

STATE OF SOUTH DAKOTA  
COUNTY OF GRANT

IN CIRCUIT COURT  
THIRD JUDICIAL DISTRICT

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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  
REPLY BRIEF**

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**INTRODUCTION**

Dakota Range I, LLC and Dakota Range II, LLC (together, “Dakota Range”), by and through their undersigned counsel, hereby submit this Reply Brief in response to Appellants Teresa Kaaz and Kristi Mogen’s (together, “Appellants”) October 15, 2018 Brief in Opposition to Dakota Range’s Motion to Dismiss.<sup>1</sup> As discussed further below, the information provided in and with the Appellants’ Brief further supports granting Dakota Range’s motion to dismiss.

By statute, the Court has jurisdiction over the Appellants’ appeal *only if* Appellants (1) “*serv[ed] 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) “*fil[ed] 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 (emphasis added). In administrative appeals, a circuit court’s appellate jurisdiction depends on compliance with statutory conditions

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<sup>1</sup> As an initial matter, Appellants’ Brief was late-filed. Pursuant to SDCL 15-6-6(d), opposing affidavits or briefs are due “not later than five days before the hearing, unless the court permits them to be served at some other time.” The “day of the event from which the designated period of time begins to run” (here, the hearing on October 19, 2018) is not included in the computation of time. SDCL 15-6-6(a). Further, weekend days are not included in the computation when the last day of the time period falls thereon. SDCL 15-6-6(a). Thus, Appellants’ opposing brief should have been served on Friday, October 12, 2018.

precedent. *AEG Processing Ctr. No. 58, Inc. v. S. Dakota Dep't of Revenue & Regulation*, 838 N.W.2d 843, 847 (S.D. 2013). “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.” *Hein v. Marts*, 295 N.W.2d 167, 170 (S.D. 1980); *Upell v. Dewey Cty. Comm'n*, 880 N.W.2d 69, 75 (S.D. 2016) (holding noting that in the context of reviewing a dismissal of an appeal to circuit court, the South Dakota Supreme Court has repeatedly ruled that “the doctrine of substantial compliance cannot be substituted for jurisdictional prerequisites.”). As demonstrated by Appellants’ own admissions, they failed to satisfy either statutory condition precedent. As a result, this Court does not have jurisdiction over the appeal and dismissal is required.

### **BACKGROUND**

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. *See* SDCL 1-26-31. Appellants, through their counsel John C. Wiles, filed a Notice of Appeal with Certificate of Service on August 22, 2018. As discussed in detail in Dakota Range’s Memorandum in Support of Motion to Dismiss, the Notice of Appeal was not properly or 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 South Dakota Public Utilities Commission (“PUC”) proceeding. Further, service of the Notice of Appeal was not accomplished as represented by Mr. Wiles in his Certificate of Service accompanying the Notice of Appeal. Each of these defects is jurisdictional and requires dismissal of the appeal.

On September 7, 2018, Dakota Range filed a Motion to Dismiss the Appellants’ appeal of the PUC’s July 23, 2018 Final Decision granting a Facility Permit for the Dakota Range Wind Project. On September 28, 2018, the PUC joined Dakota Range’s Motion to Dismiss.

## ARGUMENT

### **I. Appellants Failed to Properly Serve the Notice of Appeal Upon Dakota Range Before the Statutory Deadline.**

By Appellants' own admission, they did not serve Dakota Range's counsel with the Notice of Appeal. *See* Appellants' 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. SDCL 15-6-5(b) contains the applicable requirements for service.<sup>2</sup> SDCL 15-6-5(b) provides, in relevant part, that "[s]ervice ... upon a party shall be made by delivering a copy to him or by mailing it to him" via first class mail.<sup>3</sup> (Emphasis added). Thus, Appellants could have either 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. By their own admission, Appellants did not do either.

Appellants contend that they completed service upon Dakota Range when they sent copies of the Notice of Appeal via first class mail to the Hughes County Sheriff's Office on August 22, 2018. *See* Appellants' Brief at 3-4 and Exh. 6. 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 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. Thus, Appellants' argument is not supported by the plain language of SDCL 15-6-5(b). Further, Appellants admit 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

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<sup>2</sup> South Dakota's Rules of Procedure in Circuit Courts (found in SDCL Chapter 15-6) apply to procedures for taking and conducting appeals under SDCL Chapter 1-26. SDCL 1-26-32.1.

<sup>3</sup> Appellants do not contend that they delivered copies of the Notice of Appeal to Dakota Range within the meaning of SDCL 15-6-5(b).

serve a notice of appeal specified in SDCL 1-26-31. *See* Appellants' Brief at 4. As a result, Dakota Range was not served by the statutory deadline, and the Court lacks jurisdiction over the appeal.

