

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Big Horn Underground, LLC
Damage Prevention Enforcement

Case No. PU-16-400

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

Geralyn R. Schmaltz deposes and says that:

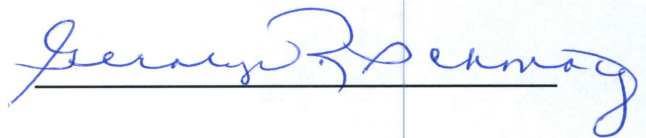
she is over the age of 18 years and not a party to this action and, on the **6th day of October, 2016**, she deposited in the United States Mail, at Bismarck, North Dakota, **one** envelope with certified postage, return receipt requested, fully prepaid, securely sealed and containing photocopy of:

- **Complaint**
- **Motion Finding Complaint States a *Prima Facie* Case**

The envelope was addressed as follows:

George LaBrie
Big Horn Underground, LLC
PO Box 30
Bloomer, WI 54724-0030
Cert. No. 7016 0600 0000 4633 7881

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



GERALYN R. SCHMALTZ

Subscribed and sworn to before me
this **6th day of October, 2016**.



Shelly A. Baush
Notary Public

SEAL

North Dakota Century Code section 49-23-04(3)(g) provides:

An excavator may not use a location more than twenty-one days, or any extension of that period, after the planned excavation date unless the excavator has made previous arrangements with the operators affected.

North Dakota Century Code section 49-23-05 provides:

To avoid damage to and minimize interference with underground facilities in and near the construction area, an excavator shall:

1. Maintain a clearance between an underground facility and the cutting edge or point of any mechanized equipment, considering the known limit of control of the cutting edge or point to avoid damage to the facility.
2. Provide support in a manner approved by the operator for underground facilities in and near the construction area, including backfill operations to protect the facilities. Backfill must be of a material equal to or better in both quality and quantity to the existing backfill.
3. Assume ownership of materials used to mark the facility, use reasonable efforts to maintain markings during excavation, and when possible remove all tangible marking materials used to mark the facility.
4. Assume the cost of excavation to expose the facility unless otherwise indicated by owner of facility.
5. Conduct the excavation in a careful and prudent manner.
6. Properly manage spoil material to prevent shifting or falling material that could damage belowground facilities.

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 June 30, 2016, the Commission received a ND One-Call Complaint from Eric Nihill with MDU. The complaint alleges a violation by Big Horn of North Dakota Century Code section 49-23-05 of the One-Call Excavation Notice System by failing to conduct the excavation in a careful and prudent manner and a violation of North Dakota Century Code section 49-23-04(3) by using an excavation location for more than twenty-one days after the planned excavation date.

V

On July 1, 2016, Commission staff issued a letter informing Big Horn of MDU's complaint filing, and requested a response by July 20, 2016. Big Horn's July 20, 2016 response asserted that they believed the ticket was valid for the entire 21st day after the excavation date and that it was a mix up on their part.

VI

As alleged by MDU's complaint, on June 29, 2016 at 3:15pm, Big Horn began an excavation as defined in North Dakota Century Code section 49-23-01(7) while performing direction boring for fiber optic line installation at the intersection of 16th St SW and 17th Ave SW in Jamestown, North Dakota. As a result of this excavation, damage was caused by a directional boring machine to MDU's 2-inch natural gas main line. MDU alleges that the cost to repair its facilities was approximately \$1000.

VII

Based on its investigation Staff determined that Big Horn personnel provided an excavation notice to the North Dakota One Call Notification Center (NDOC) on June 2, 2016 at 10:30am, with work to begin in the area cited in the complaint to begin on June 8, 2016 at 10:30am. The NDOC assigned locate ticket number 16063691 to the excavation notice, which indicates the work was being performed to install a fiber optic telephone line. Under North Dakota Century Code section 49-23-04(3)(g), the expiration date for the locate ticket is June 29, 2016 at 10:30am. On June 29, 2016 at 3:15pm, Big Horn personnel began an excavation to install a fiber optic telephone line. Big Horn

notified MDU of the damage on June 29, 2016. No customers were affected because the damage occurred in a new development with no active gas customers.

VIII

Big Horn violated North Dakota Century Code section 49-23-05(5) by failing to conduct its excavation in a careful and prudent manner.

Big Horn violated North Dakota Century Code section 49-23-04 by failing to renew its excavation or location notice prior to the expiration of the twenty-one day period.

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 Big Horn 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 49-23-05(5) and 49-23-04.
2. That the Commission impose an appropriate civil penalty up to \$25,000, but at least \$1100.
3. Such other relief that the Commission finds just and proper.

Dated this 20th day of September, 2016

/s/ John M. Schuh

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and

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Public Service Commission Advocacy Staff

APPROVED

DATE: 10-5-16
§

MOTION

October 5, 2016

Public Service Commission
Big Horn Underground, LLC
Damage Prevention Enforcement

Case No. PU-16-400

I move the Commission find the Formal Complaint filed by the North Dakota Public Service Commission Advocacy Staff on September 20, 2016, states a *prima facie* case, and serve the Complaint on the Respondent in Public Service Commission, Big Horn Underground, LLC, Damage Prevention Enforcement, Case No. PU-16-400.

SJC