STATE OF NORTH DAKOTA DISTRICT COURT

COUNTY OF BURLEIGH SOUTH CENTRAL JUDICIAL DISTRICT

APH FARMS, ARDEN HAGEROTT, JONATHAN HAGEROTT, JANEL OLSON, VALERA HAYEN, KARI CURRAN, SCOTT IRMEN, MARY JO IRMEN, LEON MALLBERG, STAROBA REVOCABLE LIVING TRUST, LOREN STAROBA, DIANE STAROBA, JAMES TIEGS, Appellants, v. NORTH DAKOTA PUBLIC SERVICE COMMISSION, SCS CARBON TRANSPORT, LLC, JOHN H. WARFORD, JR. REVOCABLE TRUST, CHAD WACHTER, CHAD MOLDENHAUER, CITY OF BISMARCK, LABORERS DISTRICT COUNCIL OF MINNESOTA AND NORTH DAKOTA, EMMONS COUNTY, and BURLEIGH COUNTY, Appellees.	**RESPONSE TO MOTION TO DISMISS** Case No. 08-2024-CV-03622

COMES NOW Appellants APH Farms, Arden Hagerott, Jonathan Hagerott, Janel Olson, Valera Hayen, Kari Curran, Scott Irmen, Mary Jo Irmen, Leon Mallberg, Staroba Revocable Living Trust, Loren Staroba, Diane Staroba, James Tiegs, by and through their attorneys of record KNOLL LEIBEL LLP (Steven J. Leibel, David M. Knoll) and DOMINA LAW GROUP (Brian Jorde), and respectfully submits this Response to Motion to Dismiss.

1. The agency proceeding in this case was a goliath that addressed a multi-billion-dollar carbon dioxide pipeline proposed by SCS Carbon Transport, LLC ("Summit"). It involved dozens of witnesses, weeks of testimony, and thousands of pages of documents. Summit's permit application was denied, then reconsidered, and ultimately granted. In this appeal, Appellants contend that the Commission's interpretation of the Century Code exceeded their statutory powers.

2. This motion is based upon a false premise. A Public Service Commission proceeding lacks the structure of a judicial proceeding. In the absence of that structure, only the Public Service Commission (the "Commission") is vested with the authority to provide definition. In this case, the Commission was unclear. This is the root issue. Summit seeks to apply a stringent technical standard to an imprecise proceeding and punish Appellants for the Commission's ambiguity. This is fundamentally unfair.

A. Summit's objection regarding Warford Trust, Moldenhauer, and Wachter is misplaced.

3. Summit's first argument is that the Landowner Appellants failed to serve The Warford Trust, Chad Moldenhauer, and Chad Wachter. As a beginning point, Summit fails to make any showing that the Warford Trust, Moldenhauer, or Wachter is "factually aggrieved by the decision of the agency." *See Inwards v. N.D. Workforce Safety & Ins.*, 2014 ND 163, ¶ 17, 851 N.W.2d 693 (in appeal from WSI proceeding, Supreme Court noting that employer, while normally an "interested party" to a WSI proceeding, did not qualify under those facts). Second, the Commission identified in its November 15, 2024 final order—the order that is the

subject of this appeal—an appearance by "Randall Bakke...on behalf of Intervenors John H. Warford, Jr. Revocable Trust, Chad Wachter and Chad Moldenhauer." *See* [Doc. 2], pg. 1. The Commission later noted that the "Warford Intervenors withdrew from the proceeding," and the Commission did not individually serve the Warford Intervenors with the November 15, 2024 final order [Doc. 2], pg. 6. Instead, the Commission only served Attorney Bakke. *See* Affidavit of Service by Certified Mail, attached as Ex. 1.

4. Pursuant to the Century Code, the Commission has a statutory obligation to serve a copy of its final order on "all the parties to the proceeding." *Compare* N.D.C.C. § 28-32-39(2)(agency has statutory obligation to "serve a copy of the final order and findings of fact and conclusions of law upon which it is based upon all the parties to the proceeding..."). 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 Ex. 1. 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). The Landowners served its notice of appeal on:

1. Lawrence Bender	2. Brant Leonard	3. Randall Bakke Bradley Wiederholt (served twice)
~~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	14. North Dakota Attorney General	

See [Doc. 6]. The only differences between the Commission's service document and the Landowners' service document is that the Landowners served the Public Service Commission and the North Dakota Attorney General and did not serve themselves—in fact, Appellants served Attorney Bakke with the notice of appeal twice because the Commission listed Mr. Bakke in its final order as appearing on behalf of Burleigh County and on behalf of Warford Trust, Wachter, and Moldenhauer. *Compare* Ex. 1

with [Doc. 6]. Appellants had the right to rely upon the Commission's statutory obligation to identify and serve the parties[1].

