STATE OF NORTH DAKOTA | IN DISTRICT COURT

COUNTY OF BURLEIGH | SOUTH CENTRAL JUDICIAL DISTRICT

APH Farms, et al., Appellant, v. North Dakota Public Service Commission, et al., Appellees.	Case No. 08-2024-CV-03622 **SCS CARBON TRANSPORT LLC'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

[¶ 1] In its initial brief, SCS Carbon Transport LLC ("Summit") explained why this Court lacks subject matter jurisdiction and why the appeal filed by certain landowners ("Landowners")[1] must be dismissed. Appellants Landowners have filed a response in opposition to Summit's motion to dismiss. Appellees Burleigh County and Emmons County 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.

[¶ 2] Landowners, Burleigh County, and Emmons County (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 that Summit's pipeline project has undergone the most exhaustive scrutiny of any pipeline ever permitted in North Dakota.

[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.

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SCS Carbon Transport LLC
Lawrence Bender, Fredrikson&Byron, P.A.

[¶ 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.

[¶ 5] The arguments raised by Landowners, Emmons County, and Burleigh County in their response briefs are addressed in Parts I, II, and III, respectively, of the argument section of this brief. 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, Landowners' appeal is legally doomed and must be dismissed for lack of jurisdiction.

ARGUMENT

I. The arguments made by Landowners lack merit.

A. The Warford Trust, Wachter, and Moldenhauer were parties that Landowners were required to serve.

[¶ 6] In its initial brief, Summit argued that Landowners were required to serve their 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. *See* Summit's Br. ¶¶ 29-30 (Doc. ID# 36). Because Landowners 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.

[¶ 7] In their response brief, Landowners do not dispute that the Warford Trust, Wachter, and Moldenhauer are parties that needed to be served. Instead, Landowners argue that their failure to serve them was excusable because of actions by the Commission. In particular, Landowners note that N.D.C.C. § 28-32-39 requires the Commission to serve all parties with a copy of its final order yet the Commission did not serve the Warford Trust, Wachter, and Moldenhauer. According to Landowners, they "had a right to rely upon the Commission's statutory obligation to identify and serve the parties." Landowners' Br. ¶ 4 (Doc. ID# 43). In other words, Landowners believe that if the Commission failed to serve parties with a copy of its final order, then Landowners have no obligation to serve those same parties with their notice of appeal.

[¶ 8] Landowners' argument completely ignores the text of N.D.C.C. § 28-32-42(4). That statute requires service of a notice of appeal upon "all other parties to the proceeding before the administrative agency." *Id.* (emphasis added). The statute does not require service only upon "all other parties to the proceeding [that have been served with a copy of the agency's final order]."

Accordingly, the fact that the Commission failed to serve the Warford Trust, Wachter, and Moldenhauer did not excuse Landowners from having to serve them. Because Landowners failed to serve all other parties to the proceeding before the Commission, their appeal must be dismissed.[2]

[¶ 9] Furthermore, Landowners cannot argue that the Warford Trust withdrew as a party. 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. Landowners were required to serve the Commission's attorney.

[¶ 10] In its initial brief, Summit argued that Landowners were required to serve their notice of appeal upon the Commission's attorney (Zachary Pelham). *See* Summit's Br. ¶¶ 33-35 (Doc. ID# 36). To briefly summarize, "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. 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, 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.).[3] Because Landowners served

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[2] *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).

[3] 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.

their notice of appeal on the Commission, rather than the Commission's attorney, they failed to comply with Rule 5 and their appeal must be dismissed.

[¶ 11] In their response brief, Landowners provide two counterarguments. Landowners first argue that they were not required to serve the Commission's attorney because Rule 5 is merely "permissive." Landowners' Br. ¶ 7. Accordingly, if Landowners would prefer, they are allowed to serve the Commission rather than its attorney. However, this argument cannot be squared with North Dakota Supreme Court precedent.

[¶ 12] 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*, 181 N.W.2d at 768. Consequently, Landowners do not get a choice. They are required to serve the Commission's attorney. In this case, it is undisputed that Mr. Pelham was the duly appointed attorney to represent the Commission.

[¶ 13] Landowners' second argument is that they actually served the Commission's attorney and therefore complied with Rule 5. Landowners note that they served their notice of appeal upon Special Assistant Attorney General John Schuh. According to Landowners, serving Schuh sufficed for the purpose of serving the Commission's attorney. *See* Landowners' Br. ¶ 10 (Doc. ID# 43).

[¶ 14] The North Dakota Supreme Court has already rejected arguments identical to Landowners' arguments. 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.

[¶ 15] Here, John Schuh did not represent the Commission in this matter. Although the Commission employs Schuh as its general counsel, the Commission did not employ him to represent it in this matter[4] and he never appeared on the Commission's behalf 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# 49). Because Schuh "did not represent the [Commission] in the proceedings before the [Commission]," service on Schuh "was not sufficient to serve the [Commission] under N.D.R.Civ.P. 5(b)." *Altru*, 2017 ND 270, ¶ 16.

C. Landowners were required to serve their notice of appeal electronically.

[¶ 16] In its initial brief, Summit argued that Landowners were required to serve their notice of appeal electronically. *See* Summit's Br. ¶¶ 36-40 (Doc. ID# 36). Because Landowners 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.

