

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission **Case No. PU-13-877**
Northern Excavating Co., Inc. (7-25-2013)
Damage Prevention Enforcement

Public Service Commission **Case No. PU-13-878**
Northern Excavating Co., Inc. (8-2-2013)
Damage Prevention Enforcement

Public Service Commission **Case No. PU-13-879**
Northern Excavating Co., Inc. (25 pair copper)
Damage Prevention Enforcement

Public Service Commission **Case No. PU-13-880**
Northern Excavating Co., Inc. (144 Fiber Optic)
Damage Prevention Enforcement

Public Service Commission **Case No. PU-13-881**
Northern Excavating Co., Inc. (9-17-2013)
Damage Prevention Enforcement

Public Service Commission **Case No. PU-13-882**
Northern Excavating Co., Inc. (9-30-2013)
Damage Prevention Enforcement

Public Service Commission **Case No. PU-13-883**
Northern Excavating Co., Inc. (75 pair 2nd time)
Damage Prevention Enforcement

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

March 25, 2015

Appearances

Commissioners Julie Fedorchak, Randy Christmann, and Brian P. Kalk.

Mitchell Armstrong, Special Assistant Attorney General, 122 East Broadway Avenue, Bismarck, North Dakota 58501, on behalf of the Public Service Commission Advocacy Staff.

Robert Lindberg, President, Northern Excavating Co., Inc. 3420 82nd Avenue Southeast, Jamestown, ND 58402, on behalf of Northern Excavating Co., Inc.

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

Rosellen Sand, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14th Street, Suite 303, Bismarck, North Dakota 58503, as Procedural Hearing Officer.

Preliminary Statement

On December 2, 2013, Reservation Telephone Cooperative (RTC) filed with the Public Service Commission (Commission) seven ND One-Call Complaint forms, alleging violations by Northern Excavating Co., Inc. (Northern) of North Dakota Century Code chapter 49-23, One-Call Excavation Notice System (One-Call Law).

On December 5, 2013, Commission Advocacy Staff (Advocacy Staff) sent Northern a copy of the complaint forms and requested a response.

On January 13, 2014, Robert Lindberg, President, Northern Excavating Co., Inc., filed a response on behalf of Northern.

On August 25, 2014, Advocacy Staff filed a formal complaint against Northern, alleging violations of the One-Call Law, and requesting the Commission find Northern in violation of the One-Call Law and impose a penalty of \$1000 in Case No. PU-13-877, \$1000 in Case No. PU-13-878, \$1500 in Case No. PU-13-879, \$3000 in Case No. PU-13-880, \$3000 in Case No. PU-13-881, \$3500 in Case No. PU-13-882, \$4000 in Case No. PU-13-883.

On September 2, 2014, the Commission found the Complaint stated a *prima facie* case and directed the complaint be served on Northern.

On November 8, 2014, the Commission issued a Notice of Consolidated Hearing on the complaint, scheduling the hearing for December 5, 2014, at 1:30 pm CDT in the Commission Hearing Room, State Capitol, 12th Floor, Bismarck, North Dakota 58505.

On December 3, 2014, the Commission granted the request for a continuance filed by Robert Lindberg.

On December 17, 2014, the Commission issued a Notice of Rescheduled Consolidated Hearing on the complaint, scheduling the hearing for February 3, 2015, at 9:00 am CDT in the Commission Hearing Room, State Capitol, 12th Floor, Bismarck, North Dakota 58505.

The Notice of Rescheduled Consolidated Hearing identified the following issues to be considered:

1. Has Northern Excavating Co., Inc. violated North Dakota Century Code Chapter 49-23, the North Dakota One-Call Law in any of the following cases: Case No. PU-13-877, Case No. PU-13-878, Case No. PU-13-879, Case No. PU-13-880, Case No. PU-13-881, Case No. PU-13-882, Case No. PU-13-883?
2. If a violation is found, should the Commission impose a civil penalty as requested in the complaint in the following amounts: \$1000 in Case No. PU-13-877, \$1000 in Case No. PU-13-878, \$1500 in Case No. PU-13-879, \$3000 in Case No. PU-13-880, \$3000 in Case No. PU-13-881, \$3500 in Case No. PU-13-882, \$4000 in Case No. PU-13-883?

