

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

Case No. PU-19-384

ORDER ON CONSENT AGREEMENT

September 22, 2021

Preliminary Statement

On December 18, 2019, the Commission received a ND One-Call Complaint from Midcontinent Communications, Inc. (Midco) alleging a violation by Randall's Excavation, Inc. (Randall's) of North Dakota Century Code (NDCC) chapter 49-23: One-Call Excavation Notice System.

On December 19, 2019, Commission Staff sent a letter to Randall's enclosing the December 18, 2019 ND One-Call Complaint and requested a response by January 6, 2020.

On January 9, 2020, the Commission received a response from Randall's regarding the December 18, 2019 ND One-Call Complaint.

On September 21, 2020, Public Service Commission Advocacy Staff (Advocacy Staff) filed with the Commission a complaint alleging that Randall's violated NDCC chapter 49-23. (Complaint).

On December 16, 2020, the Commission found the Complaint states a prima facie case and directed the Complaint be serviced on Randall's. As provided in the Complaint, Randall's was required to serve an answer to the Complaint upon the Complainant and the Commission within thirty days after service of the complaint, or the Commission may deem the complaint to be admitted.

On December 30, 2020, Randall's was served with the Complaint as evidenced by the certified mail return receipt.

On March 10, 2021, Advocacy Staff filed and served a Motion for Order of Default and Memorandum of Law requesting that the Commission enter an Order of Default against Randall's for failing to file an answer to the Complaint within twenty days after service of the Complaint, and requesting that the Commission find Randall's in violation of NDCC 49-23 and NDCC 49-23-06(1) and impose an appropriate civil penalty.

On April 1, 2021, the Commission adopted an Order and Notice of Default finding Randall's in default under NDCC chapter 28-32, finding Randall's in violation of NDCC 49-23-04(6)(1) and NDCC 49-23-06(1), and assessing a civil penalty of \$10,000. Under NDCC 28-32-30(2), Randall's has seven days after service of the Order and Notice of Default to file a written motion requesting that the default order be vacated, or the Order and Notice of Default would be the final determination of the matter.

On April 8, 2021, Randall's filed a request to vacate the April 1, 2021 Order of Default.

On September 8, 2021, a Consent Agreement between Public Service Commission Advocacy Staff and Randall's was filed for the resolution of the Complaint.

Discussion

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

On October 21, 2019, Randall's 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. The work was related to a sewer and water service install at 1126 Main Ave W, West Fargo, ND.

On October 24, 2019, Randall's began an excavation as defined in NDCC section 49-23-01(7) while performing a sewer and water service install at 1126 Main Ave. West, Fargo, ND. As a result of the excavation, damage to Midco's coaxial cable and conduit were sustained. The estimated cost to repair the damage was \$3,572.40. No Customers were affected by the incident.

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

NDCC section 49-23-04(6)(1) states that 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.

NDCC section 49-23-06(1) states that 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... 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

Having investigated the alleged violations, Advocacy Staff believes that Randall's Excavating Inc. violated NDCC section 49-23-04(6)(1).

Randall's Excavating Inc. and Advocacy Staff engaged in good faith settlement discussions resulting in a Consent Agreement intended to avoid further administrative proceedings or litigation. The Consent Agreement addresses the alleged violation of NDCC section 49-23-04(6)(1) but does not address the alleged violation of NDCC section 49-23-06(1).

Under the Consent Agreement, Randall's agrees to be assessed a civil penalty of \$2000. Randall's agrees to remit \$1000 of the \$2000, payable to the North Dakota Public Service Commission within ten business days of service of an Order accepting the Consent Agreement.

Having considered this matter, the Commission finds the Consent Agreement is reasonable and acceptable. Therefore, the Commission issues the following:

Order

The Commission Orders:

1. The request of Randall's Excavating, Inc. to vacate the Commission's April 1, 2021 Order of Default is GRANTED.
2. The Consent Agreement between Randall's and Advocacy Staff, filed with the Commission on September 8, 2021, is approved. A copy of the Consent Agreement is attached to and made a part of this Order on Consent Agreement (Order).
3. Randall's is assessed a civil penalty of \$2000 with \$1000 suspended on the condition Randall's commits no further Violation of the NDCC 49-23 within five years of the date of the Order.

4. In the event the Commission finds Randall's violated the NDCC section 49-23 within five years of the date of the Order, Randall's shall remit the suspended portion of the penalty \$1000, within the time ordered by the Commission, in addition to any additional fines or penalties imposed for the subsequent violation.

