

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

APH Farms, et al.,

Case No. 08-2024-CV-03622

Appellant,

v.

North Dakota Public Service Commission,
et al.,

Appellees.

And

Burleigh County,

Appellant,

v.

North Dakota Public Service Commission and
SCS Carbon Transport LLC,

Appellees.

**SCS CARBON TRANSPORT LLC'S SUPPLEMENTAL
BRIEF REGARDING ORAL ARGUMENT**

INTRODUCTION

[¶ 1] SCS Carbon Transport LLC (“Summit”), by and through undersigned counsel, submits this supplemental brief in response to the Court’s Order for Supplemental Briefing Regarding Oral Argument. Under Rule 9.1, N.D.R.Ct., oral argument is permissible but discretionary in an administrative appeal where the decision is based exclusively on the record made before the agency. This is such an appeal. The Court should exercise its discretion to deny

oral argument because the issues are fully presented in the extensive briefing already filed and to be filed, the appeal must be resolved on the existing administrative record, and oral argument would add burden and delay without meaningful benefit.

LAW AND ARGUMENT

I. RULE 9.1 AND THE NATURE OF THIS PROCEEDING CONFIRM ORAL ARGUMENT IS DISCRETIONARY AND UNNECESSARY HERE.

[¶ 2] This matter is an administrative appeal that must be decided exclusively on the record made before the North Dakota Public Service Commission (“Commission”). N.D.C.C. § 28-32-46. Consistent with that framework, Rule 9.1, N.D.R.Ct., directs that, once the record is received, the court fixes a briefing schedule and may permit or require oral argument in its discretion.

[¶ 3] Discretion exists for a reason. In an appeal constrained to a closed record, oral argument cannot expand the evidentiary foundation, cannot supply missing proof, and cannot cure failures of preservation. Oral argument therefore serves a limited purpose: at most, it can assist the Court in clarifying points already developed in the briefs. Where, as here, the record is complete and the briefs are extensive, oral argument becomes duplicative rather than helpful.

II. THE VOLUME OF BRIEFING ALREADY FILED, AND THE BRIEFING YET TO COME, MAKES ORAL ARGUMENT A MECHANISM FOR REPETITION, NOT CLARIFICATION.

[¶ 4] To date, five separate parties have filed five separate opening briefs totaling more than 170 pages. The Court is likely to receive at least three reply briefs under the current schedule. That means the Court’s decision will be informed by a substantial, multi-brief presentation of the same administrative record and a set of issues that, while framed by different parties, substantially overlap.

[¶ 5] The appellants' opening briefs confirm the practical problem oral argument would magnify. The appellants' submissions are repetitive and overlapping. They do not appear to have coordinated to avoid duplication, to identify truly distinct issues, or to allocate arguments among themselves to streamline the presentation. Instead, the briefs revisit the same themes with different phrasing and emphasis. If those opening briefs are any indication of what the reply briefs will contain, additional rounds will repeat the same points again.

[¶ 6] In addition, many of the arguments now advanced at length in the appellants' opening briefs were previously raised, briefed, and argued by the parties before the Commission itself. The parties' agency level briefs and the transcripts of oral argument presented to the Commission are already part of the certified administrative record in this appeal. This further demonstrates that the request for oral argument at this stage would result in yet another repetition of arguments already made, preserved, and fully presented to the agency and now again to this Court in extensive written submissions.

[¶ 7] Oral argument would compound that redundancy. A request for three hours by the APH Farms appellants and two hours by Burleigh County is not a request for clarification; it is a request to re-brief the case in open court.¹ In an administrative appeal decided on a closed record, two to three hours of argument invites repetition, encourages re-litigation of settled standards, and risks turning a discretionary tool into an inefficient substitute for written advocacy.

III. THIS APPEAL PRESENTS A LEGAL FRAMEWORK THAT DOES NOT BENEFIT FROM LIVE ARGUMENT BECAUSE THE COURT'S REVIEW IS CABINED AND DEFERENTIAL TO THE AGENCY'S DECISION.

[¶ 8] This is not a trial court review of its own discretionary rulings, and it is not a proceeding where witness credibility or evidentiary disputes can be tested in open court. The

¹ Appellants have increased the requested time allotted for oral arguments to four (4) hours in their responses to this Court's request for additional briefing.

reviewing court's task is to apply the administrative appeal standards to the Commission's decision on the record made before the Commission.

[¶ 9] And this case is also on a path that makes oral argument here even less useful. Regardless of how this Court resolves the appeal, the matter is plainly headed to the North Dakota Supreme Court. In that next stage, the Supreme Court does not accord special weight to this Court's intermediate decision; the Supreme Court's focus is the agency decision itself, and it applies the administrative standards of review to Commission's determination on the agency record. The district court decision is an intermediary decision that is not afforded independent deference.

[¶ 10] That reality matters when the Court exercises discretion under Rule 9.1. Oral argument is most useful when it can materially sharpen a court's resolution of disputed legal points or aid in managing fact intensive questions that benefit from live discussion. Here, the record is fixed, the standards of review constrain the analysis, and the parties' extensive written submissions already capture the arguments. Oral argument will not change the governing standards, will not change the record, and will not produce efficiencies.

CONCLUSION

[¶ 11] Rule 9.1 makes oral argument discretionary in record only administrative appeals, and N.D.C.C. § 28 32 46 requires review based solely on the agency record. This case has already generated five separate briefs totaling more than 170 pages, with additional response and reply briefing expected. The opening briefs are overlapping and repetitive and show no effort to coordinate and avoid duplication. Many of the same arguments were already briefed and argued before the Commission, and those briefs and oral argument transcripts are already part of the certified record. In that context, oral argument—especially the four hours now requested—would

not assist the Court; it would merely replicate the briefing, increase burden and delay, and provide no legitimate benefit.

[¶ 12] For these reasons, Summit respectfully requests that the Court deny oral argument.

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