

IN THE SUPREME COURT
OF THE
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 EL18-003**

Appeal from the Circuit Court
Third Judicial Circuit
Grant County, South Dakota
The Honorable Robert L. Spears

**APPELLEES DAKOTA RANGE I, LLC AND DAKOTA RANGE II, LLC'S
BRIEF**

John C. Wiles & Lindsay A. Martin
Wiles & Rylance
3 East Kemp, Suite 200
P.O. Box 227
Watertown, SD 57201
Attorneys for Appellant, Teresa Kaaz

Mollie M. Smith & Lisa M. Agrimonti
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425

Karen E. Cremer
500 E. Capitol Ave
Pierre, SD 57501
*Attorneys for Appellee, South Dakota
Public Utilities Commission*

Lee Schoenbeck & Joseph Erickson
Schoenbeck Law, PC
P.O. Box 1325
Watertown, SD 57201
*Attorneys for Appellees, Dakota Range I,
LLC and Dakota Range II, LLC*

Kristen Edwards
500 E. Capitol Ave.
Pierre, SD 57501
*Attorneys for Appellee, South Dakota
Public Utilities Commission Staff*

Notice of Appeal filed on December 10, 2018

TABLE OF CONTENTS

Table of Contents	ii
Table of Authorities	iii
Preliminary Statement.....	1
Jurisdictional Statement	1
Statement of Legal Issues and Authorities.....	2
Statement of the Case.....	3
Statement of the Facts	3
Standard of Review.....	5
Argument	6
1. Appellant Failed To Serve A Copy Of The Notice Of Appeal Upon Each Adverse Party Before The Statutory Appeal Deadline.	9
a. Appellant failed to serve Dakota Range until six days after the statutory deadline.....	10
b. Commission Staff is an adverse party and Appellant’s failure to serve Commission Staff before the statutory deadline is a jurisdictional flaw fatal to the appeal.....	12
2. Appellant Failed To File The Requisite Proof Of Service With The Notice of Appeal Prior To The Statutory Deadline.....	15
a. The Wiles Certificate of Service contains multiple inaccuracies and does not constitute the requisite proof of service.....	15
b. Mr. Wiles’ Certificate of Service cannot be used to attest to the actions of others.....	17
Conclusion	18
Certificate of Compliance	19
Certificate of Service	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>AEG Processing Ctr. No. 58, Inc. v. S. Dakota Dep’t of Revenue & Regulation,</i> 2013 S.D. 75, 838 N.W.2d 843.....	2, 5, 6, 7
<i>Bison Twp. v. Perkins Cty.,</i> 2002 S.D. 22, 640 N.W.2d 503.....	11
<i>Hardy v. W. Cent. Sch. Dist. No. 49-7,</i> 478 N.W.2d 832 (S.D. 1991).....	7
<i>Hein v. Marts,</i> 295 N.W.2d 167 (S.D. 1980).....	7
<i>In re Reese Trust,</i> 2009 S.D. 111, 776 N.W.2d 832.....	9
<i>Lake Hendricks Improvement Ass’n v. Brookings Cnty. Planning & Zoning Comm’n,</i> 2016 S.D. 17, 877 N.W.2d 99.....	2, 10, 13
<i>Long v. Knight Const. Co.,</i> 262 N.W.2d 207 (S.D. 1978).....	9
<i>Madsen v. Preferred Painting Contractors,</i> 89 S.D. 397, 233 N.W.2d 575 (S.D. 1975).....	11
<i>Matter of PUC Docket HP 14-0001,</i> 2018 S.D. 44, 914 N.W.2d 550.....	2, 6, 7, 8
<i>Meisel v. Piggly Wiggly Corp.,</i> 418 N.W.2d 321 (S.D. 1988).....	12
<i>Morrell Livestock Co. v. Stockman’s Comm’n Co.,</i> 77 S.D. 114, 86 N.W.2d 533 (1957).....	2, 9, 10, 13, 14
<i>Rabo Agrifinance, Inc. v. Rock Creek Farms,</i> 2012 S.D. 20, 813 N.W.2d 122.....	2, 9, 13
<i>Schreifels v. Kottke Trucking,</i> 2001 S.D. 90, 631 N.W.2d 186.....	2, 6, 7, 16
<i>Slama v. Landmann Jungman Hosp.,</i> 2002 S.D. 151, 654 N.W.2d 826.....	3, 7, 16

