

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. 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. On September 7, 2018, Dakota Range filed a Motion

to Dismiss and Memorandum in Support on the basis of lack of jurisdiction for failure to comply with the jurisdictional requirements of SDCL 1-26-31.¹

On September 13, 2018, the PUC delivered to the reviewing court and the parties the original transcripts of the contested case hearing and an electronic copy of the entire record of the proceeding.² Appellants should have filed their opening brief on the merits by October 15, 2018, but did not do so and have not requested leave of the court to modify the statutory briefing schedule.

At the October 19, 2018 hearing on Dakota Range's September 7, 2018 Motion to Dismiss for lack of jurisdiction, Dakota Range made an oral motion to dismiss for Appellants' failure to file a brief on the merits in accordance with SDCL 1-26-33.2, the statutory briefing schedule governing appeals to the circuit courts of final agency decisions. In accordance with the Court's request at the October 19, 2018 hearing, Dakota Range submits a written motion and this supporting memorandum.

LEGAL STANDARD

Failure to meet statutory filing requirements in an appeal from an agency decision may be subject to sanctions in the form of dismissal. *W. States Land & Cattle Co. v. Lexington Ins. Co.*, 459 N.W.2d 429, 432 (S.D. 1990); *DuBray v. South Dakota Dept. of Social Services*, 690 N.W.2d 657, 666 (S.D. 2004). In deciding whether dismissal is an appropriate sanction, the court looks to the intent behind the violated statute and the prejudice resulting to the non-offending party. *W. States Land & Cattle Co.*, 459 N.W.2d at 432.

¹ Dakota Range's September 7, 2018 Motion to Dismiss for lack of subject matter jurisdiction is currently under consideration by this Court.

² On September 7, 2018, the PUC sent a letter to the parties with copies of the Chronological and Alphabetical Indices of administrative record conveyed to the Court, which included references to the evidentiary hearing transcripts. The agency record and original transcripts were posted to the Court docket on September 13, 2018.

ARGUMENT

I. Appellants' Unexcused Failure to Serve Their Brief on the Merits Violates the Statutory Briefing Schedule Governing This Appeal.

Pursuant to SDCL 1-26-33.2, Appellants had until October 15, 2018 to file their brief on the merits.³ There is no dispute that Appellants failed to do so, and that they failed to request leave of the court to extend the time for filing their brief. Moreover, the briefing schedule was not stayed by Dakota Range's filing of a motion to dismiss.

A. Appellants Failed to File and Serve A Brief on the Merits Within The Time Established By Statute.

SDCL Chapter 49-41B governs permitting by the PUC of wind energy facilities, such as the Dakota Range Wind Project. Under SDCL 49-41B-30, "[a]ny 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 [Administrative Procedure and Rules]." SDCL 49-41B-30. Accordingly, appeals to the circuit court from final agency decisions are taken pursuant to, and governed by, SDCL Chapter 1-26.

The sections of SDCL Chapter 1-26 govern the procedure and review standards for civil appeals to the circuit courts from final agency decisions. SDCL 1-26-30.4. In particular, the time for filing briefs on the merits of this appeal is controlled by SDCL 1-26-33.2. *See* SDCL 49-41B-30; SDCL 1-26-30.4. Specifically, SDCL 1-26-33.2 provides the following:

Unless otherwise ordered by the circuit court, the appellant shall serve a brief within thirty days after the delivery of the transcript of the contested case hearing to counsel for the parties or to the parties if unrepresented by counsel or within thirty days after the agency

³ Weekend days are not included in the computation when the last day of the time period falls thereon. SDCL 15-6-6(a). Thus, while the 30-day time period for Appellants' opening brief on the merits ended on Saturday, October 13, 2018, Appellants' opening brief on the merits should have been filed and served on Monday, October 15, 2018.

record is transmitted to the circuit court pursuant to § 1-26-33, whichever event occurs later. The appellee shall serve a brief within thirty days after the service of the brief of appellant, or in the case of multiple appellants, within thirty days after service of the last appellant's brief. The appellant may serve a reply brief within ten days after service of appellee's brief, or in the case of multiple appellees, within ten days after service of the last appellee's brief. Pursuant to § 15-6-5(d), briefs may not be made a part of the record.

Appellants were required to serve their brief within thirty days after the delivery of the transcript of the contested case hearing or within thirty days after the agency record is transmitted to the circuit court, whichever event occurred later. SDCL 1-26-33.2. The administrative record, including the evidentiary hearing transcripts, was delivered to the parties and the circuit court on September 13, 2018. Therefore, Appellants' brief on the merits was due October 15, 2018. There is no dispute that Appellants failed to file their brief on the merits on October 15, 2018 and have not filed a brief on the merits as of the date of this Memorandum.

B. Appellants Failed to Request An Extension of the Briefing Schedule Prior to the Date Their Brief Was Due.

Appellants did not request an extension of the briefing schedule prior to the expiration of the original due date, as is the proper procedure in appeals to the circuit court from agency decisions. As illustrated in *In the Matter of PUC Docket No. HP14-002, Dakota Access Pipeline LLC*, Case No. Civ. 16-20, a motion to dismiss does not by itself modify or otherwise affect the statutory briefing schedule contained in SDCL 1-26-33.2. In that case, the appellee filed a motion to dismiss on jurisdictional grounds, and the briefing schedule was extended only upon separate motion to extend the time for filing opening briefs on the merits, granted by the court. See Exhibits A, B, and C to the Affidavit of Mollie M. Smith ("Smith Aff.").

