

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

In the Matter of the Petition for a)	TC 18-013
Declaratory Ruling Determining)	
Competitive Local Exchange Carrier)	Reply Comments on Petition for
Processes for Requesting 9-1-1 Traffic)	Declaratory Ruling and Opposition
Delivery from Rural Local Exchange)	to Motion to Dismiss
Carriers)	

The South Dakota 9-1-1 Coordination Board (“the Board”), hereby provides the following Reply Comments regarding the comments submitted by NextGen, Inc. (“NextGen”) South Dakota Telecommunications Association (“SDTA”), and PUC Staff. The Board also opposes NextGen’s Motion to Dismiss, and asks that it be denied.

NextGen’s Comments

NextGen’s comments are far afield of the question asked, and the Board requests that those comments not pertaining to the question before the Commission be deemed irrelevant. The many factual issues and arguments raised are beyond the scope of the question the Board has requested the Commission answer. However, the Board responds to the points raised by NextGen in the same numbered order in which they were presented only to clearly establish that the Board has not provided any false or misleading information. South Dakota’s business can be conducted in an above board and professional manner that does not condone slander and baseless accusations to obfuscate the actual issue.

1. NextGen states “A CLEC (in this instance, NextGen) **never** ‘requests’ 9-1-1 traffic from an RLEC.” *NextGen, Inc. Initial Comments*, pg 2, sect. 1(emphasis in the original). Attached please find Exhibit A hereby incorporated by reference, which is a

copy of a letter sent by NextGen to carriers throughout South Dakota indicating that NextGen is asking for interconnection. This document, although marked as a draft and dated July 17, 2017, was first sent on August 10, 2017. This clarified and expanded the LOA/CFA (Letter of Authority and Customer Facility Assignment) first sent on December 22, 2015.¹ This communication from Comtech/NextGen verifies the statements proffered in the Petition.

NextGen's comments then go on to repeat its legal interpretation of the law, and claim that the Board was erroneous in not adopting NextGen's reasoning within the Petition. *NextGen, Inc. Initial Comments*, pg 2, sect. 1. The Board's Petition presents no legal arguments, only facts and a question. Moreover, the Board's question intentionally does not specify interconnection, as the previous docket revealed that NextGen, despite Exhibit A, has a theory of law that interconnection is not required in the 9-1-1 environment. That theory is contrary to SDTA's position. Cognizant of the fact that the disagreement has not been resolved and because the Board is not requesting that it be resolved in this Docket, the question encapsulates all the options included in the statute (interconnection, services, or network elements). SDCL 49-31-79.

2. The Board has not in any way discouraged any potential voluntary agreements, but had to address that portion of the statute, when asking the Commission for its interpretation. It is not a factual issue, but merely frames the question on the supposition that voluntary agreements are not workable. See *NextGen, Inc. Initial Comments*, pg 2,

¹ The Board requested and received permission from NextGen to attach Exhibit A to this Reply to ensure that no confidentiality would be violated. The Board did not request permission regarding the initial 2015 documents, but if the Commission wishes to see them, or the entire document from which Exhibit A was taken, the Board would be amenable to any safeguards NextGen would request.

sect. 2. No voluntary agreements are impeded by a ruling on the Petition, and the statutory language remains unchanged.

3. The Board does not understand NextGen's claims that the RLECs' connections to the NG9-1-1 system are not halted by the legal disagreement between NextGen and the RLECs. Attached and incorporated by reference is Exhibit B, which was originally an exhibit to NextGen's Comments in Docket TC17-063. This letter from Venture Communications Cooperative maintains that as rural carrier, they are not required to connect outside their network or service area. All of the filings in TC17-063 by SDTA and SDN indicate the same stance. The RLECs indicate that they will not connect at the current points of ingress, and NextGen maintains that it is their legal responsibility to do so. *NextGen, Inc. Initial Comments*, pg 2, sect. 1. SDTA maintains it is NextGen's legal responsibility to file bona fide requests in order to determine if NextGen must connect with rural carriers within their network or service areas, and NextGen maintains it is not. *Id.*, *SDTA Initial Comments*, pgs. 5-8. Without delving into currently irrelevant factual issues of what is technologically required for connection between NextGen and rural carriers, there is clearly at least a philosophical, if not spatial and geographic gap, between where the rural carriers' service/network areas are currently located and where NextGen's points of ingress are currently located.

