

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Adelman Concrete & Excavating, Inc.
Damage Prevention Enforcement

Case No. PU-15-748

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 **22nd day of April, 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:

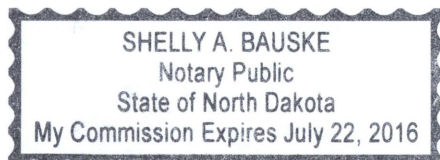
Adelman Concrete & Excavating, Inc.
5002 19th Ave. N
Fargo, ND 58102
Cert. No. 7015 3010 0000 6559 9654

Scott Adelman - Registered Agent for
Adelman Concrete & Excavating, Inc.
5002 19th Avenue N
Fargo, ND 58102
Cert. No. 7015 3010 0000 6559 9661

The addresses shown are the respective addressee's last reasonably ascertainable mailing address.

Subscribed and sworn to before me
this **22nd day of April, 2016**.

SEAL



Geralyn R. Schmaltz

Shelly A. Bauske
Notary Public

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Public Service Commission
Adelman Concrete & Excavating, Inc.
Damage Prevention Enforcement

Case No. PU-15-748

Public Service Commission,)
Complainant,)
vs.)
Adelman Concrete & Excavating, Inc.,) **Complaint**
Respondent.)

The Public Service Commission of North Dakota, by and through Advocacy Staff (Staff), for its complaint against Adelman Concrete & Excavating, Inc. (Adelman), alleges and shows the following:

I

Adelman is a registered North Dakota corporation with offices located at 5002 19th Ave N, Fargo, ND 58102.

II

Xcel Energy, Inc. (Xcel) is a registered foreign authorized to do business in North Dakota.

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 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 November 30, 2015, the Commission received a ND One-Call Complaint from Lisa Kallberg with Xcel. The complaint alleges a violation by Adelman 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 December 3, 2015, Commission staff issued a letter informing Adelman of Xcel's complaint filing, and requested a response by December 18, 2015. As of March 28, 2016, the commission had not received a response.

VI

As alleged by Xcel's complaint, on July 9, 2015 at 9:48 AM, Adelman began an excavation as defined in North Dakota Century Code section 49-23-01(7) while performing parking lot construction at the intersection of University Drive and Administration Ave in Fargo, North Dakota. As a result of this excavation, damage was caused by a skid steer to Xcel's 2 inch natural gas main. Xcel alleges that the cost to repair its facilities was approximately \$1429.

VII

Based on its investigation Staff determined that Adelman personnel provided an excavation notice to the North Dakota One Call Notification Center (NDOC) on July 7,

2015 at 3:45 PM, with work to begin in the area cited in the complaint to begin on July 9, 2015 at 4:00 PM. The NDOC assigned locate ticket number 15106480 to the excavation notice, which indicates the work was being performed was concrete parking lot. Adelman notified Xcel of the damage on July 9, 2015.

Based on its investigation, Staff concluded that there was no agreement between Adelman and Xcel under North Dakota Century Code section 49-23-04(1) prior to excavation that would relieve Adelman of its obligation to provide excavation notice at least forty-eight hours before the excavation. In fact, Xcel requested a 24 hour extension of the locate period as provided for in North Dakota Century Code section 49-23-04(3).

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

Adelman 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

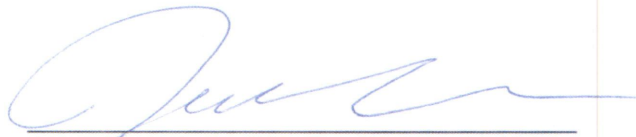
The Respondent must serve an answer to this complaint upon the Complainant and the Commission within twenty days after service of the complaint, or the Commission may deem the complaint to be admitted. Answers must be served in the manner allowed for service under the North Dakota Rules of Civil Procedure.

Prayer for Relief

Based on the foregoing, Staff seeks the following relief:

1. That the Commission find Adelman 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 \$1600.
3. Such other relief that the Commission finds just and proper.

Dated this 4th day of April, 2016



John M. Schuh (ND Bar ID No. 08138)
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Attorney for Advocacy Staff

and

Victor Schock
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Public Service Commission Advocacy Staff

APPROVED

DATE: 4-20-16
\$

MOTION

April 20, 2016

Public Service Commission
Adelman Concrete & Excavating, Inc.
Damage Prevention Enforcement

Case No. PU-15-748

I move the Commission find the Formal Complaint filed by the North Dakota Public Service Commission Advocacy Staff on April 4, 2016, states a *prima facie* case and serve the complaint on the Respondent in Public Service Commission, Adelman Concrete & Excavating, Inc., Damage Prevention Enforcement, Case No. PU-15-748.