

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Wagner Construction, Inc. (Maintain Markings)
Damage Prevention Enforcement

Case No. PU-14-760

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:

Kevin Hesse
Wagner Construction, Inc.
3151 Hwy 53
International Falls, MN 56649
Cert. No. 7015 0920 0001 6792 1824

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**.



Notary Public

SEAL

APPROVED

DATE: 12-16-15

[Signature]

MOTION

December 16, 2015

**Public Service Commission
Wagner Construction, Inc. (Maintain Markings)
Damage Prevention Enforcement**

Case No. PU-14-760

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, Wagner Construction, Inc. (Maintain Markings), Damage Prevention Enforcement, Case No. PU-14-760.

VFS

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

**Public Service Commission
Wagner Construction, Inc.
Damage Prevention Enforcement**

Case No. PU-14-760

Public Service Commission,)	
Complainant,)	
)	
vs.)	
)	
Wagner Construction, Inc.,)	Complaint
Respondent.)	

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

I

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:

....

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.

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.

II

Wagner Construction, Inc. (Wagner) is a foreign corporation authorized to do business in North Dakota. Its registered agent with the North Dakota Secretary of State is National Registered Agents, Inc. 314 E Thayer Avenue, Bismarck, ND 58501-4018.

IV

Verendrye Electric Cooperative, Inc. (Verendrye) is a registered North Dakota cooperative association with offices located at 615 Highway 52 West, Velva, ND 58790-7417.

V

On or around April 29, 2014 through October 14, 2014, Wagner personnel were excavating at or around 37th Ave SE in Minot, ND.

VI

On or around July 24, 2014 through November 19, 2014, Wagner personnel were excavating at or around 16th Ave SE in Minot, ND.

VII

On October 21, 2014, the Commission received a ND One-Call Complaint from Bruce Carlson, General Manager for Verendrye. The complaint alleges a violation by Wagner of North Dakota Century Code section 49-23-05(3) of the One-Call Excavation Notice System by failure to use reasonable efforts to maintain markings.

VIII

Staff investigation discovered witnesses at the construction site that stated that Wagner was unwilling to take any measures to protect the markings and also witnessed Wagner destroying markings shortly after being placed.

IX

During the course of excavation, due to failure to maintain markings, Wagner repeatedly and excessively called in relocates. A list of the locates are evidenced by the tables below:

Wagner personnel provided to the North Dakota One Call Notification Center (NDOC) the following excavation notices for sanitary sewer and water line installation at 37th Ave SE in Minot, ND.

TABLE 1

Ticket #	Call Date/time	Work to begin	Expiration	Days since last ticket
14035044	4/25/2014 12:08	4/29/2014 13:00	5/20/2014 13:00	
14056519	5/20/2014 17:20	5/23/2014 7:00	6/13/2014 7:00	23.75
14059907	5/23/2014 13:38	5/28/2014 13:45	6/18/2014 13:45	5.28
14066526	5/31/2014 14:44	6/4/2014 7:00	6/25/2014 7:00	6.72
14072534	6/6/2014 11:59	6/10/2014 12:00	7/1/2014 12:00	6.21
14079815	6/13/2014 15:51	6/17/2014 16:00	7/8/2014 16:00	7.17
14085351	6/19/2014 15:26	6/23/2014 15:30	7/14/2014 15:30	5.98
14090514	6/25/2014 14:04	6/27/2014 14:15	7/18/2014 14:15	3.95
14092063	6/26/2014 16:29	6/30/2014 16:30	7/21/2014 16:30	3.09

