



Public Service Commission
State of North Dakota

COMMISSIONERS

Julie Fedorchak
Randy Christmann
Brian P. Kalk

Executive Secretary
Darrell Nitschke

600 East Boulevard, Dept. 408
Bismarck, North Dakota 58505-0480
Web: www.psc.nd.gov
E-mail: ndpsc@nd.gov
Phone: 701-328-2400
ND Toll Free: 1-877-245-6685
Fax: 701-328-2410
TDD: 800-366-6888 or 711

8 April 2016

Timothy Dawson, Director
Office of Administrative Hearings
2911 North 14th Street – Suite 303
Bismarck, ND 58503

Re: Public Service Commission
Phoenix Construction
Damage Prevention Enforcement

Case No. PU-15-166

Dear Mr. Dawson:

Enclosed is a request for an Administrative Law Judge for the captioned case. A hearing has not yet been scheduled. When the Notice of Hearing is issued we will forward the Notice to your office.

The Administrative Law Judge will serve as a procedural law judge and the hearing will be electronically recorded.

If you have any questions, please contact me. Thank you.

Best regards,

Illona A. Jeffcoat-Sacco
General Counsel

enclosure
c:/w enclosure Douglas Unruh



REQUEST FOR ADMINISTRATIVE LAW JUDGE--COMPLAINT
 NORTH DAKOTA OFFICE OF ADMINISTRATIVE HEARINGS
 SFN 17818 (Rev. 06-2007)

| | | |
|--|---|------------------------------------|
| Name of Agency, Board, or Commission North Dakota Public Service Commission | | |
| Name of Respondent(s) Phoenix Construction | Address PO Box 1871, Bismarck, ND 58502-1871 | Telephone Number (701) 222-1416 |
| | | |

The above named agency, board, or commission has taken administrative action pursuant to its authority found in North Dakota Century Code Chapter 49-23 _____ (North Dakota Century Code and/or North Dakota Administrative Code).

| |
|---|
| The administrative action is more fully described as follows: Hearing to determine if Respondent violated N.D.C.C. Chapter 49-23, the North Dakota One-Call Law, and if a violation is found, whether the Commission shall impose a civil penalty. |
|---|

Has the respondent been provided a copy of the complaint? Yes No

Attached is a copy of the complaint, related documents and correspondence, and certificate, affidavit or admission of service. If the respondent has otherwise been notified about this administrative action, please explain in the comments section below.

It requests designation of an administrative law judge (please check one):

- To conduct the hearing and issue recommended findings of fact, conclusions of law, and order.
- To serve as a procedural administrative law judge only (no recommended decision). The agency head will be present at the hearing as required by NDCC 28-32-31(5). See NDCC 54-57-04.
- To conduct the hearing, issue findings of fact, conclusions of law, and a final order.

PLEASE MAKE A REQUEST FOR AN ADMINISTRATIVE LAW JUDGE AT LEAST ONE MONTH BEFORE THE HEARING.

| | |
|--|------------------|
| Agency Contact Person(s) See attached | Telephone Number |
|--|------------------|

Representation [attorney (or other)] if known:

| | |
|------------------------|------------------|
| Agency See attached | Telephone Number |
| Party | Telephone Number |
| Party | Telephone Number |

| |
|--|
| Additional Comments The Administrative Law Judge will serve as a procedural law judge and the hearing will be electronically recorded. When the Notice of Hearing is issued we will forward the Notice to your office. |
|--|

(For agencies required to use OAH, notice of hearing will be issued by the administrative law judge, unless a procedural administrative law judge is requested. Other requesting agencies and agencies requesting a procedural administrative law judge should first contact OAH about scheduling a hearing. If notice has already been issued, attach a copy of the notice.)

| | |
|---|------------------------------------|
| Typed or Printed Name and Title of Requesting Person Illona A. Jeffcoat-Sacco, General Counsel | Date 4/8/2016 |
| Signature of Requesting Person X | Telephone Number (701) 328-2407 |

