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March 5, 2015



**HAND-DELIVERED:**

Mr. Darrell Nitschke  
Executive Director  
North Dakota Public Service Commission  
600 East Boulevard, Dept. 408  
Bismarck, ND 58505-0480

In re: Northern Excavating, Inc.  
Damage Prevention Enforcement  
Case No: PU-13-877, -878, -879, -880, -881, -882, and -883

Dear Mr. Nitschke:

Enclosed for filing, please find proposed *Findings of Fact, Conclusions of Law, and Order* by advocacy staff.

Sheldon A. Smith\*  
Randall J. Bakke\*\*\*  
Scott K. Porsborg\*\*\*  
Suzanne M. Schweigert\*  
Mitchell D. Armstrong\*\*  
Stacy M. Moldenhauer\*\*  
David J. Smith\*\*  
Shawn A. Grinolds\*\*  
Bradley N. Wiederholt\*\*  
Brian D. Schmidt\*  
Tyler J. Malm\*  
Preston J. Wise\*  
Leah R. Carlson\*

Respectfully,

MITCHELL D. ARMSTRONG  
Special Assistant Attorney General for  
Public Service Commission

tmh  
enclosure

cc: Shane Hart (w/ enc.) (via U.S. Mail)  
Robert L. Lindberg (w/ enc.) (via U.S. Mail)

\* Licensed in North Dakota

■ Licensed in Minnesota

● Licensed in South Dakota

\* Board Certified Civil Trial  
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of Trial Advocacy

PSC.3	58	PU-13-880	Filed 03/05/2015	Pages: 13	58	PU-13-880	Filed 03/05/2015	Pages: 13
				Advocacy Staff's proposed order				Advocacy Staff's proposed order
	58	PU-13-883	Filed 03/05/2015	Pages: 13	58	PU-13-879	Filed 03/05/2015	Pages: 13
		Advocacy Staff's proposed order				Advocacy Staff's proposed order		Advocacy Staff's proposed order
	58	PU-13-882	Filed 03/05/2015	Pages: 13	58	PU-13-878	Filed 03/05/2015	Pages: 13
		Advocacy Staff's proposed order				Advocacy Staff's proposed order		Advocacy Staff's proposed order
	58	PU-13-881	Filed 03/05/2015	Pages: 13	58	PU-13-877	Filed 03/05/2015	Pages: 13
		Advocacy Staff's proposed order				Advocacy Staff's proposed order		Advocacy Staff's proposed order

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

<b>Public Service Commission Northern Excavating Co., Inc. (7-25-2013) Damage Prevention Enforcement</b>	<b>Case No. PU-13-877</b>
<b>Public Service Commission Northern Excavating Co., Inc. (8-2-2013) Damage Prevention Enforcement</b>	<b>Case No. PU-13-878</b>
<b>Public Service Commission Northern Excavating Co., Inc. (25 pair copper) Damage Prevention Enforcement</b>	<b>Case No. PU-13-879</b>
<b>Public Service Commission Northern Excavating Co., Inc. (144 Fiber Optic) Damage Prevention Enforcement</b>	<b>Case No. PU-13-880</b>
<b>Public Service Commission Northern Excavating Co., Inc. (9-17-2013) Damage Prevention Enforcement</b>	<b>Case No. PU-13-881</b>
<b>Public Service Commission Northern Excavating Co., Inc. (9-30-2013) Damage Prevention Enforcement</b>	<b>Case No. PU-13-882</b>
<b>Public Service Commission Northern Excavating Co., Inc. (75 pair 2nd time) Damage Prevention Enforcement</b>	<b>Case No. PU-13-883</b>

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

**Date**

**Appearances**

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

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

Robert Lindberg, President, Northern Excavating Co., Inc. 3420 82<sup>nd</sup> Avenue Southeast, Jamestown, ND 58402, appearing 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 advisory counsel.

Rosellen Sand, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14<sup>th</sup> 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, on behalf of Northern, filed a response.

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 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?

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 82<sup>nd</sup> 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 3<sup>rd</sup> Street West and Railroad Avenue, Ross, ND.
5. On August 7, 2013, a 24 fiber optic cable at 3<sup>rd</sup> 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. Northern has not reimbursed RTC for the damages.
7. Cassie Steele (Line Locator for RTC) testified that the line was properly marked, Kyle Benson (Foreman for Northern) called her to let her know that Northern had hit one of RTC's lines, and her markings were still visible in the area when she came onsite after receiving notice of the damage.
8. Kyle Benson testified that the markings were in place and that he did call Cassie to notify her that Northern hit RTC's line.