[¶ 17] In their response brief, Landowners provide two arguments for why they believe they were not required to serve their notice of appeal electronically. The first argument is based

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[4] *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.").

on the texts 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 ..." Although Landowners do not explicitly say it in their brief, they appear to argue that their notice of appeal is an "initiating pleading" that is not required to be served electronically. Landowners' Br. ¶ 11 (Doc. ID# 43).

[¶ 18] The explanatory note to N.D.R.Ct. 3.5 clearly shows that the notice of appeal filed by Landowners is not an "initiating pleading" that is 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.[5]

[¶ 19] Landowners' second 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*). Landowners interpret this statement as the North Dakota Supreme Court "stat[ing] that the rules of civil procedure permit[ ] service by mail ..." Landowners' Br. ¶ 12 (Doc. ID# 43).

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[5] *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).

[¶ 20] The *Opp* Court's statement is entirely consistent with Summit's argument that Landowners were required to serve their notice of appeal electronically. The *Opp* Court did not say that service of a notice of appeal may be by mail as Landowners suggest. 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 to 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).

[¶ 21] 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, Landowners' 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.

[¶ 22] It should also be noted that failure to electronically serve all required parties in accordance with Rule 5 has consequences. On February 11, 2025, this Court set a status hearing for February 20, 2025 and mailed the notice of hearing to Summit's counsel via First Class Mail. 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.

II. The "plain language" argument made by Emmons County is untenable.

[¶ 23] Despite the North Dakota Supreme Court unambiguously stating that "Rule 5, N.D.R.Civ.P., applies," *Altru*, 2017 ND 270, ¶ 14, Emmons County believes Landowners did not need to comply with the requirements of Rule 5 to perfect their appeal. Under the theory put forth by Emmons County, all that matters is whether Landowners complied with the plain language of N.D.C.C. § 28-32-42(4). And all that statute required of Landowners was that they "serve" their notice of appeal upon all "parties."

[¶ 24] According to Emmons County, it is undeniable that Landowners "served" their notice of appeal upon all "parties." Thus, Landowners complied with the plain language of N.D.C.C. § 28-32-42(4) and properly perfected their appeal. Whether Landowners complied with Rule 5 is irrelevant. In the words of Emmons County:

> The statute's plain language controls, not the rules of civil procedure. ...
>
> [Summit] does not and cannot allege that it or other parties were not served ... [Summit] nonetheless quibbles with the *form* of service under the *rules of civil procedure*, forgetting that compliance must be with the *statute*, which merely requires that all parties be served. And they were.
>
> In this case, [Landowners] complied with each requirement in this statute. ...
>
> [T]he statute merely requires service on the agency, the attorney general or an assistant attorney general, and the parties. The statute's plain language controls, not the rules of civil procedure.

Emmons County's Br. ¶¶ 2-11 (Doc. ID# 41).

[¶ 25] If "[t]he statute's plain language controls" and "not the rules of civil procedure," *id.* at ¶ 2, as Emmons County claims, the Landowners undeniably failed to perfect their appeal. The plain language of N.D.C.C. § 28-32-42(4) required Landowners to serve all "parties." Landowners did not serve even a single party. To be sure, Landowners did serve many of the

parties' attorneys. But the plain language of N.D.C.C. § 28-32-42(4) required the "parties" not their attorneys to be served.

[¶ 26] Likewise, N.D.C.C. § 28-32-42(4) required Landowners to "serve" their notice of appeal. Although the statute does not explain what it means to "serve" a notice, "under accepted canons of statutory interpretation, where a statute does not prescribe the method of notice, personal service is contemplated." 66 C.J.S. Notice § 23. Thus, under accepted canons of statutory interpretation, the plain language of N.D.C.C. § 28-32-42(4) required Landowners to personally serve their notice of appeal on every party. Landowners, however, did not personally serve any party. At best, they personally served one party's attorney.

[¶ 27] The foregoing makes clear just how absurd the "plain-language-controls" argument is. That is why the North Dakota Supreme Court has rejected it. Instead of requiring personal service on every party, as the plain language of N.D.C.C. § 28-32-42(4) would require, the Court has decided that an appellant may serve all parties in the manner contemplated by Rule 5. *See Altru*, 2017 ND 270, ¶ 14.

[¶ 28] Emmons County cannot have it both ways. Either "Rule 5, N.D.R.Civ.P., applies," *id.*, like the North Dakota Supreme Court has said it does, or it does not. If the Rule does apply, Landowners did not comply with its requirements and their appeal must be dismissed. In contrast, if the Rule does not apply, then Landowners' appeal still must be dismissed because they served the attorneys for all parties by mail rather than serving the actual parties personally as required by the "plain language" of N.D.C.C. § 28-32-42(4).

III. Burleigh County improperly refers to arguments in a separate brief.

[¶ 29] In its response brief, Burleigh County directs the Court's attention to a brief filed by Burleigh County in another case. *See* Burleigh County's Br. ¶ 2 (Doc. ID# 51). The North

Dakota Supreme Court has disproved of a party referring in one brief to arguments in another brief. *See, e.g., Daniels v. Ziegler*, 2013 ND 157, ¶ 13, 835 N.W.2d 852. Accordingly, this Court should not consider the brief to which Burleigh County refers. Alternatively, if the Court does consider the brief, then Summit respectfully requests that the Court also consider the reply brief submitted by Summit in the same case.

CONCLUSION

[¶ 30] In conclusion, Intervenors present four main arguments opposing Summit's motion to dismiss, each challenging the necessity of proper service of Landowners' 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 Landowners.

Dated this 10th day of March, 2025.

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