<i>Stark v. Munce Bros. Transfer & Storage</i> , 461 N.W.2d 587 (S.D. 1990)	2, 3, 7, 9, 16
<i>State v. Waters</i> , 472 N.W.2d 524 (S.D. 1991)	3, 18
<i>Upell v. Dewey Cty. Comm’n</i> , 2016 S.D. 42, 880 N.W.2d 69	5, 7, 9
<i>Vitek v. Bon Homme Cty. Bd. of Comm’rs</i> , 2002 S.D. 100, 650 N.W.2d 513	11
<i>W. States Land & Cattle Co. v. Lexington Ins. Co.</i> , 459 N.W.2d 429 (S.D. 1990)	9
<i>Wisland v. Admiral Beverage Corp.</i> , 119 F.3d 733 (8th Cir. 1997)	12
Statutes	
SDCL 1-26-31	2, 3, 6, 8, 12, 15, 16, 17, 18
SDCL 1-26-32.1	6, 11
SDCL 15-6-5(b)	2, 3, 11, 12
SDCL 15-6-12(b)(1) and (4)	5
SDCL 15-6-81(c)	6
SDCL 15-26A-3(1)	2
SDCL 15-26A-66(b)	19
SDCL 49-41B-17	2, 13
SDCL 49-41B-30	6
Other Authorities	
BLACK’S LAW DICTIONARY (10th ed. 2014)	10
<i>In the Matter of the Application of Crowned Ridge Wind II, LLC for a Facility Permit to Construct a 230 kV Transmission Line and Associated Facilities in Codington County</i> , South Dakota Public Utilities Commission Docket EL18-019	14

PRELIMINARY STATEMENT

The Appellant, Teresa Kaaz, will be referred to as “Appellant” or “Kaaz.” Appellees, Dakota Range I, LLC and Dakota Range II, LLC, will be jointly referred to as “Dakota Range.” Appellee, the South Dakota Public Utilities Commission, will be referred to as the “Commission.” Appellee, the South Dakota Public Utilities Commission Staff, will be referred to as the “Commission Staff.” The Notice of Appeal and Certificate of Service filed by Appellant’s counsel, John C. Wiles (“Mr. Wiles”), on behalf of Appellant and Kristi Mogen on August 22, 2018 to initiate the above-captioned case in the circuit court will be referred to as the “Notice of Appeal” and the “Wiles Certificate of Service,” respectively. Excerpts from the transcript of the motion hearing held before the Circuit Court for the South Dakota Third Judicial Circuit, Grant County (Hon. Robert L. Spears), on October 19, 2018 will be designated as (“MHT ___”) followed by the appropriate Appendix page number(s). The citations to the record correspond to the pages of the certified record on this appeal and are designated below as (“R. ___”). Certain pleadings and other items are reproduced in the Appendix and are referenced by their Appendix page number(s) as (“App. ___”).

JURISDICTIONAL STATEMENT

Appellant Kaaz appeals the Findings of Fact, Conclusions of Law and Order (“Order”) entered on November 13, 2018 by the Honorable Robert L. Spears of the Circuit Court for the South Dakota Third Judicial Circuit, Grant County, that dismissed for lack of subject matter jurisdiction Appellant’s Administrative Procedure Act appeal from the Commission’s July 23, 2018 Final Decision and Order Granting Permit to Construct Wind Energy Facility (“Final Decision”). Appellant filed a Notice of Appeal

of the circuit court's Order on December 10, 2018. (R. 1522.) The Order is reviewable by this Court pursuant to SDCL 15-26A-3(1).

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

1a. Whether Appellant served a copy of the Notice of Appeal upon Dakota Range within the thirty-day deadline in SDCL 1-26-31?

The Circuit Court found that Appellant failed to timely serve the Notice of Appeal upon Dakota Range before the statutory deadline, thereby depriving the court of subject matter jurisdiction and requiring dismissal of the appeal.

SDCL 1-26-31

SDCL 15-6-5(b)

AEG Processing Ctr. No. 58, Inc. v. S. Dakota Dep't of Revenue & Regulation, 2013 S.D. 75, 838 N.W.2d 843

Matter of PUC Docket HP 14-0001, 2018 S.D. 44, 914 N.W.2d 550

Schreifels v. Kottke Trucking, 2001 S.D. 90, 631 N.W.2d 186

Stark v. Munce Bros. Transfer & Storage, 461 N.W.2d 587 (S.D. 1990)

1b. Whether Appellant's failure to serve a copy of the Notice of Appeal upon Commission Staff was a jurisdictional flaw requiring dismissal?

The Circuit Court found that Commission Staff was an adverse party upon whom service of a copy of the Notice of Appeal within the statutory time period was required, and Appellant's failure to serve Commission Staff was a jurisdictional flaw depriving the court of subject matter jurisdiction and requiring dismissal of the appeal.

SDCL 1-26-31

SDCL 49-41B-17

Lake Hendricks Improvement Ass'n v. Brookings Cnty. Planning & Zoning Comm'n, 2016 S.D. 17, 877 N.W.2d 99

Morrell Livestock Co. v. Stockman's Comm'n Co., 77 S.D. 114, 86 N.W.2d 533 (1957)

Rabo Agrifinance, Inc. v. Rock Creek Farms, 2012 S.D. 20, 813 N.W.2d 122

Stark v. Munce Bros. Transfer & Storage, 461 N.W.2d 587 (S.D. 1990)

2. Whether Appellant filed with the Notice of Appeal the requisite proof of service of the Notice of Appeal on the parties before the thirty-day deadline in SDCL 1-26-31?

