

EXHIBIT E

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)	Objection and Opposition to Motion to
Next Generation 9-1-1 System)	Dismiss and Alternative Motion to
)	Supplement the Petition

The South Dakota 9-1-1 Coordination Board (hereinafter “the Board”), hereby objects to NextGen’s Motion to Dismiss and Alternative Motion to Continue to Supplement the Petition and opposes both Motions.

The Board believes that neither Motion can properly be heard on Friday, April 20th due to untimely filing and lack of reasonable time to respond.

ARSD 20:10:01:01.02: Except to the extent a provision is not appropriately applied to an agency proceeding or is in conflict with SDCL chapter 1-26, another statute governing the proceeding, or the commission's rules, the rules of civil procedure as used in the circuit courts of this state shall apply.

SDCL 15-6-6(d): A written motion, other than one which may be heard ex parte and notice of the hearing thereof or an order to show cause shall be served not later than ten days before the time specified for the hearing, unless a different period is fixed by this chapter or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit or brief, the affidavit or brief shall be served with the motion and, except as otherwise provided in § 15-6-59(b), opposing affidavits or briefs may be served not later than five days before the hearing, unless the court permits them to be served at some other time. A reply brief or affidavit may be served by the movant not later than two days before the hearing, unless the court permits them to be served at some other time.

The Board has identified no Commission specific rule that would exempt a Motion to Dismiss in the current proceeding from the general 10-day filing requirement cited above. Nor was any authority cited in the Motion.

The Board is certainly authorized to grant such a motion. Under ARSD

20:10:01:02.04:

[a] pleading may be dismissed or withdrawn prior to entry of a final order by the commission if a stipulated agreement is filed and the commission does not find that the public interest requires the proceeding to be continued. The commission may also dismiss a pleading at the request of an interested party or on its own motion, stating the reasons in its order.

However, nowhere is one party allowed to make such a dispositive motion and have it heard with only four days' notice.¹

Therefore, the Board has not had its due notice to fully research the Motion to Dismiss and the Alternative Motion on their substantive merits, but wishes to raise the following issues. First, NextGen appears to challenge the pending action on jurisdictional grounds. As personal jurisdiction as to all joined parties is either clearly appropriate or has been waived by the prior and extensive participation of all parties, it appears NextGen may be challenging the Commission's subject matter jurisdiction, but the distinction among the types of jurisdiction is important.² The Board believes

¹ Pursuant to SDCL 15-6-6(a), the day of service is excluded:

In computing any period of time prescribed or allowed by this chapter, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes those holidays listed in § 1-5-1....

² "Although it may be true that subject matter jurisdiction cannot be conferred by agreement, consent, or waiver, it is important to distinguish between subject matter jurisdiction in terms of a court's authority to

NextGen's actual argument is that the Board lacks standing. NextGen does not challenge that declaratory actions are authorized, nor does NextGen argue that they, SDN, or SDTA are outside the Commission's jurisdiction. Therefore, their argument is that the Commission has the jurisdiction to hear the pending Petition, but that the Board was not a proper entity to request the proceeding. Even though the Board believes it should be allowed to proceed with its Petition as a legal and factual matter, NextGen has also waived the issue of the Board's standing.

Subject matter jurisdiction is the power of a court to act such that without subject matter jurisdiction any resulting judgment or order is void." *Cable v. Union Cty. Bd. Of Cty. Comm'rs*, 2009 S.D. 59, ¶ 20, 769 N.W.2d 817, 825. "Subject matter jurisdiction is conferred solely by constitutional or statutory provisions." *Lake Hendricks Improvement Ass'n v. Brookings Cty. Planning & Zoning Comm'n*, 2016 S.D. 48, ¶ 15, 882 N.W.2d 307, 312. **"Furthermore, subject matter jurisdiction can neither be conferred on a court, nor denied to a court by the acts of the parties or the procedures they employ."** *Cable*, 2009 S.D. 59, ¶ 20, 769 N.W.2d at 825. "The test for determining jurisdiction is ordinarily the nature of the case, as made by the complaint, and the relief sought." *State v. Phipps*, 406 N.W.2d 146, 148 (S.D. 1987). Relevant to the existence of subject-matter jurisdiction is the doctrine of standing. A litigant must have standing in order to bring a claim in court. *Cable*, 2009 S.D. 59, ¶ 21, 769 N.W.2d at 825-26. Although standing is distinct from subject-matter jurisdiction, a circuit court may not exercise its subject-matter jurisdiction unless the parties have standing. See *Lake Hendricks Improvement Ass'n*, 2016 S.D. 48, ¶ 19, 882 N.W.2d at 313.