On February 3, 2015, 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. Northern Excavating Co., Inc. is a North Dakota corporation with offices located at 3420 82nd Avenue Southeast, Jamestown, ND 58402-1108.
2. Reservation Telephone Cooperative is a North Dakota cooperative with offices located at 24 North Main Street, Parshall, ND 58770.

PU-13-877

3. On July 31, 2013, Northern provided an excavation notice to the North Dakota One-Call (NDOC) Notification Center for excavation by Northern, scheduled to begin on August 2, 2013. The NDOC Notification Center assigned locate ticket number 13118042 to this excavation notice.
4. On August 7, 2013, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at 3rd Street West and Railroad Avenue, Ross, ND.
5. On August 7, 2013, a 24 fiber optic cable at 3rd Street West and Railroad Avenue, operated by RTC, was damaged during the excavation performed by Northern.
6. Shane Hart, Assistant General Manager for RTC, testified that the cost to repair the damage to the 24 fiber optic cable is \$3653.73. As of the date of the hearing, Northern had not reimbursed RTC for the damages.

7. Cassie Steele, Line Locator for RTC, testified that the line was properly marked. Ms. Steele also testified that her markings were still visible in the area when she arrived at the site directly after receiving notice from Kyle Benson, Foreman for Northern, that Northern had damaged one of RTC's lines.

8. Kyle Benson testified that the markings were in place and that he did call Ms. Steele to notify her that Northern hit RTC's line.

9. Robert Lindberg testified that Northern took precautions to protect the underground facilities but also admitted the damage was a result of Northern's excavation.

PU-13-878

10. On July 31, 2013, Northern provided an excavation notice to the NDOC Notification Center for excavation by Northern, scheduled to begin on August 2, 2013. The NDOC Notification Center assigned locate ticket number 13118062 to this excavation notice.

11. On August 15, 2013, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at 2nd Street West and Central Avenue, Ross, ND.

12. On August 15, 2013, a 4 fiber drop cable at 2nd Street West and Central Avenue, operated by RTC, was damaged during the excavation performed by Northern.

13. Shane Hart testified that the cost to repair the damage to the 4 fiber drop cable is \$1034.38. As of the date of the hearing, Northern had not reimbursed RTC for the damages.

14. Cassie Steele testified that the line was properly marked. Ms. Steele also testified that her markings were still visible in the area when she arrived at the site directly after receiving notice from Kyle Benson that Northern had damaged one of RTC's lines.

15. Kyle Benson testified that the markings were in place and that he did call Ms. Steele to notify her that Northern hit RTC's line.

16. Robert Lindberg testified Northern took precautions to protect the underground facilities but also admitted that the damage was a result of Northern's excavation.

17. Advocacy staff witness Victor Schock testified that, of the proposed \$1,000 civil penalty, \$500 was included as penalty for finding a second violation of the One-Call Law by the same company.

PU-13-879

18. On July 31, 013, Northern provided an excavation notice to the NDOC Notification Center for excavation by Northern, scheduled to begin on August 2, 2013. The NDOC Notification Center assigned locate ticket number 13118042 to this excavation notice.

19. On August 2, 2013, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at 3rd Street West and Central Avenue, Ross, ND.

20. On August 2, 2013, a 25 pair copper cable at 3rd Street West and Central Avenue, operated by RTC, was damaged during the excavation performed by Northern.

21. Shane Hart testified that the cost to repair the damage to the 25 pair copper cable is \$1,082.14. As of the date of the hearing, Northern had not reimbursed RTC for the damages.

22. Cassie Steele testified that the line was properly marked. Ms. Steele also testified that her markings were still visible in the area when she arrived at the site directly after receiving notice from Kyle Benson that Northern had damaged one of RTC's lines.

