

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

IN THE MATTER OF THE PETITION FOR)	
A DECLARATORY RULING DETERMINING)	NEXTGEN COMMUNICATION INC
COMPETITIVE LOCAL EXCHANGE)	REPLY COMMENTS
CARRIER PROCESSES FOR REQUESTING)	
9-1-1 TRAFFIC DELIVERY FROM RURAL)	
LOCAL EXCHANGE CARRIERS)	TC18-013
)	

NextGen Communications, Inc. ("NextGen" or "Party") hereby respectfully submits its Reply Comments in the above-captioned matter, in response to those made by the South Dakota Telecommunications Association ("SDTA") and the Commission Staff ("Staff"). In addition, NextGen reiterates its position that the Department of Public Safety / 9-1-1 Coordination Board ("Board") lacks standing and, therefore, its Petition for Declaratory Ruling ("Petition") must unfortunately be dismissed as was the Board's first Petition.¹

INTRODUCTION

The Board should be recognized for its commitment to success as an early adopter of NG9-1-1 / ESInet technologies. NextGen has also demonstrated its consistent sincere commitment to see South Dakota's groundbreaking NG9-1-1 program to fruition, and desires to

¹ The Board's prior Petition for Declaratory Ruling, TC17-063, suffered the same technical infirmity as does this similar Petition. Nothing was changed in this Petition regarding the legal theory or filing format. 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" (emphasis added). 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. 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 CLECs, 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 on it.

do what is supportive of this goal in keeping with our contractual obligations, relevant and applicable existing law and regulation, and the best interests of public safety. The transition to NG9-1-1 is progressing well, and the question presented by the Board in its Petition, while interesting, does not materially further this progress, and it would discredit all parties should this matter inadvertently disrupt the important practical benefits of NG9-1-1 to the citizens of South Dakota.

Despite its content objections and Motion to Dismiss (“Motion”), NextGen respects the Board’s request to focus comments on the legal question it presented 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?”

As such, in its prior filing, NextGen confined its Comments to that realm, and incorporates herein by reference that analysis of the defects in the question and procedure of the Motion. Unfortunately, SDTA did not respect the Board’s request and has flooded this proceeding with irrelevant and immaterial discussions and arguments, all of which were already conclusively rejected by the South Dakota Public Utilities Commission (“Commission”) in TC17-063. The Commission should disallow and/or reject the portions of SDTA’s pleading which encroach into the subject matter and arguments outside the legal question presented by the Board. The Commission should also reject any surviving SDTA arguments which are based of false or misleading factual statements.

Because of SDTA’s submission of false and/or misleading statements and rejected arguments that fall outside the Board’s question, NextGen must now respond with corrective information and counter-arguments. NextGen incorporates by reference its pleadings as filed in TC17-063. NextGen apologizes to the Board for not being able to maintain the pure legal focus

it requested. NextGen apologizes to the Commission for retreading arguments that the Commission has already reviewed and summarily ruled against.

NextGen contracted with the State of South Dakota to develop a modern NG9-1-1 system. NextGen cannot force any telecommunications provider or customer to use the State's NG9-1-1 system, and neither can the Board or the Commission. Likewise, the Commission cannot force NextGen to seek interconnection. No statute or other regulation gives the Commission jurisdiction to *order* NextGen to request interconnection with RLECs or any other telecommunications provider. That is for all carriers to decide as part of their individual business models.

RESPONSE TO STAFF FILED COMMENTS

Staff wrote that, “. . . there is not an exemption from the rural exemptions if a CLEC requests delivery of 9-1-1 traffic.” With the following clarifications, NextGen agrees with Staff's filed comments. In addition to our previous notation (in NextGen's Comments) that a CLEC never “requests” 9-1-1 traffic, NextGen must clarify that it has never suggested that 9-1-1 is an “exception” to any relevant interconnection rules or processes (of which there are several), only that the definition of “interconnection” limits applicability of a rule or process to begin with. Also, it is NextGen's position that no such discussion is complete without including the relevant global preemptive facts that;

- 1) an RLEC's obligation to provide 9-1-1 services to its customers pre-dates and supersedes any connectivity discussion (whether or not NextGen is involved), and
- 2) “interconnection,” as defined by ALL relevant interconnection statutes does not match the 9-1-1 connectivity process (as far as invoking a mandatory affirmative regulatory

requirement) since 9-1-1 is a one-way and not a two-way traffic connection (“interconnection” is defined as two-way traffic exchange).

