

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

APH Farms, et al.,

Case No. 08-2024-CV-03622

Appellant,

v.

**SCS CARBON TRANSPORT LLC'S
BRIEF IN SUPPORT OF MOTION TO
DISMISS**

North Dakota Public Service Commission,
et al.,

Appellees.

[¶ 1] Appellee SCS Carbon Transport LLC (“Summit”) submits this brief in support of its motion to dismiss the appeal filed by Appellants. 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 North Dakota Public Service Commission (“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 in Case No. PU-22-391. *Id.*, Docket No. 15.

[¶ 4] On March 6, 2023, John H. Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust (the “Warford Trust”) was permitted to appear as an intervening party to the proceedings in Case No. PU-22-391. *Id.*, Docket No. 65.

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

[¶ 5] On May 24, 2023, Chad Wachter and Chad Moldenhauer were permitted to appear as intervening parties to the proceedings in Case No. PU-22-391. *Id.*, Docket Nos. 241 and 242.

[¶ 6] Randall Bakke appeared as counsel of record for the Warford Trust, Chad Moldenhauer and Chad Wachter. *Id.*, Docket Nos. 56 and 226.

[¶ 7] On March 4, 2024, Mr. Bakke withdrew as counsel for the Warford Trust, Chad Moldenhauer and Chad Wachter. *Id.*, at Docket No. 453.

[¶ 8] On March 8, 2024, the Warford Trust, Chad Moldenhauer and Chad Wachter withdrew from participating in the proceedings in Case No. PU-22-391. *Id.*, at Docket No. 458.

[¶ 9] The following persons, trusts, partnerships and other entities were also admitted as intervening parties in Case No. PU-22-391 before the Commission:

1. SPLJ LLP,
2. Paul Kuetemeyer,
3. Steven J. Laine and Pamela M. Laine Family Trust,
4. James Rockstad,
5. Kevin Bernhardt,
6. Ann Bernhardt,
7. Randall Waloch,
8. Karla Waloch,
9. 8N2E Properties, LLP,
10. Larry Hoge,
11. BRH LLLP,
12. Kari Curran,
13. Brosowske Farms,

14. Mary Kuehn,
15. Laborers District of Minnesota and North Dakota,
16. Dorothy Barondeau,
17. Deborah Mitchell,
18. David Locken,
19. Dwight Kertzman,
20. Kevin Frederick,
21. Diane Zajac,
22. Scott Irmen,
23. MaryJo Irmen,
24. Rose Dotzenrod,
25. Benjamin Dotzenrod,
26. Soil Acre LLC,
27. Marilyn Bryan,
28. Lon Klusmann,
29. Roberta Klusmann,
30. Gordon Morris,
31. Jeffory Morris,
32. Daniel Morris,
33. Teresa Yarlott,
34. Tom Brosowske,
35. Maxine Brosowske,
36. Dean Twardoski,

37. Connie Erickson,
38. Hoge Farm LP,
39. Tim Hoge,
40. Howard Malloy,
41. John Carrels,
42. Staroba Revocable Living Trust,
43. Loren Staroba,
44. Diane Staroba,
45. Verdell Jordheim and Phyllis Jordheim Living Trust,
46. Valera Hayen,
47. Tony Hoge,
48. Leon Mallberg,
49. APH Farms,
50. Arden Hagerott,
51. Jonathan Hagerott,
52. Janel Olson,
53. Linda Gayman,
54. Burleigh County,
55. Emmons County,
56. The City of Bismarck,
57. Lugert Land Limited Partnership,
58. Marvin Lugert,
59. Jeanne Lugert,

60. CarolLee Curruth,
61. William Curruth,
62. Mitch Kertzman,
63. Julie Kertzman, and
64. Kertzman Farm Trust.

(the “Intervening Parties”). *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] The following Intervening Parties withdrew from participating in the proceedings in Case No. PU-22-391:

1. SPLJ LLP
2. Steven J. Laine and Pamela M. Laine Family Trust
3. 8N2E Properties, LLP
4. Larry Hoge
5. Brosowske Farms
6. Mary Kuehn
7. Dorothy Barondeau
8. Deborah Mitchell
9. David Locken
10. Dwight Kertzman
11. Kevin Frederick
12. Marilyn Bryan
13. Lon Klusman
14. Roberta Klusman

15. Gordon Morris
16. Daniel Morris
17. Teresa Yarlott
18. Dean Twardowski
19. Hoge Farm LP
20. Tim Hoge
21. Verdell Jordheim and Phyllis Jordheim Living Trust
22. Tony Hoge
23. Linda Gayman

(the “Non-Participating Parties”). *See* Case No. PU-22-391, Docket Nos. 479 and 489.

