

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF GRANT

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
PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This matter came to be heard on _____, 2018, before the Honorable Dawn M. Elshere on the Motion to Dismiss (“Motion”) the administrative appeal brought by Dakota Range I, LLC (“Dakota Range I”), and Dakota Range II, LLC (“Dakota Range II” and, together with Dakota Range I, “Dakota Range”). Dakota Range appeared by its attorney of record, Mollie Smith, of Fredrikson & Byron, P.A. The South Dakota Public Utilities Commission (“PUC”) appeared by its attorney of record, Karen Cremer. Kristi Mogen and Teresa Kaaz (together, “Appellants”) appeared by their attorney of record, John C. Wiles of Wiles & Rylance. The Court heard the argument and admissions of the parties, considered the affidavits offered, and considered all the written and oral arguments of the parties and counsel.

Based upon the record in its entirety, and good cause appearing therefore, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On July 23, 2018, the PUC issued and served on all parties its Final Decision and Order Granting Dakota Range a permit to construct the Dakota Range Wind Project.
2. On behalf of Appellants, John C. Wiles filed a Notice of Appeal and Certificate of Service to initiate the above-captioned case on August 22, 2018.
3. 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.

4. Service of the Notice of Appeal was not accomplished as represented by Mr. Wiles in his Certificate of Service.
5. The Notice of Appeal came into Sheriff Michael Leidholt's hand for service on August 24, 2018.
6. Dakota Range's Registered Agent, Cogency Global Inc., was not served with the Notice of Appeal until August 28, 2018.
7. Mollie M. Smith, counsel for Dakota Range, 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. Instead, Mr. Wiles sent Ms. Smith an email with the Notice of Appeal and Certificate of Service attached.
8. Even assuming the e-mail was intended as electronic service, Ms. Smith did not consent to electronic service, nor did Mr. Wiles send notice of the documents electronically served via facsimile or U.S. Mail.
9. 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.
10. 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.
11. In addition, neither an affidavit of personal service on Cogency Global Inc., nor the Admissions of Service obtained by Appellants, were filed with the Court by August 22, 2018. Thus, the Appellants also failed to file the requisite proof of service by the statutory appeal deadline.

CONCLUSIONS OF LAW

1. "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.
2. "The 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.

3. 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.”).
4. 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).
5. SDCL 1-26-31, which governs an appeal of a PUC final decision, states:

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.
6. 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.

7. There are two requirements which must be met to invoke the 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.
8. Appellants failed to satisfy either requirement. With respect to service, Appellants: (1) failed to properly and timely serve Dakota Range I and Dakota Range II (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.

Appellants Failed to Properly Serve Dakota Range By the Statutory Appeal Deadline:

9. 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).
10. “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.
11. Dakota Range I and Dakota Range II are adverse parties upon which Appellants were required to serve the Notice of Appeal.
12. In the Certificate of Service filed with the Notice of Appeal, Appellants’ counsel, Mr. Wiles, purports to have served Dakota Range I and Dakota Range II “on the 22nd day of August, 2018” “by service of Hughes County Sheriff upon Cogency Global Inc.” In reality, per the Sheriff’s Return of Personal Service filed by the Appellants, the Notice of Appeal did not come into Sheriff 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 deadline. *See* Affidavit of Mollie Smith, ¶ 13, Exh. E (“Smith Aff.”); Affidavit of Melissa Tomelden (“Tomelden Aff.”). Thus, Dakota Range I and Dakota Range II were not served with the Notice of Appeal until after the statutory deadline for appeal.

13. Appellants failed to properly serve the Notice of Appeal on Mollie Smith, as counsel to Dakota Range, within the statutory deadline.
14. 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.
15. 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.").
16. 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.
17. 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.
18. 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.
19. Appellants' counsel also 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.

Appellants' Failed to Properly Serve the PUC Staff By the Statutory Appeal Deadline:

20. Appellants failed to properly serve the PUC Staff within thirty days after the PUC served notice of its Final Decision.
21. 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. PUC Staff participated as a party in the matter. *See* Smith Aff., Exh. A at 4 (PUC Final Decision) ("Commission staff fully participated as a party in this matter, in accordance with SDCL 49-41B-17(1)"). Further, the Notice of Appeal listed PUC Staff as a party. PUC Staff is an adverse party upon which Appellants were required to serve the Notice of Appeal. Therefore, SDCL 1-26-31 requires service of the Notice of Appeal upon PUC Staff before the statutory deadline.
22. 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 actually served via the Odyssey® file and serve system. Rather, Appellant's counsel sent the Notice of Appeal to Ms. Edwards via email. *See* Smith Aff., ¶ 3, Exh. B.
23. Appellants' counsel failed to satisfy the requirements of SDCL 15-6-5(j)(2) and (4) because there is no proof that Ms. Edwards consented to service by e-mail, nor that she 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.

Appellants Failed to File the Requisite Proof of Service by the Statutory Appeal Deadline:

24. 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.
25. 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).
26. 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, 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.

27. 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.
28. 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).
29. In the event any Finding of Fact above should properly be a Conclusion of Law, or a Conclusion of Law should properly be a Finding of Fact, each shall be treated as such irrespective of its improper classification.
30. Based on the foregoing, the Court GRANTS Dakota Range’s Motion to Dismiss.

Dated this __ date of _____, 2018.

BY THE COURT:

HONORABLE DAWN ELSHERE
CIRCUIT COURT JUDGE