

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

March 25, 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.

Illona Jeffcoat-Sacco, 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 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, consolidating Case No. PU-14-134 with three similar complaint cases against Northern (Case No. GS-13-886, Case No. GS-14-229, and Case No. PU-14-671) and scheduling a 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 Excavating Co., Inc. violated N.D.C.C. Chapter 49-23, the North Dakota One-Call law in Case No. GS-13-886, Case No. PU-14-134, Case No. GS-14-229, and/or in Case No. PU-14-671?
2. If a violation is found, should the Commission impose a civil penalty in the amount of \$5500 in Case No. GS-13-886, \$5500 in Case No. PU-14-134, \$6500 in Case No. GS-14-229, and \$7500 in Case No. PU-14-671?

On February 3, 2015, the public hearing was held on the date scheduled. At the hearing, with the consent of the parties, the Administrative Law Judge separated the instant case from the other three cases for hearing. The hearing proceeded on the instant case and the hearing in Case No. GS-13-886, Case No. GS-14-229, and Case No. PU-14-671 was continued to a later date to be determined by the Commission.

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. As of the date of the hearing, Northern had not reimbursed RTC for the damages.

7. Cassie Steele, Line Locator for RTC, testified that the line was properly marked. Ms. Steele also testified that her markings were still visible in the area when she arrived at the site directly after receiving notice from Kyle Benson, Foreman for Northern, that Northern had damaged one of RTC's lines.

8. Advocacy staff witness Victor Schock testified that, of the requested \$5,500 civil penalty, \$5,000 was included as penalty for finding a eleventh violation of the One-Call Law by the same company.

9. Northern offered no evidence at the hearing

10. This proceeding consolidated for hearing several Advocacy Staff complaints regarding violations of the One-Call Law by Northern. A consolidated hearing on additional alleged violations was held prior to the hearing on the morning of February 3, 2015 before the hearing on the instant case. However, prior to the February 3, 2015 hearings on the consolidated cases and the instant case, Northern has not been before the Commission on any One Call violations. Consequently, in this proceeding, the Commission does not believe it is appropriate to impose the full amount of the civil penalty recommended by Advocacy Staff for multiple violations of One-Call Law by the same company.

11. Northern did not deny damaging the facilities and did not present any evidence the facilities were not properly marked.

12. It is the excavator's responsibility under the law 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."

13. The evidence demonstrates Northern did not excavate in a careful and prudent manner, causing damage to the facilities with its trackhoe during excavation activities.

Conclusions of Law

1. The Commission has jurisdiction over this proceeding.
2. The August 22, 2013 activity by Northern was an excavation under N.D.C.C. Chapter 49-23,
3. Northern's excavation on August 22, 2013 damaged the 4 fiber and 2 fiber drop at 2nd Street and Central Avenue in Ross, ND.
4. The Commission concludes that Northern did not act in a careful and prudent manner when conducting the excavation on August 22, 2013. 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." The evidence demonstrates Northern did not excavate in a careful and prudent manner, causing damage to the facilities with its trackhoe during excavation activities.
5. 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.

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 fine of \$1000 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	Julie Fedorchak Chairman	Brian Kalk Commissioner