

May 13, 2016

Darrell Nitschke, Executive Director  
North Dakota Public Service Commission  
State Capitol Building, Dept. 408  
600 East Boulevard  
Bismarck, ND 59505-0480

RE: Public Service Commission  
Carstensen Contracting, Inc.  
Damage Prevention Enforcement

PU-15-571

Dear Mr. Nitschke:

PSC Advocacy Staff submits for Commission decision the attached Formal Complaint. PSC Advocacy Staff requests the Commission find the Formal Complaint states a *prima facie* case and serve the complaint on the Respondent in the captioned case.

Respectfully,



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Attorney for Advocacy Staff



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 July 17, 2015, the Commission received a ND One-Call Complaint from Richard Chaska, with ONEOK. The complaint alleges a violation by Carstensen of North Dakota Century Code section 49-23-04(1) 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.

#### V

On July 20, 2015, Commission staff issued a letter informing Carstensen of ONEOK's complaint filing, and requested a response by August 3, 2015. Carstensen's July 29, 2015 response asserted that while the location description and interactive maps do not completely coordinate when reviewed together, that they still believe they had a valid One-call ticket for the excavation.

## VI

As alleged by ONEOK's complaint, on July 13, 2015 at 7:30pm, Carstensen began an excavation as defined in North Dakota Century Code section 49-23-01(7) while performing installation of a water line at 6450 133<sup>rd</sup> Ave NW, Williston, North Dakota. As a result of this excavation, damage was caused by a Track Hoe to ONEOK's 12 inch steel high pressure wellhead natural gas discharge pipeline. Immediately following the damage, Carstensen removed its equipment from the area and made contact with ONEOK's contract locator to notify them of the damage. Carstensen also placed a new one-call ticket with an excavation area description that includes the area where the line strike occurred. ONEOK alleges that the cost to repair its facilities was approximately \$61,387 and \$294,000 worth of wellhead natural gas was lost as a result of the damage.

## VII

Based on its investigation Staff determined that Carstensen personnel provided an excavation notice to the North Dakota One Call Notification Center (NDOC) on July 13, 2015 at 11:43pm, with work to begin in the area cited in the complaint to begin on July 16, 2015. The NDOC assigned locate ticket number 15112340 to the excavation notice, which indicates the work was being performed to install a water line. This ticket was placed roughly four hours after the damage had occurred. 20 customers were affected with an outage of 72 hours. ONEOK has not been reimbursed for cost to of the damages or lost product from the excavation.

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

Carstensen 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 Carstensen 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 \$22,600 for violating North Dakota Century Code section 49-23-04(1).
3. Such other relief that the Commission finds just and proper.

Dated this 13<sup>th</sup> day of May, 2016

  
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