

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT

Emmons County, Appellant, v. North Dakota Public Service Commission, SCS Carbon Transport LLC, Appellees.	Case No. 08-2024-CV-00624 SCS CARBON TRANSPORT LLC'S BRIEF IN SUPPORT OF MOTION TO DISMISS
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[¶ 1] Appellee SCS Carbon Transport LLC (“Summit”) submits this brief in support of its motion to dismiss the appeal filed by Appellant Emmons County of an interlocutory order entered by the North Dakota Public Service Commission (“Commission”) on February 7, 2024. For the reasons explained below, the Court should grant Summit’s motion.

FACTS

[¶ 2] On October 17, 2022, Summit commenced Case No. PU-22-391 before the Commission by filing a consolidated application for a certificate of corridor compatibility and route permit (“Application”) with the Commission. *See* Case No. PU-22-391, Docket No. 1.¹

[¶ 3] On December 14, 2022, Zachary Pelham was appointed as legal counsel to the Commission. *Id.*, Docket No. 15.

[¶ 4] On February 7, 2024, the Commission issued an interlocutory order finding that “*the approval* of a route permit for a gas or liquid transmission facility automatically supersedes and preempts local land use or zoning regulations . . .” (the “Interlocutory Order”) (emphasis added). *Id.*, Docket No. 440.

¹ <https://apps.psc.nd.gov/cases/pscasedetail?getId=22&getId2=391#>

[¶ 5] On March 8, 2024, Emmons County filed a notice of appeal (“Notice of Appeal”) with this Court, alleging certain specifications of error with respect to the Interlocutory Order. Notice Appeal (Doc. ID# 1).

[¶ 6] Emmons County served the Commission with its Notice of Appeal by personal service upon John Schuh, a staff attorney for the Commission. *See* Aff. Service (Doc. ID# 3).

[¶ 7] Emmons County served Summit with its Notice of Appeal by personal service upon Lawrence Bender, in his capacity as the registered agent for Summit. *See* Aff. Service (Doc. ID# 4).

[¶ 8] Emmons County served the North Dakota Attorney General with its Notice of Appeal by personal service upon Matthew Sagsveen, an Assistant Attorney General. *See* Aff. Service (Doc. ID# 5).

[¶ 9] Emmons County did not serve any other parties to the proceeding before the Commission with its Notice of Appeal. Specifically, Emmons County failed to serve the following individual and entities, and/or their respective legal counsel of record, with its Notice of Appeal, all of which were properly admitted parties to the proceedings in Case No. PU-22-391 before the Commission (collectively, the “Required Parties”):

1. John H. Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust,
2. SPLJ LLP,
3. Paul Kuetemeyer,
4. Steven J. Laine and Pamela M. Laine Family Trust,
5. James Rockstad,
6. Kevin Bernhardt,
7. Ann Bernhardt,

8. Randall Waloch,
9. Karla Waloch,
10. 8N2E Properties, LLP,
11. Larry Hoge,
12. BRH LLLP,
13. Kari Curran,
14. Brosowske Farms,
15. Mary Kuehn,
16. Laborers District of Minnesota and North Dakota,
17. Dorothy Barondeau,
18. Deborah Mitchell,
19. David Locken,
20. Dwight Kertzman,
21. Kevin Frederick,
22. Diane Zajac,
23. Scott Irmen,
24. MaryJo Irmen,
25. Rose Dotzenrod,
26. Benjamin Dotzenrod,
27. Soil Acre LLC,
28. Marilyn Bryan,
29. Lon Klusmann,
30. Roberta Klusmann,

31. Gordon Morris,
32. Jeffory Morris,
33. Daniel Morris,
34. Teresa Yarlott,
35. Tom Brosowske,
36. Maxine Brosowske,
37. Dean Twardoski,
38. Connie Erickson,
39. Hoge Farm LP,
40. Tim Hoge,
41. Howard Malloy,
42. John Carrels,
43. Staroba Revocable Living Trust,
44. Loren Staroba,
45. Diane Staroba,
46. Verdell Jordheim and Phyllis Jordheim Living Trust,
47. Valera Hayen,
48. Tony Hoge,
49. Leon Mallberg,
50. APH Farms,
51. Arden Hagerott,
52. Jonathan Hagerott,
53. Janel Olson,

54. Linda Gayman,
55. Chad Wachter,
56. Chad Moldenhauer,
57. Burleigh County,
58. The City of Bismarck,
59. Lugert Land Limited Partnership,
60. Marvin Lugert,
61. Jeanne Lugert,
62. CarolLee Curruth,
63. William Curruth,
64. Mitch Kertzman,
65. Julie Kertzman, and
66. Kertzman Farm Trust.

