



Advocating for South Dakota's Rural Broadband Providers

June 18, 2018

Ms. Patty Van Gerpen, Executive Director
South Dakota Public Utilities Commission
500 East Capitol Ave.
State Capitol Building
Pierre, SD 57501

RE: Docket TC18-013 - In the Matter of the Petition by the Department of Public Safety/9-1-1 Coordination Board for a Declaratory Ruling Determining Competitive Local Exchange Carrier Processes for Requesting 9-1-1 Traffic Delivery from Rural Local Exchange Carriers

Dear Ms. Van Gerpen:

Enclosed for filing in the above referenced docket you will find the electronic original of the "Initial Comments of the South Dakota Telecommunications Association".

As is evidenced by the Certificate of Service attached to the Comments, service has been made to representatives of the 911 Coordination Board and NextGen Communications, Inc.

Thank you for your assistance in filing and distributing copies of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard D. Coit", is written over a circular stamp or seal.

Richard D. Coit
SDTA Executive Director and General Counsel

CC: Service List

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

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

**INITIAL COMMENTS OF THE
SOUTH DAKOTA TELECOMMUNICATIONS ASSOCIATION**

The South Dakota Telecommunications Association (hereinafter referenced as “SDTA”), by and through its attorneys, hereby provides its Initial Comments in response to the Petition for Declaratory Ruling (hereinafter referenced as “the Petition”) filed by the South Dakota 911 Coordination Board/Department of Public Safety which forms the basis for the above captioned proceeding. Specifically, the Petition asks this Commission to rule on the following issue:

“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?”

In regards to this question, SDTA and its RLEC/ “rural telephone company” members believe that its resolution requires the Commission to determine more broadly whether or not the interconnection requirements established in federal law by 47 U.S.C. §§ 251 and 252, which are also part of South Dakota law under SDCL §§ 49-31-79 through 49-31-81, apply to interconnection arrangements between RLECs and certified competitive telecommunications carriers which relate to the transmission and routing of local 911 calls.

I. BACKGROUND

SDTA was granted intervention in this proceeding by a decision of the Commission made at its regularly scheduled meeting on June 12th. As noted in SDTA's Petition to Intervene, SDTA is an incorporated organization representing the interests of numerous cooperative, independent, and municipal telephone companies operating throughout the State of South Dakota. All SDTA member companies operate as rural incumbent local exchange carriers (RLECs) or "rural telephone companies" for purposes of the Federal Telecommunications Act of 1996 and also the related state laws enacted in 1998 addressing local exchange service competition (SDCL § 49-31-69, et. seq.).¹ As rural telephone companies engaged in the provisioning of voice communication services to local end user subscribers, every SDTA member company is involved in the origination of 911 calls destined for Public Safety Answering Points (PSAPs) located throughout the State of South Dakota.

The question presented by the 911 Coordination Board's Petition concerns, specifically, what processes and federal and state law requirements apply to interconnection arrangements between RLECs and other certified competitive local exchange carriers that are necessary for the transmission and delivery of 911 traffic, so that 911 calls can be received from end user customers and delivered to PSAP locations across the State.² In regards to the 911 connectivity issue that is the subject of this proceeding and also the

¹ It should be noted that SDTA represents most, but not all the "rural telephone companies" operating in South Dakota. Neither Long Lines d/b/a Jefferson Telephone Company nor Vast Broadband are members and SDTA's incumbent local exchange carrier membership also does not include those rural telephone companies that are listed in the Commission's Annual Report as "Foreign Exchange Carriers". These ILECs that are not SDTA members also would obviously have an interest in, and may be impacted by, a Commission ruling on the filed Petition for Declaratory Ruling.

² A listing of all PSAPs in South Dakota can be obtained at <https://dps.sd.gov/resource-library/PSAP-Contact-Sheet-And-Coverage-Map.docx-441>.

subject of the prior Petition for Declaratory Ruling filed in Docket TC17-063, SDTA would point out that this is not a new issue. SDTA first voiced concerns to the Commission regarding the issue in the latter part of 2015. NextGen filed an Application for a Certificate of Authority with the Commission on August 17, 2015 (Docket TC15-062) seeking authority to provide local exchange and interexchange services in the State of South Dakota.³ Within the context of that proceeding, SDTA and NextGen engaged in discussions concerning originating 911 transport and the appropriate meet points or points of interconnect for 911 traffic exchange, but were unable to reach a resolution. To clear the way for Commission action on NextGen's application for local exchange and interexchange service certification, NextGen and SDTA entered into a "Joint Stipulation" that includes the following language in relation to the unresolved 911 transport issue(s):

NextGen has indicated to SDTA that it "does not provide for the origination of the 911 call," indicating that it does not believe that it has any responsibility for the transport of 911 traffic until it reaches its centralized point of interconnection (POI) in South Dakota. SDTA does not agree with this stated assessment or position. NextGen's centralized POI will in many cases be far removed from existing rural carrier service areas and, relative to 911 traffic origination, 911 traffic exchange arrangements have historically recognized the local character of 911 calls and the more limited geographic presence of rural telephone companies -- 911 originated calls destined to centralized POI(s) of the statewide 911 services provider have generally been picked up at or near rural telephone company service areas, at long established "meet points." The Parties agree that any certification(s) issued by the Commission in this proceeding granting any local exchange service or interexchange service authority to NextGen will not address this unresolved issue, and shall not affect or constitute any precedent relative to this, as of yet, unresolved transport obligations issue relating to the carriage of originated 911 traffic. In addition, neither this Stipulation nor any final Commission Order issued in this Docket shall preclude either SDTA, its member companies, or NextGen from later initiating a separate proceeding or proceedings with this Commission for a resolution of and to obtain compensatory relief that may be due related to this unresolved transport obligations issue.

