

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Green Way Earthworks LLC
Damage Prevention Enforcement

Case No. PU-15-217

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:

Andrew Hubbell
Green Way Earthworks
351 Hwy 22
Killdeer, ND 58640
Cert. No. 7015 3010 0000 6559 9388

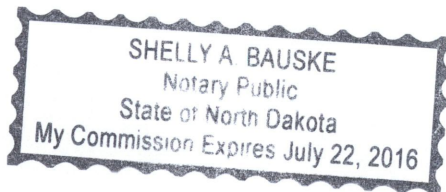
Bakken Commercial Services, LLC
Registered Agent for Green Way Earthworks LLC
PO Box 9199
Fargo, ND 58106-9199
Cert. No. 7015 3010 0000 6559 9395

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
Green Way Earth Works LLC
Damage Prevention Enforcement

Case No. PU-15-217

Public Service Commission,)
Complainant,)
vs.)
Green Way Earth Works LLC,)
Respondent.)

Complaint

The Public Service Commission of North Dakota, by and through Advocacy Staff (Staff), for its complaint against Green Way Earth Works LLC, alleges and shows the following:

I

Green Way Earth Works LLC (Green Way) is a foreign limited liability company with principal offices at 351 Highway 22, Killdeer, ND 58640-9375. Its registered agent with the North Dakota Secretary of State is Bakken Commercial Services, LLC, PO BOX 9199, Fargo, ND 58106-9199.

II

Hess Corporation (Hess) is a foreign corporation with principal offices at 1185 Avenue of the Americas New York, NY 10036-2601.

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 49-23-01(5) provides:

“Emergency” means a sudden, unexpected occurrence, involving a clear and imminent danger, and demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services.

North Dakota Century Code section 49-23-04(4) provides:

If an excavation is being made in the time of emergency, all reasonable precautions must be taken to protect the underground facilities. In an emergency, the excavator shall give notification in compliance with this chapter, as soon as practical, that an emergency exists. As soon as practical, each operator shall provide all location information that is reasonably available to the excavator.

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 May 21, 2015, the Commission received a ND One-Call Complaint from Charles Columbus with Hess. The complaint alleged a violation by Green Way of North Dakota Century Code section 49-23-04(1) of the One-Call Excavation Notice System for failure to contact the notification center and provide an excavation or location notice at least forty-eight hours before beginning any excavation.

V

On May 21, 2015, Commission staff issued a letter informing Green Way of Hess's complaint filing and requested a response by June 5, 2015. Green Way's June 10, 2015 response asserted that Green Way was working under Park Construction's

valid One-Call ticket, and that they called in an 'Emergency' One-Call ticket once they realized this.

VI

As alleged by Hess's complaint, on May 20, 2015, Green Way began an excavation as defined in North Dakota Century Code section 49-23-01(7) while performing installation of culverts at the intersection of State Highway 23 and Highway 73 in McKenzie County, North Dakota. No damage was caused as a result of this excavation.

VII

Based on its investigation, Staff determined that Green Way personnel provided an excavation notice to the North Dakota One Call Notification Center (NDOC) on May 20, 2015, with work to begin in the area cited in the complaint to begin on May 20, 2015. The NDOC assigned locate ticket number 15064371 to the excavation notice, which indicates the work was being performed was emergency installation of culverts.

Based on its investigation, Staff concluded that there was no agreement between Green Way and Hess under North Dakota Century Code section 49-23-04(1) prior to excavation that would relieve Green Way 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 as defined by 49-23-01(5) and in compliance with North Dakota Century Code section 49-23-04(4), allowing the excavator to give notification after the start of the excavation.

VIII

Green Way 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.

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.

X

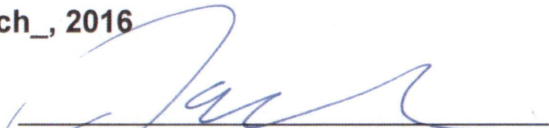
The Respondent must serve an answer to this complaint upon the Complainant and the Commission within twenty days after service of the complaint, or the Commission may deem the complaint to be admitted. Answers must be served in the manner allowed for service under the North Dakota Rules of Civil Procedure.

Prayer for Relief

Based on the foregoing, Staff seeks the following relief:

1. That the Commission find Green Way in violation of North Dakota Century Code ch.49-23 for failing to comply with the One Call requirements enumerated in North Dakota Century Code section 49-23-04(1).
2. That the Commission impose an appropriate civil penalty up to \$25,000, but at least \$500.
3. Such other relief that the Commission finds just and proper.

Dated this 2nd day of March, 2016



John M. Schuh (ND Bar ID No. 08138)
Special Assistant Attorney General
600 E. Boulevard Ave – Dept. 408
Bismarck, ND 58505-048-
701-328-2421
Attorney for Advocacy Staff

and

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

APPROVED

DATE: 3-9-16
[Signature]

MOTION

March 9, 2016

Public Service Commission
Green Way Earthworks LLC
Damage Prevention Enforcement

Case No. PU-15-217

I move the Commission find the Formal Complaint filed by the North Dakota Public Service Commission Advocacy Staff on March 2, 2016, states a *prima facie* case and serve the complaint on the Respondent in Public Service Commission, Green Way Earthworks LLC, Damage Prevention Enforcement, Case No. PU-15-217.