

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

In the Matter of the Petition for a)	
Declaratory Ruling Determining)	TC17-063
Responsibility for Rural Carrier)	
Interconnection to the)	Response to Comments on
Next Generation 9-1-1 System)	Petition for Declaratory Ruling

The South Dakota 911 Coordination Board (hereinafter “the Board”), provides the following in response to Comments filed in the above titled matter by SDTA, NextGen, and Commission Staff.

Issues Raised by Filed Comments

Upon review of all Comments filed in this matter, the Board recognizes that two additional threshold issues have been raised: the applicability of 47 U.S.C. 251 to this question, and whether or not bona fide requests have been served. The Board has no objection to consideration of these issues, and believes they fall within the parameters of this proceeding.

Federal statute 47 U.S.C. 251 discusses carriers’ interconnection responsibilities. The original Petition question specifically asks about transport, but the title of the Petition is “determining responsibility for rural carrier interconnection.” The Board has always viewed these two issues as inextricably intertwined, as transport is a necessary component of interconnection, but does not, in and of itself, allow for actual transmission of a 9-1-1 call over the NG9-1-1 network. SDCL 49-31-79, the statute cited in the Petition, discusses both interconnection and bona fide requests, and therefore both issues are within the purview of the original petition, as well as the filed Comments.

The Board, however, respectfully disagrees with the Staff Comments that fact based issues should be addressed in a later docket.¹ Regardless of whether the Commission agrees with SDTA's assertion that §251 applies or NextGen's position that it is inapplicable, the analysis must proceed to resolving factual issues.² Without taking a position on either argument, the Board submits the following analysis.

Applicability and Terminology of 47 U.S.C. §251

As pointed out in the comments submitted by Commission Staff, §251 includes a requirement that interconnection be "at any technically feasible point within the carrier's network". 47 U.S.C. §251(c)(2)(B). This requirement is not found in SDCL 49-31-79, but the provisions could be read harmoniously. If the Commission agrees with NextGen's arguments that §251 is not applicable to this issue, then the analysis would move on to the three factual issues listed in both federal and state law. If the Commission agrees with SDTA that §251 is applicable to this issue, the factual question of whether or not the requested interconnection points in Sioux Falls and Rapid City are within the carriers' respective networks must be answered.

The Board feels it is important to define the terms used. While the question presented in the Petition was "whether it is NextGen or the rural carriers comprising SDTA that has the responsibility to transport 911 traffic between the rural carriers' service areas and NextGen's centralized points of interconnection" (emphasis added), the terminology in §251 is "network". As SDTA, NextGen, and Commission Staff have all indicated that the question of the applicability of §251 is pertinent to this Petition, the term "network" would be the correct concept to apply in this case. SDTA's comments

¹ See Staff Comments, page 2.

² SDTA agrees that the Petition raises factual issues, see their comments, pages 9 & 22. NextGen's comments also include factual questions regarding the existing network, page 20.

appear to use the terms “network” and “service area” interchangeably³, but they are not logically synonymous; particularly since some “meet points” are currently within a service area or “very close” and thus networks must in some instances extend outside the carrier’s service area.⁴

As presented in NextGen’s comments, SDN is a subcontractor to NextGen and interconnection points already exist “at or near” Sioux Falls and Rapid City.⁵ Therefore, a material issue is whether the requested interconnection points already reside within the existing network. The answer to this question may possibly resolve the entire matter. If, as NextGen posits, SDN’s network is already part of the rural carriers’ network by virtue of ownership then the interconnection points may already be within the network, albeit not within each individual rural carriers’ geographic service area. Or, alternatively, even if SDN is not part of the rural carrier’s networks, because SDN is NextGen’s subcontractor, perhaps NextGen is already connecting to the rural carriers within their networks via SDN’s network. Germane to either line of reasoning is 47 U.S.C. 251 (a)(1) which presents the general duty of carriers to “interconnect directly or indirectly...” (emphasis added). The statute clearly anticipates use of a third party to facilitate interconnection between two carriers seeking to transport traffic. Therefore, much hinges on the factual issues associated with application of §251. Nonetheless, If the legal and factual analysis of §251’s applicability in this proceeding does not resolve the pending question, the discussion must proceed to the remaining factual issues.

³ See SDTA’s comments, page 7.

⁴ See SDTA’s comments, page 15; see also NextGen’s Comments, Page 17.

⁵ See NextGen’s comments, page 2, footnote 6.

Bona Fide Requests

Prior to this proceeding, the Board was not alerted by any party to any claims that South Dakota rural carriers believed the requests for interconnection sent on behalf of the Board were not sufficient under state or federal law. Again, the Board's Petition cited SDCL 49-31-79 as the pertinent statute in this proceeding. It provides:

Pursuant to 47 U.S.C. § 251(f)(1) as of January 1, 1998, the obligations of an incumbent local exchange carrier, which include the duty to negotiate and provide interconnection, unbundled network elements, resale, notice of changes and collocation, do not apply to a rural telephone company unless the company has received a bona fide request for interconnection, services, or network elements and the commission determines that the rural telephone company shall fulfill the request. The commission may only determine that the rural telephone company shall fulfill the request if, after notice and hearing pursuant to chapter 1-26, the commission finds that the request is not unduly economically burdensome the request is technically feasible, and the request is consistent with the universal service principles and provisions set forth in 47 U.S.C. § 254 as of January 1, 1998. The commission shall make such determination within one hundred twenty days after receiving notice of the request. The person or entity making the request shall have the burden of proof as to whether each of the standards for reviewing the request has been met. Nothing in this section prevents a rural telephone company from voluntarily agreeing to provide any of the services, facilities, or access referenced by this section.