³ See Commission Docket TC15-062, In the Matter of the Application of NextGen Communications, Inc. for a Certificate of Authority to Provide Local Exchange and Interexchange Service in the State of South Dakota.

In Docket TC15-062, this Commission, by a vote of 2-1, issued an Order Granting a Certificate of Authority and certain requested waivers to NextGen. In part, that Order also specifically approved and incorporated by reference the Joint Stipulation presented by SDTA and NextGen.⁴

It is important to note that the “Application” filed by NextGen in the TC15-062 proceeding indicated generally that NextGen was seeking competitive local exchange carrier certification from this Commission for two reasons: (1) so that it could access North American Numbering Plan resources, including specifically “Pseudo Automatic Number Identification (“pANI”) numbering resources which are essential to route emergency calls; and (2) so that it would be positioned to seek the same sort of “interconnection and co-location made available to Competitive Local Exchange Carriers” (services needed in order for it “to aggregate and transport emergency calls and/or calling data”).⁵ *Emphasis added.* In relation to “interconnection,” the Application provided a listing of local exchange carriers with which the company planned to interconnect. This listing, in addition to including a reference to CenturyLink, SDN, AT&T and other larger carriers, also named three rural telephone companies operating in the State, including “Golden West”, “Swiftel” and “WOW” [now Vast Broadband].⁶

Based on the fact that the Application filed by NextGen in Docket TC15-062 was in part seeking competitive local exchange carrier (CLEC) status and given references in the Application to a need for interconnection with certain incumbent local exchange carriers, it was SDTA’s expectation that soon after the Commission issued its final certification Order,

⁴ Docket TC15-062, *Order Granting Certificate of Authority and Granting Waiver.*

⁵ *Id.*, *Application* filed August 17, 2015, par. 8, p. 3, and *Joint Stipulation* paragraphs 5 and 6, p. 3.

⁶ *Id.* *Application* par. 13, pp. 3 and 4.

NextGen would directly present requests for interconnection negotiations to at least some of the SDTA member companies and that copies of or notices of these requests would be filed with this Commission. This, however, has not occurred. Nearly three years later, NextGen has still failed to follow the interconnection process embodied in federal and state law.⁷ NextGen's non-compliance with the "Section 251 and 252" provisions has necessitated both of the requests for Declaratory Ruling filed by the South Dakota 911 Coordination Board (in this Docket and in TC17-063).

II. THE FEDERAL INTERCONNECTION PROVISIONS SET FORTH IN 47 U.S.C. §§ 251 AND 252 AND IN RELATED STATE STATUTES (SDCL §§ 49-31-79 – 49-31-81) ARE APPLICABLE TO THE NETWORK INTERCONNECTION NECESSARY FOR RURAL INCUMBENT LOCAL EXCHANGE CARRIERS TO TRANSMIT 911 CALLS.

As above noted, SDTA understands the question raised by the 911 Coordination Board's Petition to be more generally asking whether the carrier-to-carrier interconnection provisions set forth in federal and state law (47 U.S.C. §§ 251 and 252, SDCL §§ 49-31-79 through 49-31-81, and ARSD §§ 20:10:32:20 through 20:10:32:41) are applicable to arrangements necessary for the transmission of 911 traffic between RLECs and other carriers. Regarding this restated question, SDTA believes the answer is clear. Based on the established federal and state law, industry practice to date, and the facts already presented

⁷ Many of the SDTA member companies have received jointly from the State and "Comtech" and "TCS" certain "Circuit Facility Assignment" (CFA) authorizations, a document from "Comtech" entitled "SOP for CLECS/ILECs Interconnecting to Comtech NG9-1-1 Aggregation Points"; and certain worksheets requesting network related information. None of these documents received by SDTA's rural telephone company members, however, identify NextGen as the entity requesting interconnection or include information sufficient to indicate whether the interconnection being requested is presented under 47 U.S.C. Section 251(a) or 251(c). In addition, to SDTA's knowledge, neither NextGen nor Comtech/TCS has provided this Commission with notice that it has made a request for interconnection or other network services pursuant to the federal and state statutes and administrative rules. Of note, the provisions of ARSD § 20:10:32:20 and ARSD § 20:10:32:38 require that the Commission be given notice of any requests for "negotiations," "interconnection, services, or network elements."