9. Robert Lindberg (owner of Northern) testified Northern took precautions to protect the underground facilities but the damage was a result of Northern's excavation.

#### **PU-13-878**

10. 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 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 2<sup>nd</sup> Street West and Central Avenue, Ross, ND.

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

13. Shane Hart (Assistant General Manager for RTC) testified that the cost to repair the damage to the 4 fiber drop cable is \$1034.38. Northern has not reimbursed RTC for the damages.

14. Cassie Steele (Line Locator for RTC) testified that the line was properly marked, Kyle Benson (Foreman for Northern) called her to let her know that Northern had hit one of RTC's lines, and her markings were still visible in the area when she came onsite directly after receiving notice of the damage.

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

16. Robert Lindberg (owner of Northern) testified Northern took precautions to protect the underground facilities but the damage was a result of Northern's excavation.

#### **PU-13-879**

17. 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.

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

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

20. Shane Hart (Assistant General Manager for RTC) testified that the cost to repair the damage to the 25 pair copper cable is \$1,082.14. Northern has not reimbursed RTC for the damages.

21. Cassie Steele (Line Locator for RTC) testified that the line was properly marked, Kyle Benson (Foreman for Northern) called her to let her know that Northern had hit one of RTC's lines, and her markings were still visible in the area when she came onsite directly after receiving notice of the damage.

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

23. Robert Lindberg (owner of Northern) testified Northern took precautions to protect the underground facilities but the damage was a result of Northern's excavation.

#### **PU-13-880**

24. 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 13118062 to this excavation notice.

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

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

27. At the hearing Shane Hart (Assistant General Manager for RTC) testified that the cost to repair the damage to the 144 fiber optic cable and the conduit it was in is \$11,547.68. Northern has not reimbursed RTC for the damages.

28. Cassie Steele (Line Locator for RTC) testified that the line was properly marked, Kyle Benson (Foreman for Northern) called her to let her know that Northern had hit one of RTC's lines, and her markings were still visible in the area when she came onsite directly after receiving notice of the damage.

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

30. Robert Lindberg (owner of Northern) testified Northern took precautions to protect the underground facilities but the damage was a result of Northern's excavation.

### **PU-13-881**

31. On August 15, 2013, Northern provided an excavation notice to the North Dakota One-Call (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.
32. 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.
33. 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.
34. At the hearing Shane Hart (Assistant General Manager for RTC) testified that the cost to repair the damage to the 75 pair copper cable is \$1913.97. Northern has not reimbursed RTC for the damages.
35. Cassie Steele (Line Locator for RTC) testified that the line was properly marked, Kyle Benson (Foreman for Northern) called her to let her know that Northern had hit one of RTC's lines, and her markings were still visible in the area when she came onsite directly after receiving notice of the damage.
36. Kyle Benson testified that the markings were in place and that he did call Cassie to notify her that Northern hit RTC's line.
37. Robert Lindberg (owner of Northern) testified Northern took precautions to protect the underground facilities but the damage was a result of Northern's excavation.

### **PU-13-882**

38. On September 26, 2013, Northern provided an excavation notice to the North Dakota One-Call (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.
39. On October 1, 2013, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at 2<sup>nd</sup> Street East and Central Avenue, Ross, ND.
40. On October 1, 2013, a 75 pair copper cable at 2<sup>nd</sup> Street East and Central Avenue, operated by RTC, was damaged during the excavation performed by Northern.
41. Shane Hart (Assistant General Manager for RTC) testified that the cost to repair the damage to the 75 pair copper cable is \$1113.39. Northern has not reimbursed RTC for the damages.

42. Cassie Steele (Line Locator for RTC) testified that the line was properly marked, Kyle Benson (Foreman for Northern) called her to let her know that Northern had hit one of RTC's lines, and her markings were still visible in the area when she came onsite directly after receiving notice of the damage.

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

44. Robert Lindberg (owner of Northern) testified Northern took precautions to protect the underground facilities but the damage was a result of Northern's excavation.

### **PU-13-883**

45. On September 26, 2013, Northern provided an excavation notice to the North Dakota One-Call (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.

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

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

48. Shane Hart (Assistant General Manager for RTC) testified that the cost to repair the damage to the 75 pair copper cable is \$2727.92. Northern has not reimbursed RTC for the damages.

49.

50. Cassie Steele (Line Locator for RTC) testified that the line was properly marked, Kyle Benson (Foreman for Northern) called her to let her know that Northern had hit one of RTC's lines, and her markings were still visible in the area when she came onsite directly after receiving notice of the damage.

