

STATE OF SOUTH DAKOTA
COUNTY OF GRANT

IN CIRCUIT COURT
THIRD JUDICIAL DISTRICT

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

Case No. 25CIV18-000070

**DAKOTA RANGE I, LLC, AND
DAKOTA RANGE II, LLC'S
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Dakota Range I, LLC and Dakota Range II, LLC (together, "Dakota Range"), by and through their undersigned counsel, hereby submit their Memorandum in Support of Motion to Dismiss.

BACKGROUND

On July 23, 2018, the South Dakota Public Utilities Commission ("PUC") issued and served on all parties its Final Decision and Order Granting Dakota Range I, LLC and Dakota Range II, LLC (together, "Dakota Range") a permit to construct the Dakota Range Wind Project. *See* Exhibit A to the Affidavit of Mollie M. Smith ("Smith Aff."). Pursuant to South Dakota Codified Laws ("SDCL") 1-26-31, an appeal of the PUC's decision had to be filed in circuit court and served on the agency and all parties within 30 days, which was no later than August 22, 2018.

On behalf of Appellants Teresa Kaaz and Kristi Mogen (together, "Appellants"), John C. Wiles filed a Notice of Appeal and Certificate of Service to initiate the above-captioned case on August 22, 2018. *See* Smith Aff., Exh. B. The Certificate of Service asserts that the Notice of Appeal was:

served upon ... Kristen Edwards, Attorney for the Public Utilities Commission Staff, by electronic e-file transmittal to Kristen.edwards@state.sd.us; Dakota Range I, LLC and Dakota Range II, LLC by service of Hughes County Sheriff upon Cogency Global Inc., 326 N. Madison Ave, Pierre, SD 57501, their Registered Service Agent; Mollie M. Smith, Counsel for Dakota Range I, LLC and Dakota Range II, LLC, by electronic e-file transmittal to msmith@fredlaw.com, Cindy Brugman, Codington County Auditor, by Admission of Service; Karen Layher, Grant County Auditor, by Admission of Service; and all other potential interveners listed on the PUC Docket EL-003 Service List ... by Admission of Service or as otherwise provided by law, all on the 22nd day of August, 2018.

However, as discussed further below, service of the Notice of Appeal was not accomplished as represented by Mr. Wiles in his Certificate of Service:

- First, Cogency Global Inc., Dakota Range I, LLC and Dakota Range II, LLC's Registered Service Agent, was not served with the Notice of Appeal until August 28, 2018.
- Second, Mollie M. Smith, counsel for Dakota Range I, LLC and Dakota Range II, LLC, was not, nor could she have been, served by "electronic e-file transmittal." Ms. Smith was not registered with the South Dakota Unified Judicial System ("UJS") Portal, which is required in order to be served by "electronic e-file transmittal" using the South Dakota Odyssey® File & Serve Portal. Rather, Mr. Wiles simply sent Ms. Smith an email with the Notice of Appeal and Certificate of Service attached. Further, even assuming the email was intended as electronic service, Mr. Wiles failed to comply with the electronic service provisions of SDCL 15-6-5(j).
- Third, to Dakota Range's knowledge, Kristen Edwards, an attorney for the South Dakota Public Utilities Commission Staff ("PUC Staff"), was served in the same manner as Ms. Smith and, for the same reasons, service upon Ms. Edwards was likewise insufficient.

Further, there is no proof in the record that Ms. Edwards was served by “electronic e-file transmittal.”

Based on the above, the Notice of Appeal was not properly served on Dakota Range or its counsel, nor was it properly served on PUC Staff, who was a party to the underlying PUC proceeding.

In addition, as discussed further below, the Admissions of Service obtained by Appellants were not filed with the Court by August 22, 2018. Thus, the Appellants also failed to file the proof of service required by SDCL 1-26-31.

LEGAL STANDARD

“Any party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission on an application for a permit, may obtain judicial review of that decision by filing a notice of appeal in circuit court. The review procedures shall be the same as that for contested cases under chapter 1-26.” SDCL 49-41B-30. Further, “[t]he sections of Title 15 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.