to this Commission through NextGen’s “Application for a Certificate of Authority to Provide Local Exchange Services” filed in Docket TC15-062, there is no reasonable basis to conclude that the South Dakota statutes and rules implementing the federal 47 U.S.C §§ 251 and 252 interconnection provisions are not applicable and should not be required to be followed by NextGen as a means of resolving the 911 transport dispute presented. More specifically, as to the precise question stated in the 911 Coordination Board’s pending Petition for Declaratory Ruling, it is also evident that NextGen in seeking an interconnection arrangement with each of the RLECs in South Dakota for 911 traffic is asking for “interconnection” as set forth in 47 U.S.C. § 251(c)(2)(A). NextGen as a “competitive local exchange carrier” is asking for “interconnection with the local exchange carrier’s network . . . for the transmission and routing of telephone exchange service . . .” This being the case, the “exemptions, suspensions, and modifications” provisions found in 47 U.S.C. §§ 251(f)(1) and 251(f)(2) and also established in South Dakota law through SDCL §§ 49-31-79 through 49-31-81 are applicable, including the requirement that carriers seeking 251(c) interconnection or network services present to rural telephone companies a “bona fide request” for such services. SDCL § 1-26-5 provides that “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.” Accordingly, as the issue is framed by the 911 Coordination Board, SDTA believes the Commission should determine that under South Dakota law, when a CLEC is requesting the delivery of 9-1-1 traffic from an RLEC or rural

telephone company, it must submit a bona fide request for interconnection as is contemplated under the provisions of SDCL § 49-31-79 and 47 U.S.C. § 251(f)(1).⁸

As our South Dakota Supreme Court has stated regarding statutory interpretation, “[w]hen regulatory language is clear, certain and unambiguous, [its] function is confined to declaring its meaning as clearly expressed.” Westmed Rehab, Inc. v. Dept. of Soc. Servs., 687 N.W. 2d 516, 518 (2004), quoting Schroeder v. Dept. of Soc. Servs., 545 N.W.2d 223, 227–28 (1996). “When engaging in statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole, as well as enactments relating to the same subject. When the language in a statute is clear, certain, and unambiguous, there is no reason for construction, and this Court’s only function is to declare the meaning of the statute as clearly expressed.” Citibank, N.A v. S.D. Dept. of Revenue, No 26933, dated July 29, 2015 citing Paul Nelson Farm v. S.D. Dep’t of Revenue, 2014 S.D. 31, ¶ 10, 847 N.W.2d 550, 554. Also, “words may not be inserted in a statutory provision under the guise of interpretation.” In re Petition for Declaratory Ruling re SDCL 62-1-1(6), 877 N.W. 2d 340, 344 (2016). “[W]hen this Court interprets legislation it cannot add language that simply is not there.” *Id.* citing State v. Hatchett, 844 N.W. 2d 610, 615 (2014).

⁸ SDCL § 49-31-79 states: Requirements of rural telephone company. 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. *Emphasis added.*

NextGen apparently takes the view that the provisions contained in 47 U.S.C. § 251 relating generally to “interconnection” between telecommunications carriers and the provisions contained in 47 U.S.C. § 252 establishing “procedures for negotiation, arbitration, and approval of agreements” for “interconnection, services, or network elements” are entirely inapplicable to the issue of how transport responsibilities involving the delivery of 911 calls to NextGen’s service platform should be addressed. NextGen’s actions to date, since this Commission took its final action in Docket TC15-062, suggest that the company believes that any agreement between it and any incumbent local exchange carriers operating in South Dakota, so long as the traffic involved is 911 related, can be negotiated and entered into without any regard to the Section 251 and 252 provisions and related state statutes. SDTA strongly disagrees with this position and is aware of no other federal or state statutes or federal or state administrative rules that can be relied on to reasonably support the contention that NextGen, as a CLEC, does not have to follow the provisions of 47 U.S.C. §§ 251 and 252 in seeking network connections with regulated incumbent local exchange carriers, and in particular with rural telephone companies. To SDTA’s knowledge, nothing in the current federal or state statutes or the federal or state administrative rules would support such a claim.⁹

The provisions of 47 U.S.C. §§ 251 and 252 are intended to facilitate interconnection arrangements between carriers for the exchange of and seamless flow of telecommunications traffic. In addition, the provisions have special relevance to this Docket because in several respects they give recognition to the increased cost recovery challenges faced in rural areas with lower population densities and higher capital and operational costs.

⁹ See 47 C.F.R. §§ 9.5, 9.7, 20.11, 20.18, 64.605, 64.706, 64.3000 to 64.3005 and Part 51.

Included within Sections 251 and 252 (and within the implementing state statutes and rules) are various rural protections/safeguards specifically intended to ensure that any interconnection requirements applied to rural telephone companies do not impose excessive financial or operational burdens that may threaten accomplishment of federal “universal service” goals (the continued availability and affordability of basic telecommunications services, including broadband Internet access services for rural area consumers).

