

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 08-2024-CV-03614

Burleigh County,

Appellant,

vs.

North Dakota Public Service Commission  
and SCS Carbon Transport LLC,

Appellees.

**BURLEIGH COUNTY’S RESPONSE TO  
SCS CARBON TRANSPORT LLC’S  
MOTION TO DISMISS**

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**I. INTRODUCTION**

[¶1] This case is an appeal of the final Findings of Fact, Conclusions of Law, and Order (“Challenged Order”) issued by the North Dakota Public Service Commission (“PSC”) on November 15, 2024 in PSC Case No. PU-22-391. SCS Carbon Transport LLC (“Summit”) claims in its brief in support of its motion to dismiss (Index # 17) (“Summit Brief”) that Burleigh County failed to timely commence this appeal due to the manner in which Burleigh County served the Notice of Appeal and Specifications of Error (Index # 1). However, Summit can only reach its conclusion that service was improper by applying the wrong procedural rules and misrepresenting the holdings of cited cases. Summit relies on a hyper-technical argument that gives the illusion of plausibility, but does not hold up to any level of scrutiny and should be rejected outright by the Court.

**II. BACKGROUND**

[¶2] On October 17, 2022, Summit filed with the PSC a Consolidated Application for a Certificate of Corridor Compatibility and Route Permit and Application for Waiver or Reduction of Procedures and Time Schedules (PSC Docket No. 1). Various landowners and entities

intervened in the proceedings. (PSC Docket Nos. 65, 66, 72, 82, 83, 159, 168, 204, 241, 242, 354, 372, 384, 418, 511 and 512). After hearings on the application, the PSC issued Findings of Fact, Conclusions of Law, and Order on August 4, 2023, denying Summit's application for waiver of procedural and time schedules, certificate of corridor compatibility, and route permit (PSC Docket No. 366). On August 18, 2023, Summit filed a Petition for Reconsideration, Notice of Route Adjustment and Request for Limited Rehearing (PSC Docket No. 371). The PSC granted Summit's petition on September 15, 2023, granting reconsideration and rehearing (PSC Docket No. 396). Due to the altered circumstances of the petition for reconsideration, including a re-route in some locations, various intervenors gave notice to the PSC of their withdrawal as parties to the case. (Exhs. 1, 2, and 3 to the *Affidavit of Randall J. Bakke*, filed herewith<sup>1</sup>)

[¶3] The PSC held various hearings on Summit's rehearing of its petition, including hearings at the State Capital Building in Bismarck, North Dakota, wherein Burleigh County and various other parties including other intervenors appeared through legal counsel, who made arguments and presented witnesses in opposition to Summit's petition. On November 15, 2024, the PSC issued the Challenged Order (PSC Docket No. 778).

[¶4] After the Commission issued the Challenged Order, it was required by North Dakota Century Code § 28-32-39(2) to:

serve a copy of the final order and the findings of fact and conclusions of law on which it is based **upon all the parties to the proceeding** within thirty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible, **in the manner allowed for service under the North Dakota Rules of Civil Procedure**.

N.D.C.C. § 28-32-39(2) (emphasis added). In order to comply with this statutory requirement, the

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<sup>1</sup> Exhibits identified as "Exh. \_\_" and referenced herein are attached to the *Affidavit of Randall J. Bakke* dated March 3, 2025, filed herewith.

PSC mailed a copy of the Challenged Order on November 15, 2024 to the following individuals at the following addresses, as evidence by its affidavit of service (Exh. 4):

Lawrence Bender  
Fredrikson & Byron, P.A.  
304 East Front Avenue Suite 400  
Bismarck, ND 58504-5639

Brant M. Leonard  
Fredrikson & Byron, P.A.  
111 E Grand Avenue, Suite 301  
Des Moines, IA 50309-1884

Randall J. Bakke  
Bradley N. Wiederholt  
Bakke Grinolds Wiederholt  
PO Box 4247  
Bismarck, ND 58502-4247

Steven Leibel  
David Knoll  
Knoll Leibel LLP  
PO Box 858  
Bismarck, ND 58502-0858

