

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

<b>IN THE MATTER OF THE PETITION FOR ) A DECLARATORY RULING DETERMINING ) RESPONSIBILITY FOR RURAL CARRIER ) INTERCONNECTION TO THE NEXT ) GENERATION 9-1-1 SYSTEM ) ) ) )</b>	<b>REPLY TO THE OBJECTIONS AND COMMENTS MADE IN RESPONSE TO NEXTGEN’S MOTION  TC17-063</b>
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COMES NOW, NextGen Communications Inc. (“NextGen” or “Party”) and respectfully responds to the South Dakota 9-1-1 Coordination Board (“Board”), South Dakota Telecommunications Association (“SDTA”), South Dakota Network, LLC’s (“SDN”) filed Objections, and the Commission Staff’s Response to the Motion to Dismiss (collectively, “Parties.”)<sup>1</sup>

As its contractually authorized agent and vendor, NextGen supports the Board’s efforts to modernize the South Dakota 9-1-1 network. NextGen supports the Board’s efforts to seek out a non-adversarial resolution to the question of how 9-1-1 telecommunication traffic is routed from the rural service area local exchange carriers (“RLECs”) to the NextGen point of interconnection (“POI”), who should be the responsible party, and how such traffic should be funded (if at all).<sup>2</sup> NextGen agrees with the Board that the filed Petition had the potential to resolve these issues. Therefore, and with the same hope and good intentions as the Board, NextGen engaged in both the formal process mandated by the Board’s Petition for Declaratory Ruling (“Petition” or “DR”)

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<sup>1</sup> On April 18, 2018, the Department of Public Safety South Dakota 911 Coordination Board filed “Objection and Opposition to Motion to Dismiss and Alternative Motion to Supplement the Petition.” On April 19, 2018 the South Dakota Network, LLC and the South Dakota Telecommunications Association filed a “Joint Response to Motion and Alternative Motion to Continue to Supplement the Petition”, and on April 19, 2018 the Commission Staff filed a “Response to Motion to Dismiss.”

<sup>2</sup> Because the current process and procedures for delivering RLEC traffic works both technically, and financially, NextGen is not convinced that there is any need for a change. With one minor POI change, the system would operate as it always has, without the need for 251 interconnection, and there would be no need for the instant action.

action, and a parallel robust informal negotiation with all Parties to discover relevant facts and solve the problem. One process does not preclude the other, and contrary to SDTA's argument, there is no law or statute supporting an argument that participation in one or both process waives any right to object if a procedural or factual defect exists or permits the Commission to "self-correct" a procedural defect. If the process was faulty in concept, it remains so now<sup>3</sup>. NextGen is as equally disappointed as others that now, after months of effort, no progress was made. As a result, NextGen regrets that it must now lead the effort to protect all Parties' due process rights by establishing that the South Dakota Public Utilities Commission ("Commission") is without authority to act on the Petition filed by the Board. Contrary to the other Parties' assertions, this is the most appropriate action available to NextGen at this time and is timely made.

NextGen further supports its Motion to Dismiss ("Motion") and responds to the objections made by the Board, SDN, SDTA and the Response filed by Commission Staff as follows:

1) **The Motion to Dismiss and Alternative Motion to Continue to Supplement the Petition was timely filed and noticed pursuant to SDCL 1-25-1.3.**

A Declaratory Ruling proceeding is not, by definition, a contested case. The fact there is an underlying controversy in this situation does not change the legal nature of the DR. Therefore, the Commission did not issue its usual procedural schedule that includes discovery deadlines, pre-filed testimony, and an evidentiary hearing date. As a result, the Commission will consider the Petition at a regular Commission meeting scheduled for April 20, 2018. SDCL 1-

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<sup>3</sup> SDTA also argues that under South Dakota legal precedent, additional facts are not required for the Commission to act. If the Commission wishes to rule upon the DR's impact on the Board alone, NextGen has no objection, but the precedent cited by SDTA is not dispositive of the previous question; who does the DR apply to, and it does not apply to NextGen.

25-1.3 only requires that the “commission...provide public notice of a meeting by posting a copy of the proposed agenda...at least seventy-two hours before the meeting is scheduled to start...”<sup>4</sup>

NextGen’s Motion was noticed on the published agenda within the statutorily required time. However, NextGen does not object if the Commission moves to reschedule the Motion for consideration at a future Commission open meeting.<sup>5</sup>

**2) The Commission lacks the statutory authority to act on the Board’s Petition.**

The argument set forth by NextGen in its Motion to Dismiss is not intended to, nor does it, attack the standing of the Board to bring the Petition. The Petition had the potential to address and solve a problem in a non-adversarial manner. As a result, NextGen supported and fully cooperated with the Petition when it was filed. NextGen was under no obligation to point out the procedural defect in the Petition, in fact, it would have been disingenuous for NextGen to move to dismiss the Petition immediately if it wholeheartedly sought an amicable solution – which it did and still does.<sup>6</sup>