Attachment
Request for ALJ
8 April 2016

Re: Public Service Commission
Phoenix Construction
Damage Prevention Enforcement

Case No. PU-15-166

| AGENCY | Address | Telephone Number |
|--|--|---|
| North Dakota Public Service Commission | 600 E. Blvd. Ave. Dept. 408 Bismarck, ND 58505-0480 | 701-328-2400 |
| Representation Illona A. Jeffcoat-Sacco PSC General Counsel & Commission Advisory Counsel | Address Same as above | Telephone Number 701-328-2407 |
| John Schuh Advocacy Staff Counsel | Same as above | 701-328-2421 |
| PARTY Phoenix Construction | Address PO Box 1871 Bismarck, ND 58502-1871 | Telephone Number 701-222-1416 |
| Representation Douglas Unruh | Address PO Box 1871 Bismarck, ND 58502-1871 | Telephone Number 701-222-1416 |



ND ONE-CALL COMPLAINT

Public Service Commission

SFN 59067 (1-14)

To allege a violation of the One-Call Excavation Notice System Law: North Dakota Century Code Chapter 49-23

PART A – WHO IS SUBMITTING THIS COMPLAINT (COMPLAINANT)

| | | | |
|--|--|------------------|-------------------------------------|
| Company/Person City of Bismarck Public Works/ Keith Demke | Street Address Po Box 5503 | City Bismarck | State and Zip Code ND 58506-5503 |
| Telephone and Cell Phone Number 701-355-1704 701-220-5059 | Email Address kdemke@bismarcknd.gov | | Date April 24, 2015 |
| <input checked="" type="checkbox"/> Complainant is willing and able to testify on the complaint if matter goes to formal hearing | | | |

PART B – WHO VIOLATED THE ONE-CALL REGULATIONS (RESPONDENT)

| | | | |
|--|--------------------------------|------------------|--------------------------------|
| Company/Person Phoenix Construction/ Doug Unruh | Street Address 4620 Sky Way | City Bismarck | State and Zip Code ND 58501 |
| Telephone and Cell Phone Number 701-222-1416 | Email Address | | |

PART C – ALLEGED VIOLATION

| |
|--|
| <input type="checkbox"/> Operator failed to provide or update the information provided to the notification center on a timely basis <input checked="" type="checkbox"/> Excavator failed to provide excavation or location notice at least 48 hours before beginning any excavation <input type="checkbox"/> Excavator failed to provide required information in excavation or location notice <input type="checkbox"/> Notification center failed to transmit the notice to every operator that has an underground facility in the area of the excavation <input type="checkbox"/> Notification center failed to inform the excavator of the names of operators of underground facilities in the area <input type="checkbox"/> Operator failed to locate and mark underground facility within 48 hours <input checked="" type="checkbox"/> Excavation started prior to underground facility locate <input type="checkbox"/> Operator failed to mark underground facility within 24 inches horizontally <input type="checkbox"/> Excavator failed to renew excavation or location request prior to the expiration of the twenty-one-day period <input checked="" type="checkbox"/> Excavator failed to conduct the excavation in a careful and prudent manner to avoid damage of underground facilities <input type="checkbox"/> Excavator failed to maintain the markings during excavation <input checked="" type="checkbox"/> Other (identify the specific section of NDCC Chapter 49-23) 49-23-06 Excavator failed to provide notice of damage, backfilled without notice or repair |
|--|

Location of Violation:
133 S. Bell Street, Bismarck

Date and Time of Violation:
Uncertain - late November-early December 2014

Description (summarize the observations on which you rely to allege the violation) *If more space is required, please provide the description on a separate page.*

Recently, we noticed that a 36-inch diameter storm sewer was not draining and appeared to be plugged. On April 21, 2015 using televising equipment we determined that the pipe was collapsed and filled with dirt at the location where Phoenix Construction built an addition onto the structure at 133 S. Bell Street. We were not notified by ND One Call to provide utility location information at the time this work was done. According to the building owner, when the contractor was excavating for the building foundation he hit something at this location. He pulled out pieces of vitrified clay pipe and then backfilled.