Brian E. Jorde  
Domina Law Group  
2425 S. 144th St.  
Omaha, NE 68144

Kevin Pranis  
LIUNA Minnesota & North Dakota  
81 E. Little Canada Road  
St. Paul, MN 55117

Bret Dublinske  
Fredrikson & Byron, P.A.  
111 E Grand Avenue, Suite 301  
Des Moines, IA 50309-1884

James Curry  
Babst, Calland, Clements & Zomnir,  
P.C.  
505 9th Street NW Suite 602  
Washington D.C. 20004

Derek Braaten  
Braaten Law Firm  
109 N 4th Street, Suite 100  
Bismarck, ND 58501

Julie Lawyer  
Burleigh County States' Attorney  
514 E Thayer Avenue  
Bismarck, ND 58501

Patrick Zomer  
Moss & Barnett  
150 S 5th Street, Suite 1200  
Minneapolis, MN 55402

Jannelle Combs  
City of Bismarck  
221 N 5th Street  
Bismarck, ND 58501

[¶5] The 30-day time limit for Burleigh County to commence this appeal does not start running until the PSC has complied with North Dakota Century Code § 28-32-39(2) by serving the

Challenged Order “upon all the parties to the proceeding... in the manner allowed for service under the North Dakota Rules of Civil Procedure.” *See* N.D.C.C. § 28-32-39(2). In that regard, North Dakota Century Code § 28-32-42(1) states in relevant part, “Any party to any proceeding heard by an administrative agency, except when the order of the administrative agency is declared final by any other statute, may appeal from the order **within thirty days after notice of the order has been given as required by section 28-32-39.** N.D.C.C. § 28-32-42(1) (emphasis added).

[¶6] Assuming the PSC’s mailing of the Challenged Order to the above-listed individuals constitutes service “upon all the parties to the proceeding... in the manner allowed for service under the North Dakota Rules of Civil Procedure,” then Burleigh County had until December 16, 2024 (30 days after the mailing of the Challenged Order) to commence this appeal. *See* N.D.C.C. §§ 28-32-39(2); 28-32-42(1). If the PSC’s mailing of the Challenged Order to the above-listed individuals did not constitute proper service of the Challenged Order, then the time limit for Burleigh County to commence this appeal still has not started running.

[¶7] The process of commencing an appeal is described in North Dakota Century Code § 28-32-42(4) as follows:

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. In an appeal of an agency's rulemaking action, only the administrative agency concerned, the attorney general, or an assistant attorney general, as well as the legislative council, need to be notified.

[¶8] N.D.C.C. § 28-32-42(4). (Emphasis Added) The service obligation in this statute required Burleigh County to serve its Notice of Appeal and Specifications of Error on 1) the PSC, 2) the Attorney General or an assistant attorney general, and 3) upon all parties to the proceeding before

the PSC.<sup>2</sup> *Id.* Notably, unlike the statute governing the PSC’s service of the Challenged Order (N.D.C.C. § 28-32-39(2)), the statute governing Burleigh County’s service of its Notice of Appeal and Specifications of Error (N.D.C.C. § 28-32-42(4)) does not contain any reference at all to the Rules of Civil Procedure.

[¶9] Burleigh County timely served its Notice of Appeal and Specifications of Error on the PSC through a process server who served the document at the PSC office in Bismarck on December 12, 2024, in compliance with North Dakota Century Code § 28-32-42(4). *See* Affidavit of Service (Index # 4).

[¶10] Burleigh County also timely met the requirement in N.D.C.C. § 28-32-42(4) to serve its Notice of Appeal and Specifications of Error on the attorney general or an assistant attorney general through a process server who served the document on December 12, 2024 on Attorney General Drew Wrigley at his office, by leaving copies with Assistant Attorney General Michael T. Pitcher. *See* Affidavit of Service (Index # 6).

