

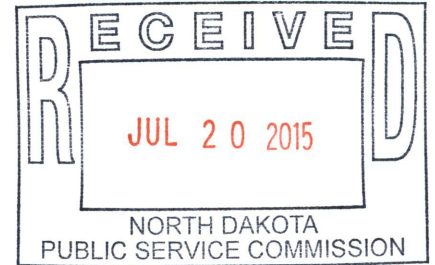
July 20, 2015

122 E. Broadway Avenue
Bismarck, ND 58501

P.O. Box 460
Bismarck, ND 58502-0460
Phone (701) 258-0630
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HAND-DELIVERED:

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

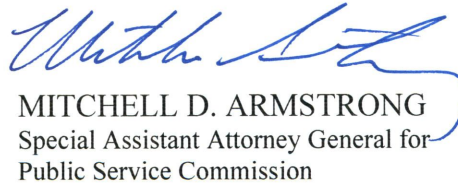


In re: Northern Excavating, Inc.
Damage Prevention Enforcement
Case No: GS-13-884; GS-13-885; GS-14-230; GS-13-886; PU-14-134;
GS-14-229; and PU-14-671

Dear Mr. Nitschke:

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

Respectfully,


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

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*

tmh
enclosure
cc: John M. Schuh (w/ enc.) (via hand-delivery)
ALJ Rosellen Sand (w/ enc.) (via U.S. Mail)
Robert L. Lindberg (w/ enc.) (via U.S. Mail)
Daniel Kuntz (w/ enc.) (via U.S. Mail)
Paul Sanderson (w/ enc.) (via U.S. Mail)
Kelsey Krapp (w/ enc.) (via U.S. Mail)

PSC.3

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Proposed Findings of Fact, Conclusions of Law, and Order
76 GS-14-229 Filed 07/20/2015 Pages: 13
Proposed Findings of Fact, Conclusions of Law, and Order
75 GS-13-886 Filed 07/20/2015 Pages: 13
Proposed Findings of Fact, Conclusions of Law, and Order
76 GS-13-885 Filed 07/20/2015 Pages: 13
Proposed Findings of Fact, Conclusions of Law, and Order
75 GS-13-884 Filed 07/20/2015 Pages: 13
Proposed Findings of Fact, Conclusions of Law, and Order

* Licensed in North Dakota

** Licensed in Minnesota

*** Licensed in South Dakota

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission **Case No. GS-13-884**
Northern Excavating Co., Inc. (9-13-13 11:00 a.m.)
Damage Prevention Enforcement

Public Service Commission **Case No. GS-13-885**
Northern Excavating Co., Inc. (10-1-13 11:40 a.m.)
Damage Prevention Enforcement

Public Service Commission **Case No. GS-13-886**
Northern Excavating Co., Inc. (10-9-13 17:15 p.m.)
Damage Prevention Enforcement

Public Service Commission **Case No. GS-14-229**
Northern Excavating Co., Inc. (05-06-14 8:57 a.m.)
Damage Prevention Enforcement

Public Service Commission **Case No. GS-14-230**
Northern Excavating Co., Inc. (04-30-14 1:45 p.m.)
Damage Prevention Enforcement

Public Service Commission **Case No. PU-14-671**
Northern Excavating Co., Inc. (5-28-14 3:30 p.m.)
Damage Prevention Enforcement

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

_____, 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.

Casey Furey, 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 November 19, 2013, Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. (MDU) filed with the Public Service Commission (Commission) three 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 form and requested a response.

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

On May 12, 2014, Montana-Dakota Utilities Co. (MDU) filed with the Public Service Commission (Commission) two 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 May 16, 2014, Commission Advocacy Staff (Advocacy Staff) sent Northern a copy of the complaint form and requested a response.

On May 29, 2014, Robert Lindberg, President, Northern Excavating Co., Inc., filed a response on behalf of Northern.

On August 5, 2014, Montana-Dakota Utilities Co. (MDU) filed with the Public Service Commission (Commission) a ND One-Call Complaint form, alleging a violation by Northern Excavating Co., Inc. (Northern) of North Dakota Century Code chapter 49-23, One-Call Excavation Notice System (One-Call Law).

On August 11, 2014, Commission Advocacy Staff (Advocacy Staff) sent Northern a copy of the complaint form and requested a response.

On October 29, 2014, Advocacy Staff filed formal complaints 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 \$5000 in Case No. GS-13-884, \$5500 in Case No. GS-13-885, \$5500 in Case No. GS-13-886, \$6500 in Case No. GS-14-229, \$7500 in Case No. GS-14-230, \$7500 in Case No. PU-14-671.

On November 6, 2014, the Commission found the Complaints stated *prima facie* cases and directed the complaints be served on Northern.