To use an “interconnection” regulation or statute, the involved Parties need to qualify under that statute’s “definition” of interconnection. Absent such qualification, the applicability of a regulation or statute is questionable at best. Such is the case with the regulations or statutes cited by the Board in its Petition and the Staff in its comments.

RESPONSE TO SDTA FILED COMMENTS

If the fundamental dispute was not previously obvious, it is now: SDTA believes NextGen has an affirmative proactive interconnection obligation to “reach out” for interconnection (that benefits only the other party), and, as explained below and noted in NextGen’s prior filings, pay enormously for that privilege. SDTA apparently believes this obligation was triggered magically by NextGen obtaining CLEC status. Yet, SDTA offers no conclusive legal authority to support its position. Instead, in reaching its conclusion:

- 1) SDTA asks this Commission to ignore the RLEC’s pre-existing 9-1-1 obligations;
- 2) SDTA asks the Commission to disregard the legal and technical elements that define “interconnection;”
- 3) SDTA does not want this Commission to inquire regarding the existence of current RLEC-to-9-1-1 provider interconnection agreements (of which there are none);

- 4) SDTA does not acknowledge the “voluntary” and “commercial” interconnection processes (even though they are both acknowledged by statute and the Federal Communications Commission (“FCC”), and invoked by SDTA’s members);
- 5) SDTA does not want this Commission to inquire into the current 9-1-1 connectivity arrangements (including how its RLEC members either deliver their 9-1-1 traffic at no charge to the current 9-1-1 system, or are subsidized by public safety to do so); and
- 6) SDTA asks the Commission to modify or add to its current CLEC certification rules a requirement that CLECs list in advance all carriers from which they may ever seek connectivity from now until an unknown future date.

These represent inconvenient facts and legal arguments bypassed in the “race to revenue” for the RLECs, the South Dakota Network (“SDN”), and SDTA.

Corrections to Statements Made By SDTA

The following statements or argument made by SDTA in its filed comments are false and/or misleading:

- 1) SDTA states that “interconnection agreements” are “necessary” for the transmission of 9-1-1 calls to PSAPS. The statement is inaccurate. First, if it were true, there would be numerous 9-1-1 interconnection agreements in existence now and/or on file with the Commission today. There are no such agreements. Second, the “definition” of “interconnection” under Section 251 does not support the SDTA statement. “One-way” 9-1-1 traffic is not included in the Section 251 definition of interconnection. Third,

RLECs can connect directly to PSAP(s) and no interconnection process exists for RLEC to PSAP interconnection. SDN provides connectivity to RLEC networks without an interconnection agreement. VoIP carriers don't use interconnection agreements. SDTA ignores the fact that alternatives to negotiated Section 251 interconnection agreements exist, as cited by the Staff and as NextGen has repeatedly noted, voluntary agreements both exist and, per South Dakota regulations, are preferred as the "first" form of connectivity (mentioned first in the statute).

- 2) SDTA's invocation of NextGen's CLEC certification is not only both a mischaracterization of the event and irrelevant to the discussion, but also a gross misstatement of the results of the negotiation between the parties. The Joint Stipulation signed by the parties in TC15-062, by its terms, is not to be used by either party in future litigation. The matter was shelved so that the Parties could renew their arguments, if relevant, in the future. SDTA cites NextGen's certification as some sort of "capitulation" on the question of interconnection when nothing could be further from the truth.
- 3) SDTA falsely classifies NextGen's CLEC certification as automatically generating a "shot clock" for "RLEC interconnection." SDTA proceeds to ask the Commission to assume there is an unavoidable requirement that NextGen, or any CLEC, affirmatively reach out for interconnection even if it is not needed. NextGen does not "need" to interconnect with the RLECs. As NextGen has explained multiple times, the RLECs "need" to deliver 9-1-1 calls. NextGen has provided the RLECs with a way to do so.

4) SDTA writes that it (technically, its RLEC members) had an “expectation” that NextGen would present “requests for interconnection.” The statement is, at a minimum, irrelevant, as well as inaccurate. As NextGen has fully and completely responded in its pleading in TC17-063, SDTA’s RLEC members responded to the joint communication from the 9-1-1 Coordination Board and NextGen/Comtech with a request for technical specifications for traffic delivery. Based upon their documented behavior, it does not appear SDTA’s RLEC members ever shared SDTA’s “expectation.”