B. Summit's objection to service on the Commission is mistaken.

5. Summit next argues that Appellants did not serve Mr. Pelham with the notice of appeal. Again, Appellants relied upon the Commission's final order. In this case, the Commission was represented by at least two (2) attorneys at various times in this proceeding. However, when the Commission listed the appearances of counsel on its November 15, 2024 final order, it did not list any attorneys on behalf of the Commission. *See* [Doc. 2]. Furthermore, the Commission did not serve Attorney Pelham with its November 15, 2024 order. Ex. 1. Based upon the Commission's order, Appellants elected to serve the Commission personally *and* via certified mail rather than serving Mr. Pelham, an attorney the Commission did not recognize in its final order[2]. This is consistent with North Dakota law.

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[1] Pursuant to the Administrative Code, the withdrawal of an attorney requires an order by the agency under some circumstances. *See* N.D.A.C. § 98-02-02-18. The application of this rule to these facts is uncertain, at best, as the actual intervenors also withdrew and stated at the time of withdrawal they did not wish to further participate in this matter. However, it also provides a basis for the Commission to serve Mr. Bakke on behalf of the Warford Trust, Wachter, and Moldenhauer. Appellants did not create this ambiguity—the Commission's order did.

[2] The Commission's docket for this matter indicates that on December 14, 2022, a motion was made to appoint Attorney Pelham as "advisory counsel." *See* Case PU-22-391 Docket Sheet, attached as Ex. 2. The docket does not appear to contain an order of appointment. Appellants do not know what an "advisory counsel" is, as the Commission's General Counsel, Assistant Attorney General John Schuh also was served by the parties with filings during this proceeding. *See, for example,* service documents, attached as Ex. 3. To the extent this is an ambiguity, it was not created by Appellants.

6. In North Dakota, an appeal is 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." *See* N.D.C.C. § 28-32-42(4). The Supreme Court has "approved the use of service under N.D.R.Civ.P. 5 for service of a notice of appeal from an administrative agency's decision upon a party or a party's attorney." *Inwards*, 2014 ND 163 at ¶ 9.

7. However, permissive service upon a party's attorney is very different than mandatory service upon a party's attorney. Summit suggests that *Altru Specialty Servs. v. N.D. Dep't of Human Servs.*, 2017 ND 270, 903 N.W.2d 721 only allows a party to be served with a notice of appeal through his or her attorney. This is an unreasonable interpretation of *Altru*, which addressed Rule 5 in a different context. In *Altru*, a company sought to appeal a decision of the Department of Human Services. The appellant served the notice of appeal on an assistant attorney general within the thirty (30) day deadline. However, it did not serve the agency for another week—37 days after the final order. *Altru*, 2017 ND 270 at ¶ 12.

8. The agency in *Altru* objected to late service and argued that the company failed to invoke the appellate jurisdiction of the district court because the agency was not served within thirty (30) days. In response, the appellant argued that it had timely served an assistant attorney general, and because the attorney general's office would represent the agency on appeal, this was sufficient service. The appellant also argued that under N.D.R.Civ.P. 4, service was proper on the agency by serving the

assistant attorney general. The Supreme Court disagreed. Because the agency was not represented by the attorney general's office in the underlying *Altru* proceeding, the appellant could not rely on service under N.D.R.Civ.P. 4 to avoid serving the agency as required by N.D.C.C. § 28-32-15 (now N.D.C.C. § 28-32-42).

9. To swallow Summit's interpretation of *Altru* requires a suspension of common sense and a generous helping of greasy *dicta*. In *Altru* neither the agency nor the agency's attorney received the notice of appeal within 30 days. In this case, the Commission was served timely via mail and through personal delivery to its general counsel, John Schuh. Summit cites zero cases that have upheld a lack of subject matter jurisdiction where the agency was timely served in person and via mail. Second, the *Altru* court held that Rule 4 cannot be relied upon to *avoid* serving an agency as required by N.D.C.C. § 28-32-42(4). It never said that a party *cannot* serve the agency.

