

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

APH Farms, et al,

Case No. 08-2024-CV-03622

Appellants,

vs.

North Dakota Public Service Commission, et al,

Appellees.

And

Burleigh County,

Case No. 08-2024-CV-03614

Appellant,

vs.

North Dakota Public Service Commission and
SCS Carbon Transport LLC,

Appellees.

Brief in Support of Motion to Consolidate

INTRODUCTION

[¶1] The North Dakota Public Service Commission (“Commission”), submits this brief in support of its motion to consolidate these two administrative appeals, which involve common

issues of fact and law. Judicial economy will be served by consolidation under N.D.R.Civ.P. Rule 42(a). The Commission requests that the matters be consolidated into the APH Farms appeal (Case No. 08-2024-CV-03622).

STATEMENT OF FACTS

[¶2] The two captioned matters are separate administrative appeals from one administrative case. The Commission, acting under statutory authority found in chapter 49-22.1 of our Century Code, issued Findings of Fact, Conclusions of Law, and Order on a pipeline siting application of SCS Carbon Transport LLC (“SCS”). *See* Case No. 08-2024-3622, Index No. 2. In the administrative proceeding, the Commission considered the application of SCS Carbon Transport LLC (“SCS”) for the siting of 320 miles of carbon dioxide pipeline and associated facilities in the following North Dakota counties: Burleigh, Cass, Dickey, Emmons, Logan, McIntosh, Morton, Oliver, Richland, and Sargent. *Id.* Numerous parties intervened as parties to the administrative case, including the appellants. As outlined in the Commission’s Order, numerous public hearings were held on the application. *Id.* The Commission also made decisions on multiple procedural and substantive matters throughout the administrative proceeding. *Id.* The Commission issued a final Order, which included the issuance of a Certificate of Corridor Compatibility and a Route Permit for the pipeline. *Id.*

[¶3] Pursuant to our Administrative Agencies Practices Act, N.D.C.C. Ch. 28-32, appeals of the Commission’s administrative Order to the Burleigh County District Court ensued. In Case No. 08-2024-CV-03622, APH Farms, et al, served and filed a Notice of Appeal and Specifications of Error on December 13, 2024. *See* Case No. 08-2024-CV-03622, Index No. 1 (this case, and its docket, is hereinafter referred to as “APH Farms Appeal”). In Case No. 08-2024-CV-03614, Burleigh County served and filed a Notice of Appeal and Specifications of Error on

December 13, 2024. *See* Case No. 08-2024-CV-03614, Index No. 1 (this case, and its docket, is hereinafter referred to as “Burleigh County Appeal”). The appellants on both captioned matters appealed from the *same* Commission Order, involving the *same* operative facts, involving the *same* operative law, and involving the *same* substantive and procedural decisions of the Commission. *See* Index. No. 1 for Burleigh County Appeal and APH Farms Appeal. While the appellants will undoubtedly have distinct arguments against the Commission’s Order, the genesis of those arguments is premised entirely on the operative facts and applied law from the SCS siting application that was analyzed, reviewed, and determined pursuant to N.D.C.C. Ch. 49-22.1 by the Commission.

[¶4] The administrative record is voluminous. The record that the Commission is working to certify includes thousands of pages of documents, exhibits, motions, and related filings; it also includes fourteen audio recorded public hearings (many lasting more than 6 hours each) and six audio recorded prehearing conferences, which will take at least three months for them to be transcribed. From an administrative standpoint, the Commission’s electronic docket has to be “scrubbed” of all color for filing on the Court’s Odyssey system. This administrative task requires the conversion of PDF files from color to black and white and is an onerous and time-consuming task. Further, as it currently stands, this filing will have to be duplicated by the Commission because two separate cases exist (Commission staff will have to upload thousands of pages of docketed administrative documents, utilizing Odyssey, twice). To be clear, the Commission will comply with its statutory obligations. This information is being pointed out so the Court understands the facts so it can be well informed when making its decision on the motion.

