STATE OF NORTH DAKOTA | IN DISTRICT COURT

COUNTY OF BURLEIGH | SOUTH CENTRAL JUDICIAL DISTRICT

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| Burleigh County,<br><br>Appellant,<br><br>v.<br><br>North Dakota Public Service Commission, SCS Carbon Transport LLC,<br><br>Appellees. | Case No. 08-2024-CV-03614<br><br>**SCS CARBON TRANSPORT LLC'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS** |

## INTRODUCTION

[¶ 1] In its initial brief, SCS Carbon Transport LLC ("Summit") explained why this Court lacks subject matter jurisdiction and why the appeal filed by Burleigh County must be dismissed. Appellant Burleigh County has filed a response in opposition to Summit's motion to dismiss. Emmons County and certain landowners ("Landowners"),[1] which are unnamed Appellees in this case, also filed responses in opposition to Summit's motion to dismiss. Appellee North Dakota Public Service Commission ("Commission") filed a response that also explains why this Court does not have subject matter jurisdiction over the appeal filed by Burleigh County.

[¶ 2] Burleigh County, Emmons County, and Landowners (collectively, the "Intervenors") waged an all-out war against Summit's pipeline application, employing a relentless "scorched earth" strategy with two primary objectives—delay and stop Summit's project at any cost. Their claims of fairness and due process are nothing more than a smokescreen. The reality is

[1] 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, and James Tiegs.

that Summit's pipeline project has undergone the most exhaustive scrutiny of any pipeline ever permitted in North Dakota.

[¶ 3] For over two years, Intervenors exploited every procedural avenue available to them—they conducted discovery, filed and responded to motions, grilled Summit's witnesses repeatedly, paraded their own witnesses (sometimes multiple times), and inserted themselves into every single one of the eight public hearings and four technical hearings before the Commission. The sheer volume of the record speaks for itself: 778 docket entries, thousands of pages of documents, and transcripts for 12 full day hearings—assuming this case proceeds and Intervenors pay for them, which they have so far refused to do. No other pipeline siting case in state history has come close to this level of scrutiny, underscoring the Commission' exhaustive and methodical approach in reviewing Summit's application.

[¶ 4] Yet, despite this ironclad record, the Intervenors now demand that this Court trample over the Commission's expertise and erase more than two years of legal proceedings—all in pursuit of their relentless campaign to stop Summit's project. But their legal maneuvering has a fatal flaw: this Court has no jurisdiction to even consider their appeals, thanks to their blatant disregard for the statutes and rules that govern this process. Their war against Summit ends here.

## ARGUMENT

### I. Summary of arguments made by Burleigh County, Emmons County and Landowners.

[¶ 5] Collectively, Intervenors make four primary arguments in opposition to Summit's motion to dismiss. First, despite acknowledging that N.D.R.Civ.P. 5 applies and states that a "document that is required to be filed must be served electronically," N.D.R.Civ.P. 5(b)(1) (emphasis added), Intervenors argue that Burleigh County was not required to serve its notice of appeal electronically. Second, despite acknowledging that Rule 5 also states that "service under

this rule must be made on the attorney," N.D.R.Civ.P. 5(b)(2) (emphasis added), Intervenors argue that Burleigh County was not required to serve its notice of appeal upon the attorney of record for the Commission. Third, despite acknowledging that N.D.C.C. § 28-32-42(4) required Burleigh County to serve its notice of appeal "upon all the parties to the proceeding before the administrative agency," Intervenors argue that Burleigh County was not required to serve its notice of appeal upon John H. Warford, as Trustee of the John H. Warford, Jr. Revocable Trust ("Warford Trust"), Chad Wachter, and Chad Moldenhauer who were all parties to the proceeding before the Commission. Fourth, Intervenors argue that dismissing Burleigh County's appeal would violate due process rights.

[¶ 6] These arguments are not just wrong—they are a desperate, last-ditch attempt to cover up Intervenors' own reckless disregard for the law. They know it. Yet, in a feeble attempt to escape the consequences of their own errors, they have twisted statutes and rules beyond recognition, grasping at any loophole to salvage their fatally flawed appeals. But no amount of legal contortion can change the facts. As set forth herein, Burleigh County's appeal is legally doomed and must be dismissed for lack of jurisdiction.

