

MINUTES

South Dakota One Call Notification Board Enforcement Panel Conference Call

Thursday, July 22, 2021 at 2:00PM CT (1:00 PM MT)

Panel Members: Fay Jandreau, Steve Mohr, Lloyd Rave

Also in attendance: Cody Honeywell, Legal Counsel; Larry Janes, Executive Director; Codi Gregg, Deputy Director

Guests in attendance: Mark Patterson, SDREA; Don Bohle, MDU; Cassandra Russell, NorthWestern Energy; Joe Muth, CenturyLink; Nick Winter, Winter Contracting

A brief description of the Enforcement Panel process: This was a legal proceeding and no comments were taken by any of the parties involved in the Complaints during this call. A probable cause determination was made based only on the written documentation received from the parties in the complaints. All parties will be given the opportunity to request a hearing before the full South Dakota One Call Notification Board, if there is disagreement with the recommendation of the Panel. If a hearing is requested, each party must be represented by legal counsel at the hearing. 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 Board Order will be mailed to each party after that Board Meeting. Please note, no payment is due until the final order is issued.

Factors to be considered in determining the amount of the penalty, if assessed shall be:

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

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-19. Penalties for intentional violations. In addition to all other penalties provided by law, any person who intentionally violates or who intentionally 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 five thousand dollars for the first violation and up to ten thousand dollars for each subsequent violation that occurs within twelve months of the initial violation.**

49-7A-20. Each violation as separate offense. **Each violation of any statute or rule of the Statewide One-Call Notification Board constitutes a separate offense. In the case of a continuing violation, each day that the violation continues constitutes a separate violation.**

The Enforcement Panel of the South Dakota One Call Notification Board met to consider the following South Dakota One Call Complaints:

OC21-005 In the Matter of the Complaint filed by NorthWestern Energy (NorthWestern) Huron, South Dakota against MP NexLevel, LLC. (MP), Maple Lake, Minnesota for an incident occurring on May 20, 2021 at 20 North 5th Street, Groton, South Dakota.

Deadline to Respond was June 28, 2021. No response has been received as of July 15, 2021.

There is previous history with MP NexLevel from 2012.

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

Discussion was opened with the Panel by Fay Jandreau regarding contracted work between Venture Communications and MP NexLevel. As Venture Communications has a contract with MP NexLevel, Fay Jandreau asked the Panel if they believed a conflict of interest would exist if he participated in the conversation. The Panel did not believe a conflict of interest existed.

The Panel continued discussion on the complaint. There was no response received from MP NexLevel. Steve Mohr asked for clarification on the photos supplied, whether these photos were taken after the damage was repaired. It was assumed the photos were after repairs.

Lloyd Rave stated that probable cause did exist in the violations of 49-7A-5 as the ticket was expired and two violations of 49-7A-12 for not calling 811 and not calling 911. The complaint states that 911 was not contacted as there was a minimal amount of escape before the line was squeezed off. South Dakota 811 does not endorse this practice in any way. It is unclear who squeezed off the service. If damage occurs, the utility should be the ONLY entity to shut down, shut off, repair, or further disturb a line. Squeezing off services is a dangerous practice to get in the habit of doing.

Fay Jandreau made the motion that probable cause did exist in the violation of 49-7A-5 and 49-7A-12 and the violations were unintentional. Fay Jandreau recommended a penalty in the amount of \$1,000 with \$750 suspended in the violation of 49-7A-5 and recommended a penalty in the amount of \$1,000 with \$500 suspended in the violation of 49-7A-12 for a total of \$2,000 with \$1,250 suspended with MP NexLevel meets the requirements as listed below:

1. Respondent must not be found guilty of a One Call violation within 12 months of the Board Order,
2. The penalty payment must be made within 30 days of the Board Order,
3. Respondent must attend a Damage Prevention meeting in 2022.
4. Respondent must conduct an in-house safety meeting to discuss South Dakota One Call laws. Detail of the discussion material, date and length of the meeting along with printed and signed names of attendees will be submitted to the Executive Director of South Dakota One Call within 30 days of the Board Order.
5. Respondent will arrange a face to face meeting with claimant to review the damage, dangers while working around utilities and safe practices. This meeting is to take place within 30 days of the Board Order being issued.

Steve Mohr seconded the motion. **Motion carried unanimously upon a roll call vote.**

OC21-006 - In the Matter of the Complaint filed by NorthWestern Energy (NorthWestern) Huron, South Dakota against MP NexLevel, LLC. (MP), Maple Lake, Minnesota for an incident occurring on May 20, 2021 at 401 East 5th Avenue, Groton, South Dakota.

Deadline to Respond was June 28, 2021. No response has been received as of July 15, 2021.

There is previous history with MP NexLevel from 2012.

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

Lloyd Rave opened discussion on the complaint, believing probable cause existed as it looks like MP NexLevel switched the sides on the alleyway which was not included in the locate. Locate said the west side, out of the work zone. Steve Mohr stated in reviewing the photos, you can see potholing was done in the second photo and was not clear on how the damage occurred. Moving across the road was questionable, a new ticket should have been submitted.

