

SOUTH DAKOTA ONE CALL BOARD
OFFICE OF HEARING EXAMINERS
PIERRE, SOUTH DAKOTA

IN THE MATTER OF THE COMPLAINT)
FILED BY RCS CONSTRUCTION, RAPID)
CITY, SD AGAINST MONTANA DAKOTA)
UTILITIES, RAPID CITY, SD, FOR AN)
INCIDENT OCCURRING ON DECEMBER)
16, 2020 AT 1636 E ST. PATRICK STREET,)
RAPID CITY, SD.)

OC20-093
OHE 21-06

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

The above matter came on for hearing before the South Dakota One Call Board (“Board”) and Office of Hearing Examiners on May 20, 2021, via Zoom. RCS Construction, Inc. (“RCS”), appeared personally and by counsel Jason M. Smiley of Gunderson, Palmer, Nelson & Ashmore, LLP, Rapid City, South Dakota. Montana Dakota Utilities appeared personally and by counsel Lindsay Riter-Rapp of Riter Rogers Law Office, Pierre, South Dakota.

The Board having heard all of the testimony and having considered all of the files and records herein including the arguments of counsel, now hereby makes and enters the following Findings of Fact and Conclusions of Law.

Any Finding of Fact which may be deemed to be a Conclusion of Law and vice versa shall be appropriately incorporated into the Findings of Fact and Conclusions of Law as the case may be.

FINDINGS OF FACT

1. RCS is a contractor from Rapid City, South Dakota.
2. MDU is a regulated utility company providing services in South Dakota.
3. ELM Utility Services (“ELM”) is the locating service hired by MDU to locate its utilities.

4. RCS had planned excavation work as part of a building project in Rapid City, South Dakota in September of 2020.

5. RCS submitted a locate ticket to 811 on September 11, 2020. See RCS Exhibit 1 (“Original Locate Ticket”).

6. The Original Locate Ticket requested the location of all utilities on the entirety of the property.

7. ELM responded to the Original Locate Ticket and attempted to locate MDU’s utilities but was unable to locate them. ELM sent RCS notice that it was unable to locate the utilities as requested. See RCS Exhibit 2.

8. RCS did not immediately request additional assistance in locating MDU’s utilities, because its planned excavation and connection to MDU’s utilities was in the opposite direction.

9. Bob Conway and Ronnie Hufstutler are employees of RCS.

10. The testimony of Bob Conway was credible.

11. The testimony of Ronnie Hufstutler was credible.

12. On December 10, 2020, MDU informed Bob Conway that RCS’s planned connection route to tie onto MDU’s gas line would not work because it is a high-pressure gas line. See RCS Exhibit 10.

13. Thereafter, on December 11, 2020, RCS submitted an additional locate ticket to 811 (“Subsequent Locate Ticket”). See RCS Exhibit 3.

14. The Subsequent Locate Ticket specifically requested MDU locate its utilities on the north side of the property because RCS planned to tie onto the building at that location.

15. ELM responded to the Subsequent Locate Ticket and attempted to mark MDU’s utilities but marked the wrong location.

16. Andrew Morse is the Field Operations Coordinator for MDU.

17. Bob Conway and Ronnie Hufstutler met Andrew Morse on the project site to discuss the new tie-on route. They walked the site together and placed white flags along the planned connection route from the building to the incorrectly marked gas line location.

18. RCS began trenching along the flagged route until it became apparent that the location marked by ELM was not correct.

19. MDU's onsite excavator notified MDU and ELM that the line was not marked correctly.

20. ELM then responded to the project site to attempt to locate MDU's utilities.

21. With RCS's assistance, ELM was successful in locating MDU's utilities during this subsequent effort.

22. MDU's gas line was located in the common utility trench. See RCS Exhibit 5.

23. The new mark of MDU's gas line by ELM was approximately 25 feet from the previous incorrect mark. See RCS Exhibits 4, 6, and 7.

24. RCS filed a complaint against MDU on December 22, 2020.

25. MDU received notice of the complaint on December 22, 2020, and filed an answer denying the claim on January 13, 2021.

26. On January 29, 2021, the Enforcement Panel (herein "Panel") convened pursuant to the authority present in SDCL § 49-7A. The Panel found probable cause that an intentional violation of SDCL § 49-7A-8 occurred.

27. The Panel recommended a penalty of \$5,000 with \$3,000 suspended upon the conditions listed below. The conditions for the suspended penalty are as follows:

1. Respondent must not be found guilty of a One-Call violation within 12 months of the Board Order.

2. The penalty payment of **\$2,000** must be made to **South Dakota One Call Notification Board, P.O. Box 187, Rapid City, SD 57709**.
3. Respondent must attend a Damage Prevention meeting in 2021 or 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 thirty (30) days of the Board Order being issued.
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 thirty (30) days of the Board Order being issued.

If any of the above conditions are not met, the suspended penalty (**\$3,000**) becomes immediately due and payable to **South Dakota One Call Notification Board, P.O. Box 187, Rapid City, SD 57709**.

CONCLUSIONS OF LAW

1. 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 (“Applicable Laws”).
2. MDU is responsible to locate its utilities in compliance with the Applicable Laws.
3. One of the Applicable Laws is SDCL § 49-7A-8, which provides:

An operator shall, upon receipt of the notice, advise the excavator of the location of underground facilities in the proposed excavation area by marking the location of the facilities with stakes, flags, paint, or other clearly identifiable marking within eighteen inches horizontally from the exterior sides of the underground facilities. The board shall promulgate rules, pursuant to chapter 1-26, to establish the response time for operators to mark the underground facilities. The response time shall be no later than forty-eight hours after the receipt of the notice, excluding Saturdays, Sundays, and legal holidays of the state or the excavation start time provided by the excavator, whichever is later. The response time may be less than forty-eight hours for emergency or subsequent inquiries to the original locate request and may be longer than forty-eight hours for nonexcavation requests. Excavators shall maintain a minimum horizontal clearance of eighteen inches between a marked underground facility and the cutting edge of any mechanical equipment. If excavation is required within eighteen inches, horizontally, the excavator shall expose the facility with hand tools or noninvasive methods approved pursuant to rule and

shall protect and support the facility prior to further excavation with mechanical equipment.

4. One of the Applicable Laws is § 49-7A-18, which provides:

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.

5. MDU failed to mark its gas line within eighteen inches horizontally from the exterior sides of the underground facilities as required by Applicable Law.

6. The decision of the Panel is modified as follows. MDU's violation of Applicable Law was not intentional. It was unintentional. Subject to this modification, the decision of the Panel is otherwise upheld, incorporated, and adopted by reference as if fully set forth herein.

IT IS SO ORDERED.

Dated this 14th day of September 2021.

DocuSigned by:

Fay Jandreau

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Fay Jandreau

Board Chairman

CERTIFICATE OF SERVICE

I certify that on September 14, 2021, a true and correct copy of this Findings of Fact, Conclusions of Law, and Order of Dismissal was mailed and e-mailed to each party listed below.

Codi M. Gregg

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