

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
NC3, LLC
Damage Prevention Enforcement

Case No. PU-20-95

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 September 2020**, she deposited in the United States Mail, at Bismarck, North Dakota, **two** envelopes with certified postage, return receipt requested, fully prepaid, securely sealed and containing a photocopy of:

- **Complaint With Supporting Documents**
- **Prima Facie Motion**

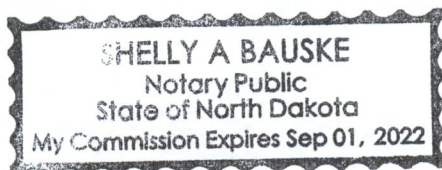
The envelopes were addressed as follows:

NC3, LLC
44926 State Hwy. 92
Clearbrook, MN 56634-4210
Cert. No. 7019 2280 0000 0692 7610

C T Corporation
Registered Agent for NC3, LLC
120 W Sweet Avenue
Bismarck, ND 58504
Cert. No. 7019 2280 0000 0692 7627

The addresses shown is the respective addressee's last reasonably ascertainable post office address.

Subscribed and sworn to before me
this **24th day of September 2020**.





Notary Public

SEAL

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Public Service Commission
NC3, LLC
Damage Prevention Enforcement

Case No. PU-20-095

Public Service Commission,)
Complainant,)
vs.)
NC3, LLC,)
Respondent.)

Complaint

The Public Service Commission of North Dakota (Commission), by and through Advocacy Staff (Staff), for its complaint against NC3, LLC., alleges and shows the following:

I

NC3, LLC (NC3) is a foreign corporation with principal offices located at 44926 State 92, Clearbrook, MN 56634-4210, and a registered agent address of C T Corporation System, 120 W Sweet Ave, Bismarck, ND 58504.

II

Walsh Water Users, Inc. (Walsh) is a registered North Dakota Non-profit Corporation authorized to do business in North Dakota.

III

North Dakota Century Code section 49-23-01(3) provides:

“Careful and prudent manner” means excavating within twenty-four inches [60.96 centimeters] of the outer edges of an underground facility located manually and marked by the owner or operator by stakes, paint, or other customary manner, and supporting and protecting the uncovered facility.

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 (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 March 2, 2020, the Commission received a ND One-Call Complaint from Brian Reilly at Walsh Water Users, Inc. The complaint alleges a violation by NC3 of N.D.C.C. 49-23-05(5) of the One-Call Excavation Notice System by failing to conduct its excavation in a careful and prudent manner.

V

On March 12, 2020, Commission staff issued a letter informing NC3 of Walsh's complaint filing, and requested a response by March 26, 2020, attached as Exhibit 1. As of August 31, 2020, the commission had not received a response, despite having spoken

to Gary with NC3 on the phone on March 24, 2020 and leaving a voicemail on July 13, 2020.

VI

On September 5, 2019 NC3 personnel provided an excavation notice to the North Dakota One Call Notification Center (NDOC), with work to begin on September 10, 2019. The NDOC assigned locate ticket number 19120163 to the excavation notice, which indicates the work was installing fiber optic lines, attached as Exhibit 2. The expiration date for this excavation notice was October 1, 2019.

VII

As alleged by Walsh's complaint, on September 23, 2019 NC3 began an excavation as defined in N.C.C.C. 49-23-01(7) while performing fiber optic line installation near the intersection of County Road 8 and 72nd St NE, near Grafton, North Dakota. As a result of this excavation, damage was caused to Walsh's water line. Walsh alleges that the cost to repair its facilities was approximately \$5508.04. Due to the location of the damage and a thunderstorm that began at the time Walsh arrived on site, the line had to be left unrepaired and leaking overnight, leaving 3 rural residences without water service. The line was estimated to be leaking about 30 gallons per minute as a result of the damage.

VIII

NC3 violated N.D.C.C. 49-23-05(5) by failing to conduct its 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. 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 NC3, LLC. 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 49-23-05(5).
2. That the Commission impose an appropriate civil penalty up to \$25,000, but at least \$500.

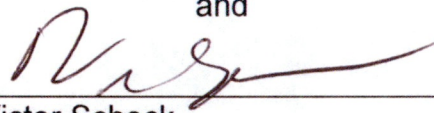
3. Such other relief that the Commission finds just and proper.

Dated this 31st day of August, 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

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

PSC 1



Public Service Commission
State of North Dakota

COMMISSIONERS

Brian Kroshus
Julie Fedorchak
Randy Christmann

March 12, 2020

600 East Boulevard, Dept. 408
Bismarck, North Dakota 58505-0480
Web: www.psc.nd.gov
E-mail: ndpsc@nd.gov
Phone: 701-328-2400
ND Toll Free: 1-877-245-6685
Fax: 701-328-2410
TDD: 800-366-6888 or 711

NC3, LLC
C/O CT Corporation System
120 W Sweet Ave
Bismarck, ND 58504-5566

Re: ND One-Call Excavation Notice System: North Dakota Century Code Chapter 49-23

To Whom it may concern:

Enclosed is a copy of a ND One-Call Complaint, against NC3, LLC, received by the North Dakota Public Service Commission on March 2, 3030, from Brian Reilly at Walsh Rural Water District, of Grafton, ND, Case Number PU-20-095. The location of the damage identified in the complaint is near the intersection of County Road 8 and 72nd St NE, Grafton, ND.