See Orders Granting Petitions to Intervene, Case No. PU-22-391, Docket Nos. 65, 66, 72, 82, 83, 159, 168, 204, 241, 242, 354, 384, 418, 511 and 512.

[¶ 10] On November 15, 2024, the Commission issued a final order granting Summit’s Application, approving and issuing a certificate of corridor compatibility and route permit to Summit (the “Final Order”).

[¶ 11] On December 12, 2024, Emmons County filed a second notice of appeal in a separate case alleging certain specifications of error with respect to the Final Order (the “Second Notice of Appeal”) which is currently pending before Judge Nieuwsma. *See Emmons County v. North Dakota Public Service Commission*, Case No. 08-2024-CV-03610.

ARGUMENT

[¶ 12] The current case is an appeal from an administrative agency decision. The Commission is an administrative agency as such term is defined in the Administrative Agencies Practice Act, § 28-32-01, et seq. (the “Act”). The Act provides clear guidelines to perfect an appeal of a final order issued by an administrative agency. Specifically, N.D.C.C. § 28-32-42 provides:

An appeal shall be taken by serving a notice of appeal and specifications of error specifying the grounds on which the appeal is taken, upon the administrative agency concerned, upon the attorney general or an assistant attorney general, and upon all the parties to the proceeding before the administrative agency, and by filing the notice of appeal and specifications of error together with proof of service of the notice of appeal, and the undertaking required by this section, with the clerk of the district court to which the appeal is taken. ...

The notice of appeal must specify the parties taking the appeal as appellants. The agency and all other parties of record who are not designated as appellants must be named as appellees.

[¶ 13] There are no exceptions to this statute’s requirements. *See, e.g., Opp v. Office of N. Dakota Attorney Gen. - BCI CWL Unit*, 2023 ND 131, ¶ 17, 993 N.W.2d 498 (“Equitable tolling cannot be applied as an exception to a statutory jurisdictional requirement.”); *Ellis v. North Dakota Workforce Safety & Ins.*, 2020 ND 14, ¶ 9, 937 N.W.2d 513 (“[W]e have previously declined to extend the time for filing the appeal by applying other procedural rules.”). “For the district court to acquire subject matter jurisdiction, the appellant must satisfy statutory requirements for perfecting an appeal.” *Altru Specialty Servs., Inc. v. North Dakota Dep’t of Human Servs.*, 2017 ND 270, ¶ 8, 903 N.W.2d 721. If an appellant fails to comply with even a single one of these requirements, then “the district court lacks subject matter jurisdiction and the appeal *must* be dismissed.” *Id.*, ¶ 11 (emphasis added).

[¶ 14] As explained more fully below, Emmons County did not comply with the requirements set forth in N.D.C.C. § 28-32-42. Accordingly, the appeal filed by Emmons County must be dismissed.

I. The Interlocutory Order is not an appealable final order.

[¶ 15] A party to a proceeding heard by an administrative agency can only appeal a *final* order of the administrative agency. *See* N.D.C.C. § 28-32-42(3)(a) (“Only final orders are appealable.”). An order is “final” if it “terminates the issue, leaving the agency with nothing more to decide.” *Henry v. Securities Com’r for State*, 2003 ND 62, ¶ 7, 659 N.W.2d 869. If an order of an administrative agency is *not* final, then a court does not have jurisdiction to review the order, and the appeal must be dismissed. *See id.* at ¶ 21.

[¶ 16] The Interlocutory Order that Emmons County appealed on March 8, 2024 was not a final order because the Interlocutory Order did not “terminate the issue, leaving the [Commission] with nothing more to decide.” *Henry*, 2003 ND 62, ¶ 7. In fact, the Commission held three public hearings and several “technical hearings” on Summit’s Application subsequent to issuing the Interlocutory Order. *See* Case No. PU-22-391, Docket Nos. 465 and 542. The Final Order granting Summit’s Application was not issued by the Commission until November 15, 2024.

