

# COMPLAINT OC04-062A & OC04-002B

Complaint filed against Prairie Hills Construction by Golden West Telecommunications

This complaint involves two alleged violations:

- A. SDCL 49-7A-5 failure to provide proper notification of proposed excavation
- B. SDCL 49-7A-12 Failure to provide notification of damage to underground facility

## COMPLAINT OC04-002A

**Legal Reference: Specific language related to this complaint noted in bold**

### § 49-7A-5. Notification of proposed excavation.

No excavator may begin any excavation without first notifying the one-call notification center of the proposed excavation. **The excavator shall give notice by telephone, facsimile, in person, or by other methods approved by the board pursuant to rules promulgated pursuant to chapter 1-26 to the one-call notification center at least forty-eight hours prior to the commencement of the excavation, excluding Saturdays, Sundays, and legal holidays of the state,** but not more than ten business days prior to any excavation. The board may promulgate rules to reduce the forty-eight-hour interval for emergency or subsequent inquiries to the original locate request and may lengthen the forty-eight-hour interval for nonexcavation requests. Legal statute for committee review process.

**§ 49-7A-1. Definition of terms.** (3) "Excavation," any operation in which earth, rock, or other material in or on the ground is moved or otherwise displaced by means of tools, equipment, or explosives, and includes grading, trenching, digging, ditching, drilling, augering, tunneling, scraping, and cable or pipe plowing or driving...

### Probable Cause Determination

**§ 49-7A-25. Complaint, answer to be sole basis for probable cause determination.** A determination of probable cause shall be made by the panel solely on these submissions and no other evidence shall be considered

**Note:** Only comments related to these issues should be taken into consideration, other unsubstantiated comments should not be considered

1. To determine probable cause, after reviewing relevant material, the following questions need to be answered.
  - a. Did excavation activity commence without notification being made to the South Dakota One Call Center?
    - i. If after reviewing the material, you answer in the affirmative, you would then need to answer question 3.
    - ii. If you answer in the negative, you should go to item 2 below.
2. If no probable cause is determined, this complaint will be sent to the involved parties with the determination and reason for the determination. **Formal motion to dismiss is required for dismissal of alleged violations**
3. If probable cause is determined, the committee must determine if the penalty should be assessed under SDCL 49-7A-18 or SDCL 49-7A-19. **Formal motion is required to establish that there is probable cause that the alleged violations occurred.**

## **Penalty Determination – applicable if probable cause is determined**

**§ 49-7A-18. Penalties.** Except as provided in §49-7A-19 and in addition to all other penalties provided by law, any person who violates or who procures, aids, or abets in the violation of §49-7A-2, 49-7A-5, 49-7A-8, or 49-7A-12, or any rules promulgated pursuant to §49-7A-2, 49-7A-5, or 49-7A-8 may be assessed a penalty of up to one thousand dollars for the first violation and up to five thousand dollars for each subsequent violation that occurs within twelve months of the initial violation.

**§ 49-7A-26. Factors considered in determining amount of penalty.** The amount of recommended penalty shall be determined by a majority vote of the panel. Factors to be considered in determining the amount of the penalty shall be:

1. The amount of damage, degree of threat to the public safety, and inconvenience caused;
2. The respondent's plans and procedures to insure future compliance with statute and rules;
3. Any history of previous violations;
4. Other matters as justice requires.

You may also reference the attached spreadsheet for a precedent of similar violations.

**Formal Motion is required to establish penalty:**

# COMPLAINT OC04-002B

## Legal Reference: Specific language related to this complaint

### § 49-7A-12 Notification of damage to underground facility -- Civil penalty.

If any underground facility is damaged, dislocated, or disturbed in advance of or during excavation work, the excavator shall immediately notify the operator of the facility, or, if unknown, the one-call notification center of such damage, dislocation, or disturbance. No excavator may conceal or attempt to conceal such damage, dislocation, or disturbance, nor may that excavator attempt to make repairs to the facility unless authorized by the operator of the facility.

**§ 49-7A-25. Complaint, answer to be sole basis for probable cause determination.** A determination of probable cause shall be made by the panel solely on these submissions and no other evidence shall be considered

**Note:** Only comments related to these issues should be taken into consideration, other unsubstantiated comments should not be considered

1. To determine probable cause, after reviewing relevant material, the following questions need to be answered.
  - a. Did excavation activity damage the underground facility of GoldenWest Telecommunications?
    - i. If after reviewing the material, you answer in the affirmative, you would then need to answer question b.
    - ii. If you answer in the negative, you should go to item 2 below.
  - b. Did the excavator know that the damage had occurred and fail to report the damage to GoldenWest Telecommunications and/or the South Dakota One Call Center?
    - i. If after reviewing the material, you answer in the affirmative, you would then need to answer question b.
    - ii. If you answer in the negative, you should go to item 2 below
2. If no probable cause is determined, this complaint will be sent to the involved parties with the determination and reason for the determination. **Formal motion to dismiss is required for dismissal of alleged violations**
3. If probable cause is determined, the committee must determine if the penalty should be assessed under SDCL 49-7A-18 or SDCL 49-7A-19. **Formal motion is required to establish that there is probable cause that the alleged violations occurred.**

If probable cause is found, follow the same guidelines a previously noted in OC04-002A