

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28833

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 EL 18-003

APPEAL FROM THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
GRANT COUNTY, SOUTH DAKOTA

THE HONORABLE ROBERT L. SPEARS
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

NOTICE OF APPEAL FILED DECEMBER 10, 2018

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PRELIMINARY STATEMENT

The South Dakota Public Utilities Commission will be referred to as “PUC” throughout this brief. Dakota Range I, LLC and Dakota Range II, LLC will be jointly referred to as “Dakota Range.” Counsel for the Appellant, John C. Wiles, will be referred to as “Wiles.” Counsel for Dakota Range, Mollie Smith, will be referred to as “Smith.” Counsel for PUC Staff, Kristen Edwards, will be referred to as “Edwards.” References to the attached appendix will be made as follows: “*App.* __, *pg(s)*. ____.” References to the transcript of the October 19, 2018 motions hearing will be made as follows: “*MHT pg(s)*. __, *line(s)* ____.”

JURISDICTIONAL STATEMENT

On September 7, 2018, Dakota Range filed a Motion to Dismiss. A hearing was held on that Motion on October 19, 2018 before the Honorable Robert L. Spears. Judge Spears issued his Memorandum Opinion on October 29, 2018, granting Dakota Range’s motion. Appellant’s filed objections to Dakota Range’s proposed findings and filed Appellant’s proposed findings. Judge Spears signed Dakota Range’s Findings of Fact and Conclusions of Law as well as an order dismissing the action on November 7, 2018. Judge Spears denied Appellant’s Proposed Findings of Fact and Conclusions of Law. Notice of Entry was filed and served on November 13, 2018. Notice of Appeal to this Court was filed December 10, 2018.

STATEMENT OF LEGAL ISSUES

I. Whether Dakota Range and PUC Staff were timely served with Appellants' Notice of Appeal.

The circuit court held that Dakota Range and PUC Staff were not timely served with the Notice of Appeal as required by SDCL 1-26-31.

Bison Township v. Perkins County, 640 N.W.2d 503, 2002 S.D. 22.

SDCL 1-26-31

SDCL 15-6-5(b)

SDCL 49-41B-17(1)

II. Whether the Appellant timely filed Notice of Appeal with proof of service in the office of the Grant County Clerk of Courts.

The circuit court held that Appellants did not timely file the Notice of Appeal with adequate proof of service on August 22, 2018 as required by SDCL 1-26-31.

State v. Waters, 472 N.W.2d 524, (S.D. 1991).

SDCL 15-6-5(b)

STATEMENT OF THE CASE

Appellant, Teresa Kaaz, appeals the Honorable Robert L. Spears' decision granting Dakota Range's Motion to Dismiss the case for lack of subject matter jurisdiction and insufficient service of process.

On July 23, 2018, the PUC entered a Final Decision and Order Granting Permit to Construct Wind Energy Facility (Docket EL18-003). The order granted Dakota Range a permit to construct the Dakota Range Wind Project in Grant and Codington County, South Dakota. On August 22, 2018, Appellants filed a Notice of Appeal and Certificate of Service with the Grant County Clerk of Courts in order to appeal the PUC decision to the circuit court. *App. G.*

On September 7, 2018, Dakota Range filed a Motion to Dismiss pursuant to SDCL 15-6-12(b) for lack of jurisdiction over the subject matter and insufficiency of service of process. The PUC joined Dakota Range's Motion. A motions hearing was held on October 19, 2018 before the Honorable Robert L. Spears in the Codington County Courthouse.¹ Counsel for Dakota Range, Mollie Smith, and counsel for Teresa Kaaz and Kristi Mogen², John Wiles, presented oral argument at the hearing. Judge Spears issued his Memorandum Opinion on October 29, 2018, granting Dakota Range's motion. Judge Spears signed Dakota Range's Findings of Fact and Conclusions of Law as well as an order dismissing the action on November 7, 2018. Notice of Entry was filed and served on November 13, 2018. Notice of Appeal to this Court was filed December 10, 2018.

¹ The Honorable Dawn Elshere was originally appointed to this case, but voluntarily recused herself due to a conflict of interest. Judge Spears was appointed in her place.

² Appellant Kristi Mogen did not wish to join in this appeal to the Supreme Court.

STANDARD OF REVIEW

“A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading...” *North American Truck & Trailer, Inc. v. M.C.I. Com. Serv., Inc.*, 751 N.W.2d 710, 712, 2008 S.D. 45, ¶ 6. Therefore, circuit court’s ruling on a motion to dismiss a pleading is reviewed de novo, with no deference to the circuit court’s determination. *Id.* The Supreme Court’s review of issues regarding jurisdiction of the circuit court is a question of law that is reviewed de novo. *Hyde v. Sully Cty. Bd. of Adjustment*, 886 N.W.2d 355, 357, 2016 S.D. 65, ¶ 5. A circuit court’s findings of fact are reviewed under the clearly erroneous standard. SDCL 15-6-52(a), *Interest of A.B.*, 880 N.W.2d 95, 101, 2016 S.D. 44, ¶ 16.

ARGUMENT

I. Whether Dakota Range I, LLC, Dakota Range II, LLC, and PUC Staff were timely served with Appellants’ Appeal.

“An appeal shall be allowed in the circuit court to any party in a contested case from a final decision, ruling, or action of an agency.” SDCL 1-26-30.2. The procedure to be followed is stated in SDCL 1-26-31:

“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.” (Emphasis added).

Under SDCL 49-41B-17(1), parties to a proceeding by the PUC for energy conversion and transmission include: “(1) The Public Utilities Commission and applicant; (2) Each municipality, county and governmental agency in the area where the facility is proposed

to be sited...; and (3) Any person residing in the area where the facility is proposed to be sited... or any interested person...”

