

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Public Service Commission
T & A Turf and Irrigation LLC
Damage Prevention Enforcement**

Case No. PU-14-703

CONSENT ORDER

DATED this 17 day of November 2014

The North Dakota Public Service Commission (Commission) finds:

T & A Turf and Irrigation LLC (T&A Turf) is a Nebraska corporation with offices located at 104 N 2nd St, Elmwood, NE 68349-6010.

On August 22, 2014, the Commission received a ND One-Call Complaint from Verendrye Electric Coop, Inc. (Verendrye). The complaint alleged a violation by T&A Turf of North Dakota Century Code chapter 49-23: One-Call Excavation Notice System.

Commission Advocacy Staff (Staff) conducted an investigation including communication with T&A Turf, Verendrye, and North Dakota One Call (NDOC).

North Dakota Century Code section 49-23-04(1) provides:

Except in an emergency, an excavator shall contact the notification center and provide an excavation or location notice at least forty-eight hours before beginning any excavation, excluding Saturdays, Sundays, and holidays, unless otherwise agreed to between the excavator and operator. If an operator determines more time is necessary for location, the operator may request a twenty-four-hour extension of the excavation or location notice by notifying the notification center. The notification center shall notify the excavator of the extension. An excavation begins the first time excavation occurs in an area that was not previously identified by the excavator in an excavation notice.

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.

Investigation Summary

Based on its investigation, Staff concluded that on August 20, 2014, T&A Turf personnel began an excavation as defined under North Dakota Century Code section 49-23-01(7) while performing the installation of an irrigation system at the Minot Country Club in Minot, North Dakota.

Based on its investigation, Staff concluded that a 500mcm three phase feeder line was damaged during this excavation and that the amount of damage was approximately \$3064.71. The operator has been reimbursed for damages. As a result of the damage approximately 520 residential customers, over 100 business customers and one clinic lost service for one hour.

Based on its investigation, Staff concluded that there was no agreement between T&A Turf and Verendrye under North Dakota Century Code section 49-23-04(1) prior to excavation that would relieve T&A Turf of its obligation to provide excavation notice at least forty-eight hours before the excavation.

Based on its investigation, Staff concluded that the excavation was not being made in a time of emergency under North Dakota Century Code section 49-23-04(4), allowing the excavator to give notification after the start of the excavation.

Based on its investigation, Staff concluded that T&A Turf violated North Dakota Century Code section 49-23-04(1) by failing to provide an excavation notice to the NDOC Notification Center at least forty-eight hours before beginning its excavation.

Concurrences

T&A Turf and the Commission have agreed to resolve this matter without further administrative proceedings.

In the attached Consent to Entry of Order, T&A Turf expressly waives its rights to a hearing in this matter, to consult an attorney, to present argument to the Commission, and to appeal from any adverse determination after a hearing.

There are no covenants, promises, undertakings, or understanding other than as specifically set forth in this Order.

The Commission issues the following:

Order

The Commission orders T&A Turf to pay a fine of \$12,000 payable to the North Dakota Public Service Commission within ten business days of the effective date of this Order.

PUBLIC SERVICE COMMISSION

"Nagy"

Randy Christmann
Commissioner

Brian Kalk

Brian Kalk
Chairman

Julie Fedorchak

Julie Fedorchak
Commissioner

CONSENT TO ENTRY OF ORDER

The undersigned, on behalf of T & A Turf and Irrigation LLC (T&A Turf) is authorized to act on behalf of T&A Turf and bind T&A Turf for purposes of this Consent Order; has read the Consent Order, knows and fully understands its content and effect; has been advised of the right to a hearing in this matter, the right to be represented by legal counsel, the right to present evidence and arguments to the Commission, and the right to appeal from an adverse determination after hearing; and that by signing this Consent to Entry of Order waives those rights in their entirety on behalf of T&A Turf, and consents to entry of this Order by the North Dakota Public Service Commission to resolve the violation without further administrative proceedings. It is further expressly understood that this Order constitutes the entire settlement agreement between the parties, there being no other promises or agreements, either express or implied.

DATED this 17 day of November 2014

T & A Turf and Irrigation LLC

By Tim Heland

Its Member
{TITLE}

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Public Service Commission
T & A Turf and Irrigation LLC
Damage Prevention Enforcement**

Case No. PU-14-703

**Dissenting Opinion
Commissioner Randy Christmann**

November 20, 2014

I respectfully dissent from the approval of the T & A Turf and Irrigation LLC Consent Order. T & A Turf and Irrigation LLC is a Nebraska corporation with offices located at 104 N 2nd St., Elmwood, NE 68349-6010.

I have no disagreement with any of the five conclusions listed in the Investigation Summary of the Consent Order. Among these conclusions are that T & A Turf and Irrigation LLC violated the North Dakota Century Code by failing to provide an excavation notice as required, that damage was done to a 500mcm three phase feeder line, that the amount of the damage was approximately \$3064.71, and that the operator has been reimbursed for the damages.

While I fully agree that a fine is appropriate in this case, I do not support the imposition of a \$12,000 fine.

Public Service Commission staff have done excellent work in processing damage prevention cases and evolving the associated penalties to encourage safety and still avoid being unnecessarily punitive. They emphasize the extra danger associated with gas line cuts with higher fines than similar cuts of electric or telecommunications lines. They emphasize the extra impact on citizens that cuts to infrastructure serving large amounts of consumers can have. They also emphasize the extra impact that can occur when businesses lose service, especially clinics, assisted living facilities, nursing homes, and hospitals.

While these points of emphasis have merit, in this case we have escalated the penalty too high. Nothing on the record demonstrates that T & A Turf and Irrigation LLC has a record of previous violations, there were no injuries or loss of life, and there was no indication of extraordinary monetary losses by consumers who lost power. That being the case, this violation should not rise to nearly the midpoint of the range of penalties the last Legislature allowed this Commission to impose.



Randy Christmann, Commissioner