STATE OF SOUTH DAKOTA
THIRD JUDICIAL CIRCUIT COURT
CODINGTON COUNTY COURTHOUSE
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IN RE 25CIV18-0070

October 25, 2018

MEMORANDUM OPINION

INTRODUCTION

Appellees Dakota Range I, LLC and Dakota Range II, LLC (collectively, "Dakota Range") filed their Motion to Dismiss and Memorandum in Support of said motion on September 7, 2018, seeking to dismiss, pursuant to SDCL 15-6-12(b)(1) and (4), Appellants Teresa Kaaz and Kristi Mogen's (collectively, "Appellants") appeal of a Final Decision and Order Granting Permit to Construct Wind Energy Facility entered by the South Dakota Public Utilities Commission

("PUC") on July 23, 2018, filed in PUC Docket EL18-003. On September 28, 2018, the PUC filed its Joinder of Dakota Range's Motion to Dismiss. Appellants filed their Brief in Opposition to the Motion to Dismiss on October 15, 2018.[1] On October 17, 2018, Dakota Range filed their Reply Brief. A hearing on the motion was held before this Court on October 19, 2018. Based on the rationale set forth below, and the law as applied to the facts presented, this Court will grant Appellees' motion to dismiss this appeal for lack of jurisdiction.

STATEMENT OF FACTS

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. Appellants filed a Notice of Appeal and Certificate of Service to initiate appeal of this decision on August 22, 2018. Appellants' Certificate of Service indicated that all parties were served with copies of the Notice of Appeal on August 22, 2018. Appellees contend, however, that Appellants failed to timely serve all adverse parties to this matter—specifically Dakota Range and PUC Staff—and thus the Court is deprived of subject matter jurisdiction. Appellants counter that, as to Dakota Range, they timely served process via first-class mail sent to the Hughes County Sheriff's Office; as to PUC Staff, Appellants argue that they were not required to serve process on PUC Staff because they were not granted "party status" by the PUC in the underlying proceeding.

For the purposes of clarification, references to Dakota Range's Memorandum in Support of Motion to Dismiss, as joined by the PUC, will be cited as "Appellees' Memo at [page number]."

[1] It should be noted that, 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 Appellant's Brief and not dismiss the appeal for this reason.

References to Appellants' Brief in Opposition to the Motion to Dismiss will be cited as "Appellants' Brief at [page number]." References to Dakota Range's Reply Brief will be cited as "Appellees' Reply at [page number]." References to Appellants' Exhibits—as attached to Appellants' Brief and the affidavit of Attorney John C. Wiles—will be cited as "Appellants' Exh. [exhibit number] at [page number]." Finally, references to Appellees' Exhibits—as attached to the affidavit of Attorney Mollie Smith—will be cited as "Appellees' Exh. [exhibit number] at [page number]."

RULES OF LAW

As an initial note, "[n]o 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). 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." *Id.* Moreover, "[t]he 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.").

Under SDCL 15-6-12(b)(4), a party may 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)). Additionally, under SDCL 15-6-12(b)(1), a party may motion to dismiss a proceeding for lack of subject matter jurisdiction. SDCL 15-6-12(b)(1). "[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).

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

ANALYSIS

[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).

[3] Moreover, 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).

1. *Whether Appellants timely served a copy of the notice of appeal upon all adverse parties.*

Here, Appellees contend that this Court is deprived of subject matter jurisdiction over this appeal because Appellants failed to sufficiently serve process on all adverse parties, namely Dakota Range and PUC Staff. (Appellees' Memo at 3). The following analysis will examine the sufficiency of process, if any, to each of the aforementioned parties.

a. Dakota Range

Appellees argue that Appellants did not timely serve process on Dakota Range, its counsel, Mollie Smith, nor its registered agent, Cogency Global Inc. ("Cogency"). (Appellees' Memo at 3). 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 at 3-4; Appellants' Exh. 6. Here, 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). In this case, 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.").

[4] Regarding the copy of the Notice of Appeal emailed by Appellants to Ms. Smith, Appellants concede that they did not serve process on Ms. Smith but rather sent the email as a courtesy. Appellants' Brief at 4-5; *see also Johnson v. Lebert Const., Inc.*, 2007 S.D. 74, ¶ 2, 736 N.W.2d 878, 879 n.1 ("The current version of SDCL 15–6–5(b) does not allow for service by electronic mail.").

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' Exh. 6-8). 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 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.

b. PUC Staff

Additionally, Appellants concede that they did not serve process on Kristen Edwards, counsel for 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, however, that failure to serve process on Ms. Edwards was immaterial because PUC Staff was not a party to the underlying proceedings. *Id.* at 4. While Appellants assert 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 serve 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.

2. *Whether Appellants timely filed the notice of appeal with proof of such service in the office of the clerk of courts.*

Appellants, by failing to serve all adverse parties (as previously discussed), also thereby failed to timely file their Notice of Appeal with proof of such service. 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 refuted by an opposing party's evidence or arguments. *State v. Waters*, 472 N.W.2d 524, 525 (S.D. 1991). Here, and as discussed at length *supra*, 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 statements, 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.

[5] The Court disagrees with Appellants' strict interpretation of SDCL 49-41B-17(1), which 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. Appellees' Exh. A at 4.

CONCLUSION

Based on the rationale discussed above, the law requires this Court to grant the Appellees' motion for an order dismissing this appeal. Appellees' counsel shall prepare an order along with findings of fact and conclusions of law, (unless waived), consistent with this Memorandum Opinion.

Robert L. Spears
Circuit Court Judge.