

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

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

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

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

**November 30, 2016**

**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, PO BOX 1871, Bismarck, ND 58501, appearing on behalf of Phoenix Construction.

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, Director, 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 complaint form from Keith Demke, P.E. Director of Utility Operations for the City of Bismarck (Bismarck). Bismarck alleged Phoenix Construction (Phoenix) failed to provide an excavation notice to the North Dakota One Call Notification Center (Notification Center) at least forty-eight hours before beginning its excavation, failed to provide notice to the operator of damage to their underground facilities and backfilled over the un-repaired damaged underground facilities, in violation of North Dakota Century Code sections 49-23-04(1) and 49-23-06(1).

On April 28, 2015, Commission Staff informed Phoenix of Bismarck's complaint filing, by letter, and requested a response by May 12, 2015. The Commission did not receive a response by May 12, 2015.

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 Notification Center at least forty-eight hours before beginning its excavation. Advocacy Staff also alleged 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.

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

On March 28, 2016, Douglas Unruh, owner 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 filed a Request for Continuance, asking that the hearing be continued to 1:00 pm on October 18, 2016.

On October 5, 2016, the Commission approved the Request for Continuance, and continued 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. During October or November of 2014, Phoenix began an excavation as defined under North Dakota Century Code section 49-23-01(7) in order to construct building footings at 133 S Bell St, in Bismarck, North Dakota.

4. Randy Meiers, owner of the building at 133 S. Bell St. where Phoenix was excavating, testified that he was told by Phoenix that Phoenix struck some old reddish clay pipe during excavation that was probably an abandoned sewer or water line, as the pipe was dry and empty.

5. Brad Wright, Senior Project Engineer for Bismarck, testified that when he visited the site in the spring of 2015, he was told by the owner that the excavator had hit something during excavation, and Mr. Wright then viewed the rubble.

6. Victor Schock, Public Utility Analyst assigned as Advocacy Staff, testified that he investigated and found no locates registered for Phoenix's October or November 2014 excavation at 133 S. Bell St., Bismarck.

7. Doug Unruh, owner of Phoenix, admitted in his March 28, 2016 letter Answer to the Commission that Phoenix did not request locates from the Notification Center for the excavation at issue.

8. Bismarck described, in the complaint form it filed prompting the opening of this case, how Bismarck discovered the damage to its thirty-six inch storm sewer line. Bismarck noticed that the storm sewer line was not draining and appeared to be plugged. Using televising equipment, Bismarck determined that the pipe was collapsed and filled with dirt at the location where Phoenix excavated to build the addition at 133 S. Bell St., Bismarck, ND.

9. Bismarck hired a contractor who dug on the east side of the building in question. From this excavation, Bismarck could see that the bottom of the footing for the building addition constructed by Phoenix at 133 S. Bell St., Bismarck, was approximately one foot lower than the top of the thirty-six inch storm sewer line. Mr. Wright also testified that it would take a considerable effort to break the storm sewer line, so that if a storm sewer line was impacted by an excavator, the excavator would know it.

10. Mr. Wright testified that the damage to the storm sewer line could have caused storm water flooding in south Bismarck if there was a major rain event or a fast spring snow melt event during the period the damaged line remained unrepaired. Furthermore, he testified that this line was a backup for the city's sewage system and in the event of a need for an emergency bypass for the Washington Street Lift Station, raw sewage could have flooded parts of south Bismarck.

11. Jeron Fueller, Superintendent of Water Distribution and Waste Water Collection for Bismarck and Brad Wright both testified that Phoenix did not notify Bismarck of the damaged storm sewer line.

12. Mr. Unruh testified that he did not personally perform the excavation, he was not at the site when the excavation took place, and he was not informed by his crew that they struck the storm sewer line. He testified that the excavation site was formerly owned by a construction company, so the pipe could have been something that was left by that construction company. Mr. Unruh testified that he never saw the hole in the ground so he was not aware that a pipe was hit. He testified that he has been in business since 1992 and normally doesn't do excavations. He testified that in this instance, since no electrical wiring was planned under the new addition, it was not cost effective for him to hire an excavator as the project just involved pouring concrete and putting up the building with the concrete floor.

13. Mr. Unruh admitted that he violated the law and a fine was appropriate. However, in his letter Answer filed on March 28, 2016 he indicated: "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."

14. Mr. Unruh also testified that he understood his insurance would cover the amount due Bismarck for damage reimbursement.

15. As a result of the excavation at issue conducted by Phoenix, Bismarck's thirty-six inch storm sewer line was damaged.

16. Phoenix did not call in a locate request to the Notification Center for the excavation at issue.

17. There is no evidence tending to show that Phoenix made any attempt to notify Bismarck or any other operator of the damage to the underground facility. Instead, Phoenix poured a concrete footing through the pipe and then backfilled the excavation area.

18. Mr. Schock explained how Advocacy Staff reached its recommended penalty of \$11,000.00. Advocacy Staff included \$500.00 for failure to procure a One-Call ticket, \$500.00 for causing damage to underground facilities, and \$10,000.00 for covering up the damage and not reporting it to the owner of the facilities. Mr. Schock stated that the amount being recommended for the damage is appropriate because of the extent and egregious nature of the damage.

### **Conclusions of Law**

1. The Commission has jurisdiction over this proceeding.

2. The activity at issue in this proceeding, conducted by Phoenix at 133 S Bell St., Bismarck, ND in October or November 2014, was an excavation under North Dakota Century Code Chapter 49-23.

3. Phoenix violated North Dakota Century Code section 49-23-04(1) by failing to provide an excavation notice to the Notification Center at least forty-eight hours before beginning its excavation.
4. The excavation by Phoenix caused the damage to Bismarck's storm sewer line at the location of the excavation.
5. Phoenix violated North Dakota Century Code section 49-23-06 by not notifying Bismarck of the damaged facilities and further, by backfilling over the damaged facilities.

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 North Dakota One Call Notification Center at least forty-eight hours before beginning Phoenix's excavation.
2. Phoenix violated North Dakota Century Code section 49-23-06(1) by failing to provide notice to the operator of damage Phoenix caused to the operator's underground facilities and further, by backfilling over the unrepaired damaged underground facility.
3. Phoenix is assessed a civil penalty in the amount of \$11,000.
4. Phoenix shall remit \$6,000 of the \$11,000, payable to the North Dakota Public Service Commission, within ten business days of service of this order.
5. The remaining \$5,000 civil penalty is suspended, on the condition that Phoenix commits no further violations of the North Dakota One Call Law (North Dakota Century Code Chapter 49-23) within five years of the date of this order.
6. In the event the Commission finds Phoenix violated the North Dakota One Call Law within five years of the date of this order, Phoenix shall remit the suspended portion of the penalty, \$5,000, within the time ordered by the Commission, in addition to any additional fines or penalties imposed by the Commission for the subsequent violation.

7. If there is no subsequent violation of the North Dakota One Call Law by Phoenix within five years of the date of this order, the suspended portion of the penalty, \$5,000, is dismissed.

**PUBLIC SERVICE COMMISSION**

  
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**Randy Christmann**  
Commissioner

  
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**Julie Fedorchak**  
Chairman

  
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**Brian P. Kalk**  
Commissioner