

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION,)	Case No. PU-19-384
)	
Complainant,)	NOTICE OF MOTION FOR
vs.)	ORDER OF DEFAULT
)	
Randall's Excavating, Inc.,)	
)	
Respondent.)	

TO: Randall's Excavating, Inc., PO BOX 99, Glyndon, MN 56547.

PLEASE TAKE NOTICE that the Public Service Commission, Advocacy Staff, Movant in the above proceeding, respectfully moves for an order declaring Randall's Excavating, Inc. 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 10th day of March, 2021.



Brian Johnson
Special Assistant Attorney General Bar ID 07397
North Dakota Public Service Commission
600 East Boulevard Avenue Dept. 408
Bismarck ND, 58505
701-328-2407

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION,)	Case No. PU-19-384
)	
Complainant,)	
)	MOTION FOR
vs.)	ORDER OF DEFAULT
)	AND MEMORANDUM OF
Randall’s Excavating, Inc.,)	LAW
)	
Respondent.)	

MOTION FOR ORDER OF DEFAULT

Public Service Commission Advocacy Staff (“Advocacy Staff”) respectfully seeks an order in default against Respondent, Randall’s Excavating, Inc. 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 December 30, 2020, Randall’s Excavating, Inc. received the Formal Complaint filed with the Commission via certified mail. Randall’s Excavating, Inc. 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 Randall’s Excavating, Inc. and “enter an order in default as the facts and law may warrant.” N.D.C.C. § 28-32-21(e).

BACKGROUND

On December 18, 2019, the Commission received a ND One-Call Complaint from Robert Johnson with Midco Communications, Inc.(Midco). The complaint alleges a violation by Randall's Excavating, Inc.(Randall's) of North Dakota Century Code section 49-23-04(6)(l) of the One-Call Excavation Notice System by presuming that an underground facility was abandoned without verification by reference to installation records or testing, and a violation of N.D.C.C. 49-23-06(1) of the One-Call Excavation Notice System by failing to contact the operator as soon as reasonably possible and backfilling over the damage. *See Attached ND One-Call Complaint.* On December 19, 2019, Commission staff issued a letter informing Randall's of Midco's complaint filing and requested a response by January 6, 2020. Randall's January 9, 2020 response asserted that there were no markings in the area of the facility, and Randall's backhoe operator did not consider the line to be active or potentially active and was advised by the property owner that there were no private facilities in the area of the excavation. *See Attached Response from Randall's* On October 7, 2020 the Commission appointed Advocacy Staff to the case effective September 18, 2020.

On September 21, 2020, based on its investigation, Advocacy Staff filed a Formal Complaint alleging Randall's violated N.D.C.C. § 49-23-04(6)(l) by presuming that an underground facility was abandoned without verification by reference to installation records or testing, and N.D.C.C. 49-23-06(1) by backfilling over the damage and failing to notify the operator of damage to their facilities. *See Attached Formal Complaint.* On December 16, 2020, the Commission found the Formal Complaint stated a *prima facie* case. Service of the Formal Complaint was initiated on December 18, 2020 via certified mail by Geralyn R. Schmaltz to Randall's Excavating, Inc., PO BOX 99, Glyndon, MN 56547 (Cert. No. 7020 1290 0001 6150

5810). A return receipt was signed by Cindy Henriksen on December 30, 2020. *See Attached Return Ticket.*

In Section X of the Formal Complaint, Randall's 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 January 19, 2021, 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 March 9, 2021, Randall's 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 Randall's, impose an appropriate civil penalty up to \$25,000, but at least \$10,000, and such other relief that the Commission finds just and proper.

