

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION



Public Service Commission
Plote Construction ND, LLC
Damage Prevention Enforcement

Case No. GS-14-216

Public Service Commission,)
Complainant,)
vs.)
Plote Construction ND, LLC)
Respondent.)

Complaint

The North Dakota Public Service Commission Advocacy Staff (Staff), for its complaint against Plote Construction ND, LLC, alleges and shows the following:

I

Plote Construction ND, LLC (Plote) is a registered North Dakota company with offices located at 1100 Brant Dr, Hoffman Estates, IL 60192-1676.

II

Montana-Dakota Utilities Company (MDU) is a registered Delaware corporation with offices located at 1200 West Century Avenue, Bismarck, ND 58506-5650.

III

North Dakota Century Code section 49-23-05(5) provides:

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

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.
2. Provide support in a manner approved by the operator for underground facilities in and near the construction area, including backfill operations to protect the facilities. Backfill must be of a material equal to or better in both quality and quantity to the existing backfill.
3. Assume ownership of materials used to mark the facility, use reasonable efforts to maintain markings during excavation, and when possible remove all tangible marking materials used to mark the facility.
4. Assume the cost of excavation to expose the facility unless otherwise indicated by owner of facility.
5. Conduct the excavation in a careful and prudent manner.
6. Properly manage spoil material to prevent shifting or falling material that could damage belowground facilities.

North Dakota Century Code section 28-32-22 provides:

Unless otherwise prohibited by specific statute or rule, informal disposition may be made of any adjudicative proceeding, or any part or issue thereof, by stipulation, settlement, waiver of hearing, consent order, default, alternative dispute resolution, or other informal disposition, subject to agency approval. Any administrative agency may adopt rules of practice or procedure for informal disposition if such rules do not substantially prejudice the rights of any party. Such rules may establish procedures for converting an administrative matter from one type of proceeding to another type of proceeding.

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.

North Dakota Administrative Code section 69-02-04-05 provides:

In any proceeding in which the commission is authorized to act after opportunity for hearing, opportunity is afforded by service of notice fixing a reasonable period of time within which any person desiring to be heard may file a protest or request for a hearing. If a protest or request for hearing is not filed within the time provided, the commission may dispose of the matter on the basis of the pleadings, other submittals, and the studies and recommendations of the staff. A party not requesting oral hearing in the party's pleading is deemed to have waived a hearing for the purpose of the decision, but not for the purpose of applying for rehearing with respect to the decision. If a person requests a hearing but does not show good cause, the commission may determine the matter without a hearing.

IV

On April 14, 2014, the Commission received a ND One-Call Complaint from Paul Riely, District Gas Superintendent for MDU. The complaint alleges a violation by Plote of North Dakota Century Code section 49-23-04(1) of the One-Call Excavation Notice System.

V

By its April 29, 2014 letter, attached as Exhibit 1, Staff informed Plote of MDU's complaint filing, and requested a response by May 20, 2014. Plote's May 8, 2014

response asserted that Plote was told by the general contractor for the site that utility service to the site would be turned off on the date of the excavation.

VI

As alleged by MDU's complaint, on February 18, 2014, Plote began an excavation as defined in North Dakota Century Code section 49-23-01(7) while digging footings for a maintenance building at 621 East 42nd Street in Williston, North Dakota. As a result of this excavation, damage was caused by a back-hoe to MDU's 2-inch medium pressure natural gas main distribution line causing an unintentional release of gas. MDU alleges that the cost to repair its facilities was approximately \$1051.41.

VII

Based on its investigation Staff determined that Plote personnel provided an excavation notice to the North Dakota One Call Notification Center (NDOC) on January 30, 2014, with work to begin in the area cited in the complaint to begin on February 3, 2014. The NDOC assigned locate ticket number 14006256 to the excavation notice, which indicates the work was being performed was underground utility, attached as Exhibit 3. Under North Dakota Century Code section 49-23-04(3)(g), the expiration date for the locate ticket is February 24, 2014. On February 18, 2014, Plote personnel began an excavation to dig footings for a maintenance building. Plote notified MDU of the damage on February, 18, 2014. No customers lost service as the area was a new residential development under construction. MDU has been reimbursed for cost of the damages from the excavation.

VIII

Plote violated North Dakota Century Code section 49-23-05(5) by failing to conduct the excavation in a careful and prudent manner.

IX

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 chapter 49-22, shall, in addition to any other penalty provided, be subject to a civil penalty of not to exceed five thousand dollars. 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.

X

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.

XI

The Respondent must serve an answer to this 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 Plote in violation of North Dakota Century Code ch.49-23 for failing to comply with the One Call requirements enumerated in North Dakota Century Code section 49-23-05(5).
2. That the Commission impose an appropriate civil penalty up to \$25,000, but at least \$2000.
3. Such other relief that the Commission finds just and proper.

Dated this 3rd day of February, 2016



John Schuh

Public Service Commission Advocacy Counsel
State Capitol – 12th Floor
600 E Boulevard Ave – Dept. 408
Bismarck, North Dakota 58505-0480
701-328-2412

Victor Schock
Public Utility Analyst
Public Service Commission Advocacy Staff
State Capitol – 12th Floor
600 E Boulevard Ave – Dept 408
Bismarck, North Dakota 58505-0480
701-328-3397