

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
JDM Schmitt Concrete
Damage Prevention Enforcement

Case No. PU-15-681

CONSENT ORDER

April 5, 2016

Preliminary Statement

On September 1, 2015, the Commission received a ND One-Call Complaint from Otter Tail Power Company. The complaint alleged a violation by JDM Schmitt Concrete (JDM) of North Dakota Century Code chapter 49-23: One-Call Excavation Notice System.

On October 7, 2015 Public Service Commission staff sent a copy of the ND One Call Complaint to JDM for response.

On January 15, 2016 JDM filed a response.

Discussion

JDM is a North Dakota sole proprietorship with principal offices at 6449 13th Ave NE, Towner, ND 58788-9108.

Otter Tail Power Company (OTP) is a foreign authorized to do business in North Dakota.

Commission Advocacy Staff (Staff) conducted an investigation of the alleged violation, including review of the filings and communication with JDM, OTP, 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 on August 26, 2015, JDM personnel began an excavation as defined under North Dakota Century Code section 49-23-01(7) while performing concrete installation at 113 5th Ave W, Drake, North Dakota. JDM failed to provide an excavation notice to the NDOC notification center at any time during this excavation.

Based on its investigation, Staff concluded that no facilities were damaged during this excavation.

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

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

In the attached Consent to Entry of Order, JDM 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 a hearing.

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

The Commission issues the following:

Order

1. JDM violated North Dakota Century Code section 49-23-04(1) by failing to provide and excavation notice to the NDOC notification center at east forty-eight hours before beginning its excavation.
2. JDM shall remit a civil penalty of \$250 payable to the North Dakota Public Service Commission within ten business days of service of this Order. An additional \$250 suspended penalty is assessed, to be automatically waived upon no further violations of the North Dakota One Call Law within five years of the date of this order. If the Commission finds a subsequent violation of the North Dakota One Call Law within five years of the date of this order, the suspended penalty shall be remitted in addition to any fines imposed by the Commission for subsequent violations.

PUBLIC SERVICE COMMISSION

Randy Christmann

**Randy Christmann
Commissioner**

Julie Fedorchak *Brian P. Kalk*

**Julie Fedorchak
Chairman**

**Brian P. Kalk
Commissioner**

CONSENT TO ENTRY OF ORDER

The undersigned, on behalf of JDM Schmitt Concrete (JDM). is authorized to act on behalf of JDM and bind JDM 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 JDM, 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 24 day of March 2016

JDM Schmitt Concrete

By Brenda Schmitt

Its Owner
{TITLE}