

STATE OF NORTH DAKOTA  
PUBLIC SERVICE COMMISSION

Public Service Commission  
Phoenix Construction  
Damage Prevention Enforcement

Case No. PU-15-166

AFFIDAVIT OF SERVICE BY REGULAR 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 **3rd day of November, 2016**, she deposited in the United States Mail, at Bismarck, North Dakota, **one** envelope by regular mail, with postage fully prepaid, securely sealed and each containing a photocopy of:

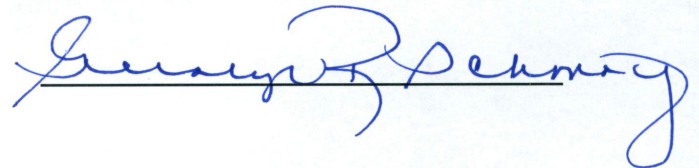
- **Proposed Findings of Fact, Conclusions of Law and Order**

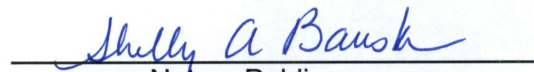
The envelope was addressed as follows:

Doug Unruh  
Phoenix Construction  
PO Box 1871  
Bismarck, ND 58501

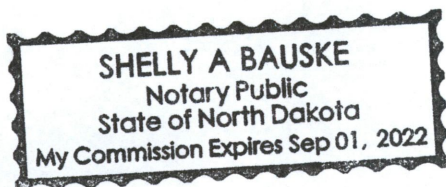
The address shown is the respective addressee's last reasonably ascertainable mailing address.

Subscribed and sworn to before me  
this **3rd day of November, 2016**.



  
Notary Public

SEAL





# Public Service Commission

## State of North Dakota

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### 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](http://www.psc.nd.gov)  
E-mail: [ndpsc@nd.gov](mailto:ndpsc@nd.gov)  
Phone: 701-328-2400  
ND Toll Free: 1-877-245-6685  
Fax: 701-328-2410  
TDD: 800-366-6888 or 711

November 3, 2016

Darrell Nitschke  
Executive Secretary  
ND Public Service Commission  
600 E. Boulevard Ave. Dept. 408  
Bismarck, ND 58505-0480

Re: Case No. PU-15-166  
Public Service Commission  
Phoenix Construction  
Damage Prevention Enforcement

Dear Mr. Nitschke:

Attached please find for filing in the above referenced case the Proposed Findings of Fact, Conclusions of Law and Order.

Thank You!

Best Regards,

A handwritten signature in blue ink that reads "Geri Schmaltz".

Geri Schmaltz  
Public Utilities Division

Enclosure

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

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

**Case No. PU-15-166**

**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

**Date**

**Appearances**

Commissioners Randy Christmann, and Brian P. Kalk.

John Schuh, Special Assistant Attorney General, appearing on behalf of the Public Service Commission Advocacy Staff.

Douglas Unruh, Owner, Phoenix Construction, Inc. PO BOX 1871, Bismarck, ND 58501, appearing on behalf of Phoenix Construction, Inc.

Illona Jeffcoat-Sacco, General Counsel, North Dakota Public Service Commission, 600 East Boulevard, Bismarck, North Dakota 58505, as Advisory Counsel.

Timothy J. Dawson, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14<sup>th</sup> Street, Suite 303, Bismarck, North Dakota 58503, as Procedural Hearing Officer.

**Preliminary Statement**

On April 24, 2015, the North Dakota Public Service Commission (Commission) received a North Dakota One-Call (NDOC) Complaint from Keith Demke, director of utility operations for the City of Bismarck (Bismarck). The NDOC Complaint alleged Phoenix Construction, Inc. (Phoenix) failed to provide an excavation notice to the North Dakota One Call (NDOC) Notification Center at least forty-eight hours before beginning its excavation, and failed to provide notice to the operator of damage to their underground facilities and backfilling over the un-repaired damaged underground facility, in violation of North Dakota Century Code sections 49-23-04(1) and 49-23-06(1).

On April 28, 2015, Commission staff issued a letter informing Phoenix of Bismarck's complaint filing, and requested a response by May 12, 2015. Initially, the Commission did not receive a response to the ND One-Call Complaint.

On March 1, 2016, Commission Advocacy Staff (Advocacy Staff) filed a Formal Complaint alleging that 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, and 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.

On March 9, 2016, the Commission found the Formal Complaint stated a *prima facie* case and served the complaint upon Phoenix.

