

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**Public Service Commission
Montana-Dakota Utilities Co.
Damage Prevention Enforcement**

Case No. PU-21-142

**Public Service Commission
Montana-Dakota Utilities Co.
Damage Prevention Enforcement**

Case No. DM-23-241

ORDER ON CONSENT AGREEMENT

November 29, 2023

Preliminary Statement

On June 26, 2023, the Commission received a North Dakota One-Call Complaint (Complaint) from Burlington Construction, LLC (Burlington) alleging a violation by Montana-Dakota Utilities Co. (MDU) 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. Additionally, Burlington stated their request for compensation for lost time due to Burlington having to reach out to MDU to confirm the area was clear prior to commencing excavation while having a crew onsite was denied by MDU.

On July 25, 2023, Staff sent a letter to MDU enclosing the June 26, 2023, Complaint and requested a response by August 18, 2023.

On August 16, 2023, Staff received a response from MDU.

On November 1, 2023, a Consent Agreement between Public Service Commission Advocacy Staff (Advocacy Staff) and MDU was filed for the resolution of the Complaint.

Previously, on July 21, 2021, MDU entered into a Consent Agreement for violation of N.D.C.C. § 49-23-04(6)(b) by failing to mark its underground facility within 24 inches horizontally. MDU was assessed a civil penalty in the amount of \$7,500, of which, \$5,000 was to be remitted within ten (10) business days of the service of the Order on Consent Agreement. The remaining \$2,500 was suspended on the condition MDU committed no further violations of N.D.C.C. Chapter 49-23 within five (5) years of the date of the Order on Consent Agreement. MDU remitted the \$5,000 civil penalty; however, pursuant to the Order in Case No. PU-21-142, MDU “shall remit the suspended portion of the penalty, \$2,500, within the time ordered by the Commission and remit any additional fines or penalties imposed for the subsequent violation.” See August 18, 2021, Order on Consent Agreement, Case No. PU-21-142.

Discussion

Montana-Dakota Utilities Co. is a foreign corporation with the principal address of 400 North 4th Street, Bismarck, North Dakota 58501.

On June 9, 2023, Burlington provided an excavation notice to the North Dakota One-Call Notification Center (NDOC), with a work to begin date of June 14, 2023. NDOC assigned locate ticket number 23051703 to the excavation notice which identified the address as 400 2nd Street East, Carpio, North Dakota and the type of work to be performed as “repair sewer/waterlines.”

On June 13, 2023, an MDU service technician was dispatched and determined the area was clear for excavation and marked the area clear in MDU’s one-call system.

On June 15, 2023, Burlington had a crew waiting to commence excavation. Burlington reached out to Shane Homiston, MDU Williston District Manager, to inquire regarding the locate status of one-call ticket number 23051703. Mr. Homiston informed Burlington the status of the locate request was “clear/no conflict”. MDU then began investigating why a positive response was not sent to NDOC.

On June 16, 2023, MDU discovered positive response was disconnected for the NDOC MDU06 district/registration code, which encompasses the Carpio, North Dakota area and a manual response was immediately submitted as “clear/no conflict” to NDOC. MDU believes their one-call program issue has been corrected and should function as intended in the future.

On August 16, 2023, Staff received a response from MDU providing information that MDU fulfilled the locate request; however, due to a new integration of one-call ticket management software, MDU was experiencing sporadic issues transmitting a positive response to the North Dakota One-Call Notification Center.

Having investigated the alleged violation, Staff believes MDU did not violate N.D.C.C. § 49-23-04(6)(a). However, Staff believes MDU violated N.D.C.C. § 49-23-04(6)(n) for failing to provide a positive response to NDOC for one-call ticket number 23051703.

Regarding Burlington’s request for lost time compensation, N.D.C.C. Chapter 49-23, One-Call Excavation Notice System, does not reference or provide guidelines for compensation for lost time. Furthermore, the Commission is not a court and does not award damages.

MDU 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, MDU agrees to be assessed a civil penalty of \$300. MDU agrees to remit \$300 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 MDU and Advocacy Staff filed with the Commission on November 1, 2023, is approved. A copy of the Consent Agreement is attached to and made a part of this Order on Consent Agreement (Order).
2. MDU is assessed a civil penalty of \$2,500 in Case No. PU-21-142. MDU shall remit the \$2,500 civil penalty, payable to the North Dakota Public Service Commission, within ten business days of service of this Order.
3. MDU is assessed a civil penalty of \$300 in Case No. DM-23-241. MDU shall remit the \$300 civil penalty, payable to the North Dakota Public Service Commission, within ten business days of service of this Order.
4. 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. MDU 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

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Public Service Commission
Montana-Dakota Utilities Co.
Damage Prevention Enforcement

Case No. DM-23-241

PUBLIC SERVICE COMMISSION,)	
)	
Complainant,)	
)	
vs.)	CONSENT AGREEMENT
)	
)	
Montana-Dakota Utilities Co.)	
)	
Respondent.)	