I am sending you this information so that you are aware of the complaint and may respond with information concerning the complaint. **Please respond to Executive Secretary, North Dakota Public Service Commission, 600 East Boulevard Avenue, Dept 408, Bismarck, ND 58505-0480 by March 26, 2020**, with your written account of the event, including the applicable One Call locate ticket number for work performed at the address indicated.

Your response and the ND One-Call Complaint will be reviewed to determine whether there may be a violation of the One-Call Excavation Notice System law.

If I do not receive a response by the date noted, I will determine whether there was a violation, without your side of the story, based on the facts contained in this complaint. If I conclude a violation did occur I will file a formal complaint against NC3, LLC with the Commission, which may result in a penalty up to \$25,000 per violation as approved by the North Dakota Legislative Assembly in 2013 under North Dakota Century Code Section 49-07-01.1.

Please contact me at 701-328-3397 or at vschock@nd.gov with any questions regarding this correspondence.

Sincerely,

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

Enc: ND One-Call Complaint
c: Brian Reilly

2 PU-20-95 Filed: 3/12/2020 Pages: 3
Letter enclosing North Dakota One-Call Complaint



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 Walsh Rural Water District	Street Address 14768 Hwy 17	City Grafton	State and Zip Code ND 58237
Telephone and Cell Phone Number 7013523915	Email Address wwater@wrvwmr.com		Date 3/2/2020
<input 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 NC 3, LLC	Street Address 44925 State Hwy 92	City Clearbrook	State and Zip Code MN 56634
Telephone and Cell Phone Number 7622664317	Email Address		

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 checked="" 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 checked="" 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 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: Firts 1 NE County Road 6 72nd St NE
Date and Time of Violation: 9/23/2019
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> Nc3 failed to probe or locate water line before boring over crossing Water Line was installed in 1973

PART D - DAMAGE

Fatalities	Injuries	In-patient Hospitalization
Underground facility type(s) and Operator(s) affected:		
Estimated Value of Damage (damage as defined under NDCC Chapter 49-23): \$ contract labor to repair was \$4,580.00 total Damages \$5,508.04		Number of Customers Affected 29
Other impact of event:		
Please attach photos of Event Area or Damaged Facility		

PART I - SIGNATURE

Signature of Person Filing Complaint Brian Reilly	Date 03/02/2020
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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 P

Telephone: (701) 328-2400

1

PU-20-95 Filed: 3/2/2020
North Dakota One-Call Complaint

Pages: 2

North Dakota One Call

Ticket No: 19120163
 LORQ ROUTINE
Original Call Date: 09/05/19 09:33 am
Op: iashark
Work to Begin Date: 09/10/19 12:01 am
Op: iashark
Expiration Date: 10/01/19 12:01 am

CALLER INFORMATION

Company Name: N C 3
Contact Name: SCOTT STEINMETZ
Phone: 702-286-4317
Alt Contact: ZAK QUALLY
Alt. Phone: 218-533-0606
Caller Address: 44926 STATE HWY 92 CLEARBROOK, MN 56634
Email Address: scott.steinmetz@outlook.com

DIG SITE INFORMATION

Type of Work: FIBER OPTIC INSTALL
Work Being Done For: CENTURYLINK
Depth: 4FT
Explosives: N
Tunneling/Boring: Y
White Lining/Site Identification: WHITE MARKING

DIG SITE LOCATION

County: WALSH
Place: GRAFTON
City Limits: N
Address:
Street: CO RD 8
Intersecting Street: 73RD ST NE
Location of Work: FROM THE ABOVE INTERSECTION LOCATE STARTING IN THE SOUTH WEST CORNER OF THE INTERSECTION LOCATE THE WEST R-O-W GOING SOUTH FOR 3 MILES TO 70TH ST NE

Remarks:
Map Twp: 157N
Rng: 53W
Sect-Qtr: 7-SW-NW,6-SW-NW
Map Twp: 157N
Rng: 54W
Sect-Qtr: 12-SE-NE,1-SE-NE
Map Twp: 158N
Rng: 53W
Sect-Qtr: 31-SW-NW
Map Twp: 158N
Rng: 54W

Sect-Qtr: 36-SE-NE
Map Coord NW Lat: 48.4705544
Lon: -97.5361932
SE Lat: 48.4271592
Lon: -97.5355038

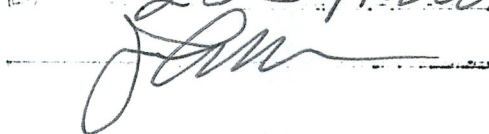
MEMBERS NOTIFIED

District	Company Name	Marking Concerns	Status
CTLND01	CTLQL-CENTURYLINK	800-283-4237	Clear/No conflict
NODAK01	NODAK ELECTRIC COOPERATIVE	701-746-4461	Marked (Done 9-6-19)
WALSH01	WALSH RURAL WATER DISTRICT	701-352-3915	Marked
WILSTN03	WBI ENERGY TRANSMISSION	888-859-7291	Marked

Legend:  Locate Polygon

Lat/Lon



APPROVED
DATE: 23 Sept. 2020


STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
NC3, LLC
Damage Prevention Enforcement

Case No. PU-20-095

MOTION

September 23, 2020

I move the Commission find the Formal Complaint filed by the North Dakota Public Service Commission Advocacy Staff on August 31, 2020, states a *prima facie* case, and serve the Complaint on the Respondent in Public Service Commission, NC3, LLC, Damage Prevention Enforcement, Case No. PU-20-095.

AR