

STATE OF SOUTH DAKOTA )  
 ) SS:  
COUNTY OF HUGHES )

IN CIRCUIT COURT  
SIXTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA, )  
DEPARTMENT OF PUBLIC SAFETY )  
ON BEHALF OF THE SOUTH DAKOTA )  
9-1-1 COORDINATION BOARD )

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Plaintiff,

v.

COMPLAINT

NEXTGEN COMMUNICATIONS, INC.; )  
TELECOMMUNICATION SYSTEMS, )  
INC.; AND COMTECH )  
TELECOMMUNICATIONS CORP. )

Defendants.

COMES NOW Plaintiff, by and through its undersigned counsel, and for its cause of action against Defendants, alleges and states as follows.

**Nature of Action**

In order to ensure working, redundant and available 9-1-1 services to South Dakota citizens and visitors, the State brings this action to:

(1) Require NextGen Communications, Inc. (“NextGen”), TeleCommunication Systems, Inc. (“TCS”) and Comtech Telecommunications Corp. (“Comtech”) (all collectively known as “Contractor”) to ensure current 9-1-1 services are not interrupted in South Dakota while the State moves to a new 9-1-1 vendor by complying with and specifically performing certain terms under the State of South Dakota Consulting Contract dated December 18, 2014 (“Contract”) among the State of South Dakota

Department of Public Safety and the South Dakota 9-1-1 Coordination Board, and NextGen, TCS and Comtech as the successor;

(2) Require NextGen, TCS and Comtech to pay damages to the State based upon their breach of contract and unjust enrichment;

(3) Require NextGen, TCS and Comtech to pay damages, including both compensatory and punitive damages, to the State based upon their fraud and deceit; and

(4) Require NextGen, TCS and Comtech to indemnify the State for costs and expenses, including attorney fees.

#### **JURISDICTION AND VENUE**

Under § 13 of the Contract between the State and Defendants, the parties have consented to any lawsuit brought against them being venued in the Sixth Judicial Circuit Court, Hughes County, South Dakota.

#### **Facts**

1. Plaintiff is the State of South Dakota, Department of Public Safety on behalf of the South Dakota 9-1-1 Coordination Board (collectively “State”).
2. The South Dakota 9-1-1 Coordination Board (“Board”) is a public entity administratively attached to the South Dakota Department of Public Safety.
3. The Board is responsible for overseeing the coordination of 9-1-1 services in South Dakota.
4. NextGen is a Maryland corporation that applied for and received a Certificate of Authority as a Foreign Business in South Dakota on June 2, 2015.

5. The South Dakota Registered Agent for NextGen is Corporation Service Company, 503 S. Pierre St., Pierre, SD 57501-4522.
6. TCS is a Maryland corporation that applied for and received a Certificate of Authority as a Foreign Business in South Dakota on June 2, 2015.
7. The South Dakota Registered Agent for TCS is Corporation Service Company, 503 S. Pierre St., Pierre, SD 57501-4522.
8. On December 23, 2015, in South Dakota Public Utility file TC15-062, the South Dakota Public Utilities Commission granted NextGen a Certificate of Authority to operate in South Dakota (Commissioner Hanson dissented).
9. On or about December 18, 2014, NextGen and TCS contracted with the State to design, build, implement, and maintain a Next Generation 9-1-1 (“NG9-1-1”) system for South Dakota. A true and correct copy of the Contract is attached hereto, as “Exhibit A”, and incorporated herein by this reference.
10. At the time of contracting, NextGen was a wholly owned subsidiary of TCS.
11. On or about November 23, 2015, Comtech purchased TCS, and as a result, TCS and NextGen became wholly owned subsidiaries of Comtech.
12. Comtech is a Delaware corporation.
13. The Delaware registered agent for Comtech is The Prentice-Hall Corporation System, Inc., 251 Little Falls Drive, Wilmington, Delaware 19808.
14. The Annual Report for Comtech, effective July 31, 2018, provides that TCS is a subsidiary of Comtech and that NextGen, a subsidiary of TCS, is a subsidiary of Comtech.

15. Since on or about November 23, 2015, Comtech, by way of letters, emails, phone calls and documents, has represented to the State that it is the responsible party for the Contract.

