BEFORE THE SOUTH DAKOTA ONE CALL NOTIFICATION BOARD

IN THE MATTER OF THE COMPLAINT FILED BY MONTANA-DAKOTA UTILITIES CO. AGAINST RCS CONSTRUCTION, RAPID CITY, SOUTH DAKOTA FOR AN INCIDENT OCCURING ON MARCH 25, 2012	) ENFORCEMENT PANEL) RECOMMENDATION TO) THE SD ONE CALL BOARD,)) OC12-007

On May 16, 2012 the South Dakota Public Utilities Commission received a complaint from Montana-Dakota Utilities Co. (herein "MDU") against RCS Construction of Rapid City, South Dakota. The complaint alleges RCS Construction performed excavation without valid locates.

A copy of the complaint was sent to RCS Construction on May 18, 2012. RCS Construction responded to the Complaint on June 4, 2012. In its response RCS Construction admits it was excavating under a prior ticket.

On June 18, 2012, pursuant to SDCL 49-7A-22 a panel of five One Call Board members (herein "Panel") convened. The Panel met to determine whether probable cause exists to believe the violation occurred as described in the complaint. The Panel found sufficient evidence was presented to determine probable cause exists to believe a violation of SDCL 49-7A-5 occurred. Specifically, the Panel found RCS Construction failed to have facilities marked and to wait the requisite time prior to excavation. The Panel did not find the violation intentional.

The Panel found it proper to assess a One Thousand Dollar ($1,000) penalty. The penalty recommendation is based on the respondent's failure to articulate a plan to prevent future violations. The Panel found it proper to conditionally suspend Seven Hundred Fifty Dollars ($750) of the penalty under the following conditions:

(i) RCS Construction shall make payment of the **Two Hundred Fifty Dollar ($250) unsuspended portion** of the penalty within thirty days of issuance of the final SD One Call Board Order.

(ii) RCS Construction must not be found guilty of a One Call violation in the next 12 months.

(iii) RCS Construction shall attend an excavator meeting put on by the SD One Call Board in the spring of 2013.

If any of the conditions are not met, the entire One Thousand Dollar Penalty ($1,000) will be immediately due and owing.

The Panel recommends the South Dakota One Call Board accept its findings and recommendations herein. If either party to this Complaint disagrees or objects to the recommendations or findings herein, a hearing may be requested. To request a hearing

you must reply within twenty days from the date of service of this notice. Failure to request a hearing is considered acceptance of the recommendations and findings herein.

The South Dakota One-Call Notification Board has jurisdiction in this matter pursuant to SDCL Chapters 1-26 and 49-7A and ARSD 20:25.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile by first class mail, or by other electronic means.

Larry L. Janes, Executive Director

Date June 18, 2012

REQUEST FOR A HEARING
COMPLAINT OC12-007

I REJECT THE COMMITTEE RESOLUTION TO COMPLAINT OC12-007 AND REQUEST A HEARING.

_____ _____

Signature – RCS Construction **Date**

I REJECT THE COMMITTEE RESOLUTION TO COMPLAINT OC12-007 AND REQUEST A HEARING.

_____ _____

Signature – Montana-Dakota Utilities Co. **Date**

<u>YOUR REQUEST FOR A HEARING MUST BE SENT TO ALL OTHER PARTIES INCLUDING:</u>

SOUTH DAKOTA ONE CALL NOTIFICATION BOARD
C/O SOUTH DAKOTA PUBLIC UTILITIES COMMISSION
500 E. CAPITOL AVE.
PIERRE, SD 57501-5070

Failure to request a hearing, results in acceptance of the Enforcement Committee's recommendation. In that case, the One Call Board will Order the recommendation as the final disposition of this Complaint.

MINUTES
SOUTH DAKOTA ONE CALL NOTIFICATION BOARD
ENFORCEMENT PANEL CONFERENCE CALL
June 18, 2012, 10 AM Central Time, 9 AM Mountain Time

Roll Call:

Enforcement Panel Members in attendance: **John Ward**; **Erin Hayes; Todd Chambers; Dan Kaiser; Doug Larson**; Legal Counsel, Kara Semmler; Executive Director, Larry Janes.

Also in attendance:
Bob Scull, RCS Construction
Ron Blum, Montana-Dakota Utilities Co.

Order of Business:

Larry Janes provided a brief description of the Enforcement Panel process, including that this is a legal proceeding and that no comments by either party may be taken during this call. The determination of whether probable cause exists that a violation of South Dakota One Call laws may have, or may not have, occurred will only be made after consideration of the written documentation provided in the complaint and by the rebuttal information received from the defendant. Both parties will be provided the Panel's recommendation in writing. Each party will be given the opportunity to request a hearing before the full South Dakota One Call Notification Board, if either disagrees with the recommendation of the Panel. The request must be received within 20 days of issuance of the recommendation. If a hearing is not requested, the Enforcement Panel recommendation will be presented to the South Dakota One Call Board of Directors for acceptance at the next Board Meeting. A final Order will then be mailed to each party. If a penalty amount is assessed, payment must be made within 30 days of the issuance of the Order.