23. Kyle Benson testified that the markings were in place and that he did call Cassie to notify her that Northern hit RTC's line.

24. Robert Lindberg testified Northern took precautions to protect the underground facilities but also admitted that the damage was a result of Northern's excavation.

25. Victor Schock testified that, of the proposed \$1,500 civil penalty, \$1,000 was included as penalty for finding a third violation of the One-Call Law by the same company.

PU-13-880

26. On July 31, 013, Northern provided an excavation notice to the NDOC Notification Center for excavation by Northern, scheduled to begin on August 2, 2013. The NDOC Notification Center assigned locate ticket number 13118062 to this excavation notice.

27. On August 9, 2013, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at 2nd Street West and Central Avenue, Ross, ND.

28. On August 9, 2013, a 144 fiber optic cable and the conduit it was in at 2nd Street West and Central Avenue, operated by RTC, was damaged during the excavation performed by Northern.

29. Shane Hart testified that the cost to repair the damage to the 144 fiber optic cable and the conduit it was in is \$11,547.68. As of the date of the hearing, Northern had not reimbursed RTC for the damages.

30. Cassie Steele testified that the line was properly marked. Ms. Steele also testified that her markings were still visible in the area when she arrived at the site directly after receiving notice from Kyle Benson that Northern had damaged one of RTC's lines.

31. Kyle Benson testified that the markings were in place and that he did call Ms. Steele to notify her that Northern hit RTC's line.

32. Robert Lindberg testified Northern took precautions to protect the underground facilities but also admitted that the damage was a result of Northern's excavation.

33. Victor Schock testified that, of the proposed \$3,000 civil penalty, \$1,500 was included as penalty for finding a fourth violation of the One-Call Law by the same company.

PU-13-881

34. On August 15, 2013, Northern provided an excavation notice to the NDOC Notification Center for excavation by Northern, scheduled to begin on August 19, 2013. The NDOC Notification Center assigned locate ticket number 13132442 to this excavation notice.

35. On September 9, 2013, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at Main Street and Central Avenue, Ross, ND.

36. On September 9, 2013, a 75 pair copper cable at Main Street and Central Avenue, operated by RTC, was damaged during the excavation performed by Northern.

37. Shane Hart testified that the cost to repair the damage to the 75 pair copper cable is \$1913.97. As of the date of the hearing, Northern had not reimbursed RTC for the damages.

38. Cassie Steele testified that the line was properly marked. Ms. Steele also testified that her markings were still visible in the area when she arrived at the site directly after receiving notice from Kyle Benson that Northern had damaged one of RTC's lines.

39. Kyle Benson testified that the markings were in place and that he did call Ms. Steele to notify her that Northern hit RTC's line.

40. Robert Lindberg testified Northern took precautions to protect the underground facilities but also admitted that the damage was a result of Northern's excavation.

41. Victor Schock testified that, of the proposed \$3,000 civil penalty, \$2,000 was included as penalty for finding a fourth violation of the One-Call Law by the same company.

PU-13-882

42. On September 26, 2013, Northern provided an excavation notice to the NDOC Notification Center for excavation by Northern, scheduled to begin on September 30, 2013. The NDOC Notification Center assigned locate ticket number 13167425 to this excavation notice.

43. On October 1, 2013, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at 2nd Street East and Central Avenue, Ross, ND.

44. On October 1, 2013, a 75 pair copper cable at 2nd Street East and Central Avenue, operated by RTC, was damaged during the excavation performed by Northern.

45. Shane Hart testified that the cost to repair the damage to the 75 pair copper cable is \$1113.39. As of the date of the hearing, Northern had not reimbursed RTC for the damages.

46. Cassie Steele testified that the line was properly marked. Ms. Steele also testified that her markings were still visible in the area when she arrived at the site directly after receiving notice from Kyle Benson that Northern had damaged one of RTC's lines.

47. Kyle Benson testified that the markings were in place and that he did call Cassie to notify her that Northern hit RTC's line.

48. Robert Lindberg testified Northern took precautions to protect the underground facilities but also admitted that the damage was a result of Northern's excavation.