16. The Contract, at Section 1.1, required Contractor to:

Design and maintain for the State a next generation 9-1-1 Internet Protocol based system (the "System"), which will include, but is not limited to: (a) structuring the System to specifications as set forth herein; (b) providing all equipment and software necessary for the System as set forth herein; (c) performing installation and all labor required for deployment of the System as set forth herein; (d) providing standardized interfaces from call and message services, capable of processing all types of emergency calls including non-voice (multi-media) messages as set forth herein; (e) acquiring and integrating additional data useful to call routing and handling as set forth herein; (f) delivering the calls or messages and the data to the participating Public Safety Answering Points ("PSAPs") and other emergency entities as set forth herein; (g) supporting data and communications needs for coordinated incident response and management as set forth herein; and (h) providing a secure environment for emergency communications utilizing an Emergency Services IP Network (ESInet) that uses broadband, packet switched technology capable of carrying voice and varying types of data using Internet Protocols and standards as set forth herein.

17. In Section 7.1 of the Contract, Contractor provided the following affirmative representations and obligations:

"The Consultant represents and warrants that it is fully aware of the State's business requirements and intended purposes and uses for the deliverables as set forth herein and the deliverables shall satisfy such requirements in all material respects and are fit for such intended purposes and uses as set forth in Exhibit A and supplemented by Exhibit B."

18. The venue Section 13 of the Contract reads as follows:

"This Agreement shall be governed by and construed in accordance with the laws of the State of South Dakota, exclusive of its choice of law principles. Any lawsuit pertaining to or affecting this Agreement, even after termination, shall be venued in Circuit Court, Sixth Judicial Circuit, Hughes County, South Dakota."

19. The Contract at Section 19.8 provides:

"All the terms, provisions, and conditions of the Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, permitted assigns, and legal representatives."

20. In Section 19.10 of the Contract, Contractor agreed that:

“TeleCommunications Systems, Inc. and NextGen Communication, Inc. will be jointly and severally liable and responsible for carrying out all obligations of the Consultant set forth or described in this Agreement.”

21. In accordance with the Technical Proposal attached to the Contract as Exhibit A and incorporated into the Contract as if fully set out in it, Contractor represented and agreed to the following:

a. Real Time Monitoring-Section 3.1.8

i. “Monitoring is provided by the TCS NOC [network operations center]. Our NOC provides 24x7, subscription-based real-time protection to our customers.”

b. ESInet Architecture Overview-Section 3.1.9

i. “We understand the State of South Dakota’s view of the ESInet and have designed our solution accordingly.”

c. No single point of failure – Section 3.1.11.1

i. “Our routing architecture rides on top of [the network carrier], embodied by redundant hardware installed at two geodiverse host sites, with all elements available on a real-time basis throughout the life of the system. There is, therefore, no functional single point of failure anywhere along the ESInet with regard to delivery and receipt of 9-1-1 calls. This geographic diversity permits the system to operate as a single entity even under the most catastrophic conditions.”

d. Architectural Survivability – Section 3.1.15.1

i. “It consists of redundant central system components that provide load sharing and load balancing with 100% failover capability. We have engineered capacity such that the entire system’s call volume can be handled by one core network site in the event of the loss of the other site.”

e. Network Diversity-Section 3.1.15.2

i. “This geographic diversity provides for a seamless transition in call-processing capacity from platform to platform and site to site, even under the most challenging of circumstances.”

- f. Network Availability – Section 3.1.16
  - i. “Our proposed solution is a NENA i3-compliant platform committed to the “five nines” standard (99.999 percent availability) for the delivery and receipt of 9-1-1 calls. Our solution minimizes single points of failure. It consists of redundant central system components that provide load sharing and load balancing in an active/active configuration.”
- g. Automatic Internet Protocol Rerouting-Section 3.1.24.3
  - i. “The IP routing protocol shall be set up to provide automatic rerouting in the event of a failure of any network facility or component....”
- h. Network Fault Monitoring-Section 3.1.28.2
  - i. “Fault monitoring shall detect and log IP network problems, notify the network operator, and depending on severity and policy, provide timely notification of designated PSAP official [*sic*] and State staff.”
- i. Solution Availability-Section 3.2.6.5
  - i. “It is a requirement that the solution deliver an industry standard up time of 99.999 percent.”
- j. Geographically Diverse Redundant Configuration-Section 3.2.6.8
  - i. “Our proposed solution includes two data centers, each identically populated with ESInet equipment. For geodiverse survivability in the event of natural or manmade disasters, we have selected Dallas, Texas, and Raleigh, North Carolina, as the sites for these data centers. We engineered, paired, and sized all network equipment to support the workload of the entire system. In the event of a loss of power or communications at one site, the other site will provide uninterrupted operability to all PSAPs within the system.”
- k. Fault Tolerance-Section 3.2.6.15
  - i. “All components of the system are continually exercised, so when there is a failure of a component it is not the first time the item’s replacement has been used.”
- l. Redundancy – Section 3.2.6.40
  - i. “This solution eliminates single points of failure. It consists of redundant central system components that provide load sharing with 100 percent failover capability.”