In the matter before the South Dakota One Call Notification Board Enforcement Panel

OC12-006 In the Matter of the Complaint filed by the City of Pierre, SD against Sharpe Enterprises, Inc. On May 3, 2012 the City of Pierre, SD (herein "Pierre") filed a South Dakota One Call Complaint alleging that Sharpe Enterprises, Inc. (herein "Sharpe") started work on May 2, 2012 at 8 am at 3800 Airport Road prior to the start date on the locate ticket. The complaint also alleges that all utilities had not been located and that work was being done using old marks under an expired ticket. Sharpe responded to the Complaint on June 6, 2012, after the Enforcement Panel Agenda was posted. In its response Sharpe stated Mr. Diez, Sharpe foreman, showed Mr. Patton, Pierre, where facilities had to be pot holed on-site. Sharpe provided pictures of as-built drawings with their response, as well as the water line that was being lowered, and stated the Pierre did not discuss a probable violation with them. Pierre provided a locate ticket number in the Complaint, however neither party produced a copy of a locate ticket as evidence.

Larry Janes stated there have been no South Dakota One Call Complaints filed against Sharpe within the last twelve months. The only previous complaint was filed in 2009.

Today, shall the Enforcement Panel of the South Dakota One Call Notification Board find that there is probable cause that Sharpe violated any statute or rule under the jurisdiction of the Board, and if so was the alleged violation unintentional or intentional, and if so shall a civil penalty be assessed?

Dan Kaiser asked if the previous Complaint filed against Sharpe was between SDN Communications and Sharpe. Larry Janes stated it was, but it was settled between the parties. Dan Kaiser mentioned that the response from Sharpe did not arrive by the required date and asked if we had to accept the response. Kara Semmler mentioned that the Panel could refuse to accept the response, but it would then be setting precedent for future Enforcement Panels. She went on to state accepting or rejecting the response is up to Panel discretion. Erin Hayes stated there was no damage according to the Complaint. Todd Chambers mentioned the Complaint stated that work was being done using old marks on an expired ticket. Erin Hayes questioned if there was enough evidence provided in the Complaint to find probable cause. Dan Kaiser made a motion to not accept Sharpe's response due to it being received late. Erin Hayes seconded the motion. A roll call vote was taken. Erin Hayes and Dan Kaiser voted in favor to not accept the response. John Ward, Todd Chambers, and Doug Larson voted against the motion. **Motion failed upon a roll call vote.** Todd Chambers then made a motion to dismiss Complaint OC12-006 due to a lack of evidence. Doug Larson seconded the motion. John Ward, Erin Hayes, Todd Chambers, and Doug Larson voted in favor of the motion. Dan Kaiser voted against the motion. **Motion carried upon a roll call vote.**

OC12-007 In the Matter of the Complaint filed by Montana-Dakota Utilities Co., against RCS Construction On May 16, 2012, Montana-Dakota Utilities Co. (herein "MDU") filed a South Dakota One Call Complaint alleging that RCS Construction (herein "RCS") did not have valid locates at 3936 Canyon Lake Drive, Rapid City, SD, when working on March 25, 2012. RCS responded on June 4, 2012 that the line had been previously marked and the marks were still visible. RCS also provided a copy of locate request 120830288 prepared at 13:32 on March 23, 2012 and stated it had not been cleared before digging commenced on March 24, 2012. RCS further stated that it appeared they pinched an unknown service line placed between the time of the original mark and the new ones and was 12" deep. A picture indicating the route of the old steel main and the new service line was provided. The MDU bill has been paid.

Larry Janes stated there have been no previous South Dakota One Call Complaints filed against RCS.

Today, shall the Enforcement Panel of the South Dakota One Call Notification Board find that there is probable cause that RCS violated any statute or rule under the jurisdiction of the Board, and if so was the alleged violation unintentional or intentional, and if so shall a civil penalty be assessed?

Dan Kaiser mentioned the RCS stated in its response that a locate ticket was prepared on March 23rd, and that digging commenced on March 24, 2012, and that marks from a previous ticket were still visible. Dan stated he felt that RCS jumped the gun by digging before the new locate ticket was cleared. Todd Chambers stated it was not made clear if a previous locate ticket had actually been made or by whom. Dan Kaiser made a motion that there is probable cause that a violation of SDCL 49-7A-5 occurred. Todd Chambers seconded the motion. **Motion carried unanimously upon a roll call vote.**

Discussion moved to intent. John Ward felt that curb was being removed and that this was an unintentional violation. He then made a motion stating the same. Dan Kaiser seconded the motion. **Motion carried unanimously upon a roll call vote.**

Discussion then moved to the penalty phase. Kara Semmler stated the factors noted in SDCL 49-7A-26 which must be taken into consideration in determining the amount of penalty shall be:

1. The amount of damage, degree of threat to 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.

Kara Semmler went on to say that per SDCL 49-7A-18, a penalty amount of up to $1,000 may be assessed for a first violation.

Erin Hayes stated that even placing 18" stakes when placing new curb can cause damage and injury. Todd Chambers stated that it appeared RCS was using good placing techniques by hand digging, but that a ticket should have been called in. Todd Chambers made a motion that a penalty be assessed to RCS of $1,000, with $750 suspended, if there are no further violations within the next twelve months, if the penalty is paid within 30 days of the final Order, and if a representative attend a South Dakota One Call Spring Meeting. Doug Larson seconded. There was no further discussion. **Motion carried unanimously upon a roll call vote.**

Larry Janes asked if there was any further discussion. Upon being none, he asked for a motion to adjourn. Erin Hayes so moved. Todd Chambers seconded. **Motion carried unanimously on a Roll Call vote.**

Meeting Adjourned

Minutes of this meeting were prepared by Larry Janes, Executive Director, South Dakota One Call Notification Board.