10. Finally, the Commission did not identify Attorney Pelham as appearing on its behalf in its final order and did not list him in the service document for its final order. Attorney John Schuh—a Special Assistant Attorney General located at 600 East Boulevard Ave, Dept. 408, Bismarck ND 58505[3]—has been on the service list in addition to Mr. Pelham. *See, for example,* Ex. 3. Appellants personally served Attorney Schuh with its notice of appeal. [Doc. 9] (affidavit of service indicating the Public Service Commission was personally served with Appellants' notice of appeal by handing the notice to "John Schuh, Staff Atty.").

[3] See John Maurice Schuh listing on ndcourts.gov/lawyers, attached as Ex. 4.

C. Summit's objection to "only" being served by mail and personal service is not well-taken.

11. Summit next argues that it was not served with the notice of appeal under N.D.C.C. § 28-32-42(4) because Appellants only served Summit's counsel—who is also Summit's registered agent—personally *and* by certified mail. Specifically, Summit argues that because N.D.R.Civ.P. 5(b)(1) states that a party must utilize electronic service under N.D.R.Ct. 3.5 in some circumstances, electronic service via Odyssey is necessary to trigger subject matter jurisdiction. This argument is mistaken. Even if Summit's argument was accepted at face value, N.D.R.Ct. 3.5 only requires electronic services of "[a]ll documents filed electronically *after the initiating pleadings*." *See* N.D.R.Ct. 3.5(e)(1)(emphasis added). It is the understanding of the undersigned that North Dakota's Odyssey system does not provide for electronic serving on initial filings (i.e. "file and serve") such as a notice of appeal, until those filings have been accepted by the applicable clerk and a matter number is assigned[4]. As such, while electronic service on a counsel is permitted, it is not required by Rule 3.5.

12. Second, Summit's argument is a deviation from the plain language of the statute, which requires service on the agency, the attorney general, and the

[4] According to Kira Melchior, the Burleigh County Calendar Control Clerk, Attorney Bender was mailed notice of the status conference hearing. [Doc. 33] Attorney Bender says that notice was not received. However, he was handed a copy of the notice of appeal on December 13, 2024. [Doc. 9] He had the ability to protect himself from surprise filings. A "notice of appearance" informs the court and the parties of an attorney's representation. It also ensures that an attorney receives notice of any hearings via the Attorney Subscription Management System. N.D.R.Ct. 3.5(e)(5). Summit cannot manufacture its own prejudice.

parties. N.D.C.C. § 28-32-42. In a case that predates *Altru* by only nine months, the Supreme Court stated that the rules of civil procedure permitted service by mail on the Department of Transportation of a notice of appeal. *See Opp. v. Dir., N.D. DOT*, 2017 ND 101, ¶ 12, 892 N.W.2d 891, ("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."). It is not uncommon that a party changes attorneys to handle an appeal, and Appellants should not be forced to rely on assumptions. Simply stated, Summit is seeking to manufacture a procedural hurdle that conflicts with N.D.C.C. § 28-32-42. *Opp*, 2017 ND 101 at ¶ 12 ("This Court has recognized the rules of civil procedure apply to administrative appeals to the extent the rules are not inconsistent with applicable statutes.").

D. Summit's argument regarding the case caption is not well-taken.

13. Finally, Summit argues that Appellants failed to designate the "Warford Trust, Chad Moldenhauer, Chad Wachter, and the Intervening Parties as appellees." Summit contends this is a jurisdictional defect. Summit cites no authority for the argument that the structure of a caption is a jurisdictional trigger. As stated above, N.D.C.C. § 28-32-42(4) requires service. Even if the Warford Trust or Moldenhauer or Wachter were not named as appellees—they are—there is no reason a court could not amend the caption to correct it. In fact, the Supreme Court has held it is reversible error for a trial court to dismiss an appeal from an agency decision merely because a party was not identified in the caption:

> There is no dispute that MacDonald's notice of appeal was timely filed. The Commission's only complaint about the notice of appeal is that the

> Board, as the adjudicative agency, was not listed as an appellee in the caption. The rationale of *Cahoon* that allows amendment, beyond the 30-day appeal period, of a proof of service to show actual service is even more compelling where, as here, the appellant merely seeks to correct the caption of a notice of appeal to include the adjudicative agency.
>
> 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.