On March 28, 2016, Douglas Unruh, on behalf of Phoenix, filed an Answer to the Formal Complaint.

On August 17, 2016, the Commission issued a Notice of Hearing on the complaint, scheduling the hearing for October 18, 2016, at 8:30 am CDT in the Commission Hearing Room, State Capitol, 12th Floor, Bismarck, North Dakota 58505.

The notice identified the following issues to be considered:

1. Whether Phoenix Construction violated N.D.C.C. Chapter 49-23.
2. If a violation is found, whether the Commission should impose a civil penalty, and if so, in what amount.

On October 4, 2016, Advocacy staff submitted a Request for Continuance, asking that the hearing start time be moved to 1:00 pm on October 18, 2016.

On October 5, 2016, the Commission approved the Request for Continuance, setting the hearing to October 18, 2016, at 1:00 pm CDT in the Commission Hearing Room, State Capitol, 12<sup>th</sup> Floor, Bismarck, North Dakota 58505.

The public hearing was held as scheduled.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed, and considered all testimony and evidence presented, the Commission makes the following:

#### **Findings of Fact**

1. Phoenix Construction, Inc. is a North Dakota sole proprietorship with offices located at 3615 Saratoga Ave, Bismarck, ND 58503.
2. The City of Bismarck is an incorporated municipality in North Dakota with offices located at 221 N Fifth St, Bismarck, ND 58501.

3. On or about November or December of 2014, Phoenix began an excavation as defined under North Dakota Century Code section 49-23-01(7) while performing excavation for building footings at 133 S Bell St, in Bismarck, North Dakota.
4. Randy Meiers (Owner of the building that Phoenix was performing work on) testified that he saw pieces of pipe near the excavation area and was told by Douglas Unruh what they were from an abandoned line.
5. Victor Schock testified that no locates were registered for Phoenix's excavation at 133 S Bell St, Bismarck.
6. Exhibit PSC-3, Doug Unruh's response admitted that Phoenix did not request locates from NDOC.
7. As a result of this excavation, damage was caused 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, but instead poured a concrete footing through and over the pipe and then backfilled the excavation area.
8. Brad Wright (Senior project engineer for Bismarck) testified that the bottom of the footing for the building addition constructed by Phoenix at 133 S Bell St, Bismarck was approximately 1 foot lower than the top of the 36" storm sewer line. He also stated that it takes a considerable effort to break the storm sewer line, so that if it was impacted by an excavator, it would be known.
9. Mr. Wright testified that the damage could have caused storm water flooding in south Bismarck if there were a major rain event or spring meltwater event. Furthermore, he stated that this line was a backup for the city's sewage system and raw sewage could have flooded parts of south Bismarck.
10. Jeron Fueller (Utilities Superintendent for City of Bismarck) and Brad Wright both testified that the City of Bismarck was not notified of the damaged storm sewer line by Phoenix.
11. Douglas Unruh, on behalf of Phoenix, testified that he was not at the site when the excavation took place and that he was not informed by his crew that they struck the storm sewer line.

### **Conclusions of Law**

1. The Commission has jurisdiction over this proceeding.
2. The activity by Phoenix was an excavation under North Dakota Century Code Chapter 49-23.

3. Phoenix failed to provide an excavation notice to the NDOC Notification Center at least forty-eight hours before beginning its excavation and the excavation resulted in damage to Bismarck's 36" storm sewer line at 133 S Bell St in Bismarck, ND. Consequently, Phoenix violated North Dakota Century Code chapter 49-23-04(1).

4. Phoenix did not notify the operator of the damaged facilities and backfilled over the damaged underground facilities. Consequently, Phoenix violated North Dakota Century Code chapter 49-23-06.

5. Phoenix must reimburse Bismarck for the costs identified under North Dakota Century Code section 49-23-06(2)(a): "repair and restoration, loss of product, and interruption of service occurring because of the damage or injury to the facilities, together with reasonable costs and expenses of suit, including reasonable attorney's fees."

From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes its:

### **Order**

The Commission orders:

1. 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.

2. Phoenix 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.

3. Phoenix shall pay a total fine of \$11,000 payable to the North Dakota Public Service Commission within ten business days of the service of this Order.

### **PUBLIC SERVICE COMMISSION**

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**Randy Christmann**  
Commissioner

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**Julie Fedorchak**  
Chairman

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**Brian Kalk**  
Commissioner