[¶ 17] Furthermore, the Interlocutory Order is very clear that only “the approval” of a route permit for a gas or liquid transmission facility will trigger the automatic preemption of local land use or zoning regulations. At the time Emmons County filed its Notice of Appeal, the Commission had not yet rendered a decision on Summit’s Application and had not yet approved or issued a route permit to Summit. In other words, the zoning ordinances of Emmons County were not superseded or preempted by the issuance of the Interlocutory Order. The Interlocutory Order did not impact Emmons County until November 15, 2024, when the Commission issued its

Final Order giving effect to the Commission's determination set forth in the Interlocutory Order. Accordingly, the appeal filed by Emmons County must be dismissed because the Interlocutory Order is not an appealable, final order.

II. Emmons County did not serve all the parties to the proceeding before the Commission.

[¶ 18] To perfect its appeal, Emmons County was required to serve its Notice of Appeal on all parties to the proceeding before the Commission. *See* N.D.C.C. § 28-32-42(4) ("An appeal shall be taken by serving a notice of appeal ... upon all the parties to the proceeding before the administrative agency."). A "party" is statutorily defined as "each person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party." N.D.C.C. § 28-32-01(9). If Emmons County failed to serve even a single party, then its "appeal must be dismissed." *Altru*, 2017 ND 270, ¶ 11; *see also Pederson v. North Dakota Workers Comp. Bureau*, 534 N.W.2d 809, 810 (N.D. 1995) (dismissing appeal because appellant failed to serve a party to the proceeding before the administrative agency); Order Granting Mot. Dismiss, *Equinor Energy LP v. North Dakota Indus. Comm'n*, Case No. 53-2018-CV-01025 (Doc. ID# 64) (dismissing appeal because appellant failed to serve a party to the proceeding before the administrative agency).

[¶ 19] The Required Parties were parties to the proceedings in Case No. PU-22-391, but Emmons County did not serve them, nor their counsel of record, with the Notice of Appeal. Consequently, this Court does not have jurisdiction and Emmons County's appeal must be dismissed.

[¶ 20] If the service requirements set for administrative appeals are not strictly enforced, the appeal will proceed subject to possible future jurisdictional challenges raised by one or more of the Required Parties. Summit and the Commission would be unfairly prejudiced if the appeal is allowed to proceed, requiring Summit and the Commission to expend significant time and expense

defending the Commission's Final Order, only to have the appeal subsequently dismissed on jurisdictional grounds.

III. Emmons County did not serve the Commission's attorney with its Notice of Appeal.

[¶ 21] To perfect its appeal, Emmons County was also required to serve the Commission with its notice of appeal in compliance with N.D.R.Civ.P. 5. *See* N.D.C.C. § 28-32-42(4) ("An appeal shall be taken by serving a notice of appeal ... upon the administrative agency concerned."); *Altru*, 2017 ND 270, ¶ 14 ("Rule 5, N.D.R.Civ.P., applies to service of a notice of appeal from an administrative agency's decision.").

[¶ 22] Rule 5(b)(2)(A), N.D.R.Civ.P., states that "[i]f a party is represented by an attorney, service under this rule *must* be made on the attorney unless the court orders service on the party." (emphasis added). This requirement "is to be followed literally; ... service upon the party does not comply with the rule if that party is represented by an attorney." 4B Wright & Miller, *Federal Practice and Procedure* § 1145 (4th ed.); *see also Conerly v. International Bus. Machines Corp.*, 64 Fed. Appx. 312, 314 (2d Cir. 2003) (holding service of a motion "was defective because [the plaintiff] did not serve the motion on the defendants' counsel, as required under Fed.R.Civ.P. 5, but rather served the motion only on the defendant").²

[¶ 23] Here, the Commission was, and is currently, represented by an attorney, Mr. Zachary Pelham. Emmons County did not serve Mr. Pelham, who does not have an office at the North Dakota capitol building where the Commission's offices are located, with its Notice of Appeal as required by N.D.R.Civ.P. 5. *See* Aff. Service (Doc. ID# 3). Emmons County's failure

² Rule 5, N.D.R.Civ.P., is modeled after Fed. R. Civ. P. 5. Therefore, the North Dakota Supreme Court looks to federal caselaw interpreting the federal rule when interpreting the North Dakota rule. *Thomas v. Thomas*, 382 N.W.2d 639, 641 (N.D. 1986).

to serve the Commission's attorney with its Notice of Appeal in compliance with N.D.R.Civ.P. 5 means its appeal must be dismissed.³

IV. Emmons County did not use the proper method of service to serve the Commission, the Attorney General, and Summit with its Notice of Appeal.

