

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

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

**Case No. PU-14-760**

**CONSENT ORDER**

**NOTE: Date of Order will be inserted here when ready for Commission action**

**Preliminary Statement**

On October 22, 2014, the Commission received a ND One-Call Complaint from Verendrye Electric Cooperative, Inc.(Verendrye) The complaint alleged a violation by Wagner Construction, Inc.(Wagner) of North Dakota Century Code chapter 49-23: One-Call Excavation Notice System.

On October 24, 2014 Commission Advocacy Staff (Staff) sent a copy of the ND One Call Complaint to Wagner for response.

On November 7, 2014 Wagner filed a response to the complaint.

On December 10, 2015 Staff filed a formal complaint against Wagner alleging a violation of the One-Call Law, and requesting the Commission find Wagner in violation of the One-Call Law and impose a penalty of \$3500.

On December 16, 2015 the Commission found the complaint stated a *prima facie* case and directed the complaint be served on Wagner.

On January 11, 2016 Wagner filed a response to the formal complaint.

**Discussion**

Wagner Construction, Inc. 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.

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

Commission Advocacy Staff (Staff) conducted an investigation of the alleged violation, including review of the filings and communication with Wagner, Verendrye, and North Dakota One Call (NDOC).

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 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

Staff determined that 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	na
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.

Staff determined that 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.

Based on its investigation, Staff believes that Wagner violated North Dakota Century Code section 49-23-05(3) by failing to use reasonable efforts to maintain markings during excavation.

Wagner does not believe it violated North Dakota Century Code section 49-23-05(3).

This agreement may be executed in counterparts and duplicate copies, each of which shall be deemed to be an original, and which, when taken together, shall constitute one and the same instrument.

### **Concurrences**

Wagner and the Commission have agreed for Wagner to pay \$3500 to resolve this matter without further administrative proceedings.

In the attached Consent to Entry of Order, Wagner expressly waives its rights to a hearing in this matter, to consult an attorney, to present argument to the Commission, and to appeal the Commission's order in the captioned case.

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 Wagner Construction, Inc. to pay a penalty of \$3500, payable to the North Dakota Public Service Commission within ten business days of service of this Order.

### **PUBLIC SERVICE COMMISSION**

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**Randy Christmann**  
**Commissioner**

**Julie Fedorchak**  
**Chairman**


**Brian Kalk**  
**Commissioner**

**CONSENT TO ENTRY OF ORDER**

The undersigned, on behalf of Wagner Construction, Inc. (Wagner), is authorized to act on behalf of Wagner and bind Wagner 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, the right to cross examine witnesses, and the right to appeal from an adverse determination; and that, by signing this Consent to Entry of Order, waives all those rights in their entirety on behalf of Wagner, and consents to entry of this Order by the North Dakota Public Service Commission to resolve the issues identified in this order 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 10<sup>th</sup> day of February 2016

Wagner Construction, Inc.

By  \_\_\_\_\_

Its cfo \_\_\_\_\_  
{TITLE}