## II. Burleigh County did not serve its notice of appeal electronically.

[¶ 7] In its initial brief, Summit argued that Burleigh County was required to serve its notice of appeal electronically. *See* Summit's Br. ¶¶ 40-44 (Doc. ID# 17). Because Burleigh County failed to do so, the Court "lacks subject matter jurisdiction and the appeal must be dismissed." *Altru Specialty Servs., Inc. v. North Dakota Dep't of Human Servs.*, 2017 ND 270, ¶ 11, 903 N.W.2d 721. As explained in the following sections, the arguments raised by Burleigh County for why it was not required to serve its notice of appeal electronically are without merit.

**A. A notice of appeal is not an initiating pleading exempt from electronic service.**

[¶ 8] The first argument raised by Burleigh County is based on the language of N.D.R.Civ.P. 5 and N.D.R.Ct. 3.5. The former rule states that "[a] document that is required to be filed must be served electronically under the procedure specified in N.D.R.Ct. 3.5." The latter rule states that "[a]ll documents filed electronically after the initiating pleadings must be served electronically through the Odyssey system ..." Burleigh County argues that its notice of appeal is an "initiating pleading" that is not required to be served electronically. Burleigh County's Br. ¶ 22 n.4 (Doc. ID# 22).

[¶ 9] The explanatory note to N.D.R.Ct. 3.5 clearly demonstrates that Burleigh County's notice of appeal is not an "initiating pleading" exempt from electronic service. That explanatory note states that "[i]n an appeal from an agency determination under N.D.C.C. § 28-32-42, the notice of appeal must be served on all the entities listed in the statute, some of whom may not be subject to electronic service through the Odyssey system." N.D.R.Ct. 3.5 (explanatory note). The Joint Procedure Committee (who authored N.D.R.Ct. 3.5) and the North Dakota Supreme Court (who approved N.D.R.Ct. 3.5) would not have included this explanatory note to N.D.R.Ct. 3.5 if they believed that a notice of appeal from an order of an administrative agency was an initiating pleading exempt from the rule.[2]

**B. Unless a notice of appeal is served in compliance with Rule 5, then the notice is not truly "served" as that word is used in N.D.C.C. § 28-32-42(4).**

[¶ 10] Burleigh County's next argument is based on the text of N.D.C.C. § 28-32-42(4). Burleigh County notes that the statute's text only says that a notice of appeal must be "served." According to Burleigh County, this means that N.D.C.C. § 28-32-42(4) "only required Burleigh

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[2] *See also Inwards v. North Dakota Workforce Safety & Ins.*, 2014 ND 163, ¶ 11, 851 N.W.2d 693 (notice of appeal from order of administrative agency was served electronically pursuant to N.D.R.Ct. 3.5).

County to 'serve' the Notice of Appeal …, not to serve it electronically." Burleigh County's Br. ¶ 22 (Doc. ID# 22).

[¶ 11] Summit agrees with Burleigh County that N.D.C.C. § 28-32-42(4) only required Burleigh County to "serve" its notice of appeal. But the statute "does not specify how [a] notice of an appeal is to be served." *Sande v. State*, 440 N.W.2d 264, 266 (N.D. 1989) (emphasis added). In contrast, "Rule 5, N.D.R.Civ.P., provides procedural rules for … how service is made." *Altru*, 2017 ND 270, ¶ 14 (emphasis added). As a result, the North Dakota Supreme Court has decided that "Rule 5, N.D.R.Civ.P., applies to service of a notice of appeal from an administrative agency's decision." *Id.*

[¶ 12] Accordingly, the manner in which an appellant "serves" a notice of appeal under N.D.C.C. § 28-32-42(4) is by serving the notice in compliance with Rule 5. If an appellant "serves" a notice of appeal in a way that does not comply with Rule 5, then the appellant did not truly "serve" the notice as that word is used in N.D.C.C. § 28-32-42(4).

[¶ 13] Here, Rule 5 required Burleigh County to serve its notice of appeal "electronically under the procedure specified in N.D.R.Ct. 3.5." N.D.R.Civ.P. 5(b)(1). Burleigh County did not do so. Therefore, Burleigh County did not truly "serve" its notice of appeal.

