

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Verendrye Electric Cooperative, Inc.
Damage Prevention Enforcement

Case No. PU-18-374

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

September 9, 2020

Appearances

Commissioners Brian Kroshus, Julie Fedorchak, and Randy Christmann

Brian Johnson, Special Assistant Attorney General, appearing on behalf of the Public Service Commission Advocacy Staff.

Randy Hauck, General Manager, Verendrye Electric Cooperative, Inc. 615 Highway 52W, Velva, ND 58790-7417, appearing on behalf of Verendrye Electric Cooperative, Inc.

John Schuh, General Counsel, North Dakota Public Service Commission, 600 East Boulevard, Bismarck, North Dakota 58505, as Advisory Counsel.

Timothy J. Dawson, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14th Street, Suite 303, Bismarck, North Dakota 58503, as Procedural Hearing Officer.

Preliminary Statement

On October 30, 2018, the North Dakota Public Service Commission (Commission) received a North Dakota One-Call (NDOC) Complaint from Warren Colby (Mr. Colby) of Voltaire. The NDOC Complaint alleged Verendrye Electric Cooperative, Inc. (Verendrye) failed to mark its underground facility within 24 inches horizontally, in violation of North Dakota Century Code section 49-23-04(6)(b).

On November 1, 2018, Commission Advocacy Staff (Advocacy Staff) issued a letter informing Verendrye of Mr. Colby's complaint filing and requested a response by November 15, 2018.

On November 14, 2018, the Commission received a response from Verendrye's locate contractor, Summit Utility Services, LLC, regarding the October 30, 2018 NDOC Complaint.

On November 16, 2018, the Commission received a response from Verendrye regarding the October 30, 2018 NDOC Complaint.

On April 3, 2019, the Commission received a supplemental response from Verendrye regarding the October 30, 2018 NDOC Complaint.

On December 2, 2019, Advocacy Staff filed a Formal Complaint alleging that Verendrye violated North Dakota Century Code section 49-23-04(6)(b) by failing to mark its underground facility within 24 inches horizontally.

On February 19, 2020, the Commission found the Formal Complaint stated a prima facie case and served the complaint upon Verendrye.

On May 27, 2020, the Commission issued a Notice of Hearing on the complaint, scheduling the hearing for July 21, 2020, at 8:00 am CT in the Commission Hearing Room, State Capitol, 12th Floor, Bismarck, North Dakota 58505.

The Notice identified the following issues to be considered:

1. Whether Verendrye Electric Cooperative, Inc. violated North Dakota Century Code chapter 49-23, the North Dakota One-Call law in Case No. PU-18-374;
2. If a violation is found, whether a civil penalty should be assessed and in what amount; and
3. Whether there is any other relief the Commission finds just and proper?

On July 21, 2020, the public hearing was held as scheduled. Exhibits 1 through 4 and Exhibit A were admitted at the hearing.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed, and considered all testimony and evidence presented, the Commission makes the following:

Findings of Fact

1. Verendrye Electric Cooperative, Inc. is a North Dakota Cooperative Association with offices located at 615 Highway 52 West, Velva, ND 58790-7417.
2. Warren Colby is an individual/person who resides at 846 44th St N, Voltaire, ND 58501.
3. On July 25, 2018, Mr. Colby contacted the One-Call notification center and placed an excavation notice for his property at 846 44th St N, Voltaire, ND. The notification center

assigned ticket number 18090429 to the excavation notice. The ticket states that the type of work was installing wooden fence posts, and the work to begin date was July 28, 2018.

4. Verendrye provided location marks prior to the excavation.
5. On or about July 28, 2018, Mr. Colby began an excavation at the location specified in the excavation notice. During the excavation Mr. Colby struck an unjacketed concentric neutral primary 15 kV electric supply cable more than 24 inches from the location marks placed by Verendrye.
6. Mr. Colby testified he used a traditional fiberglass two-handled posthole digger to complete his excavation. Upon reaching a depth of 2 to 2.5 feet, Mr. Colby struck the inaccurately marked cable. He stated that the next thing he knew he was standing 5 to 6 feet away from the hole, which was then emitting smoke and fire. At that time, he contacted Verendrye to notify them of the incident.
7. Mr. Colby testified that he was told by a doctor that he was electrocuted, and he was not killed. He has some lingering shaking in his hands, and he lost some dental fillings.
8. Verendrye affirmed in its November 16, 2018 correspondence that it received the locate ticket, that it was the operator of the damaged facilities, and that the underground facilities were not located within 24 inches horizontally.
9. Victor Schock of Advocacy Staff testified that a penalty of \$10,000 was justified since there was a risk of a more serious injury or death to Mr. Colby.
10. Randy Hauck of Verendrye testified that the line was mis-located.
11. Tim Krumwiede of Verendrye testified that in his November 16, 2018 response letter to the NDOC Complaint, Verendrye's locate marks were not within 24 inches of the underground facility.
12. There was no agreement between Mr. Colby and Verendrye under North Dakota Century Code section 49-23-04(6) prior to excavation that would have relieved Verendrye of its obligation to mark its underground facilities within 24 inches horizontally.