[¶11] Burleigh County also timely complied with its obligation to serve its Notice of Appeal and Specifications of Error on “all the parties to the proceeding before the administrative agency” by mailing it to the identical list of individuals at the identical addresses that the PSC mailed its Challenged Order to. *See* Certificate of Service (Index # 3); *see also* Exh. 4 With respect to Summit (whose application to the PSC is the subject of this case and who filed the present motion to dismiss), in addition to mailing the Notice of Appeal and Specifications of Error to Summit’s attorney Lawrence Bender (*see* Index # 3), Burleigh County also personally served Summit’s registered agent for service of process (also Lawrence Bender) by process server on December 12,

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<sup>2</sup> N.D.C.C. § 28-32-42(4) also requires the Notice of Appeal and Specifications of Error to be filed with the Court, along with proof of service, and the undertaking required by the section, all of which Burleigh County complied with. *See* Index #s 1 through 6.

2024 (see Index # 5).

[¶12] Burleigh County has fully complied with the statute governing its commencement of this appeal.

### **III. ARGUMENT**

#### **A. Burleigh County Served the Notice of Appeal on All Parties to the Proceedings in PSC Case No. PU-22-391, and Even Assuming Arguendo It Did Not, the Appropriate Remedy Would Not Be Dismissal of this Appeal with Prejudice**

##### **1. Burleigh County Served the Notice of Appeal on All Parties to the Proceedings in PSC Case No. PU-22-391**

[¶13] Summit argues Burleigh County did not serve its Notice of Appeal and Specifications of Error on “all the parties to the proceeding before the [PSC]” (as required by N.D.C.C. § 28-32-42(4)) because Burleigh County did not serve The Warford Trust, Chad Moldenhauer, or Chad Wachter. Summit Brief, Index # 17 at pp. 10-12. These three intervening parties were all represented by the undersigned attorney and intervened in the PSC case prior to the rerouting of the pipeline route. After Summit rerouted the proposed pipeline, these three intervening parties filed with the PSC a Notice of Withdrawal by Bismarck Intervenors, expressly withdrawing as “parties to this matter”, and the undersigned attorney withdrew as their counsel. Exh. 1 (emphasis added); Exh. 5. Notably, the PSC thereafter treated these three as non-parties, not serving them with any further documents in the case, including the Challenged Order.

[¶14] Summit argues for a once-a-party, always-a-party standard, which defies logic, and ignores the PSC’s handling of its own administrative case. Under Summit’s theory, no intervenors can ever withdraw from a PSC proceeding, even if they no longer have any interest in the proceeding and give notice of their withdrawal “as parties to this matter.” In this case, the PSC evidently treated The Warford Trust, Chad Moldenhauer, and Chad Wachter as non-parties after their withdrawal, not serving them with further notices or orders, including the Challenged Order (which

the PSC would be required to serve on these three if they were still parties to the case – *see* N.D.C.C. § 28-32-39(2)).

[¶15] Summit also argues Burleigh County should have served its Notice of Appeal and Specifications of Error on certain intervening landowners, labeled “Non-Participating Parties” and listed individually in Summits’ brief. Index # 17 at pp. 5-6, 10-12. The record at the PSC does not contain the addresses or other contact information for any of these numerous “Non-Participating Parties.” They were all represented by attorneys Brian E. Jorde, Steven Leibel, and David Knoll in the PSC proceedings, none of which have ever submitted to the PSC a notice of their withdrawal of representation. As to all of these “Non-Participating Parties,” their attorneys submitted to the PSC on their behalf notices of withdrawal, expressly “withdrawing their Petition to Intervene due to changing conditions, including pipeline reroutes.” (Exh. 2 and Exh. 3) Again, the PSC did not serve the Challenged Order on any of these “Non-Participating Parties,” instead only serving it on the attorneys (Jorde, Leibel, and Knoll), just as Burleigh County later did with its Notice of Appeal and Specifications of Error. Summits theory would require Burleigh County, within 30 days, to track down the contact information for numerous former intervenors and serve them all with the Notice of Appeal and Specifications of Error, even though they expressly withdrew their petitions to intervene, and the attorneys who had appeared on their behalf were still served. Summit’s hyper-technical analysis of what constitutes a “party” ignores reality and ignores the PSC’s handling of the case.