14092672	6/27/2014 12:13	7/1/2014 12:15	7/22/2014 12:15	0.82
14093183	6/29/2014 11:03	7/2/2014 7:00	7/23/2014 7:00	0.78
14099000	7/8/2014 7:51	7/10/2014 8:00	7/31/2014 8:00	8.04
14100419	7/9/2014 7:21	7/11/2014 7:30	8/1/2014 7:30	0.98
14103923	7/12/2014 9:46	7/16/2014 7:00	8/6/2014 7:00	4.98
14104020	7/13/2014 9:41	7/16/2014 7:00	8/6/2014 7:00	0.00
14105749	7/15/2014 7:26	7/17/2014 7:30	8/7/2014 7:30	1.02
14107645	7/16/2014 12:06	7/18/2014 12:15	8/8/2014 12:15	1.20
14112425	7/22/2014 9:04	7/24/2014 9:15	8/14/2014 9:15	5.88
14114114	7/23/2014 14:51	7/25/2014 15:00	8/15/2014 15:00	1.24
14116320	7/25/2014 12:37	7/29/2014 12:45	8/19/2014 12:45	3.91
14116689	7/26/2014 14:47	7/30/2014 7:00	8/20/2014 7:00	0.76
14118153	7/29/2014 6:57	7/31/2014 7:00	8/21/2014 7:00	1.00
14123991	8/4/2014 14:19	8/6/2014 14:30	8/27/2014 14:30	6.31
14143621	8/26/2014 8:28	8/28/2014 8:30	9/18/2014 8:30	21.75
14146565	8/28/2014 11:19	9/2/2014 11:30	9/23/2014 11:30	5.13
14151529	9/4/2014 7:33	9/8/2014 7:45	9/29/2014 7:45	5.84
14152822	9/5/2014 7:10	9/9/2014 7:15	9/30/2014 7:15	0.98
14153879	9/6/2014 11:23	9/10/2014 7:00	10/1/2014 7:00	0.99
14153975	9/7/2014 9:52	9/10/2014 7:00	10/1/2014 7:00	0.00
14154198	9/8/2014 8:14	9/10/2014 8:15	10/1/2014 8:15	0.05
14156164	9/9/2014 10:59	9/11/2014 11:00	10/2/2014 11:00	1.11
14158384	9/11/2014 8:20	9/15/2014 8:30	10/6/2014 8:30	3.90
14161005	9/13/2014 7:32	9/17/2014 7:00	10/8/2014 7:00	1.94
14162822	9/16/2014 7:26	9/18/2014 7:30	10/9/2014 7:30	1.02
14164182	9/16/2014 23:06	9/19/2014 7:00	10/10/2014 7:00	0.98
14165508	9/17/2014 23:36	9/22/2014 7:00	10/13/2014 7:00	3.00
14167263	9/19/2014 12:20	9/23/2014 12:30	10/14/2014 12:30	1.23
14174766	9/29/2014 7:48	10/1/2014 8:00	10/22/2014 8:00	7.81
14176235	9/30/2014 7:28	10/2/2014 7:30	10/23/2014 7:30	0.98
14180342	10/3/2014 12:46	10/7/2014 13:00	10/28/2014 13:00	5.23
14185913	10/9/2014 15:18	10/14/2014 15:30	11/4/2014 15:30	7.10

Table 1 lists 41 excavation notices between April 29, 2014 and October 14, 2014.

If the location marks had been maintained for the 21 day effective period for a ticket, Wagner would have needed only the original locate plus 8 relocates for this time period.

Wagner personnel provided to the NDOC the following excavation notices for sanitary sewer and water line installation at 16th Ave SE in Minot, ND.

TABLE 2

Ticket #	Call Date/time	Work to begin	Expiration	Days since last ticket
14112139	7/21/2014 19:58	7/24/2014 8:00	8/14/2014 8:00	na
14127168	8/7/2014 10:07	8/11/2014 10:15	9/1/2014 10:15	18.09
14137290	8/19/2014 8:38	8/21/2014 8:45	9/11/2014 8:45	9.94
14144331	8/26/2014 14:23	8/28/2014 14:30	9/18/2014 14:30	7.24
14151688	9/4/2014 8:27	9/8/2014 8:30	9/29/2014 8:30	10.75
14165879	9/18/2014 10:14	9/22/2014 10:15	10/13/2014 10:15	14.07
14172711	9/25/2014 10:43	9/29/2014 10:45	10/20/2014 10:45	7.02
14183057	10/7/2014 10:45	10/9/2014 11:00	10/30/2014 11:00	10.01
14194186	10/20/2014 7:38	10/22/2014 7:45	11/12/2014 7:45	12.86
14215605	11/16/2014 12:49	11/19/2014 7:00	12/10/2014 7:00	27.97

Table 2 lists 10 excavation notices between July 24, 2014 and November 19, 2014. If the location marks had been maintained for the 21 day effective period for a ticket, Wagner would have needed only the original locate plus 6 relocates for this time period.

X

Substantial financial costs and operational strain were placed on Verendrye to comply with the requirements of the North Dakota Century Code ch. 49-23 as a result of the unwillingness and inaction to protect the markings.

XI

After investigation, Advocacy Staff has determined that Wagner violated North Dakota Century Code section 49-23-05(3) by not assuming ownership of the materials used to locate the facilities and by failing to maintain the markings.

XII

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.

XIII

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.

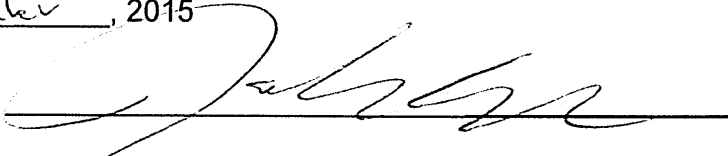
Prayer for Relief

Wherefore, based on the foregoing, Advocacy Staff seeks the following relief:

1. That the Commission find Wagner 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(3).
2. That the Commission impose an appropriate civil penalty of up to \$25,000, but at least \$3,500.

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

Dated this 10th day of December, 2015



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