5) SDTA claims NextGen competes with the RLECs. The statement is false. It is immaterial to NextGen if an RLEC directly connects to a PSAP, or connects to the ESInet, or does or doesn’t provide 9-1-1 services, and because NextGen cannot force an RLEC to connect to the ESInet, it’s impossible for NextGen to understand how NextGen competes with the RLECs – for anything. What customer of an RLEC is now receiving substitute services from NextGen instead? SDTA’s citation of AT&T’s ESInet services is equally odd and irrelevant. NextGen cannot, nor has it tried to, prevent “competition” in the NG9-1-1 space in South Dakota. Moreover, SDTA members are benefiting from NextGen’s contract with the Board, and due to this contract, SDTA members have additional revenue from NextGen for circuits, collocation, and on-site technical support.

SDTA’s Arguments Fall Outside Legal Question Asked by The Board

CLEC certification is a legacy requirement of the introduction of telecommunications competition from the Telecommunications Act of 1996 (“Act”). However, not every state follows the “CLEC” process for 9-1-1 / NG9-1-1 provider certification (Ohio, Illinois, and

Colorado are examples of alternative certification processes). The Act is an imprecise tool for 9-1-1 service provider certification and some confusion is understandable.

As reflected in the Act's provision, the primary focus of certification, and then interconnection, is the affirmative requirement on the "incumbent" providers (including RLECs) to allow competitors to enter the market, and to make their networks available to these competitors. Section 251 is the centerpiece of this discussion and is designed to *prevent an incumbent from refusing interconnection to a competitor*. The South Dakota CLEC certification process mimics this ideal and supports the conclusion that certification does not create an affirmative duty *on the CLEC* to interconnect.

No matter how SDTA attempts to reinterpret history, CLEC certification does not generate a requirement or affirmative obligation that NextGen request formal Section 251 interconnection with any other telecommunications provider. However, it is obvious that NextGen needs to allow "connectivity" to fulfill its contractual obligations. The State of South Dakota's ESInet connects with SDN and transports traffic from the ESInet POI (Point of Interconnection) to PSAPs over SDN's physical transmission facilities (NextGen does not own transmission facilities in the state). NextGen needs the ability to connect as a "carrier" (not as a retail customer) to the carrier actually transporting 9-1-1 traffic from the POI to the NG9-1-1 PSAP.

As the Commission knows, pursuant to the requirements of the South Dakota CLEC application process, carriers were named in NextGen's application as examples of the "types" companies that might make use of the 9-1-1 network NextGen offers. NextGen did not attempt to list all such carriers as the CLEC application process did not require same. Contrary to SDTA's contention, the resulting CLEC certification grant by the Commission in and of itself

does not create an affirmative obligation by NextGen to seek Section 251 interconnection with the carriers listed in NextGen’s application, or with any carrier. No such mandatory commitment or process exists. Also, nothing in the CLEC certification process or grant of authority precludes the use of / mandates voluntary or commercial connectivity / interconnection processes. SDTA cannot point to the CLEC certification of any company wherein the Commission mandated or ordered that the newly certified CLEC send out formal interconnection requests (or sanctioned it for not doing so). The Commission has never mandated a CLEC send interconnection requests because it does not have the statutory authority to do so. If the Commission adopts SDTA’s arguments, then the Commission will be adding a “new” obligation to its certification process. Such a change needs to happen through the legislative process, not a declaratory ruling.

SDTA’s “reinterpretation” of the 9-1-1 Coordination Board’s Petition is inappropriate and should be rejected. The pleading stands as it is. If the SDTA wants a question answered, it is free to ask the specific question (and the Commission has already provided specific guidance in TC17-083 as how this should be accomplished). Undeterred in its quest to “reinvent” this matter for its own purposes, SDTA goes further and answers a question that was not asked. SDTA’s attempt to do so is inappropriate, procedurally improper, and should be rejected.

