

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
MBC Corp.
Damage Prevention Enforcement

Case No. GS-14-725

AFFIDAVIT OF SERVICE CERTIFIED MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

Geralyn R. Schmaltz deposes and says that:

she is over the age of 18 years and not a party to this action and, on the **21st** day of **December, 2015**, she deposited in the United States Mail, at Bismarck, North Dakota, **one** envelope with certified postage, return receipt requested, fully prepaid, securely sealed and containing photocopy of:

- **Complaint**
- **Motion Finding Complaint States a *Prima Facie* Case**

The envelope was addressed as follows:

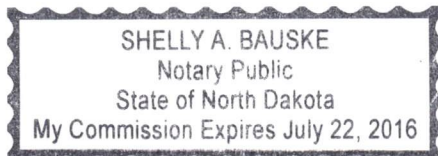
Mike Bendele – President
MBC Corporation
4050 Grandview Drive Suite 101
Grand Forks, ND 58201-7521
Cert. No. 7015 0640 0006 6433 1833

The address shown is the respective addressee's last reasonably ascertainable mailing address.



Subscribed and sworn to before me
this **21st** day of **December, 2015**.

SEAL



Notary Public

APPROVED

DATE: 12-16-15
\$

MOTION

December 16, 2015

Public Service Commission
MBC Corp.
Damage Prevention Enforcement

Case No. GS-14-725

I move the Commission find the December 10, 2015 Complaint filed by the North Dakota Public Service Commission Advocacy Staff states a *prima facie* case and serve the complaint on the Respondent in Public Service Commission, MBC Corp., Damage Prevention Enforcement, Case No. GS-14-725.

VFS

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Public Service Commission
MBC Corp.
Damage Prevention Enforcement

Case No. GS-14-725

Public Service Commission,)	
Complainant,)	
vs.)	
MBC Corp.)	Complaint
Respondent.)	

The Public Service Commission of North Dakota, by and through Advocacy Staff (Staff), for its complaint against MBC Corp. alleges and shows the following:

I

MBC Corp. (MBC) is a North Dakota corporation with offices registered with the North Dakota Secretary of State at 4050 Grandview Drive, Suite 101, Grand Forks, ND 58201-7215. MBC provided an updated address to Advocacy Staff as 4000 Garedenview Drive, Suite 101, Grand Forks, ND 58201.

II

Xcel Energy (Xcel) is a foreign corporation authorized to do business in North Dakota. Its registered agent with the North Dakota Secretary of State is Corporation Service Company, 1501 North 12th Street, Suite 1, Bismarck, ND 58501-2713.

III

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 49-23-06 (1)(a) provides:

If any damage occurs to an underground facility or its protective covering, the excavator shall notify the operator as soon as reasonably possible. When the operator receives a damage notice, the operator shall dispatch, as soon as reasonably possible, personnel to the damage area to investigate. If the damage endangers life, health, or property, the excavator responsible for the work shall take immediate action to protect the public and property and to minimize the hazard until arrival of the operator's personnel or until emergency responders have arrived and taken charge of the damaged area.

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 September 23, 2014, the Commission received a ND One-Call Complaint from Elisabeth M. Kalberg, with Xcel. The complaint alleges a violation by MBC of North Dakota Century Code chapter 49-23: One-Call Excavation Notice System.

V

In a letter to MBC dated September 24, 2014, staff provided a copy of the complaint form with attachments and requested a written response to the complaint by October 8, 2014, attached as Exhibit 1.

VI

On October 8, 2014, the Commission received a response email from MBC, attached as Exhibit 2.

VII

In its complaint Xcel alleges that on June 23, 2014, MBC began an excavation as defined in North Dakota Century Code section 49-23-01(7) at 416 South 4th St in Grand

Forks, North Dakota. As a result of this excavation, Xcel claims that a natural gas service line was damaged. Xcel further states that the cost to repair the damage was \$382.45.

VIII

According to information provided by Xcel during a staff investigation of the complaint, the incident affected one customer, and the damage occurred as a result of being cut by a backhoe.

IX

The homeowner rather than MBC personnel provided an excavation notice to the North Dakota One Call Notification Center (NDOC) on May 12, 2014, with work to begin in the area cited in the complaint to begin on May 14, 2014. The NDOC assigned locate ticket number 14047182 to the excavation notice, which indicates the work was being performed as part of a home addition, attached as Exhibit 3. Under North Dakota Century Code section 49-23-04(3)(g), the expiration date for the locate ticket was June 4, 2014.

In its response letter, MBC claims that the homeowner was the general contractor for this job and had called in all locates. MBC also claims that this was his second excavation at the site. After the first, Xcel was requested to move the natural gas service line to a location that would not be impacted by digging footings for the addition to the home.

X

Based on its investigation staff determined that on June 23, 2014 MBC began an excavation as defined in North Dakota Century Code section 49-23-01(7) while

excavating footings for a garage at 416 South 4th Street in Grand Forks, North Dakota. As a result of this excavation, damage was caused by a back-hoe to Xcel's natural gas service line.

XI

MBC 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.

XII

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. 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.

XIII

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.

XIV

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 MBC 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 section 49-23-04(1).
2. That the Commission impose an appropriate civil penalty up to \$25,000, but at least \$1,500.
3. Such other relief that the Commission finds just and proper.

Dated this 10th day of December, 2015



John Schuh

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