

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

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

Case No. PU-15-283

CONSENT ORDER

NOTE: Date of Order will be inserted here when ready for Commission action

Preliminary Statement

On June 5, 2015, the Commission received a ND One-Call Complaint from Bob Schell at Midcontinent Communications. The complaint alleged a violation by Terpening Construction, Inc. (Terpening) of North Dakota Century Code chapter 49-23: One-Call Excavation Notice System.

On June 11, 2015 Public Service Commission staff sent a copy of the ND One Call Complaint to Terpening for response.

On June 22, 2015 Terpening filed a response.

Discussion

Terpening is a North Dakota corporation with principal offices at 406 Highway 30 S, Maddock, ND 58348-0249.

Midcontinent Communications Investor, LLC (Midco) is a South Dakota corporation with principal offices at 3600 Minnesota Dr, Suite 700, Minneapolis, MN 55435-7918.

Commission Advocacy Staff (Staff) conducted an investigation of the alleged violation, including review of the filings and communication with Terpening, Midco, and North Dakota One Call (NDOC).

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 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.

Investigation Summary

Based on its investigation, Staff concluded that Terpening personnel did not provide an excavation notice to the NDOC Notification Center at any time during this construction project.

Based on its investigation, Staff concluded that on May 27, 2015, Terpening personnel began an excavation as defined under North Dakota Century Code section 49-23-01(7) while performing a driveway replacement project at 1353 Elm Ave, Harvey, North Dakota.

Based on its investigation, Staff concluded that a communication cable belonging to Midco was damaged during this excavation and that the amount of damage was approximately \$300.

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

Based on its investigation, Staff concluded that Terpening 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.

This agreement may be executed in counterparts and duplicate copies, each of which shall be deemed to be an original, and which, when taken together, shall constitute one and the same instrument.

Concurrences

Terpening and the Commission have agreed to resolve this matter without further administrative proceedings.

Terpening agrees to pay a fine of \$500, payable to the North Dakota Public

Service Commission within ten business days of service of this order. Terpening also agrees to be subject to a \$500 penalty suspended for a period of five years, and if found in violation of the North Dakota One Call law a second time within five years, the suspended penalty will be assessed in addition to any fines imposed by the second violation.

In the attached Consent to Entry of Order, Terpening expressly waives its rights to a hearing in this matter, to consult an attorney, to present argument to the Commission, and to appeal from any adverse determination after hearing.

Terpening will reimburse Midco for the costs the operator identifies under North Dakota Century Code section 49-23-06(2)(a) as the costs of "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."

The Commission reserves the right to bring future administrative and judicial actions and to seek additional fines and other relief should Terpening fail to pay to the North Dakota Public Service Commission the agreed upon fine of \$500 within ten business days of service of this order; or for any violations to the North Dakota One Call law subsequent to the captioned case.

There are no covenants, promises, undertakings, or understanding other than as specifically set forth in this Order.

The Commission issues the following:

Order

The Commission orders Terpening Construction, Inc. to pay a fine of \$500, payable to the North Dakota Public Service Commission within ten business days of service of this Order.

In addition to the \$500 fine ordered, the Commission orders Terpening Construction, Inc. is subject to a \$500 penalty suspended for a period of five years from the date of this order. If found in violation of North Dakota One Call law a second time within the five year period of the Commission entering this order, the \$500 suspended penalty will be assessed in addition to any fines imposed by the second violation.

PUBLIC SERVICE COMMISSION

Randy Christmann
Commissioner

Julie Fedorchak
Chairman

Brian P. Kalk
Commissioner

CONSENT TO ENTRY OF ORDER

The undersigned, on behalf of Terpening Construction, Inc. (Terpening). is authorized to act on behalf of Terpening and bind Terpening for purposes of this Consent Order; has read the Consent Order, knows and fully understands its content and effect; has been advised of the right to a hearing in this matter, the right to be represented by legal counsel, the right to present evidence and arguments to the Commission, the right to cross examine witnesses, and the right to appeal from an adverse determination after hearing; and that, by signing this Consent to Entry of Order, waives all those rights in their entirety on behalf of Terpening, and consents to entry of this Order by the North Dakota Public Service Commission to resolve the violation without further administrative proceedings. It is further expressly understood that this Order constitutes the entire settlement agreement between the parties, there being no other promises or agreements, either express or implied.

DATED this 23 day of March 2016

Terpening Construction, Inc.

By Bruce Terpening

Its President
{TITLE}