



Public Service Commission

State of North Dakota

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October 17, 2023

Mr. Steve Kahl
Executive Secretary
North Dakota Public Service Commission
600 E Boulevard Ave Dept 408
Bismarck ND 58505-0480

via Hand Delivery

Re: Case No. DM-23-279
Public Service Commission
Border States Paving, Inc.
Damage Prevention Enforcement

Dear Mr. Kahl:

Enclosed is a copy of the Consent Agreement to be filed in the above captioned case.

Best regards,

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

Brian Johnson
Legal Counsel

Enclosure

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

Public Service Commission
Border States Paving, Inc.
Damage Prevention Enforcement

Case No. DM-23-279

PUBLIC SERVICE COMMISSION,)	
)	
Complainant,)	
)	
vs.)	CONSENT AGREEMENT
)	
Border States Paving, Inc.)	
)	
Respondent.)	

This Consent Agreement is entered into by and between Border States Paving, Inc. (Border States) and the Public Service Commission (Commission) Advocacy Staff (Staff) (together, the Parties) for resolution of Case No. DM-23-279.

Preliminary Statement

On July 27, 2023, the Commission received a North Dakota One-Call Complaint (Complaint) from NuStar Energy L.P. (NuStar). The Complaint alleges Border States violated North Dakota Century Code (N.D.C.C.) § 49-23-04(1) of the One-Call Excavation Notice System by failing to provide an excavation or location notice prior to beginning excavation.

On August 2, 2023, Staff sent a letter to Border States enclosing the July 27, 2023, Complaint and requested a response by August 25, 2023.

On August 28, 2023, Staff received a response from Border States stating they do not dispute the factual basis of the claim and acknowledging that Border States conducted excavations without a valid excavation notice. Additionally, Border States stated, “a Border States Paving representative erroneously assumed the locate flags in place on a Border States project were called in under a Border States ticket and began excavation without confirming a Border States ticket number.”

Discussion

On July 21, 2023, Border States was conducting pavement repair along with manhole lid frame/ring replacement on 26th Avenue South between 32nd Street South and 25th Street South, Fargo, North Dakota. There were six work locations with each having approximately 15 square feet of seven-inch-thick asphalt removed. A NuStar locator arrived at the location and observed Border States working within 17 feet of NuStar’s 10 inch steel petroleum line. After talking with Border States, it was determined that Border States did not have a valid excavation notice. Border States stopped work until locate requests could be placed.

On July 24, 2023, Border States provided excavation notices to the North Dakota One-Call Notification Center (NDOC) with a work to begin date of July 27, 2023, at the location identified above. NDOC assigned ticket numbers 23081507, 23081508, 23081509 and 23081510 to the excavation.

Alleged Violation – Excavator Failed to Provide Locate Notice Prior to Beginning Excavation

N.D.C.C. § 49-23-04(1) states 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.

Having investigated the alleged violation, Staff believes that Border States violated N.D.C.C. § 49-23-04(1) by starting an excavation prior to placing a locate notice.

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. Border States violated N.D.C.C. § 49-23-04(1) of the One-Call Excavation Notice System by failing to provide an excavation or location notice prior to beginning excavation.
2. Border States agrees to be assessed a civil penalty of \$500.
3. Border States agrees to remit \$250 of the \$500, 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 \$250 civil penalty is suspended on the condition that Border States 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 Border States violated N.D.C.C. Chapter 49-23 within five (5) years of the date of the Order, Border States 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 Border States, the remaining \$250 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. Border States 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, Border States 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, Border States 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 Border States and bind Border States for the purposes of this Consent Agreement and knows and fully understands the content and effect.

Dated this 17th day of October, 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 11th day of October, 2023

Border States Paving, Inc.

By:  _____

Korey Bender, President