**C. Burleigh County was not allowed to serve its notice of appeal by mail.**

[¶ 14] Burleigh County's next argument is based on the following statement made by the North Dakota Supreme Court: "Under the rules of civil procedure, we have recognized that 'service' of a notice of appeal may be by mail …" *Opp v. Director, N. Dakota Dep't of Transp.*, 2017 ND 101, ¶ 12, 892 N.W.2d 891 (citing *Sande*). Burleigh County argues this statement shows the "North Dakota Supreme Court has recognized … service by mail is allowed …" Burleigh County's Br. ¶ 23 (Doc. ID# 22).

[¶ 15] The *Opp* Court's statement is entirely consistent with Summit's argument that Burleigh County was required to serve its notice of appeal electronically. The *Opp* Court did not say that service of a notice of appeal may be by mail as Burleigh County suggests. What the *Opp* Court actually said was that "[u]nder the rules of civil procedure, we have [*i.e.*, in the past] recognized that 'service' of a notice of appeal may be by mail." *Opp*, 2017 ND 101, ¶ 12. The *Opp* Court was referring its previous decision in *Sande*. When the *Sande* case was decided in 1989, the rules of civil procedure actually did allow service by mail. *See* N.D.R.Civ.P. 5(b) (1989).

[¶ 16] Since *Sande* was decided, however, the rules have been amended and service by mail is only allowed for "[a] document that is not required to be filed, or that will be served on a person exempt from electronic service." N.D.R.Civ.P. 5(b)(3)(C). Here, Burleigh County's notice of appeal was required to be filed, and every party other than the Warford Trust, Wachter, and Moldenhauer is represented by counsel and therefore are not exempt from electronic service. Accordingly, service by mail was not allowed other than for the Warford Trust, Wachter, and Moldenhauer.

**D. The North Dakota Supreme Court would likely apply its decision in *Dakota Heritage Bank* to require electronic service.**

[¶ 17] Burleigh County's next argument is based on caselaw. Burleigh County claims that "[a] review of applicable case law … 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." Burleigh County's Resp. Br. ¶ 25 (Doc. ID# 22). "Summit complains of the manner of service, not the fact of service …" *Id.*

[¶ 18] It is true that Summit cannot cite to a North Dakota Supreme Court case where the Court dismissed an administrative appeal because the notice of appeal was not served in the proper manner. But it is equally true that Burleigh County cannot cite to a case where Court allowed an

administrative appeal to proceed despite the notice of appeal not being served in the proper manner. The Court simply has not addressed the issue in the specific context of an administrative appeal.

[¶ 19] But the North Dakota Supreme Court has addressed the issue outside the context of an administrative appeal. Specifically, the Court held that serving a document by non-electronic means when Rule 5 requires the document to be served electronically is not sufficient. *See, e.g.*, *Dakota Heritage Bank v. Iaccone*, 2014 ND 150, ¶ 10, 849 N.W.2d 219. There is no reason that the North Dakota Supreme Court would not apply the same rule in the context of an administrative appeal given that "Rule 5, N.D.R.Civ.P., applies to service of a notice of appeal from an administrative agency's decision." *Altru*, 2017 ND 270, ¶ 14.

**E. Summit accurately represented the holding of *Dakota Heritage Bank*.**

[¶ 20] Burleigh County's final argument is simply claiming that Summit "severely misrepresent[ed] the holding of *Dakota Heritage Bank* ..." Bureigh County's Br. ¶ 29 (Doc. ID# 22). This is a futile attempt by Burleigh County to confuse this Court because the plain language of the ruling in *Dakota Heritage Bank* is clear. In *Dakota Heritage Bank*, a document was served by mail. The Court held that serving the document by mail was not sufficient because it did not comply with Rule 5's electronic service requirement.[3]

[¶ 21] In other words, the Court held that serving a document by non-electronic means (*i.e.*, by mail) when Rule 5 requires the document to be served electronically is not sufficient. And Summit cited *Dakota Heritage Bank* 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

