

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Public Service Commission
Big Horn Underground, LLC
Damage Prevention Enforcement**

Case No. PU-16-400

ORDER AND NOTICE ON DEFAULT

January 4, 2017

Preliminary Statement

On June 30, 2016 Montana-Dakota Utilities Co., a Division of MDU Resources Group (Montana-Dakota) filed a third party damage complaint alleging a violation of North Dakota Century Code Chapter 49-23 by Big Horn Underground, LLC (Big Horn).

On July 1, 2016 Commission Staff forwarded a copy of the third party damage complaint to the respondent, Big Horn, for response. Big Horn responded on July 20, 2016.

On September 20, 2016 Public Service Commission Advocacy Staff (Advocacy Staff) filed a formal Complaint against Big Horn alleging violation of the North Dakota One-Call Law, North Dakota Century Code Chapter 49-23, requesting the Commission find Big Horn in violation and impose a penalty.

On October 5, 2016 the Commission found the Complaint states a *prima facie* case.

On October 6, 2016 the Commission served the Complaint on Big Horn.

On October 12, 2016 Big Horn received the formal Complaint as evidenced by the return receipt on file with the Commission.

On November 30, 2016 Advocacy Staff filed and served a Motion and Notice of Motion for Order of Default.

Discussion and Statement of Grounds for Default

Big Horn violated North Dakota Century Code Chapter 49-23 by failing to conduct the excavation in a careful and prudent manner and by using an excavation location for more than twenty-one days after the planned excavation date. As a result of this

excavation, damage was caused by a directional boring machine to a 2-inch natural gas main line. Montana-Dakota alleges that the cost to repair its facilities was approximately \$1,000.

The facts before the Commission indicate that Big Horn is in default for failing to file an Answer within 20 days after service of the Complaint.

Big Horn's failure to file an Answer to the Complaint constitutes grounds for default under North Dakota Century Code Chapter 28-32 and North Dakota Administrative Code Chapter 69-02-02.

This Order and Notice of Default constitutes written Notice of Default and a statement of the grounds for default.

The Commission issues the following:

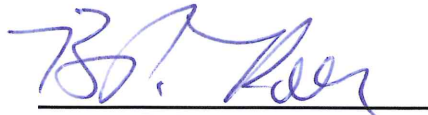
Order and Notice of Default

The Commission orders:

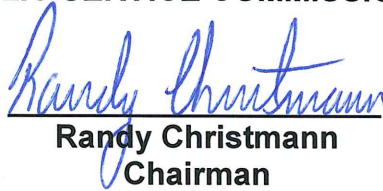
1. Big Horn Underground, LLC is in default under North Dakota Century Code Chapter 28-32 and North Dakota Administrative Code Chapter 69-02-02 for failing to file an Answer to the Complaint within twenty days after service of the Complaint.
2. Big Horn Underground, LLC is in violation of North Dakota Century Code Chapter 49-23 for failing to conduct its excavation in a careful and prudent manner and failing to renew its excavation or location notice prior to the expiration of the twenty-one day period.
3. Big Horn Underground, LLC is assessed a civil penalty of \$1,100.00.
4. Big Horn Underground, LLC shall remit the \$1,100.00 civil penalty, payable to the North Dakota Public Service Commission, within ten business days of service of this Order and Notice on Default.
5. This Order and Notice on Default constitutes written Notice of Default and a statement of the grounds for default.
6. Under North Dakota Century Code Section 28-32-30(2), Big Horn Underground, LLC has seven days after service of this Order and Notice on Default to file a written motion requesting that the default order be vacated. Unless Big Horn Underground, LLC, within seven days after service of this Order and Notice on Default, files a written motion

requesting that the default order be vacated, this Order and Notice on Default will be the final determination of this matter.