However, the Board reiterates that this issue does not need to be resolved in this Docket. For this Docket it is sufficient to state the Board's position that simply because 9-1-1 traffic may continue to be delivered over a legacy system, and eventually reach an IP-based system, does not mean that the State has a complete end-to-end NG9-1-1 system that directly connects to all carriers. The germane point of this discussion is that

the Board's statements in the Petition are supported by the filings in the previous docket, available at the time of submission of this Petition.

But once again, whether or not rural carrier exemptions apply to the specific situations of each carrier within the State's NG9-1-1 project is beyond the scope of the current Docket. The Board is only asking if bona fide requests are a required first step. The Board freely acknowledges that this Petition will not resolve all the legal and factual issues that exist within this project. The answer to the Board's question, which would be applicable to any certified entity in South Dakota, provides guidance as to how to procedurally solve the remaining questions and issues. And, regardless of whether NextGen views the Petition as helpful to resolving the existing impasse (see *NextGen, Inc. Initial Comments*, pg. 2 line 4), the Board believes that it is a helpful, and necessary, determination.

4. Attached as Exhibit C and incorporated by reference is the Commission's Order in TC15-062, NextGen's certification proceeding. The third paragraph of the Order states in part "the Commission voted to grant the waivers of ARSD 20:10:32:03 (11) and ARSD 20:10:32:10, approve the Joint Stipulation, and grant the Certificate of Authority, subject to the provisions of the Joint Stipulation." The Board freely admits that when describing (not quoting) this Order in the Petition, the phrase "pursuant to" was used rather than the direct quote "subject to". *Petition for Declaratory Ruling*, TC18-013, pg. 2. The Board believes this to be a correct, synonymous description; contrary to NextGen's assertion. *NextGen, Inc. Initial Comments*, pg 2, sect. 4. Nor did the Board ever state that the Order bound NextGen or anyone else to subsequent proceedings. The Board merely stated that "[u]nder Section 7 of that Stipulation, the issue of who had

responsibility or transport of 9-1-1 traffic to NextGen's centralized points of interconnection remained undetermined." *Petition for Declaratory Ruling*, TC18-013, pg.

2. The Joint Stipulation is attached hereto as Exhibit D and incorporated by reference so that it can be read by all. As to NextGen's other allegations in this area, the Board respectfully leaves it to the Commission to interpret its own Order.

5. While the Board believes that NextGen's comments in this section ignore the discussion had on the record with the Commission at its April 20, 2018 meeting regarding the previous petition, the pertinent context is that the Board has tried to comply with the Commission's instructions. First, the Board believes that a Petition for Declaratory Ruling is a quasi-judicial action.

"[A]s our earliest decisions indicate, quasi-judicial acts are those that could have been 'determined as an original action in the circuit court.'" *Department of Game, Fish and Parks v. Troy Township*, 2017 S.D. 50, ¶21, 900 N.W.2d 840, 849 (quoting *Champion v. Bd. Of Cty Comm'rs*, 5 Dakota 416, 430, 41 N.W. 739, 742 (1889)). "Perhaps as good a criterion as any for determining what is judicial is merely to compare the action in question with the ordinary business of courts: that which resembles what courts customarily do is judicial, and that which has no such resemblance is nonjudicial." *Id.* (quoting *Francisco v. Bd. Of Dirs. Of Bellevue Pub. Sch. Dist. No 405*, 85 Wash2.d 575, 537 P.2d 789, 792 (1975) (en banc) (other citation omitted)). Declaratory actions are statutorily authorized for both administrative agencies and circuit courts. SDCL § 1-26-15 and SDCL ch. 21-24. Therefore, under both of the above criteria, a declaratory action constitutes a quasi-judicial function. Also, "[a]dministrative action is quasi-judicial if it 'investigates, declares, and enforces

liabilities as they stand on present or past facts and under laws supposed to already exist' rather than 'looking to the future and changing existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.'" *Dept. v. Troy*, 2017 S.D. 50, ¶ 21, 900 N.W.2d 840 at 849 (quoting *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226, 29 S.Ct. 67, 69, 53 L.Ed. 150 (1908) (other citations omitted)). The Board is only asking for a ruling as to the present, existing law.