[¶5] 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 has been in the process of preparing the record. Highlighting the inefficiency of two separate cases involving the same administrative proceeding, in the Burleigh County Appeal, the Court issued an Order on a motion to dismiss filed by SCS, requiring Burleigh County to pay the estimated cost of preparation of the record within fourteen days of the Order. *See* Burleigh County Appeal, Index No. 49 (dated June 6, 2025). On June 10, 2025, the Commission received payment in the amount stated in the Notice of Appellant of Estimated Costs. *Id.* at Index No. 52. To be absolutely clear, the Commission considers this payment of estimated costs to be applicable to *both* separate appeals (no “doubling up” of the estimated costs); the Commission is currently in the process of having a third-party prepare the transcripts to be used in both appeals (or in one consolidated appeal, if the Court grants this motion). In contrast from the Burleigh County Appeal Order (Index 49), the Court in the APH Farms Appeal issued an Order dated May 9, 2025, denying the SCS motion to dismiss on substantive grounds. *See* APH Farms Appeal, Index No. 77. Later, the Court in APH Farms Appeal issued a Notice to File Certificate of Record, dated May 19, 2025. *Id.* at Index No. 78. The Notice directed that the certificate must be filed within four months of the Notice, or by September 19, 2025. *Id.* Suffice it to say, the Commission is acting to comply with its statutory requirements to certify the record, albeit in differing fashions as ordered by two separate Courts.

[¶6] Further, the fact of the matter is the APH Farms Appeal has a judge assigned and the Burleigh County Appeal has no judge assigned given there is no one yet assigned to Judgeship #1. *See* Order dated June 20, 2025, Burleigh County Appeal, Index No. 54. While the following borders on argument, the fact of the matter is Judge Nesvig is already familiar with some of the basis of this matter. When the Governor names a successor for Judge Reich, and when that

successor will be able to take office, are factual factors that should be considered by Judge Nesvig in making a decision on this motion.

[¶7] Summarizing the facts, for purposes of the pending motion, of these two appeals from the same administrative proceeding: 1) The Commission is actively working to certify the record for *both* appeals since recently receiving payment for the estimated cost to prepare the record; 2) duplication of filing the record in two separate appeals is administratively taxing and inefficient for the Commission (and the Court, as presumably the clerk will have to check the Odyssey filings twice if the matter is not consolidated); 3) duplication of judicial resources to determine the facts and law of administrative appeals from the *same* administrative agency involving the *same* facts and law and pipeline siting application is the epitome of inefficiency and allows for the greater potential for incongruent decisions, presenting the ultimate appellate court with a record that will be duplicative (at best) and possibly incongruent. This motion is made because consolidation of the appeals into the APH Farms Appeal will better serve all involved.

LAW AND ARGUMENT

[¶8] Consolidation of these appeals will result in consistent application of the law to the same operative facts from a single administrative proceeding. Not consolidating these appeals will result in duplication of attorney *and* judicial resources and could result in incongruent decisions that would likely necessitate additional resources by attorneys and the judiciary to address when this case is (almost certainly) appealed to the North Dakota Supreme Court. Under Rule 42(a) of the Rules of Civil Procedure, when an action involves “common questions of law or fact” a district court may order a joint hearing or trial, or order the actions consolidated. N.D.R.Civ.P. 42(a)(i)-(iii). By consolidating litigation, Rule 42(b) allows a court to facilitate “the efficient and expeditious resolution of disputes.” *Praus ex rel. Praus v. Mack*, 2001 ND 80, ¶ 16, 626 N.W.2d

239. The decision to consolidate is left to the court's discretion, but is generally ordered when consolidation "serves the interests of justice." *Id.* at ¶ 17 (quoting 9 Fed. Prac. & Proc.: Civil 2d, § 2388, pp. 473-7 (1995)). In deciding whether to consolidate litigation, courts employ a balancing test:

Whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses, and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

Id. at ¶17 (quoting *Malcom v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d. Cir. 1993)). "There are no limitations on the kind of action that may be consolidated" *Id.* at ¶ 18. In general, the common reasons for consolidation are "judicial economy, the risk of inconsistent results from two juries when the transactions and operative facts are closely intertwined, and the undue delay and expense caused by separate trials." *Praus*, 2001 ND 80, at ¶ 18.