Lippold v. Meade Cnty Bd. Of Comm'rs, 2018 S.D. 7, ¶¶17-18, 906 N.W.2d 917, 921-922 (S.D. 2018)(emphasis added). "According to our precedent, a challenge to standing can be waived." *Whitesell v. Rapid Soft Water & Spas, Inc.*, 2014 S.D. 41, ¶9, 850 N.W.2d 840, 842 (S.D. 2014) (citation omitted).

The South Dakota Supreme Court dealt with waiver of standing as to whether standing was waived as an issue on appeal, but NextGen cites no authority for raising this threshold issue after all other submissions in this Docket have long been filed.

adjudicate certain classes of cases and a court's jurisdiction over a particular offense and a particular defendant." *Honomichl v. SD*, 333 N.W.2d 797, 799 (S.D. 1983) (Wollman, J. dissenting)

There are no allegations that any facts or circumstances have changed since the filing of all pertinent documents. And the rules of civil procedure address this.

Even if NextGen is trying to incorrectly raise subject matter jurisdiction, SDCL 15-6-12(b) requires in part that,

[e]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

- (1) Lack of jurisdiction over the subject matter;
- (2) Lack of jurisdiction over the person;
- (3) Insufficiency of process;
- (4) Insufficiency of service of process;
- (5) Failure to state a claim upon which relief can be granted;
- (6) Failure to join a party under § 15-6-19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted....(emphasis added).

Previously, the Board would not have considered this a proceeding one in which defenses need to be raised, and freely admits that it did not file a complaint against NextGen; but as NextGen alleges that the Board's action is inappropriate and that a ruling on the Petition could cause harm to the public's safety³; the Board views the Motion as adversarial, and believes such claims should have be raised earlier. Under this rule, NextGen has also waived its argument that Century Link has not been joined.⁴

Another pertinent part of this analysis is that the requirements for standing differ between declaratory actions before agencies and those before a circuit court.

The [Administrative Procedures Act] contains two statutes authorizing declaratory rulings. SDCL 1-26-15 authorizes declaratory rulings by agencies on statutes, rules, and agency orders. And SDCL 1-26-14 authorizes declaratory rulings by circuit courts on agency rules. Both provisions were taken almost verbatim from the Revised Model State Administrative Procedure Act of 1961 (MSAPA). See Revised Model State Admin. Procedure Act §§ 7-8 (Unif. Law Comm'n 1961). A

³ NextGen's Motion to Dismiss, pages 1-4 and Alternative Motion to Continue, pages 5, 7, and 9.

⁴ Alternative Motion, page 7, Section 5.

comparison of the two statutes reveals a clear difference in the standing required for persons requesting declaratory rulings from administrative agencies and declaratory rulings from courts. To request a declaratory ruling from a court, SDCL 1–26–14 requires an actual case or controversy. The plaintiff must allege that the administrative “rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff.” *Id.* In contrast, the Legislature excluded this actual case or controversy language from the statute authorizing declaratory rulings by agencies. SDCL 1–26–15 requires agencies to adopt rules **permitting anyone other than penitentiary inmates** to request “declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency.”

In re Petition for Declaratory Ruling re SDCL 62-1-1(6), 2016 S.D. 21, ¶¶ 7-8, 877 N.W.2d 340, 343-344 (S.D. 2016) (emphasis added). “Considering these statutes together as a part of the same act, we conclude that by excluding the case or controversy language from SDCL 1–26–15, the Legislature excluded an actual case or controversy requirement in agency declaratory proceedings.” *Id.* at ¶9, 877 N.W.2d at 344.

In the above case, the South Dakota Supreme Court noted in footnote 5 that some agency rules, such as the Commission’s rule in ARSD 20:10:01:34 do require a question as to the applicability *to the petitioner*. *Id.* at ¶8, 877 N.W.2d at 343. But the opinion goes no further. Even if an actual controversy was required, it is clear on the record in this Docket that such a controversy exists. So the remaining question as raised by NextGen’s Motions is whether or not the Board can request a declaratory action.