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*, 631 N.W.2d 186, 189 (S.D. 2001). 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.*, 654 N.W.2d 826, 827 (S.D. 2002); *see also*

Hardy v. W. Cent. Sch. Dist. No. 49-7, 478 N.W.2d 832, 834 (S.D. 1991) (“It is settled law in South Dakota that failure to timely file a notice of appeal as prescribed by statute is a jurisdictional flaw requiring dismissal of the appeal.”).

In administrative appeals, a circuit court’s appellate jurisdiction depends on compliance with statutory conditions precedent. *AEG Processing Ctr. No. 58, Inc. v. S. Dakota Dep’t of Revenue & Regulation*, 838 N.W.2d 843, 847 (S.D. 2013). “As a general rule, where a method of giving notice is prescribed by statute, there must be strict compliance with the prescribed method in form of notice.” *Hein v. Marts*, 295 N.W.2d 167, 170 (S.D. 1980); *see also Stark v. Munce Bros. Transfer & Storage*, 461 N.W.2d 587, 588 (S.D. 1990) (“When 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.”). A failure to comply with such conditions precedent deprives the circuit court of appellate jurisdiction. *Hardy*, 478 N.W.2d at 834; *see also Upell v. Dewey Cty. Comm’n*, 880 N.W.2d 69, 74 (S.D. 2016) (holding that the circuit court lacked jurisdiction because the notice of appeal was not served on one of the members of the board of county commissioners as required by statute, and that service on the county commissioners’ attorney was insufficient); *Schreifels*, 631 N.W.2d at 188 (holding that the circuit court lacked jurisdiction when the appeal was not filed in the venue dictated by SDCL 1-26-31).

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[.]” SDCL 1-26-31. Second, the appealing party must also “fil[e] the original [Notice of Appeal] with proof of such service . . . within thirty days after the agency served notice of the final decision.” SDCL 1-26-31. South Dakota’s Rules of Procedure in Circuit Courts (found in SDCL Chapter 15-6) apply to “procedure for taking and conducting” appeals under SDCL Chapter 1-26. SDCL 1-26-32.1; *see also* SDCL 15-6-1 (stating that SDCL Chapter 15-6 “governs the procedure in the circuit courts.”).

Since the PUC served its Final Decision on July 23, 2018, the statutory deadline for Appellants to serve the Notice of Appeal upon adverse parties and file the Notice of Appeal with proof of such service was August 22, 2018. Appellants failed to satisfy either requirement. With respect to service, Appellants: (1) failed to properly and timely serve Dakota Range I, LLC and Dakota Range II, LLC (either individually or through their counsel Ms. Mollie Smith); and (2) failed to properly and timely serve the PUC Staff. With respect to the filing requirement, Appellants failed to file with their Notice of Appeal the requisite proof of service upon the adverse parties by the August 22, 2018 deadline. Accordingly, this Court lacks jurisdiction to hear this matter, and dismissal is appropriate.

I. Appellants Failed to Serve a Copy of the Notice of Appeal Upon Each Adverse Party Before the Statutory Appeal Deadline.

Appellants’ failure to serve each adverse party within thirty days of service of the PUC’s final decision is fatal to the appeal and requires its dismissal. *See Rabo Agrifinance, Inc. v. Rock*

Creek Farms, 813 N.W.2d 122, 125 (S.D. 2012); *Long v. Knight Const. Co.*, 262 N.W.2d 207, 208 (S.D. 1978) (stating that failure to serve notice of appeal upon defendant-respondent before the time for taking the appeal expired was fatal to the appeal); *W. States Land & Cattle Co. v. Lexington Ins. Co.*, 459 N.W.2d 429, 432 (S.D. 1990) (stating that failure to timely serve and file the notice of appeal was jurisdictionally fatal to the appeal's validity); *Hardy*, 478 N.W.2d at 834 (observing that failure to timely serve and file a notice of appeal is jurisdictionally fatal to an appeal's validity). "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.*, 86 N.W.2d 533, 534 (1957). This has been construed to include situations where reversal or modification of the judgment could adversely impact a party. *Id.* at 536.

It is undisputed that Dakota Range I, LLC and Dakota Range II, LLC are adverse parties. Further, as Appellants recognized in their Notice of Appeal, PUC Staff is an adverse party. Appellants' failure to serve Dakota Range and PUC Staff before the statutory deadline is a jurisdictional error requiring dismissal of the appeal.