The rules of Title 15 relating to procedure in the circuit courts apply to appeals taken under SDCL 1-26. SDCL 1-26-32.1. Service is made as follows: “...Service by mail shall be by first class mail and is complete upon mailing...” SDCL 15-6-5(b).

The PUC’s decision was served on July 23, 2018. Thirty days from that date is August 22, 2018. There is no dispute that August 22 was the deadline for service of the Notice of Appeal. *MHT pg. 5, lines 6-8. App. K, pg. 59.* The Notice of Appeal and Certificate of Service were filed simultaneously on August 22, 2018. *App. G.*

a. The PUC, Grant County, Codington County and all intervenors of record were timely served by admission of service.

The PUC was the agency that made the decision from which this appeal stems. They are required to be served pursuant to SDCL 1-26-31. On August 22, 2018, the executive director of the PUC, Patricia Van Gerpen, was served by Admission of Service. *App. H, pg. 39.* Grant County was served by admission of service upon Karen Layher, the county auditor. *App. H, pg. 40.* Codington County was served by admission of service upon its county auditor, Cindy Brugman. *App. H, pg. 41.* All parties granted party status pursuant to the PUC’s Order were served with the Notice of Appeal and signed admissions of service. *App. I.*

Therefore, service was timely made upon the PUC, the counties involved, and interested parties pursuant to SDCL 1-26-31 and 49-41B-17(1).

b. The Applicant, Dakota Range, was timely served by First Class United States Mail.

Dakota Range were served through their registered service agent, Cogency Global, Inc., located in Pierre, South Dakota. As indicated during the Motions Hearing,

Wiles contacted the agent for service of process for Dakota Range prior to filing the Notice of Appeal. They indicated that they would not sign an admission of service, and that they accepted service only through the Sheriff. *MHT pg. 17, lines 9-13. App. K, pg. 60.* A letter signed by counsel for Appellants, John C. Wiles, as well as two copies of the Notice of Appeal were mailed by First Class United States Mail on August 22, 2018 to the Hughes County Sheriff's Office for service upon Dakota Range. *App. J, pg. 54.* Service of a notice of appeal by mail is deemed complete upon mailing. *Bison Township v. Perkins County*, 640 N.W.2d 503, 506, 2002 S.D. 22, ¶12. Therefore, service upon Dakota Range was made within the statutory period, notwithstanding that the Hughes County Sheriff did not complete service upon the registered agent until August 28, 2018. *App. J, pgs. 55-56.*

c. Counsel for Dakota Range and PUC Staff were not required to be served under SDCL 1-26-31.

Under SDCL 1-26-31, service upon counsel for the applicant, Smith, was not required. Smith appeared as counsel for Dakota Range during the underlying hearing before the PUC. However, because this case was not initiated until after the notice of appeal was filed, Smith was not "counsel of record." In addition, PUC Staff and their attorney, Edwards, were not a party to the underlying proceeding pursuant to SDCL 49-41B-17(1) or 1-26-31. Neither one of those statutes lists PUC Staff as a party to the hearing that is required to be served with a notice of appeal. The PUC Staff is not the agency that heard the application, nor an adverse party to the proceeding. "Adverse" is defined as "... [h]aving an opposing or contrary interest, concern, or position...." *Adverse*, Black's Law Dictionary (10th ed. 2014). The PUC Staff will not be adversely affected by the reversal of the PUC decision. The only party with an adverse interest is

Dakota Range because they applied for a permit to construct a wind energy facility. Even so, Smith and Edwards were provided a copy of the Notice of Appeal by e-mail on August 22, 2018 as a courtesy. *App. J, pg. 57.*

II. Whether the Appellant timely filed Notice of Appeal with proof of service in the office of the Grant County Clerk of Courts.

“An attorney's certificate of service, the written admission of service by the party or his attorney or an affidavit shall be sufficient proof of service.” SDCL 15-6-5(b). An attorney’s certificate of service is sufficient proof of service. *State v. Waters*, 472 N.W.2d 524, 525 (S.D. 1991). “When an attorney files a certificate of service...a presumption arises as to the sufficiency of the service.” *Id.*

The Notice of Appeal was filed August 22, 2018 in the Grant County Clerk of Courts Office. *App. G.* The Certificate of Service was attached and filed simultaneously with the Notice of Appeal. *App. G, pgs. 37-38.* The Certificate of Service was signed by Wiles. *App. G, pg. 37.* Therefore, both the Notice of Appeal and required proof of service were timely filed within the statutory requirements for an administrative appeal to the circuit court.

CONCLUSION

In conclusion, all parties required to be served under SDCL 1-26-31 and SDCL 49-41B-17(1) were timely served with the notice of appeal in this case. The Notice of Appeal and Proof of Service were timely filed with the clerk on August 22, 2018. For these reasons, Judge Spears’ decision should be reversed.

The Appellant respectfully requests oral argument on this matter.

Dated this 31st day of January, 2019.

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CERTIFICATE OF COMPLIANCE

I, John C. Wiles, certify that Appellant's Brief complies with the type volume limitation provided in SDCL 15-26A-66. The Appellant's Brief is six (6) pages in length and contains 1,627 words and 9,697 characters. It is typed in proportionally spaced typeface, Times New Roman 12 point font. I relied upon the word or character count of my word-processing system used to prepare the Brief.

Dated this 31st day of January, 2019.

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CERTIFICATE OF SERVICE

I, John C. Wiles, hereby certify that on the 31st day of January, 2019 I mailed the original "APPELLANT'S BRIEF" and Appendix as well as two (2) copies of the same to the Supreme Court at the address below and emailed a Word version of the Brief, along with a PDF version of the Appendix to the following addresses:

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