This Consent Agreement is entered into by and between Montana-Dakota Utilities Co. (MDU) and the Public Service Commission (Commission) Advocacy Staff (Staff) (together, the Parties) for resolution of Case No. DM-23-241.

Preliminary Statement

On June 26, 2023, the Commission received a North Dakota One-Call Complaint (Complaint) from Burlington Construction, LLC (Burlington). The Complaint alleges MDU violated 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. Additionally, Burlington stated their request for compensation for lost time due to Burlington having to reach out to MDU to confirm the area was clear prior to commencing excavation while having a crew onsite was denied by MDU.

On July 25, 2023, Staff sent a letter to MDU enclosing the June 26, 2023, Complaint and requested a response by August 18, 2023.

On August 16, 2023, Staff received a response from MDU providing information that MDU fulfilled the locate request; however, due to a new integration of one-call ticket management software, MDU was experiencing sporadic issues transmitting a positive response to the North Dakota One-Call Notification Center.

Discussion

On June 9, 2023, Burlington provided an excavation notice to the North Dakota One-Call Notification Center (NDOC), with a work to begin date of June 14, 2023. NDOC assigned locate ticket number 23051703 to the excavation notice which identified the address as 400 2nd Street East, Carpio, North Dakota and the type of work to be performed as "repair sewer/waterlines."

On June 13, 2023, an MDU service technician was dispatched and determined the area was clear for excavation and marked the area clear in MDU's one-call system. However, due to the previously stated issue, MDU's one-call system did not transmit a positive response to NDOC and mark the area clear/no conflict on the one-call ticket.

On June 15, 2023, Burlington had a crew waiting to commence excavation. Burlington reached out to Shane Homiston, MDU Williston District Manager, to inquire regarding the locate status of one-call ticket number 23051703. Mr. Homiston informed Burlington the status of the locate request was "clear/no conflict". MDU then began investigating why a positive response was not sent to NDOC.

On June 16, 2023, MDU discovered positive response was disconnected for the NDOC MDU06 district/registration code, which encompasses the Carpio, North Dakota

area and a manual response was immediately submitted as "clear/no conflict" to NDOC. MDU believes their one-call program issue has been corrected and should function as intended in the future.

Alleged Violation 1:

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."

Additionally, N.D.C.C. § 49-23-04(6)(n) states "An operator that has completed marking of the excavation area or has determined there are no facilities in the area identified in the ticket shall provide positive response to the notification center in compliance with the notification center's procedures established under subsection 5 for assuring positive response from operators."

Furthermore, N.D.C.C. § 49-23-01(16) states "'Positive response' means notification by the operator to the notification center that underground facilities within the area covered by a location request have been marked or cleared."

Having investigated the alleged violation, Staff believes MDU did not violate N.D.C.C. § 49-23-04(6)(a). However, Staff believes MDU violated N.D.C.C. § 49-23-04(6)(n) for failing to provide a positive response to NDOC for one-call ticket number 23051703.

Alleged Violation 2:

Operator Failed to Compensate Excavator for Lost Time

N.D.C.C. Chapter 49-23, One-Call Excavation Notice System, does not reference or provide guidelines for compensation for lost time. Furthermore, the Commission is not a court and does not award damages.

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. MDU violated N.D.C.C. § 49-23-04(6)(n) for failing to provide a positive response to NDOC for one-call ticket number 23051703.
2. MDU agrees to be assessed a civil penalty of \$300.
3. MDU agrees to remit the \$300, payable to the North Dakota Public Service Commission, within ten (10) business days of service of an Order accepting or approving the Consent Agreement.
4. 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.
5. MDU 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, MDU 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.

6. 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, MDU 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.
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 of 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 MDU and bind MDU for the purposes of this Consent Agreement and knows and fully understands the content and effect.

Dated this 1st 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 1st day of November, 2023

Montana-Dakota Utilities Co.

By: 

Travis Jacobson, Director of Regulatory Affairs