On December 17, 2014, the Commission issued a Notice of Consolidated Hearing on the complaint for cases GS-13-884, GS-13-885 and GS-14-230, scheduling the hearing for February 3, 2015, at 3:00 pm CDT in the Commission Hearing Room, State Capitol, 12th Floor, Bismarck, North Dakota 58505.

On December 17, 2014, the Commission issued a Notice of Consolidated Hearing on the complaints for cases GS-13-885, GS-14-229 and PU-14-671, scheduling the hearing for February 3, 2015, at 1:00 pm CDT in the Commission Hearing Room, State Capitol, 12th Floor, Bismarck, North Dakota 58505.

On February 3, 2015, with the consent of the parties, the Administrative Law Judge continued the hearing on the captioned six cases.

On April 8, 2015, the Commission issued Notices of Rescheduled Consolidated Hearing on the complaints, scheduling the hearings for June 30, 2015, at 8:30 am CDT in the Commission Hearing Room, State Capitol, 12th Floor, Bismarck, North Dakota 58505.

The Notices 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. GS-13-884, Case No. GS-13-885, Case No. GS-13-886, Case No. GS-14-229, Case No. GS-14-230, Case No. PU-14-671?
2. If a violation is found, should the Commission impose a civil penalty as requested in the complaint in the following amounts: \$5000 in Case No. GS-13-884, \$5500 in Case No. GS-13-885, \$5500 in Case No. GS-13-886, \$6500 in Case No. GS-14-229, \$7500 in Case No. GS-14-230, \$7500 in Case No. PU-14-671?

On June 30, 2015, the public hearing was held as scheduled. By agreement of the parties, all cases were consolidated into one hearing.

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. Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. is a foreign corporation with offices located at 400 North 4th Street, Bismarck, ND 58501-4022.

GS-13-884

3. On August 15, 2013, Northern provided an excavation notice to the North Dakota One-Call (NDOC) Notification Center for work to begin on August 19, 2013. The NDOC Notification Center assigned locate ticket number 13132425 to this excavation notice. Under North Dakota Century Code section 49-23-04(3)(g), the expiration date for the locate ticket was September 9, 2013.
4. On September 13, 2013, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at Main and Railroad Avenue in Ross, ND.
5. On September 13, 2013, a natural gas service line at Main and Railroad Avenue in Ross, ND, was damaged during the excavation performed by Northern.
6. Dana Baxter, Working Gas Lead for MDU, testified that he was not able to be on site that day, but was given the information from his employee who was onsite to repair the damaged line.
7. Paul Riely, District Gas Superintendent for MDU, testified that the cost to repair the damage to the service line is \$743.38. As of the date of the hearing, Northern had not reimbursed MDU for the damage.
8. Robert Lindberg testified that Northern had a valid One-Call ticket, and that the locate markings were 33 inches away from where the line hit occurred. The ticket number provided, 13132425, was expired on the date of the damage. Mr. Lindberg further testified that he did not know how long a One-Call ticket is valid for.
9. Commission Advocacy Staff Victor Schock testified that, of the proposed \$5,000 civil penalty, \$4,000 was included as penalty for finding an eighth violation of the One-Call Law by the same company.

GS-13-885

10. On October 15, 2013, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at Railroad Avenue and 3rd Street West in Ross, ND.

11. On October 15, 2013, a 3" gas main and a 2" gas main at Railroad Avenue and 3rd Street West, operated by MDU, were damaged during the excavation performed by Northern.

12. Leamon Ferrell, Working Lead Foreman for MDU, testified that he when he arrived at the site on October 15, 2013 he was told by Kyle, a foreman for Northern, that Northern did not have a locate ticket. Mr. Ferrell also testified that the lines were not cut all the way through, but were still blowing gas. The lines were 1.5 to 2 feet away from one another.

13. Paul Riely testified that the cost to repair the 2" gas main is \$1044.21 and the cost to repair the 3" gas mains is \$1183.64. As of the date of the hearing, Northern had not reimbursed MDU for the damage.

14. Robert Lindberg testified Northern began the excavation without a One-Call ticket because they needed to fix a temporary water line that had broken. He felt that the circumstances around this created an emergency. Mr. Lindberg further testified that the damage was a result of Northern's excavation, but they had to get the water line fixed.

15. Victor Schock testified that, of the proposed \$5,500 civil penalty, \$4,500 was included as penalty for finding a ninth violation of the One-Call Law by the same company.

GS-13-886

16. 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.

17. On October 9, 2013, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at Central Avenue in Ross, ND.

18. On October 9, 2013, a distribution service line at Central Avenue, operated by MDU, was damaged during the excavation performed by Northern.

