

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.

Case No. 08-2024-CV-03614

**NORTH DAKOTA PUBLIC
SERVICE COMMISSION'S
RESPONSE TO MOTION TO
DISMISS OF SCS CARBON
TRANSPORT LLC**

INTRODUCTION

[¶1] The North Dakota Public Service Commission (“Commission”), under the authority of N.D.C.C. ch. 49-22.1, issued its Findings of Fact, Conclusions of Law, and Order on a pipeline siting application of SCS Carbon Transport LLC (“SCS”). (PSC Dkt. 778: <https://www.psc.nd.gov/database/documents/22-0391/778-010.pdf>). Appellant filed its Notice of Appeal and Specifications of Error with this Court on December 13, 2024. Dkt. No. 1.

[¶2] The record on appeal has not been prepared by the Commission. Why? The Commission is required to prepare the record on appeal within thirty days of the appeal being taken “*and after* payment by the appellant of the estimated cost of preparation and filing of the entire record of the proceedings before the” Commission. N.D.C.C. § 28-32-44 (emphasis added). The Commission filed the Notice to Appellant of Estimated Costs on December 20, 2025. Dkt. No. 9. “The transcript of the hearing prepared for the person presiding at the hearing, including all testimony taken, and any written statements, exhibits, reports, memoranda, documents, or other information or evidence considered before final dispositions of the proceedings” is part of this administrative

record. N.D.C.C. § 28-32-44(4)(h). The Commission “may contract with any person or another agency to prepare and file the record of any proceeding before the agency.” N.D.C.C. § 28-32-44(2). To date, the Appellant has not paid the estimated costs of preparing the “entire record of the proceedings.” This is why the Court does not have the administrative record for this appeal at the present time.

[¶3] Be all as that may be, the pending motion to dismiss does not require a review of the entire administrative record because jurisdiction is implicated. But if the Court believes the record is required to decide the pending motion, the Court should either order the Appellant to pay the estimated costs or, after giving the Appellant a reasonable amount of time to comply, dismiss the appeal for failure of the Appellant to comply with N.D.C.C. § 28-32-44.

FACTUAL BACKGROUND

[¶4] The motion to dismiss is primarily premised on various arguments that the Appellant did not properly institute the appeal because it failed to include certain parties in the administrative action. The facts of the administrative record are publicly available. While the Commission has not forwarded the administrative record to the Court for the above-stated reasons, it is available on the Commission’s public website:
<https://apps.psc.nd.gov/cases/pscasedetail?getId=22&getId2=391#>

[¶5] The Commission heard the application of SCS to construct an approximately 332-mile carbon dioxide pipeline and associated facilities in the following North Dakota Counties: Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland, and Sargent. Numerous public hearings took place before the Commission reached its decision. Numerous parties formally intervened. The Commission’s administrative code provision on intervention provides:

Any person with a substantial interest in a proceeding may petition to intervene in that proceeding by complying with this section. An intervention may be granted if

the petitioner has a statutory right to be a party to the proceeding; or the petitioner has a legal interest which may be substantially affected by the proceeding, and the intervention would not unduly broaden the issues or delay the proceeding. The commission may impose conditions and limitations on an intervention to promote the interests of justice.

N.D.A.C. § 69-02-02-05. The Administrative Law Judge granted numerous intervention requests in the action.

[¶6] John H. Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust (“Warford Trust”), was granted intervention status on March 6, 2023. (PSC Dkt. 65: <https://www.psc.nd.gov/database/documents/22-0391/065-010.pdf>). A notice of withdrawal was filed with the Commission for the “Bismarck Intervenors” and signed by “John Warford, Sr.”, Chad Wachter, and Chad Moldenhauer on March 8, 2024. (PSC Dkt. 458: <https://www.psc.nd.gov/database/documents/22-0391/458-010.pdf>). There is no indication on the notice of withdrawal that John Warford, Sr. signed the document in his capacity as a trustee of the Warford Trust. There is no notice of withdrawal of record for the John H. Warford, Jr. Revocable Trust. Indeed, counsel for the Warford Trust, recognizing a Trust is necessarily distinct from an individual, filed a notice of withdrawal as counsel specifically naming the Warford Trust on March 4, 2024. (PSC Dkt. 453: <https://www.psc.nd.gov/database/documents/22-0391/453-010.pdf>). But, again, no notice of withdrawal of the Warford Trust is of record.

ARGUMENT

[¶7] The Commission agrees that the jurisdiction of a district court for an appeal of an administrative agency’s final decision requires compliance with N.D.C.C. § 28-32-42. Our supreme court has strictly construed these requirements. *Altru Specialty Servs., Inc. v. N.D. Dep’t of Human Servs.*, 2017 ND 270, ¶8, 903 N.W.2d 721. Our Legislative Assembly requires “all other parties of record who are not designated as appellants must be named as appellees” on a

notice of appeal. N.D.C.C. § 28-32-42. These are not the rules, desires, wishes, or hopes of the Commission (or any other party for that matter). This is the law of North Dakota as enacted by the Legislative Assembly to which courts must adhere to.

[¶8] The question for the Court is whether the Appellant's notice of appeal complies with N.D.C.C. § 28-32-42. On its face, the Notice of Appeal does not include "all other parties of record" as appellees. The Notice of Appeal only names the Commission and SCS as appellees. Because the Notice of Appeal does not comply with N.D.C.C. § 28-32-42, the notice of appeal is defective on its face. The appeal should be dismissed for this reason alone.

[¶9] The Appellant did not include the Warford Trust as an appellee, or otherwise serve the Warford Trust with the notice of appeal. This is an oversight with consequence. The Warford Trust has not withdrawn as an intervenor; it is still a party. Because it is a party, it needed to be included in the Notice of Appeal. It was not included. The notice of withdrawal by the Bismarck Intervenors was signed by "John Warford, Sr." in his individual capacity. It was not signed "John Warford, Sr., Trustee of the John H. Warford, Jr. Revocable Trust." Our supreme court notes "courts have long held that the signature of a representative without any indication that he was signing in a representative capacity leaves him personally liable." *Farmers & Merchants Nat'l Bank v. Lee*, 333 N.W.2d 792, 794 (N.D. 1983). Because the signature does not state it was signed "for" or "by" the trustee of the Trust, it exhibits only a signature by an individual not in his representative capacity as a matter of law. And because of this, the Warford Trust did not withdraw as a party.

[¶10] The Warford Trust has not appealed and is not seeking to appeal. Its right to appeal is not at issue. The question for the Court is whether the Appellant's notice of appeal complies with the statute, not whether the Warford Trust received a copy of the Commission's order. Because

Appellant here has not complied with the specific appellate procedure, the appeal should be dismissed because the Court lacks jurisdiction as a matter of law.

[¶11] The undersigned has been, and still is, counsel for the Commission at all relevant points in time for this matter. The undersigned was not served with any notice of appeal by the Appellant. The Commission adopts and joins in the arguments presented in Section II of the SCS motion to dismiss brief.

[¶12] The Commission takes no position on the remaining arguments contained in the motion to dismiss brief of SCS.

CONCLUSION

[¶13] The Court should grant the motion to dismiss of SCS. Alternatively, the Court should order the Appellant to either proceed with the appeal by paying the Commission the estimated costs to prepare and supply the administrative record within ten days of the Order or dismiss the appeal for failure to comply with N.D.C.C. § 28-32-44(2).

Respectfully submitted this 4th day of March, 2025.

/s/ Zachary E. Pelham
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