

March 5, 2015

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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: PU-14-134

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**
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Tyler J. Malm*
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tmh
enclosure
cc: Shane Hart (w/ enc.) (via U.S. Mail)
Robert L. Lindberg (w/ enc.) (via U.S. Mail)

PSC.2

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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Northern Excavating Co., Inc. (4-fiber 2nd 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 82nd 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 14th 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 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.
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 2nd Street and Central Avenue, Ross, ND.
5. On August 22, 2013, a 4 fiber and a 2 fiber drop at 2nd 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 2nd 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

Randy Christmann
Commissioner

Julie Fedorchak
Chairman

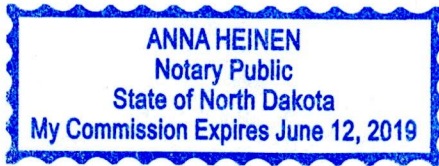
Brian Kalk
Commissioner


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



Tiffany Heim

Subscribed and sworn before me this 5th day of March, 2015.





Notary Public
Burleigh County, North Dakota