- m. Self-monitoring – Section 3.2.44.2
  - i. “These alarms are designed to notify all affected parties in the event they are unable to receive and distribute 9-1-1 calls on the network.”
- 22. The State relied on Contractor’s statements made in their response to the request for proposals and awarded the NG9-1-1 contract to Contractor.
- 23. Commencing on or about January 23, 2015, the State began making payments to Contractor under the Contract.
- 24. According to the implementation and installation schedule incorporated into the Contract, PSAPs were to be fully operational on the NG9-1-1 system within 18 months of the Contract date.
- 25. To be fully operational on the NG9-1-1 system, PSAPs would be operating on new call processing equipment provided by Contractor and on a fully redundant and failsafe emergency services IP network provided by Contractor.

**Call Processing Equipment (CPE)**

- 26. Exhibit A to the Contract at Section 3.2.45.1 requires, in part, that call processing equipment be installed and functional within 18 months after the Contract award. Call processing equipment under the Contract includes such items as the xT911 PSAP workstation, PSAP backroom equipment, host site equipment and the related software.
- 27. On or about between March 27, 2015 and July 19, 2017, Contractor installed call processing equipment in South Dakota PSAPs.
- 28. The installed call processing equipment failed to function properly in that the equipment:
  - a. suffered repeated, widespread and unpredictable outages that kept PSAPs from receiving or making phone calls;

- b. failed to provide consistent, updated Automatic Location Identifier (“ALI”) and Automatic Number Identifier (“ANI”) information;
  - c. created time lags between when an emergency caller would hear the phone ring and when the dispatcher’s phone would ring;
  - d. created time lags in transmission of audio which caused a caller’s voice to not immediately be heard by the dispatcher and a dispatcher’s voice to not be immediately heard by a caller;
  - e. did not allow a second dispatcher to join an emergency call; and
  - f. transmitted choppy, low quality, or low volume audio.
29. On July 28, 2015, the State notified Contractor that payments would be withheld because Contractor failed to develop network protocols that provided proper and timely routing and re-routing of data based upon priority and delay tolerance; and because Contractor failed to fulfill its contractual commitment that “[t]he MetroCommunications Agency and the following four (4) additional PSAPs identified as beta sites will be deployed within six months following the official date the Contract is fully executed.” A February 10, 2015 Project Change Request changed the initial deployment order to Pennington, Brookings, Mitchell, Pierre, Winner and Metro. Failing to meet the specific requirements of the Statement of Work violated Section 7.1 of the Contract. A true and correct copy of the July 28, 2015 letter is attached hereto, as “Exhibit B”, and incorporated herein by this reference.
30. On October 29, 2015, the State notified Contractor of a number of recurring issues after six PSAPs cut to Contractor’s call processing equipment. These issues included:
- a. delayed ability to replay 9-1-1 calls;

- b. poor audio quality;
  - c. inability to promptly log-in to the call processing equipment;
  - d. monitoring difficulties during 9-1-1 training at the PSAPs, in that supervisors could not adequately monitor 9-1-1 calls during PSAP employee training;
  - e. improperly functioning trouble ticketing system;
  - f. ghost ringing – calls continue to ring after a call was answered requiring the 9-1-1 call handler to restart the call processing equipment; and
  - g. improperly functioning keypads.
31. The State indicated to the Contractor “[w]e don’t understand why when these issues were identified at the first PSAP cut, and were supposedly resolved, why they continue to show up at subsequent PSAP cuts. It appears “band-aid” type fixes are being applied at each individual PSAP instead of a permanent fix system-wide to ensure we don’t have the same issue at future cuts.” A true and correct copy of the October 29, 2015 email is attached hereto, as “Exhibit C”, and incorporated by this reference.
32. The State required Contractor to attend an in-person meeting on April 13, 2016.
33. During the April 13, 2016 meeting, one of the topics the State raised with Contractor was “Unreliability and Trust.” A true and correct copy of the meeting Agenda is attached hereto, as “Exhibit D”, and incorporated by this reference.
34. At the April 13, 2016 meeting, Contractor, by and through Matt Hayes, Vice President of Safety and Security Technology, acknowledged that the issues identified in Exhibit D were not acceptable, that they should not be occurring, and that Contractor would address them.

