STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

August 11, 2008

Larry Englerth
Executive Director
Dakota One Call Notification Board
1012 N. Sycamore Ave.
Sioux Falls, SD 57110

OFFICIAL OPINION NO. 08-07

Responsibility to mark underground facilities as is required by SDCL 49-7A

Dear Mr. Englerth:

You have requested an official opinion from this Office in regard to the following factual situation:

FACTS:

In an effort to protect underground facilities, provide a safe work environment for employees, and ensure the safety of the general public, the South Dakota Legislature established the South Dakota One Call Notification System (The System) in 1993. The System was codified in SDCL Title 49 Chapter 7A. This chapter requires that all operators of underground facilities become members of the System. Operators are then required to notify the System of where their underground facilities are located. Before any excavation may begin, excavators are required to specifically notify the System of their intention to excavate. The System then notifies all operators who potentially have underground facilities in the excavation area. Once the System has notified the operators, they normally have 48 hours to mark the location of the underground facilities they operate.

When an excavator provides notification of excavation, some utility companies do not mark the water or sewer lines located in either the public right-of-way or on private real

property. These utility companies contend that these lines are owned by the real property owner, making he/she the actual operator under SDCL 49-7A. Private homeowners would then be required to adhere to the marking responsibilities of SDCL 49-7A. As a result, the underground facility is often unidentified for the excavator, significantly increasing the risk of serious damage to both person and property. Leaving underground facilities unmarked can also lead to the potential for legal disputes to determine who is responsible for damage to those facilities.

Based on these facts, you have asked the following questions:

QUESTIONS**:**

1. Pursuant to SDCL 49-7A, who is the party responsible for marking the underground water and sewer facilities in the right-of-way as required by SDCL 49-7A-8—the facility operator or real property owner?

2. Does SDCL 49-7A-1(9) (definition of underground facility) include the water facility from the right-of-way to the meter, thus requiring the marking of all underground water facilities from a right-of-way to the meter, as required by SDCL 49-7A-8, or is the operation of the underground water facility included under SDCL 49-7A-15 and so is excluded from the underground facilities covered in SDCL 49-7A-1(9)?

3. Does SDCL 49-7A-1(9) (definition of underground facility) include the sewer facility from the right-of-way to the first termination at the building on the real property, thus requiring the markings of all underground sewer facilities from a right-of-way to the building, as required by SDCL 49-7A-8, or is the operation of this underground sewer facility included under SDCL 49-7A-15 and so is excluded from the underground facilities covered under SDCL 49-7A-1(9)?

IN RE QUESTION 1:

SDCL 49-7A-1 provides definitions of the terms used throughout the chapter:

. . . .

(4) “Excavator,” any person who performs

excavation;

. . . .

(7) “Operator,” any person who operates an underground facility;

(8) ”Person,” an individual, partnership, limited liability company, association, municipality, state, county, political subdivision, utility, joint venture, or corporation, and includes the employer of an individual;

(9) ”Underground facility,” any item of personal property buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic or telegraphic communications, fiber optics, cablevision, electric energy, oil, gas, hazardous liquids, or other substances including pipes, sewers, conduits, cables, valves, lines, wires, manholes, and attachments.

SDCL 49-7A-5 provides in part:

No excavator may begin any excavation without first notifying the one-call notification center of the proposed excavation. The excavator shall give notice by telephone or by other methods approved by the board . . . .

SDCL 49-7A-8 provides in 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 eighteen inches horizontally from the exterior sides of the underground facilities.

SDCL 49-7A-12 provides:

If any underground facility is damaged, dislocated, or disturbed in advance of or during excavation work, the excavator shall immediately notify the operator of the facility, or, if unknown, the one-call notification center of such damage, dislocation, or disturbance. No excavator may conceal or attempt to conceal such damage, dislocation, or disturbance, nor may that excavator attempt to make repairs to the facility unless authorized by the operator of the facility.

SDCL 49-7A-13 provides:

If in the course of excavation the excavator is unable to locate the underground facility or discovers that the operator of the underground facility has incorrectly located the underground facility, he shall promptly notify the operator, or, if unknown, the one-call notification center.