A. Appellants Failed to Serve Dakota Range Until Six Days After the Statutory Deadline.

Appellants failed to properly serve a copy of the Notice of Appeal upon Dakota Range I, LLC and Dakota Range II, LLC within thirty days after the PUC served notice of the Final Decision. In the Certificate of Service filed with the Notice of Appeal, Appellants' counsel, Mr. Wiles, purports to have served Dakota Range I, LLC and Dakota Range II, LLC "on the 22nd day of August, 2018" "by service of Hughes County Sheriff upon Cogency Global Inc.," without providing an affidavit of personal service. In reality, per the Sheriff's Return of Personal Service filed by Appellants on September 5, 2018, the Notice of Appeal did not come into Sheriff

Michael Leidholt's hand for service until August 24, 2018 – two days after the statutory appeal deadline – and Cogency Global Inc. did not receive the Notice of Appeal by personal service until August 28, 2018 – six days after the statutory appeal deadline. *See* Smith Aff., ¶ 13 and Exh. E and Affidavit of Melissa Tomelden (“Tomelden Aff.”). Thus, Dakota Range I, LLC and Dakota Range II, LLC were not timely served.

B. Appellants Failed to Properly Serve Dakota Range's Counsel Before the Statutory Appeal Deadline.

1. Ms. Smith was not served by “electronic e-file transmittal.”

Appellants also failed to properly serve the Notice of Appeal on Mollie Smith, as counsel for Dakota Range, within the statutory deadline. In the Certificate of Service filed with the Notice of Appeal, Appellants' counsel, Mr. Wiles, purports to have served “Mollie M. Smith, Counsel for Dakota Range I, LLC, and Dakota Range II, LLC by electronic e-file transmittal to msmith@fredlaw.com.” However, Ms. Smith was not actually served via the electronic filing (“e-filing”) service available through the Odyssey® File & Serve portal maintained by the South Dakota Unified Judicial System. At the time, Ms. Smith was not registered with the applicable e-filing service, so she could not have been served through the e-filing system. Smith Aff., ¶¶ 5-7 and Exh. C. Further, prior consent to being served by e-file service is required. *See* SDCL 16-21A-7(1) (“A party who files a document electronically must serve the document by electronic means *if the recipient consents to accept documents served electronically*” (emphasis added)); SDCL 16-21A-2(3) (“Registration for electronic filing constitutes written consent to electronic service of all documents filed in accordance with these rules and the Rules of Civil Procedure.”). Thus, contrary to the statement in Mr. Wiles Certificate of Service, Dakota Range's counsel was not served by “electronic e-file transmittal” before the statutory appeal deadline.

2. Ms. Smith was not properly served by email.

Appellant’s counsel sent the Notice of Appeal to Ms. Smith via electronic mail (“email”). *See Smith Aff.*, ¶¶ 3-4 and Exh. B. Even if an email is an acceptable method of service of process of a Notice of Appeal, Appellants failed to properly serve Ms. Smith by email. Specifically, SDCL 15-6-5(j) provides, in relevant part, that the following requirements must be met in order to serve a party represented by an attorney by email:

(2) Prior to the service, the attorney upon whom service is made has agreed in writing to accept service by email, or has served the serving party in the same case by email;

... and

(4) The sending attorney by facsimile or mail sends a certificate of service specifying the items electronically served.

In this case, neither condition was satisfied.

First, neither requirement of SDCL 15-6-5(j)(2) was met. Prior to service, Ms. Smith did not agree in writing to accept service by email. *See Smith Aff.*, ¶ 8. In addition, since this “case” did not exist until a notice of appeal was filed with the Grant County Circuit Court, Ms. Smith had not – nor could she have – previously served the Appellants in the same case by email. Second, Appellants’ counsel failed to satisfy SDCL 15-6-5(j)(4). Ms. Smith did not receive, by facsimile or mail, a certificate of service specifying the items electronically served. *See Smith Aff.*, ¶ 9. Therefore, Dakota Range’s counsel was not properly served by email before the statutory deadline.

