

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

**Public Service Commission  
Eatherly Constructors, Inc.  
Damage Prevention Enforcement**

**Case No. GS-22-168**

**ORDER ON CONSENT AGREEMENT**

**November 10, 2022**

**Preliminary Statement**

On April 13, 2022, the Commission received a ND One-Call Complaint (Complaint) from Halstad Telephone Co. (HTC) alleging a violation by Eatherly Constructors, Inc. (Eatherly) of North Dakota Century Code (N.D.C.C.) chapter 49-23: One-Call Excavation Notice System.

On May 11, 2022, Commission Staff sent a letter to Eatherly enclosing the April 13, 2022 Complaint, requesting a response by May 26, 2022.

On May 24, 2022, Staff received a request from counsel for Eatherly requesting an extension on the response deadline. Both Eatherly and Public Service Commission Advocacy Staff agreed to extend the response deadline to June 3, 2022.

On June 3, 2022, Eatherly responded to the Complaint.

On November 1, 2022, a Consent Agreement between Public Service Commission Advocacy Staff (Advocacy Staff) and Eatherly was filed for the resolution of the Complaint.

**Discussion**

Eatherly Constructors, Inc. is a foreign corporation with a principal address of 1810 Boots Road, Garden City, KS 67846.

On June 9, 2021, Eatherly provided an excavation notice to the North Dakota One-Call Notification Center (NDOC). NDOC assigned locate ticket number 21060828 to the excavation notice. The work was for waterline installation along State Highway 200 between Cummings, North Dakota and Hillsboro, North Dakota.

On June 11, 2021, HTC responded to the locate ticket indicating their underground facilities were marked.

On June 19, 2021, Eatherly was conducting an excavation as defined in N.D.C.C. § 49-23-01(7) while performing rural water line installation south of the intersection of State Highway 200 and 6th Street Northeast near Cummings, North Dakota. At approximately 4:00 PM, Eatherly struck HTC's fiber optic cables resulting in 60 customers being affected. Eatherly notified HTC of the damage and HTC arrived at the site of the strike at 5:40 PM.

On June 23, 2021, HTC completed the necessary repairs and backfilled the cables by 5:00 PM.

Having investigated the alleged violation, Advocacy Staff believes that Eatherly violated N.D.C.C. § 49-23-05(3) for failure to maintain markings and N.D.C.C. § 49-23-05(5) for failing to conduct the excavation in a careful and prudent manner.

Eatherly and Advocacy Staff engaged in good faith settlement discussions resulting in a Consent Agreement intended to avoid further administrative proceedings or litigation.

Under the Consent Agreement, Eatherly agrees to be assessed a civil penalty of \$1,500.

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 Consent Agreement between Eatherly Constructors, Inc. and Advocacy Staff filed with the Commission on November 1, 2022, is approved. A copy of the Consent Agreement is attached to and made a part of this Order on Consent Agreement (Order).
2. Eatherly is assessed a civil penalty of \$1,500.
3. Eatherly shall remit the \$1,500 civil penalty, payable to the North Dakota Public Service Commission, within ten business days of service of this Order.

### PUBLIC SERVICE COMMISSION

  
Randy Christmann  
Commissioner

  
Julie Fedorchak  
Chair

  
Sheri Haugen-Hoffart  
Commissioner

**BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA**

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<b>PUBLIC SERVICE COMMISSION,</b>	)	
	)	
<b>Complainant,</b>	)	<b>Case No. GS-22-168</b>
<b>vs.</b>	)	
	)	<b>CONSENT AGREEMENT</b>
<b>Eatherly Constructors, Inc.,</b>	)	
	)	
<b>Respondent.</b>	)	

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**Preliminary Statement**

This Consent Agreement is entered into by and between Eatherly Constructors, Inc. (Eatherly) and the Public Service Commission (Commission) Advocacy Staff (Staff) (together, the Parties) for resolution of Docket No. GS-22-168.

