

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Tom's Backhoe Service, Inc.  
Damage Prevention Enforcement**

**Case No. GS-13-712**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

**November 20, 2014**

**Appearances**

Commissioners Brian P. Kalk, Randy Christmann, and Julie Fedorchak (Commissioner Fedorchak appearing via telephone).

Ryan Norrell, Special Assistant Attorney General, 1605 E. Capitol Ave., Bismarck, North Dakota 58501, appearing on behalf of the Public Service Commission Advocacy Staff.

Tom Thompson, Vice President, Tom's Backhoe Service, Inc., 323 Woodland Hills Ln, Brainerd, Minnesota 56401, appearing on behalf of Tom's Backhoe Service, Inc.

Illona Jeffcoat-Sacco, General Counsel, North Dakota Public Service Commission, 600 East Boulevard, Bismarck, North Dakota 58505, as advisory counsel.

Wade Mann, Administrative Law Judge, Office of Administrative Hearings 1707 North 9<sup>th</sup> Street, Bismarck, North Dakota 58503, as Procedural Hearing Officer.

**Preliminary Statement**

On July 26, 2013, Montana-Dakota Utilities Co. (MDU) filed with the Public Service Commission (Commission) a Third Party Damage Complaint form, alleging a violation by Tom's Backhoe Service, Inc. (Tom's Backhoe) of North Dakota Century Code chapter 49-23, One-Call Excavation Notice System (One-Call Law).

On August 16, 2013, Commission Advocacy Staff (Advocacy Staff) sent Tom's Backhoe a copy of the complaint form and requested a response.

On September 6, 2013, Tom Thompson, on behalf of Tom's Backhoe, filed a response.

On March 6, 2014, Advocacy Staff filed a formal complaint against Tom's Backhoe, alleging violation of the One-Call Law, and requesting the Commission find Tom's Backhoe in violation of the One-Call Law and impose a penalty of \$500.

On March 12, 2014, the Commission found the Complaint states a *prima facie* case and directed the complaint be served on the Respondent, Tom's Backhoe. The Complaint was served on March 13, 2014 by certified mail, as evidenced by the Affidavit of Service on file with the Commission.

Also on March 12, 2014, the Commission issued a Notice of Hearing on the complaint, scheduling the hearing for May 1, 2014, at 9:00 a.m. CDT in the Commission Hearing Room, State Capitol, 12th Floor, Bismarck, North Dakota 58505. The Notice of Hearing was served with the complaint on March 13, 2014 by certified mail, as evidenced by the Affidavit of Service on file with the Commission.

The notice identified the following issues to be considered:

1. Has Tom's Backhoe Service, Inc. violated N.D.C.C. Chapter 49-23, the North Dakota One-Call law?
2. If a violation is found, should the Commission impose a civil penalty in the amount of \$500.00?

The public hearing was held as scheduled.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed, and considered all testimony and evidence presented, the Commission makes the following:

### **Findings of Fact**

1. Tom's Backhoe is a North Dakota foreign corporation with offices located at 323 Woodland Hills Lane, Brainerd, Minnesota 56401-6514.
2. MDU is a North Dakota corporation with offices located at 400 N 4<sup>th</sup> St, Bismarck, North Dakota 58501-4022.
3. On July 19, 2013, Tom's Backhoe provided an excavation notice to the North Dakota One-Call (NDOC) Notification Center for excavation by Tom's Backhoe, scheduled to begin on July 23, 2013. The NDOC Notification Center assigned locate ticket number 13106871 to this excavation notice.
4. On July 26, 2013, Tom's Backhoe began an excavation as defined under North Dakota Century Code section 49-23-01(7) at 3500 SW 4<sup>th</sup> St in the City of Minot, in Ward County, North Dakota.

5. On July 26, 2013, a one-inch gas service line at 3500 W 4<sup>th</sup> St in the City of Minot, operated by MDU, was damaged during the excavation performed by Tom's Backhoe.

6. MDU alleged that the value of the damage to the gas service line amounted to approximately \$401.11.

7. Tom's Backhoe has reimbursed MDU for the damages in the amount of \$401.11.

8. The written response filed by Tom's Backhoe on September 6, 2013 stated:

In response to the complaint letter received on August 16<sup>th</sup>, 2013, this 1" line was installed by the gas company 2 years ago. It was 12" deep on the west side of the road and six feet to the east of this it was 36" deep, this is where I had potholed this line. The line was not cut; it had a ½" rock pushed up into it causing it to leak. I was informed by the gas company that this line had been cut twice since installation by other contractors in this area. There was no negligence in locating this line. It varied in depth by 2 feet within 6 feet. I crossed this utility eleven times in the last 1500' and it maintained a 4 foot depth.

I did not expect such a variation in depth on a newly installed line which I had located in my hole. Is there not a depth requirement on gas lines? It is still only 12" deep on the west side of the road.

We did use reasonable care to maintain locate marks for the life of the project, we called in relocates every 9 days and did what we could do for reasonable care.

We have a very good history in being in compliance and attempting to be in compliance at all times with the one call law.

9. At the hearing, Mr. Thompson acknowledged that Tom's Backhoe damaged the line. However, Mr. Thompson also testified that the totality of the circumstances should be taken into account, i.e. the great variation in depth of the line and standard practices of road excavation, in determining if he acted in a careful and prudent manner.

10. At the hearing, Mr. Thompson testified that the fact that he potholed the line previously indicates he was excavating in a careful and prudent manner. Mr. Thompson stated the varying depth of the line was the problem, not the excavating done by Tom's Backhoe.

11. At the hearing, Mr. Thompson stated that he noted four splices in the gas service line when it was exposed for repair, and that a MDU service technician told him that the line had been cut twice previously within the past year during water and sewer installations at the same location. Mr. Thompson further stated that, in his opinion,

slack was left in the line in order to accommodate additional facilities, and therefore the line was not reinstalled at the proper depth during the previous repairs.

12. At the hearing, Mr. Thompson stated that, in his opinion, it is standard practice for excavators to use mechanical equipment when removing Class 5 material, even within the "hand-dig zone".

### Conclusions of Law

1. The Commission has jurisdiction over this proceeding.
2. The July 26, 2013 activity by Tom's Backhoe was an excavation and damaged the one-inch gas service pipeline at 3500 W 4<sup>th</sup> St in the City of Minot.
3. From the totality of the circumstances, the Commission cannot conclude that Tom's Backhoe did not act in a careful and prudent manner when conducting the excavation on July 26, 2013.


From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes its:

### Order

The Commission orders that Tom's Backhoe Service, Inc. did not violate North Dakota Century Code chapter 49-23, the North Dakota One-Call law.

### PUBLIC SERVICE COMMISSION

  
Randy Christmann  
Commissioner

  
Brian P. Kalk  
Chairman

  
Julie Fedorchak  
Commissioner