For purposes of this declaratory ruling proceeding, SDTA would highlight the following 47 U.S.C. §§ 251 and 252 statutory language:

§ 251(a) setting forth the general duties applicable to all telecommunications carriers, including the duty to “interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.”;

§ 251(b) setting forth specific service obligations imposed on all local exchange carriers in relation to requests for services from competing providers;

§ 251(c) listing a set of “additional obligations” for “incumbent local exchange carrier[s], including the “duty to negotiate” with other carriers; the duty to provide “interconnection with the local exchange carriers’ network, the duty to provide nondiscriminatory access to network elements on an unbundled basis; the duty to offer resale at wholesale rates any telecommunications service that the local exchange carrier offers on a retail basis; the duty to provide reasonable public notice of network changes; and the duty to provide for “physical colocation” of the equipment of other interested telecommunications carriers;¹⁰

§ 251(f)(1) providing an “exemption” for certain rural telephone companies from the obligations set forth in § 251(c) until the rural telephone company has received a “bona fide request for interconnection, services, or network elements” and the State commission has concluded, after an inquiry, that the request made by the other carrier is not “unduly economically

¹⁰ It should be noted that, to SDTA’s knowledge, all the SDTA member rural telephone companies continue to hold the rural interconnection “exemption” provided for under this subsection of the FCC rules, which generally exempts rural telephone companies from the 47 U.S.C. § 251(c) obligations. This Commission has not issued any orders that specifically terminate the exemption provided. In addition, it should be mentioned that one of the obligations contained within § 251(c) is the duty for interconnection “at any technically feasible point within the carrier’s network.”

burdensome, is technically feasible, and is consistent with the universal service provisions found in section 254”;

§ 251(f)(2) allowing incumbent local exchange carriers with fewer than 2% of the Nations’ subscriber lines to petition the State commission for a suspension or modification of any of the exchange service requirements contained in subsections 251(b) or 251(c)¹¹;

§ 252(a)(1) allowing for the negotiation of agreements between incumbent local exchange carriers and other carriers without regard to the “standards” set forth in subsections 251(1)(b) or 251(c), but also stating that any such agreement must be submitted to the State Commission for approval;

§ 252(a)(2) giving State commissions authority to mediate differences arising in the course of carrier negotiations;

§ 252(b)(1) giving either the incumbent local exchange carrier or any other carrier or party to a negotiation a right to petition the State commission to arbitrate any open issues; and

§ 252(e) requiring that any interconnection agreement adopted by negotiation or arbitration be submitted to the State commission for approval.¹²

Emphasis added.

The above referenced statutes are intended to ensure that State commissions are involved in the process of evaluating the technical feasibility and costs associated with providing interconnection or other carrier-to-carrier wholesale services, particularly regarding the provisioning of such services by rural telephone companies. In addition, the statutes mandate that any interconnection agreements reached between incumbent local exchange carriers and other carriers must be filed for Commission approval. More specifically, these agreements are subject to review by State commissions to ensure that their terms are “consistent with the public interest convenience and necessity” and that they

¹¹ Under this subsection, State Commissions are required to grant any such petition if it is determined that the requested suspension or modification “(A) is necessary— (i) to avoid a significant adverse economic impact on users of telecommunications services generally; (ii) to avoid imposing a requirement that is unduly economically burdensome; or (iii) to avoid imposing a requirement that is technically infeasible; and (B) is consistent with the public interest, convenience, and necessity.

¹² State commissions are specifically directed to approve or reject the interconnection agreement that is filed. They are authorized to reject any agreement filed upon finding that (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity . . .”

do not “discriminate against a telecommunications carrier that is not a party to the agreement. *Emphasis added*”¹³

It is SDTA’s position that the carrier-to-carrier interconnection provisions set forth in 47 U.S.C. §§ 251 and 252 and in related state statutes (SDCL §§ 49-31-79 thru 49-31-81) are applicable to the network connections at issue in this Docket. By taking the position that it does not have to follow the standards and processes for interconnection set forth in the federal and state law, NextGen is asking this Commission to set aside important rural carrier and rural consumer protections and to also ignore the Commission’s legal obligation to review and approve the agreements that are reached between regulated ILEC carriers and other competing carriers/providers.¹⁴ SDTA does not believe the Commission has such authority.

If NextGen (or indirectly its affiliated company Comtech/TCS) desires interconnection with any rural telephone company in the State, it must follow the process that any other CLEC would follow. Specifically, because NextGen is a certified CLEC in South Dakota and is seeking interconnection for the purpose of receiving 911 calls (traffic which has historically been treated as local and not subject to access charges), it is evident that the company is seeking interconnection services under the ambit of 47 U.S.C. § 251(c). This in turn means that its requests for interconnection are subject to the “exemption” provided rural telephone companies under subsection 251(f)(1). In such case, NextGen is obligated

¹³ See Section 251(e), SDCL § 49-31-81, and ARSD § 20:10:32:21.