PUBLIC SERVICE COMMISSION



Randy Christmann
Commissioner



Julie Fedorchak
Chair



Brian Kroshus
Commissioner

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION,)	
)	
Complainant,)	Case No. PU-19-384
vs.)	
)	CONSENT AGREEMENT
Randall's Excavating, Inc.,)	
Respondent .)	

Preliminary Statement

This Consent Agreement is entered into by and between Randall's Excavating, Inc. (Randall's) and the Public Service Commission Advocacy Staff (Staff) (together, the "Parties") for resolution of Docket No. PU-19-384.

On December 18, 2019, the Commission received a ND One-Call Complaint from Midcontinent Communications (Midco). The complaint alleged a violation by Randall's of North Dakota Century Code (NDCC) section 49-23-04(6)(l) by presuming that an underground facility was abandoned without verification by reference to installation records or testing, and a violation of NDCC section 49-23-06(1) by failing to contact the operator as soon as reasonably possible and backfilling over the damage.

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 excavation.

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 at 1126 Main Ave W, West Fargo, ND. The expiration date for the ticket was November 14, 2019.

On October 24, 2019, Randall's began an excavation as defined in NDCC section 49-23-01(7) while performing sewer and water service installation at the location cited in the excavation notice. As a result of this excavation, damage was caused to Midco's unmarked communication coaxial cable and conduit. After the damage occurred, Randall's personnel presumed the damaged facility was abandoned in violation of NDCC section 49-23-04(6)(l), and proceeded to backfill over the damage. 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 Midco who then initiated an investigation and was able to find and confirm the damage to their underground facility from the October 24, 2019 excavation. Midco alleges the cost to repair its facilities was approximately \$3,572.40.

NDCC section 49-23-04(6)(l) states that 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.

Having investigated the alleged violation, Staff believes that Randall's violated NDCC section 49-23-04(6)(l).

Randall's and Staff engaged in good faith settlement discussions resulting in this Consent Agreement. Having agreed that settlement of this proceeding will avoid further administrative proceedings or litigation and that entry of this Consent Agreement is the most appropriate means of resolving this administrative action, Staff and Randall's agree to the following, subject to the approval and acceptance of the Commission:

1. Randall's violated NDCC section 49-23-04(6)(l) by presuming that an underground facility was abandoned without verification by reference to installation records or testing.
2. Randall's agrees to be assessed a civil penalty of \$2000. Randall's agrees to remit \$1000 of the \$2000, payable to the North Dakota Public Service Commission within ten business days of service of an Order accepting or approving the Consent Agreement (Order). The remaining \$1000 civil penalty is suspended on the condition that Randall's commits no further violation of NDCC section 49-23 within five years of the date of the Order
3. In the event the Commission finds Randall's violated the NDCC section 49-23 within five years of the date of the Order, Randall's shall remit the suspended

portion of the penalty, within the time ordered by the Commission, in addition to any additional fines or penalties imposed for the subsequent violation.

4. If within five years of the date of the Order there is no subsequent violation of the NDCC section 49-23 by Randall's, the remaining \$1000 penalty is withdrawn.
5. Staff agrees no other proceeding will be initiated and no other remedy or penalty will be sought based on the violation alleged in the Case.
6. Randall's consents to the filing of the Consent Agreement and an Order and hereby waives any further procedural requirements with respect to the Order's issuance. Provided the Public Service Commission adopts this Consent Agreement and issues an Order consistent with it, Randall's understands and agrees to waive all rights to contest the violation, the right to be represented by counsel, the right to present evidence and arguments to the Commission, the right to cross examine witnesses, or contest the validity of this Consent Agreement and Order, including all rights to administrative or judicial hearings or appeals.
7. There are no covenants, promises, undertakings, or understandings other than specifically set forth in this Consent Agreement and Order.
8. This agreement may be executed in counterparts and duplicate copies, each which shall be deemed to be an original, and which, when taken together, shall constitute one and the same instrument.
9. The undersigned is authorized to act on behalf of Randall's and bind Randall's for purposes of this Consent Agreement and knows and fully understands the content and effect.

Dated this 8th day of September, 2021

PUBLIC SERVICE COMMISSION
ADVOCACY STAFF – DAMAGE PREVENTION

By: 

Brian Johnson
Special Assistant Attorney General Bar ID 07937
North Dakota Public Service Commission
600 East Boulevard Avenue Dept. 408
Bismarck ND, 58505
701-328-2407

Dated this 23 day of AUGUST, 2021

Randall's Excavating, Inc.

By: 

Name: RANDALL HENRIKSEN