

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Public Service Commission
Northern Excavating Co., Inc.
Damage Prevention Enforcement**

Case No. PU-14-134

Public Service Commission,)	
Complainant,)	
)	
vs.)	
)	
Northern Excavating Co., Inc.)	Complaint
Respondent.)	

The North Dakota Public Service Commission Advocacy Staff ("Staff"), for its complaint against Northern Excavating Co., Inc., alleges and shows the following:

I.

Northern Excavating Co., Inc., ("Northern") is a North Dakota corporation with offices located at 3420 82nd Avenue SE, Jamestown, ND 58402-1108.

II.

Reservation Telephone Cooperative ("RTC") is a North Dakota cooperative association with offices located at 24 N Main Street, Parshall, ND 58770.

III.

North Dakota Century Code section 49-23-05 provides:

To avoid damage to and minimize interference with underground facilities in and near the construction area, an excavator shall:

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.

...

5. Conduct the excavation in a careful and prudent manner.

North Dakota Century Code section 49-23-01(3) provides:

“Careful and prudent manner” means excavating within twenty-four inches [60.96 centimeters] of the outer edges of an underground facility located manually and marked by the owner or operator by stakes, paint, or other customary manner, and supporting and protecting the uncovered facility.

IV.

On March 20, 2014, the Commission received a ND One-Call Complaint form from Shane Hart, Assistant General Manager for RTC. The complaint alleges violations by Northern of North Dakota Century Code chapter 49-23: One-Call Excavation Notice System.

V.

In a letter to Northern dated March 21, 2014, (“request letter”), staff provided a copy of the complaint form and requested a written response concerning the complaint by April 4, 2014, attached as Exhibit 1.

VI.

On March 30, 2014, the Commission received supplementary information from Shane Hart (“supplementary information”) concerning the complaint, attached as Exhibit 2.

VII.

On April 2, 2014, the Commission received a response letter from Northern (“response letter”), attached as Exhibit 3.

VIII.

In its complaint, RTC alleges that on August 2, 2013, Northern began an excavation as defined in North Dakota Century Code section 49-23-01(7) at 2nd Street and Central Avenue in the City of Ross, North Dakota ("Ross"). As a result of this excavation, RTC alleges that a 4-fiber and a 2-fiber drop was damaged. RTC further alleges that the facilities were properly marked prior to excavation and the cost to repair the damage was \$1,522.51. The date of excavation was revised to August 22, 2013, in the supplementary information.

IX.

According to information provided by RTC during a staff investigation of the complaint, RTC has not been reimbursed for damages, the incident affected two parties, the damage occurred as a result of being cut by a trackhoe, no critical facilities such as hospitals or clinics were affected by the incidents. RTC further indicated that they are not aware of any other contractors working in the area of the complaint at the time of the incident. This is the eleventh complaint filed by staff against Northern.

X.

Northern provided an excavation notice to the North Dakota One Call Notification Center (NDOC) on August 15, 2013, with work to begin in the area cited in the complaint to begin on August 19, 2013. The NDOC assigned locate ticket number 13132439 to the excavation notice, which indicates the work was being performed as part of a water mainline installation project in Ross.

XI.

In its response letter, Northern claims that they were not working in the location of the complaint at the time of the incident and do not take responsibility for the damages to RTC facilities.

XII.

In a letter to Northern dated August 21, 2014, ("updated request letter"), staff provided a copy of the complaint form along with the updated incident date and requested a written response by September 4, 2014 concerning the complaint, attached as Exhibit 4. As of October 1, 2014, the Commission had not received a response from Northern.

XII.

Northern violated North Dakota Century Code section 49-23-05 by failing to conduct the excavation in a careful and prudent manner.

XIV.

North Dakota Century Code section 49-07-01.1 provides:

Any person who violates any statute, commission order, or commission rule which applies to matters within the authority of the commission under chapters 8-08, 8-09, 8-10, 24-09, 32-25, and 51-05.1, titles 60 and 64, and title 49 except for chapters 49-22 and 49-23, shall, in addition to any other penalty provided, be subject to a civil penalty of not to exceed five thousand dollars. A violation occurring under chapter 49-23, in addition to any other penalty, is subject to a civil penalty not to exceed twenty-five thousand dollars. The commission shall develop policies for the assessment of penalties under chapter 49-23 which will take into consideration the severity of damages and the conduct of the offender. The civil penalty may be compromised by the commission. The amount of the penalty when finally determined or agreed upon in compromise, if not paid, may be recovered in a civil action in the courts of this state.

XV.

The North Dakota Public Service Commission Damage Prevention Plan provides:

D PROPOSED CIVIL PENALTIES:

1. The following criteria must be used by Commission staff to determine if a civil penalty should be proposed when filing a formal complaint:
 - a. The nature, circumstances and severity of the complaint;
 - b. The degree of suspected fault on the part of the respondent;
 - c. The respondent's history of prior violations or complaints;
 - d. The respondent's ability to pay;
 - e. Any good faith effort by the respondent in attempting to achieve compliance; and
 - f. The effect the penalty may have on the respondent's ability to continue in business.

IX.

The Respondent must serve an answer to a complaint upon the Complainant and the Commission within twenty days after service of the complaint, or the Commission may deem the complaint to be admitted. Answers must be served in the manner allowed for service under the North Dakota Rules of Civil Procedure.

Prayer for Relief

Based on the foregoing, Staff seeks the following relief:

1. That the Commission find Northern in violation of North Dakota Century Code chapter 49-23 for failing to failing to conduct an excavation in a careful and prudent manner as outlined in North Dakota Century Code section 49-23-05.
2. That the Commission impose a civil penalty in the amount of \$5500.
3. Such other relief that the Commission finds just and proper.

Dated this 29th day of October, 2014



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