

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

**IN THE MATTER OF THE PETITION FOR ) MOTION TO DISMISS  
A DECLARATORY RULING DETERMINING ) AND  
RESPONSIBILITY FOR RURAL CARRIER ) ALTERNATIVE MOTION TO  
INTERCONNECTION TO THE NEXT ) CONTINUE TO SUPPLEMENT  
GENERATION 9-1-1 SYSTEM ) THE PETITION  
)  
)  
)** **TC17-063**

COMES NOW, NextGen Communications Inc. (“NextGen” or “Party”) and respectfully submits this Motion to Dismiss the South Dakota 9-1-1 Coordination Board’s (“Board” or “Party”) (collectively “Parties”) Petition for Declaratory Ruling.<sup>1</sup> In the alternative, if the South Dakota Public Utilities Commission (“Commission”) denies this Motion to Dismiss, NextGen moves to continue this proceeding with a requirement that all Parties factually supplement the Board’s filed Petition for Declaratory Ruling. NextGen supports its Motion and Alternative Motion as follows:

**MOTION TO DISMISS**

1. Changing from a half-century old 9-1-1 system to a modern Next Generation 9-1-1 network is an important and serious matter, and NextGen recognizes that all the Parties are supportive of efforts to protect the lives and property of the citizens of South Dakota. NextGen appreciates, in particular, the Board’s recognition of the unique rural carrier transport challenges that exist in the transition to Next Generation 9-1-1 services in the state. However, and in no way to diminish the magnitude of its good intentions, the legal proceeding initiated by the Board to resolve these challenges is not proper. The

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<sup>1</sup> *Petition for Declaratory Ruling Determining Responsibility for Rural Carrier Interconnection to the Next Generation 9-1-1 System, Public Utilities Commission of the State of South Dakota*, filed by the South Dakota 911 Coordination Board (filed October 27, 2017), Docket No. TC17-06.

Commission does not have statutory authority to take a rendition of the facts and the “issue to be decided” from a petitioner to whom the law in question does not apply.

2. This Docket, as it has been filed, must be processed, and ruled upon only within the confines of a Declaratory Ruling legal proceeding. Pursuant to ARSD 20:10:01:34, “any person wishing the Commission to issue its ruling as to the applicability to **that person** of any statutory provision or rule of order of the Commission may file with the Commission a Petition for Declaratory Ruling.”<sup>2</sup> (emphasis added)
  
3. The Board’s filing fails to meet the requirements of the law as it has not requested the Commission to determine the applicability of a law rule or order to **the Board** itself. Rather, it requests the Commission make a ruling as to the applicability of the law and impact of the law on other entities, including NextGen. In fact, the Commission has no jurisdictional authority over the Board whatsoever. Therefore, it is legally insufficient and procedurally improper for the Board to request the Commission to determine how a statute rule or order impacts the Board since the Commission’s decision would have no impact.
  
4. The question the Board requests the Commission answer is, “who” is responsible for transporting 9-1-1 traffic. The Board itself is not in the business of transporting

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<sup>2</sup> ARSD 20:10:01:34 20:10:01:34. 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.

telephone traffic, and it not subject to the Commission's authority as a carrier. Therefore, the Commission cannot declare the Board to be the responsible Party. Rather, the Board wants the Commission to rule regarding other Parties' financial and/or technical obligations. In their own defenses and to protect their business and legal interests, those "other" Parties (i.e., SDTA, SDN and NextGen) voluntarily intervened in this Docket. However, intervention by these impacted Parties certainly does not generate or create the statutory authority the Commission needs to rule in this matter. Nothing the intervening Parties did or can do will change or create the statutes or administrative rules that gives authority for the Commission to act on the Board's Petition. The Commission obtains its authority from statute. Without this specific authority, the Commission has no legal option but to dismiss the Board's request.

5. The law does not permit the Commission to act on the request made by the Board. No law providing the Commission with authority can be applied to the Board. The law cited in by the Board in its Petition relates only to the authority of the Commission and applies to telecommunication companies, not Executive Branch boards.
  
6. In an agency-based Declaratory Ruling legal proceeding, the ruling agency acts on assumed facts. It is not necessary that an actual controversy exist. Rather, because a party requests the decision-maker determine the applicability of the law to it, that petitioning party is responsible to present the proper facts. *In re Petition For Declaratory Ruling*, 2016 SD 21. As such, in an agency-based declaratory ruling, discovery is not conducted because the party presenting the facts is the party then

impacted by the questioned law and agency ruling. The process works as intended by the law.