In Footnote 7 on Page 5 of its filed comments SDTA complains that NextGen failed to follow the procedural requirements of Section 251 to request interconnection. NextGen previously addressed these arguments and again apologizes for repeating its reply. NextGen is not “requesting access to 9-1-1,” just the opposite, it offers a means for RLEC’s to meet their obligations to provide 9-1-1.² NextGen does not send traffic to the RLECs. However, even if an

² Just one example; 47 Code of Federal Regulations § 64.3001 Obligation to transmit 911 calls.

affirmative obligation to request some flavor of interconnection (formal or informal) existed (which NextGen denies) the detailed correspondence (entered in the record in TC17-063) from it to SDTA's RLEC members more than qualifies as a "bona fide" requests for interconnection.³

The attached Exhibit A is a page from the "SOP for CLECS/ILECs Interconnecting to Comtech NG9-1-1 Aggregation Points" referenced in the above Footnote 7. This document is but one illustration of the points NextGen desires to convey to the Commission in this responsive filing:

- 1) The state of South Dakota contracted Comtech/NextGen to build the South Dakota NG9-1-1 network;
- 2) Carriers connect to Comtech/NextGen for NG9-1-1; and
- 3) Carriers are asked to connect.

Exhibit A validates NextGen's position that it can achieve connectivity without the provision of Section 251. Under the current 9-1-1 system, as used by the RLECs, a Section 251 agreement is not necessary, and NextGen, simply because it obtained CLEC certification, has no affirmative obligation to request entry into a formal Section 251 interconnection agreement with any provider. NextGen surely can make such a request if it desires but cannot be forced to.

All telecommunications carriers shall transmit all 911 calls to a PSAP, to a designated statewide default answering point, or to an appropriate local emergency authority as set forth in § 64.3002.
<https://www.law.cornell.edu/cfr/text/47/64.3001>

³ Please see NextGen's extensively documented response in TC17-063 for a complete rebuttal of SDTA's arguments. It is too voluminous to repeat here.

SDTA Arguments Conclusively Rebutted in TC17-063
Also Fall Outside Legal Question Asked by the Board

SDTA cites the financial hardships that RLECs may encounter from the delivery of 9-1-1 service outside their “networks.” There is no financial hardship that NextGen can detect, for several reasons:

- 1) The RLECs are already currently delivering their 9-1-1 traffic (upon information and belief) via SDN to the CenturyLink 9-1-1 selective router outside of their “networks” either at their sole expense or under a reimbursement mechanism that would continue unchanged with a transition to ESInet connectivity. No financial hardship exists.
- 2) SDN is the RLEC’s owned affiliate under Section 251 rules, and is, therefore, the RLEC’s “network.” This is undisputed. NextGen already has a transport contract with SDN and collocation of its equipment with SDN’s equipment. Because the RLECs (via SDN) and NextGen have network POIs in the same location, there is no connectivity burden or financial hardship
- 3) NextGen provided a cost study, based on SDN’s tariffs and actual RLEC 9-1-1 traffic volumes, that the provision of 9-1-1 traffic to the ESInet POI could “cost” each RLEC less than \$0.01 per subscriber per year. This is not a financial hardship.

NextGen is not insensitive to the RLECs position that they have different economic and technical constraints than other carriers. However, the RLECs have specifically remedied these

concerns through their creation and operation of SDN, which was *explicitly certified* by the Commission in part to deal with 9-1-1 public safety concerns. SDTA's arguments evaporate because the RLECs were happy to "volunteer" to transport their 9-1-1 traffic on SDN when that sacrifice was part of SDN's pending Commission certification process.

Furthermore, if the RLECs have remaining financial or technical issues with their obligation to provide 9-1-1 services, this is matter for separate Commission action, or legislation (in coordination with the Board). NextGen has no financial or technical resources, and is not contracted, to solve such problems. Its distracting, unfair, and disingenuous to expect NextGen to do so in this proceeding.

SDTA Seeks Only Financial Gain Not Regulatory Certainty

NextGen recognizes that SDTA disagrees with the federal and South Dakota mandates that RLECs are singularly responsible to provide 9-1-1 services to their customers. NextGen acknowledges that the Board, and even the Staff, desire clarity on this matter. However, it now appears that the relationships exemplified in the instant case have drawn the attention of the FCC.

NextGen encourages the Commission to review the FCC's tentative conclusions about how the unique market structure of local exchange carrier ownership of a monopoly centralized equal access ("CEA") transport carrier, such as SDN (specifically cited in the FCC docket), can lead to allegations of illegal rate arbitrage.⁴ NextGen cannot help but note the same powerful market dynamics and incentives at work here.