¹⁴ Clearly, NextGen is not the only NG911 services provider and is in competition with other carriers or providers that are engaged in the provisioning of 911 related support services. Under the provisions of Section 251 and 252, it is envisioned that these other competing entities would have some access to the rates, terms or conditions included within any agreement that is reached between a rural telephone carrier and NextGen. See 47 U.S.C. §§ 251(c)(2)(C) and (D) and 252(e)(2)(i) and (ii). This purpose is frustrated, if any such agreements are never filed with State commissions and made available for review by other interested entities.

to submit to each of the rural telephone companies in South Dakota a “bona fide request” for “interconnection, services, or network elements” that fulfills the specific informational requirements put in place under ARSD § 20:10:32:37. The company is also required, pursuant to ARSD § 20:10:32:38, to provide this Commission with “notice” concerning any such request. Rural telephone companies must under that same administrative rule review the request and inform the requesting party and the Commission whether they dispute that the request meets “bona fide” status. This action must occur within 10 days after the rural telephone company receives the request for interconnection or other network services. If the rural telephone company does not dispute that the request received is a bona fide request, the rule states that the “[C]ommission shall initiate a proceeding to determine if the rural telephone company shall comply with the request unless the rural telephone company receiving the request waives its exemption.”

III. NEXTGEN AS A CERTIFIED COMPETITIVE LOCAL EXCHANGE CARRIER PROVIDING REGULATED 911 EMERGENCY SERVICES IN SOUTH DAKOTA REQUIRES INTERCONNECTION WITH THE PUBLIC SWITCHED TELEPHONE NETWORK AND, CONSEQUENTLY, IS SUBJECT TO THE 47 U.S.C. §§ 251 AND 252 INTERCONNECTION PROVISIONS AND RELATED IMPLEMENTING STATE STATUTES.

NextGen in the prior Docket TC17-063 proceedings offered a hodge-podge of arguments to support a claim that in seeking its network connections with RLECs throughout the State it is not required to follow the 47 U.S.C. §§ 251 and 252 interconnection provisions. The company asserted that: (1) it is not a competitor to the RLECs, but is acting under contractual authority as an agent of the State of South Dakota, and that Sections 251 and 252 only apply when a carrier is requesting interconnection to a LEC for the purpose of competition; (2) RLEC 911 call delivery is not pure “interconnection” as contemplated by the

1996 Telecommunications Act – a request on NextGen’s part “for interconnection is unnecessary as the duty to interconnect for 9-1-1 traffic lies with the RLECs as a natural consequence of their basic regulatory and statutory 9-1-1 responsibilities”; and (3) “there are at least two types of interconnection; regulated and commercial”, suggesting that “commercial agreements” may occur without any regard to the Section 251/252 process.

All of these referenced arguments are without merit and should be summarily rejected. It is clear from the prior proceedings in Docket TC15-062 that NextGen operates in South Dakota as a carrier engaged in the provisioning of 911 emergency services and to provide these services, to all potential customers, it must have connections with local exchange carriers throughout the State (both ILECs and CLECs).¹⁵ The 911 services it is providing are regulated telecommunications services and, by law, are considered an essential component of “local exchange” or “telephone exchange services.” Given these basic realities, it is beyond a stretch to suggest that NextGen is seeking something other than “interconnection” as contemplated under the federal Section 251 and 252 provisions and related state statutes. In providing its 911 transport and selective routing services, NextGen is operating as a “local exchange carrier” delivering a service that is part of “telephone exchange service”. As such, its requests for interconnection/traffic exchange arrangements

¹⁵ NextGen within its “Application” filed with the Commission in Docket TC15-062 specifically sought “certification so that it may provide VPC and MPC services in South Dakota which involve the aggregation and transport of emergency local, VoIP, telemetric, PBX, and mobile E9-1-1 traffic, the management and transmission of location and calling number data, and the provision of call routing management for the delivery of emergency calls to the Public Service Answering Points (PSAPs) throughout South Dakota.” It also indicated that [I]n order to aggregate and transport emergency calls and/or calling data, NextGen may require the same sort of interconnection and co-location made available to certificated Competitive Local Exchange Carriers (“CLEC”). And, further in referencing its technical competence specifically stated that it is “technically qualified to provide the proposed local exchange and interexchange services in South Dakota.” *Emphasis added.* Application, pp. 3 and 4, paragraphs 8 and 10.

with existing incumbent carriers are subject to the federal and state “interconnection” requirements.

A. NextGen is operating as a competitive carrier in providing its NG911 emergency services.

NextGen indicated in the prior TC17-063 proceeding that it does not believe the 47 U.S.C. §§ 251 and 252 interconnection provisions are relevant to the transport issue presented based on a claim that it is not “operating as a competitor to the RLECs”, that it is only seeking to support RLEC public safety obligations through its contractual mandate with the State. Sections 251 and 252 in NextGen’s view, “only apply when a carrier is requesting interconnection “to” a LEC for the purpose of competition . . .”¹⁶

This position lies in stark contrast to action taken by NextGen in the prior Docket TC15-062 proceedings where the company obtained a certificate of authority to provide “local exchange services”, at least in part for the stated purpose of obtaining the same sort of interconnection that is made available to other competitive local exchange carriers.¹⁷ Further, NextGen exists as a for-profit entity and is providing its NG911 services in South Dakota only after winning a competitive bidding process in which other vendor/carrier providers participated.¹⁸ And, it must be recognized that NextGen in delivering its NG911 services to the State is engaged in providing 911 “emergency services” which by its own admission involve the transmission of “emergency local” traffic.¹⁹

¹⁶ Comments of NextGen Communications, Inc. filed October 30, 2017, p. 11.

¹⁷ Id., Application at par. 8.