The Circuit Court found that Appellant failed to timely file the Notice of Appeal with the requisite proof of service, thereby depriving the court of subject matter jurisdiction and requiring dismissal of the appeal.

SDCL 1-26-31

SDCL 15-6-5(b)

Slama v. Landmann Jungman Hosp., 2002 S.D. 151, 654 N.W.2d 826

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

STATEMENT OF THE CASE

This case is an appeal brought by Appellant Kaaz from the Order entered on November 13, 2018 in Case No. 25CIV18-000070 by the Honorable Robert L. Spears of the Circuit Court for the South Dakota Third Judicial Circuit, Grant County, dismissing for lack of subject matter jurisdiction Appellant's Administrative Procedure Act appeal from the South Dakota Public Utilities Commission's July 23, 2018 Final Decision granting Dakota Range a permit to construct the Dakota Range Wind Project.

STATEMENT OF THE FACTS

On July 23, 2018, the Commission issued and served on all parties its Final Decision granting Dakota Range a permit to construct the Dakota Range Wind Project. (Final Decision, App. 3-20.) Pursuant to SDCL 1-26-31, an appeal of the Commission's Final Decision had to be filed in circuit court and served on the agency and all parties within thirty days, which was no later than August 22, 2018. (MHT, App. 55.)

On August 22, 2018, Appellant and Ms. Kristi Mogen¹ filed a Notice of Appeal and the Wiles Certificate of Service with the Grant County Clerk of Courts to appeal the Commission's Final Decision. (Notice of Appeal and Wiles Certificate of Service, App. 29-32.) The Wiles 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.

(Wiles Certificate of Service, App. 31.)

Service of the Notice of Appeal was not accomplished as represented by Mr. Wiles in the Wiles Certificate of Service. First, Appellant sent copies of the Notice of Appeal via first class mail to the Hughes County Sheriff's Office on August 22, 2018. (MHT, App. 57; Letter to Sheriff, App. 46.) The Notice of Appeal came into Sheriff Michael Leidholt's hand for service on August 24, 2018. (Sheriff's Returns of Personal Service, App. 47-48.) Dakota Range's Registered Agent, Cogency Global Inc., was not served with the Notice of Appeal until August 28, 2018. (Sheriff's Returns of Personal Service, App. 47-48; *see also* Affidavit of Melissa Tomelden, App. 52.) Second, the Notice of Appeal was not served on either Ms. Mollie M. Smith, counsel for Dakota Range, or Ms. Kristen Edwards, an attorney for the Commission Staff. (Affidavit of

¹ Ms. Mogen did not join Appellant's appeal to this Court. (Appellant's Brief at 1, n. 2.)

Mollie M. Smith, App. 49-50; MHT, App. 56-57; *see also* Appellant’s Brief at 4-5.) Rather, they were sent courtesy copies of the Notice of Appeal via e-mail. (MHT, App. 56-57; Appellant’s Brief at 5.)

On September 7, 2018, Dakota Range filed and served a Motion to Dismiss pursuant to SDCL 15-6-12(b)(1) and (4) for lack of jurisdiction and insufficiency of service of process (“Motion to Dismiss”). (R. 32.) On September 28, 2018, the Commission filed a Joinder of Dakota Range’s Motion to Dismiss. (R. 1360.) On October 15, 2018, Appellant (untimely) filed a Brief in Opposition to the Motion to Dismiss. (Memorandum Opinion, App. 61, n.1; *see also* R. 1367-71.) On October 17, 2018, Dakota Range filed its Reply Brief. (R. 1390-96.)

The matter came before the Honorable Robert L. Spears on October 19, 2018. (MHT, App. 54.) Judge Spears filed the Memorandum Opinion on October 29, 2018, granting Dakota Range’s Motion to Dismiss. (Memorandum Opinion, App. 60-67.) Judge Spears signed the Findings of Fact, Conclusions of Law and Order dismissing the action for lack of subject matter jurisdiction on November 7, 2018. (Notice of Entry and Signed Findings of Fact, Conclusions of Law and Order, App. 77.) The Order was entered and served on all parties on November 13, 2018. (Notice of Entry, App. 68-71.) Appellant filed a Notice of Appeal to this Court on December 10, 2018. (R. 1522.)

STANDARD OF REVIEW

The South Dakota Supreme Court reviews a dismissal for lack of jurisdiction as a question of law under the de novo standard of review. *Upell v. Dewey Cty. Comm’n*, 2016 S.D. 42, ¶ 9, 880 N.W.2d 69, 72. Statutory interpretation is a question of law, reviewed de novo. *Upell*, 2016 S.D. 42, ¶ 9, 880 N.W.2d at 72. A circuit court’s findings of fact are reviewed under the clearly erroneous standard. *AEG Processing Ctr.*

No. 58, Inc. v. S. Dakota Dep't of Revenue & Regulation, 2013 S.D. 75, ¶ 5, n. 1, 838 N.W.2d 843, 846, n. 1.