Dated: March 10, 2021

Respectfully,



Brian Johnson
Special Assistant Attorney General Bar ID 07397
North Dakota Public Service Commission
600 East Boulevard Avenue Dept. 408
Bismarck ND, 58505
701-328-2407



ND ONE-CALL COMPLAINT

Public Service Commission

SFN 59067 (5-17)

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 Midcontinent Communications	Street Address 3901 N Louise Ave	City Sioux Falls	State and Zip Code SD 57109
Telephone and Cell Phone Number 701.335.4228 701.739.1319	Email Address robert.johnson@midco.com		Date 12/18/2019
<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 Randalls Excavating, Mark Stotesbery	Street Address 533 2nd St SE, Po Box 99	City Glyndon	State and Zip Code MN 56547
Telephone and Cell Phone Number 218.498.2475, 320.333.0744	Email Address stotes9@gmail.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 type="checkbox"/> Excavator failed to renew excavation or location request prior to the expiration of the twenty-one-day period <input 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 checked="" type="checkbox"/> Other (identify the specific section of NDCC Chapter 49-23) <u>49-23-06, damage to utility and failure to contact operator.</u>
Location of Violation: 1126 W main Ave West Fargo, ND
Date and Time of Violation: Approximately October 14th, no timeframe known.
Description (summarize the observations on which you rely to allege the violation) <i>If more space is required, please provide the description on a separate page.</i> See attached

PART D – DAMAGE

Fatalities N/A	Injuries N/A	In-patient Hospitalization N/A
Underground facility type(s) and Operator(s) affected: Communication Coax cable & Conduit. Midcontinent Communications - Midco		
Estimated Value of Damage (damage as defined under NDCC Chapter 49-23): \$ \$3,572.40	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 Robert Johnson	Date 12/18/2019
--	--------------------

Submit

If the "Submit" function is not working properly, please print the completed form and then either **email to** ndpsc@nd.gov, **fax to** 701-328-2410 or **send to** Public Service Commission, 600 E Boulevard Ave Dept 408, Bismarck ND 58505-0480.

Telephone: (701) 328-2400

12/18/2019

Randall's excavating had a locate called in for 1126 Main Ave West Fargo, ND for ticket #19135142, 19120033, 19149371. The additional tickets are for re-spots of the project location.

The project for Randall's excavating overlapped a project that Midco had planned for a new service cable in this area. The new service was placed after Randall's excavating locate had cleared for their work to proceed. Since there was an overlap in dates the Midco cable in question was not located for Randall's Excavating. Randall's excavating proceeded with their work and in doing so damaged Midco's cable that was in their scope of work area. This complaint is in reference to section 49-23-06 of the ND One Call handbook failure to contact operator when damaging an operator's utility.

This complaint is based off two discussion's with Mark Stoteberry (Randall's excavating employee). Mark had stated to a Midco tech Nathaniel on 10/26 during another emergency locate request that Randall's excavating had damaged a Midco utility during their project on 1126 Main Ave a couple weeks back. Upon investigating on 10/29/2019 by other Midco technicians they found and confirmed the damage utility.

Robert Johnson called Mark Stotebery on or around November 26th to discuss the damaged Midco utility. In this discussion Mark confirmed that they did hit a utility during their construction that was not marked. When Robert asked why Midco was not notified until two weeks later regarding the hit utility, Mark simply stated he did not have time to call every time they hit a utility that is not located properly. Robert stated that all damaged utility per ND One Call by an excavator are required to contact the operator of the damage.



P.O. Box 99 Phone: 701.219.9126
Glyndon, MN 56547 Fax: 218.498.2445

www.randalls@loretel.net
Website: www.randallsinc.com

Victor Schock
Public Utilities Division
ND Public Service Commission
600 E Boulevard Ave, Dept 408
Bismarck ND 58505-0480

1/9/2020

RE: ND One Call Complaint Case #PU-19-384

Dear Mr. Schock:

This letter is in response to complaint filed against Randall's Excavating, Inc on December 18, 2019 by Robert Johnson of Midcontinent Communications.

As stated in complaint, three separate locate tickets were called in for 1126 Main Ave West Fargo ND. These tickets covered the time span of September 10, 2019-November 13, 2019 for a sewer and water project. This project was being completed for a building remodel for Northern Stone. Also stated in complaint, the damaged utility in question was never located after any tickets were cleared and was confirmed by Mr. Johnson.