PART D – DAMAGE

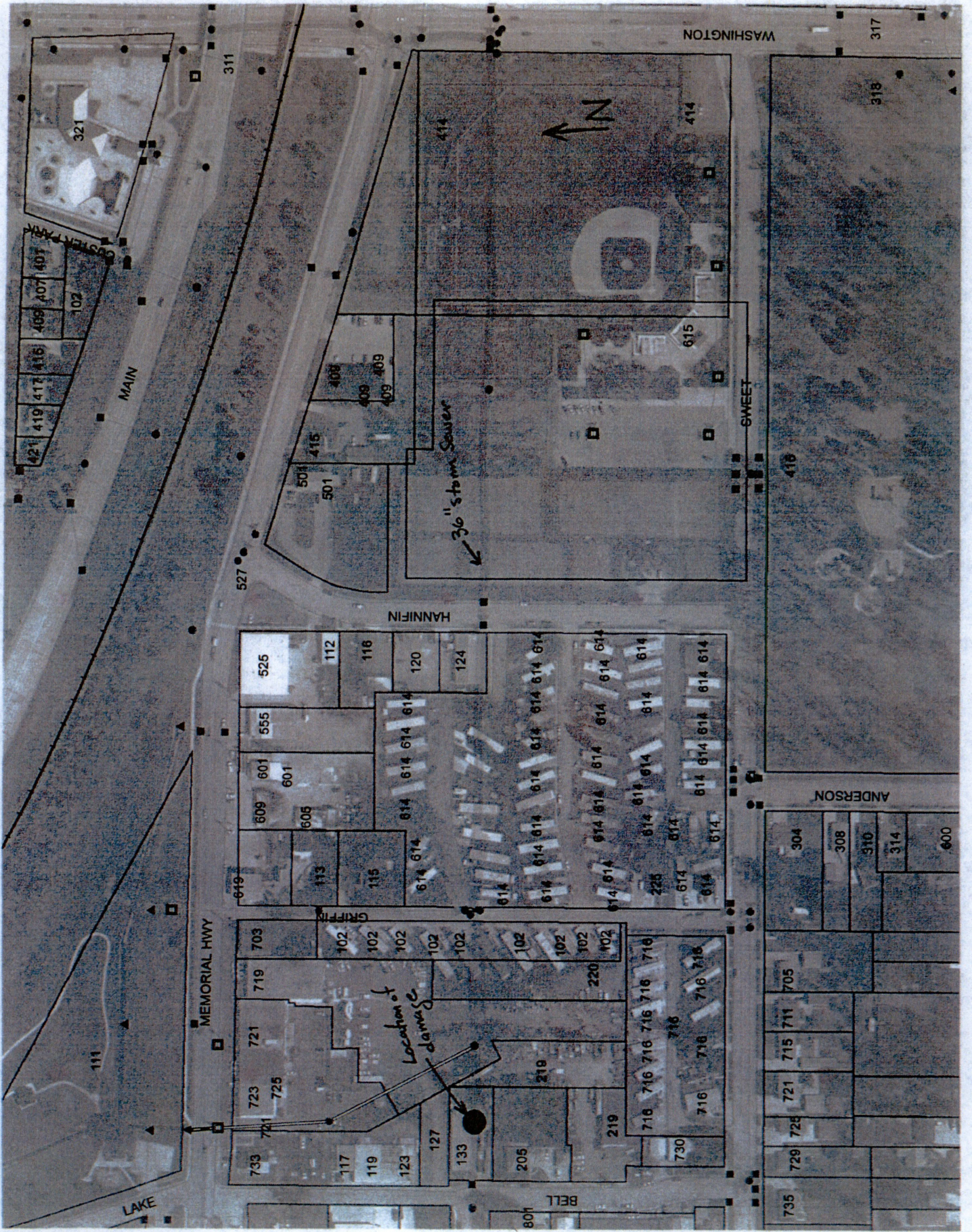
| | | |
|--|---|----------------------------------|
| Fatalities na | Injuries na | In-patient Hospitalization na |
| Underground facility type(s) and Operator(s) affected: Collapsed 36 inch diameter storm sewer | | |
| Estimated Value of Damage (damage as defined under NDCC Chapter 49-23): \$ Not determined at this time | Number of Customers Affected See below | |
| Other impact of event: The collapsed sewer presents a flooding risk to residents and businesses upstream who rely on this drainage system to convey storm water run off. No customers have been affected to date, however the potential exists for flooding in this neighborhood in case of heavy rainfall. This main also serves as an emergency bypass for sewage. While it's use is rare, if it were to be needed and is unusable, the result would be basements flooding with backed up sewage. | | |
| Please attach photos of Event Area or Damaged Facility | | |

