day of October, 2018.

WILES & RYLANCE



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