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[3] *See Dakota Heritage Bank*, 2014 ND 150, ¶ 10, 849 N.W.2d 219 ("[T]he Bank claims it served notice of entry of judgment by mail ... Rule 5(b), N.D.R.Civ.P., provides the procedural requirements for proper service and states, 'A document that is required to be filed must be served electronically....' The Bank's service by mail ... did not comply with the procedural requirements for service and notice and, therefore, was not sufficient ...").

sufficient." Summit's Br. ¶ 42 (Doc. ID# 17). Summit literally could not have more accurately represented the holding of *Dakota Heritage Bank.*

[¶ 22] Last, it should be noted that failure to electronically serve all required parties in accordance with Rule 5 has meaningful consequences. In their separate appeal,[4] Landowners also failed to serve Summit in accordance with N.D.R.Civ.P. 5. The court in that case set a status hearing for February 20, 2025 and mailed the notice of hearing to Summit's counsel via First Class Mail on February 11, 2025.[5] As of the date of filing this reply brief, Summit's counsel has not received the court's notice of the hearing which was sent via First Class Mail. Summit's counsel was made aware of the status hearing by a colleague who manually reviewed the docket for said case. If Landowners had served Summit with their notice of appeal in accordance with Rule 5, Summit's counsel would have received immediate notice of the status hearing through the Odyssey system.

## III. Burleigh County did not serve its notice of appeal upon the Commission's attorney as required by N.D.R.Civ.P. 5 and N.D.C.C. § 28-32-42(4).

[¶ 23] In its initial brief, Summit argued that Burleigh County was required to serve its notice of appeal upon the Commission's attorney (Zachary Pelham). *See* Summit's Br. ¶¶ 37-39 (Doc. ID# 17). Because Burleigh County failed to do so, its appeal must be dismissed. The following subsections of this brief will each address one of the counterarguments Burleigh County raises in its brief for why it believes it did not need to serve the Commission's attorney or, alternatively that it actually did serve the Commission's attorney.

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[4] *See APH Farms, et al. v. North Dakota Public Service Comm'n, et al.*, Case No. 08-2024-CV-03622.
[5] *See id.*.

**A. Burleigh County knew that Pelham was the Commission's attorney in this proceeding.**

[¶ 24] Burleigh County first argues that it did not know Pelham was still the Commission's attorney at the time that it was serving its notice of appeal. In its own words, Burleigh County states, "it was entirely unknown to Burleigh County when it served its Notice of Appeal ... whether Pelham's special assistant attorney general appointment extended to also handling subsequent appeals." Burleigh County's Br. ¶ 32 (Doc. ID# 22).

[¶ 25] Burleigh County is feigning ignorance. An attorney cannot stop representing his or her client without first obtaining permission to do so from the relevant decisionmaker.[6] Given that Pelham never received permission to withdraw as the Commission's attorney from a hearing officer or a court, it was quite obvious at the time that Burleigh County was serving its notice of appeal that Pelham was still the Commission's attorney.

**B. Burleigh County was required to serve the Commission's attorney.**

[¶ 26] The next argument that Burleigh County offers is that it simply was not required to serve the Commission's attorney. *See* Burleigh County's Br. ¶ 34 (Doc. ID# 22). Burleigh County believes that serving the Commission directly was sufficient. *Id.*

[¶ 27] This argument, however, cannot be squared with North Dakota Supreme Court precedent. Again, "Rule 5, N.D.R.Civ.P., applies ..." *Altru*, 2017 ND 270, ¶ 14. Pursuant to that rule, "[i]f a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party." N.D.R.Civ.P. 5(b)(2) (emphasis added). Under this rule, "[i]t is mandatory that service be made upon counsel," *Kinsella v. Kinsella*, 181 N.W.2d 764,

[6] N.D.A.C. § 98-02-02-18(2) ("[A]n attorney may withdraw an appearance for a party only upon leave of the presiding hearing officer."); N.D.R.Ct. 11.2(a) ("An attorney's appearance for a party may only be withdrawn upon leave of court.").