PART I – SIGNATURE

| | |
|--|-------------------|
| Signature of Person Filing Complaint | Date 4/24/2015 |
|--|-------------------|

Send Completed, Original Complaint To:
Public Service Commission
600 E Boulevard Ave Dept 408
Bismarck ND 58505-0480
Telephone: (701) 328-2400

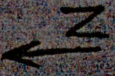
*Director of Utility Operations
City of Bismarck*



WASHINGTON

317

318



414

414

321

102

409

407

401

419

417

416

421

MAIN

311

527

408

409

409

501

501

36" storm sewer

615

SWEET

418

HANNIFIN

525

112

116

120

124

609

601

601

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GRIFFIN

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705

735

729

725

721

715

711

705

735

ANDERSON

304

308

310

314

600

LAKE

MEMORIAL HWY

BELL

Location of dam



Looking at
damaged location
from the west.





Public Service Commission
State of North Dakota

COMMISSIONERS

Julie Fedorchak
Randy Christmann
Brian P. Kalk

Executive Secretary
Darrell Nitschke

600 East Boulevard, Dept. 408
Bismarck, North Dakota 58505-0480
Web: www.psc.nd.gov
E-mail: ndpsc@nd.gov
Phone: 701-328-2400
ND Toll Free: 1-877-245-6685
Fax: 701-328-2410
TDD: 800-366-6888 or 711

April 28, 2015

Doug Unruh
Phoenix Construction
PO BOX 1871
Bismarck, ND 58502-1871

Re: One-Call Excavation Notice System: North Dakota Century Code Chapter 49-23

Dear Mr. Unruh:

Enclosed is a copy of a ND One-Call Complaint, with attachments, against Phoenix Construction, received by the North Dakota Public Service Commission on April 24, 2015, from Keith Demke, Director of Utility Operations for the City of Bismarck, in Bismarck, ND, Case Number PU-15-166. The location of the damage identified in the complaint is approximately 133 South Bell Street, Bismarck, ND.

I am sending you this information so that you are aware of the Complaint and have an opportunity to present any information you may have to assist us in processing this case. **Please respond to Darrell Nitschke, Executive Secretary, North Dakota Public Service Commission, by May 12, 2015**, with your written account of the event, including the applicable One Call locate ticket number for work performed at the address indicated.

I will review your response, the ND One-Call Complaint, and other available information to determine the next step in this matter. If I conclude there was a violation of the One Call law, I may file a formal complaint with the Commission. If I decide to proceed with a formal complaint, I will attempt to contact you in advance.

Please contact me at 701-328-3397 or at vschock@nd.gov with any questions regarding this correspondence.

