

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Public Service Commission  
Phoenix Construction  
Damage Prevention Enforcement

Case No. PU-15-166

Public Service Commission, )  
Complainant, )  
vs. )  
Phoenix Construction, )  
Respondent. )

Complaint

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

I

Phoenix Construction is a registered ND sole proprietorship with offices located at 3615 Saratoga Ave, Bismarck, ND 58503.

II

The City of Bismarck (Bismarck) is an incorporated municipality in ND with offices located at 221 N Fifth St, Bismarck, ND 58501.

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 April 24, 2015, the Commission received a ND One-Call Complaint from Keith Demke, director of utility operations for Bismarck. The complaint alleges violations by Phoenix of North Dakota Century Code sections 49-23-04(1) and 49-23-06(1)(a) of the One-Call Excavation Notice System by failing to provide an excavation notice to the NDOC Notification Center at least forty-eight hours before beginning its excavation and failing to provide notice to the operator of damage to their underground facilities and backfilling over the un-repaired damaged underground facility.

#### V

On April 28, 2015 Commission staff issued a letter informing Phoenix of Bismarck's complaint filing, and requested a response by May 12, 2015. As of February 26, 2016, the Commission has not received a response from Phoenix.

#### VI

As alleged by Bismarck's complaint, on or about November or December of 2014, Phoenix began an excavation, as defined in North Dakota Century Code section

49-23-01(7), while performing excavation for a building addition at 133 S Bell St, in Bismarck, North Dakota. As a result of this excavation, damage was caused by a back hoe to Bismarck's 36" storm sewer line. Phoenix made no attempt to notify Bismarck or any other operator of the damage to the underground facility as required by North Dakota Century Code section 49-23-06(1), but instead, backfilled the hole and continued construction. Bismarck did not learn of the damage to the storm sewer until April 21, 2015 when the line backed up as a result of the blockage caused by Phoenix's excavation. Bismarck alleges that the cost to repair its facilities was approximately \$84,705.

## VII

Based on its investigation, Staff determined that Phoenix personnel did not provide an excavation notice to the North Dakota One Call Notification Center (NDOC) at any time during this construction project.

Based on its investigation, Staff concluded that there was no agreement between Phoenix and Bismarck under North Dakota Century Code section 49-23-04(1) prior to excavation that would relieve Phoenix 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.

## VIII

Phoenix 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.

Phoenix also violated North Dakota Century Code section 49-23-06(1) by failing to provide notice to the operator of damage to their underground facilities and backfilling over the un-repaired damaged underground facility.

## IX

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 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

Based on the foregoing, Staff seeks the following relief:

1. That the Commission find Phoenix in violation of North Dakota Century Code sections 49-23-04(1) and 49-23-06(1) for failure to comply with One Call requirements.
2. That the Commission impose an appropriate civil penalty up to \$25,000 per violation, but at least \$1,000 for violation of North Dakota Century Code section 49-23-04(1), and \$10,000 for violation of North Dakota Century Code section 49-23-06(1).
3. Such other relief that the Commission finds just and proper.

Dated this 1<sup>st</sup> day of March, 2016



John M. Schuh (ND Bar ID No. 08138)  
Special Assistant Attorney General  
600 E Boulevard Ave – Dept 408  
Bismarck, North Dakota 58505-0480  
(701) 328-2421  
Attorney for Advocacy Staff

and

Victor Schock  
Public Utility Analyst  
600 E Boulevard Ave – Dept 408  
Bismarck, North Dakota 58505-0480  
701-328-3397  
Public Service Commission Advocacy Staff