ARGUMENT

No right to appeal an administrative decision to circuit court exists unless the South Dakota Legislature enacts a statute creating that right. *Matter of PUC Docket HP 14-0001*, 2018 S.D. 44, ¶ 12, 914 N.W.2d 550, 555. SDCL 49-41B-30 permits “[a]ny party to a permit issuance proceeding aggrieved by the final decision of the Public Utilities Commission on an application for a permit,” to “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. “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; *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.”).

“[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,” and “[n]oncompliance deprives the court of subject-matter jurisdiction.” *Matter of PUC Docket HP 14-0001*, 2018 S.D. 44, ¶ 12, 914 N.W.2d at 555 (alterations in original); *see also Schreifels v. Kottke Trucking*, 2001 S.D. 90, ¶ 12, 631 N.W.2d 186, 189 (“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.”); *AEG Processing Ctr. No. 58*,

Inc., 2013 S.D. 75, ¶ 8, 838 N.W.2d at 847 (holding that in appeals of administrative agency decisions, “a circuit court’s appellate jurisdiction depends on compliance with statutory conditions precedent.”); *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.”); *see also Hein v. Marts*, 295 N.W.2d 167, 170 (S.D. 1980) (“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.”).² “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.*, 2002 S.D. 151, ¶ 4, 654 N.W.2d 826, 827 (citing *Schreifels*, 2001 S.D. 90, ¶ 12, 631 N.W.2d at 189); *see also Matter of PUC Docket HP 14-0001*, 2018 S.D. 44, ¶ 12, 914 N.W.2d at 555 (“Noncompliance deprives the court of subject-matter jurisdiction.”); *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.”); *Upell*, 2016 S.D. 42, ¶¶ 14-16, 880 N.W.2d at 74-75 (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). Moreover, where the circuit court lacked subject matter jurisdiction, this Court does “not acquire jurisdiction over th[e]

² This 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*, 2016 S.D. 42, ¶ 19, 880 N.W.2d at 75-76 (citing *AEG Processing Ctr. No. 58, Inc.*, 2013 S.D. 75, ¶ 23, 838 N.W.2d at 850).

subject matter by the filing of appeal from a [circuit court's] final order or judgment.”

Matter of PUC Docket HP 14-0001, 2018 S.D. 44, ¶ 12, 914 N.W.2d at 555.

SDCL 1-26-31 provides the following:

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.

There are two requirements which must be met to invoke jurisdiction of the judiciary in an administrative appeal: (1) 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,” and (2) 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.” SDCL 1-26-31.

Since the Commission served its Final Decision on July 23, 2018, the statutory deadline for Appellant to serve the Notice of Appeal upon adverse parties and file the Notice of Appeal with proof of such service was August 22, 2018. (MHT, App. 55.) Appellant failed to satisfy either requirement. With respect to service, Appellant: (1) failed to properly and timely serve Dakota Range I, LLC and Dakota Range II, LLC; and (2) failed to properly and timely serve the Commission Staff. With respect to the filing requirement, Appellant failed to file with the Notice of Appeal the requisite proof of service upon the adverse parties by the August 22, 2018 deadline. Accordingly, the Circuit Court properly dismissed this matter for lack of subject matter jurisdiction.

1. Appellant Failed To Serve A Copy Of The Notice Of Appeal Upon Each Adverse Party Before The Statutory Appeal Deadline.

Appellant's failure to serve a copy of the Notice of Appeal upon each adverse party within thirty days of service of the Commission's Final Decision is a fatal jurisdictional flaw requiring dismissal of the appeal. *See, e.g., In re Reese Trust*, 2009 S.D. 111, ¶ 14, 776 N.W.2d 832, 836 ("Failure to serve a notice of appeal on a party before the time for taking an appeal has expired is fatal to the appeal and requires its dismissal."); *Rabo Agrifinance, Inc. v. Rock Creek Farms*, 2012 S.D. 20, ¶ 11, 813 N.W.2d 122, 127 (upholding and recognizing the requirement of timely service of the notice of appeal on a party as jurisdictional and holding the lack of such service to be fatal to an appeal); *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 an appeal expired is fatal to the appeal."); *W. States Land & Cattle Co. v. Lexington Ins. Co.*, 459 N.W.2d 429, 432 (S.D. 1990) (recognizing that failure to timely serve and file the notice of appeal was jurisdictionally fatal to the appeal's validity); *Upell*, 2016 S.D. 42, ¶¶ 11-12, 880 N.W.2d at 73 (holding that failure to serve the notice of appeal on a required party is a jurisdictional defect which deprives the circuit court of subject matter jurisdiction); *Stark*, 461 N.W.2d at 588-89 (holding that failure to timely serve notice of appeal on all parties was a jurisdictional error requiring dismissal of the appeal). "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.*, 77 S.D.