Sincerely,

Victor Schock
Compliance and Competitive Markets Division

Enc: ND One-Call Complaint with attachments
c: Keith Demke with attachments



ND ONE-CALL COMPLAINT

Public Service Commission

SFN 59067 (1-14)

To allege a violation of the One-Call Excavation Notice System Law: North Dakota Century Code Chapter 49-23

PART A – WHO IS SUBMITTING THIS COMPLAINT (COMPLAINANT)

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|--|--|------------------|-------------------------------------|
| Company/Person City of Bismarck Public Works/ Keith Demke | Street Address Po Box 5503 | City Bismarck | State and Zip Code ND 58506-5503 |
| Telephone and Cell Phone Number 701-355-1704 701-220-5059 | Email Address kdemke@bismarcknd.gov | | Date April 24, 2015 |
| <input checked="" type="checkbox"/> Complainant is willing and able to testify on the complaint if matter goes to formal hearing | | | |

PART B – WHO VIOLATED THE ONE-CALL REGULATIONS (RESPONDENT)

| | | | |
|---|--------------------------------|------------------|--------------------------------|
| Company/Person Phoenix Construction/ Doug Uhrich | Street Address 4820 Sky Way | City Bismarck | State and Zip Code ND 58501 |
| Telephone and Cell Phone Number 701-222-1416 | Email Address | | |

PART C – ALLEGED VIOLATION

| |
|--|
| <input type="checkbox"/> Operator failed to provide or update the information provided to the notification center on a timely basis <input checked="" type="checkbox"/> Excavator failed to provide excavation or location notice at least 48 hours before beginning any excavation <input type="checkbox"/> Excavator failed to provide required information in excavation or location notice <input type="checkbox"/> Notification center failed to transmit the notice to every operator that has an underground facility in the area of the excavation <input type="checkbox"/> Notification center failed to inform the excavator of the names of operators of underground facilities in the area <input type="checkbox"/> Operator failed to locate and mark underground facility within 48 hours <input checked="" type="checkbox"/> Excavation started prior to underground facility locate <input type="checkbox"/> Operator failed to mark underground facility within 24 inches horizontally <input type="checkbox"/> Excavator failed to renew excavation or location request prior to the expiration of the twenty-one-day period <input checked="" type="checkbox"/> Excavator failed to conduct the excavation in a careful and prudent manner to avoid damage of underground facilities <input type="checkbox"/> Excavator failed to maintain the markings during excavation <input checked="" type="checkbox"/> Other (identify the specific section of NDCC Chapter 49-23) 49-23-06 Excavator failed to provide notice of damage, backfilled without notice or repair |
| Location of Violation: 133 S. Bell Street, Bismarck |
| Date and Time of Violation: Uncertain - late November-early December 2014 |
| Description (summarize the observations on which you rely to allege the violation) <i>If more space is required, please provide the description on a separate page.</i> Recently, we noticed that a 36-inch diameter storm sewer was not draining and appeared to be plugged. On April 21, 2015 using televising equipment we determined that the pipe was collapsed and filled with dirt at the location where Phoenix Construction built an addition onto the structure at 133 S. Bell Street. We were not notified by ND One Call to provide utility location information at the time this work was done. According to the building owner, when the contractor was excavating for the building foundation he hit something at this location. He pulled out pieces of vitrified clay pipe and then backfilled. |

PART D – DAMAGE

| | | |
|--|---|----------------------------------|
| Fatalities na | Injuries na | In-patient Hospitalization na |
| Underground facility type(s) and Operator(s) affected: Collapsed 36 inch diameter storm sewer | | |
| Estimated Value of Damage (damage as defined under NDCC Chapter 49-23): \$ Not determined at this time | Number of Customers Affected See below | |
| Other impact of event: The collapsed sewer presents a flooding risk to residents and businesses upstream who rely on this drainage system to convey storm water run off. No customers have been affected to date, however the potential exists for flooding in this neighborhood in case of heavy rainfall. This main also serves as an emergency bypass for sewage. While it's use is rare, if it were to be needed and is unusable, the result would be basements flooding with backed up sewage. | | |
| Please attach photos of Event Area or Damaged Facility | | |

PART I – SIGNATURE

| | |
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| Signature of Person Filing Complaint | Date 4/24/2015 |
|--|-------------------|

Send Completed, Original Complaint To:
Public Service Commission
600 E Boulevard Ave Dept 408
Bismarck ND 58505-0480
Telephone: (701) 328-2400

*Director of Utility Operations
City of Bismarck*

04/21/15
MH STOP: F
L05A1101
L05A1103M

Looking at
damaged location
from the west.

