BEFORE THE SOUTH DAKOTA ONE CALL NOTIFICATION BOARD

IN THE MATTER OF THE COMPLAINT FILED BY TM RURAL WATER DISTRICT AGAINST MP NEXLEVEL, LLC FOR AN INCIDENT OCCURING ON JULY 26, 2012 IN SALEM, SOUTH DAKOTA	) ENFORCEMENT PANEL) RECOMMENDATION TO) THE SD ONE CALL BOARD))) OC12-014

On August 2, 2012 the South Dakota Public Utilities Commission received a complaint from TM Rural Water District (herein "TM") of Parker, SD against MP Nexlevel, LLC (herein "Nexlevel") of Maple Lake, MN. The complaint alleges Nexlevel performed excavation outside the ticket area.

A copy of the complaint was sent to Nexlevel on August 3, 2012. Nexlevel responded to the Complaint on August 20, 2012. In its response Nexlevel acknowledged their error and stated the steps taken to prevent a violation in the future.

On August 29, 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 57-7A-5 occurred. Specifically, the Panel found Nexlevel performed excavation outside the ticket area. Based on evidence in the Complaint, the Panel found the violation to be intentional.

The Panel found it proper to assess a One Thousand Dollar ($1,000) penalty but found it proper to conditionally suspend Five Hundred Dollars ($500) of the penalty because there have not been any prior complaints against Nexlevel and the company took steps to prevent future violations.

The suspension conditions are as follows:

(i) Nexlevel shall make payment of the **Five Hundred Dollar ($500) unsuspended portion** of the penalty within thirty days of issuance of the final SD One Call Board Order.

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

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 8-31-2012

REQUEST FOR A HEARING
COMPLAINT OC12-014

I REJECT THE COMMITTEE RESOLUTION TO COMPLAINT OC12-014 AND REQUEST A HEARING.

_____ _____

Signature – MPNEXLEVEL **Date**

I REJECT THE COMMITTEE RESOLUTION TO COMPLAINT OC12-014 AND REQUEST A HEARING.

_____ _____

Signature – TM Rural Water District **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.

MINUTES
SOUTH DAKOTA ONE CALL NOTIFICATION BOARD
ENFORCEMENT PANEL CONFERENCE CALL
August 29, 2012, 9:30 AM Central Time, 8:30 AM Mountain Time

Roll Call:

Enforcement Panel Members in attendance: Kurt Pfeifle; Erin Hayes; Dan Kaiser; Gene Solseth; John Ward; Legal Counsel, Kara Semmler; Executive Director, Larry Janes.

Also in attendance:

Todd Chambers, Watertown Municipal Utilities
Jay Jorgensen, TM Rural Water District
Lynnea Sjoquist, MP Nexlevel, LLC

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

OC12-011 - In the Matter of the Complaint Filed by Northern Natural Gas Company, Harrisburg, South Dakota, Against John Wellnitz, Yale, South Dakota, for an Incident Occurring on July 12, 2012, in Yale, South Dakota. On July 17, 2012, Northern Natural Gas company filed a complaint against John Wellnitz, alleging that Mr. Wellnitz damaged a high pressure natural gas line while excavating without a locate ticket. Mr. Wellnitz responded on August 1, 2012 that he was not aware of the law to call 811 before digging. He stated that he has now read the handbook sent to him and has placed visual reminders on his equipment in order to avoid future incidents. Larry Janes stated there have been no previous complaints filed against Mr. Wellnitz.

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

Panel Discussion: Dan Kaiser stated he had a hard time believing that someone starting an excavation business would not know the requirement to call for locates before digging. John Ward stated not knowing can't be considered as part of the consideration today. Dan agreed.

Dan Kaiser made a motion that probable cause exists that Mr. Wellnitz violated South Dakota One Call law by not calling for a locate ticket before excavating. Kurt Pfeifle seconded the motion. **Motion carried unanimously upon a roll call vote.**

Kurt Pfeifle stated that not knowing the law is no excuse for breaking the law. He went on to state that he believed the violation was unintentional and made a motion stating the same. Dan Kaiser seconded the motion. **Motion carried unanimously upon a roll call vote.**

Dan Kaiser stated that safety, even though it was only Mr. Wellnitz's safety in this instance, had to be considered when determining a penalty amount. Kara Semmler stated the four 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 also stated that per SDCL 49-7A-18, a penalty amount of up to $1,000 may be assessed for a first violation.