[¶16] For the same reasons discussed above, Burleigh County was not required to designate The Warford Trust, Chad Moldenhauer, Chad Wachter, or the “Non-Participating Parties” as parties in

the caption of this appeal.<sup>3</sup>

**2. Even Assuming Arguendo Burleigh County Did Not Serve the Notice of Appeal on All Parties to the Proceedings in PSC Case No. PU-22-391, the Appropriate Remedy Would Not Be Dismissal of this Appeal with Prejudice**

[¶17] As discussed above, Burleigh County strongly opposes Summit’s claim that Burleigh County failed to serve its Notice of Appeal and Specifications of Error on “all the parties to the proceeding before the [PSC]”, as required by N.D.C.C. § 28-32-42(4). However, if the Court disagrees and finds that Burleigh County should have served The Warford Trust, Chad Moldenhauer, Chad Wachter, and/or the “Non-Participating Parties” listed in Summits’ brief, then the appropriate remedy is not dismissal of this appeal with prejudice. Summit’s exact arguments claiming Burleigh failed to serve of its Notice of Appeal and Specifications of Error on all parties to the proceeding before the PSC apply equally to the PSC’s service of the Challenged Order on the parties. The PSC has never served the Challenged Order at all on The Warford Trust, Chad Moldenhauer, Chad Wachter, or on any of the “Non-Participating Parties” listed in Summits’ brief. *See* Exh. 4.

[¶18] If the Court finds that Summit’s service arguments against Burleigh County have merit, which the Court should not, then the same arguments establish the PSC did not properly serve the Challenged Order “upon all the parties to the proceeding” as required by North Dakota Century Code § 28-32-39(2). If that is the case, the conditions have not been met to even start the clock running on the deadline for Burleigh County to serve its Notice of Appeal and Specifications of Error, which must be served withing 30 days after the PSC has given notice to all the parties as

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<sup>3</sup> Summit also argues Burleigh County should have named the other Intervening Parties as appellees in the caption of this case. All intervening parties were served through their counsel. To the extent the Court may find they should be listed in the caption of this case as well, that may be addressed by simply ordering the caption be updated, not dismissal of the appeal.

required by Section 28-32-39. *See* N.D.C.C. § 28-32-42(1).

[¶19] If that is the case, the PSC would have failed its statutory obligation to serve the Challenged Order on all the parties to the proceeding “within thirty days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible.” The proper remedy is not to dismiss this appeal (and certainly not with prejudice). Rather, if Summit’s argument is correct, which it is not, the matter would need to be remanded to the PSC (or simply order the PSC as a party to this appeal) to comply with its service requirements under North Dakota Century Code § 28-32-39.

[¶20] If the Court does dismiss this appeal, it should only be without prejudice, with instructions to the PSC to comply with its service obligations, so Burleigh County can recommence the appeal afterward.

**B. Burleigh County Was Not Required to Serve the Notice of Appeal Electronically**

[¶21] Summit argues Burleigh County’s service of the Notice of Appeal and Specifications of Error was improper because it was done via a combination of both mail and by process server, rather than electronically. Summit Brief, Index # 17, at pp.13-14. However, Summit can only reach its conclusion by applying the wrong procedural rule and misrepresenting the holdings of cited cases.

[¶22] Summit relies on North Dakota Rule of Civil Procedure 5(b)(1), which states, “A document that is required to be filed must be served electronically under the procedure specified in N.D.R.Ct. 3.5.”<sup>4</sup> Summit’s reliance on the North Dakota Rules of Civil Procedure is misplaced because, in

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<sup>4</sup> Even if Rule 5, N.D.R.Civ.P., governed service of the Notice of Appeal and Specifications of Error in this case, which it does not, the rule only requires service “electronically under the procedure specified in N.D.R.Ct. 3.5.” According to Rule of Court 3.5(e), entitled “Electronic Service”, “All documents filed electronically after the initiating pleadings must be served

this case, a statute controls over the rules. North Dakota Century Code § 28-32-42(4), part of the Administrative Agencies Practice Act, only required Burleigh County to “serve” the Notice of Appeal and Specifications of Error, not to serve it electronically. It should be noted, the North Dakota Legislative Assembly made clear that when the agency serves its final order on the parties under Section 28-32-39(2), it must be served “in the manner allowed for service under the North Dakota Rules of Civil Procedure.” There is no such reference to the Rules of Civil Procedure with respect to an appealing party’s service of the Notice of Appeal and Specifications of Error in Section 28-32-42(4).