114, 115, 86 N.W.2d 533, 534 (1957).³ This has been construed to include situations where reversal or modification of the judgment could adversely impact a party. *See Morrell Livestock Co.*, 77 S.D. 114, 120, 86 N.W.2d at 536 (“We are of the opinion that a reversal or modification of the judgment appealed from could adversely affect the defendant ... He is, therefore, an adverse party.”). Non-appearing adverse parties are required to be served with the notice of appeal. *Lake Hendricks Improvement Ass’n v. Brookings Cnty. Planning & Zoning Comm’n*, 2016 S.D. 17, ¶¶ 5 and 6, 877 N.W.2d 99, 101-02.

It is undisputed that Dakota Range I, LLC and Dakota Range II, LLC are adverse parties. (Appellant’s Brief at 4-5.) Further, as set forth in the Commission’s Final Decision, Commission Staff is an adverse party upon whom service of the Notice of Appeal was required. (Final Decision, App. 6.) Appellant’s failure to serve Dakota Range and Commission Staff before the statutory deadline is a jurisdictional error requiring dismissal of the appeal.

a. Appellant failed to serve Dakota Range until six days after the statutory deadline.

Appellant failed to properly serve a copy of the Notice of Appeal upon Dakota Range I, LLC and Dakota Range II, LLC within thirty days after the Commission served notice of the Final Decision. By Appellant’s own admission, she did not serve Dakota Range’s counsel with the Notice of Appeal. (MHT, App. 56-57; Appellant’s Brief at 4-5.) Therefore, the only manner by which service of the Notice of Appeal could have been made was by service upon Dakota Range or its registered agent.

³ *See also* adverse party, BLACK’S LAW DICTIONARY (10th ed. 2014) (An “adverse party” is “[a] party whose interests in a transaction, dispute, or lawsuit are opposed to another party’s interests.”).

SDCL 15-6-5(b) contains the applicable requirements for service. *See* SDCL 1-26-32.1.⁴ SDCL 15-6-5(b) provides that “[s]ervice ... *upon a party* shall be made by *delivering a copy to him or by mailing it to him* at his last known address” via first class mail. (Emphasis added). Thus, Appellant could have delivered a copy of the Notice of Appeal to Dakota Range or its registered agent by August 22, 2018, or could have mailed the Notice of Appeal to Dakota Range or its registered agent by August 22, 2018. Appellant did not do either.

Appellant contends that she completed service upon Dakota Range when she sent copies of the Notice of Appeal via first class mail to the Hughes County Sheriff’s Office on August 22, 2018. (Appellant’s Brief at 4.) However, mailing to a third person – not Dakota Range or its authorized agent – does not meet the statutory requirement to perfect an administrative appeal. Per SDCL 15-6-5(b), service by first class mail is complete upon mailing, but such service “shall be made by ... *mailing it to [the party] at his last known address[.]*” SDCL 15-6-5(b) (emphasis added). Service by mail must be sent to the party upon whom service is sought – not to someone else for delivery to the party at a future unspecified date. *See* SDCL 15-6-5(b); *see also Madsen v. Preferred Painting Contractors*, 89 S.D. 397, 401, 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.”). Here, Appellant did not mail the Notice of Appeal directly to Dakota Range or to its registered agent, but rather to the Hughes

⁴ In an analogous situation involving appeals (through filing of notices of appeal) from decisions of a county commission, this Court has held that service of a notice of appeal falls within SDCL 15-6-5, which governs the service and filing of pleadings and other papers. *See Bison Twp. v. Perkins Cty.*, 2002 S.D. 22, ¶ 12, 640 N.W.2d 503, 506; *Vitek v. Bon Homme Cty. Bd. of Comm’rs*, 2002 S.D. 100, ¶¶ 12-14, 650 N.W.2d 513, 517-18.

County Sheriff's Office. (Letter to Sheriff, App. 46; MHT, App. 57.) Thus, Appellant's argument is not supported by the plain language of SDCL 15-6-5(b).

Appellant's letter and attached Notices of Appeal are thus better considered a *request* for the sheriff to serve Dakota Range's registered agent, which did not even come into the hands of the sheriff for service until August 24, 2018 – two days after the deadline for appeal. (Sheriff's Returns of Personal Service, App. 47-48); *see also Wisland v. Admiral Beverage Corp.*, 119 F.3d 733, 735, 737 (8th Cir. 1997) (applying South Dakota law and holding that when service by sheriff is used to serve a summons and complaint, they are considered delivered to the sheriff for service when they are *delivered into the hands of the sheriff*, not when they are posted in the mail to the sheriff); *see also Meisel v. Piggly Wiggly Corp.*, 418 N.W.2d 321, 323 (S.D. 1988) (“the summons must be delivered to the sheriff on or before the last day for commencement of the action.”). Appellant admits that Dakota Range's registered agent was not personally served with the Notice of Appeal until August 28, 2018 – six days after the thirty-day deadline to file and serve a notice of appeal specified in SDCL 1-26-31. (Appellant's Brief at 4.) As a result, Dakota Range was not served by the statutory deadline, and the circuit court properly concluded that it lacked jurisdiction over the appeal.

b. Commission Staff is an adverse party and Appellant's failure to serve Commission Staff before the statutory deadline is a jurisdictional flaw fatal to the appeal.