Dan Kaiser made a motion to assign a penalty amount of $200 if there are no further violations within one year of the final Order, if the penalty amount is paid within thirty days of the Order, and if Mr. Wellnitz attends a Spring Excavator meeting in 2013. Erin Hayes seconded the motion. After further discussion by John Ward regarding consistency in penalties, Dan Kaiser amended his motion to assign a penalty of $1,000 with $500 suspended, along with the stipulations earlier mentioned. Erin Hayes seconded the amended motion. **Motion carried unanimously upon a roll call vote.**

OC12-012 - In the Matter of the Complaint Filed by Watertown Municipal Utilities, Watertown, South Dakota, Against Stromseth Construction, Watertown, South Dakota, for an Incident Occurring on July 28, 2012, in Watertown, South Dakota. On July 31, 2012, Watertown Municipal Utilities filed a complaint against Stromseth Construction alleging that Stromseth Construction damaged a natural gas line while digging without a locate ticket in company name and not exposing a facility in a manner that does not damage a facility. Larry Janes stated that Stromseth Construction did not respond to the complaint, which is considered an admission of guilt. He went on to state that there have been previous complaints filed against Stromseth Construction in 2007 and 2010.

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

This Complaint Docket generated a lot of discussion around Stromseth Construction's continued disregard to adherence of South Dakota One Call laws and rules by receiving multiple One Call Complaints, and the apparent disregard of safety to themselves and others, by allegedly continuing to dig after a gas line was damaged. Kara Semmler mentioned 49-7A-5, which states that no excavator may begin any excavation without first notifying the one-call notification center of the proposed

excavation. Dan Kaiser brought up a discussion of 49-7A-20 which states "each violation constitutes a separate offense. In the case of a continuing violation, each day that the violation continues constitutes a separate violation". The question was raised if previous complaints could be considered when deciding this complaint. Kara Semmler stated that previous complaints can considered during the penalty phase of a complaint.

Erin Hayes made a motion stating there is probable cause that a violation of 49-7A-5 did occur on Saturday, July 28, 2012 and continued on Sunday, July 29, 2012. John Ward seconded the motion. There was no further discussion. **Motion carried unanimously upon a roll call vote.**

Dan Kaiser made a motion stating the violation was intentional. Erin Hayes seconded the motion. There was no further discussion. **Motion carried unanimously upon a roll call vote.**

Gene Solseth made a motion to assess a $5,000 penalty and suspend $2,500 for violating 49-7A-5, by digging on Saturday, July 28, 2012. Stromseth Construction must make the payment within 30 days of the final Order, must not violate any one call laws within 12 months of the final order, must attend a Spring Excavator Meeting, and must conduct an in-house, documented gas safety meeting within 30 days of the final Order. Documentation of the meeting shall include the printed and signed names of the meeting participants, details of the material discussed, along with the date and length of the meeting. This documentation shall be submitted to the Executive Director of South Dakota One Call. Erin Hayes seconded the motion. **Motion carried unanimously upon a roll call vote.**

Dan Kaiser made a motion that a $5,000 penalty be assessed with $0 suspended for the violation of 49-7A-5 on Sunday, July 28, 2012. Erin Hayes seconded the motion. **A roll call vote was taken with Kurt Pfeifle, Erin Hayes, Dan Kaiser, and John Ward voting in favor of the motion. Gene Solseth opposed the motion.**

Erin Hayes stated that Administrative Rule 20:25:03:05.03, excavator responsibilities when excavating near markings, was clearly violated on Saturday, July 27, 2012. Dan Kaiser made a motion stating that there is probable cause that a violation of 20:25:03:05.03 was violated. Erin Hayes seconded. **Motion carried unanimously upon a roll call vote.**

Dan Kaiser made a motion that the violation of 20:25:03:05.03 was intentional. Gene Solseth seconded the motion. There was no additional discussion. **Motion carried unanimously upon a roll call vote.**

Kara Semmler stated that per 49-7A-19, an intentional violation could be assessed an amount of $5,000 for the first violation. Erin Hayes made a motion to require a penalty payment of $5,000 with $0 suspended. Kurt Pfeifle seconded the motion. There was no further discussion. **Motion carried unanimously upon a roll call vote.**

OC12-013 - In the Matter of the Complaint Filed by TM Rural Water District, Parker, South Dakota, Against MP Nexlevel, LLC, Maple Lake, Minnesota, for an Incident Occurring on July 24, 2012, in RuralSalem, South Dakota. On August 2, 2012, TM Rural Water District filed a complaint against MP Nexlevel, LLC, alleging that MP Nexlevel did not follow the 18 inch minimum clearance rule by hand digging and damaged a 5 inch rural water main. MP Nexlevel LLC responded on August 20, 2012 stating that they were under the impression that the locate flags were bowed out about 3 feet. Larry Janes

stated there have been no previous complaints brought against MP Nexlevel LLC prior to the complaint dockets being discussed today.

