

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

BURLEIGH COUNTY,

Appellant,

vs.

NORTH DAKOTA PUBLIC SERVICE
COMMISSION and SCS CARBON
TRANSPORT LLC,

Appellees.

**LANDOWNERS' RESPONSE TO
MOTION TO DISMISS**

Case No. 08-2024-CV-03614

COMES NOW Appellees APH Farms, Arden Hagerott, Jonathan Hagerott, Janel Olson, Valera Hayen, Kari Curran, Scott Irmén, Mary Jo Irmén, Leon Mallberg, Staroba Revocable Living Trust, Loren Staroba, Diane Staroba, and James Tiegs ("Landowners") by and through their counsel of record KNOLL LEIBEL LLP (Steven J. Leibel), and respectfully submits this, the Response to Motion to Dismiss.

1. Appellee SCS Carbon Transport LLC ("Summit") is asking the Court to apply an impossible standard. The Landowners are a group of North Dakota citizens who own property affected by Summit's CO2 pipeline. They have noticed a separate appeal, *APH Farms, et al. v. North Dakota Public Service Commission, et al.*, Case No. 08-2024-CV-03622 (Hon. Pamela Nesvig), and are facing the same motion to dismiss from Summit based on the same issues in their appeal. This is not unexpected—Summit is made up of foreign venture capitalists, and it is not light on lawyers. However, when its motion is placed into context, Summit's arguments are

unreasonable. The Court should review the Affidavit of Service from the Public Service Commission in the context of the Commission's statutory obligations. Appellant Burleigh County—like other parties to this appeal—should not be held to a different standard than the Commission.

ARGUMENT AND AUTHORTIES

2. The Landowners have noticed their own appeal and have the statutory right to fully participate in Burleigh County's appeal. N.D.C.C. § 28-32-42(5). The Landowners oppose the dismissal of Burleigh County's appeal because Summit is trying to impose both a hyper-technical interpretation of N.D.C.C. § 28-32-42 and a blind eye to the Commission's order.

3. The Landowners join in the response of Burleigh County and contend that Summit's objections are misplaced. The Landowners respond separately to raise personal due process objections. Specifically, in North Dakota the right to appeal is triggered by the service of a final order. *See* N.D.C.C. 28-32-42 (timeline for appeal starts when "notice of the order has been given as required by section 28-32-39."). This opportunity for judicial review is the glue that holds together procedural due process in agency proceedings. The North Dakota Supreme Court has held that the opportunity for judicial review "provides the ultimate due process protection to those aggrieved by agency decisions." *Feist v. North Dakota Workers Compensation Bureau*, 569 N.W.2d 1, 4 (N.D. 1997).

4. However, if Summit's objections are sustained, the Commission failed to satisfy its statutory obligations under N.D.C.C. § 28-32-39. This statute charges the Commission with service of a final order as follows:

If the agency head, or another person authorized by the agency head or by law to issue a final order, is presiding, the order issued is the final order. The agency shall 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.

See N.D.C.C. § 28-32-39(2)(emphasis added). Pursuant to N.D.C.C. § 28-32-39(2), the Commission served its final order on:

1. Lawrence Bender	2. Brant Leonard	3. Randall Bakke Bradley Wiederholt
4. Steven Leibel David Knoll	5. Brian Jorde	6. Kevin Pranis
7. Bret Dublinske	8. James Curry	9. Derek Braaten
10. Julie Lawyer	11. Patrick Zomer	12. Janelle Combs

See Affidavit of Service by Certified Mail, attached as Ex. 1.

5. The Century Code charges an appellant with almost identical language in describing how an appeal is taken:

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.

N.D.C.C. § 28-32-42(4)(emphasis added). According to its declaration of service, Burleigh County served its final order on:

1. Lawrence Bender	2. Brant Leonard	3. Randall Bakke Bradley Wiederholt
4. Steven Leibel David Knoll	5. Brian Jorde	6. Kevin Pranis
7. Bret Dublinske	8. James Curry	9. Derek Braaten
10. Julie Lawyer	11. Patrick Zomer	12. Janelle Combs
13. PSC		

See [Doc. 3]. The only difference between the Commission's service document and Burleigh County's service document is (1) Burleigh County served the PSC, and (2) Burleigh County did not serve its attorneys (Randall Bakke and Julie Lawyer).

6. This is the point. In North Dakota, procedural due process "requires fundamental fairness, which, at a minimum, necessitates notice and a meaningful opportunity for a hearing appropriate to the nature of the case." *See Kummer v. Hehn (In re Hehn)*, 2021 ND 20, ¶ 7 (citations omitted). "Due process is flexible and considered on a case-by-case basis, and the totality of the circumstances must be considered in all cases." *Id.*

7. If Summit's arguments are correct, the Commission's final order misrepresented the parties to the proceeding, made secret rulings upon withdrawal

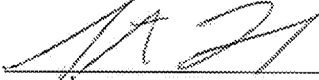
of parties and counsel that are not reflected in the record, and failed to serve all parties as required by N.D.C.C. § 28-32-39(2). This order is not in accordance with the law, violates the constitutional rights of appellants, and demonstrates that the proceeding before the Commission was clearly in violation of Chapter 28-32 as a matter of law. It also prejudiced Appellants by making an appeal impossible. This triggers this Court's judicial oversight under N.D.C.C. § 28-32-46(1)-(3), and should lead the Court to invalidate the November 15, 2024 final order and remand to the Commission to correct its final order by issuing findings of fact and conclusions of law regarding the various objections made by Summit as to the status of the various parties and requiring serving on all the parties to this proceeding as required by N.D.C.C. § 28-32-39.

8. For these reasons, Summit's motion should be denied. In the alternative, the November 15, 2024 final order should be vacated and remanded to the Commission to issue findings of fact and conclusions of law regarding the various objections made by Summit as to the status of the various parties and requiring serving on all the parties to this proceeding as required by N.D.C.C. § 28-32-39.

Dated this 4th day of March, 2025.

Respectfully submitted,

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