

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 October 19, 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. 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. Dakota Range's Registered Agent, Cogency Global Inc. ("Cogency"), was not served with the Notice of Appeal until August 28, 2018.
6. The Notice of Appeal was not served on either Ms. Smith or Ms. Edwards.
7. On September 7, 2018, Dakota Range filed and served a Motion to Dismiss for Lack of Jurisdiction. On September 28, 2018, the PUC filed a Joinder of Dakota Range's Motion to Dismiss. On October 15, 2018, Appellants filed their Brief in Opposition to the Motion to Dismiss.¹ On October 17, 2018, Dakota Range filed their Reply Brief.
8. Based on the above, the Notice of Appeal was not timely served on Dakota Range or its counsel, nor was it properly or timely served on South Dakota Public Utilities Commission Staff ("PUC Staff"), who was a party to the underlying PUC proceeding. In addition, Appellants also failed to file the requisite proof of service by the statutory appeal deadline.

CONCLUSIONS OF LAW

1. "No right to appeal an administrative decision to circuit court exists unless the South Dakota Legislature enacts a statute creating that right." *In re PUC Docket HP 14-0001*, 2018 S.D. 44, ¶ 12, 914 N.W.2d 550, 555 (citations omitted).
2. SDCL 49-41B-30 permits any "party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission on an application for a permit," to appeal the decision by filing a notice of appeal in circuit court. SDCL 49-41B-30. "The review procedures shall be the same as that for contested cases under chapter 1-26." SDCL 49-41B-30.

¹ Pursuant to SDCL 15-6-6(a) and (d), Appellants' Brief in Opposition was untimely filed. *See* SDCL 15-6-6(d) ("[O]pposing affidavits or briefs may be served not later than five days before the hearing, unless the court permits them to be served at some other time."); *see also id.* at 15-6-6(a) ("In computing any period of time prescribed or allowed by this chapter ... the day of the act, event, or default from which the designated period of time begins to run shall not be included. ... When the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."). Upon inquiry of both sides at the hearing held on the above date, neither side seemed overly concerned about this issue. Consequently, the Court will allow the late filing of Appellants' Brief and not dismiss the appeal for this reason.

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 [SDCL ch. 1-26] 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; *see also* SDCL 15-6-81(c) (“[SDCL ch. 15-6] does not supersede the provisions of statutes relating to appeals to the circuit courts.”).
4. A party may file a motion to dismiss a proceeding for insufficient service of process. SDCL 15-6-12(b)(4). Generally, an objection to service of process must be specific and must point out in what manner the serving party has failed to satisfy the requirements of the service provision utilized. *Grajczyk v. Tasca*, 2006 S.D. 55, ¶ 16, 717 N.W.2d 624, 630 (quoting *Photolab Corp. v. Simplex Specialty Co.*, 806 F.2d 807, 810 (8th Cir. 1986)).
5. A party may file a motion to dismiss a proceeding for lack of subject matter jurisdiction. SDCL 15-6-12(b)(1).
6. “[W]hen the [L]egislature provides for appeal to circuit court from an administrative agency, the circuit court’s appellate jurisdiction depends on compliance with conditions precedent set by the [L]egislature.” *In re PUC Docket HP 14-0001*, 2018 S.D. 44, ¶ 12, 914 N.W.2d 550, 555 (alterations in original) (quoting *Schreifels v. Kottke Trucking*, 2001 S.D. 90, ¶ 9, 631 N.W.2d 186, 188). Noncompliance deprives the Court of subject matter jurisdiction. *Id.* (citing *Schreifels*, 2001 S.D. 90, ¶ 9, 631 N.W.2d at 188).
7. A condition precedent to an appeal from a final agency decision is SDCL 1-26-31, which reads, in part:

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 ...* SDCL 1-26-31 (emphasis added).²
8. “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.” *Slama v. Landmann Jungman Hosp.*, 2002 S.D. 151, ¶ 4, 654 N.W.2d 826, 827 (quoting *Schreifels*, 2001 S.D. 90, ¶ 12, 631 N.W.2d at 189). When a party ignores the plain language of the statute, the Court is deprived of subject matter

² An “adverse party” is “[a] party whose interests in a transaction, dispute, or lawsuit are opposed to another party’s interests.” *Adverse Party*, BLACK’S LAW DICTIONARY (10th ed. 2014).

jurisdiction and must dismiss the appeal. *Id.* (quoting *Schreifels*, 2001 S.D. 90, ¶ 12, 631 N.W.2d at 189).³

9. 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.
10. 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; 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 required.

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

11. While Appellants concede that they did not serve process on Ms. Smith,⁴ Appellants contend that they timely served process on Cogency by mailing a letter and attached copies of the Notice of Appeal via first-class mail to the Hughes County Sheriff’s Office on August 22, 2018. Appellants’ Brief in Opposition to the Motion to Dismiss at 3-4 (hereinafter “Appellants’ Brief”); Appellants’ Brief and the affidavit of Attorney John C. Wiles, Exhibit (hereinafter “Appellants’ Exh.”) 6.
12. While Appellants point to the pertinent part of SDCL 15-6-5(b) indicating that service of process by mail is complete upon mailing, Appellants ignore that such service “shall be made by ... *mailing it to [the party] at his last known address* or, if no address is known, by leaving it with the clerk of the court.” SDCL 15-6-5(b) (emphasis added). Appellants did not mail service of process directly to Dakota Range or to Cogency – but rather to the Hughes County Sheriff’s Office. *See Madsen v. Preferred Painting Contractors*, 233 N.W.2d 575, 577 (S.D. 1975) (“[W]here a statute authorizes service of notice by registered mail, service is effective when the notice is properly addressed, registered, and mailed.”). Appellants’ letter and attached Notices of Appeal is thus better considered not as service of process via first class mail but as a *request* for the sheriff to serve Cogency, which is what the sheriff ultimately and untimely did on August 28, 2018. Appellants’ Exhs. 6-8.
13. While Appellants could have simply mailed service of process directly to Cogency within the statutory deadline, Appellants chose to involve an unnecessary third party and allow