By Appellant's own admission, Appellant's counsel did not serve the Commission Staff with the Notice of Appeal; rather, they provided Ms. Edwards, counsel for the Commission Staff, with a courtesy copy of the Notice of Appeal on August 22, 2018. (MHT, App. 56-57; Appellant's Brief at 4-5.) SDCL 1-26-31 requires that the Notice of Appeal be served upon all adverse parties within thirty days after service of the

Commission’s final decision. “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.*, 77 S.D. 114, 115, 86 N.W.2d at 534; *see also, e.g., Rabo Agrifinance, Inc. v. Rock Creek Farms*, 2012 S.D. 20, ¶ 14, 813 N.W.2d 122, 128 (“United States was named as a party defendant, served as a party defendant, answered as a party defendant, and appeared and participated in the case below. Clearly, the United States was a party entitled to service of the notice of appeal.”). This has been construed to include situations where reversal or modification of the judgment *could* adversely impact a party, even those who had not appeared. *See Morrell Livestock Co.*, 77 S.D. 114, 119-20, 86 N.W.2d at 536; *see also Lake Hendricks Improvement Ass'n*, 2016 S.D. 17, ¶ 5, 877 N.W.2d at 101.

Appellant’s argument that SDCL 49-41B-17 should be interpreted as an exclusive list of parties to a Commission proceeding is contrary to the plain language of the statute. SDCL 49-41B-17 does not purport to limit parties to a Commission proceeding regarding energy conversion and transmission facilities to those expressly listed. *See* SDCL 49-41B-17 (“[P]arties to a proceeding under this chapter *unless otherwise provided* include ...”) (emphasis added). As stated in the Commission’s Final Decision, Commission Staff participated as a party in the underlying proceeding. (Final Decision, App. 6 (“Commission staff fully participated as a party in this matter, in accordance with SDCL 49-41B-17(1)”).) As the Commission’s Counsel Ms. Karen Cremer explained, the Commission “sits as the judge,” Staff is completely separate from the Commission, and Staff is a party to the proceedings – “[e]x parte rules are followed. Lines are not crossed.

Staff does not talk to the commission or its advisors and attorneys ... They are a party.” (MHT, App. 59.)

Further, Appellant’s claim that the Commission did not grant “party status” to Commission Staff in its April 6, 2018 Order Granting Party Status and Establishing Procedural Schedule ignores the fact that the Commission’s April 6, 2018 order contemplated applications for party status by those who were not already parties, but wished to “intervene” in the proceeding. (Order Granting Party Status and Establishing Procedural Schedule, App. 1-2; MHT, App. 58.) Appellant further ignores that Commission Staff is listed in the procedural schedule portion of that Order alongside the other “parties” (Applicant and Intervenors). (Order Granting Party Status and Establishing Procedural Schedule, App. 1-2.) Lastly, Appellant listed Commission Staff as a party in its own Notice of Appeal. (Notice of Appeal, App. 29.) As a full participant in the underlying proceeding, reversal or modification of the Commission’s Final Decision could adversely impact Commission Staff. *See Morrell Livestock Co.*, 77 S.D. 114, 119-20, 86 N.W.2d at 536.⁵ Accordingly, Appellant’s failure to serve Commission Staff before the statutory deadline is a jurisdictional error requiring dismissal of the appeal.

⁵ Commission Staff’s role and interest in the underlying proceeding is further illustrated by the fact that Commission Staff can and does enter into settlement stipulations that contain negotiated permit conditions between the parties – i.e., the applicant and Commission Staff – and jointly moves with the applicant for Commission approval. (*See, e.g., In the Matter of the Application of Crowned Ridge Wind II, LLC for a Facility Permit to Construct a 230 kV Transmission Line and Associated Facilities in Codington County*, Commission Docket EL18-019, Joint Motion for Approval of Settlement Stipulation and Settlement Stipulation (January 8, 2019), App. 78-86.)

2. Appellant Failed To File The Requisite Proof Of Service With The Notice of Appeal Prior To The Statutory Deadline.

In addition to the defective service discussed above, Appellant failed to file the requisite proof of service of the Notice of Appeal within thirty days after the Commission served notice of its Final Decision. 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). The Wiles Certificate of Service accompanying Appellant’s Notice of Appeal contains multiple misrepresentations and cannot be relied upon as evidence that service was timely made. Further, Appellant’s counsel’s assertions in the Wiles Certificate of Service regarding the acts of others do not provide sufficient proof of service.

a. The Wiles Certificate of Service contains multiple inaccuracies and does not constitute the requisite proof of service.

Service of the Notice of Appeal was not accomplished as represented by Appellant’s counsel, Mr. Wiles, in the Wiles Certificate of Service.

