

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

<b>IN THE MATTER OF THE PETITION FOR )</b>	
<b>A DECLARATORY RULING DETERMINING )</b>	<b>NEXTGEN COMMUNICATION INC</b>
<b>COMPETITIVE LOCAL EXCHANGE )</b>	<b>INITIAL COMMENTS AND</b>
<b>CARRIER PROCESSES FOR REQUESTING )</b>	<b>MOTION TO DISMISS</b>
<b>9-1-1 TRAFFIC DELIVERY FROM RURAL )</b>	
<b>LOCAL EXCHANGE CARRIERS )</b>	<b>TC18-013</b>
<b>)</b>	

NextGen Communications, Inc. ("NextGen" or "Party") hereby respectfully submits its Comments and Motion to Dismiss in the above-captioned matter.

This is the second Petition for Declaratory Ruling filed by the Department of Public Safety / 9-1-1 Coordination Board ("Board") on this topic. The first Petition was dismissed by the Public Utilities Commission of South Dakota ("Commission"). See TC17-063. In this second Petition, the Board requests that the Commission issue a Declaratory Ruling for the following:

"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?"

NextGen believes the Board desires, with this Petition, to effect change or at least learn more about how the interested parties should handle 9-1-1 traffic in South Dakota. NextGen shares those goals. However, the Petition is based on several false and technically incorrect assumptions and misstates or mischaracterizes certain information as facts. As a result, if the Commission acts upon the question presented by the Board in reliance on those false assumptions and mischaracterizations, none of the Board's or NextGen's goals will be advanced. NextGen also asks that the Commission make note of NextGen's detailed regulatory and factual

arguments in docket TC17-063 as they are relevant and instructive regarding the procedural defects in the Petition.

NextGen offers the following in support of its position that the Petition is flawed in fact and law, and as a result will not advance the South Dakota 9-1-1 system or assist the Board and that the Petition should be dismissed:

1. The Petition is based, in part, on the false and technically incorrect assertion that a “CLEC is requesting delivery of 9-1-1 traffic from an RLEC.” A CLEC (in this instance, NextGen) **never** “requests” 9-1-1 traffic from an RLEC. 9-1-1 traffic is one-way; from the RLEC’s subscriber to the 9-1-1 network, not two-way. However, because of the one-way traffic flow, an RLEC frequently “requests” to *deliver* its 9-1-1 traffic. Because an RLEC has preexisting federal and state mandates (and often tariff commitments) to provide 9-1-1 service to its customers, it has the preexisting affirmative obligation to deliver its customers’ 9-1-1 calls to a PSAP for completion so that it may fulfill these mandates. This can be accomplished via direct connection, but is more commonly provided by the RLEC delivering its 9-1-1 traffic to a state sanctioned 9-1-1 network at a common point of connection used by all relevant carriers.
2. The Petition is also based on an assumption that “voluntary agreements are not feasible.” NextGen notes that the only 9-1-1 arrangements in place today in South Dakota *must be* “voluntary” as there are no Commission approved negotiated 9-1-1 specific agreements on file with the Commission, and the 9-1-1 network is operating. The detailed research supporting NextGen’s statement is contained in our TC17-063 filings. Therefore, this premise of the Board’s request is incorrect.
3. Another assertion for the Board’s request is that the progress has “halted” regarding connecting rural carriers to the NG9-1-1 System. This is not correct. NextGen is unsure why the Board perceives progress is halted, and no explanation is providing in the Petition. The 9-1-1 network functions today and will continue to function with the next phase of conversion to the ESInet. Connection to South Dakota’s NG9-1-1 system requires minimal, if any, action by all carriers, including the RLECs, and is in keeping with the current law and regulation of 9-1-1 service, as well as the existing NG9-1-1 project plan.
4. In its Petition, the Board cites to the Joint Stipulation (“Stipulation”) in TC15-062 (NextGen’s request for a Certificate of Authority) and explains that NextGen was granted a Certificate of Authority “pursuant” to the Stipulation between NextGen and the South Dakota Telecommunications Association. However, this is incorrect. The parties to that Stipulation

*did not commit* to any future legal proceeding. Rather, they agreed to proceed with the docket despite a potential disagreement. In fact, according to the Joint Stipulation *itself*, it is specifically *not* to be considered as “precedent” relative to the subject matter of the Joint Stipulation. Therefore, the Joint Stipulation is not considered binding on either party in any way in the future, and this makes it impossible for the Joint Stipulation to be a condition of NextGen’s Certificate of Authority.

5. The Board states that one basis for filing this new Petition is that the Commission denied its previous TC17-063 petition because it was too “broad” and the instant Petition seeks a “narrow, non-party specific, legal ruling”. In fact, the Commission stated that its decision was based on the need for a “quasi-judicial resolution of the technical and factual issues raised by the parties.” Its decision had nothing to do with the “breadth” of the issue, but the process vehicle chosen for adjudication. A Declaratory Ruling is an inappropriate Commission process for answering the Board’s question – period. The Commission even attempted to avoid future confusion by giving explicit direction that for it to decide such a case (as the Petition) it would require a “contested case” and “a full record” - neither of which exists or will be created by the Petition. At best, the Petition would result in a “theoretical opinion” that would have no value to anyone, and isn’t an appropriate role for the Commission.
6. Unfortunately, while we support the Board’s need to address its concerns, NextGen believes the instant Petition is legally flawed for the same reason that the Board’s TC17-063 Petition was found to be flawed; inappropriate standing of the Petitioner. Both Petitions require the Commission to make a legal ruling on how an interpretation of a regulation applies to *other* parties, not the Board as Petitioner (since the Board is not regulated by the Commission). As NextGen explained in detail in its TC17-063 filings, this construct is not within the Declaratory Ruling paradigm; in other words, asking the Commission to make a ruling regarding the application of a regulation to a *third party* is not a “Declaratory Ruling.”
7. If the Commission were to issue an Order in TC18-013 based upon the incorrect factual assumptions included in the Petition, and the procedural defect of the process, NextGen would have no choice but to deny the decision’s validity and any impact on NextGen. If the Board perceives there is a problem to be fixed, then the Board should follow the Commission’s previous decision and instructions, and must initiate a different type of action at the Commission, such as a compliant, or seek a remedy in a different venue.

Despite what NextGen perceives as fatal factual and legal flaws, if the Commission desires to use Docket TC18-013 as a vehicle to fully and fairly, in an open and transparent evidentiary proceeding, investigate the current 9-1-1 process, including legal and regulatory

questions such as; A) what interconnection mandates exist, if any, B) is there an allocation of costs, C) what are the current and future funding sources for B), and C) what is the assignment of responsibilities, if any, then NextGen will enthusiastically participate so long as the Commission explores *all* of such questions as part of the inquiry. See attached Exhibit A which contains what NextGen perceives to be relevant topics and questions that should be considered.

WHEREFORE, for the reasons noted above, and for those reasons previously detailed in its filings in TC17-063, incorporated herein, NextGen respectfully requests that the Commission dismiss the Petition.

In the alternative, in a spirit of cooperation and in support of the Board's desires to resolve outstanding questions, if the Commission initiates an investigation or other proceeding on this or similar topics, NextGen requests that the Commission include the questions presented in Exhibit A as part of the investigation, and to be made a party to such proceeding.

Dated this 15 day of June 2018.

NEXTGEN COMMUNICATIONS, INC.

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## 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 15, 2018:

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Dated this 15 day of June, 2018.

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