South Dakota Attorney General's Opinion 08-07

Responsibility to Mark Underground Facilities as is Required by SDCL 49-7A

South Dakota Underground Pipeline Task Force

September 22, 2008

OFFICIAL OPINION NO. 08-07
Responsibility to mark underground facilities as is required by SDCL 49-7A

FACTS: 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.

OFFICIAL OPINION NO. 08-07
Responsibility to mark underground facilities as is required by SDCL 49-7A - Question 1

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?

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. Unallocated lines would lead to more broken lines by 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).

OFFICIAL OPINION NO. 08-07
Responsibility to mark underground facilities as is required by SDCL 49-7A
Questions 2 & 3

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)?

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. *** 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."

SDCL 49-7A-8 says operators must mark all the underground facilities within the proposed excavation area.