STATE OF NORTH DAKOTA	DISTRICT COURT
COUNTY OF BURLEIGH	**SOUTH CENTRAL JUDICIAL DISTRICT**
Burleigh County, Appellant, v. North Dakota Public Service Commission, and SCS Carbon Transport LLC, Appellees	Case No.: 08-2024-CV-03614 **EMMONS COUNTY'S RESPONSE TO SCS CARBON TRANSPORT LLC'S MOTION TO DISMISS**

[¶1] Emmons County submits its response brief in opposition to SCS Carbon Transport's ("SCS") Motion to Dismiss.

I. Emmons County Adopts and Incorporates by Reference Appellant Burleigh County's arguments.

[¶2] The plain language of N.D.C.C. § 28-32-42 controls, not SCS's tortured reading of caselaw referencing the rules of civil procedure. *Altru Specialty Servs. v. N.D. Dep't of Human Servs.*, 2017 ND 270, ¶ 17, 903 N.W.2d 721; *see also MacDonald v. N.D. Comm'n on Med. Competency*, 492 N.W.2d 94, 96 (N.D. 1992) (emphasis added) ("Thus, we hold that the filing of a document showing proof of *some* service is sufficient under section 28-32-15 to confer jurisdiction on the district court…." and "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….."). To the extent SCS attempts to argue that the statute does not state *how* service is to be made, it must be reiterated that if it is possible to accomplish service that satisfies the plain language of the statute but not SCS's tortured and hypertechnical reading of civil rules, then the rules conflict with the statute and the plain language of the statute controls.

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[¶3] It should also be noted that authority regarding whether a party has standing to take an appeal is inapposite here, where the question is whether self-avowed nonparties were parties for purposes of needing to serve them with a notice of appeal under N.D.C.C. § 28-32-42. Compare *Minn-Kota Ag Prods. v. N.D. Pub. Serv. Comm'n*, 2020 ND 12, ¶ 1, 938 N.W.2d 118 ("company had standing to appeal the North Dakota Public Service Commission's (PSC) decision denying an electric public utility's application for a certificate of public convenience and necessity") with *Inwards v. N.D. Workforce Safety & Ins.*, 2014 ND 163, ¶ 17, 851 N.W.2d 693, 698 ("This Court has construed 'parties' under N.D.C.C. § 28-32-15 [currently N.D.C.C. § 28-32-42] to mean a real party in interest as well as an adverse party.") (emphasis added). Regarding the employer, Bobcat, in the *Inwards* case, the Court recognized that "[t]he legislature has recognized the employer's status as an interested party." *Inwards v. N.D. Workforce Safety & Ins.*, 2014 ND 163, ¶ 17, 851 N.W.2d 693 (emphasis added). Despite that explicit recognition *in the statutes*, it nonetheless indicated under the factual circumstances of that case and based on that court's discretion, it was not necessary to serve Bobcat the employer with the notice of appeal in that proceeding regardless of its statutorily defined status as an 'interested party.' *Id.* This Court has similar discretion, particularly given the weakness of SCS's claims about which "parties" supposedly required service.

[¶4] To poignantly highlight the illogic inherent in its argument, SCS literally refers to unserved individuals as "the 'Non-Participating Parties" and then nonetheless argues that they must nonetheless be served. Except that this is contrary to law. "[A]ny person who is directly interested in the proceedings before an administrative agency who may be factually aggrieved by the decision of the agency, and who participates in the proceeding before such agency, is a 'party' to any proceedings for the purposes of taking an appeal from the decision." *Inwards v. N.D.*

Workforce Safety & Ins., 2014 ND 163, ¶ 17, 851 N.W.2d 693 (emphasis added). The withdrawals were withdrawals of participation as recognized by SCS's choice of labels for them. And their withdrawals were literally the effective legal manner in which to indicate they are no longer a party and intend to cease participation in this proceeding. Based on SCS's own definition of these individuals as "Non-Participating Parties" they did not need to be served. While the statute says nothing about parties who withdraw, that is because it does not need to say anything – by the literal definition of what they are doing, their withdrawal indicates they are no longer parties requiring service.

[¶5] Finally, Emmons County joins in the arguments made in the briefing filed by Appellant herein, and also specifically agrees that the PSC was required to serve its final order on all parties, and to the extent there are any deficiencies with the parties' service of the notice of appeal the same problems exist with the PSC's service of its final order. As such, if the Court gives any credibility and weight to SCS's arguments, it must also remand for the PSC to properly serve the final order because the logically necessary consequent of SCS's argument is that the PSC never properly served its final order and no appeal period has started to run.

II. SCS's argument that the appeal should be dismissed because Appellant did not designate all other parties as appellees is frivolous.

[¶6] SCS argues that the Appellant did not name as appellees John Warford, Chad Moldenhauer, or Chad Wachter as appellees and consequently the appeal must be dismissed. SCS is throwing things at the wall to see what might stick.

[¶7] First, these individuals are not parties and did not require service. Further, SCS's argument is contrary to clear law. *MacDonald v. N.D. Comm'n on Med. Competency*, 492 N.W.2d 94, 97 (N.D. 1992) ("We conclude that MacDonald's failure to name the Board as an appellee in his timely-filed notice of appeal is not a jurisdictional defect, but may be corrected, with leave of

court, after the 30-day period for filing the notice of appeal has expired if no other party's rights are prejudiced. The district court erred in dismissing MacDonald's appeal on this basis.").

III. Emmons County is a party to this appeal and as indicated herein does not agree with SCS's conjecture about its dismissals.

[¶8] SCS argues that the dismissal of parallel appeals by Emmons County somehow has bearing on the issues pertinent in this matter. It does not. The parties, *sans* SCS, agreed to file and then consolidate these proceedings in order to conserve judicial resources. SCS instead filed parallel motions in numerous actions because it was lying in wait while the other parties discussed a cooperative way to consolidate these cases and conserve judicial resources. SCS's motion creates a potential for conflicting rulings if both this and the parallel *APH Farms* matter (08-2024-CV-03622) move forward simultaneously. Consolidation made sense, but SCS is determined to drain its opposition's resources (even if it also drains the judiciary's in the process). Emmons County has significantly mitigated that issue and has appeared in this matter to address the merits, and respectfully requests that this Court deny SCS's motion to dismiss and proceed with a briefing schedule for the substantive issues on appeal.

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Respectfully submitted,

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