

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA**

IN THE MATTER OF THE PETITION FOR A)	
DECLARATORY RULING BY THE DEPARTMENT)	
OF PUBLIC SAFETY/911 COORDINATION BOARD)	DOCKET TC17-063
REGARDING DETERMING RESPONSIBILITY FOR)	
RURAL CARRIER INTERCONNECTION TO THE NEXT)	
GENERATION 9-1-1 SYSTEM)	

**JOINT RESPONSE TO MOTION TO DISMISS AND
ALTERNATIVE MOTION TO CONTINUE TO SUPPLEMENT THE PETITION**

The South Dakota Telecommunications Association (hereinafter referenced as “SDTA”), by and through its attorneys, and South Dakota Network, LLC, (“SDN”) by and through its attorneys, hereby provide a Joint Response to Motion to Dismiss and Alternative Motion to Continue to Supplement the Petition filed by NextGen Communications, Inc. (“NextGen”).

A. History

On October 27, 2017, the South Dakota 911 Coordination Board/Department of Public Safety (“911 Board”) filed a Petition for Declaratory Ruling pursuant to ARSD § 20:10:01:34. The Board filed its Petition requesting the Commission to provide a ruling on the following:

“Whether it is NextGen [NextGen Communications, Inc.] or the rural carriers comprising SDTA that has the responsibility to transport 911 traffic between rural carriers’ service areas and NextGen’s centralized points of interconnection?” See Petition for Declaratory Ruling, p. 3.

On November 15, 2017, the South Dakota Public Utilities Commission (“Commission”) granted intervention to SDTA and NextGen. On November 25, 2017, the Commission granted intervention to SDN. Extensive briefing by all parties involved was

concluded on January 16, 2018. In an effort to allow settlement discussions to occur, the parties, mutually agreed to schedule the hearing on the Declaratory Ruling on April 20, 2018. Now just days before the scheduled hearing, NextGen, with very limited legal authority, has requested 1) the Petition for Declaratory Ruling be dismissed or 2) in the alternative that the parties engage in a discovery process wherein it would like to engage in a factual fishing expedition into a number of inquiries surrounding the current state of RLEC 9-1-1 routing before NextGen begins implementing the NG911 system. For the reasons set forth below, SDTA and SDN are requesting that the Commission deny both requests.

B. Legal Argument

1. NextGen's hyper technical reading of A.R.S.D. § 20:10:01:34 does not support a dismissal of the Petition.

NextGen has asked the Commission to dismiss the Petition for Declaratory Ruling because the 911 Board has not asked the Commission to determine the applicability of a law, rule, or order to the 911 Board itself. NextGen is pursuing a hyper technical reading of A.R.S.D. § 20:10:01:34¹ and has insinuated the purpose of this Declaratory Action has no “applicability” to the 911 Board. When engaging in statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole, as well as enactments relating to the same subject. *Citibank, N.A. v. S.D. Dep't of Revenue*, 2015 SD 67, ¶12, 868 NW 2d 381, 387. In its Petition, the 911 Board has indicated the unanswered underlying legal question

¹ ARSD § 20:10:01:34 states “any person wishing the commission to issue its ruling as to the applicability to that person of any statutory provision or rule or order of the commission may file with the commission a petition for declaratory ruling. The petition shall contain the following: (1) The state statute or commission rule or order in question; (2) The facts and circumstances which give rise to the issue to be answered by the commission; and (3) The precise issue to be answered by the commission's declaratory ruling.”

to be determined by the Commission has halted progress in connecting rural carriers to the NG911 System, a project that it is spearheading in an effort to implement NG911 throughout the State. Petition for Declaratory Ruling, Page 2. The interpretation of SDCL § 49-31-79 and the relevant federal statutes such as 47 USC 251 and 252, as requested in the Petition and the Comments of the Intervenors, certainly is applicable to the 911 Board as it implements the NG911 project.

