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October 13th, 2022

SD One Call

Attn: Notification Board

P.O. Box 187

Rapid City, SD 57709

RE: Answer of Respondent

*In the matter of the Complaint OC22-013 & OC22-014; filed by Elliot
Construction, Inc. vs. Lake Madison Sanitary District*

To whom it may concern:

This Answer is made on behalf of the Lake Madison Sanitary District in a response to complaint OC22-013 and OC22-014 filed by Elliot Construction, Inc. alleging violations of the South Dakota 811 One Call statutes specifically SDCL § 49-7A-8. Pursuant to SDCL § 49-7A-8, in relevant part, “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 18 inches horizontally from the exterior sides of the underground facilities....the response times shall be no later than 48 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.”

Most relevant and dispositive of the Complainant’s complaints is SDCL 49-7A-21. This statute provides that:

“a complaint alleging a violation of any statute, except § 49-7A-12, or alleging a violation of any rule of the statewide one call notification board shall be brought not later than 90 days after the discovery of the alleged violation, but in no case may the complaint to be brought more than one year after the date of the alleged violation. Any complaint alleging a violation of section 49-7A-12 shall be brought within one (1) year of discovery of the alleged violation.”

Since the complaint is not alleging a violation of section 49-7A-12, according to statute, these complaints should have been brought not later than ninety (90) days after the discovery of the alleged violation and in no case should these complaints be brought more than one year after the date of the alleged violation.

According to the Complainant's own documents provided in support of their complaint, the Complainant called in ticket numbers 2115318658, 2115318653, and 2115318652 on June 23rd, 2021, with an expected work date of June 4th, 2021, at 7:00 a.m. According to The Complainant's own statements, and statement from Jeff Jones in support of the Complainant's complaint, Complainant was aware of damages as early as July 6th, 2021. Regardless of the date of when the Complainant became aware of damages, the Complainant had to have been aware of the alleged violation of SDCL § 49-7A-8 in that the complaint does not allege that Lake Madison Sanitary District failed to notify of damages or caused said damages but rather, failed to properly mark their underground facilities pursuant to a locate request and consistent with South Dakota law. The Complainant would have been aware of any alleged violation for failing to mark the underground facilities at the time the excavator arrived to do the work.

According to the complaint, the Complainant and agents of the same were aware that "Lake Madison Sanitary District showed up and marked the sewer main under the street indicating that they had responded." Jeff Jones, co-owner and manager of ECI, made the assumption that water and sewer services went out the other side of the house because there were no lines sprayed between the house and the main. As the Complainant states, they have done thousands of jobs in just the last thirteen (13) years and should be well educated and experienced in the ditch digging work which involves dealing with multiple different utilities including sanitary and water. Given the existence of a water and a sewer main properly marked in front of these residences, it would be foolish to believe that the immediate properties adjacent to the main do not in fact hook-up to that system. There would be no logical reason for a sewer and water main to run along this area of Peninsula Point which did not in fact provide the services to the adjacent homes. It is at this point that any alleged violation by the Sanitary District would have been discovered by the Complainant. At this point, pursuant to SDCL § 49-7A-10, the excavator should have proceeded in a careful and prudent manner which, logic would dictate that the connections to the adjacent homes leading to the water or sewer mains have not been properly marked, then the excavator should have notified the operator for proper markings or notified 811. Given the excavator's experience as stated by the Complainant, the existence of markings on a peninsula showing the mains as stated in the

Complaint, and the Complaint stating excavation beginning June 4th, this is the date that should be used for purposes of calculating the statute of limitations.

If the Board does not believe that it was at this moment stated above when the excavator became aware of any alleged violation by the Sanitary District it is indisputable that the excavator and the Complainant became aware of any alleged violation by the Sanitary District on July 6th, 2021 when they were notified of damages to sewer and water lines which had occurred between the water or sewer main properly marked in the street and the adjacent residences. By way of the Complainant's "Background Information" provided in support of their complaint, the Complainant states, "on July 6th, 2021, Jeff called the Madison Sanitary District office and asked why the services were not marked." If this second and later occurrence is to be used as the date for purposes of determining when the Complainant discovered the alleged violation by the Sanitary District, according to SDCL § 49-7A-21, no complaint for these alleged violations should have been brought after October 5th, 2021, and in no case should have been brought after July 6th, 2021. Therefore, these complaints should be dismissed immediately as they have been brought grossly outside of the statute of limitations provided by South Dakota codified law.