In *In the Matter of PUC Docket HP 14-001, Petition of TransCanada Keystone Pipeline, LP For Order Accepting Certification of Permit Issued in Docket HP 09-001 to Construct the Keystone XL Pipeline*, Civ. 16-33, 16-34, 16-36, 16-37, 16-38, 16-39 (consolidated), the

statutory time for filing the appellants' opening brief on the merits was extended only upon motion to the court and stipulated agreement of the parties. *See* Smith Aff., Exhibits D, E, and F.

Appellants had ample time to request an extension of the time to file their brief on the merits. They chose not to do so. Further, Appellants' failure to submit their brief on the merits is not the only time Appellants have failed to meet deadlines in this case. In addition to the late service of the Notice of Appeal, Appellants' Response to Dakota Range's first Motion to Dismiss was late-filed. *See* Dakota Range Reply Brief at fn. 1. Appellants have persistently failure to adhere to, or even acknowledge, statutory deadlines in this case.

C. The Statutory Time for Serving Briefs in This Appeal Was Not Modified by Dakota Range's Motion to Dismiss for Lack of Jurisdiction.

Dakota Range's Motion to Dismiss for lack of jurisdiction did not affect the statutory briefing schedule governing this case. The rules of procedure in circuit courts, contained in SDCL Chapter 15-6, supplement Chapter 1-26 and apply *absent a specific provision in Chapter 1-26*, and only to the extent that they are *applicable* and *consistent* with the provisions in Chapter 1-26. SDCL 1-26-32.1. As explained above, SDCL Chapter 1-26 specifically establishes a schedule for filing briefs in this case. *See* SDCL 1-26-33.2. This statutory time for filing briefs governs over any section of SDCL Chapter 15-6 that is inconsistent with or would modify this schedule. *See* SDCL 1-26-32.1. The "pausing" effect on the proceedings that would occur if SDCL 15-6-12(a) were applied is inconsistent with the schedule established by SDCL 1-26-33.2 and contrary to the unambiguous language of the governing statutes providing that SDCL Chapter 1-26 governs the conduct of appeals to the circuit courts from final agency decisions. *See* SDCL 49-41B-30 ("The review procedures shall be the same as that for contested cases under chapter 1-26"); SDCL 1-26-30.4 (providing that the sections of Chapter 1-26 on appeals to

circuit courts govern appeals to the circuit courts from final agency decisions pursuant to chapter 1-26).

Additionally, SDCL 15-6-12(a) provides that the service of a motion pursuant to SDCL 15-6-12 modifies the time for serving responsive pleadings. However, SDCL 15-6-12(a) does not apply to the time for filing and serving an appellant's brief on the merits in an appeal from a final agency decision. Rather, SDCL 15-6-12(a) specifically applies to time for filing responsive pleadings following a summons and complaint, such as an answer or counterclaim.⁴ Appellants' brief on the merits is not a responsive pleading and therefore SDCL 15-6-12(a) is not applicable. *See* SDCL 1-26-32.1 (providing that the rules in SDCL Chapter 15-6 apply to appeals from final agency decisions "*so far as the same may be consistent and applicable*") (emphasis added).

II. Dismissal of this Appeal is an Appropriate Remedy Because Appellants' Default Frustrates the Purpose of the Statutory Briefing Schedule and Prejudices Dakota Range by Preventing the Case from Proceeding.

Dismissal is an appropriate sanction for Appellants' failure to submit their brief on the merits in accordance with the statutory deadlines. The South Dakota Supreme Court has stated that, under South Dakota's analogous rules of appellate procedure, omissions such as failure to file a statement of the issues on appeal may be subject to sanctions in the form of dismissal. *W. States Land & Cattle Co.*, 459 N.W.2d at 432; *DuBray*, 690 N.W.2d at 666. In deciding whether dismissal is an appropriate sanction, the court looks to the intent behind the violated statute and the prejudice resulting to the non-offending party. *W. States Land & Cattle Co.*, 459 N.W.2d at 432. In *W. States Land & Cattle Co.*, the court held that the failure to timely file a statement of issues did not frustrate the intent of the statute or prejudice the appellee because the purpose of a

⁴ Notices of appeal from final agency decisions are treated as pleadings, not summonses and complaints. *See Bison Twp. v. Perkins Cty.*, 640 N.W.2d 503, 506 (S.D. 2002) (holding that a notice of appeal is treated as a pleading, not a summons and complaint); *Vitek v. Bon Homme Cty. Bd. of Comm'rs*, 650 N.W.2d 513, 517 (S.D. 2002) (reiterating holding that notices of appeal are treated as pleadings and fall within SDCL 15-6-5).

statement of issues was to allow the appellee the opportunity to order additional portions of the transcript, and no transcript was made of the subject proceedings that could be ordered. *Id.*

Unlike in *W. States Land & Cattle Co.*, Appellants' failure to timely file a brief on the merits frustrates the intent of the violated statute (SDCL 1-26-33.2) and the entire statutory framework for the appeal because it halts the briefing schedule and prevents the case from progressing. This delay severely prejudices Dakota Range by drawing out this process beyond the timeframe established by statute and causing uncertainty as to the process moving forward. Unlike in *Dubray*, Appellants have not requested relief from their default arising out of their failure to timely file their brief, and Appellants have shown no good cause as to why their default should be excused. *See DuBray*, 690 N.W.2d at 666. Further, unlike the aggrieved party in *DuBray*, Dakota Range has moved promptly for dismissal on the grounds of Appellants' failure to timely file their brief. *See id.* at 666-67.

CONCLUSION

Based on the foregoing, Dakota Range I, LLC and Dakota Range II, LLC respectfully request that the Court dismiss the appeal based on Appellants' failure to serve their brief on the merits in a timely manner, pursuant to SDCL 1-26-33.2. In the alternative, Dakota Range requests that the Court order Appellants to submit their brief on the merits as soon as possible.

Dated this 22nd day of October, 2018.

By: /s/ Mollie M. Smith

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