35. After the April 13, 2016 meeting, PSAPs continued to cut over to Contractor's call processing equipment.
36. On the morning of December 14, 2016, PSAPs in Canton, Mitchell, Pierre, Rapid City, Sioux Falls, and Watertown were unable to answer 9-1-1 calls. Rapid City reported its inability to answer incoming 9-1-1 calls to Contractor at approximately 10:01 a.m. MST. Contractor verified that call handling had been restored for the last PSAP at 11:20 am MST.
37. On the evening of December 14, 2016, PSAPs in Deadwood, Huron, Mobridge, Rapid City, Sioux Falls, and Watertown were unable to answer 9-1-1 calls. Rapid City again reported its inability to answer calls to Contractor at approximately 9:55 p.m. MST. Contractor reported the system was stabilized at 10:27 p.m. MST.
38. As a result of these outages, on December 28, 2016, Ted Ruffedt, Chairman of the 9-1-1 Coordination Board, sent a letter to Contractor requesting that Contractor provide an explanation, and a written plan that would assure the outages would never happen again. A true and correct copy of the December 28, 2016 letter is attached hereto, as "Exhibit E", and incorporated by this reference.
39. Ruffedt emphasized to Contractor in the December 28, 2016 letter, "we expect the 9-1-1 system provided by Comtech to work 100% of the time or as absolutely close to that as possible. Even 30 seconds of down time at one PSAP puts the public at risk".
40. On January 6, 2017, Contractor responded, acknowledging the outages that occurred and assured the State that Contractor was "implementing the necessary modifications to our practices to ensure that the scenario that caused the issue is mitigated". A true and correct

copy of the January 6, 2017 letter is attached hereto, as “Exhibit F”, and incorporated by this reference.

41. On February 9, 2017, based in part on recurring call processing issues at the PSAPs in Aberdeen, Brookings, Canton, Custer, Mitchell, Pierre, Sioux Falls, Vermillion, Winner and Yankton, the State disputed Contractor’s invoice and notified Contractor that the State would be withholding payment. A true and correct copy of the February 9, 2017 letter is attached hereto, as “Exhibit G”, and incorporated by this reference.
42. As a result of the February 9, 2017 letter, on February 22, 2017, Jim Mohler, Contractor’s Senior Vice President-General Manager, Call Handling, met with the Cabinet Secretary of the Department of Public Safety and the State 9-1-1 Coordinator to discuss the reoccurring issues.
43. On February 28, 2017, Contractor responded to the State’s February 9, 2017 letter indicating Contractor would work in “good faith” with the State to achieve prompt resolutions. A true and correct copy of the February 28, 2017 letter is attached hereto, as “Exhibit H”, and incorporated by this reference.
44. Even though Contractor pledged to work in “good faith” with the State, subsequent call processing equipment outages occurred.
45. On March 1, 2017, the PSAP in Rapid City experienced an outage.
46. On March 17, 2017, the PSAPs in Aberdeen, Brookings, Canton, Huron, Sioux Falls, and Watertown all experienced outages.
47. On March 20, 2017, the PSAP in Aberdeen experienced an outage.

48. On April 21, 2017 the PSAPs in Tyndall and Lake Andes both experienced outages.
49. On May 3, 2017, based in part on recurring call processing issues at the following PSAPs: Rapid City, Brookings, Brown County, Huron, Lincoln County, Sioux Falls, Watertown, Bon Homme County and Charles Mix County, the State disputed Contractor's invoice and notified Contractor that the State would be withholding payment. A true and correct copy of the May 3, 2017 letter is attached hereto, as "Exhibit I", and incorporated by this reference.
50. During the summer of 2017, the call processing equipment finally stopped experiencing outages, although issues remained with the equipment.

**ESInet**

51. Exhibit A to the Contract at Section 3.2.45.1 requires, in part, that the ESInet be built to specifications and be functional within 18 months after Contract award. ESInet refers to the Emergency Services Internet Protocol Network used to transport 9-1-1 traffic.
52. Contractor and State met on June 8, 2016 and Contractor provided the State with a diagram of the ESInet.
53. Contractor and State again met on May 10, 2017, and Contractor again provided the State with a presentation and diagram of the ESInet.
54. Contractor and State met on January 30 and 31, 2018 and Contractor provided a draft method of procedure for moving PSAPs to the ESInet.
55. PSAPs did not begin moving to the ESInet until May 2018.

