



# Public Service Commission

## State of North Dakota

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### COMMISSIONERS

Julie Fedorchak  
Randy Christmann  
Brian P. Kalk

Executive Secretary  
Darrell Nitschke

600 East Boulevard, Dept. 408  
Bismarck, North Dakota 58505-0480  
Web: [www.psc.nd.gov](http://www.psc.nd.gov)  
E-mail: [ndpsc@nd.gov](mailto:ndpsc@nd.gov)  
Phone: 701-328-2400  
ND Toll Free: 1-877-245-6685  
Fax: 701-328-2410  
TDD: 800-366-6888 or 711

March 4, 2015

Darrell Nitschke  
Executive Secretary  
North Dakota Public Service Commission  
600 East Boulevard Avenue, Dept 408  
Bismarck, ND 58505

Re: Public Service Commission Case No. PU-14-134.

Dear Mr. Nitschke,

Enclosed for docketing in the above enumerated cases is North Dakota Public Service Commission Advocacy Staff's Proposed Findings of Fact, Conclusions of Law and Order.

Sincerely,

A handwritten signature in black ink, appearing to read "V. Schock", with a long horizontal flourish extending to the right.

Victor Schock  
Public Utility Analyst  
North Dakota Public Service Commission  
600 East Boulevard Ave, Dept 408  
Bismarck, ND 58505-0480

Encl.

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

**Public Service Commission**  
**Northern Excavating Co., Inc. (4-fiber 2<sup>nd</sup> time)**  
**Damage Prevention Enforcement**

**Case No. PU-14-134**

**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 March 20, 2014, Reservation Telephone Cooperative (RTC) 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 March 21, 2014, Commission Advocacy Staff (Advocacy Staff) sent Northern a copy of the complaint form and requested a response.

On April 7, 2014, Robert Lindberg, on behalf of Northern, filed a response.

On October 29, 2014, Advocacy Staff filed a formal complaint against Northern, alleging violation of the One-Call Law, and requesting the Commission find Northern in violation of the One-Call Law and impose a penalty of \$5500.

On November 6, 2014, the Commission found the Complaint states a *prima facie* case and directed the complaint be served on the Respondent, Northern.

On December 17, 2014, the Commission issued a Notice of Consolidated Hearing on the complaint, 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.

The notice identified the following issues to be considered:

1. Has Northern violated North Dakota Century Code 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 \$5500?

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.
3. 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 13132439 to this excavation notice.
4. On August 22, 2013, Northern began an excavation as defined under North Dakota Century Code section 49-23-01(7) at 2<sup>nd</sup> Street and Central Avenue, Ross, ND.
5. On August 22, 2013, a 4 fiber and a 2 fiber drop at 2<sup>nd</sup> Street and Central 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 4 fiber and 2 fiber drop cables is \$1522.51. 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 directly after receiving notice of the damage.

8. Northern did not offer any evidence at the hearing. Robert Lindberg, on behalf of Northern, argued in his closing argument that Northern took the proper precautions to protect the underground facilities.

### **Conclusions of Law**

1. The Commission has jurisdiction over this proceeding.

2. The August 22, 2013 activity by Northern was an excavation and damaged the 4 fiber and 2 fiber drop at 2<sup>nd</sup> Street and Central 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 22, 2013. Northern did not deny damaging the facilities and did not present any evidence the facilities were not properly marked. It is the excavator's responsibility to conduct the excavation in a careful and prudent manner, which 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, pain, or other customary manner, and supporting and protecting the uncovered facility." The evidence demonstrates Northern did not excavate in a careful and prudent manner, causing damage to the facilities with its trackhoe during excavation activities.

4. 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 \$5500 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**