It does not appear this question has ever been previously addressed by the Commission. However, the Board does have standing and is an appropriate party to file the Petition under the law. While the Board itself is not subject to the Commission in the ordinary course of business, no authority is cited making that a prerequisite to a

declaratory action. The Board does, however, has statutory authority for implementation of the NextGen 9-1-1 system in South Dakota.⁵ This issue is halting the implementation of a complete NextGen 9-1-1 system encompassing all providers and users of the South Dakota 9-1-1 system. As the entity responsible for all 9-1-1 surcharge dollars collected in South Dakota⁶, and as the South Dakota contracting agency for the NextGen 9-1-1 System, the Board is both interested in and affected by changing costs dependent on the resolution of the issue before the Commission. The Board's initial Petition explained the Board's role, and the Board's subsequent Comments and Reply to Comments clearly elucidate the Board's position in this controversy.

It is true that the Board is not an individual "person" as stated by the rule, and "person" is not defined in ARSD 20:10:01:01.01.⁷ But, as the Commission has authority over corporations and other legal entities, it is absurd to interpret the rule as excluding requests from anyone or any entity other than an individual person. So too, it is absurd, and contradictory to the plain language of SDCL 1-26-15, to say that a requestor can only be someone within the legal jurisdiction of the entity.

Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. No inmate as defined in § 1-15-20.1 may petition an agency for a declaratory ruling on the applicability of statutory provisions, rules, or orders of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases. A copy of all such rulings shall be filed with the director for publication in the Administrative Rules of South Dakota.

⁵ See SDCL 34-45-12 which provides in part "[t]he board may solicit proposals to coordinate and implement an upgrade to the 911 emergency service system of all public safety answering points. The funds may be disbursed for the purpose of planning, coordinating, purchasing, installing, maintaining, and operating, an upgrade to the 911 emergency services system."

⁶ The Board determines what local costs are or not allowable expenses to be paid with surcharge dollars. SDCL 34-45-18.2. The Department of Public Safety, to whom the Board is administratively attached, disperses all surcharge dollars monthly. SDCL 34-45-8.4, 34-45-8.5, and 34-45-19.

⁷ ARSD 20:10:01:01.01 is the definition section pertaining to the declaratory action rule.

Id. The statute does not include the language of applicability *to the person*. And if the Commission adopted NextGen's interpretation, no member of the public as a user of telephone or utility services could request a declaratory action as to the applicability of the Commission's statutes, rules or rulings. Such an interpretation limits the public's access to the Commission, and undercuts the plain language of SDCL 1-26-15 as well as the *In re Petition for Declaratory Ruling re SDCL 62-1-1(6)* decision cited above.

Second, having previously recognized the technical linguistic issue now raised by NextGen, the Board consulted Commission staff prior to filing of the Petition and was told that the Board could properly utilize the declaratory ruling procedure in ARSD 20:10:01:34. This is supported by Staff's Comments filed on December 19, 2017 and Staff's Reply Comments dated January 16, 2018. While Staff differentiates between what they view as the appropriate legal issues encompassed by the proceeding and some of the factual findings requested by the Board and other parties, nowhere does Staff indicate that the Petition is inappropriate under Commission rules.

Finally, the Board is at a loss as to why a Motion to Dismiss would be filed at this point in the proceedings. NextGen was not only granted intervenor status, but also filed comments and reply comments. Moreover, NextGen supported the declaratory action process at the Board's public meeting considering this action held on October 19, 2017. All appropriate procedural processes in this docket have been completed for months. Now, a mere five days from the date the Commission was to render a decision on the Petition⁸, NextGen posits that a better option would be for any aggrieved party to file a

⁸ See Letter from PUC Staff dated March 30, 2018 supporting scheduling the issue for a decision on April 20, 2018. See Also the Commission's posted Agenda for April 20th, 2018. The Agenda was posted after filing of NextGen's Motions.

Complaint with the Commission,⁹ thereby wasting all efforts invested in the existing Docket. NextGen states there is no prejudice by a blanket dismissal of this Docket¹⁰, but the Board feels that the taxpayers of South Dakota are prejudiced by the costs of delaying the NextGen 9-1-1 implementation.

The pending Petition was the result of over a year of talks to resolve interconnection and transport issues and disagreements between and among the intervening parties, as is well documented in this Docket. None of the intervening parties moved to file a complaint when talks failed. It is because of the Board's desire that all South Dakotans enjoy the same level of 9-1-1 service across the State, and the Board's responsibility to coordinate the implementation of the new NextGen 9-1-1 service, that the Board took the initiative to file this Petition. The action was intended to resolve the legal question at issue, without casting aspersions on any participating entity. The Board fears that if this Petition is dismissed based on its supposed lack of standing that no further action will be taken by the other parties. As a result, rural PSAPs and South Dakotans residing in the service areas of the rural providers could be left with a diminished level of 9-1-1 service compared to the rest of the State.