This situation is different. In this case, the filing party, who presented the facts, will not be directly impacted by the Commission decision. Therefore, the filing party's perception of the verifiable and relevant facts, and potential impacts, cannot be complete. The Board simply does not know all the facts. If the Commission rules on the Petition as filed, with incomplete facts that are not presented from the impacted Parties' perspectives, the Commission will make an ill-informed and illegal decision.

7. There is no prejudice to any Party if the Commission dismisses this Declaratory Ruling docket. If this Petition is dismissed, then any Party who can assert the law does *impact it directly* is free to refile its own Petition for a Declaratory Ruling. In that case, if the petitioning party fails to fully state the facts, it alone risks obtaining an irrelevant or unenforceable Commission decision. As a better option, any aggrieved party can file a Complaint with the Commission, or in an applicable court based upon a civil cause of action. In a contested case, the parties can litigate the relevant facts and the trier of fact can determine which facts are pertinent to the decision.

WHEREFORE, NextGen respectfully requests the Commission dismiss the instant Petition for Declaratory Ruling, as the Commission lacks statutory authority to act on the Petition as filed by the Board.

**ALTERNATIVE MOTION TO CONTINUE TO SUPPLEMENT THE  
BOARD'S PETITION FOR DECLARATORY RULING**

1. If the Commission denies NextGen's Motion to Dismiss the Petition for Declaratory Ruling, in the interests of justice, the Petition as filed by the Board must be supplemented. The Petition, as filed, does not sufficiently state the facts, and does not sufficiently frame the unresolved issue.
  
2. In its Petition, the Board requested the Commission rule as to the applicability and impact of the law on other Parties, including NextGen. Yet, the Board as the Petitioner is the only entity that is permitted to set forth the facts, as is required by ARSD 20:10:01:34. The facts as set for in the Petition, are the only facts that must be considered. The Board is denied access to the facts as they exist for the actual impacted entities, and the Board cannot (and does not) represent the impacted entities, including NextGen.

Furthermore, a Declaratory Ruling proceeding does not permit the Parties to litigate which of the facts are relevant and must be considered by the trier of fact. Rather, the facts as stated by the Petitioner; whether correct, incorrect, hypothetical, or real, are those that must be accepted. As a result, if the facts presented by the Petitioner are incorrect or incomplete, the Commission risks entering an Order that may be a detriment to the public's safety or inapplicable due to an ongoing dispute regarding the factual basis which supports the decision. It is in the public interest to supplement the record to assure the proper facts are asserted as the basis for a Commission decision.

3. ARSD 20:10:01:35 permits the Commission to request additional information of “the Petitioner.”<sup>3</sup> This not been done, and even if it had been done, “the Petitioner” does not actually hold the information the Commission must know to make an informed decision.
4. If the Commission opts to rule on the Petition for Declaratory Ruling, despite its lack of statutory authority to do so, it should require that the Petitioner collect additional information. Indispensable relevant facts missing from this proceeding include, but are not limited to:
  - a. Currently, 9-1-1 calls are routed and transported successfully from the RLECs to centralized collection points (AKA, Point of Interconnection – “POIs”) before distribution to the appropriate Public Service Answering Points (“PSAPs”). Each RLEC knows how its customers’ 9-1-1 calls get from callers to the POIs. However, no other Party to this proceeding definitively knows this information. It is improper for the Commission to order a change to the current 9-1-1 system, when is has no factual evidence and, therefore, no justifiable reason to believe the current transport method is inadequate. Current RLEC 9-1-1 transport detail by RLEC/carrier is indispensable to an informed Commission decision.
  - b. Not only are the 9-1-1 calls currently successfully and reliably transported, but each involved entity is adequately compensated financially in the process.

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<sup>3</sup> **20:10:01:35. Commission action on petition.** 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.

The Commission must know the funding source(s), levels, and processes (i.e., what Parties, agencies, government authorities, or others pay for which services) for the current transport plans before it can make an informed decision, if any, as to how or why the current system can or should change.