[¶23] The North Dakota Supreme Court has explained:

This Court has recognized the rules of civil procedure apply to administrative appeals to the extent the rules are not inconsistent with applicable statutes. *Sande v. State*, 440 N.W.2d 264, 266 (N.D. 1989); *City of Casselton v. N.D. Pub. Serv. Comm’n*, 307 N.W.2d 849, 852 (N.D. 1981); *Schroeder v. Burleigh Cty. Bd. of Comm’rs*, 252 N.W.2d 893, 895 (N.D. 1977); *Reliance Ins. Co. v. Pub. Serv. Comm’n*, 250 N.W.2d 918, 920-21 (N.D. 1977); N.D.R.Civ.P. 81(b) (civil rules govern procedure and practice relating to appeals to district courts to the extent the rules are not in conflict with the statutes). Under the rules of civil procedure, we have recognized that “service” of a notice of appeal may be by mail and is complete upon mailing. *Sande*, at 266; *City of Casselton*, at 852; *Reliance Ins. Co.*, at 920-21.

*Opp v. Dir., N.D. DOT*, 2017 ND 101, ¶ 12, 892 N.W.2d 891 (emphasis added). *Opp* was decided in 2017, years after the electronic service requirement was added to Rule 5. *See Dakota Heritage Bank v. Iaccone*, 2014 ND 150, ¶ 10, 849 N.W.2d 219, 222 (“The electronic service requirement was included in an amendment to the Rule, which became effective on April 1, 2013....”). Thus,

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electronically through the Odyssey system except for documents served on or by self-represented litigants and prisoners.” N.D.R.Ct. 3.5(e) (emphasis added). In this case, the initial pleading filed with this District Court was the Notice of Appeal and Specifications of Error (Index # 1). The record on appeal from the PSC is not even prepared yet or filed with the District Court. North Dakota Rule of Court 3.5 does not require Burleigh County to serve its initial pleading (Index # 1) electronically.

the North Dakota Supreme Court has recognized the Rules of Civil Procedure do not control over the plain language of North Dakota Century Code § 28-32-42(4), and further service by mail is allowed for a Notice of Appeal and Specifications of Error in an administrative appeal, regardless of Rule 5.

[¶24] The statute governing Burleigh County’s commencement of this appeal states as follows in relevant part:

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.

N.D.C.C. § 28-32-42(4). Burleigh County complied with every single requirement in the statute. Summit’s arguments as to service relate only to the manner of Burleigh County’s compliance (mail and/or process server v. electronic), not the fact of compliance. Burleigh County did in fact serve all the individuals listed on its certificate of service by mail (Index # 3), and additionally also served Summit’s registered agent, the Attorney General, and the PSC by process server (Index #s 4 through 6).

[¶25] A review of applicable case law, including the case law cited by Summit, reveals that when courts have been faced with service issues in administrative appeal cases, the issues relate to whether a party was served at all. Summit complains of the manner of service, not the fact of service<sup>5</sup>, and it relies on the Rules of Civil Procedure, rather than relying on the governing statute.

[¶26] For example, in *Altru Specialty Servs., Inc. v. N. Dakota Dep’t of Hum. Servs.*, cited by

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<sup>5</sup> Except with respect to The Warford Trust, Chad Moldenhauer, Chad Wachter, and the “Non-Participating Parties” which are addressed above.

Summit, the appellant failed to serve the agency at all, and instead tried to claim that service on an assistant attorney general alone was sufficient to meet the service requirements in North Dakota Century Code § 28-32-42(4), because the Attorney General’s office represents the agency, and because North Dakota Rule of Civil Procedure 4(d)(2)(F) allows service on a state agency by serving an assistant attorney general. 2017 ND 270, 903 N.W.2d 721. The Court rejected these arguments and noted, “the statutory requirement to serve both the agency and the attorney general [in N.D.C.C. § 28-32-42(4)] would be rendered inoperative or superfluous if N.D.R.Civ.P. 4 and 5 control and permit service of a notice of appeal on an agency by serving the attorney general or any assistant attorney general in all appeals from agency orders.” *Altru*, 2017 ND 270, ¶ 17, 903 N.W.2d 721.