768 (N.D. 1970) (emphasis added). "[S]ervice upon the party does not comply with the rule." 4B Wright & Miller, *Federal Practice and Procedure* § 1145 (4th ed.).[7]

[¶ 28] Accordingly, Burleigh County failing to serve the Commission's attorney means that it failed to comply with Rule 5. And because Burleigh County failed to comply with Rule 5, it did not truly "serve" its notice of appeal upon the Commission as that word is used in N.D.C.C. § 28-32-42(4).

**C. Neither Michael Pitcher nor John Schuh is the Commission's attorney.**

[¶ 29] The final argument made by Burleigh County is that it actually did comply with Rule 5(b)(2) by serving the Commission's attorney. Burleigh County notes that it served its notice of appeal upon Special Assistant Attorney General John Schuh and Assistant Attorney General Michael Pitcher. According to Burleigh County, serving these two attorneys counts as Burleigh County serving the Commission's attorney. *See* Burleigh County's Br. ¶¶ 33-35 (Doc. ID# 22).

[¶ 30] The North Dakota Supreme Court has rejected this argument. In *Altru*, the appellant served its notice of appeal on an assistant attorney general that did not represent the administrative agency in the proceeding before the administrative agency. 2017 ND 270, ¶ 13. The appellant argued that this satisfied the requirements of Rule 5(b)(2). *Id.* But the *Altru* Court rejected the argument. The Court explained that "the assistant attorney general who was served with the notice of appeal ... did not represent the [agency] in the proceedings before the agency" and therefore "service on the assistant attorney general was not sufficient to serve the [agency] under N.D.R.Civ.P. 5(b)." *Id.* at ¶ 16.

[¶ 31] Here, neither Michael Pitcher nor John Schuh represented the Commission in this matter. Although the Commission employs Schuh as its general counsel, the Commission did not

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[7] The North Dakota Supreme Court routinely relies on Wright & Miller when interpreting the rules of civil procedure. *See, e.g.*, *White v. T.P. Motel, L.L.C.*, 2015 ND 118, ¶ 27, 863 N.W.2d 915.

employ him to represent it in this matter[8] and he never appeared on the Commission's behalf (or otherwise) at any hearing. Instead, the Commission specifically employed Zachary Pelham as its attorney, and he appeared at every hearing to represent the Commission. In the Commission's own words, Pelham "has been, and still is, counsel for the Commission at all relevant points in time in this matter." Commission's Br. ¶ 11 (Doc. ID# 38).

[¶ 32] Simply put, binding precedent requires this Court to reject Burleigh County's argument that serving Pitcher and Schuh with its notice of appeal sufficed as service upon the Commission's attorney. Pitcher and Schuh "did not represent the [Commission] in the proceedings before the [Commission]." *Altru*, 2017 ND 270, ¶ 16. Therefore, service on Pitcher and Schuh "was not sufficient to serve the [Commission] under N.D.R.Civ.P. 5(b)." *Id.*

## IV. Burleigh County did not serve its notice of appeal upon all parties to the proceedings before the Commission.

[¶ 33] In its initial brief, Summit argued that Burleigh County was required to serve its notice of appeal upon the Warford Trust, Wachter, and Moldenhauer who were all parties to the proceeding before the Commission. *See* Summit's Br. ¶¶ 32-34 (Doc. ID# 17). Because Burleigh County failed to do so, its appeal must be dismissed. The following subsections of this brief each respond to one of the counterarguments that Burleigh County and Emmons County raise in their response briefs for why they believe Burleigh County was not required to serve the Warford Trust, Wachter, and Moldenhauer.

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[8] *See Kinsella*, 181 N.W.2d at 768 ("In ordinary circumstances an attorney represents his client only in the matters in which he is employed and not in unrelated proceedings which may be instituted against his client.").

### A. The Warford Trust, Wachter, and Moldenhauer are parties.

[¶ 34] Burleigh County argues that the Warford Trust, Wachter, and Moldenhauer are not "parties" and therefore Burleigh County was not required to serve them. Notably, Burleigh County does not cite to a single legal authority to support its argument.

