

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,
CONCLUSIONS OF LAW AND
ORDER**

This matter came to be heard on _____, 2018, before the Honorable Robert L. Spears 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 attorneys of record, Mollie Smith, of Fredrikson & Byron, P.A, and Joe Erickson, Schoenbeck Law, PC. 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 attorneys of record, John C. Wiles and Lindsay Martin 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. On August 31, 2018, Appellants filed their Statement of Issues on Appeal.
4. On September 7, 2018, Dakota Range filed and served a Motion to Dismiss for Lack of Jurisdiction.

5. 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.¹
6. Appellants did not submit a brief on the merits by October 15, 2018.
7. Based on the above, Appellants did not submit a brief on the merits of this appeal within thirty days after the agency record was transmitted to the circuit court and the transcript of the contested case hearing was delivered to the reviewing court and served upon the parties. Thus, Appellants failed to serve their brief in accordance with the statutory 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 [SDCL Chapter 1-26] on appeals to circuit courts shall govern civil appeals to the circuit courts of South Dakota from final decisions, rulings, or actions of agencies pursuant to chapter 1-26.” SDCL 1-26-30.4.
3. “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.
4. The rules of procedure in circuit courts, contained in SDCL Chapter 15-6, supplement Chapter 1-26 and apply only *absent a specific provision in Chapter 1-26* and only so far as they are *consistent* with SDCL Chapter 1-26 and the statute allowing the appeal. SDCL 1-26-32.1.
5. SDCL 1-26-33.2, which governs the time for filing briefs in an appeal of a PUC final decision, states:

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 record is transmitted to the circuit court pursuant to § 1-26-

¹ 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 docket on September 13, 2018.

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.

6. The time for serving briefs in this matter is governed by SDCL 1-26-33.2.
7. SDCL 15-6-12(a) does not apply to modify the time for filing and serving an appellant's brief on the merits in an appeal from a final agency decision. Therefore, the statutory briefing schedule governing this appeal was not modified by Dakota Range's September 7, 2018 Motion to Dismiss.
8. The administrative records, including the evidentiary hearing transcripts were delivered to the parties and the circuit court on September 13, 2018. Therefore, the statutory deadline for Appellants to serve a brief on the merits of the appeal was October 15, 2018.²
9. Appellants did not request an extension of the time to file their brief prior to the statutory deadline, nor have they requested such an extension since the deadline.
10. 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.
11. Dismissal is appropriate as a result of Appellants' failure to serve a brief in accordance with the statutory time for serving briefs in appeals from final agency decisions. Appellants' failure to timely file a brief on the merits frustrates the intent of the violated statute (SDCL 1-26-33.2) and the statutory framework for the appeal because it halts the briefing schedule and prevents the case from progressing. Dakota Range has been prejudiced as a result of Appellants' failure to timely submit their brief
12. Appellants had ample time to request an extension of the time to file their brief on the merits. They chose not to do so, or to seek clarification from the court.

² 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.

13. Appellants have illustrated a persistent failure to adhere to, or even acknowledge, statutory deadlines in this case. In addition to failing to serve their brief in accordance with the governing statute, Appellants' Response to Dakota Range's first Motion to Dismiss was late-filed.
14. Appellants have shown no good cause as to why their default should be excused.
15. 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.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court hereby GRANTS Dakota Range's Motion to Dismiss.

Dated this ___ date of _____, 2018.

BY THE COURT:

HONORABLE ROBERT L. SPEARS
CIRCUIT COURT JUDGE