[¶27] However, in the present case, Burleigh County **did** serve **both** the PSC (*see* Index # 4) and the Attorney General (*see* Index # 6), and met all the other requirements of North Dakota Century Code § 28-32-42(4). The *Altru* case provides no support for Summit’s position in this motion to dismiss.

[¶28] In *Inwards v. N. Dakota Workforce Safety & Ins.*, also cited by Summit, the Court approved an extension of time to serve the agency based on an attempted service through the Odyssey filing system, which was claimed to have been hampered by technical issues. 2014 ND 163, 851 N.W.2d 693. The Court stated, “It is unclear why electronic service was not accomplished. The court found *Inwards* was not prejudiced and determined good cause existed to grant WSI appropriate relief. Under the circumstances, we conclude the district court did not abuse its discretion in allowing WSI additional time to electronically serve *Inwards* with the notice of appeal and specification of errors.” *Id.* at ¶¶ 14-15, 851 N.W.2d 693, 698. Again, the *Inwards* case involved a failure to serve at all, and in that case, the Court still granted an extension of time to serve the notice of appeal and

specification of errors. *Id.*

[¶29] Summit cites *Dakota Heritage Bank v. Iacone*, claiming the case stands for the proposition that “[s]erving a document by non-electronic means when N.D.R.Civ.P. 5 requires the document to be served electronically is not sufficient.” Summit Brief, Index # 17 at p. 14 (citing 2014 ND 150, 849 N.W.2d 219). Summit also quotes *Dakota Heritage Bank* using an ellipse and bracketed added text to obscure the nature of that case. *Id.* Summit severely misrepresents the holding of *Dakota Heritage Bank* and its applicability to the facts of the present case. The Court in *Dakota Heritage Bank* mentioned Rule 5 only in passing and in a very different context. *Dakota Heritage Bank* had nothing to do with North Dakota Century Code § 28-32-42(4). Rather, the case involved service of notice of entry of judgment, wherein the appellant claimed it did not receive notice of entry and judgment and did not have actual knowledge of entry of judgment. *Dakota Heritage Bank*, 2014 ND 150, ¶ 7, 849 N.W.2d 219. The Court concluded, “Pankonin was not properly served with notice of entry of the judgment and no evidence establishes Pankonin's actual knowledge of entry of the judgment until November 19, 2013. We conclude Pankonin's appeal is timely, and we deny the Bank's motion to dismiss.” *Id.* at ¶ 12. The applicability of *Dakota Heritage Bank* to the issue of whether Burleigh County properly served the Notice of Appeal and Specifications of Error under North Dakota Century Code § 28-32-42(4) has not been established and is entirely unclear.

[¶30] The case law does not establish that service by mail and/or process server is insufficient to meet the service requirement in North Dakota Century Code § 28-32-42(4), or that electronic service is the only sufficient method. The case law instead establishes the plain language of the statute [N.D.C.C. § 28-32-42(4)] governs, not the Rules of Civil Procedure. Under Section 28-32-42(4), mail and process server are sufficient. *See Altru*, 2017 ND 270, ¶ 17, 903 N.W.2d 72; *Opp*,

2017 ND 101, ¶ 12, 892 N.W.2d 891; *see also MacDonald v. N. Dakota Comm'n on Med. Competency*, 492 N.W.2d 94, 97–98 (N.D. 1992) (stating, “In *Sande v. State*, 440 N.W.2d 264, 266–267 (N.D.1989), we rejected the argument that effective service of a notice of appeal on the Board of Nursing required service on at least one of the Board's members. We noted that the Administrative Agencies Practice Act did not specify how service of a notice of appeal is to be made on an administrative agency....”