PUBLIC SERVICE COMMISSION



**Brian P. Kalk
Commissioner**



**Randy Christmann
Chairman**



**Julie Fedorchak
Commissioner**

November 30, 2016

Darrell Nitschke
Executive Secretary
ND Public Service Commission
600 E. Boulevard Ave. Dept. 406
Bismarck, ND 58505-0480

Re: Case No. PU-16-400
Public Service Commission
Big Horn Underground, LLC
Damage Prevention Enforcement

Dear Mr. Nitschke:

Attached please find the Notice of Motion for Order of Default and Motion for Order of Default and Memorandum of Law to be filed in the above referenced case.

Thank you!

Best Regards,



John Schuh
PSC Advocacy Staff

Enclosures

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

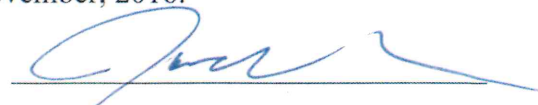
PUBLIC SERVICE COMMISSION,)	Case No. PU-16-400
)	
Complainant,)	NOTICE OF MOTION FOR
vs.)	ORDER OF DEFAULT
)	
Big Horn Underground, LLC.,)	
)	
Respondent.)	

TO: Respondent Big Horn Underground, LLC. (“Big Horn”), PO Box 30 Bloomer, WI 54724.

PLEASE TAKE NOTICE that the Public Service Commission, Advocacy Staff, Movant in the above proceeding, respectfully moves for an order declaring Big Horn in default. The motion is attached to this notice and by reference made a part hereof.

YOUR ARE HEREWITH NOTIFIED that the Notice of Motion and Motion for Judgment of Default has been submitted pursuant to N.D.C.C. § 28-32-21(e) and N.D. Admin. Code art. 69-02. The Public Service Commission may deem the Formal Complaint admitted and may enter an order in default as the facts and law may warrant. If the Public Service Commission rules in favor of Advocacy Staff’s motion, you have (7) days after service of the default notice, order and grounds to file a written motion with the Public Service Commission requesting that the default order be vacated and stating the grounds relied upon.

Bismarck, North Dakota, this 30th day of November, 2016.



John M. Schuh (ND ID # 08138)
Advocacy Staff Counsel
600 E Boulevard Ave – Dept 408
Bismarck, ND 58505
jschuh@nd.gov

(701) 328-2421
BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION,)	Case No. PU-16-400
)	
Complainant,)	
)	MOTION FOR
vs.)	ORDER OF DEFAULT
)	AND MEMORANDUM OF
Big Horn Underground, LLC.,)	LAW
)	
Respondent.)	

MOTION FOR ORDER OF DEFAULT

Public Service Commission Advocacy Staff (“Advocacy Staff”) respectfully seeks an order in default against Respondent, Big Horn Underground, LLC., (“Big Horn”). In support of the motion, Advocacy Staff states the following:

MEMORANDUM

Pursuant to N.D.C.C. § 28-32-21(e) and N.D. Admin. Code § 69-02-02-03(1), a Formal Complaint “may inform the respondent that an answer to the complaint must be served upon the complainant and the agency with which the complaint is filed within twenty days after service of the complaint, or the agency may deem the complaint to be admitted.” On 12 October 2016, Big Horn received the Formal Complaint filed with the Commission via certified mail. Big Horn failed to respond to the Formal Complaint within the time allotted under N.D.C.C. § 28-32-21(e). Having failed to answer the complaint, the Commission may deem the Formal Complaint to be admitted by Big Horn and “enter an order in default as the facts and law may warrant.” N.D.C.C. § 28-32-21(e).

BACKGROUND

On 29 June 2016, Montana-Dakota Utilities submitted a ND One-call complaint alleging Big Horn failed to conduct the excavation in a careful and prudent manner and by using an excavation location for more than twenty-one days after the planned excavation date. *See Attached ND One-Call Complaint.* On 1 July 2016, Commission Staff enclosed a copy of the ND One-Call Complaint to Big Horn and requested a response and written account of the event, including the applicable One Call locate ticket number for work performed at the location listed in the ND One-Call Complaint. On 2 July 2016, Big Horn responded to the request. On 17 August 2016 the Commission appointed Advocacy Staff to the case.