NextGen, improperly, has inserted the word “directly” into its interpretation of ARSD § 20:10:01:34 which just does not exist. ARSD § 20:10:01:34 is predicated upon SDCL § 1-26-15 which states, “Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency”. Clearly, there is no use of the word “directly” within this statute, and the statute itself does not implicate that the statutory provision, rule or order of the agency in question must apply “directly” to an individual entity for that entity to file a petition for declaratory ruling. In fact, the South Dakota Supreme Court has opined that “SDCL § 1-26-15 requires agencies to adopt rules permitting **anyone** other than penitentiary inmates to request ‘declaratory rulings as to the applicability of any statutory provision or any rule or order of the agency.’” *In re Petition for Declaratory Ruling re SDCL 62-1-1(6)*, 2016 SD 21¶8, 877 N.W.2d 340, 344 (emphasis added).

The applicability to the 911 Board of the relevant statutes is how the NG911 project will be implemented. The argument that NextGen is now chasing is that the 911 Board is not in a position to ask for a Commission ruling that would possibly impact NextGen, SDTA, and SDN as NextGen implements the NG911 project with the State. This argument is contrary to the actions of NextGen to date and appears to be nothing more than a stall tactic. SDN, SDTA

and NextGen all availed themselves to ARSD § 20:10:01:15.05 and were granted Party Status because each alleged they would be affected by the outcome of the proceeding. It should not be a surprise to NextGen that the outcome may certainly impact it as well as the 911 Board, SDN, and SDTA member companies.

2. NextGen's Motion to Dismiss and Alternative Motion to Continue to Supplement the Petition is untimely.

The issue brought before the Commission in the Petition for Declaratory Ruling filed by the 911 Board has been known by all parties since 2015. As Commission Staff pointed out in its Comments in this matter filed on December 19, 2017, this very issue was first presented to the Commission in "Docket TC15-062 which granted NextGen a Certificate of Authority (COA), but left unresolved the issue of which entity had responsibility to transport 911 traffic to NextGen's centralized points of interconnection, located in Sioux Falls and Rapid City." Staff's Comments on Petition for Declaratory Ruling, Page 1.

The Petition for Declaratory Ruling was filed almost six (6) months ago on October 27, 2017. Extensive comments have been filed by all parties, and oral argument has been set for Friday, April 20, 2018. If NextGen truly believed the Petition was not properly filed under A.R.S.D. § 20:10:01:34, it should have filed a motion to dismiss prior to requesting to intervene, prior to agreeing to the proposed scheduling order, prior to submitting comments and reply comments, and prior to agreeing to the date of oral argument.

Further, the issue of whether the Petition was properly filed under A.R.S.D. §20:10:01:34 has already been addressed by the Commission in its Order dated December 12, 2017. After all parties that the declaratory ruling might affect had been granted intervention into the matter and after those parties agreed to a proposed procedural

schedule, the Commission reviewed the Petition for Declaratory Ruling filed by the 911 Board and found that it is properly before the Commission. Specifically, in its Order Granting Waiver of Deadline and Setting Procedural Schedule dated December 12, 2017, the Commission found as follows:

The Commission has jurisdiction in this matter pursuant to SDCL Chapters 1-26 and 49-31 and ARSD 20:10:01:15.05, 20:10:01:34, and 20:10:01:35. The Commission may rely upon any or all of these or other laws of this state in making its determination.

At its regularly scheduled meeting on December 5, 2017, the Commission considered this matter. Finding that the waiver request and procedural schedule was acceptable to all parties, the Commission voted unanimously to grant the Waiver of Sixty Day Deadline and to set the procedural schedule as proposed. It is therefore

ORDERED, that the Waiver of Sixty Day Deadline is hereby granted. It is further

ORDERED, that all submissions on the Petition for Declaratory Ruling shall be filed by December 19, 2017, and all responses to the submissions shall be filed by January 16, 2018.

(Emphasis added.) Accordingly, since the Commission has already addressed the question of applicability of the statute in question to the 911 Board, NextGen's Motion to Dismiss and Alternative Motion to Continue to Supplement the Petition is untimely and should be denied.