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

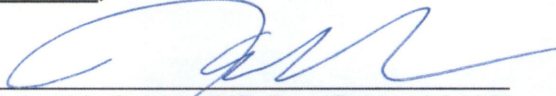
The Respondent must serve an answer to this complaint upon the Complainant and the Commission within twenty days after service of the complaint, or the Commission may deem the complaint to be admitted. Answers must be served in the manner allowed for service under the North Dakota Rules of Civil Procedure.

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 1st 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

APPROVED

DATE: 3-9-14
S

MOTION

March 9, 2016

**Public Service Commission
Phoenix Construction
Damage Prevention Enforcement**

Case No. PU-15-166

I move the Commission appoint John Schuh and Victor Schock as advocacy staff effective February 1, 2016, in Public Service Commission, Phoenix Construction, Damage Prevention Enforcement, Case No. PU-15-166.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Phoenix Construction
Damage Prevention Enforcement

Case No. PU-15-166

AFFIDAVIT OF SERVICE BY 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 **10th day of March, 2016**, she deposited in the United States Mail, at Bismarck, North Dakota, **two** envelopes with certified postage, return receipt requested, fully prepaid, securely sealed and containing photocopy of:

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

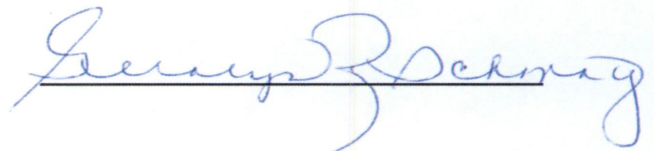
The envelopes were addressed as follows:

Doug Unruh
Phoenix Construction
PO Box 1871
Bismarck, ND 58501
Cert. No. 7015 3010 0000 6559 9425

Doug Unruh
Phoenix Construction
3615 Saratoga Avenue
Bismarck, ND 58503
Cert. No. 7015 3010 0000 6559 9432

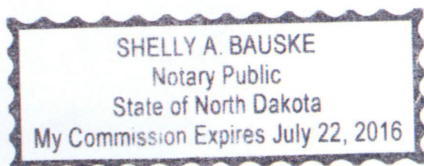
The addresses shown are the respective addressee's last reasonably ascertainable mailing address.

Subscribed and sworn to before me
this **10th day of March, 2016**.




Notary Public

SEAL



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,)
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vs.)
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Respondent.)

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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 1st 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

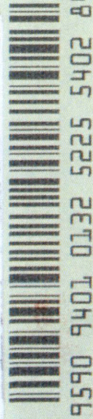
Victor Schock
Public Utility Analyst
600 E Boulevard Ave – Dept 408
Bismarck, North Dakota 58505-0480
701-328-3397
Public Service Commission Advocacy Staff

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Doug Unruh
 Phoenix Construction
 PO Box 1871
 Bismarck, ND 58501
Cert. No. 7015 3010 0000 6559 9425
PU-15-166

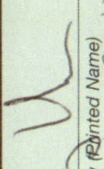


2. Article Number (Transfer from service label)

Cert. No. 7015 3010 0000 6559 9425

PS Form 3811, July 2015 PSN 7530-02-000-9053

COMPLETE THIS SECTION ON DELIVERY

A. Signature  Agent
 Addressee

C. Date of Delivery

B. Received by (Printed Name)
DOUG UNRUH

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

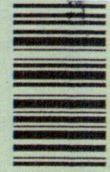
7 PU-15-166 Filed 03/21/2016 Pages: 2
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 USPS