Next, it is correct that the Commission suggested a complaint-based case to resolve the myriad issues raised in the previous action. However, without an understanding of the threshold question presented in this Petition, the Board is unsure what grounds it should use to file a complaint against any of the involved parties. As was clear in Docket TC17-063, NextGen and SDTA have differing interpretations of federal and state law. Without knowing whether bona fide requests are required in 9-1-1 traffic situations, the Board cannot even determine if either party is correct in either refusing to file such requests, or requiring such requests. As the Board does not believe it is appropriate to file unfounded complaints against any person or party, regardless of the situation, it decided to again file a declaratory action to ask this prefatory question-not the entirety of the issues raised in the previous docket, which the Commission indicated would require a different procedural vehicle-giving all due possible credence and deference to the guidance previously provided by the Commission. This Docket does not preclude later filings or action.

Finally, NextGen states that "[a]t best, [this] Petition would result in a theoretical opinion that would have no value to anyone, and isn't an appropriate role for the Commission." *NextGen, Inc Initial Comments*, pg 3, section 5. The Board completely

disagrees with this statement. The opportunity for declaratory actions is required by South Dakota statute and the Commission's own administrative rules comply with that requirement. SDCL 1-26-15, ARSD 20:10:01:34 and 20:10:01:35. NextGen cites no authority for the claim that the Commission cannot do what the law requires the Commission to do. Nor does NextGen explain how a declaratory ruling, as provided for in law and rule, can be only "theoretical" and without value.

6. The Board objects to NextGen's Motion to Dismiss (*NextGen, Inc. Initial Comments*, pg 3, sect. 6.) as untimely and legally unfounded. The Board believes NextGen's argument is moot due to the Commission's written Order Granting Intervention and Order Establishing Procedural Schedule in this matter dated June 18th, 2018. The Commission therein stated that "[t]he Commission has jurisdiction in this matter...." But, the Board renews its legal and logical arguments from previous Docket TC17-063 as to why NextGen's Motion is untimely, and contrary to South Dakota law. For ease of reference and brevity of this Reply, the Board's previous brief is attached hereto as Exhibit E and incorporated by reference. NextGen's filing in this Docket also fails to acknowledge that while the previous docket did ask the Commission which entity had the duty for transport and interconnection, this Docket merely asks the Commission to declare what the law sets as the appropriate procedure to begin to determine responsibility for those areas, as applicable. Thus, the Board is not asking the Commission to Order NextGen or SDTA to do anything, but is rather asking whether South Dakota law requires bona fide requests as a prerequisite to determining if RLEC exemptions do or do not apply when a CLEC is requesting delivery of 9-1-1 traffic from an RLEC, assuming voluntary agreements are not feasible.

7. Once again, NextGen provides no authority for its sweeping statement that it intends (prior to any decision from the Commission) to ignore any decision the Commission issues. *NextGen, Inc. Initial Comments*, pg 3, sect. 7. The Board does not believe that any party, particularly one who asked to be allowed to intervene, can dictate how the Commission conducts its lawful business. Nor is it appropriate to threaten to flout the law unless a specific, desired outcome is granted. Similarly, NextGen does not provide any authority for conditioning their cooperation on their requirement that the Commission exponentially expand the breadth of the current Petition and require the extensive discovery that NextGen wishes. *NextGen, Inc. Initial Comments*, pgs 3-4. The diagram and questions in NextGen's Exhibit are superfluous to the issue pending before the Commission. The questions listed address and mandate participation from parties who did not seek intervention in this Docket. The Board further notes that this Petition in no way limits or prevents any party from also pursuing any other venue they may consider more appropriate if they truly wish to resolve these issues to the benefit of the safety of South Dakota's citizens and visitors.

SDTA and Staff Comments

The Board's only pertinent reply to the other Comments filed in this Docket is to reiterate that the Board has only asked the question recorded in the Petition, and believes that SDTA's Initial Comments also address issues broader than the question necessitates. The Board, again, is not advocating one possible interpretation of the law over the other. Consequently, the Board has no reply to the Comments submitted by the Commission's Staff, other than to note the Board has no objections or concerns with those Comments.

Conclusion

The history of this Petition has been laborious. But the effort put forward is indicative of the importance of South Dakota's NG9-1-1 project. Recognizing the numerous legal and factual issues that have been identified, the Board asks that the Commission deny NextGen's Motion to Dismiss and issue a Declaratory Ruling answering only the basic, legal question stated in the Petition:

“Does South Dakota law require bona fide requests as a prerequisite to determining if RLEC exemptions do or do not apply when a CLEC is requesting delivery of 9-1-1 traffic from an RLEC, assuming voluntary agreements are not feasible?”

Whatever the Commission determines to be the appropriate legal answer, the answer will assist the Board in determining how to proceed with resolving the other existing questions and issues.

Respectfully submitted this 22nd day of June, 2018

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