

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Public Service Commission
City of Kenmare
Damage Prevention Enforcement

Case No. DM-23-238

Public Service Commission
City of Kenmare
Damage Prevention Enforcement

Case No. DM-23-239

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

Shelly A. Bauske deposes and says that:

she is over the age of 18 years and not a party to this action and, on the **4th day of December 2023** 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:

- **Order on Consent Agreement**

The envelope was addressed as follows:

Arlen Gartner, Mayor
City of Kenmare
PO Box 816
Kenmare ND 58746-0816
Cert. No. 7022 3330 0000 7993 6262

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

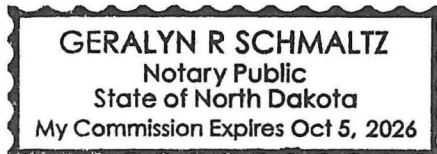
Subscribed and sworn to before me
this **4th day of December 2023**.

Shelly A Bauske

Geraldyn R Schmaltz

Notary Public

SEAL



STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Public Service Commission
City of Kenmare
Damage Prevention Enforcement**

Case No. DM-23-238

**Public Service Commission
City of Kenmare
Damage Prevention Enforcement**

Case No. DM-23-239

ORDER ON CONSENT AGREEMENT

November 29, 2023

Preliminary Statement

On June 23, 2023, the Commission received two North Dakota One-Call Complaints (Complaints) from John Ware Excavating (Ware Excavating) alleging a violation by the City of Kenmare (City) of North Dakota Century Code (N.D.C.C.) § 49-23-04(6)(a) of the One-Call Excavation Notice System by failing to locate and mark or otherwise provide the approximate horizontal location of the underground facilities within the location period.

On June 27, 2023, Staff sent a letter to the City enclosing the June 23, 2023, Complaints and requested a response by July 21, 2023.

On July 17, 2023, Staff received a response from the City.

On November 13, 2023, a Consent Agreement between Public Service Commission Advocacy Staff (Advocacy Staff) and the City was filed for the resolution of the Complaint.

Discussion

The City of Kenmare is located in Ward County. The mailing address is PO Box 816, Kenmare, North Dakota 58746-0816.

On June 14, 2023, Ware Excavating provided two excavation notices to the North Dakota One-Call Notification Center (NDOC), both with a work to begin date of June 17, 2023. NDOC assigned locate ticket numbers 23055343 and 23055354 to the excavation notices and identified the type of work to be performed was "stump grinding."

On June 17, 2023, the City was the only operator who had not cleared or marked either locate ticket.

On July 3, 2023, the City provided a positive response to both locate tickets and marked them as "Clear/No Conflict."

On July 17, 2023, Staff received a response from the City providing information that the locates were not completed within the locate period due to employee turnover and current employee unfamiliarity with the One-Call system. Additionally, the City added they were communicating and working with Ware Excavating regarding the locate requests.

On October 25, 2023, Staff had an additional conversation with the City in which the City provided further details regarding the Complaints. The City stated that when the previous Public Works Director left there was no communication regarding the One-Call system and that all excavation notices were sent only to this ex-employee's phone. No other employees in the office received the excavation notices. This situation has since been rectified. The City appears to have a system in place where multiple employees receive the excavation notices and there is no longer the possibility of a single point of failure.

Having investigated the alleged violation, Staff believes the City violated N.D.C.C. § 49-23-04(6)(a) by failing to locate and mark or otherwise provide the approximate horizontal location of the underground facilities within the location period.

The City 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, the City agrees to be assessed a civil penalty of \$2,000. The City agrees to remit \$1,000 of the \$2,000 payable to the North Dakota Public Service Commission within ten business days of service of an Order accepting or approving 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 Consent Agreement between the City and Advocacy Staff filed with the Commission on November 13, 2023, is approved. A copy of the Consent Agreement is attached to and made a part of this Order on Consent Agreement (Order).
2. The City is assessed a civil penalty of \$2,000 with \$1,000 suspended, on the condition the City commits no further violation of N.D.C.C. Chapter 49-23 within five years of the date of the Order.

3. The City shall remit the \$1,000 civil penalty, payable to the North Dakota Public Service Commission, within ten business days of service of this Order.

4. In the event the Commission finds the City violated N.D.C.C. Chapter 49-23 within five years of the date of the Order, the City shall remit the suspended portion of the penalty within the time ordered by the Commission, in addition to any fines or penalties imposed for the subsequent violation.