Today, shall the Enforcement Panel of the South Dakota One Call Notification Board find that there is probable cause that MP Nexlevel, LLC violated any statute or rule under the jurisdiction of the Board, and if so shall a civil penalty be assessed?

Kurt Pfeifle made a motion that there is probable cause that MP Nexlevel, LLC violated Administrative Rule 20:25:03:05.03 by digging with excavation equipment near a buried facility. Erin Hayes seconded. There was no further discussion. **Motion carried unanimously upon a roll call vote.**

Kurt Pfeifle made a motion stating that this violation was unintentional. Erin Hayes seconded the motion. No additional discussion took place. **Motion carried unanimously upon a roll call vote.**

Kurt Pfeifle made a motion to assign a penalty amount of $1,000 with $500 suspended, if there are no further violations within twelve months, if the penalty is paid within 30 days of the final Order, and if future work will be performed in South Dakota, a representative of MP Nexlevel must attend a 2013 Spring Excavator meeting. If MP Nexlevel does not intend to do further work in South Dakota, it must notify the Executive director. Erin Hayes seconded the motion. **Motion carried unanimously upon a roll call vote.**

OC12-014 - In the Matter of the Complaint Filed by TM Rural Water District, Parker, South Dakota, Against MP Nexlevel, LLC, Maple Lake, Minnesota, for an Incident Occurring on July 26, 2012, in Rural Salem, South Dakota. On August 2, 2012 TM Rural Water District filed a complaint against MP Nexlevel LLC alleging that MP Nexlevel LLC excavated on private right-of-way outside the area described on the locate ticket, therefore not having a valid locate at the site of the damaged 2 inch rural water line. MP Nexlevel responded on August 20, 2012 stating that once the route changed they should have called in an amended ticket.

Today, shall the Enforcement Panel of the South Dakota One Call Notification Board find that there is probable cause that MP Nexlevel, LLC. violated any statute or rule under the jurisdiction of the Board, and if so shall a civil penalty be assessed?

Kurt Pfeifle made a motion that there is probable cause that a violation of 49-7A-5 occurred. Dan Kaiser seconded the motion. There was no further discussion. **Motion carried unanimously upon a roll call vote.**

Kurt Pfeifle made a motion stating that this violation was unintentional. Gene Solseth seconded the motion. John Ward stated that there was a valid ticket on one, but not on this, so it had to be intentional. Kurt Pfeifle withdrew his motion. John Ward made a motion stating the violation was intentional. Dan Kaiser seconded the motion. There was no further discussion. **A roll call vote was taken. Erin Hayes, Dan Kaiser, Gene Solseth, and John Ward voted in favor of the motion. Kurt Pfeifle voted against.**

John Ward went on to make a motion to assess a penalty of $1,000 with $500 suspended. Dan Kaiser seconded the motion. Kurt Pfeifle stated he agreed with the penalty, although he didn't think it was the

company's intention to violate the law. That intention was made by an employee. **Motion carried unanimously upon a roll call vote.**

OC12-015 - In the Matter of the Complaint Filed by TM Rural Water District, Parker, South Dakota, Against MP Nexlevel, LLC, Maple Lake, Minnesota, for an Incident Occurring on August 1, 2012, in Rural Salem, South Dakota. On August 2, 2012 TM Rural Water District filed a complaint against MP Nexlevel LLC alleging that MP Nexlevel LLC drove over and damaged a water valve riser and clean out. MP Nexlevel LLC responded on August 20, 2012, stating the valve was not identified with a marker, therefore MP Nexlevel LLC is not responsible for the damage.

Today, shall the Enforcement Panel of the South Dakota One Call Notification Board find that there is probable cause that MP Nexlevel, LLC. violated any statute or rule under the jurisdiction of the Board, and if so shall a civil penalty be assessed?

Kurt Pfeifle asked what violation would apply to this complaint. John Ward agreed there was no violation. Gene Solseth mentioned the locates were completed. John stated there should have been a marker to indicate the riser valve. Erin Hayes re-stated the complaint and noted the flags were rusty and TM Rural Water could not remember a locate ticket. Kara Semmler stated Section IV of the complaint where it was stated the markings were complete prior to the start time on the ticket, and the facility was marked accurately. Gene Solseth made a motion to dismiss the complaint due to lack of probable cause. He cited the lack of clarity in the complaint. John Ward seconded the motion. **Motion carried unanimously upon a roll call vote.**

With the completion of the last complaint docket, Larry Janes asked for a motion to adjourn. Erin Hayes so moved. Kurt Pfeifle seconded the motion. **Motion carried unanimously upon a Roll Call vote. Meeting Adjourned**

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