19. Leamon Ferrell testified that when he arrived on site on October 9, 2013 he could see both locate flags and yellow paint in the area of the damage. He also testified that the line was bent over so that it was no longer blowing gas, and Northern continued their work in the area of the damage. He was told by Northern personnel on site that the operator was Shannon Severson.

20. Paul Riely testified that the cost to repair the damage to the service line is \$341.74. As of the date of the hearing, Northern had not reimbursed MDU for the damage.

21. Robert Lindberg testified that Shannon Severson does not operate equipment for Northern, but rather is a laborer. Mr. Lindberg further testified that Shannon pierced the line with a roughly 3/8-inch diameter probe. Northern then dug up the line with a track hoe so they could bend over the line to stop the flow of gas.

22. Victor Schock testified that, of the proposed \$5,500 civil penalty, \$5,000 was included as penalty for finding a tenth violation of the One-Call Law by the same company.

GS-14-229

23. On May 1, 2014, Northern provided an excavation notice to the NDOC Notification Center for excavation by Northern, scheduled to begin on May 5, 2014. The NDOC Notification Center assigned locate ticket number 14038256 to this excavation notice.

24. On May 6, 2014, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at 309 feet east of 2nd street east on Central Avenue in Ross, ND.

25. On May 6, 2014, a one inch natural gas distribution main line at 309 feet east of 2nd street east on Central Avenue, operated by MDU, was damaged during the excavation performed by Northern.

26. Dana Baxter testified that whisker biscuits were visible in line with the damaged gas line. He further testified that in his opinion the line was marked properly, but the marks were not properly maintained by Northern.

27. Paul Riely testified that the cost to repair the damage to the gas main line is \$1168.85. As of the date of the hearing, Northern had not reimbursed MDU for the damage.

28. Robert Lindberg testified Northern requested more locate flags in the area from ELM, but ELM refused to do so. Mr. Lindberg further testified that the spacing between the whisker biscuits was too far (in excess of 50 feet).

29. Victor Schock testified that, of the proposed \$6,500 civil penalty, \$6,000 was included as penalty for finding a twelfth violation of the One-Call Law by the same company.

GS-14-230

30. On April 21, 2014, Northern provided an excavation notice to the NDOC Notification Center for excavation by Northern, scheduled to begin on April 23, 2014. The NDOC Notification Center assigned locate ticket number 14030557 to this excavation notice.

31. On April 30, 2014, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) east of 2nd Street on Central Avenue in Ross, ND.

32. On April 30, 2014, a natural gas distribution line at 196 feet east of 2nd street east on Central Avenue, operated by MDU, was damaged during the excavation performed by Northern.

33. Dana Baxter testified that the damage caused was outside of the area covered by the One-Call ticket provided.

34. Paul Riely testified that the cost to repair the damage to the service line is \$1065.22. As of the date of the hearing, Northern had not reimbursed MDU for the damage.

35. Robert Lindberg testified Northern's ticket number 14030557 was valid, and that the ticket did cover the area they were excavating. He acknowledged that the location listed on the ticket does not match the area Northern was excavating in. He believes there was a miscommunication between the One-Call center and the locator.

36. Victor Schock testified that, of the proposed \$7,500 civil penalty, \$6,500 was included as penalty for finding a thirteenth violation of the One-Call Law by the same company.

PU-14-671

37. On May 13, 2014, Northern provided an excavation notice to the NDOC Notification Center for excavation by Northern, scheduled to begin on May 15, 2014. The NDOC Notification Center assigned locate ticket number 14048562 to this excavation notice.

38. On May 28, 2014, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at 700 feet northwest of 3500 Apple Creek Road near Bismarck, ND.

39. On May 28, 2014, a 3-phase primary cable at 700 feet northwest of 3500 Apple Creek Road, operated by MDU, was damaged during the excavation performed by Northern.

40. Cordell Wiest, Electric Construction Supervisor for MDU, testified that the damage he witnessed at the site must have been caused on that same day because there was no corrosion on the damaged facility and the line would not have lasted more than a few hours with the amount of damage sustained. Mr. Wiest also testified that a Northern Track Hoe was sitting on site and was the only piece of equipment in the area capable of causing the damage.

41. Craig Lohstreter, Electric Superintendent for MDU, testified that the cost to repair the damage to the cable is \$2039.41. As of the date of the hearing, Northern had not reimbursed MDU for the damage.

42. Robert Lindberg testified Northern took pictures of the lines two minutes after excavating 4ft away from the lines and the trench wall collapsed allowing the lines to fall into their trench. Mr. Lindberg further testified there was no damage on the lines at the time he took the pictures and that he called MDU to notify them that their lines were exposed but not damaged.

43. Victor Schock testified that, of the proposed \$7,500 civil penalty, \$7,000 was included as penalty for finding a fourteenth violation of the One-Call Law by the same company.