56. Under the Contract, Contractor was required to ensure the geo-diverse redundancy and failover capability of the NG9-1-1 system in South Dakota.
57. Contractor was contractually required to build and maintain alarming and notification functions within the network.
58. Contractor was likewise mandated by the Contract to appropriately monitor the NG9-1-1 system.
59. Contractor was required, under the Contract, to maintain sufficient and appropriate equipment, hardware and software.
60. Contractor failed to (a) create and implement a NG9-1-1 system with geo-diverse redundancy; (b) create, maintain or appropriately monitor alarming and notification functions within the NG9-1-1 system; and (c) maintain sufficient equipment, hardware and software.
61. Under the Contract, Contractor was also required to ensure that no single point of failure existed with the NG9-1-1 system.
62. A single point of failure in a NG9-1-1 system would harm the public, since a failure of the system would necessarily mean that 9-1-1 calls would go unanswered.
63. ARSD 20:10:33:08 directs that each telecommunications company employ prudent management and engineering practices so that sufficient equipment and adequate personnel are available at all times, including busy hours, to respond to network and customer service problems.

64. ARSD 20:10:33:27 provides that each local exchange company shall, immediately upon discovery, report to each 9-1-1 public safety answering point serving the affected local service areas, to the local area broadcast media serving the affected local service areas, and to the commission pertinent information concerning any specific occurrence or development which disrupts or impairs the local service area's access to the 9-1-1 service within a given 9-1-1 system. In addition, the rule requires that each local exchange company is to provide the public safety answering point, the local area news media, and the commission with a time estimation on when the repair to the 9-1-1 system will be completed and the 9-1-1 service restored.
65. On or before May 30, 2018, Contractor represented that the network had been built and was ready for PSAPs to begin using it for 9-1-1 call traffic. Based on these representations, PSAPs were moved to Contractor's network beginning on May 30, 2018.
66. The State was not able to independently verify whether the network had been built as required by the Contract and relied on Contractor's representations as to the structure and reliability of the network.
67. It was Contractor's assurance that the network was suitable for PSAPs' use that caused the State to move the PSAPs from the legacy 9-1-1 system to Contractor's network.

**East River South Dakota Public Safety Answer Points NG9-1-1 Outage**

68. At 0616 Central Time on October 15, 2018, Contractor's Network Operations Center received an alert about equipment failure at the Raleigh, North Carolina data center. One Management Network Server module within Raleigh's GSX switch had failed. The Management Network Server had dual modules, which allowed it to continue running at

that time. The Raleigh data center though had no backup module on site to replace the failed module.

69. The State was not notified of the module failure on October 15, 2018 and based upon information and belief, Contractor took no steps to provide additional monitoring or heightened care to address the fact that if the second module failed, the Raleigh data center would be unable to process 9-1-1 calls.
70. Contractor knew there was no redundancy in its network and if the Raleigh data center was unable to process calls, 9-1-1 services in eastern South Dakota would be unavailable.
71. On October 16, 2018 the second module in Contractor's GSX switch failed.
72. At 0251 Central Time on October 16, 2018, the NG9-1-1 network in South Dakota experienced a failure resulting in the outage of NG9-1-1 services.
73. As a result of such outage, 9-1-1 calls did not go through to 19 of the PSAPs in eastern South Dakota.
74. Based upon information and belief, individuals trying to call 9-1-1 in any area served by a PSAP in Eastern South Dakota using Contractor's NG9-1-1 system experienced a fast-busy signal and the call did not go through to the PSAP.
75. In the State of South Dakota there are 28 PSAPs and two back up PSAPs, not including PSAPs run by tribal organizations.
76. On October 16, 2018, 26 PSAPs were utilizing the NG9-1-1 system created by Contractor as it existed at that time.

