

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Dean's Excavating
Damage Prevention Enforcement

Case No. PU-20-340

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 **15th day of July 2021** 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 a photocopy of:

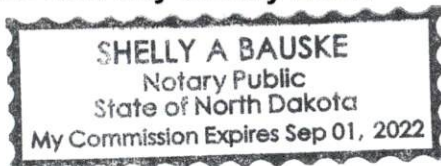
- **Complaint**
- **Motion Finding Complaint States a *Prima Facie* Case**

The envelope was addressed as follows:

Dean Geiger
Dean's Excavating
207 121st Ave SW
Minot, ND 58701
Cert. No. 7020 1810 0000 0894 2271

Each address shown is the respective addressee's last reasonably ascertainable post office mail address.

Subscribed and sworn to before me
this **15th day of July 2021**.



A handwritten signature in blue ink, appearing to read "Geralyn R. Schmaltz", written over a horizontal line.

A handwritten signature in blue ink, appearing to read "Shelly A. Bauske", written over a horizontal line.

Notary Public

SEAL

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

**Public Service Commission
Dean's Excavating, LLC.
Damage Prevention Enforcement**

Case No. PU-20-340

Public Service Commission,)	
Complainant,)	
vs.)	
Dean's Excavating, LLC.,)	Complaint
Respondent.)	

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

I

Dean's Excavating, LLC. (Dean's) is a North Dakota Corporation with offices located at 207 121st Ave SW, Minot, ND 58701, and a registered agent address of Ardelle Biewer, 201 121st Ave SW, Minot, ND 58701.

II

Cenex Pipeline, LLC. (Cenex) is a foreign corporation authorized to do business in North Dakota.

III

North Dakota Century Code (N.D.C.C.) 49-23-04(1) provides:

Except in an emergency, an excavator shall contact the notification center and provide an excavation or location notice before beginning any

excavation. An excavation begins the first time excavation occurs in an area that was not previously identified by the excavator in an excavation notice.

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 July 10, 2020, the Commission received a ND One-Call Complaint from Tina Beach at Cenex. The complaint alleges a violation by Dean's of N.D.C.C. 49-23-04(1) of the One-Call Excavation Notice System by failing to provide an excavation or location notice before beginning any excavation.

V

On July 10, 2020, Commission staff issued a letter informing Dean's of Cenex's complaint filing, and requested a response by July 24, 2020, attached as Exhibit 1. As of June 16, 2021, Dean's has not responded to the letter or a subsequent email sent to Dean's on June 4, 2021.

VI

As alleged by Cenex's complaint, on June 8, 2020, Dean's began an excavation as defined in NCCC section 49-23-01(7) while performing excavation for a building foundation at latitude 48.145347, longitude -101.157041. There is no evidence of Dean's contacting the North Dakota One Call Notification Center prior to beginning this excavation. No damage resulted from this excavation.

VII

Dean's violated N.D.C.C. 49-23-04(1) by failing to provide an excavation or location notice before beginning any excavation.

VIII

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.

IX

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 Dean's Excavating, 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 49-23-04(1).
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 16th day of June, 2021.



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

APPROVED

DATE: 07/14/2021
PJT

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
Dean's Excavating
Damage Prevention Enforcement

Case No. PU-20-340

MOTION

July 14, 2021

I move the Commission find the Formal Complaint filed by the North Dakota Public Service Commission Advocacy Staff on June 16, 2021, states a *prima facie* case, and serve the Complaint on the Respondent in Public Service Commission, Dean's Excavating, Damage Prevention Enforcement, Case No. PU-20-340.

PJF