Also stated in complaint, it is based off two discussions with me, Mark Stotesbery, after damage and repair had been done. On 12/17/19, I had a discussion with Mr. Johnson in regards to an invoice we had received from him for repairs done to damaged line. At that time he pled his case and I responded with mine. The conversation included a desire of Robert Johnson to settle on dollar amount lower than invoice to cover costs. I respectfully declined. Conversation ended with no resolution. A day later, 12/18/2019, we received an email to disregard the invoice sent. We assumed the matter was resolved.

The damage to utility happened Thursday October 25, 2019. At that time, the backhoe operator, Rick, did not consider this to be an active or potentially active line. It appeared to be a scrap piece of conduit due to no markings, soil conditions, and the property owners confirmation of no private utilities he was aware of in the excavation site. On Friday, 10/25/2019, another hole was excavated due east of previous hole. During this excavation, Rick uncovered utility in question with no damage. It was not located. It did raise suspicion whether this line continued west to previous hole and could be live or have potential to be. At that time, I was contacted with details on what had happened. The initial hole had been backfilled before second hole had been dug.

On Saturday 10/26/19, as stated in complaint, I did have a brief conversation with a midcontinent technician. I mentioned to him the possibility of their line being damaged. I came to the conclusion of that possibility after narrowing down the possibilities of being any other service providers.

In the complaint, it stated it was two weeks later of the reported damage. It was two days. Mr. Johnson also stated that I responded to two week delay in notification by saying we don't have time to call every time they hit a utility that is not located properly. That is wrong. We take any possibility of damage, right or wrong, to utilities very seriously. We maintain a great history of working with utility companies during issues, there fore would not knowingly cover up any potential problems. At no time did Randall's Excavating fail to contact operator of a damaged line. Please feel free to contact me in regards to this matter.

Respectfully,

Mark Stotesbery
Underground Superintendent
320-333-0744
Stotes9@gmail.com

Randall J Henriksen
Owner/President
Randall's Excavating, Inc.

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Public Service Commission
Randall's Excavating, Inc.
Damage Prevention Enforcement

Case No. PU-19-384

Public Service Commission,)	
Complainant,)	
)	
vs.)	
)	Complaint
Randall's Excavating, Inc.,)	
Respondent.)	

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

I

Randall's Excavating, Inc. (Randall's) is a foreign Corporation with offices located at 1312 110th St S, Glyndon, MN 56547-9504, and a registered agent address of Mary M Johnson, 4981 Klitzke Dr, Horace, ND 58047.

II

Midco Communications, Inc. (Midco) is a foreign corporation authorized to do business in North Dakota.

III

North Dakota Century Code (N.D.C.C.) 49-23-04(6)(I) provides:

A facility owner, excavator, or other person may not present or presume that an underground facility is abandoned, or treat an underground facility as abandoned, unless the facility has been verified as abandoned by reference

to installation records or by testing. The notification center shall establish a method of providing personnel from a facility owner qualified to safely inspect and verify whether a facility is abandoned or inactive if necessary. An inactive facility must be considered active for purposes of this section.

North Dakota Century Code (N.D.C.C.) 49-23-06(1) provides:

a. If any damage occurs to an underground facility or its protective covering, the excavator shall notify the operator as soon as reasonably possible. When the operator receives a damage notice, the operator shall dispatch, as soon as reasonably possible, personnel to the damage area to investigate. If the damage endangers life, health, or property, the excavator responsible for the work shall take immediate action to protect the public and property and to minimize the hazard until arrival of the operator's personnel or until emergency responders have arrived and taken charge of the damaged area.

b. An excavator shall delay backfilling in the immediate area of the damaged underground facilities until the damage has been investigated by the operator, unless the operator authorizes otherwise. The repair of damage must be performed by the operator or by qualified personnel authorized by the operator.

c. An excavator is guilty of a class A misdemeanor if the excavator damages an underground facility or its protective covering and knew or reasonably should have known the damage occurred and:

- (1). The excavator does not notify the operator as soon as reasonably possible; or
- (2). The excavator backfills in violation of subdivision b.