¹⁸ See “State of South Dakota Consulting Contract” executed in November of 2016, which can be accessed at <http://open.sd.gov/contracts/14/15-1400-025.pdf>. In that contract, NextGen specifically references the fact that it is a “certified competitive local exchange carrier (CLEC)” (Specific Point-by-Point Response to RFP, Section 3.1.1.3).

¹⁹ “Application” filed in Docket TC15-062 at par. 8.

Under the Federal Communications Act, “local exchange carriers” are defined as persons “engaged in the provision of telephone exchange service or exchange access.”²⁰

“Telephone exchange service” is specifically defined under the Act as follows:

The term “telephone exchange service” means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.²¹ *Emphasis added.*

The ability for local exchange service end users to dial 9-1-1 and reach emergency response services has always been included as part of retail local exchange service offerings and 9-1-1 calls, like other local calls, do not generate any separate end user per call or per minute charges. NextGen filed an application with this Commission seeking certification for “local exchange services” for the specific purpose of providing its 911 emergency services. To the extent the company provides any local exchange services, even if limited to providing 911 access, it is either in fact providing, or potentially replacing “telephone exchange services” that could otherwise be provided directly by other certified local exchange carriers. NextGen tellingly admitted in its initial comments filed in Docket TC17-063 that “an RLEC has a choice and could independently provision its 9-1-1 traffic from callers to all South Dakota PSAPs . . .”²² Simply put, there is no basis for NextGen to reasonably contend that in providing its 911 services it is not “competing” with the RLECs or other already certified CLECs in the State.²³

²⁰ 47 U.S.C. § 153(32).

²¹ See 47 U.S.C. § 153(54). A review of the definition given the term “telephone toll service” under 47 U.S.C. § 153(55) is also helpful. It means “telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.”

²² Comments of NextGen p. 9.

²³ See “[AT&T announces plan to deploy nationwide ESInet to support PSAPs’ transition to NG911](http://urgentcomm.com/ng-911/att-announces-plan-deploy-nationwide-esinet-support-psaps-transition-ng911)”, April 30, 2018, <http://urgentcomm.com/ng-911/att-announces-plan-deploy-nationwide-esinet-support-psaps-transition-ng911>

NextGen has simply failed to cite to any specific legal authority supporting a claim that the Sections 251 and 252 interconnection provisions only apply when a carrier is requesting interconnection with an ILEC for the purpose of “competing.” SDTA is aware of no such qualifier in relation to the existing carrier-to-carrier federal and state interconnection provisions. NextGen is a certified local exchange carrier providing 911 telecommunications services that are regulated under both federal and state law.²⁴ In providing such regulated services, it operates as a regulated “common carrier” and in order to make its services available to the public (to all potential 911 service users in South Dakota), it requires interconnection with the established local exchange networks of all other local exchange carriers operating in the State. In other words, NextGen like any other CLEC requires interconnection with the public switched telephone network in South Dakota and, accordingly, the 47 U.S.C. §§ 251 and 252 provisions and the related state statutes implementing these federal laws are applicable.

B. The general obligation imposed on local exchange carriers to provide “access to 911” does not relieve NextGen of its obligation to request interconnection with the RLECs.

NextGen has also argued that “RLEC 911 call delivery is not pure “interconnection” as contemplated by the 1996 Telecommunications Act; therefore, reliance on the “RLEC-Centric” Section 251/252 provisions is not required.”²⁵ Generally, NextGen takes the position that it has no affirmative duty to interconnect, but instead this duty rests on each of the RLECs operating in South Dakota, stating that “the duty to interconnect for 9-1-1 traffic

²⁴ See SDCL Chapters 49-31 and 34-45, ARSD §§ 20:10:32:03(11), 20:10:32:54(3) and 20:10:32:27, and 47 C.F.R. Parts 64, 20 and 9. Under SDCL § 49-31-1.1 “Emergency services” are classified along with other telecommunications services, including local exchange services as being “non-competitive” for state regulatory purposes.

²⁵ *Id.*, Comments of NextGen p.11.

lies with the RLEC as a natural consequence of its basic regulatory and statutory 9-1-1 responsibilities.” Apparently, in NextGen’s opinion, all RLECs as part of their obligations to provide “access to emergency services such as 911 or enhanced 911” (under both state local exchange carrier certification and state and federal “eligible telecommunications carrier” laws) are required to transport 9-1-1 traffic at their own expense to whatever location either NextGen or the State of South Dakota determines and they have no rights to assert any of the rural telephone company interconnection protections established within the federal and state law. SDTA strongly disagrees with NextGen’s interpretation of the existing laws relating to 911 services and carrier interconnection. SDTA is unaware of any federal or state statutes, rules or decisions that may be relied on to circumvent the 47 U.S.C. §§ 251 and 252 interconnection provisions and effectively impose greater transport obligations and costs on wireline local exchange carriers for 9-1-1 traffic delivery.

The provisions of 47 U.S.C. §§ 251 and 252 of the Federal Communications Act apply to carrier-to-carrier interconnection involving 911 traffic and these provisions only mandate interconnection “with the local exchange carriers’ network.” They do not, as NextGen claims, require that rural local exchange carriers with limited service areas and limited local exchange networks provide interconnection “off network” for the benefit of NextGen or any other carrier that may be engaged in providing NG911 services.