[¶ 11] The Non-Participating Parties were each represented by Brian Jorde and Steven Leibel. *See id.*

[¶ 12] 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”). *Id.*, Docket No. 778.

[¶ 13] On December 13, 2024, Appellants filed a notice of appeal (“Notice of Appeal”) with this Court, alleging certain specifications of error with respect to the Final Order. Notice Appeal (Doc. ID# 1).

[¶ 14] Appellants served the Commission with their Notice of Appeal by personal service upon John Schuh, a staff attorney for the Commission. *See* Aff. Service (Doc. ID# 9).

[¶ 15] Appellants served the North Dakota Attorney General with their Notice of Appeal by personal service upon Erik Wallevand, an assistant attorney general. *See* Aff. Service (Doc. ID# 11).

[¶ 16] Appellants served Summit with their Notice of Appeal by personal service upon Lawrence Bender. *See* Aff. Service (Doc. ID# 10).

[¶ 17] Appellants did not serve the Warford Trust, Chad Moldenhauer, or Chad Wachter with their Notice of Appeal and Appellants cannot claim service was completed through Mr. Bakke because, as set forth above, Mr. Bakke withdrew as counsel of record for these parties. *See* Decl. Service (Doc. ID# 6).

[¶ 18] Further, it is unclear whether Appellants served the Non-Participating Parties with their Notice of Appeal because it is unclear whether Mr. Jorde or Mr. Leibel continued to represent the Non-Participating Parties subsequent to their withdrawal. *Id.*

[¶ 19] As set forth above, Emmons County was a properly admitted party to the proceedings in Case No. PU-22-391 before the Commission. *See* Order Granting Petition to Intervene, Case No. PU-22-391 at Docket No. 354.

[¶ 20] On March 8, 2024, Emmons County filed a notice of appeal alleging certain specifications of error with respect to the February 7, 2024 interlocutory order issued by the Commission in Case No. PU-22-391 (the “Interlocutory Appeal”). *See* Notice Appeal, *Emmons County vs. North Dakota Public Service Commission*, Case No. 08-2024-CV-00624 (Doc. ID# 1) (“*Emmons County I*”).

[¶ 21] On December 12, 2024, Emmons County filed a notice of appeal alleging certain specifications of error with respect to the Final Order issued by the Commission in Case No. PU-22-391 (the “Final Order Appeal”). *See* *Emmons County vs. North Dakota Public Service Commission, et al.*, Case No. 08-2024-CV-03610, Notice Appeal (Doc. ID# 1) (“*Emmons County II*”).

[¶ 22] On January 22, 2025, Summit filed a motion to dismiss the Interlocutory Appeal filed by Emmons County on the grounds that Emmons County failed to serve all parties to the proceedings in Case No. PU-22-391 as required by N.D.C.C. § 28-32-42. Mot. Dismiss, *Emmons County I* (Doc. ID# 16).

[¶ 23] On January 23, 2025, Summit filed a motion to dismiss the Final Order Appeal filed by Emmons County on the grounds that Emmons County failed to serve all parties to the proceedings in Case No. PU-22-391 as required by N.D.C.C. § 28-32-42. Mot. Dismiss, *Emmons County II* (Doc. ID# 10).

[¶ 24] On January 31, 2025, Emmons County filed voluntary dismissals of its appeals in Case No. 08-2024-CV-00624 and Case No. 08-2024-CV-03610. Notice Voluntary Dismissal, *Emmons County I* (Doc. ID# 19); Notice Voluntary Dismissal, *Emmons County II* (Doc. ID# 13).

[¶ 25] As discussed in detail below, Appellants committed the same errors as Emmons County with respect to service of their Notice of Appeal.

ARGUMENT

[¶ 26] The current case is an appeal from an administrative agency decision. The North Dakota Public Service 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.

[¶ 27] 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.* at ¶ 11 (emphasis added).

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

I. Appellants did not serve all the parties to the proceedings in Case No. PU-22-391 before the Commission.

[¶ 29] To perfect their appeal, Appellants were required to serve their Notice of Appeal on all parties to the proceedings before the Commission in Case No. PU-22-391. *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 [Appellants did] not serve the notice of appeal as required by [N.D.C.C. § 28-32-42(4)], ... the 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).