77. Contractor's Network Operations Center received alerts at 0251 Central Time on October 16, 2018 but the alerts were not acknowledged by Contractor until 0306 Central Time on that day.
78. The Network Operations Center alerts only showed an issue for the Raleigh data center.
79. No alarms existed or sounded to indicate that the PSAPs in eastern South Dakota could not receive 9-1-1 calls.
80. Contractor's South Dakota NG9-1-1 system was not built to indicate when PSAPs in eastern South Dakota could not receive 9-1-1 calls.
81. Approximately 2 hours and 42 minutes after the NG9-1-1 system failed, Clay Area Emergency Services Communication Center, in Clay County, South Dakota, notified Contractor that 9-1-1 calls were not going through to the center. That notification occurred at 0533 Central Time on October 16, 2018.
82. At 0600 Central Time on October 16, 2018, the Yankton Police Department reported to Contractor that 9-1-1 calls were not ringing in to the Department.
83. At 0602 Central Time on October 16, 2018, the Union County Sheriff's Office reported to Contractor that 9-1-1 calls were not ringing in to the Office.
84. At 0613 Central Time on October 16, 2018, Contractor finally notified the State regarding the failure of Clay Area Emergency Services Communication Center. This notification came approximately 3 hours and 22 minutes after the NG9-1-1 system failed.
85. Contractor notified the State of the Clay Area Emergency Services Communication Center failure but failed to notify the State of the widespread scope of the failure.

86. At 0619 Central Time on October 16, 2018, Lincoln County Communications office reported to Contractor that 9-1-1 calls were not ringing in to the office.
87. At 0720 Central Time on October 16, 2018, the Watertown Police Department reported to Contractor that 9-1-1 calls were not ringing in to the Department.
88. At 0801 Central Time on October 16, 2018, Bon Homme County reported issues with 9-1-1 calls to Contractor.
89. At 0810 Central Time on October 16, 2018, confirmation was received that the Raleigh, North Carolina data center was not functioning. It was only at this time that Contractor finally became aware of the extent of the outage.
90. At 0827 Central Time on October 16, 2018, Marshall County reported issues with 9-1-1 calls to Contractor.
91. At 0831 Central Time on October 16, 2018, Roberts County reported issues with 9-1-1 calls to Contractor.
92. At 0856 Central Time on October 16, 2018, the Mitchell Police Department reported issues with 9-1-1 calls to Contractor.
93. The NG9-1-1 system was down in eastern South Dakota from approximately 0251 Central Time on October 16, 2018 until 0622 Central Time on October 17, 2018.
94. At approximately 0921 Central Time on October 16, 2018, CenturyLink started routing 9-1-1 calls to the administrative phone lines of the impacted PSAPs in eastern South Dakota.

95. By approximately 1106 Central Time on October 16, 2018, all 9-1-1 calls were routed to the administrative phone lines of the impacted PSAPs in eastern South Dakota.
96. From approximately 0251 Central Time until 1106 Central Time on October 16, 2018, callers in areas of eastern South Dakota served by Contractor's NG9-1-1 system could not reach 9-1-1.
97. If Contractor had an available replacement for the failed module, then the first module could have been replaced before the second module failed.
98. If the NG9-1-1 system had been built with the promised alarming and notification capabilities, then PSAPs would have known that 9-1-1 calls were not coming through and could have moved to administrative lines much sooner.
99. If the NG9-1-1 system had been built with the promised geo-diverse redundancy failover capabilities and automatic rerouting, when the Raleigh, North Carolina data center failed, then all 9-1-1 traffic would have shifted automatically to the data center in Dallas, Texas.
100. On or about November 13, 2018, Kent Hellebust, President of Safety and Security Technologies for Comtech, informed the State that Comtech's management had purposely decided not to build the NG9-1-1 system with the required geo-diverse redundancy.
101. During the October 16, 2018 failure, the following PSAPs were not able to receive 9-1-1 calls:
  - a. Bon Homme County 9-1-1
  - b. Brown County Communications
  - c. Central South Dakota Communications (Pierre)
  - d. Charles Mix County 9-1-1

- e. Clay Area Emergency Services Communications Center
- f. Huron Police Department
- g. Lake County 9-1-1 Communications
- h. Lincoln County Communications
- i. Marshall County 9-1-1
- j. Miner County Dispatch
- k. Mitchell Regional 9-1-1
- l. Moody County Emergency Management
- m. North Central Regional E9-1-1 Center (Mobridge)
- n. Roberts County Sheriff's Office
- o. Spink County Sheriff's Office
- p. Union County Sheriff's Office
- q. Watertown Police Department
- r. Winner Police Department, which is geographically west river, but utilizes the Sioux Falls to Raleigh Selective Router
- s. Yankton Police Department

102. During the meeting on November 13, 2018, Hellebust made this offer on behalf of Comtech: "We Will Give South Dakota \$100,000 (or reimburse Vendors) to Do Anything it Wants to Improve Public Safety."