On April 13, 2022, the Commission received a North Dakota One-Call Complaint from Halstad Telephone Co. (HTC). The complaint alleged a violation by Eatherly of North Dakota Century Code (N.D.C.C.) § 49-23-05(5) for failing to conduct the excavation in a careful and prudent manner subsequently damaging one 288 fiber optic cable and one 60 fiber optic cable.

On May 11, 2022, Commission Staff issued a letter informing Eatherly of HTC's complaint filing and requested a response by May 26, 2022.

On May 24, 2022, Staff received a request from counsel for Eatherly requesting an extension on the response deadline. The Parties agreed to extend the response deadline to June 3, 2022.

On June 3, 2022, Staff received a response from Eatherly admitting that Eatherly cut HTC's two fiber optic cables but denied that Eatherly was negligent or failed to conduct the excavation in a careful and prudent manner. Furthermore, Eatherly disclosed in their response that "The sheer volume of dirt being moved and heaped upon the site by machines would have obliterated most flags and markers."

### **Discussion**

On June 9, 2021, Eatherly provided an excavation notice to the North Dakota One-Call Notification Center (NDOC). NDOC assigned locate ticket number 21060828 to the excavation notice. The work was for waterline installation along State Highway 200 between Cummings, North Dakota and Hillsboro, North Dakota.

On June 11, 2021, HTC responded to the locate ticket indicating their underground facilities were marked.

On June 19, 2021, Eatherly was conducting an excavation as defined in N.D.C.C. § 49-23-01(7) while performing rural water line installation south of the intersection of State Highway 200 and 6th Street Northeast near Cummings, North Dakota. At approximately 4:00 PM, Eatherly struck HTC's fiber optic cables resulting in 60 customers being affected. Eatherly notified HTC of the damage and HTC arrived at the site of the strike at 5:40 PM.

On June 23, 2021, HTC completed the necessary repairs and backfilled the cables by 5:00 PM.

Having investigated the alleged violation, Staff believes that Eatherly violated N.D.C.C. § 49-23-05(3) for failure to maintain markings and N.D.C.C. § 49-23-05(5) for failing to conduct the excavation in a careful and prudent manner.

### **Agreement**

The Parties 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 (Agreement) is the most appropriate means of resolving this administrative action, the Parties agree to the following, subject to the approval and acceptance of the Commission:

1. Staff determined Eatherly violated N.D.C.C. § 49-23-05(3) for failure to maintain markings and N.D.C.C. § 49-23-05(5) for failing to conduct the excavation in a careful and prudent manner.
2. Eatherly, without conceding a violation occurred, will not contest a determination that it violated N.D.C.C. § 49-23-05(3) for failure to maintain markings or N.D.C.C. § 49-23-05(5) for failing to conduct the excavation in a careful and prudent manner.
3. Eatherly agrees to be assessed a civil penalty of \$1,500 payable to the North Dakota Public Service Commission within ten (10) business days of service of an Order accepting or approving this Agreement.
4. Staff agrees no other proceeding will be initiated and no other remedy or penalty will be sought based on the violation alleged in this case.
5. Eatherly consents to the filing of this Agreement and an Order and hereby waives any further procedural requirements with respect to the Order's issuance.

Provided the Commission adopts this Agreement and issues an Order consistent with it, Eatherly 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 Agreement and Order, including all rights to administrative or judicial hearings or appeals.

6. There are no covenants, promises, undertakings, or understandings other than specifically set forth in this Agreement and Order.
7. 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.
8. The undersigned is authorized to act on behalf of Eatherly and bind Eatherly for purposes of this Agreement and knows and fully understands the content and effect.

Dated this 15<sup>th</sup> day of November, 2022

PUBLIC SERVICE COMMISSION  
ADVOCACY STAFF – DAMAGE PREVENTION

By: \_\_\_\_\_

  
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

Dated this 25<sup>th</sup> day of October, 2022

Eatherly Constructors, Inc.

By: Robert J. Eatherly  
Robert Eatherly, President