49. Northern's witnesses contended the facility was damaged as a result of an "S-type" loop in the facility due to a previous repair.

50. Victor Schock testified that, of the proposed \$3,500 civil penalty, \$2,500 was included as penalty for finding a fifth violation of the One-Call Law by the same company.

PU-13-883

51. On September 26, 2013, Northern provided an excavation notice to the NDOC Notification Center for excavation by Northern, scheduled to begin on September 30, 2013. The NDOC Notification Center assigned locate ticket number 13167425 to this excavation notice.

52. On October 1, 2013, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at 2nd Street East and Central Avenue, Ross, ND.

53. On October 1, 2013, a 75 pair copper cable at 2nd Street East and Central Avenue, operated by RTC, was damaged during the excavation performed by Northern.

54. Shane Hart testified that the cost to repair the damage to the 75 pair copper cable is \$2727.92. As of the date of the hearing, Northern had not reimbursed RTC for the damages.

55. Cassie Steele testified that the line was properly marked. Ms. Steele also testified that her markings were still visible in the area when she arrived at the site directly after receiving notice from Kyle Benson that Northern had damaged one of RTC's lines.

56. Kyle Benson testified that the markings were in place and that he did call Cassie to notify her that Northern hit RTC's line.

57. Robert Lindberg testified Northern took precautions to protect the underground facilities but also admitted that the damage was a result of Northern's excavation.

58. Victor Schock testified that, of the proposed \$4,000 civil penalty, \$3,000 was included as penalty for finding a sixth violation of the One-Call Law by the same company.

ALL CASES

59. This proceeding consolidated for hearing several Advocacy Staff complaints regarding violations of the One-Call Law by Northern. However, prior to the February 3, 2015 hearing on the consolidated cases, Northern has not been before the Commission on any One Call violations. Consequently, in these proceedings, the Commission does not believe it is appropriate to impose the full amount of the civil penalties recommended by Advocacy Staff for multiple violations of One-Call Law by the same company.

60. Northern did not deny damaging RTC's facilities. Rather, Northern contended the damage was caused either as a result of either protecting the trench during the backfill process or poor soil conditions and groundwater.

61. Except for Case No. PU-13-882 in which Northern contended the facility was damaged as a result of an “S-type” loop in the facility due to a previous repair, Northern did not contend the facilities were improperly marked.

62. In all cases, the lines were properly marked but damaged by Northern’s track hoe during excavation activities. It is the excavator’s responsibility to conduct the excavation in a careful and prudent manner, which means “excavating within twenty-four inches of the outer edges of an underground facility located manually and marked by the owner or operator by stakes, pain, or other customary manner, and supporting and protecting the uncovered facility.” North Dakota Century Code section 49-23-01(3).

Conclusions of Law

1. The Commission has jurisdiction over this proceeding.

PU-13-877

2. The August 7, 2013 activity by Northern was an excavation under N.D.C.C. Chapter 49-23.

3. Northern’s August 7, 2013 excavation damaged the 24 fiber optic cable at 3rd Street West and Railroad Avenue in Ross, ND.

4. Northern did not act in a careful and prudent manner when conducting the excavation on August 7, 2013.

PU-13-878

5. The August 15, 2013 activity by Northern was an excavation under N.D.C.C. Chapter 49-23.

6. Northern’s August 15, 2013 excavation damaged the 4 fiber drop cable at 2nd Street West and Central Avenue in Ross, ND.

7. Northern did not act in a careful and prudent manner when conducting the excavation on August 15, 2013.

PU-13-879

8. The August 2, 2013 activity by Northern was an excavation under N.D.C.C. Chapter 49-23.

9. Northern’s August 2, 2013 excavation damaged the 25 pair copper cable at 3rd Street West and Central Avenue in Ross, ND.

10. Northern did not act in a careful and prudent manner when conducting the excavation on August 2, 2013.

PU-13-880

11. The August 9, 2013 activity by Northern was an excavation under N.D.C.C. Chapter 49-23.

12. Northern's August 9, 2013 excavation damaged the 144 fiber optic cable and the conduit it was in at 2nd Street West and Central Avenue in Ross, ND.