The Board wants all parties to have a fair opportunity to fully participate in this docket, and believes that has occurred. However, the Board is concerned that these Motions will distract the Commission from deciding the issue, previously uncontested as appropriately before the Commission under the filed Petition, of whether or not 47 U.S.C. §251 applies to NextGen. The issue of 47 U.S.C. §251 applicability, and all interconnection and transportation issues fall within the Commission's subject matter

⁹ NextGen Motion to Dismiss, Page 4, Section 7.

¹⁰ Motion to Dismiss, Page 4, Section 7.

jurisdiction. SDCL Chs. 49-30, 49-31, and 49-32, et al. While that determination may not resolve all factual issues, it would provide guidance moving forward with the NextGen 9-1-1 project.

Next, the Board opposes the Alternative Motion to Continue to Supplement the Board's Petition for Declaratory Ruling. This Motion is inherently contradictory as it asks the Commission to order the Board¹¹ to provide additional facts to the Petition,¹² but previously states that the Board "does not actually hold the information the Commission must know".¹³ The Alternative Motion further states that "no other Party to this proceeding definitively knows this information"¹⁴. Therefore, the Motion asks the Commission to do what NextGen already says is impossible-for the Board to provide information it does not have.

Furthermore, the facts NextGen seeks to add to the Petition have no bearing on whether 47 U.S.C. §251 applies, or whether rural telephone companies are required to connect outside their service areas if the legal prerequisites are met. Nor do the requested additional facts have bearing on a determination as to what area is included in a rural telephone company's "network," what items are required for an interconnection request to be bona fide, or whether NextGen needs an interconnection agreement from the rural carriers. These issues were identified by Staff in reply comments as those

¹¹ In the introduction of NextGen's Motion it states that they move "to continue this proceeding with a requirement that all Parties factually supplement the Board's filed Petition..." Page 1 (emphasis added). But in Section 4 of the Alternative Motion, NextGen states the Commission "should require the Petitioner collect additional information." Page 6.

¹² Alternative Motion, page 6.

¹³ Alternative Motion, page 6, Sect. 3.

¹⁴ Alternative Motion, Page 6, Section 4a.

eligible to be decided by a ruling on this Petition.¹⁵ A Commission ruling on whether or not 47 U.S.C. §251 does apply could result in appropriate interconnection requests and contested proceedings before the Commission that would discover and decide the very facts NextGen is requesting.

Just as with the Motion to Dismiss, this is certainly the first time the Board has heard anyone allege that not all necessary parties are joined. The Board has supported the intervention of all joined parties in the proceeding, and in fact discussed that option with both NextGen and SDTA prior to filing the Petition. Claiming now that the Board through this docket is seeking a decision that would “disenfranchise impacted parties...without seeking information from them regarding the impact of a decision on their rights, finances, and operations”¹⁶ is wholly unfounded. Nor does NextGen explain why they wish the Commission to order the Board to do something that NextGen says the Board cannot do, rather than seeking discovery through the Commission.¹⁷ Moreover, the existing Petition does not ask the Commission to exercise authority over a contract, and any contractual issues between parties in this proceeding are outside the purview of the Commission.

The Board renews its request that the Commission determine all that is appropriate within the auspices of the filed Petition. The Board had good reason to believe this action was appropriate, based not only on Staff consultation, but NextGen’s public support of the action given to the Board, and the factual reasons provided.

¹⁵ Staff Comments, Pages 2-3; Staff Reply Comments, Page 3.

¹⁶ Alternative Motion, Page 7, section 5.

¹⁷ The Commission has discovery authority under ARSD 20:10:01:22.01. “A party may obtain discovery from another party without commission approval. The commission at its discretion, either upon its own motion or for good cause shown by a party to a proceeding, may issue an order to compel discovery. The taking and use of discovery shall be in the same manner as in the circuit courts of this state.” *Id.*

NextGen has not provided any authority beyond the administrative rule supporting its allegation that the Board's filing was inappropriate, nor has the Board located any in the short time since receiving this Motion. NextGen, SDN, and SDTA unquestionably fall within the purview of the Board, as does the subject matter of this docket-the transport and interconnection of telephone traffic between carriers. The claim that the action is legally insufficient because the Board is not subject to the Commission is not supported under South Dakota law and cannot be supported when the Board is asking based on the impact to the NextGen 9-1-1 System.

For all the foregoing reasons, the Board asks that both Motions by NextGen be dismissed for procedural error, for lack of legal and factual support, and/or as legally and factually incorrect; and that the Commission rule on the pending Petition for Declaratory Action.

Respectfully submitted this 18th day of April, 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