**II. Appellants Failed to Properly Serve the Notice of Appeal Upon PUC Staff Before the Statutory Deadline.**

By Appellants' own admission, they did not serve the PUC Staff within thirty days after the PUC served notice of its Final Decision. *See* Appellants' Brief at 4-5. Appellants' claim that the PUC did not grant "party status" to PUC Staff in its April 6, 2018 Order Granting Party Status and Establishing Procedural Schedule (*see* Appellants' Brief at 4) ignores the fact that the Order contemplated applications for party status by those who were not already parties but wished to "intervene" in the proceeding. Appellants further ignore that Staff is listed in the procedural schedule portion of that Order alongside the other "parties" (Applicant and Intervenors). *See* Appellants' Brief, Exh. 9. Lastly, Appellants listed PUC Staff as a party in their own Notice of Appeal. *See* Appellants' Brief, Exh. 1. It is disingenuous for Appellants now to claim PUC Staff was not a party to the underlying PUC proceeding. Appellants' failure to serve PUC Staff before the statutory deadline is a jurisdictional error requiring dismissal of the appeal.

**III. Appellants' Certificate of Service Accompanying the Notice of Appeal Contains Multiple Misrepresentations and is Insufficient Proof of Service.**

The Certificate of Service accompanying Appellants' Notice of Appeal contains multiple misrepresentations and cannot be relied upon as evidence that service was timely made. Further, Appellants' counsel's assertions in the Certificate of Service regarding the acts of others do not provide sufficient proof of service.

**A. The Certificate of Service Contains Multiple Inaccuracies and Does Not Constitute the Requisite Proof of Service.**

As described in detail in Dakota Range’s Memorandum in Support of Motion to Dismiss, and as further supported by Appellants’ own admissions in their Brief, service of the Notice of Appeal was not accomplished as represented by Appellants’ counsel, Mr. Wiles, in his Certificate of Service.

First, Appellants’ counsel purports to have served Dakota Range I, LLC and Dakota Range II, LLC “on the 22nd day of August, 2018” “by service of Hughes County Sheriff upon Cogency Global Inc.” *See* Appellants’ Brief, Exh. 1 at 3. This is simply not true. In reality, as Appellants admit in their Brief, Mr. Wiles merely sent the Notice of Appeal to the sheriff on August 22, 2018, who did not serve Cogency Global Inc. until August 28, 2018. *See* Appellants’ Brief at 3-4 and Exhs. 6, 7, 8. Thus, Dakota Range I, LLC and Dakota Range II, LLC were not served as represented by Mr. Wiles in his Certificate of Service.

Second, Ms. Wiles’ asserts in his Certificate of Service that he served both Ms. Smith and PUC Staff attorney, Ms. Kristen Edwards, “on the 22nd day of August, 2018” “by electronic e-file transmittal.” *See* Appellants’ Brief, Exh. 1 at 3. Directly contradicting this statement, Appellants’ counsel admits he did not “serve” Ms. Smith or Ms. Edwards with the Notice of Appeal – rather, he simply provided courtesy copies. *See* Appellants’ Brief at 4-5.

Third, Mr. Wiles states in his Certificate of Service that the Notice of Appeal was served upon Karen Layher, Grant County Auditor, by Admission of Service on August 22, 2018. *See* Appellants’ Brief, Exh. 1 at 3. However, as shown by Ms. Layher’s Admission of Service, Ms. Layher admitted service on August 23, 2018. *See* Appellants’ Brief, Exh. 4.

Given the misstatements, Mr. 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.

**B. Mr. Wiles' Certificate of Service Cannot Be Used to Attest to the Actions of Others.**

In his 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. Others eventually (and untimely) served Dakota Range, not Mr. Wiles. 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 Hughes County Sheriff. Moreover, the inaccuracies in Mr. Wiles' Certificate of Service demonstrate specifically why one should not be allowed to attest to the acts of others.

Appellants contend that a presumption of service was created by filing the Certificate of Service. However, even if true, that presumption has been soundly refuted by the evidence and admissions of inaccuracies in the Certificate of Service. *See State v. Waters*, 472 N.W.2d 524, 525 (S.D. 1991) (noting that a party could submit evidence or argument to refute a certificate of service).

For the reasons noted above, Appellants did not file the requisite proof of service of the Notice of Appeal on the parties to the PUC proceeding by the statutory deadline. Thus, a condition precedent to the Court having jurisdiction was not satisfied, and dismissal of the appeal is required.

**CONCLUSION**

Based on the foregoing, Dakota Range I, LLC and Dakota Range II, LLC respectfully request that the Court dismiss the appeal pursuant to SDCL 15-6-12(b)(1) and (4).

Dated this 17th day of October, 2018.

By: /s/ Mollie M. Smith

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