STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Public Service Commission
KPH, Inc.
Damage Prevention Enforcement

Case No. PU-18-418

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 **24th day of October 2019**, 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:

Eric Merhiy – President
KPH, Inc.
9530 39th Street S
Fargo, ND 58104
Cert. No. 7018 2290 0000 6607 8176

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

Geralyn R Schmaltz

Subscribed and sworn to before me
this **24th day of October 2019**.

Shelly A Bauske
Notary Public

SHELLY A BAUSKE
Notary Public
State of North Dakota
My Commission Expires Sep 01, 2022

SEAL

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Public Service Commission **KPH, Inc.** **Damage Prevention Enforcement**	**Case No. PU-18-418**
Public Service Commission, **Complainant,** **vs.** **KPH, Inc.** **Respondent.**	**Complaint**

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

I

KPH, Inc. (KPH) is a North Dakota corporation with principal offices located at, 9530 39th St S, Fargo, ND 58104-7824. KPH is subject to the jurisdiction of the North Dakota Public Service Commission (Commission) and is an "excavator" as defined by North Dakota Century Code (N.D.C.C.) § 49-23-01(8).

II

The Commission has been granted jurisdiction pursuant to N.D.C.C. chapter 49-23 and N.D.C.C. § 49-07-01.1. N.D.C.C. § 49-07-1.1 provides that "[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."

III

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

To avoid damage to and minimize interference with underground facilities in and near the excavation area, a ticket holder 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 remove all tangible marking materials used to mark the underground facility and site area upon completion of the excavation.
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 below ground facilities.

IV

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 December 4, 2018, the Commission received a ND One-Call Complaint from Lisa Kallberg with Xcel Energy (Xcel). The complaint alleges a violation by KPH of N.D.C.C. 49-23-05(5) of the One-Call Excavation Notice System by failing to conduct the excavation in a careful and prudent manner.

VI

On August 15, 2018, KPH personnel began an excavation to install new sanitary sewer service at 402 9th Ave S in Fargo, ND under ND-One Call ticket 18123742. As a result of this excavation Xcel's 5/8 inch natural gas line was damaged resulting in a repair cost of approximately $606.

VII

On January 2, 2019, Commission staff issued a letter informing KPH of Xcel's complaint filing, and requested a response by January 17, 2019. KPH's January 17, 2019 response asserted that the natural gas line was embedded in the asphalt when it was removed, causing KPH to damage the line.

VIII

KPH violated N.D.C.C. 49-23-05(5) by failing to conduct the excavation in a careful and prudent manner.

IX

The 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.

Relief Requested

Based on the foregoing, Staff seeks the following relief:

1. That the Commission find KPH violated N.D.C.C. chapter 49-23 with the One Call requirements enumerated in N.D.C.C. 49-23-05(5).

2. That the Commission impose an appropriate civil penalty up to $25,000, but at least $1000.

3. Such other relief that the Commission finds just and proper.

Dated this 18th day of September, 2019

Brian Johnson (ND Bar ID No. 07397)
Special Assistant Attorney General
600 E Boulevard Ave – Dept. 408
Bismarck, North Dakota 58505-0480
701-328-2047
Attorney for Advocacy Staff

APPROVED
DATE: 22 OCT 2019

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Public Service Commission **Case No. PU-18-418**
KPH, Inc.
Damage Prevention Enforcement

M O T I O N

October 22, 2019

I move the Commission find the Formal Complaint filed by the North Dakota Public Service Commission Advocacy Staff on September 18, 2019, states a *prima facie* case, and serve the Complaint on the Respondent in Public Service Commission, KPH, Inc., Damage Prevention Enforcement, Case No. PU-18-418.