5. For identification of Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), the performance is restitution, remediation, or an amount paid to come into compliance with the law. The City shall provide the Commission with a U.S. Department of the Treasury Internal Revenue Service Form W-9 for the purpose of the identification requirement of 26 U.S.C. § 162(f)(2)(A)(ii) within ten business days of service of this Order.

PUBLIC SERVICE COMMISSION


Sheri Haugen-Hoffart
Commissioner


Randy Christmann
Chair


Julie Fedorchak
Commissioner

On July 17, 2023, Staff received a response from the City providing information that the locates were not completed within the locate period due to employee turnover and current employee unfamiliarity with the One-Call system. Additionally, the City added they were communicating and working with Ware Excavating regarding the locate requests.

On October 25, 2023, Staff had an additional conversation with the City in which the City provided further details regarding the Complaints. The City stated that when the previous Public Works Director left there was no communication regarding the One-Call system and that all excavation notices were sent only to this ex-employee's phone. No other employees in the office received the excavation notices. This situation has since been rectified. The City appears to have a system in place where multiple employees receive the excavation notices and there is no longer the possibility of a single point of failure.

Discussion

On June 14, 2023, Ware Excavating provided two excavation notices to the North Dakota One-Call Notification Center (NDOC), both with a work to begin date of June 17, 2023. NDOC assigned locate ticket numbers 23055343 and 23055354 to the excavation notices and identified the type of work to be performed was "stump grinding."

On June 17, 2023, the City was the only operator who had not cleared or marked either locate ticket.

On July 3, 2023, the City provided a positive response to both locate tickets and marked them as "Clear/No Conflict."

Alleged Violation:

Operator Failed to Mark or Clear Underground Facility within the Locate Period

N.D.C.C. § 49-23-04(6)(a) states "an operator with underground facilities within the area of a location request shall locate and mark or otherwise provide the approximate horizontal location of the underground facilities of the operator within the location period or as agreed by the parties." The City failed to mark or clear their underground facilities within the location period. Furthermore, when questioned by Ware Excavating about the delay in completing the locate tickets, the City's response was "If the 811 call was not completed, I am told it would be best to re-submit your request."

Having investigated the alleged violation, Staff believes the City violated N.D.C.C. § 49-23-04(6)(a) by failing to locate and mark or otherwise provide the approximate horizontal location of the underground facilities within the location period.

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 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. The City violated N.D.C.C. § 49-23-04(6)(a) of the One-Call Excavation Notice System by failing to locate and mark or otherwise provide the approximate horizontal location of the underground facilities within the location period.
2. The City agrees to be assessed a civil penalty of \$2,000.

3. The City agrees to remit \$1,000 of the \$2,000, payable to the North Dakota Public Service Commission within ten (10) business days of service of an Order accepting or approving the Consent Agreement. The remaining \$1,000 civil penalty is suspended on the condition that the City commits no further violation of N.D.C.C. Chapter 49-23 within five (5) years of the date of the Order.
4. In the event the Commission finds the City violated N.D.C.C. Chapter 49-23 within five (5) years of the date of the Order, the City 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.
5. If within five (5) years of the date of the Order there is no subsequent violation of N.D.C.C. Chapter 49-23 by the City, the remaining \$1,000 penalty is withdrawn.
6. Staff agrees no other proceeding will be initiated and no other remedy or penalty will be sought based on the violations alleged in this case.
7. The City consents to the filing of the Consent Agreement and an Order and hereby waives any further procedural requirements with respect to the issuance of the Order. Provided the Commission adopts this Consent Agreement and issues an Order consistent with it, the City 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.

8. For purposes of the identification requirement of Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), the performance is restitution, remediation, or an amount paid to come into compliance with the law, the City agrees to provide the Commission with a U.S. Department of the Treasury Internal Revenue Service Form W-9 for this purpose within ten (10) business days of service of an Order accepting or approving the Consent Agreement.
9. There are no covenants, promises, undertakings, or understandings other than specifically set forth in this Consent Agreement and Order.
10. This agreement may be executed in counterparts and duplicate copies, each of which shall be deemed to be an original, and which, when taken together, shall constitute one and the same instrument.
11. The undersigned is authorized to act on behalf of the City and bind the City for the purposes of this Consent Agreement and knows and fully understands the content and effect.

Dated this 13th day of November, 2023


PUBLIC SERVICE COMMISSION
ADVOCACY STAFF – DAMAGE PREVENTION

By: 

Brian Johnson
Special Assistant Attorney General (Bar ID 07937)
Public Service Commission
600 E. Boulevard Ave., Dept. 408
Bismarck, ND 58505-0480
701-328-2407

Dated this 9th day of November, 2023

City of Kenmare

By: 

Arlen Gartner, Mayor