[¶9] Can the Court consolidate administrative appeals? Yes. The Administrative Agencies Practices Act, N.D.C.C. ch. 28-32, governs appeals from administrative agencies to the district court. N.D.C.C. § 28-32-42(3); *Lewis v. N.D. Workers Comp. Bur.*, 2000 ND 77, ¶ 7, 609 N.W.2d 445. Rule 81(b) of the North Dakota Rules of Civil Procedure states: "[t]hese rules do not supersede the statutory provisions *relating to appeals to or review by the district courts*, but must govern procedure and practice relating to the extent these rules are not in conflict with the statutes." N.D.R.Civ.P. 81(b) (emphasis added) (the explanatory note provides: "The North Dakota Supreme Court has held that these rules govern procedures on appeal to district court from a decision of an administrative agency except where applicable statutes are inconsistent with the rules"); *c.f. Lewis*, 2000 ND 77 at ¶ 11 (holding N.D.R.Civ.P. 60(b) was "inconsistent with the statutory appeal procedures of the Administrative Agencies Practice" and "would allow the court

powers prohibited by the statute” in that the district court “would become a trier of fact”). The rules of civil procedure are applicable on an appeal to the district court *unless* the procedural rule is *inconsistent* with statutory procedures. Here, consolidation under Rule 42 is not in conflict or inconsistent with the statutory procedure for an appeal under N.D.C.C. § 28-32-42.

[¶10] Judicial economy, consistent results, and conserving the parties’ resources will all be furthered by consolidating the two appeals. Consolidation is appropriate for the following reasons:

- The underlying facts are *identical*—they come from the *same* administrative proceeding and record.
- The parties are the same—all of the parties in both appeals were parties in the administrative proceeding (and were all represented by the same attorneys).
- Consolidation will allow the Commission to upload the record one time, rather than twice, saving considerable time for Commission administrative staff.
- While the Motion to Dismiss brought by SCS in both appeals resulted in differing decisions by Judge Reich and Judge Nesvig, this proves incongruent decisions from two learned jurists is not only possible, it is likely (what two attorneys agree on how the law should be applied to identical facts...not many). Preventing the furtherance of inconsistent decisions serves the interests of judicial economy and economy for the parties.
- N.D.R.Civ.P. Rule 42 allows for consolidation of cases with similar operative background and facts. Here, the background is identical for all parties. N.D.R.Civ.P Rule 81(b) provides that district courts reviewing appeals from administrative agencies can utilize the rules of civil procedure so long as the rule is consistent with the statutory procedure for the appeal. Here, the statutory procedure is consistent with consolidation (or, in the least, not inconsistent with it).
- Because Judge Reich has retired, it makes the most sense to consolidate the appeals into the APH Farms Appeal. While the undersigned can certainly appreciate the likelihood SCS will be resistant to this, given the decision from Judge Nesvig on its motion to dismiss, from the standpoint of moving this appeal forward and preventing further inconsistent rulings, this factors

in favor of consolidating both cases into the APH Farms Appeal. SCS has made its motion and it has preserved its argument for appeal. And nothing prevents SCS from taking up its motion to dismiss in the Burleigh County Appeal after the Commission has filed the certified record if the Court consolidates the Burleigh County Appeal with the APH Farms Appeal. Judge Nesvig is more than capable of making a decision on that motion and fairly re-evaluating the arguments made in the motion to dismiss that was filed in the Burleigh County Appeal. Even though we have one inconsistent decision from two able-minded jurists so far does not mean we all need to continue with two separate appeals that will likely yield future inconsistent decisions if the appeals are not consolidated.

CONCLUSION

[¶11] The facts and applicable law pertinent to the two appeals are a mirror image (yes, the parties dispute the effect of the law to the facts and there are disputes concerning the facts—but they all come from the same administrative case). How the Courts apply the law to the facts should be consistent. Having two judges increases the chance of inconsistent decisions. Having two appeals increases the administrative burden on the Commission by having to file two identical records on Odyssey when this really only needs to be done once. As such, the Court should GRANT the Commission’s motion to consolidate the two appeals into the APH Farms Appeal and order the Commission to certify the record in the APH Farms Appeal once the transcripts are completed.

Respectfully submitted this 24th day of June, 2025.

/s/ Zachary E. Pelham
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