C. Appellants Failed to Properly Serve the PUC Staff Within the Statutory Appeal Deadline.

Appellants likewise failed to properly serve the PUC Staff within thirty days after the PUC served notice of its Final Decision. SDCL 1-26-31 requires that the Notice of Appeal be served upon all adverse parties within thirty days after service of the PUC’s final decision. As

stated in the Final Decision, PUC Staff participated as a party in the underlying proceeding. *See* Smith Aff., Exh. A at 4 (“Commission staff fully participated as a party in this matter, in accordance with SDCL 49-41B-17(1)”). Further, the Notice of Appeal lists the PUC Staff as a party. Therefore, SDCL 1-26-31 requires service of the Notice of Appeal upon PUC Staff before the statutory deadline.

In the Certificate of Service filed with the Notice of Appeal, Appellants’ counsel purports to have served Kristen Edwards, attorney for the PUC Staff, “by electronic e-file transmittal to Kristen.edwards@state.sd.us.” However, there is no proof that Ms. Edwards was served via the Odyssey® file and serve system. To the best of Dakota Range’s knowledge, Appellants’ counsel sent the Notice of Appeal to Ms. Edwards via email at the same time he emailed it to Ms. Smith. *See* Smith Aff., ¶¶ 3 and Exh. B. Further, Appellants’ counsel failed to satisfy the requirements of SDCL 15-6-5(j)(4) because there is no proof that Ms. Edwards was sent, by facsimile or mail, a certificate of service specifying the items electronically served. Accordingly, service upon Ms. Edwards was not effective and, therefore, the PUC Staff was not properly served.

II. Appellants Failed to File the Requisite Notice Proof of Service with the Notice of Appeal Prior to the Statutory Appeal Deadline.

In addition to the defective service discussed above, Appellants failed to file the requisite proof of service of their Notice of Appeal within thirty days after the PUC served notice of its Final Decision.

Pursuant to SDCL 1-26-31, the appealing party must “fil[e] the original [Notice of Appeal] *with proof of such service . . .* within thirty days after the agency served notice of the final decision.” (Emphasis added). As discussed above, “[t]he 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.*, 86 N.W.2d at 534. Non-

appearing adverse parties are required to be served a Notice of Appeal. *Lake Hendricks Improvement Ass'n v. Brookings Cnty. Planning & Zoning Comm'n*, 877 N.W.2d 99, 101 (S.D. 2016).

Several parties were purported to be served by Admission of Service in Appellants' counsel's Certificate of Service. These parties are adverse parties within the meaning of SDCL 1-26-31 because each petitioned to intervene in the underlying PUC proceeding, and each could be adversely impacted by reversal or modification of the PUC's Final Decision. *See also* SDCL 1-26-17.1 ("A person who is not an original party ... may become a party to the hearing by intervention."). Further, Appellants acknowledged these persons as parties by listing them as "parties to this appeal" in their Notice of Appeal and indicating they required service in their Certificate of Service.

However, despite the clear language of SDCL 1-26-31 requiring filing of not only the Notice of Appeal, but also "proof of such service" by the appeal deadline, none of the Admissions of Service were filed with the circuit court by August 22, 2018. Most were filed on August 27, 2018 – several days after the appeal deadline. *See* Smith Aff., Exh. D. Likewise, Appellants did not file the Sheriff's Returns of Personal Service on Cogency Global Inc., Registered Agent for Dakota Range, until September 5, 2018. Accordingly, Appellants failed to meet the requirements of SDCL 1-26-31 to perfect their appeal, and this Court does not have jurisdiction to hear this matter. *See Slama*, 654 N.W.2d at 827 (holding that failure to follow the plain language of the statute deprives the circuit court of subject matter jurisdiction over the appeal and requires its dismissal); *Schreifels*, 631 N.W.2d at 188 ("SDCL 1–26–31 provides the basis for the circuit court to exercise jurisdiction ... It is clear and uses mandatory language."); *Stark*, 461 N.W.2d at 588 ("When 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.”); *W. States Land & Cattle Co.*, 459 N.W.2d at 432 (stating that failure to timely serve and file the notice of appeal was jurisdictionally fatal to the appeal's validity); *Hardy*, 478 N.W.2d at 834 (observing that failure to timely serve and file a notice of appeal is jurisdictionally fatal to an appeal's validity).

CONCLUSION

Based on the foregoing, Dakota Range I, LLC and Dakota Range II, LLC respectfully request that the Court dismiss the appeal pursuant to SDCL 15-6-12(b)(1) and (4).

Dated this 7th day of September, 2018.

By: /s/ Mollie M. Smith
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