Although these complaints should be dismissed for they are brought in violation of the statute of limitations provided by South Dakota Codified Law, I will proceed to address the allegation so as to not fail to state a claim or defense and for purposes of any necessary appeals.

The Lake Madison Sanitary District denies the claim that the District acted in violation of SDCL § 49-7A-8 and states that consistent with the undisputed fact that the water and sewer mains were properly marked prior to excavation pursuant to the ticket numbers described in the Complainant's complaint that the Sanitary District did thereby fully comply with South Dakota Codified Law. At the time of the receipt of request to locate tickets relevant in this matter, Lake Madison Sanitary District had been operating consistently under the idea that they were not obligated to mark the underground facilities beyond the right-of-way which would be the responsibility of the private property owner. In looking into this issue, the District became aware that this was the same type of procedure that other entities had been operating under as well. The other entities may be operating consistent with the statements made by the Complainant in which they are doing a deliberate, conscious and economically driven decision to not mark and gamble that the utility won't get hit, or to simply just place a flag or paint here or there to avoid an excavator using the word "intentional" on a complaint. This cynical belief held by the

Complainant may be reality for some entities but that is not how this Sanitary District was operating.

As stated by representatives of the Sanitary District, the District was not aware of the Attorney General opinion until communications from the Complainant. That being said, and in defense of the District, an Attorney General's Opinion is just that, an opinion. An Attorney General's Opinion does not become law unless codified by the legislature and is not case law as if a case heard and ruled on by the South Dakota or United State's Supreme Courts. Although the attorney general's opinion is persuasive, the District maintains that it is not the current applicable law and there is still an argument that the District is not required to mark the lines from the right-of-way over private property. This will not be settled until a case is before the Supreme Court or legislature adopts new wording clarifying who is responsible for marking private lines.

Regardless of whether the District is correct on our current position with regards to the attorney general's position and who should mark those private lines, as stated above, and supported by the Complainant's complaint, the District was not aware of the Attorney General's Opinion until dealing with the current Complainant. Therefore, this Board could not find that the District not marking the private lines was an "intentional" violation of 811 Call or the South Dakota Codified Law relevant thereto. The District did not make a conscious decision in face of the Attorney General's Opinion to not mark those private lines.

Since becoming aware of the Attorney General's Opinion, this board has been working to implement new plans to address situations in which the District does not have an accurate set of plans for where those utilities truly lie so that they can properly mark them. The District has not currently settled on a course of action and is currently between two options; one option is to go into the basements, pull up the toilet, and scope and track the line. The other option is to hire another entity that does these types of markings and contract with them to do their locate requests. This problem is one for older construction in which as-built plans have not been provided. The District now requires clean outs and tracer wire to be installed with all new developments and installations.

Wherefore the Lake Madison Sanitary District, as respondent to complaints OC22-013 & OC22-014, hereby requests the 811-notice board to:

1. Dismiss both complaints for failing to bring a timely action under SDCL § 49-7A-21 in violation of the statute of limitations as prescribed by South Dakota Codified Law.

2. That the Board, assuming the Board did not dismiss these complaints as clear violations of statute of limitations prescribed by South Dakota Codified Law, find that the respondent did comply with South Dakota Codified Law and properly marked the underground facilities consistent with established South Dakota Codified Law; or alternatively;
3. Find that any alleged violations the Board deems the respondent to have committed are not intentional violations under SDCL § 49-7A-19.

This answer is respectfully submitted by the respondent and dated October 13th, 2022.

Best Regards,

LAMMERS, KLEIBACKER,
DAWSON & MILLER, LLP

By Cody J. Miller

Cody J. Miller

CJM/sem