ALL CASES

44. This proceeding consolidated for hearing six Advocacy Staff complaints regarding violations of the One-Call Law by Northern. Northern was before the Commission on careful and prudent violations for cases PU-13-877 through PU-13-883 and PU-14-134 on February 3, 2015, which resulted in findings of several violations. Consequently, in these proceedings, the Commission believes 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.

45. Northern did not deny damaging MDU's facilities for cases GS-13-884-886, GS-14-229 and GS-14-230.

46. Northern contended for case no. PU-14-671 that the facility was damaged as a result of someone else's excavation, even though it could not identify whose excavation that was, Northern did not contend the facilities were improperly marked. The evidence indicates the facility was damaged by Northern's excavation activity due to the nature of the damage (lack of corrosion), the likelihood the facility would not have performed in the condition it was in, and the excavation activities described by Northern at the hearing.

47. In cases GS-13-886, GS-14-229 and PU-14-671, 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).

48. In cases GS-13-884, GS-13-885 and GS-14-230, the lines were not marked because Northern did not have valid locate tickets for the location of the damage at the time of the damage. It is the excavator's responsibility to "provide an excavation or locate notice at least forty-eight hours before beginning any excavation" North Dakota Century Code section 49-23-04. In case GS-13-884, the locate ticket was expired as the excavation was occurring more than 21 days after the location request. Northern requested an updated ticket approximately 45 minutes following the damage to the facility. In case GS-13-885, Northern admits it did not have a ticket, but claims there was an emergency. The circumstances claimed by Northern do not rise to the level of an emergency as defined by North Dakota Century Code § 49-23-01(5). Further, North Dakota Century Code § 49-23-04(4) provides what is to occur in an emergency, and Northern did not follow those procedures or assert an emergency existed at any time prior to the hearing. In case GS-14-230, Northern's excavation was outside the area of any valid locate ticket. The location of the damaged facility was outside the area indicated to be excavated in the locate ticket relied upon by Northern.

Conclusions of Law

1. The Commission has jurisdiction over this proceeding.

GS-13-884

2. The September 13, 2013 activity by Northern was an excavation under N.D.C.C. Chapter 49-23.
3. Northern's September 13, 2013 excavation damaged a natural gas service line at Main and Railroad Avenue in Ross, ND.
4. Northern did not have a valid locate for the area before beginning its excavation on September 13, 2013.

GS-13-885

5. The October 15, 2013 activity by Northern was an excavation under N.D.C.C. Chapter 49-23.
6. Northern's October 15, 2013 excavation damaged the 3" gas main and 2" gas main at Railroad Avenue and 3rd Street West in Ross, ND.
7. Northern did not have a valid locate for the area before beginning its excavation on October 15, 2013.

GS-13-886

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

9. Northern's October 9, 2013 excavation damaged the distribution service line at Central Avenue in Ross, ND.

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

GS-14-229

11. The May 6, 2014 activity by Northern was an excavation under N.D.C.C. Chapter 49-23.

12. Northern's May 6, 2014 excavation damaged the one inch natural gas main line at 309 feet east of 2nd street east on Central Avenue in Ross, ND.

13. Northern did not act in a careful and prudent manner when conducting the excavation on May 6, 2014.

GS-14-230

14. The April 30, 2014 activity by Northern was an excavation under N.D.C.C. Chapter 49-23.

15. Northern's April 30, 2014 damaged the natural gas distribution line at 196 feet east of 2nd street east on Central Avenue in Ross, ND.

16. Northern did not have a valid locate for the area before beginning its excavation on April 30, 2014.

PU-14-671

17. The May 28, 2014 activity by Northern was an excavation under N.D.C.C. Chapter 49-23.

18. Northern's May 28, 2014 excavation damaged the 3-phase primary cable at 700 feet northwest of 3500 Apple Creek Road near Bismarck, ND.

19. Northern did not act in a careful and prudent manner when conducting the excavation on April 30, 2014.

ALL CASES

20. The evidence demonstrates the lines were properly marked but damaged by Northern's track hoe during excavation activities for cases GS-13-886, GS-14-229 and PU-14-671. 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).

21. 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.

22. The evidence demonstrates the facilities were not marked because Northern did not have valid locate tickets for the location of the damage at the time of the damage for cases GS-13-884, GS-13-885 and GS-14-230. It is the excavator's responsibility to comply with North Dakota Century Code section 49-23-04.

23. 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.

24. Northern must reimburse MDU 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. \$5000 in Case No. GS-13-884;
 - b. \$5500 in Case No. GS-13-885;
 - c. \$5500 in Case No. GS-13-886;
 - d. \$6500 in Case No. GS-14-229;
 - e. \$7500 in Case No. GS-14-230; and
 - f. \$7500 in Case No. PU-14-671.
3. The total \$37,500 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