- c. In fact, NextGen believes that the historic RLEC 9-1-1 traffic transport infrastructure and funding mechanisms need not change even with the transformation to an NG9-1-1 environment (except a change of POIs, which are essentially co-located with current POIs). The Commission's decision on the Declaratory Ruling could result in a disruptive and unnecessary change to that traffic. In any case, the Commission has no information on what that impact could be. It is improper for the Commission to make such a decision in the absence of all the necessary technical and financial information required to determine whether, why, and what impact a change in 9-1-1 traffic transport will have on the public's safety.

5. If the Commission proceeds and makes a ruling on the Petition as filed, the substantive rights of the involved PSAPs and Qwest Corporation d/b/a CenturyLink QC ("CenturyLink") may also be impacted. If this litigation were properly pled, witnesses could be called, discovery could be conducted, subpoenas served, and third parties joined as appropriate. Without these procedural due process options for the Parties, in the alternative the Commission must seek out the missing information. It is legal error to disenfranchise impacted parties and/or potential litigants without seeking information from them regarding the impact of a decision on their rights, finances, and operations.

6. The voluminous filings made by all Parties highlight the many fact-based issues and questions which must be vetted before an effective and proper decision can be made by the Commission. Without the full and fair consideration of a record that would contain the answers to the factual conflicts and inadequacies presented in the various filings, the Commission risks acting on partial information when deciding an issue with state-wide public safety impacts. As part of its factual contribution, NextGen incorporates by reference, its filings made in this docket to date.
  
7. Not only are the facts presented by the Petitioner inadequate for all the above reasons, but the “precise issue to be answered by the commission’s declaratory ruling” as written in the Petition is also inadequate.<sup>4</sup> The issue presented asks: whether NextGen or the SDTA members have the “responsibility” to transport the 911 traffic. Is it possible that the Commission’s view of the issue is different from the Petitioning Party’s view? Is the request intended to mean only technical impact, or financial impact, or both? Are these impacts the same? Furthermore, regardless of how the Commission acts, there is great risk that many issues will be left unanswered, and resolution could only be achieved through additional lengthy litigation both at the Commission and Judicial levels. Had this matter been filed as a contested case, all Parties through their own pleadings, could identify and articulate the necessary causes of action to facilitate what they perceive to be the proper Commission decision and solve the issues at hand.

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<sup>4</sup> See ARSD 20:10:01:34 (3).



8. If the Commission proceeds with this docket, there is a danger that it may substantively impact a South Dakota Executive Branch contract; an area not within the Commission's authority. Again, without the ability to subpoena information or call witnesses, the Commission lacks relevant information, and risks making an uninformed decision with unforeseen and/or unintended negative impacts on the public's safety.
  
9. NextGen believes the Board views itself as "stuck in the middle," and desired only to initiate a non-adversarial legal proceeding. NextGen suspects the Board believed Parties would take the filing as an opportunity to discuss options, share facts and ideas, and work toward a meaningful resolution. Frankly, this was NextGen's desire as well, and NextGen repeatedly initiated such good faith amicable resolution efforts. However, that process did not occur as hoped. NextGen believes, as we have repeatedly detailed in our pleadings, that SDN, SDTA, some PSAPs, and the RLECs hold information that is indispensable to the proper adjudication of this matter. To date, and despite repeated requests, the information has not been provided.
  
10. In summary, while this matter was launched with all good intentions, and hope for a non-controversial outcome, unfortunately, the declaratory ruling "type" of docket does not provide the process or procedure necessary to fully discover and present facts, and missing facts are the key to this predicament. Some Parties, for reasons they believed justified their silence, would not release essential data. In the alternative, the remaining Parties could not conduct discovery, call witnesses, or subpoena information. Without all the tools of litigation available and in use, the Commission has only heard each Parties'

“version” of the facts manipulated to best support their individual and independent positions. To reach a fair, just, and defensible decision, the Commission must seek out the additional information and permit supplementation of the Petition before it rules. NextGen welcomes an opportunity, and believes other Parties may as well, to provide the Commission with the relevant and essential missing information.

WHEREFORE, if the Commission chooses not to dismiss the Petition for Declaratory Ruling, per the request above, then NextGen respectfully requests the Commission engage in a discovery process wherein it requires the Board, Parties, and other affected groups or individuals, to provide 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 16 day of April 2018.

By:

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