SDCL 49-7A-15 provides:

Underground facilities owned or operated by the landowner on his own land which do not extend beyond the boundary of the private property are not subject to the provisions of this chapter.

Based on the language used in the above-mentioned statutes, the intent of the Legislature becomes clear. The Legislature specifically outlined how the system was to work. Excavators are to notify the System about an upcoming excavation, the System must notify the operators, who then are to mark their facilities. Therefore, operators and not excavators are always required to mark both the lines they operate in the public right-of-way and service laterals which may travel across private property. The question then becomes who is the operator—the facility operator or the real property owner? Based upon the language used in the above-mentioned statues, it is clear that the operator is the person who operates the underground facility, not the real property owner under SDCL 49-7A.

The term "operator" is defined at SDCL 49-7A-1(7). The word "own" is not found in the definition of the term "operator." It is a long held presumption in South Dakota that the Legislature knows how to include and exclude items from its statutes. Sanford v. Sanford, 2005 S.D. 34, ¶ 19, 694 N.W.2d 283, 289 (citing State v. Young, 2001 S.D. 76, ¶ 12, 630 N.W.2d 85, 89) (further citations omitted). If the Legislature had intended that the real property owner of the underground facility be the operator, the Legislature would have used the word "owner" in the definition of the term "operator."

For example, the Colorado One Call Statute defines operator as "Operator" or "Owner" and means "any person, including public utilities, municipal corporations, political subdivisions, or other persons having the right to bury underground facilities in or near a public road, street, alley, right of way, or utility easement." C.R.S.A. § 9-1.5-102. See also M.S.A. § 216 D.01 (Minn. Statute that also contains the word owner).

Those statutes, unlike SDCL 49-7A-1(7), specifically use the word owner. However, even though the Colorado statute uses the word owner, the Colorado Court of Appeals has held that private owners were not required by the statute to mark the underground facilities on their property. Wycon Const. Co. v. Wheat Ridge Sanitation Dist., 870 P.2d 496, 498 (Colo. 1993). That court determined that the reasonable interpretation of the statute was that the municipality should be responsible for marking the underground facilities. Id.; see also City of Albany v. Central Locating Serv., 228 A.D.2d 920, 922 (N.Y. 1996) (owner of the conduit housing underground utility was irrelevant; because plaintiff operated the underground facility to interconnect its public safety services, he was the operator under the NY One Call Notification Statute); Report of the Administrative Law Judge, Office of Administrative Hearings, Department of Public Safety, State Of Minnesota, Re: Proposed Amendments to Rules Governing the Minnesota Excavation Notification System, 25-31 (3-31-2005) (private homeowners and tenants were not operators, only utility companies and municipalities were operators under M.S.A. § 216 D.01).

The South Dakota Supreme Court has held that when interpreting South Dakota statutes, words and phrases must be given their plain meaning and effect. Martinmaas v. Engelmann, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611. "Operators" are the people who run the underground facilities not the people who own them. That is the plain meaning under SDCL 49-7A. It is clear that if the Legislature had intended that "owners" be "operators" under SDCL 49-7A, they would have included relevant language in that definition. Even our sister states that do have the aforementioned statutory language do not require private homeowners to mark their utilities.

The intent of these statutes must be determined from examining SDCL 49-7A as a whole. Sanford, 2005 S.D. 34, ¶ 13, 694 N.W.2d at 287 (citing State v. I-90 Truck Haven Service, Inc., 2003 S.D. 51, ¶ 3, 662 N.W.2d 288, 290 (citing Martinmaas, 2000 S.D. 85, ¶ 49, 612 N.W.2d at 611)). SDCL §§ 49-7A-12 and 49-7A-13 discuss what is to be done when there is an inability to locate or damage to the underground facility. These two statutes both provide that the excavator "shall immediately notify the operator of the facility, or if unknown, the one-call notification center" (SDCL 49-7A-12) and "shall promptly notify the operator, or, if unknown, the one-call notification center." (SDCL 49-7A-13). If the real property owner were the operator as defined by SDCL 49-7A-1(7), he or she would not be "unknown" for purposes of who the excavator shall notify. (The Register of Deeds would be able to provide ownership information.) Therefore, it is clear that the intent of the

Legislature was to make the facility operator and not the real property owner the party responsible for marking underground facilities.