[¶ 35] Instead, Burleigh County bases its argument entirely on two pieces of factual information. First, the Warford Trust, Wachter, and Moldenhauer filed a "Notice of Withdrawal" in which they stated that they "no longer wish to be parties in this matter." Aff. Randall Bakke Ex. 1 (Doc. ID# 24). Second, after the Warford Trust, Wachter, and Moldenhauer filed their notice of withdrawal, the Commission did not mail later filings in the case to them. According to Burleigh County, these facts show that the Warford Trust, Wachter, and Moldenhauer are not parties. *See* Burleigh County's Br. ¶¶ 13-16 (Doc. ID# 22).

[¶ 36] What documents the Warford Trust, Wachter, and Moldenhauer filed with the Commission and what documents the Commission served them with have no bearing on whether they are each a party. The Legislature has already defined a "party" as "each person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party." N.D.C.C. § 28-32-01(9). Thus, if the Warford Trust, Wachter, and Moldenhauer meet this definition, then they are each a "party" regardless of any other facts or circumstances.[9]

[¶ 37] The Warford Trust, Wachter, and Moldenhauer undoubtedly meet this definition. Regardless of them filing a notice of withdrawal, and regardless of the Commission not serving them with certain documents, Burleigh County cannot dispute that they are each a person that the

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[9] In its brief, Burleigh County accuses Summit of "argu[ing] for a once-a-party, always-a-party standard." Burleigh County's Br. ¶ 14 (Doc. ID# 22). The reason that Summit is arguing for such a standard is that the Legislature chose such a standard. The Legislature could have defined a "party" as any person named or admitted as a party and that has not withdrawn as a party. But the Legislature did not. Instead, it defined "party" as any person named or admitted as a party.

Commission named as a party and admitted as a party. Accordingly, Burleigh County was required to serve them. Because it failed to do so, its appeal must be dismissed.[10]

[¶ 38] Furthermore, as correctly pointed out by the Commission in its response to Summit's motion to dismiss, the Notice of Withdrawal purporting to withdraw the Warford Trust from the proceedings before the Commission was signed by John Warford, Sr. in his individual capacity and not as trustee of the Warford Trust. Accordingly, the Warford Trust never formally withdrew from the case and remained a party.

**B. The present case is more like *Pederson* than *Inwards*.**

[¶ 39] In its response brief, Emmons County raises an argument based on *Inwards*, 2014 ND 163. However, *Inwards* is distinguishable from the present case. The issue in *Inwards* was whether an employer (Bobcat) was a "party" that needed to be served with a notice of appeal. "The record reflect[ed] that Bobcat did not make an appearance in these administrative proceedings." *Id.* at ¶ 18. Accordingly, the North Dakota Supreme Court determined that Bobcat was not a party and "service of the notice of appeal … on Bobcat was not required under the circumstances." *Id.* at ¶ 19.

[¶ 40] Similarly, the issue in *Pederson* was also whether an employer was a "party" that needed to be served with a notice of appeal. 534 N.W.2d at 810. Unlike the employer in *Inwards*, the employer in *Pederson* actually made an appearance in the administrative proceedings. *Id.* ("A representative of the employer appeared at the administrative hearing and was noted in the record."). Accordingly, the Court determined that the employer was a party that needed to be

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[10] *Pederson v. North Dakota Workers Comp. Bureau*, 534 N.W.2d 809, 810 (N.D. 1995) (dismissing appeal because the appellant failed to serve a party to the proceeding before the administrative agency); Order Granting Mot. Dismiss, *Equinor Energy LP v. North Dakota Indus. Comm'n*, Case No. 53-2018-CV-01025 (Doc. ID# 64) (same).

served with a notice of appeal. *Id.* Because the employer was not served, the Court dismissed the appeal for lack of jurisdiction. *Id.*

[¶ 41] The present case is like *Pederson* and unlike *Inwards*. Like the employer in *Pederson*, the Warford Trust, Wachter, and Moldenhauer all made multiple appearances in this case. They are therefore parties that needed to be served.

**C. The time to appeal commenced for all parties that were served with the Commission's order.**

[¶ 42] If the Court agrees with Summit that the Warford Trust, Wachter, and Moldenhauer are parties that were required to be served with the notice of appeal, then Burleigh County provides an alternative argument in its brief. Specifically, Burleigh County argues that the Commission also did not serve the Warford Trust, Wachter, or Moldenhauer with its final order and therefore the 30 day time period to appeal has not commenced for any party, even if such parties were served with the notice of appeal. *See* Burleigh County's Br. ¶¶ 17-20 (Doc. ID# 22).