⁴ SDN has been mentioned by the FCC in its Notice of Proposed Rulemaking, *In the Matter of Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage* (WC Docket No. 18-155) (Released June 5,

If this matter were only about such “connectivity” or “interconnection”, there would be no controversy. Instead, NextGen has sufficiently argued and fully documented that this controversy is solely about money and SDTA’s desire, for the economic benefit of its RLEC members via their owned and operated monopoly transport affiliate, SDN, to force the Commission against its will to leave NextGen no choice but to make usury-level payments for RLEC 9-1-1 traffic transport.

NextGen has noted repeatedly and proven by research that the RLECs voluntarily (meaning without any filed or regulated interconnection agreements) deliver their traffic today to the current 9-1-1 network *at no charge to anyone* (or through an undisclosed compensation mechanism that would continue in place to support the RLECs). Or, RLECs may directly connect to PSAPs (as some may do today). Just as there is no regulation on the RLECs that requires use of the South Dakota ESInet, there is no regulation that compels NextGen to reach out and pay for RLEC 9-1-1 traffic delivery.

Because SDTA believes the Commission should review and approve any interconnection arrangement between NextGen and the RLECs, it follows that it would be satisfied if such an arrangement included transport of the RLECs 9-1-1 traffic to the South Dakota NG9-1-1 Network POIs at no charge to NextGen. NextGen submits that the FCC has already effectively reached this conclusion with its proposed “bill and keep” rule for connectivity between local

2018). The FCC believes strongly enough that there is the potential for financial abuse of a connecting carrier when a market is composed of a CEA provider being used by a local exchange carrier that it is introducing a rule where transport exchanged between the connecting carrier and the local exchange carrier would be only “bill and keep” – in other words, the carriers would not charge each other. The similarities to the situation in South Dakota are too strong to ignore. NextGen is not assigning culpability to anyone. We only note that the application of this proposed FCC rule to the RLEC/SDN/NextGen relationship would be that the RLECs would connect via SDN to NextGen at no charge to NextGen. <https://docs.fcc.gov/public/attachments/FCC-18-68A1.pdf>

exchange carriers, SDN (as a CEA), and connecting carriers.⁵ If the SDTA's concerns are about the "legal sufficiency" and formality of the interconnection process, the Commission's agreement with the FCC should satisfy those concerns.

CONCLUSION

NextGen remains open to all fair, full, and constructive ideas and alternatives in this matter. However, NextGen should not be forced to agree to unnecessarily subsidize SDN (or any other carrier) for the sole benefit of its RLEC owners, thus introducing new costs into the NG9-1-1 system, or pay the RLECs or SDN when they either have no new costs or are already being paid through other mechanisms for their 9-1-1 obligations.

NextGen's stands behind its arguments, and its position that the Petition should be dismissed as the Board lacks standing.

Dated this 22nd day of June 2018.

NEXTGEN COMMUNICATIONS, INC.

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⁵ *Ibid.*

ATTACHMENT A

1. Introduction

The Comtech NG9-1-1 Interconnection Service was created to provide Next Generation (NG) 9-1-1 integration services for the State of South Dakota (SoSD.) Comtech was chosen as the NG9-1-1 Service Provider and will be working closely with all stakeholders to provide an efficient transition for the CARRIER onto the SoSD NG9-1-1 network.

1.1. Contact Information

- Comtech NG9-1-1 Project Manager –
Laurie Hickok, Laurie.Hickok@comtechtel.com
515-344-5830

Technical Contacts:

- Comtech Test and Turn-up for T1s
Comtech Transport group
SST-Transport@comtechtel.com

1.2. NG9-1-1 Connectivity Requirements of CARRIER

All CLECs and ILECs who provide dial tone/local service in the SoSD PSAPs' jurisdictions are asked to connect to the Comtech NG9-1-1 Aggregation Points. Each CARRIER will connect to the Comtech NG9-1-1 Aggregation Points by establishing T1/DS0 facilities, trunks, and SS7 routes (if applicable) between the CARRIER's network and Comtech NG9-1-1 network.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Petition to Intervene was served electronically on the parties listed below on June 22, 2018:

Ms. Patricia Van Gerpen Executive Director South Dakota Public Utilities Commission patty.vangerpen@state.sd.us	Ms. Amanda Reiss Staff Attorney South Dakota Public Utilities Commission amanda.reiss@state.sd.us
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Dated this 22 day of June 2018.

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