

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Steven Keller
Damage Prevention Enforcement

Case No. PU-16-182

AFFIDAVIT OF SERVICE BY CERTIFIED AND REGULAR 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 June, 2016**, she deposited in the United States Mail, at Bismarck, North Dakota, **one** envelope with certified postage, return receipt requested, fully prepaid, securely sealed and containing photocopy of:

- **Consent Order**

The envelope was addressed as follows:

Steven Keller
717 Brewster St. E
Harvey, ND 58341
Cert. No. 7015 3010 0000 6559 5540

Geralyn R. Schmaltz further deposes and says that on the **10th day of June, 2016**, she deposited in the United States Mail, Bismarck, North Dakota, **two** envelopes by regular mail, with postage fully prepaid, securely sealed, containing a photocopy of the same.

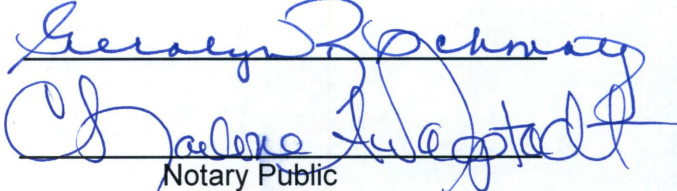
The envelopes were addressed as follows:

Bob Schell
Midco
1005 14th St. NE
Devils Lake, ND 58301

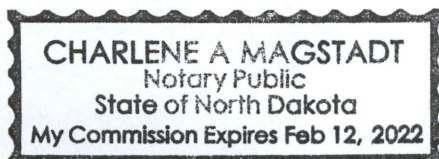
Schweitzer & Sons Construction, LLC
1001 79th Ave. NE
Bismarck, ND 58503

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

Subscribed and sworn to before me
this **10th day of June, 2016**.


Notary Public

SEAL



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Affidavit of Service Cert. and Reg. Mail – Consent Order

Public Service Commission

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CONSENT ORDER

June 8, 2016

Preliminary Statement

On May 2, 2016, the Commission received a ND One-Call Complaint from Bob Schell at Midcontinent Communications. The complaint alleged a violation by Schweitzer & Sons Construction, LLC.(Schweitzer) of North Dakota Century Code chapter 49-23: One-Call Excavation Notice System.

On May 3, 2016 Public Service Commission staff sent a copy of the ND One Call Complaint to Schweitzer for response.

On May 6, 2016 Schweitzer filed a response asserting that Schwietzer has never done work within the city cited in the complaint. Schweitzer further stated that it had borrowed one of its construction trailers and tools to its nephew around the date noted in the complaint.

On May 17, 2016 Public Service Commission staff received a phone call from Beckee Keller who stated that she and her husband (Steven Keller) were the homeowners at the location of the damage cited in the complaint. Beckee Keller acknowledged that the damage resulted from their personal excavation activity to pour a concrete slab in their backyard.

Discussion

Steven Keller (Steven) is a North Dakota homeowner with a mailing address of 717 Brewster St E, Harvey, ND 58341.

Midcontinent Communications (Midco) is a foreign corporation 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 Steven, 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 on April 30, 2016, Steven began an excavation as defined under North Dakota Century Code section 49-23-01(7) while installing a concrete pad in his backyard at 717 Brewster St E in Harvey, North Dakota. At no time prior to or during this excavation did Steven provide an excavation notice to the NDOC Notification Center.

Based on its investigation, Staff concluded that Midco communication cable was damaged during this excavation and that the amount of damage was approximately \$350.

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

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

In the attached Consent to Entry of Order, Steven expressly waives his 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

The Commission orders:

1. Steven Keller violated North Dakota Century Code Section 49-23-04(1) by failing to contact the NDOC notification center forty-eight hours before beginning an excavation.
2. Steven Keller is assessed a civil penalty in the amount of \$1,000.
3. The \$1000 civil penalty is suspended, on the condition that Steven Keller commits no further violations of the North Dakota One Call Law (North Dakota Century Code Chapter 49-23) within five years of the date of this order.
4. In the event the Commission finds Steven Keller violated the North Dakota One Call Law within five years of the date of this order, Steven Keller Shall remit the suspended penalty, \$1000, within the time ordered by the Commission, in addition to any additional fines or penalties imposed by the Commission for the subsequent violation.
5. If within five years of the date of this order the Commission finds no subsequent violation of the North Dakota One Call Law by Steven Keller, the Commission will withdraw the suspended penalty, \$1000.

PUBLIC SERVICE COMMISSION



Randy Christmann **Julie Fedorchak** **Brian P. Kalk**
Commissioner **Chairman** **Commissioner**

CONSENT TO ENTRY OF ORDER

The undersigned, Steven Keller, 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 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 26 day of May 2016

Steven Keller

By 