On 20 September 2016, based on its investigation, Advocacy Staff filed a Formal Complaint alleging Big Horn a violation of N.D.C.C. § 49-23-05(5) by failing to conduct its excavation in a careful and prudent manner, and N.D.C.C. § 49-23-04 by failing to renew its excavation or location notice prior to the expiration of the twenty-one day period. *See Attached Formal Complaint.* On 5 October 2016, the Commission found the Formal Complaint stated a *prima facie* case. Service of the Formal Complaint was initiated on 29 March 2016 via certified mail by Geralyn R. Schmaltz to George LaBrie, Registered Agent for Big Horn Underground, LLC, PO Box 30, Bloomer, WI 54724-0030 (Cert. No. 7016 0600 0000 4633 7881). A return receipt was signed by Terri Burgess on 12 October 2016. *See Attached Return Ticket.*

In Section X of the Formal Complaint Big Horn was informed that “[t]he 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.” Having received no answer to the Formal Complaint by 17 November 2016, the Commission may deem the Formal Complaint to be admitted and enter an Order of Default pursuant to

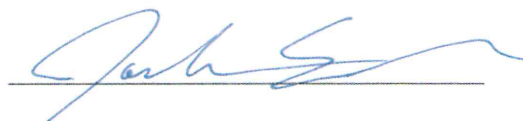
N.D.C.C. § 28-32-21(e). As of 30 November 2016, Big Horn has not responded and has not responded to any attempt by Advocacy Staff to communicate.

CONCLUSION

For these reasons, Advocacy Staff respectfully requests the Public Service Commission enter an Order of Default against Big Horn, impose an appropriate civil penalty up to \$25,000, but at least \$1,100, and such other relief that the Commission finds just and proper.

Dated: November 30th, 2016

Respectfully,

A handwritten signature in blue ink, appearing to read 'John M. Schuh', is written over a horizontal line.

John M. Schuh (ND ID# 08138)
Advocacy Staff
12th Floor, Dept. 408
600 E Boulevard Ave
Bismarck, ND 58505
(701) 328-2421 - jschuh@nd.gov



ND ONE-CALL COMPLAINT

Public Service Commission

SFN 59067 (1-14)

To allege a violation of the One-Call Excavation Notice System Law: North Dakota Century Code Chapter 49-23

PART A – WHO IS SUBMITTING THIS COMPLAINT (COMPLAINANT)

Company/Person Montana Dakota Utilities/Eric Nihill	Street Address 701 12th Ave SE	City Jamestown	State and Zip Code ND 58401
Telephone and Cell Phone Number 701-252-9833 ext 6657	Email Address eric.nihill@mdu.com		Date 6/29/2016
<input checked="" type="checkbox"/> Complainant is willing and able to testify on the complaint if matter goes to formal hearing			

PART B – WHO VIOLATED THE ONE-CALL REGULATIONS (RESPONDENT)

Company/Person Big Horn Underground/George Labrie - President	Street Address 521 N. Main street	City Bloomer	State and Zip Code Wisconsin, 54724
Telephone and Cell Phone Number 715-568-9598 cell 715-645-0585	Email Address georgelabrie@bighomunderground.com		