Additionally, SDCL 49-7A-15 sets up an exception as to whom the statute can be enforced against. It is clear from the language that the Legislature was not requiring private landowners to register their personal underground facilities. Logic dictates that the Legislature also did not intend for private homeowners to register their service lines that come from public utilities located in the public right-of-way. Most landowners simply lack the skill or experience to do so, a fact presumably known to the Legislature.

According to the South Dakota Supreme Court, if the result obtained from an interpretation of a statute is unpractical or absurd, then that interpretation is clearly erroneous. See Martinmaas, 2000 S.D. 85, ¶ 49, 612 N.W.2d at 611; Matter of Estate of Gossman, 1996 S.D. 124, ¶ 6, 555 N.W.2d 102, 104; Nelson v. South Dakota State Bd. Of Dentistry, 464 N.W.2d 621, 624 (S.D. 1991). It is clear that the Legislature did not intend for every private homeowner to be considered operators under SDCL 49-7A, for such would surely be "unpractical." Further support for this proposition flows from statute and rule.

SDCL 49-7A-2 provides in part:

All operators are subject to this chapter and the rules promulgated thereto. Any operator who fails to become a member of the one-call notification center or who fails to submit the locations of the operator's underground facilities to the center, as required by this chapter and rules of the board, is subject to applicable penalties under §§ 49-7A-18 and 49-7A-19 and is subject to civil liability for any damages caused by noncompliance with this chapter.

ARSD 20:25:03:10 provides in part:

Each operator required by SDCL 49-7A-2 to join the one-call system must respond to notification of excavation as required by SDCL chapter 49-7A or by the response intervals listed . . . . If an excavation is being made in a time of emergency, as defined in SDCL 49-7A-1, each operator shall respond as follows: (1) The operator shall respond as soon as possible but not longer than two hours from the notification time during the business day and not longer than four hours from the notification time outside of the business day or by the start time on the ticket, whichever is later[.]

Including private homeowners in the definition of "operators" creates an unreasonable and absurd result with regard to these provisions. If private homeowners were considered operators under SDCL 49-7A, then every homeowner with underground utility lines under his/her yard would be forced to become a member of the System. The owner would also have to report the location of all buried utilities to the notification center. In an emergency, homeowners may have as little as two hours to mark their lines. Since this definition would create an unreasonable and absurd result, it is clearly not the Legislature's intent. See Martinmaas, 2000 S.D. 85, ¶ 49, 612 N.W.2d at 611. The Legislature did not intend to place this kind of burden on private homeowners and tenants. The Legislature intended to put this burden on the companies and municipalities that were already running these utilities. Furthermore, it is overly burdensome and unreasonable to force private homeowners to be part of this System.

In addition, SDCL 49-7A-3 provides:

The one-call notification center shall be governed by an eleven member board who shall serve without pay. The board shall consist of one member representing telecommunication companies offering local exchange service to less than fifty thousand subscribers; one member representing telecommunication companies offering local exchange service to fifty thousand or more subscribers; one member representing rural water systems; one member representing rural electric cooperatives; one member representing investor-owned electric utilities; one member representing investor-owned natural gas utilities; one member representing community antenna television systems; one member representing municipalities; one member representing underground interstate carriers of gas or petroleum; and two members representing contractors who perform excavation services. The board shall be appointed by the Governor and shall serve staggered three-year terms.

This language indicates that the System was designed to prevent excavators from hitting buried utility lines. The board has enforcement power over both excavators and operators. The board that enforces the marking of the underground facilities is made up of the groups which the board has disciplinary power over: utility companies, municipalities, and excavators. The board does not contain any private homeowners. This is because the Legislature only intended SDCL 49-7A to apply to excavators, utility companies, and municipalities, exactly the people mandated to enforce the statute. Therefore, private homeowners are not considered operators under SDCL 49-7A.