³ The South Dakota Supreme Court has specifically held, in the context of reviewing a dismissal of an appeal to circuit court, that “the doctrine of substantial compliance cannot be substituted for jurisdictional prerequisites.” *Upell v. Dewey Cty. Comm’n*, 2016 S.D. 42, ¶ 19, 880 N.W.2d 69, 75-76 (quoting *AEG Processing Ctr. No. 58, Inc. v. S. D. Dept. of Revenue & Regulation*, 2013 S.D. 75, ¶ 23, 838 N.W.2d 843, 850).

⁴ Regarding the copy of the Notice of Appeal emailed to Ms. Smith, Appellants concede that they did not serve process on Ms. Smith but rather sent the email with a copy of the Notice of Appeal and Mr. Wiles’ Certificate of Service as a courtesy. Appellants’ Brief at 4-5.

for the untimely delay of service to Dakota Range. *See State v. Anders*, 2009 S.D. 15, ¶ 7, 763 N.W.2d 547, 550 (quoting *Chatterjee v. Mid Atl. Reg'l Council of Carpenters*, 946 A.2d 352, 355 (D.C. 2008)) (“Service by mail must be accomplished so as to allow delay only within the official channels of the United States mail, not through inter-office or other institutional delays”); *see also Singelman v. St. Francis Med. Ctr.*, 777 N.W.2d 540, 542-43 (Minn. Ct. App. 2010) (holding, under statute stipulating a civil action begins when “summons is delivered to the sheriff in the county where the defendant resides for service,” that mailing summons and complaint to sheriff rather than personally delivering them within limitations period was insufficient). Since such an untimely delay fails to satisfy the first requirement of SDCL 1-26-31, therefore, this Court does not have subject matter jurisdiction over Appellants’ appeal.

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

14. Appellants failed to properly serve the PUC Staff within thirty days after the PUC served notice of its Final Decision.
15. Appellants concede that they did not serve process on Kristen Edwards, PUC Staff, but rather provided her with a courtesy copy of the Notice of Appeal on August 22, 2018. Appellants’ Brief at 4-5. Appellants argue that failure to serve process on Ms. Edwards was immaterial because PUC Staff was not a party to the underlying proceedings. *Id.* at 4.
16. While Appellants argue that the PUC’s April 6, 2018, decision does not grant “party status” to PUC Staff, the relevant paragraph clearly pertains to the granting of applications for party status submitted by sixteen individuals who sought to intervene in the matter. Appellants’ Exh. 9 at 1-2. Moreover, in its findings of fact for its July 23, 2018, final decision, the PUC found that PUC Staff “fully participated as a party in [the] matter, in accordance with SDCL 49-41B-17(1).” Appellees’ Exh. A at 4.⁵ Appellants also named PUC Staff as a party to the appeal in its Notice of Appeal. Appellants’ Exh. 1 at 1. Therefore, since Appellants failed to service process on PUC Staff or its counsel by August 22, 2018, Appellants have not satisfied the first requirement of SDCL 1-26-31 and this Court does not have subject matter jurisdiction over Appellants’ appeal.

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

17. Appellants, by failing to serve all adverse parties, also thereby failed to timely file their Notice of Appeal with proof of such service.

⁵ Appellants’ strict interpretation of SDCL 49-41B-17(1) is contrary to the plain language of the statute. *See* SDCL 49-41B-17(1) (listing the “Public Utilities Commission” as a party to a proceeding under SDCL ch. 49-41B). Even if SDCL 49-41B-17(1) does not include PUC Staff, the statute does not purport to limit parties to a PUC proceeding regarding energy conversion and transmission facilities to those expressly listed. *See id.* (listing parties to such a proceeding “unless otherwise provided”). Here, the PUC clearly provided that its staff was a party to the proceeding. Affidavit of Mollie M. Smith, Exhibit A (hereinafter, “Appellees’ Exh. A”) at 4.

18. While Appellants contend that Mr. Wiles' Certificate of Service, filed along with the Notice of Appeal on August 22, 2018, provides sufficient proof of service pursuant to SDCL 15-6-5(b), such a certificate of service only provides a presumption of sufficient service which may be rebutted by an opposing party's evidence or arguments. *State v. Waters*, 472 N.W.2d 524, 525 (S.D. 1991). Here, Appellees have presented sufficient evidence that Dakota Range was not served with process until August 28, 2018; Appellants have also conceded, contrary to Mr. Wiles' certified statement, that counsel for Dakota Range and PUC Staff were not served via "electronic e-file transmittal." Appellants' Brief at 4-5; Appellants' Exh. 1 at 3. Therefore, Appellants have not satisfied the second requirement of SDCL 1-26-31 and this Court does not have subject matter jurisdiction over Appellants' appeal.
19. 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

1. Based on the foregoing Findings of Fact and Conclusions of Law, the Court GRANTS Dakota Range's Motion to Dismiss the above-captioned appeal.

Dated this ____ date of _____, 2018.

BY THE COURT:

HONORABLE ROBERT L. SPEARS
CIRCUIT COURT JUDGE