Conclusions of Law

1. The Commission has jurisdiction over this proceeding.
2. Verendrye failed to mark its underground facility within 24 inches horizontally. Consequently, Verendrye violated North Dakota Century Code chapter 49-23-04(6)(b).

From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes its:

Order

1. Verendrye violated North Dakota Century Code section 49-23-04(6)(b) by failing to mark its underground facility within 24 inches horizontally.
2. Verendrye is assessed a civil penalty of \$7,500.
3. Verendrye shall remit \$5,000 of the civil penalty, payable to the North Dakota Public Service Commission within ten business days of service of the Order. The remaining \$2,500 civil penalty is suspended on condition that Verendrye commits no further violation of North Dakota Century Code chapter 49-23 within five years of the date of the Order.
4. In the event the Commission finds Verendrye violated North Dakota One-Call Law within five years of the date of this Order, Verendrye shall remit the suspended portion of the penalty, \$2,500, within the time ordered by the Commission, and in addition, any additional fees or penalties imposed for subsequent violation. If within five years of the date of the Order, there is no subsequent violation of North Dakota Century Code chapter 49-23 by Verendrye, the suspended penalty is withdrawn.

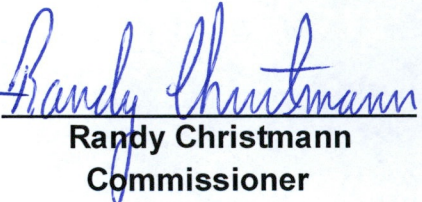
PUBLIC SERVICE COMMISSION



Julie Fedorchak
Commissioner



Brian Kroshus
Chairman



Randy Christmann
Commissioner

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.”

IV

North Dakota Century Code section 49-23-04(6)(a) provides: “An operator with underground facilities within the area of a location request shall locate and mark or otherwise provide the approximate horizontal location of the underground facilities of the operator within the location period or as agreed by the parties.”

North Dakota Century Code section 49-23-04(6)(b) provides: “For purposes of this section, the approximate horizontal location of the underground facilities is a strip of land two feet [60.96 centimeters] on either side of the underground facilities. An operator of a facility required to be locatable is responsible for the costs of location. If an excavator is unable to locate a facility within two feet on either side of the operator's facility location markings and requests assistance from the operator to locate the facility, but the operator fails to provide the requested assistance within a reasonable time, the operator is responsible for the excavator's reasonable costs incurred to locate the facility. This subdivision does not apply to an underground facility to convey water installed before August 1, 2013.”

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.

V

On October 30, 2018, the Commission received a ND One-Call Complaint from Mr. Colby. The complaint alleges a violation by Verendrye of North Dakota Century Code section 49-23-04(6)(b) of the One-Call Excavation Notice System by failing to mark its underground facility within 24 inches horizontally.

VI

Mr. Colby provided an excavation notice to the North Dakota Once Call Notification Center (NDOC) on July 25, 2018, with work to begin in the area cited in the complaint to begin on July 28, 2018. NDOC assigned ticket number 18090429 to the excavation notice, which indicates the type of work is 'putting in wooden posts'. Pursuant to N.D.C.C. § 49-23-04(6)(g), the expiration date for the locate ticket was August 18, 2018.

VII

On July 29, 2018, Mr. Colby struck a 15Kv Verendrye underground electric line in a location that was greater than 24" from Verendrye's markings. Mr. Colby immediately notified Verendrye of the damage.

VIII

There was a risk of injury or death to Mr. Colby created by Verendrye by not locating its underground facilities accurately.

IX

On November 1, 2018, Commission staff issued a letter informing Verendrye of Mr. Colby's complaint filing, and requested a response by November 15, 2018. Verendrye's November 15, 2018 response affirmed it received the locate ticket, was the operator of the damaged facilities, and that the underground facilities were not located within 24 inches horizontally.

X

There was no agreement between Mr. Colby and Verendrye under North Dakota Century Code section 49-23-04(1) prior to excavation that would relieve Verendrye of its obligation to mark its underground facilities within 24 inches horizontally.

XI

Verendrye violated North Dakota Century Code section 49-23-04(6)(b) by failing to mark its underground facility within 24 inches horizontally.

XII

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.

XIII

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.

Relief Requested

Based on the foregoing, Staff seeks the following relief:

- 1. That the Commission find Verendrye violated North Dakota Century Code ch.49-23 with the One Call requirements enumerated in North Dakota Century Code section 49-23-04(6)(b).
- 2. That the Commission impose an appropriate civil penalty up to \$25,000, but at least \$10,000.
- 3. Such other relief that the Commission finds just and proper.

Dated this 2nd day of December, 2019



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