

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 August 5, 2014, the Commission received a ND One-Call Complaint form from Craig Lohstreter of MDU. The complaint alleges a violation by Northern of North Dakota Century Code chapter 49-23: One-Call Excavation Notice System.

V.

In a letter to Northern dated August 11, 2014, (“request letter”), staff provided a copy of the complaint form and requested a written response by August 25, 2014 concerning the complaint, attached as Exhibit 1. As of October 1, 2014, the Commission has not received a response from Northern.

VI.

In its complaint, MDU alleges that on May 28, 2014 at 3:30pm, Northern began an excavation as defined in North Dakota Century Code section 49-23-01(7) at approximately 700 feet northwest of 3500 Apple Creek Road, Bismarck, ND. As a result of this excavation, MDU alleges that a three-phase primary cable was damaged. MDU further alleges in its complaint that the facilities were properly marked prior to excavation and the cost to repair the damage was \$1,950.

According to information provided by MDU during a staff investigation of the complaint, the incident affected seven commercial parties, the damage occurred as a result of being cut by a backhoe, no critical facilities such as hospitals or clinics were affected by the incidents. This is the fourteenth complaint filed by staff against Northern.

VII.

Northern provided an excavation notice to the North Dakota One Call Notification Center (NDOC) on May 13, 2014, with work to begin in the area cited in the complaint to begin on May 15, 2014. The NDOC assigned locate ticket number 14048562 to the excavation notice, which indicates the work was being performed as part of a Sanitary Sewer and Water Lateral project for the City of Bismarck, attached as Exhibit 2.

VIII.

Northern violated North Dakota Century Code section 49-23-05 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 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.

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 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.

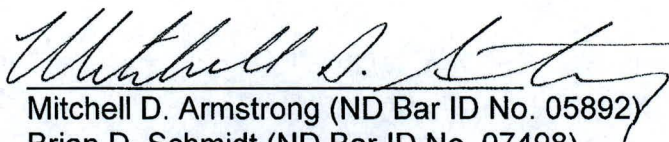
Prayer for Relief

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 comply with the One Call procedures outlined in North Dakota Century Code sections 49-23-01 and 49-23-05.
2. That the Commission impose a civil penalty in the amount of \$7,500 in Case No. PU-14-671.

3. Such other relief that the Commission finds just and proper.

Dated this 29th day of October, 2014



Mitchell D. Armstrong (ND Bar ID No. 05892)

Brian D. Schmidt (ND Bar ID No. 07498)

Special Assistant Attorneys General

122 East Broadway Avenue

P.O. Box 460

Bismarck, ND 58502-0460

(701) 258-0630

Attorneys for Advocacy Staff