It was because the Board believed, as stated in the Board's initial comments, that the threshold requirement of valid requests had been met, that the Board asked for a determination under this statute as to which party, NextGen or SDTA's rural carriers, had responsibility to transport 9-1-1 traffic to the NG9-1-1 points of interconnection.

As that understanding has now been challenged, it appears the Commission must rule as to whether or not the bona fide requests were required; and if they were required, whether or not the requests issued were bona fide. Based on the Board's understanding of the Comments, bona fide requests would not be required if NextGen is not legally requesting interconnection, because the NG9-1-1 network will only transport

and terminate the traffic.⁶ Perhaps, interconnection requests would not be necessary if NextGen is entitled to adopt existing agreements.⁷ This issue also has factual interplay with the question of how SDN's network and its relationships to both SDTA's carriers and NextGen effects the entire construct of transport and interconnection in this situation. If SDN is part of the rural carriers' network, then the only interconnection at issue would be with NextGen, and that issue may have been addressed in the private contract between NextGen and SDN.

If such requests were either not required or were bona fide, then the analysis under the statute can proceed. Assuming for purposes of argument that either the requests were bona fide or if the Commission adopts NextGen's reasoning as to the inapplicability of the requirement, the question of legal responsibility cannot be determined under either federal or state law without determination of the remaining factual questions.

Determination of Burden and Feasibility

The general premise under federal and state law is that all carriers must comply with interconnection requests. There are exceptions for rural carriers, if certain factual requirements are met:⁸

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:...The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network **(A)** for the transmission and routing of telephone exchange service and exchange access; **(B)** at any technically feasible point within the carrier's network; **(C)** that is at least equal in

⁶ See NextGen's Comments, page 12.

⁷ See NextGen's Comments, page 15.

⁸ Rural carriers are also able to petition for other modifications to the requirements in 47 U.S.C. §§ 251 (b) and 252 (c) as provided for in 47 U.S.C. 251 (f)(C)(2) and SDCL 49-31-80. But those sections do not appear pertinent to the comments presented.

quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and **(D)** on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

47 U.S.C. §251 (c).

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

47 U.S.C. §251 (f).

These statutes mirror the provision in SDCL 49-31-79. The law is clear. Any carrier must interconnect. Rural carriers may be excepted from the interconnection requirement based on three factual findings: 1. A bona fide request; 2. whether the request is unduly burdensome; and 3. whether the request is technically feasible.

Because both federal and state law list the same requirements, the Board remains puzzled as to what legal ruling the Commission could issue in this case without answering these questions. Neither SDTA, NextGen, nor Commission staff, has presented any other legal authorities that address interconnection and the requisite transport to interconnection points as a strictly legal matter without required factual findings. Furthermore, subsumed in these factual questions are the issues raised by both SDTA and NextGen in their Comments regarding cost and existing network capability. It was precisely because the Commission is the only entity authorized to make these factual findings that the Petition was filed.

9-1-1 Coordination Board Authority and NG9-1-1 Project Participation

The Board wishes to clarify its position regarding its authority and the existing network infrastructure. The Board has not mandated that PSAPs join the NG9-1-1 system. Under the statutory framework in SDCL 34-45, it is a local government decision. Moreover, the Board does not have the authority to shut down the existing network, as the Board has no authority over either CLECs or RLECs. Because of the benefits of NG9-1-1, and the funding mechanisms provided for implementation, the project has moved along to this point as a voluntary, cooperative effort among the Board, local governments, PSAPs, and carriers.

Public Policy

As previously stated, the Board is concerned by the idea that all factual issues should be negotiated among the parties or brought in subsequent actions before the Commission. The prior filings in this action reflect that the parties have been unsuccessful in informally resolving this issue since it was reserved in the Commission certification proceeding in 2015. All pertinent parties have been granted intervention, and the issues thoroughly presented by SDTA and NextGen. Therefore, the Board requests that the issues contained in SDCL 49-31-79 as presented in the original Petition, as well as the threshold issues raised by SDTA, NextGen, and Commission Staff be resolved in this proceeding. As a matter of public policy, splitting the issues between legal and factual and requiring additional proceedings is inefficient and could delay the progress of the entire NG9-1-1 project. Of course, the Board recognizes that some factual findings may prohibit reaching other issues, but again merely asks the Commission to resolve all that is appropriate in this docket.

The Board respectfully requests oral presentations to the Commission in this matter.

Respectfully submitted this 12th day of January, 2018

/s/ Jenna E. Howell _____
Jenna E. Howell
Special Assistant Attorney General
Attorney for South Dakota
Department of Public Safety
118 West Capitol Avenue
Pierre, SD 57501
605-773-3178
jenna.howell@state.sd.us