13. Northern did not act in a careful and prudent manner when conducting the excavation on August 9, 2013.

PU-13-881

14. The September 9, 2013 activity by Northern was an excavation under N.D.C.C. Chapter 49-23.

15. Northern's September 9, 2013 damaged the 75 pair copper cable at Main Street and Central Avenue in Ross, ND.

16. Northern did not act in a careful and prudent manner when conducting the excavation on September 9, 2013.

PU-13-882

17. The October 1, 2013 activity by Northern was an excavation under N.D.C.C. Chapter 49-23.

18. Northern's October 1, 2013 excavation damaged the 75 pair copper cable at 2nd Street East and Central Avenue in Ross, ND.

19. From the totality of the circumstances, the Commission cannot conclude whether Northern failed to act in a careful and prudent manner when conducting the excavation on October 1, 2013.

PU-13-883

20. The October 1, 2013 activity by Northern was an excavation under N.D.C.C. Chapter 49-23.

21. Northern's October 1, 2013 excavation and damaged the 75 pair copper cable at 2nd Street East and Central Avenue in Ross, ND.

22. Northern did not act in a careful and prudent manner when conducting the excavation on October 1, 2013.

ALL CASES

23. The evidence demonstrates the lines were properly marked but damaged by Northern's track hoe during excavation activities. It is the excavator's responsibility to conduct the excavation in a careful and prudent manner, which means "excavating within twenty-four inches of the outer edges of an underground facility located manually and marked by the owner or operator by stakes, pain, or other customary manner, and supporting and protecting the uncovered facility." North Dakota Century Code section 49-23-01(3).

24. In addition, North Dakota Century Code section 49-23-05 requires an excavator to:

1. Maintain a clearance between an underground facility and the cutting edge or point of any mechanized equipment, considering the known limit of control of the cutting edge or point to avoid damage to the facility.
2. Provides support in a manner approved by the operator for underground facilities in and near the construction area, including backfill operations to protect the facilities.

....

6. Properly manage spoil material to prevent shifting or falling material that could damage belowground facilities.

25. Northern's claimed defenses to the damage it caused to RTC's facilities, even if correct, still constitute violations of North Dakota Century Code section ch. 49-23 in Case No. PU-13- 877, Case No. Pu-13-878, Case No. Pu-13-879, Case No. PU-13-880, Case No. PU-13-881 and Case No. PU-13-883.

26. North Dakota Century Code section 49-23-06(2)(a) provides.

If an excavator fails to comply with this chapter or damages an underground facility, the excavator is liable for all damages caused by the failure to comply with this chapter and for all damages to the facilities and must reimburse the operator for the cost of repair and restoration, loss of product, and interruption of service occurring because of the damage or injury to the facilities, together with reasonable costs and expenses of suit, including reasonable attorney's fees.

27. Northern must reimburse RTC for the costs identified under North Dakota Century Code section 49-23-06(2)(a): "repair and restoration, loss of product, and

interruption of service occurring because of the damage or injury to the facilities, together with reasonable costs and expenses of suit, including reasonable attorney's fees".

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

Order

The Commission orders:

1. Northern violated North Dakota Century Code chapter 49-23, the North Dakota One-Call law.
2. Northern shall pay a total fine of \$8,000 made up of the following:
 - a. \$1000 in Case No. PU-13-877;
 - b. \$1000 in Case No. PU-13-878;
 - c. \$1000 in Case No. PU-13-879;
 - d. \$2000 in Case No. PU-13-880;
 - e. \$1500 in Case No. PU-13-881; and
 - f. \$1500 in Case No. PU-13-883.
3. The total \$8000 fine is payable to the North Dakota Public Service Commission within ten business days of the service of this Order

PUBLIC SERVICE COMMISSION



Randy Christmann
Commissioner



Julie Fedorchak
Chairman



Brian Kalk
Commissioner