103. On November 13, 2018 the following PSAPs moved off Contractor's network and returned to utilizing the legacy 9-1-1 system:

- a. Bon Homme County 9-1-1
- b. Brown County Communications
- c. Central South Dakota Communications (Pierre)
- d. Clay Area Emergency Services Communications Center
- e. Huron Police Department
- f. Lincoln County Communications
- g. Miner County Dispatch
- h. Mitchell Regional 9-1-1
- i. Moody County Emergency Management
- j. Roberts County Sheriff's Office
- k. Spink County Sheriff's Office
- l. Union County Sheriff's Office
- m. Winner Police Department, which is geographically west river, but utilizes the Sioux Falls to Raleigh Selective Router
- n. Yankton Police Department

104. On November 29, 2018 the following PSAPs moved off Contractor's network and returned to utilizing the legacy 9-1-1 system:

- a. Lake County 9-1-1 Communications
- b. North Central Regional E9-1-1 Center (Mobridge)

**West River South Dakota Public Safety Answering Points Network Failure**

105. At approximately 0832 Central Time on October 27, 2018 Contractor received an alarm indicating issues at its data center in Dallas, Texas.
106. While operating on NextGen's 9-1-1 network, the seven west river South Dakota PSAPs received calls through the Dallas data center. The PSAPs effected were:
- a. Butte County Dispatch Center
  - b. Custer County Communications
  - c. Fall River County Sheriff's Office
  - d. Lawrence County Sheriff's Office
  - e. Meade County Telecom
  - f. Pennington County 9-1-1
  - g. Spearfish Police Department
107. On October 27, 2018, at 0937 Central Time, in response to the alarm and technical issues, Contractor routed South Dakota's west river call traffic from Dallas, Texas to the call center in Raleigh, North Carolina.
108. Based upon information and belief, Contractor had to manually route the 9-1-1 calls to Raleigh, North Carolina because the NG9-1-1 system was not built for automatic failover between the data center in Dallas, Texas and Raleigh, North Carolina.
109. In routing South Dakota's west river 9-1-1 traffic from Dallas, Texas to Raleigh, North Carolina, 9-1-1 calls were lost.
110. The State was notified that calls had been routed away from Dallas, Texas to Raleigh, North Carolina, as of 1249 Central Time on October 27, 2018.
111. At 1819 Central Time, on October 27, 2018, the Pennington County PSAP reported to Contractor that the PSAP was experiencing intermittent problems with Automatic

Number Identifier and with Automatic Location Identifier delivery, and that there was a 2-4 second lag between calls being answered by dispatchers and the calls connecting.

112. Based upon information and belief, no alarms ever sounded to indicate there were issues with the South Dakota NG9-1-1 system.
113. At 2300 Central Time on October 27, 2018, the seven South Dakota west river PSAPs moved to their administrative lines.
114. On October 29, 2018 at 1800 Central Time, Contractor decided to resume traffic through Dallas, Texas and the affected South Dakota PSAPs returned to utilizing Contractor's network. Thereafter, additional technical problems arose.
115. On October 29, 2018 at 2332 Central Time, Contractor again began moving South Dakota's west river PSAPs to its administrative lines. The impacted PSAPs operated using only administrative lines until October 31, 2018. No Automatic Number Identifier or Automatic Location Identifier data was provided with 9-1-1 calls while the PSAPs used the administrative lines.
116. On October 31, 2018, South Dakota's seven west river PSAPs moved off Contractor's network and returned to utilizing the legacy 9-1-1 system.
117. All seven west-river PSAPs continue to operate on the legacy 9-1-1 network to date.

#### **December 2018 9-1-1 Outage**

118. On December 16, 2018 at 0700 Central Time, Contractor's network experienced a partial equipment failure.
119. Due to Contractor's network architecture, the equipment issue resulted in a 9-1-1 outage for the three South Dakota PSAPs that were at that time still on Contractor's network, namely:

- a. Charles Mix County 9-1-1
  - b. Marshall County 9-1-1
  - c. Watertown Police Department
120. Between 0700 and 0741 on December 16, 2018 twelve 9-1-1 calls to the three PSAPs, referred to in the preceding paragraph, were not received.
121. Contractor was alerted to the issue by the subcontractor and, based upon information and belief, Contractor's NG9-1-1 system never alarmed to indicate a problem.
122. Service was not fully restored to the three PSAPs until 0935 Central Time on December 16, 2018.
123. On December 17, 2018, the following PSAPs moved off Contractor's network and returned to utilizing the legacy 9-1-1 system:
- a. Charles Mix County 9-1-1
  - b. Marshall County 9-1-1
  - c. Watertown Police Department