[¶ 43] Burleigh County's argument is based on a misreading of Section 28-32-42. That statute refers to a singular "party" and its purpose is to ensure that singular party has 30 days to appeal an order upon receiving notice of the order. Thus, when that statute says that a party may appeal an order "within thirty days after notice of the order has been given as required by section 28-32-39," the statute is referring to the requirement in section 28-32-39 that the agency serve its order "in the manner allowed for service under the North Dakota Rules of Civil Procedure," not the requirement in section 28-32-39 that the agency serve its order "upon all the parties to the proceeding." In other words, if an agency serves a party with a copy of its order in the manner allowed for service under the rules of civil procedure, then notice of the order has been given as required by section 28-32-39.

[¶ 44] Here, the Commission served Burleigh County with a copy of its order on November 15, 2024, in the manner allowed for service under the rules of civil procedure. Accordingly, notice of the order has been given as required by section 28-32-39 and the running of Burleigh County's time to appeal commenced on November 15, 2024. However, if this Court is convinced that the Commission did not provide notice of its order as required by section 28-32-39, the 30 day period within which Burleigh County was required to file its notice of appeal still commenced on November 15, 2024. "[I]rregular procedures do not extend the time for appeal indefinitely." *Thorson v. Thorson*, 541 N.W.2d 692, 694 (N.D. 1996). "Actual knowledge of entry of an order, when clearly evidenced by the record, commences the running of the time for appeal." *Id.*

[¶ 45] Burleigh County indisputably had actual knowledge of the entry of the Commission's order on November 15, 2024. Thus, its time for appeal started running even assuming that "notice of the order has [not] been given as required by section 28-32-39," N.D.C.C. § 28-32-42(4).

## V. The Court does not have the power to vacate the Commission's order and remand the case.

[¶ 46] Finally, Landowners argue in their brief that this Court dismissing Burleigh County's appeal would violate their right to due process. *See* Landowners' Br. (Doc. ID# 35). Accordingly, if the Court accepts Summit's arguments, Landowners request that this Court vacate the Commission's order and remand the case rather than dismissing the case. *Id.* at ¶ 8.

[¶ 47] As explained above, there is little more that could have been done in order to provide more due process to Burleigh County, Emmons County and Landowners in the proceedings before the Commission. The fact that Burleigh County, Landowners and Emmons County were unable to follow the law and rules regarding service of their respective notices of

appeal is a self-inflicted violation of such due process. If anything, their failure to serve all parties in accordance with such laws and rules violates the due process of the appellees which they refused to name and properly serve.

[¶ 48] Nevertheless, this Court cannot grant Landowners' request. If Burleigh County did not perfect its appeal as Summit alleges, then this Court would "lack [ ] subject matter jurisdiction." *Altru*, 2017 ND 270, ¶ 11. "Absent jurisdiction, a court is powerless to do anything beyond dismissing without prejudice." *Opp v. Office of N. Dakota Attorney Gen. - BCI CWL Unit*, 2023 ND 131, ¶ 17, 993 N.W.2d 498. Accordingly, this Court does not have the power to vacate the Commission's order or remand this case as requested by Landowners. Without jurisdiction, this Court is required to dismiss the appeal brought by Burleigh County.

## CONCLUSION

[¶ 49] In conclusion, Intervenors present four main arguments opposing Summit's motion to dismiss, each challenging the necessity of proper service of Burleigh County's notice of appeal. Despite acknowledging the explicit requirements of N.D.R.Civ.P. 5 and N.D.C.C. § 28-32-42(4), they contend that electronic service was not mandatory, that service upon the attorney of record was not required, and that certain parties to the original proceeding did not need to be served. Additionally, they argue that dismissal of the appeal would violate due process rights. These arguments ultimately seek to justify deviations from the established service requirements, raising significant procedural and legal considerations for the Court's determination to dismiss the appeal filed by Burleigh County.

Dated this 10th day of March, 2025.

FREDRIKSON & BYRON, P.A.

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