3. The issue before the Commission is that of a legal question and additional facts are not necessary for the Commission to issue a ruling.

The South Dakota Administrative Procedures Act contains two statutes authorizing declaratory rulings. The first is SDCL § 1-26-15 which authorizes declaratory rulings by agencies on statutes, rules and agency orders. The second is SDCL § 1-26-14 which authorizes declaratory rulings by circuit courts on agency rules. This Petition for

Declaratory Ruling is clearly filed pursuant to SDCL § 1-26-15. This distinction is important, because when comparing the two statutes, the South Dakota Courts have held that SDCL § 1-26-15 authorizes agencies to issue declaratory rulings absent an actual case or controversy. *In re Petition for Declaratory Ruling re SDCL 62-1-1(6)*, 2016 SD 21¶10, 877 NW 2d 340, 344. In that case our Supreme Court relied upon a New York Appellate Court who reversed a lower court when it found, “agencies had jurisdiction to issue declaratory rulings only if they are based upon the facts, established or conceded, of genuine question, dispute or controversy”. The Court of Appeals held that:

“under statutory language just like SDCL § 1-26-15, agency declaratory rulings may be based on ‘any state of facts described by a petition’ including ‘any assumed state of facts’. Like we do today, the New York Court reasoned: “Notably absent from [New York’s statutory] language is any limitation to agreed or proved facts or ‘genuine’ questions, disputes or controversies.””

Our South Dakota Supreme Court has squarely addressed the issue and has held a factual inquiry as suggested by NextGen is not warranted, and the Commission can rule on the issue with the facts before it as presented.

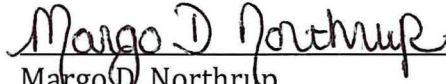
Even more important, the issue to be determined by the Commission is purely legal in nature and is very narrow in scope. The parties, through the 911 Board’s Petition for Declaratory Action, are requesting a determination under the laws of this State and the Federal Communication Commission, as to whose responsibility it is to transport 911 traffic between rural carrier’s service areas and the Next Generation 911 network’s centralized points of interconnection. The competing positions can be simplified fairly easily and need no factual supplementation: Is NextGen statutorily obligated to transport traffic to the rural carriers’ service area or is the rural carrier statutorily obligated to transport its traffic to NextGen’s centralized points of interconnection?

The South Dakota Supreme Court has recognized the philosophy of the Declaratory Judgment Act is to enable parties to authoritatively settle their rights in advance of any invasion thereof. The object of the act is to prevent actual invasions of rights and to establish guidelines for parties' actions so they may keep within lawful bounds, avoid expense, bitterness of feelings, the disturbance of orderly purists and to foster judicial economy. *Kneip v. Herseth*, 1974 SD 642, 214 NW 2d 93, 96. The Petition for Declaratory Ruling presents a limited question for the Commission and certainly should not be expected to resolve all of the issues unrelated to the Declaratory Ruling. To expect the Commission to not only request factual information but provide definitive answers on how this might impact the contract between NextGen and the Board, or how this might impact a PSAP is far beyond the scope of the Petition before the Commission. The question is solely legal and once answered, may give the parties the framework to tackle the additional issues and concerns not addressed.

C. Conclusion

For the reasons stated herein, SDN and SDTA respectfully request that the Commission deny the late-filed motions and proceed with deciding the Declaratory Action on its merits. The parties have expended substantial time and effort on this docket and SDTA and SDN believe a ruling is necessary before the parties can move forward to resolve any additional issues.

Dated this 19 of April, 2018.



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CERTIFICATE OF SERVICE

I hereby certify that an original of the Response to Motion to Dismiss and Alternative Motion to Continue to Supplement the Petition dated April 18, 2018 filed in PUC Docket TC17-063, was served upon the Commission electronically, directed to the attention of:

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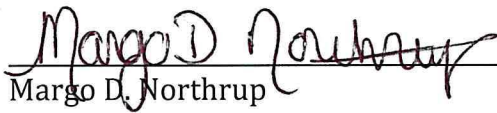
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