[¶ 24] To perfect its appeal, Emmons County was required to serve the Commission, the Attorney General or an assistant attorney general, and Summit with its Notice of Appeal using the manner of service required by N.D.R.Civ.P. 5. *See* N.D.C.C. § 28-32-42(4) (“An appeal shall be taken by serving a notice of appeal ... upon the administrative agency concerned, upon the attorney general or an assistant attorney general, and upon all the parties to the proceeding before the administrative agency.”); *Altru*, 2017 ND 270, ¶ 14 (“Rule 5, N.D.R.Civ.P., applies to service of a notice of appeal from an administrative agency’s decision.”).

[¶ 25] Rule 5(b)(1), N.D.R.Civ.P., states that “[a] document that is required to be filed must be served electronically under the procedure specified in N.D.R.Ct. 3.5.” (emphasis added). A notice of appeal is required to be filed. N.D.C.C. § 28-32-42(4). Thus, a notice of appeal must be served electronically. *Inwards v. North Dakota Workforce Safety & Ins.*, 2014 ND 163, ¶ 11, 851 N.W.2d 693 (party appealing administrative agency’s decision “electronically served the notice of appeal”); N.D.R.Ct. 3.5 (explanatory note) (“In an appeal from an agency determination under N.D.C.C. § 28-32-42, the notice of appeal must be served on all the entities listed in the statute, some of whom may not be subject to electronic service through the Odyssey system.”).

[¶ 26] Emmons County did not electronically serve the Commission, the Attorney General or an assistant attorney general, or Summit with its Notice of Appeal. Instead, Emmons County

³ There is also a strong argument that Emmons County did not serve Summit’s attorney of record. Although Emmons County served Lawrence Bender and Mr. Bender is Summit’s attorney of record in Case No. PU-22-391, Emmons County served Mr. Bender in his capacity as Summit’s registered agent. *See* Aff. Service (Doc. ID# 4).

used personal service. Serving a document by non-electronic means when N.D.R.Civ.P. 5 requires the document to be served electronically is not sufficient. *Dakota Heritage Bank v. Iacone*, 2014 ND 150, ¶ 10, 849 N.W.2d 219 (“[S]ervice by mail ... did not comply with [Rule 5(b)(1)’s] procedural requirements for service and notice and, therefore, was not sufficient.”). Because Emmons County served its Notice of Appeal using a method of service other than the one required by N.D.R.Civ.P. 5, its appeal must be dismissed.

V. Emmons County did not designate the Required Parties as appellees.

[¶ 27] To perfect its appeal, Emmons County was required designate the Required Parties as appellees in the caption of its Notice of Appeal. *See* N.D.C.C. § 28-32-42(5) (“The agency and all other parties of record who are not designated as appellants must be named as appellees.”).

[¶ 28] Emmons County designated the Commission and Summit as appellees in the caption of its Notice of Appeal, but did not designate any of the Required Parties as appellees. As a result, its appeal must be dismissed.

VI. Emmons County failed to meet the requirements set forth in N.D.C.C. § 28-32-42 with respect to its Second Notice of Appeal.

[¶ 29] As set forth above, Emmons County filed a Second Notice of Appeal alleging certain specifications of error with respect to the Final Order. *See* Case No. 08-2024-CV-03610.

[¶ 30] Summit will be filing separate motions to dismiss the Second Notice of Appeal pending in Case No. 08-2024-CV-03610 based on lack of jurisdiction and many of the same the deficiencies outlined herein.

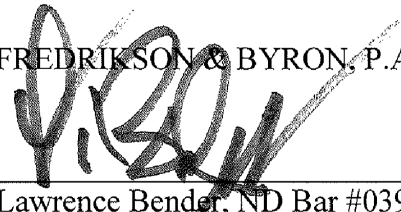
CONCLUSION

[¶ 31] For the foregoing reasons, this Court should grant Summit’s motion and dismiss the appeal filed by Emmons County.

Dated this 22nd day of January, 2025.

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