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<sup>4</sup> SDCL 1-25-1.3 Notice of meetings of the state and its boards, commissions, and departments--Violation as misdemeanor. The state and each state board, commission, or department shall provide public notice of a meeting by posting a copy of the proposed agenda at the principal office of the board, commission, or department holding the meeting. The proposed agenda shall include the date, time, and location of the meeting, be visible, readable, and accessible to the public. The agenda shall be posted at least seventy-two hours before the meeting is scheduled to start according to the agenda. The seventy-two hours does not include the day the agenda is posted nor Saturday, Sunday, or legal holidays. The notice shall also be posted on a state website, designated by the commissioner of the Bureau of Finance and Management. For any special or rescheduled meeting, the information in the notice shall be delivered in person, by mail, by email, or by telephone, to members of the local news media who have requested notice. For any special or rescheduled meeting, each state board, commission, or department shall also comply with the public notice provisions of this section for a regular meeting to the extent that circumstances permit. A violation of this section is a Class 2 misdemeanor.

<sup>5</sup> With a rescheduled meeting may come other procedural and/or briefing requirements. NextGen accepts those as well.

<sup>6</sup> NextGen’s efforts to achieve a non-adversarial, amicable, or negotiated solution are mentioned frequently in this and NextGen’s other pleadings. NextGen can document, if needed, the multiple unrequited attempts it made to gather the Parties for discussions and negotiations. In the end, NextGen was met with only one 11<sup>th</sup> hour response; an adhesion contract exacting full responsibility to NextGen for traffic transport at a rate hundreds of times the rate cited in NextGen’s cost study. It is inconceivable that such a response in any way, shape, or form resembles an attempt at negotiation or compromise. Hence, when it became clear that negotiations would not succeed, NextGen reluctantly made the decision to file our Motion. However, having said this, NextGen included the discovery

NextGen recognizes that the Board has an interest in how and whose responsibility it is when 9-1-1 traffic is routed from the RLEC's service areas to the NG9-1-1 POI. Further, NextGen does not dispute that the Commission has jurisdiction over telephone carriers. However, the Commission only has the authority to act in its regulatory capacity because statutes and rules specifically provide for it.

The administrative rule that the Board relies upon in its filing gives the Commission authority to "issue its ruling as to the applicability *to that person* (emphasis added) of any statutory provision or rule or order of the commission . . ." This plainly means applicability to the Petitioner.<sup>7</sup> Interesting, but insufficient in this case because that is simply not what the Board is asking the Commission to do. Rather, the Board asks the Commission to accept its facts and then, based upon those facts, determine how the law applies *to other entities*.

No Party to this proceeding, including the Commission itself, can create Commission authority where none exists. Within the boundaries of its statutory authority, the Commission has great discretion. However, the Circuit Court may reverse an agency decision that exceeds the agency's statutory authority.<sup>8</sup> Parties may waive various due process rights throughout a legal proceeding, and Parties can waive their own defenses. However, the argument NextGen makes is not "waivable" and it is not a "defense." Rather, the statutes on point simply do not permit the Commission to enter an Order as requested by the Board.

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alternative in its Motion, in the slim but persistent hope that the Commission can extract the facts which will bring all Parties to an honest negotiated resolution.

<sup>7</sup> ARSD 0:10:01:34. Petition for declaratory ruling. 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.

<sup>8</sup> See SDCL 1-26-36.

NextGen acknowledges the existence of the Administrative Procedures Act (“APA” or “Act”) as cited by the Board. The Act sets forth the framework from which the various State Agencies then develop their own processes. The Commission, just like other agencies, has developed its own rules, and the filed Petition must be heard first pursuant to those rules, not the APA.

Other agencies have different rules, for example: The Department of Revenue requires 10 days’ notice prior to hearing, testimony may be given, and the secretary may direct that interested parties file briefs.

*ARSD 64:01:01:09. A hearing on a petition for declaratory ruling may be held upon ten days written notice to all parties. The hearing must be public; testimony must be recorded on magnetic tape or by other equivalent means. At the request of any person, testimony given at such a hearing must be transcribed. The transcription expense must be borne by each person requesting a transcript. Parties may make their own provisions to have court reporters present at the hearing. Briefs may be filed by interested parties as the secretary may direct.*

The Commission on Gaming permits any person to petition for a determination of the applicability of any rule or order. If the Public Utilities Commission had a rule such as this, then it could act upon the Board’s Petition, but it does not.

*ARSD 20:18:04:01. Petition for declaratory ruling. A person may petition the commission for declaratory ruling to determine the general application of any statutory provision, rule, or order of the commission or executive secretary.*

The Department of Health requires that the Petitioner identify all others that may have a claim or interest in the Petition, and if affected, they shall be made parties. In addition, the Department of Health must conduct its hearing within the conformity of SDCL 1-26-17 through 26.