In sum, the term operator under SDCL 49-7A-1(7) means the person who actually runs or operates the underground facility. The people who run/operate the underground facility are utility companies and municipalities. Private homeowners are not operators. These homeowners may own the underground facility lines; however, they are merely customers of the operators. If property owners were included in the definition of "operators," underground facilities would go unmarked because these property owners likely do not know how to locate and mark these lines. Unlocated lines would lead to more broken lines by excavators. The South Dakota Supreme Court held that "it is the cardinal rule of interpretation that a statute must be construed with reference to the objects intended to be accomplished by it." Dorman v. Crooks State Bank, 225 N.W. 661, 665 (S.D. 1929). Based on this precedent, it is appropriate to determine the reason behind SDCL 49-7A. What was being accomplished by the passage of SDCL 49-7A was the protection of South Dakotans' safety and property by preventing underground facilities from being struck by excavators. Since incorporating property owners into the definition of the term "operators" would lead to more underground facilities being struck by excavators, that interpretation of SDCL 49-7A is erroneous. It was the Legislature's intent that the term operators means utility companies and municipalities or any person who operates (not just uses) an underground facility. Excavators are also not operators under SDCL 49-7A. Only operators are required to mark the underground facilities for the excavators. Therefore, SDCL 49-7A-8 requires that facility operators mark both the underground facilities in the public right-of-way, and any service laterals which extend from their facilities on to private property (which are in the excavation zone).

IN RE QUESTIONS 2 and 3:

Because the only difference between these two questions is that one deals with water lines and the other deals with sewer lines, and this distinction does not change the answer, these questions will be dealt with jointly.

As noted above, SDCL 49-7A-15 is an exception to the rules laid out in SDCL 49-7A. This statute says that landowners whose private underground facilities do not extend past their property lines are exempt from 49-7A enforcement. The Legislature, when enacting 49-7A-15, was specifying that private landowners would not have to become part of the System. However, the relevant language here is "on his own land which do not extend beyond the boundary of the private property." This language signifies that if the underground facilities extend to a public right-of-way or just off the private property, then

the underground facilities are subject to the provisions of SDCL 49-7A. For example, if private service laterals extend off the property to a water main under the public right-of-way, the SDCL 49-7A-15 exception does not apply. Since both the water and sewer lines in these two questions are not wholly contained within private property and the water and sewage companies are utility companies and not private landowners, the exception in SDCL 49-7A-15 does not apply.

The two questions ask how close to personal residences do underground facilities need to be marked by their operators. The answer to both of these questions can be found in SDCL 49-7A-8. The pertinent part of that statute says "An operator shall, upon receipt of the notice, advise the excavator of the location of underground facilities in the proposed excavation area." The purpose of SDCL 49-7A and SDCL 49-7A-8 gives the answer. The purpose of 49-7A is to protect the public's property and safety by preventing underground facilities from being hit by excavators. SDCL 49-7A-8 says operators must mark all the underground facilities within the proposed excavation area. Therefore, operators must mark all utilities that they operate within the proposed excavation area. This rule applies regardless of whether private property is included in the excavation area, and regardless of how close to private residences the proposed excavation area is located.

Furthermore, if the excavators require the marking of lines to extend a reasonable distance past the actual dig site, in order to better understand underground facilities locations, SDCL 49-7A requires operators to do so. In Question 1 it was determined that private homeowners are not operators under SDCL 49-7A. This means that if the municipalities and utility companies were not responsible for marking all the underground facilities throughout the entire proposed excavation site, then these lines would not be marked. Having unmarked underground facilities would lead to an increase in accidental damage to those underground facilities. This result would go against the objectives intended to be accomplished by SDCL 49-7A, so it cannot be the correct interpretation of that statute. See Dorman, 225 N.W. at 665.

In sum, the determination of how much of the underground facility needs to be located and marked is not determined by meters or first terminations. All of the underground facility which is located within the proposed excavation site must be located and marked by the operator which operates that underground facility.

Respectfully submitted,

Lawrence E. Long
Attorney General

LEL/MND/dh