[¶31] Summit’s attempts to misdirect the Court and conflate the issues are well highlighted by paragraph 43 of Summit’s brief in support of this motion to dismiss, and the declaration referenced therein. In paragraph 43 of its brief, Summit argues the Landowner Intervenor, in a separate appeal (Case No. 08-2024-CV-03622), failed to serve Summit electronically. Based on a Declaration of Lawrence Bender (Summit’s counsel), which was filed in the present appeal (Index # 18), Summit claims its counsel was not aware of a status conference in the separate appeal until a colleague told him about it. Summit Brief, Index # 17 at ¶ 43. What this status conference in a separate appeal brought by different parties has to do with Burleigh County’s service of documents in this case is not clear. In the present case, Lawrence Bender received the Notice of Appeal and Specifications of Error in two ways: 1) by mail (*see* Index # 3), and 2) by hand delivery directly to Lawrence Bender himself at his office (*see* Index # 5). Summit’s attempts to make it look like it was prejudiced because Lawrence Bender was not served electronically (even though he was personally handed a hard copy of the Notice of Appeal and Specifications of Error by a process server on December 12, 2024), are disingenuous and misleading.

**C. Burleigh County Was Not Required to Serve the Notice of Appeal on Special Assistant Attorney General Zach Pelham**

[¶32] Summit argues Burleigh County was required by N.D.C.C. § 28-32-42(4) and N.D. R. Civ. P. 5(b)(2)(A) to serve the Notice of Appeal and Specifications of Error on special assistant attorney

general Zach Pelham (“Pelham”), as he was one of the attorneys who advised the PSC during its proceedings in this case. As an initial matter, it should be noted it was entirely unknown to Burleigh County when it served its Notice of Appeal and Specifications of Error whether Pelham’s special assistant attorney general appointment extended to also handling subsequent appeals. It is not uncommon for the PSC to rely on different attorneys in litigation and on appeal than handled the case below. *See e.g. Nodak Elec. Coop., Inc. v. N. Dakota Pub. Serv. Comm’n*, 2022 ND 225, 982 N.W.2d 592.

[¶33] Further, Pelham was not the only attorney representing the PSC at the proceedings in this administrative case. Special Assistant Attorney General John Schuh (“Schuh”) also represented the PSC and also appeared on behalf of the PSC at the various hearings in this matter. Schuh’s business address is listed on <https://www.ndcourts.gov/lawyers> as the office of the North Dakota Public Service Commission, 600 E. Boulevard Ave, Dept. 408 Bismarck, ND 58505-0480. (Exh. 6) Schuh’s business address is the same address where Burleigh County’s process server served the Notice of Appeal and Specifications of Error on the PSC, leaving copies with an administrative assistant. *See id.*; *see also* Affidavit of Service, Index # 4. Summit’s suggestion that Burleigh County failed to serve the PSC’s attorney is false.

[¶34] In any event, while service on Pelham or Schuh is sufficient to serve the PSC (*see Sande v. State*, 440 N.W.2d 264, 266 (N.D. 1989)), this was not the only permitted way to serve the PSC under N.D.C.C. § 28-32-42(4) (*see Opp*, 2017 ND 101, ¶ 12, 892 N.W.2d 891). Burleigh County served the PSC by process server at its offices on December 12, 2024. Affidavit of Service, Index # 4.

[¶35] In addition, Burleigh County also served the Attorney General by process server. Affidavit of Service, Index # 6. Under North Dakota Century Code § 49-01-09, the Attorney General is ex

officio attorney for the PSC. It is simply incorrect for Summit to suggest Burleigh County did not serve the PSC's attorney.

**D. Emmons County's Separate Appeal is Irrelevant to this Motion to Dismiss**

[¶36] Summit also argues that Emmons County voluntarily dismissed its separate appeal, and Summit assumes (without evidence or explanation) that Emmons County's decision in that regard must have been due to Summit's similar arguments in that case. Summit has not explained how Emmons County's decision in another appeal impacts the proper analysis of the issues raised in this motion. Summit's motion in the other appeal, which was not ruled on by the Court, is irrelevant to Summit's motion in this case.

**IV. CONCLUSION**

[¶37] As discussed above, Summit's motion to dismiss is entirely without merit and should be rejected in its entirety. If the Court finds that Summit's arguments have some merit, the matter should be remanded to the PSC (or simply order the PSC as a party to this appeal) to comply with its service requirements under North Dakota Century Code § 28-32-39, after which Burleigh County could timely re-serve its Notice of Appeal and Specifications of Error.

Dated this 3<sup>rd</sup> day of March, 2025.

BAKKE GRINOLDS WIEDERHOLT

By: /s/ Randall J. Bakke

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