MacDonald v. North Dakota Comm'n on Medical Competency, 492 N.W.2d 94, 97 (N.D. 1992)(*citing Cahoon v. N.D. Workers Comp. Bureau*, 482 N.W.2d 865 (N.D. 1992).

14. To the extent that Summit suggests that Appellants had an obligation to serve other landowners represented by Appellants' counsel who chose not to proceed with an appeal, that argument is not well-taken. At its core, Summit is arguing that the Court should pierce the attorney-client privilege to determine the current status of any particular landowner vis a vis Appellant's attorneys. Again, the Commission did not name or serve a single individual landowner, including those landowners who filed notices of withdrawal, in its final order. Appellants' counsel owe duties to their clients, and have advised their clients consistent with their ethical obligations. To the extent there is ambiguity, it was created by the Commission.

E. <u>This Court should protect the statutory rights of the public, including these Appellants</u>.

15. Summit is determined to have this matter decided politically—not on the merits. However, Appellants are not billionaire foreign venture capitalists with unlimited funds. They want their objections heard because Appellants believe the

Summit steamrolled the Commission to reach this result. It is unfair that these Appellants should have to expend fees and costs to defend alleged mistakes in the four corners of the Commission's order.

16. However, this prejudice is not inevitable. As stated in the Administrative Agencies Practices Act, this Court must affirm an agency's order unless it finds any of the following:

> (1) The order is not in accordance with the law.
> (2) The order is in violation of the constitutional rights of the appellant.
> (3) The provisions of this chapter have not been complied with in the proceedings before the agency.

N.D.C.C. § 28-32-46(1)-(3). If this Court lacks subject matter jurisdiction, it only lacks jurisdiction because the Commission failed to satisfy its obligation under N.D.C.C. § 28-32-39 to serve all the parties with its order. Where Appellants' characterization of a party's status is derivative of statutory obligations of the Commission, Appellants should not be punished if the Commission did not do its job in accordance with N.D.C.C. § 28-32-39.

17. For the same reason, the Commission's order also violates Appellants' right to due process. Appellants do not believe that the Commission intentionally tried to manufacture a procedural bar to jurisdiction. However, that is exactly how Summit is attempting to use the Commission's omissions. This should not be allowed. 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.*

18. In this case, Appellants' right to appeal is triggered by service of a final order as required by N.D.C.C. § 28-32-39. *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."). N.D.C.C. § 28-32-39 requires that 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..." N.D.C.C. § 28-32-39(2). This right to appeal to the district court—and the 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). To allow an agency to essentially avoid judicial review by misrepresenting the parties to the proceeding violates basic notions of fundamental fairness.

19. If Summit's arguments are correct, the Commission's final order misrepresented the parties to the proceeding, made secret rulings outside the record upon withdrawal of parties and counsel, and failed to serve all parties as required by N.D.C.C. § 28-32-39. This violates basic notions of fundamental fairness and triggers this Court's judicial oversight and obligations under N.D.C.C. § 28-32-46. For these reasons, and if the Court sustains Summit's objections, the Court should invalidate the November 15, 2024 final order and remand to the Commission to correct its final

order by issuing specific findings regarding the various issues raised by Summit in its motion and serving all the parties to this proceeding as required by N.D.C.C. § 28-32-39.

20. For these reasons, the motion should be denied. In the alternative, the Court should invalidate the November 15, 2024 final order and remand to the Commission to address the objections made by Summit.

Dated this 4th day of March, 2025.

Steven Leibel (ID 07361)
David Knoll (ID 06167)
Knoll Leibel LLP
P.O. Box 858
1915 N. Kavaney Drive, Ste. 3
Bismarck, ND 58501
Ph: (701) 255-2010
steve@bismarck-attorneys.com
david@bismarck-attorneys.com

Landowner/Intervenor Lawyers

Brian E. Jorde
Pro Hac Vice Pending
Domina Law Group
2425 S. 144th St.
Omaha, NE 68144
Ph: 402-493-4100
bjorde@dominalaw.com
NDCO2@dominalaw.com

Landowner/Intervenor Lawyers