3. Service Type
- Adult Signature
 - Adult Signature Restricted Delivery
 - Certified Mail®
 - Certified Mail Restricted Delivery
 - Collect on Delivery
 - Collect on Delivery Restricted Delivery
 - Insured Mail (over \$500)
 - Insured Mail Restricted Delivery
 - Priority Mail Express®
 - Registered Mail™
 - Registered Mail Restricted Delivery
 - Return Receipt for Merchandise
 - Signature Confirmation™
 - Signature Confirmation Restricted Delivery

Domestic Return Receipt

fu-15-166

USPS TRACKING#



9590 9401 0

ND 585

7 PU-15-166 Filed: 3/21/2016 Pages: 2
Return receipt - 7015-3010-0000-6559-9425

First-Class Mail
Postage & Fees Paid

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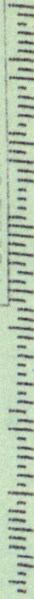
United States
Postal Service

USPS

box

RECEIVED
ND Public Service Commission
600 E. Boulevard Avenue Dept. 408
Bismarck, ND 58505-0480
MAR 21 2016

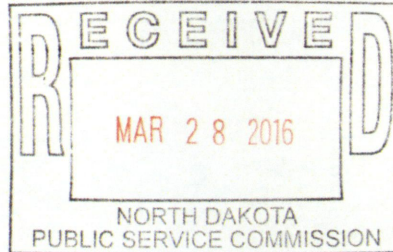
NORTH DAKOTA
PUBLIC SERVICE COMMISSION





PHOENIX CONSTRUCTION, INC

P.O. BOX 1871
BISMARCK, ND 58502-1871
(701) 222-1416



Public Service Commission
VS
Phoenix Construction

March 24, 2016

Case No
PU-15-166

Doug Unruh (DBA Phoenix Const.) Answer to Complaint.

I can not afford an attorney to answer this complaint so I hope this will be a sufficient answer. I will admit we did not call One-Call to locate, all I can offer is the reason we did not. In talking with the owner he said a few years back he had the property located and since he knew where the water and sewer were located and the power lines were over head and we were not going close to lot lines. We made a bad decision to start excavating.

Since there was a lot of rubble buried in the excavation we did not know we had hit any kind of pipe so we did not knowingly bury the pipe back up.

The owner has held back \$38,000.00 and this has caused financial hardship.

If the penalty is imposed on Phoenix Construction it would push me over the edge and I would have no option but to file bankruptcy.

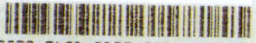
3254062

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Doug Unruh
 Phoenix Construction
 3615 Saratoga Avenue
 Bismarck, ND 58503
 Cert. No. 7015 3010 0000 6559 9432
 PU-15-166



9590 9401 0132 5225 5406 28

2. Article Number (Transfer from service label)

Cert. No. 7015 3010 0000 6559 9432

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

- Agent
- Addressee

B. Received by (Printed Name)

C. Date of Delivery

- D. Is delivery address different from item 1? Yes
- If YES, enter delivery address below: No

3. Service Type

- Adult Signature
- Adult Signature Restricted Delivery
- Certified Mail®
- Certified Mail Restricted Delivery
- Collect on Delivery
- Collect on Delivery Restricted Delivery
- Insured Mail
- Insured Mail Restricted Delivery (over \$500)
- Priority Mail Express®
- Registered Mail™
- Registered Mail Restricted Delivery
- Return Receipt for Merchandise
- Signature Confirmation™
- Signature Confirmation Restricted Delivery

PS Form 3811, July 2015 PSN 7530-02-000-9053

PU-15-166

Domestic Return Receipt

7015 3010 0000 6559 9432

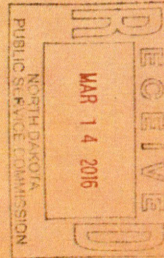


CERTIFIED MAIL®

PUBLIC SERVICE COMMISSION
 600 E BOLLIVARD AVE DEPT 408
 BISMARCK, ND 58505-0480
OFFICIAL MAIL

Doug Unruh
 Phoenix Construction
 3615 Saratoga Avenue
 Bismarck, ND 58503

NMR



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