PART C – ALLEGED VIOLATION

<input type="checkbox"/> Operator failed to provide or update the information provided to the notification center on a timely basis <input type="checkbox"/> Excavator failed to provide excavation or location notice at least 48 hours before beginning any excavation <input type="checkbox"/> Excavator failed to provide required information in excavation or location notice <input type="checkbox"/> Notification center failed to transmit the notice to every operator that has an underground facility in the area of the excavation <input type="checkbox"/> Notification center failed to inform the excavator of the names of operators of underground facilities in the area <input type="checkbox"/> Operator failed to locate and mark underground facility within 48 hours <input type="checkbox"/> Excavation started prior to underground facility locate <input type="checkbox"/> Operator failed to mark underground facility within 24 inches horizontally <input checked="" type="checkbox"/> Excavator failed to renew excavation or location request prior to the expiration of the twenty-one-day period <input checked="" type="checkbox"/> Excavator failed to conduct the excavation in a careful and prudent manner to avoid damage of underground facilities <input type="checkbox"/> Excavator failed to maintain the markings during excavation <input type="checkbox"/> Other (Identify the specific section of NDCC Chapter 49-23) _____
Location of Violation: Intersection of Toxtrot Road and 16th Street, Jamestown, ND
Date and Time of Violation: 6/29/16 - 3:15 PM
Description (summarize the observations on which you rely to allege the violation) if more space is required, please provide the description on a separate page. Contractor spotted 2" plastic main initially. When they directional bored, they bored approximately 3 feet from where they spotted main and could not see the crossing and hit main. Upon further investigation, we found that the locates they had called in were past the 21 day dig period and were expired. Ticket number 16063691 that was provided to us by contractor, was expired at the time of the hit.

PART D – DAMAGE

Fatalities none	Injuries none	In-patient Hospitalization none
Underground facility type(s) and Operator(s) affected: Natural gas - Montana Dakota Utilities		
Estimated Value of Damage (damage as defined under NDCC Chapter 49-23): \$ \$1000.00	Number of Customers Affected 0	
Other impact of event:		
Please attach photos of Event Area or Damaged Facility		

PART I – SIGNATURE

Signature of Person Filing Complaint Eric Nihill	Date 6/30/16
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Send Completed, Original Complaint To:
 Public Service Commission
 600 E Boulevard Ave Dept 408
 Bismarck ND 58505-0480
 Telephone: (701) 328-2400

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:

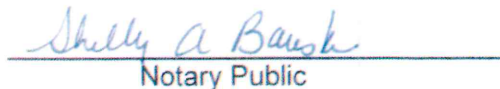
George LaBrie
Big Horn Underground, LLC
PO Box 30
Bloomer, WI 54724-0030
Cert. No. 7016 0600 0000 4633 7881

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

John M. Schuh
Special Assistant Attorney General
600 E. Boulevard Ave #408
Bismarck, ND 58505
(701) 328-2421
Attorney for Advocacy Staff

and

Victor Schock
Public Utility Analyst
600 E Boulevard Ave – Dept 408
Bismarck, North Dakota 58505-0480
701-328-3397
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

PU-16-400

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. A

George LaBrie
 Big Horn Underground, LLC
 PO Box 30
 Bloomer, WI 54724-0030
 Cert. No. 7016 0600 0000 4633 7881
 Case No. PU-16-400



8 PU-16-400 Filed 10/17/2016 Pages: 2
 Return receipt - 7016-0600-0000-4633-7881
 USPS

COMPLETE THIS SECTION ON DELIVERY

A. Signature Agent
 Terri Bunsco Addressee
 B. Received by (Printed Name) Date of Delivery
Terri Bunsco *10/12/16*
 D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No

2. Article Number (Transfer from service label)

Cert. No. 7016 0600 0000 4633 7881

PS Form 3811, July 2015 PSN 7530-02-000-9053

PU-16-400

Domestic Return Receipt

- Collect on Delivery
- Collect on Delivery Restricted Delivery
- Insured Mail
- Insured Mail Restricted Delivery (over \$500)
- Merchandise
- Signature Confirmation™
- Signature Confirmation™ Restricted Delivery

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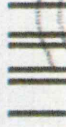
USPS TRACKING #

8

PU-16-400

Filed: 10/17/2016 Pages: 2

Return receipt - 7016-0600-0000-4633-7881



First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

USPS

and ZIP+4® in this box®

RECEIVED
OCT 17 2016
ND Public Service Commission
600 E Boulevard Ave. Dept. 408
Bismarck, ND 58505-0480
NORTH DAKOTA
PUBLIC SERVICE COMMISSION