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

Robert Lindberg (owner of Northern) testified Northern took precautions to protect the underground facilities but the damage was a result of Northern's excavation.

### **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 and damaged the 24 fiber optic cable at 3<sup>rd</sup> Street West and Railroad Avenue in Ross, ND.

3. From the totality of the circumstances, the Commission concludes that Northern did not act in a careful and prudent manner when conducting the excavation on August 7, 2013.

**PU-13-878**

4. The August 15, 2013 activity by Northern was an excavation and damaged the 4 fiber drop cable at 2<sup>nd</sup> Street West and Central Avenue in Ross, ND.

5. From the totality of the circumstances, the Commission concludes that Northern did not act in a careful and prudent manner when conducting the excavation on August 15, 2013.

**PU-13-879**

6. The August 2, 2013 activity by Northern was an excavation and damaged the 25 pair copper cable at 3<sup>rd</sup> Street West and Central Avenue in Ross, ND.

7. From the totality of the circumstances, the Commission concludes that Northern did not act in a careful and prudent manner when conducting the excavation on August 2, 2013.

**PU-13-880**

8. The August 9, 2013 activity by Northern was an excavation and damaged the 144 fiber optic cable and the conduit it was in at 2<sup>nd</sup> Street West and Central Avenue in Ross, ND.

9. From the totality of the circumstances, the Commission concludes that Northern did not act in a careful and prudent manner when conducting the excavation on August 9, 2013.

**PU-13-881**

10. The September 9, 2013 activity by Northern was an excavation and damaged the 75 pair copper cable at Main Street and Central Avenue in Ross, ND.

11. From the totality of the circumstances, the Commission concludes that Northern did not act in a careful and prudent manner when conducting the excavation on September 9, 2013.

**PU-13-882**

12. The October 1, 2013 activity by Northern was an excavation and damaged the 75 pair copper cable at 2<sup>nd</sup> Street East and Central Avenue in Ross, ND.

13. From the totality of the circumstances, the Commission concludes that Northern did not act in a careful and prudent manner when conducting the excavation on October 1, 2013.

**PU-13-883**

14. The October 1, 2013 activity by Northern was an excavation and damaged the 75 pair copper cable at 2<sup>nd</sup> Street East and Central Avenue in Ross, ND.

15. From the totality of the circumstances, the Commission concludes that Northern did not act in a careful and prudent manner when conducting the excavation on October 1, 2013.

**ALL CASES**

16. For its defense, Northern did not deny damaging RTC's facilities. Rather, Northern contended the damage was caused either as a result of protecting the trench, in the backfill process, or otherwise due to poor soil conditions and groundwater. Northern also did not contend the facilities were improperly marked, except in Case No. PU-13-882, Northern contended the facility was damaged as a result of an "S-type" loop in the facility due to a previous repair. In all cases, the evidence demonstrated the lines were properly marked but damaged by Northern's trackhoe 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).

17. 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.

18. All of Northern's claimed defenses to the damage it caused to RTC's facilities, even if correct, are still violations of North Dakota Century Code section ch. 49-23.

19. Northern is liable to 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 that Northern violated North Dakota Century Code chapter 49-23, the North Dakota One-Call law.

For the reasons testified to by Victor Schock at the hearing, the Commission orders Northern to pay a fine 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 for a total of \$17,000 payable to the North Dakota Public Service Commission within ten business days of the service of this Order.

**PUBLIC SERVICE COMMISSION**

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**Randy Christmann**  
**Commissioner**

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**Julie Fedorchak**  
**Chairman**

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**Brian Kalk**  
**Commissioner**




**U.S. MAIL:**

Shane Hart  
Reservation Telephone Cooperative  
P.O. Box 68  
Parshall, ND 58770

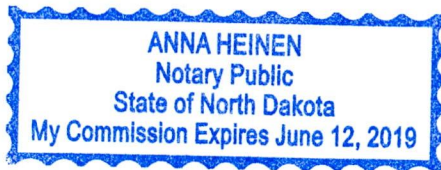
**U.S. MAIL:**


Robert L. Lindberg  
Northern Excavating Co.  
End of 5<sup>th</sup> St. NW  
NW City Limits Box 1108  
Jamestown, ND 58401

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota

  
\_\_\_\_\_  
Tiffany Heim

Subscribed and sworn before me this 5<sup>th</sup> day of March, 2015.



  
\_\_\_\_\_  
Notary Public  
Burleigh County, North Dakota