NextGen has cited to the provisions of 47 C.F.R. § 64.3001 as a mandate that RLECs are required to transport their 9-1-1 traffic to the NG911 POIs. This Section of the FCC rules states that “[a]ll 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”. This single sentence, standing alone, cannot be

interpreted to impose a requirement that wireline local exchange carriers must provide transport to whatever ESInet POI's may be established for NG911 services. The rule references only a general obligation to "transmit" 911 calls and includes no reference to "points of interconnection" with other carriers that may be involved in the provisioning of 911 emergency services.²⁶ Moreover, these rule provisions were adopted by the FCC in January of 2002 at a time when 911 calls were routed directly to PSAP entities, long before the deployment of any NG911 networks.

There is no language in this rule or within any other FCC rule indicating that the existing interconnection provisions found in 47 U.S.C. §§ 251 and 252 are inapplicable to 911 traffic arrangements and that the FCC has decided that wireline incumbent local exchange carriers are responsible for all transport costs to or from whatever "points of interconnection" may be desired by other carriers for 9-1-1 traffic. Although the FCC in 2002 took action by an "Order on Reconsideration" to clarify the demarcation point for allocating costs between wireless carriers and PSAPs with respect to the delivery of "Phase I" and "Phase II" enhanced 911 information (voice call and location data), there has been no similar action addressing wireline carrier E911 or NG911 obligations.²⁷ The FCC gave specific recognition in this prior Order on Reconsideration of important differences existing between wireless and wireline services in the way they are regulated, noting that this would support different treatment in relation to designating a demarcation point for E911 implementation. This "undecided" status as to wireline carrier 911 transport obligations has been confirmed

²⁶ Also, it should be noted that the related provisions found in 47 C.F.R. § 64.3002 are more specific in referencing 911 traffic obligations and repeatedly reference only that telecommunications carriers "shall complete all translation and routing necessary to deliver 911 calls . . ." *Emphasis added.*

²⁷ FCC's "Order on Reconsideration" (FCC 02-146) released July 24, 2002, CC Docket 94-102, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems.

more recently by the National Emergency Number Association (NENA) in a Standards/Network Information Document which specifically addresses “Potential Points of Demarcation in NG911 Networks”.²⁸ In that document, in a section captioned “Regulatory Issues,” NENA made the following statement:

This document does not explore the regulatory issues associated with the various options for demarcation. This topic calls for a detailed analysis of any and all regulatory impacts associated with the various options for demarcation. For example, carriers, equipment providers, and service providers may be required to implement certain technologies in order to transmit data to interfaces provided by the 9-1-1 authority, and vice-versa. For example, existing regulation requires wireless carriers to deliver calls to Selective Routers at the carrier’s own cost. The LNG input is the same interface as the Selective Router, but the ESRP, with an IP input, provides the equivalent function of the selective router. And so, whether this regulation applies in an NG environment, and if so, how that regulation is interpreted, is an outstanding issue outside the scope of a technical document. More important, the nature and scope of standards set by or incorporated into applicable regulations will have a material impact on the implementation and application of demarcation points and associated interfaces and gateways. Emphasis added.

NextGen throughout its comments in Docket TC17-063 suggested that the federal and state laws related to 911 already address the issue raised by the Petition for Declaratory Ruling and impose a requirement on RLECs to transport 911 calls originated outside of their local exchange networks and rural service areas, contrary to other existing “interconnection” provisions. This is not an accurate representation. None of the existing 911 provisions work to displace, change or expand the interconnection requirements set forth in 47 U.S.C. §§ 251 and 252 and the relating South Dakota laws.

²⁸ NENA Potential Points of Demarcation in NG9-1-1 Networks Information Document, http://www.nena.org/?page=NG911_Demarcation prepared by NENA Interconnection and Security Committee, Origination Access Network Sub-Committee, Demarcation Workgroup, released March 21, 2013.

C. The ability to pursue “commercial negotiations” does not displace the procedures set forth in SDCL §§ 49-31-79 through 49-31-81 and 47 U.S.C. §§ 251 and 252.

NextGen has also previously argued that none of the 47 U.S.C. §§ 251 or 252 interconnection statutes are applicable based on a claim that it may pursue a separate “commercial negotiations” process. Apparently, NextGen believes that there are two types of interconnection, regulated and commercial and argues, with respect to the interconnection it is seeking in South Dakota, that it may engage in commercial negotiations entirely outside of the Section 251/252 interconnection provisions.

SDTA disputes this reading of the law. Again, as already noted, NextGen is seeking interconnection arrangements that are necessary for it to receive 911 originating traffic from all other local exchange carriers operating in South Dakota. It requires local interconnection with exchange carrier networks throughout the State and it is not asking for exchange access services in the form of switched access services, that could be obtained out of either the LECA, NECA or individual company tariffs, or special access services that could be purchased out of the existing LEC tariffs or possibly on an individual case basis through contract. Rather, it is seeking “interconnection” with the public switched network that requires both local transport and local switching services (for switching and transport of “non-access” local telecommunications traffic). These services in all other cases to date, when provided by RLECs to other CLEC entities, have been provided pursuant to “interconnection agreements” negotiated by the parties, and filed with and approved by this Commission in accordance with the 47 U.S.C. § 252 procedures.