Fay Jandreau made the motion that probable cause exists in the violation of 49-7A-5 and 49-7A-12 and the violations were unintentional. Fay recommended a penalty in the amount of \$1,000 with \$250 suspended in the violation of 49-7A-5, and recommended a penalty in the amount of \$1,000 with \$500 suspended in the violation of 49-7A-12 for a total of \$2,000 with \$750 suspended with MP NexLevel meeting the requirements as listed below:

1. Respondent must not be found guilty of a One Call violation within 12 months of the Board Order,
2. The penalty payment must be made within 30 days of the Board Order,
3. Respondent must attend a Damage Prevention meeting in 2022.
4. Respondent must conduct an in-house safety meeting to discuss South Dakota One Call laws. Detail of the discussion material, date and length of the meeting along with printed and signed names of attendees will be submitted to the Executive Director of South Dakota One Call within 30 days of the Board Order.
5. Respondent will arrange a face to face meeting with claimant to review the damage, dangers while working around utilities and safe practices. This meeting is to take place within 30 days of the Board Order being issued.

Lloyd Rave seconded the motion. **Motion carried unanimously upon a roll call vote.**

OC21-007 In the Matter of the Complaint filed by CenturyLink (CenturyLink) Sioux Falls, South Dakota against Winter Contracting (Winter), Volga, South Dakota for an incident occurring on June 8, 2021 at 33rd Street and Minnesota Avenue in Sioux Falls, South Dakota.

Deadline to Respond was July 8, 2021. Response was received on July 8, 2021.

There is no previous history with Winter Contracting.

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

The Panel opened discussion on this complaint, there is a lot happening in this complaint. The amount of damage and the disregard to the utilities is concerning.

Steve Mohr stated the photos in the complaint do not show if the locates were completed and lead to more questions than answers. Fay Jandreau commented he agreed, what was not said in the documentation? There is cause to believe the locates weren't performed but the contractor was advised of the utilities.

On the response, there was a locate ticket identified but not submitted. Both forms state to submit the locate ticket. The Panel does not have the authority to seek out documentation, it has to be provided. A verification should have been called in by the excavator prior to work starting.

Lloyd Rave made the motion to defer this complaint, and have both complainant and respondent submit more information. Fay Jandreau seconded the motion. **Motion carried unanimously upon a roll call vote.**

A letter requesting further documentation will be sent to both parties, with a deadline for the information to be received by Codi Gregg and Larry Janes. The complaint will then be reviewed with the Panel on September 23, 2021.

OC21-008 In the Matter of the Complaint filed by Montana Dakota Utilities (MDU) Mobridge, South Dakota against Anderson Contractors, Inc. (Anderson), Pierre, South Dakota for an incident occurring on June 8, 2021 at 500 Pleasant in Pierre, South Dakota.

Deadline to Respond was July 20, 2021. No response has been received as of July 15, 2021.

There is no previous history with Anderson Contractors, Inc.

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

Steve Mohr opened discussion on the complaint stating no statute violations were listed. The Enforcement Panel does not have the authority to assign violations in a complaint. 49-7A-10 does state that an excavator is to act in a careful and prudent manner.

Lloyd Rave made the motion to dismiss the complaint, allowing MDU to refile the complaint with statute violations included under 49-7A-21, allowing for 90 days after that date of discovery for a complaint to be filed. Fay Jandreau seconded the motion to dismiss. **Motion carried unanimously upon a roll call vote.** If the complaint is refiled, this will be not be considered a second offense and considered new.

OC21-009 In the Matter of the Complaint filed by Montana Dakota Utilities (MDU) Mobridge, South Dakota against Anderson Contractors, Inc. (Anderson), Pierre, South Dakota for an incident occurring on June 1, 2021 at the corner of Oneida and Pleasant in Pierre, South Dakota.

Deadline to Respond was July 20, 2021. No response has been received as of July 15, 2021.

There is no previous history with Anderson Contractors, Inc.

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

Fay Jandreau opened discussion regarding the complaint and the violation listed. An administrative rule is considered a law in South Dakota and can be listed as the statute violated so the complaint can be heard by the Panel.

Fay Jandreau reviewed the complaint, asking if the damage was intentional? Anderson potholed the utilities, the depths changed. Wooden forming stakes were used, as Anderson was aware of the utilities. Fay Jandreau continued, he believed Anderson was using caution.

Fay Jandreau made the motion that probable cause did exist in the violation of 20:25:03:05:03, the violation was unintentional and recommended a penalty in the amount of \$1,000 with \$750 suspended with Anderson meeting the following requirements:

1. Respondent must not be found guilty of a One Call violation within 12 months of the Board Order,
2. The penalty payment must be made within 30 days of the Board Order,
3. Respondent must attend a Damage Prevention meeting in 2022.
4. Respondent must conduct an in-house safety meeting to discuss South Dakota One Call laws. Detail of the discussion material, date and length of the meeting along with printed and signed names of attendees will be submitted to the Executive Director of South Dakota One Call within 30 days of the Board Order.
5. Respondent will arrange a face to face meeting with claimant to review the damage, dangers while working around utilities and safe practices. This meeting is to take place within 30 days of the Board Order being issued.

Steve Mohr seconded the motion. **Motion carried unanimously upon a roll call vote.**

Having no further business, Fay Jandreau made the motion to adjourn the call and dismiss the panel. Lloyd Rave seconded the motion. **Motion carried unanimously upon a roll call vote.**

Please note: This was a legal proceeding and only written information provided by the Complainants and the written response from the Defendants was considered per SDCL 49-7A-25. No comments from the parties involved in the complaints were taken during this call.