First, Appellant’s counsel purports to have served Dakota Range “on the 22nd day of August, 2018” “by service of Hughes County Sheriff upon Cogency Global Inc.” (Wiles Certificate of Service, App. 31.) This is simply not true. In reality, as Appellant admits, Appellant’s counsel merely sent the Notice of Appeal to the sheriff on August 22, 2018, who did not serve Dakota Range’s registered agent, Cogency Global Inc., until August 28, 2018. (Letter to Sheriff, App. 46; Sheriff’s Returns of Personal Service, App. 47-48; MHT, App. 57; *see also* Appellant’s Brief at 4.) Thus, Dakota Range was not served as represented by Mr. Wiles in the Wiles Certificate of Service.

Second, Appellant has also conceded, contrary to Mr. Wiles’ certified statement, that counsel for Dakota Range and Commission Staff were not served “on the 22nd day

of August, 2018” “by electronic e-file transmittal.” (Wiles Certificate of Service, App. 31; MHT, App. 56-57; Appellant’s Brief at 4-5.) Directly contradicting his certified statement, Appellant’s counsel admits he did not “serve” Ms. Smith or Ms. Edwards with the Notice of Appeal – rather, he simply provided courtesy copies. (MHT, App. 56-57; Appellant’s Brief at 4-5.)

Third, Mr. Wiles states in the Wiles Certificate of Service that the Notice of Appeal was served upon Karen Layher, Grant County Auditor, by Admission of Service on August 22, 2018. (Wiles Certificate of Service, App. 31.) However, as shown by Ms. Layher’s Admission of Service, Ms. Layher admitted service on August 23, 2018. (Admission of Service, App. 35.)

Given the misstatements, the Wiles Certificate of Service cannot be relied upon as the requisite “proof of such service” that must be filed with the Notice of Appeal pursuant to SDCL 1-26-31. Accordingly, Appellant failed to meet the requirements of SDCL 1-26-31 to perfect the appeal and the Circuit Court properly dismissed the appeal. *See Slama*, 2002 S.D. 151, ¶ 4, 654 N.W.2d at 827 (“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*, 2001 S.D. 90, ¶ 7, 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”) (internal citations omitted); *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.”).

b. Mr. Wiles' Certificate of Service cannot be used to attest to the actions of others.

In the Wiles Certificate of Service, Mr. Wiles attempted to attest to what *others* purportedly did to complete service, not what he had done personally. Others signed the Admissions of Service, not Mr. Wiles. (Admissions of Service, App. 33-45.) Others eventually (and untimely) served Dakota Range, not Mr. Wiles. (Sheriff's Returns of Personal Service, App. 47-48.) However, the proof of service required to satisfy SDCL 1-26-31 is the actual signed Admissions of Service and the Sheriff's Return of Personal Service. If it were not, then there would have been no need for Mr. Wiles to obtain signed admissions of service or to request a return of personal service from the Hughes County Sheriff. Despite the clear language of SDCL 1-26-31 requiring filing of not only the Notice of Appeal, but also "proof of such service" by the appeal deadline, none of the Admissions of Service were filed with the circuit court by August 22, 2018. (Admissions of Service, App. 33-45.) Most were filed on August 27, 2018 – several days after the appeal deadline. (Admissions of Service, App. 34-45.) 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. (Sheriff's Returns of Personal Service, App. 47-48.) Moreover, the inaccuracies in the Wiles Certificate of Service demonstrate specifically why one should not be allowed to attest to the acts of others.

Appellant contends that the Wiles Certificate of Service, filed along with the Notice of Appeal on August 22, 2018, provides a presumption of proof of service. (Appellant's Brief at 5.) However, even if true, that presumption has been soundly refuted by the evidence and admissions of inaccuracies in the Wiles Certificate of

Service. *See State v. Waters*, 472 N.W.2d 524, 525 (S.D. 1991) (acknowledging that a party could submit evidence or argument to refute a certificate of service).

For the reasons noted above, Appellant did not file the requisite proof of service of the Notice of Appeal on the parties to the Commission proceeding by the statutory deadline. Thus, Appellant failed to meet the requirements of SDCL 1-26-31 to perfect the appeal and the Circuit Court was correct to dismiss the appeal.

CONCLUSION

Based on the foregoing, Dakota Range respectfully requests that the Court affirm the Circuit Court's Order dismissing the appeal for lack of subject matter jurisdiction.

DATED this 21st day of February, 2019.

Respectfully submitted,

/s/ Mollie M. Smith

Mollie M. Smith (#4798)
Lisa M. Agrimonti (#3964)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Telephone: 612-492-7000
Facsimile: 612-492-7077
msmith@fredlaw.com
lagrimonti@fredlaw.com

and

Lee Schoenbeck
Joseph Erickson
SCHOENBECK LAW, PC
P.O. Box 1325
Watertown, SD 57201
Telephone: 605-886-0010
lee@schoenbecklaw.com
joe@schoenbecklaw.com
*Attorneys for Appellees Dakota Range I,
LLC and Dakota Range II, LLC*

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements provided for in SDCL 15-26A-66(b). This brief was prepared using Microsoft Word 2010, with 12 point Times New Roman font. This brief contains 5,169 words, excluding table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificates of counsel. I relied on the word count feature in Microsoft Word 2010 to prepare this certificate.