The provisions of 47 U.S.C. § 251(a)(1) reference “[v]oluntary negotiations,” but merely provide that “an incumbent local exchange carrier may negotiate and enter into a

binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 . . .” There is no language indicating that the “procedures for negotiation, arbitration, and approval of agreements” may be set aside at the discretion of interconnecting carriers and entirely replaced with a separate commercial negotiations process. The provisions of 47 U.S.C. § 251(a)(1) clearly indicate otherwise requiring, in part, that any “agreement, including any interconnection agreement negotiated before February 8, 1996” must still be submitted for State commission review and approval pursuant to Section 252(e).²⁹

IV. THE PROCESS FOR CLECS TO OBTAIN INTERCONNECTION WITH RLECS SHOULD NOT BE CHANGED WITHOUT DUE CONSIDERATION OF BOTH THE IMMEDIATE AND POTENTIAL LONGER-TERM IMPACTS

As to the filed Petition and the question raised, SDTA would urge the Commission to proceed carefully and seriously consider both the immediate and longer-term impacts of any decision in this proceeding that would narrow applicability of the existing federal and state interconnection provisions and could lead to an unreasonable expansion of rural carrier transport responsibilities to meet points or points of interconnection existing outside RLEC exchange areas or service areas. What NextGen is seeking through this process is an extreme shift as to how transport obligations and associated costs have historically been addressed and divided between smaller carriers which generally serve less dense, rural service areas and larger carriers, which often operate in multiple states and are more focused on serving

²⁹ This provision should clearly be interpreted to mean that even though agreements for interconnection may be negotiated without regard to the “standards” contained in 47 U.S.C. § 251(b) and (c), the procedures applicable to interconnection agreements set forth in 47 U.S.C. § 252 continue to apply. Further, the lack of an exception from the interconnection procedures of Section 252 is confirmed by 47 C.F.R. § 51.305(b) which only references a carrier that “requests interconnection solely for the purpose of originating or terminating interexchange traffic on an incumbent LECs network” as not being entitled to receive interconnection pursuant to section 251(c)(2) of the Act.”

urban customers. No other telecommunications carriers/service providers having connections (either direct or indirect) with the SDTA member RLECs today for traffic exchange (whether it be local or long-distance traffic) view themselves as exempt from having to arrange for transmission either into or out of the existing rural telephone company service areas. Interexchange carriers or long-distance providers many of which use indirect interconnection through SDN pay access charges for the origination and termination of their traffic into the rural service areas. Competitive local exchange carriers that need to exchange local traffic with another local exchange carrier establish meet points for such purpose within rural service areas or very close to service area boundaries. CMRS providers in exchanging “non-access” Intra-MTA wireless traffic use direct connections to points of interconnect within the RLEC exchange areas or pay for transiting services to reach meet points within RLEC service areas. CMRS providers, for Inter-MTA traffic either received from or destined for RLEC customers, pay access charges. And, the traffic of interconnected VoIP providers is also subject to originating and terminating access charges per the FCC rules to reimburse local exchange carriers for use of local exchange network facilities.

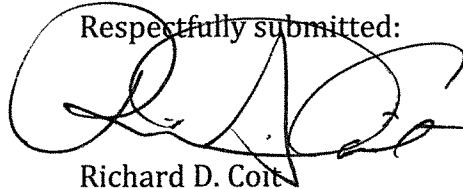
Specifically, NextGen is proposing that all RLECs in South Dakota would be responsible for delivering all 911 calls originated by their local area end users to centralized points of interconnection established in the cities of Sioux Falls and/or in Rapid City. This in some cases would require rural carriers to deliver 911 calls, which historically have been viewed as local calls traveling to local area PSAPs, to locations that are hundreds of miles from the rural telephone company service areas. Without question, any Commission action increasing rural local exchange carrier transport responsibilities so significantly would be unprecedented.

V. CONCLUSION

Regarding the question presented by the Petition for Declaratory Ruling, SDTA believes the answer is clear and that the Commission must find that the carrier-to-carrier interconnection provisions set forth in federal and state law (47 U.S.C. §§ 251 and 252, SDCL §§ 49-31-79 thru 49-31-81, ARSD §§ 20:10:32:20 through 20:10:32:41) are applicable to arrangements necessary for the transmission of 911 traffic over the public switched telephone network. This then would require that CLECs requesting delivery of 9-1-1 traffic from an RLEC submit a "bona fide request" for interconnection to each RLEC and also file a copy of such request with the Commission as required under 47 U.S.C. § 251(f)(1)(B), SDCL § 49-31-79 and ARSD § 20:10:32:38.

Dated this ~~18th~~ day of June, 2018.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I hereby certify that an original of the Initial Comments of the South Dakota Telecommunications Association, dated June 18, 2018, filed in PUC Docket TC18-013, was served upon the PUC electronically, directed to the attention of:

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