[¶ 30] The Act does not make exceptions for parties which may have withdrawn from the proceedings. The Warford Trust, Chad Moldenhauer, Chad Wachter and the other Non-Participating Parties were each “named or admitted as a party” in Case No. PU-22-391 before the Commission and Appellants were required to serve each of these parties with their Notice of Appeal. Appellants cannot claim service was completed through Mr. Bakke for the Warford Trust, Chad Moldenhauer or Chad Wachter because Mr. Bakke formally withdrew as counsel for these parties prior to becoming counsel for Burleigh County. Accordingly, Appellants were required to mail a copy of their Notice of Appeal to the Warford Trust, Chad Moldenhauer and Chad Wachter. Since Appellants failed to complete service upon these parties, this Court does not have jurisdiction and the appeal must be dismissed.

[¶ 31] It is also possible that one or more of the Non-Participating Parties were no longer represented by Mr. Jorde or Mr. Leibel at the time Appellants served their Notice of Appeal. Assuming this to be true, then Appellants were required to serve their Notice of Appeal on each Non-Participating Party that is no longer represented by Mr. Jorde or Mr. Leibel.

[¶ 32] Based on the foregoing, Appellant’s appeal must be dismissed for lack of jurisdiction.

II. Appellants did not serve the Commission’s attorney with their Notice of Appeal.

[¶ 33] To perfect their appeal, Appellants were also required to serve the Commission with their 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.”).

[¶ 34] 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

[¶ 35] Here, the Commission was, and is currently, represented by an attorney, *i.e.*, Mr. Zachary Pelham. Appellants 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 their Notice of Appeal as required by N.D.R.Civ.P. 5. *See* Aff. Service (Doc. ID# 3). Appellants’ failure to serve the Commission’s attorney with their Notice of Appeal in compliance with N.D.R.Civ.P. 5 means their appeal must be dismissed.

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) (“Rule 5(b), N.D.R.Civ.P., is adopted nearly verbatim from the corresponding federal rule, and we therefore look to interpretive federal caselaw as an aid in construing our own rule.”).

III. Appellants did not serve the parties to Case No. PU-22-391 in the manner required by the North Dakota Rules of Civil Procedure.

[¶ 36] To perfect their appeal, Appellants were required to serve the Commission, the Attorney General or an assistant attorney general, Summit, and all other parties to the proceeding before the Commission with their 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.”).

[¶ 37] 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. *See* N.D.C.C. § 28-32-42(4). Accordingly, 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.”).

[¶ 38] Appellants did not electronically serve the Commission, the Attorney General or an assistant attorney general, Summit, and all other parties to the proceeding before the Commission with their Notice of Appeal. Instead, Appellants served their Notice of Appeal using mail and 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.”).

[¶ 39] Failure to serve all required parties, such as counsel for Summit, counsel for the Commission and the Attorney General, in accordance with Rule 5 has meaningful consequences. On February 11, 2025, this Court set a status hearing for February 20, 2025 and mailed the notice of hearing to Summit’s counsel via First Class Mail. Notice of Hearing (Doc. ID#33). As of the date of filing this motion, Summit’s counsel has not received the notice of the hearing which was sent via First Class Mail on February 11, 2025. Declaration of Lawrence Bender, ¶ 2. Summit’s counsel was made aware of the status hearing by a colleague who manually reviewed the docket for this case. *Id.*, ¶ 3. If Appellants had served Summit with their notice of appeal in accordance with Rule 5, Summit’s counsel would have received immediate notice of the status hearing through the Odyssey system.

[¶ 40] Because Appellants served their Notice of Appeal using the method of service other than the one required by N.D.R.Civ.P. 5, their appeal must be dismissed.

IV. Appellants did not designate all other parties to the proceedings in Case No. PU-22-391 as appellees.

[¶ 41] To perfect their appeal, Appellants also needed to designate the Warford Trust, Chad Moldenhauer, Chad Wachter, and the Intervening 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.”).

[¶ 42] Appellants did not designate the Non-Participating Parties as appellees in the caption of their Notice of Appeal. As a result, their appeal must be dismissed.

V. Emmons County voluntarily dismissed its separate appeals based on the same deficiencies outlined herein.

[¶ 43] As set forth above, Emmons County voluntarily dismissed its separate appeals of the Commission's February 7, 2024, interlocutory order and the Commission's Final Order. Emmons County voluntarily dismissed its two separate appeals without responding to Summit's motions to dismiss, essentially acknowledging that the court did not have jurisdiction over said appeals due to its failure to serve all required parties in accordance with N.D.C.C. § 28-32-42 and in accordance with the North Dakota Rules of Civil Procedure.

[¶ 44] As detailed above, Appellants made the same fatal errors as Emmons County and therefore, their appeal must be dismissed.

CONCLUSION

[¶ 45] For the foregoing reasons, this Court should grant Summit's motion and dismiss Appellants' appeal for lack of jurisdiction.

Dated this 18th day of February, 2025.

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