*ARSD 20:41:02:01. An individual may apply for a declaratory ruling by filing a petition directed to the board which states generally the factual situation existing under which the question arises. The petition must be verified by the petitioner,*

*except that matters not within the personal knowledge of the petitioner may be on information or belief. The petition shall identify all persons who have or claim any interest which would be affected by the declaratory ruling. When declaratory relief is sought all persons who have or claim any interest which would be affected by the declaration shall be made parties.*

*20:41:02:02. A hearing on a petition for declaratory ruling may be held upon ten days written notice to all parties. The hearing must be public; testimony must be recorded on magnetic tape or by other equivalent means. At the request of any person, testimony given at such a hearing must be transcribed. The transcription expense must be borne by each person requesting a transcript. Parties may make their own provisions to have court reporters present at the hearing. Briefs may be filed by interested parties as the board may direct. Hearings shall be conducted in conformity with the provisions of SDCL 1-26-17 to 1-26-26, inclusive.*

The point of all these examples is this; never does the APA strip an agency of the ability to customize its own hearing process. The Act does not dictate that all agencies conduct their business in the same manner. While the Act provides broad guidance and authority when there is no applicable agency rule, the PUC must refer to its own statutes and rules to determine the extent of its authority to act in this case. The PUC must follow the language of the rule on point: ARSD 20:10:01:34.<sup>9</sup>

**3) “Person” as written in ARSD 20:10:01:34 includes all legal entities.**

NextGen agrees with the Board: “Person” also means entities and agencies. But, that does not change the fact that the Board asked the Commission to rule as to the applicability of a statute on other entities. The PUC lacks the statutory authority to do so.

**4) The Alternative Motion to Supplement the Petition.**

If this were a contested case, discovery would have been permitted and NextGen would have engaged in the process. However, this proceeding is not a contested case. Therefore, as

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<sup>9</sup> *Ibid.*

ARSD 20:10:01:35 states, the Commission may request additional information necessary to rule on the question.<sup>10</sup>

If the Commission disagrees with NextGen and believes it can enter an Order as requested by the Board, what facts will it rely on in doing so? The Circuit Court gives “great weight to the findings made and inferences drawn by an agency on questions of fact.”<sup>11</sup>

Certainly, due to the disputed facts in this case, as acknowledged by even the Commission Staff, the Commission must enter Findings of Fact. Yet the procedure in this case does not allow for the Commission to put witnesses under oath or otherwise divine the facts. The applicability and usefulness of any Order the Commission issues is entirely dependent upon the facts the Commission relies upon in doing so. NextGen does not perceive that the Commission has been supplied with a set of uncontested facts from which it can enter an Order. Therefore, if the Commission proceeds, NextGen requests the factual basis for the Commission’s decision be made part of the record.

**5) NextGen echoes the concern expressed by Commission Staff: a Commission decision which comes from the filed Petition will not solve the issue at hand.**

NextGen argues that due to the disagreement regarding relevant facts and the limitations of the DR process, a ruling by the Commission could lead to added and procedurally complicated litigation. It may well impact NextGen’s contract with the Board. NextGen does not believe, due to the nature of the dispute, that a Commission ruling on the DR will provide any guidance to any Parties. NextGen maintains its argument that the Commission does not have authority to

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<sup>10</sup> ARSD 20:10:01:35. Upon receipt of the petition for declaratory ruling, the commission may request from petitioner further information as may be required for the issuance of its ruling. Unless the petitioner agrees to a longer period of time, the commission shall issue its declaratory ruling within 60 days after the filing of the petition or within 60 days following the receipt of further requested information.

<sup>11</sup> See SDCL 1-26-36.

rule on the Petition. However, it finds merit in and supports the Commission Staff's suggestion that it may also be appropriate to dismiss for "Failure to Pose a Question that can be Properly Answered by the Commission." The Commission was not presented with a set of known, uncontested facts from which to rule. The very principal upon which a DR is based is a set of uncontested facts. The question as presented by the Board, therefore, cannot be properly answered by the Commission.

WHEREFORE, if the Commission chooses not to dismiss the Petition for Declaratory Ruling, pursuant to NextGen's filed Motion, or for the reasons stated in the Commission Staff's pleading, then NextGen respectfully requests the Commission oversee a discovery process wherein it obtains the information necessary to determine: (i) how RLEC 9-1-1 traffic is currently transported, including detailed routes and carrier identification; (ii) at what costs the 9-1-1 traffic is transported, who pays such costs, and how costs are processed/funded (including the source(s) of funding); (iii) whether there is sufficient need for change to the current 9-1-1 transport process, including an impact of any such change on the technical aspects and costs for providing 9-1-1 RLEC transport; and (iv) the overall impact on 9-1-1 and the NG9-1-1 system if a change is ordered.

Dated this 19 day of April 2018.

By:  
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