North Dakota Century Code (N.D.C.C.) 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 (N.D.C.C.) 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 December 18, 2019, the Commission received a ND One-Call Complaint from Robert Johnson at Midco. The complaint alleges a violation by Randall's of N.D.C.C. 49-23-04(6)(l) of the One-Call Excavation Notice System by presuming that an underground facility was abandoned without verification by reference to installation records or testing, and a violation of N.D.C.C. 49-23-06(1) of the One-Call Excavation Notice System by failing to contact the operator as soon as reasonably possible and backfilling over the damage.

V

On December 19, 2019, Commission staff issued a letter informing Randall's of Midco's complaint filing, and requested a response by January 6, 2020, attached as Exhibit 1. Randall's January 9, 2020 response asserted that there were no markings in the area of the facility, and Randall's backhoe operator did not consider the line to be active or potentially active, and was advised by the property owner that there were no private facilities in the area of the excavation, attached as Exhibit 2.

VI

On October 21, 2019 Randall's personnel provided an excavation notice to the North Dakota One Call Notification Center (NDOC), with work to begin on October 24, 2019. The NDOC assigned locate ticket number 19149371 to the excavation notice, which indicates the work was sewer and water service install, attached as Exhibit 3. The excavation location cited in the notice is 1126 Main Ave W, West Fargo, ND.

VII

As alleged by Midco's complaint, on October 24, 2019, Randall's began an excavation as defined in N.C.C.C. 49-23-01(7) while performing sewer and water service install in the excavation location cited in the excavation notice. As a result of this excavation, damage was caused to Midco's communication coaxial cable and conduit. After the damage occurred, Randall's personnel presumed the damaged facility was abandoned in violation of N.D.C.C. 49-23-04(6)(l), and proceeded to backfill over the damage in violation of N.D.C.C. 49-23-06(1). During a subsequent excavation in an adjacent area to the damage on October 25, 2019, Randall's personnel encountered, but

did not damage what appeared to be the same underground facility. On October 26, 2019, Randall's personnel discussed the incidents with a Midcontinent technician who then initiated an investigation and was able to find and confirm the damage to their underground facility. Midco alleges that the cost to repair its facilities was approximately \$3572.40.

VIII

Randall's violated N.D.C.C. 49-23-04(6)(l) by presuming that an underground facility was abandoned without verification by reference to installation records or testing, and N.D.C.C. 49-23-06(1) by backfilling over the damage and failing to notify the operator of damage to their facilities

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. 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 Randall's Grading, Inc. in violation of N.D.C.C. chapter 49-23 for failing to comply with the One Call requirements enumerated in North Dakota Century Code section 49-23-04(6)(l) and 49-23-06(1).
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 21st day of September, 2020.



Brian Johnson
Special Assistant Attorney General Bar ID 07397
North Dakota Public Service Commission
600 East Boulevard Avenue Dept. 408
Bismarck ND, 58505
701-328-2407

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.

Randall Henriksen -Owner/President
 Randall's Excavating, Inc.
 PO Box 99
 Glyndon, MN 56547
 Cert. No. 7020 1290 0001 6150 5810
 Case No. PU-19-384

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X *Cindy Henriksen* Agent Addressee

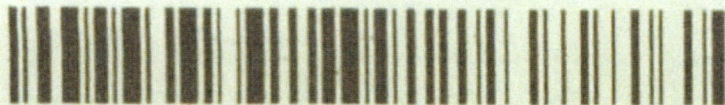
B. Received by (Printed Name)

Cindy Henriksen

C. Date of Delivery

12/30/20

D. Is delivery address different from item 1? Yes
 If YES, enter delivery address below: No



9590 9402 6024 0069 3939 7

8 PU-19-384 Filed 01/04/2021 Pages: 2

Return receipt

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- Collect on Delivery
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- Insured Mail
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- Merchandise
- Signature Confirmation™
- Signature Confirmation Restricted Delivery

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United States
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NORTH DAKOTA

PUBLIC SERVICE COMMISSION

8

PU-19-384
Return receipt

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ND Public Service Commission
Attn: Public Utilities Dept.
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Bismarck, ND 58505-0480