DATED this 21st day of February, 2019.

/s/ Mollie M. Smith

Mollie M. Smith (#4798)
FREDRIKSON & BYRON, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
Telephone: 612-492-7000
msmith@fredlaw.com
*Attorneys for Appellees Dakota Range I,
LLC and Dakota Range II, LLC*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 21st day of February, 2019, true and correct copies of *Appellees Dakota Range I, LLC and Dakota Range II, LLC's Brief* were served electronically on the following persons:

Ms. Karen E. Cremer – Representing the Commission Special Assistant Attorney General South Dakota Public Utilities Commission 500 E. Capitol Ave. Pierre, SD 57501 Karen.cremer@state.sd.us	Ms. Kristen Edwards – Representing Commission Staff Staff Attorney South Dakota Public Utilities Commission 500 E. Capitol Ave. Pierre, SD 57501 Kristen.edwards@state.sd.us
Mr. Lee Schoenbeck – Co-Counsel for Dakota Range I, LLC and Dakota Range II, LLC Schoenbeck Law, P.C. P.O. Box 1325 Watertown, SD 57201 lee@schoenbecklaw.com	Mr. Joseph Erickson – Co-Counsel for Dakota Range I, LLC and Dakota Range II, LLC Schoenbeck Law, P.C. P.O. Box 1325 Watertown, SD 57201 joe@schoenbecklaw.com
Ms. Lindsay Martin – Representing Teresa Kaaz Wiles & Rylance 3 East Kemp, Suite 200 P.O. Box 227 Watertown, SD 57201-0227 lindsay@wilesandrylance.com	Mr. John C. Wiles – Representing Teresa Kaaz Wiles & Rylance 3 East Kemp, Suite 200 P.O. Box 227 Watertown, SD 57201-0227 jcw@wilesandrylance.com

And on the 21st day of February, 2019, two (2) true and correct copies of *Appellees Dakota Range I, LLC and Dakota Range II, LLC's Brief* were served upon the following persons via First Class U.S. Mail, postage prepaid:

Ms. Karen E. Cremer – Representing the Commission Special Assistant Attorney General South Dakota Public Utilities Commission 500 E. Capitol Ave. Pierre, SD 57501	Ms. Patricia Van Gerpen Executive Director South Dakota Public Utilities Commission 500 E. Capitol Ave. Pierre, SD 57501
Ms. Kristen Edwards – Representing Commission Staff Staff Attorney South Dakota Public Utilities Commission 500 E. Capitol Ave. Pierre, SD 57501	Mr. Lee Schoenbeck & Mr. Joseph Erickson – Co-Counsel for Dakota Range I, LLC and Dakota Range II, LLC Schoenbeck Law, P.C. P.O. Box 1325 Watertown, SD 57201

Mr. John C. Wiles & Ms. Lindsay A. Martin – Representing Teresa Kaaz Wiles & Rylance 3 East Kemp, Suite 200 P.O. Box 227 Watertown, SD 57201-0227	Ms. Karen Layher Auditor Grant County 210 E. Fifth Ave. Milbank, SD 57252
Ms. Cindy Brugman Auditor Codington County 14 First Ave., SE Watertown, SD 57201	Diane Redlin 305 W. Lakefront Drive South Shore, SD 57263
Jared Krakow 16460 470th Ave. Strandburg, SD 57265	Kevin Krakow 16462 470th Ave. Strandburg, SD 57265
Matt Whitney 16450 462nd Ave. Watertown, SD 57201	Timothy Lindgren 16050 464th Ave. South Shore, SD 57263
Linda Lindgren 16050 464th Ave. South Shore, SD 57263	Kelly Owen 15629 468th Ave. Stockholm, SD 57264
Wade Bauer 15371 459th Ave. South Shore, SD 57263	Patricia Meyer 15452 486th Ave. Milbank, SD 57252
Ms. Kristi Mogen 15160 471st Ave. Twin Brooks, SD 57269	Vincent Meyer 15452 486th Ave. Milbank, SD 57252

And on the 21st day of February, 2019, the original and two (2) copies of *Appellees Dakota Range I, LLC and Dakota Range II, LLC's Brief* were mailed via First Class U.S. Mail, postage prepaid to:

South Dakota Supreme Court Clerk's Office
500 E. Capitol Ave.
Pierre, SD 57501

And on the 21st day of February, 2019, a true and correct copy of *Appellees Dakota Range I, LLC and Dakota Range II, LLC's Brief* in Microsoft Word format (the Appendix in PDF) was filed electronically with the Clerk of the Supreme Court at SCClerkBriefs@ujs.state.sd.us.

/s/ Mollie M. Smith
Mollie M. Smith (#4798)
*Attorneys for Appellees Dakota Range I,
LLC and Dakota Range II, LLC*