**NextGen TC15-062**

124. In NextGen's filing with the South Dakota Public Utilities Commission in file TC15-062, Commission Staff requested that NextGen: "Please provide a network facilities diagram that depicts the local exchange services and interexchange services NextGen plans to provide in South Dakota. The diagram should provide the path of 9-1-1 calls from the end user to the PSAP, including all facilities NextGen plans to use in order to facilitate 9-1-1 call aggregating and routing."
125. NextGen responded to the request with a diagram representing a geo-diverse redundant NG9-1-1 system with no single point of failure. A true and correct copy of the diagram from TC15-062, DR 2-4, Figure 1-Network Facilities Diagram, is attached hereto, as "Exhibit J" and hereby incorporated by this reference.

126. In NextGen's filing with the South Dakota Public Utilities Commission in file TC15-062, Commission Staff asked NextGen: "How will the Company deliver 9-1-1 traffic?"
127. NexGen responded with a diagram representing a geo-diverse redundant NG9-1-1 system with no single point of failure. A true and correct copy of the diagram with the Call Flow Overlay from TC15-062, DR 3-7, Figure 2 – Call Flow Overlay, is attached hereto, as "Exhibit K" and incorporated by this reference.

### **NG9-1-1 System Failure**

128. Up to and until the NG9-1-1 system failed on October 16, 2018 and Contractor's report to the State, the State was not aware that (a) a single point of failure existed in the NG9-1-1 system; (b) Contractor failed to provide the geo-diverse redundancy within the NG9-1-1 system; (c) the NG9-1-1 system had no failover capabilities; (d) the NG9-1-1 system could not provide automatic rerouting; (e) the Contractor failed to maintain sufficient equipment, hardware and software in order to make certain the NG9-1-1 system would not experience a failure; and (f) the Network Operations Center alarm and monitoring system did not show which NG9-1-1 system(s) was impacted by a particular alarm or issue.
129. Contractor purposely did not build or create a geo-diverse redundancy failover capability in South Dakota's NG9-1-1 system.
130. Contractor purposely did not build the promised alarming capability or appropriately monitor the NG9-1-1 system in South Dakota.
131. When Contractor received the initial alarm at 0251 on October 16, 2018, Contractor was not able to identify that the NG9-1-1 system in South Dakota was experiencing a massive

failure. Contractor did not know that the alarms involved South Dakota or that South Dakota was impacted until the Clay County PSAP alerted Contractor.

132. Contractor failed to maintain sufficient equipment, hardware and software.
133. Contractor purposely failed to provide and maintain the following:
  - a. Network alarming and notification;
  - b. Geo-diverse redundancy;
  - c. Failover capability;
  - d. Automatic rerouting; and/or
  - e. Sufficient equipment, hardware and software to make certain the NG9-1-1 system would not experience a failure.
134. Contractor failed to ensure that no single point of failure existed within the NG9-1-1 system.
135. Contractor willfully failed to comply with the requirements of its Contract with the State.
136. As a result of such failure on October 16, 2018, the west-river network failure, and the December 16, 2018 outage, South Dakota's PSAPs have all moved back to the legacy 9-1-1 system in order to handle 9-1-1 calls.
137. Contractor's network has repeatedly proven to be unreliable and in violation of the 99.999% up-time requirement of the Contract.
138. Based upon information and belief, Contractor may allege that damages are limited under the Contract.
139. The State affirmatively alleges that any such limitation of damages would be unconscionable and should not be enforced.

140. The State affirmatively alleges that public policy serves to invalidate any term in the Contract seeking to limit Contractor's damages.
141. The State affirmatively alleges that any contract term(s) limiting damages on the part of Contractor is void based upon fraud.
142. Any contract term(s) purporting to limit damages is of no force and effect.
143. Under Section 3.3 of the Contract, Contractor is required to promptly pay to the State the full amount of any erroneous or overpayment to which the Contractor is not entitled, and any contractual term purporting to limit damages does not apply.

**COUNT 1: BREACH OF CONTRACT**

144. The State re-alleges and incorporates by reference paragraphs 1 through 143 as though set forth herein.
145. State and Contractor entered into a contract for the Contractor to perform work as described in the preceding paragraphs.
146. Contractor failed to deploy the call processing equipment and ESInet within the timeline specified in the Contract.
147. Contractor's call processing equipment failed to perform according to the Contract's specifications.
148. The public was harmed in that calls could not be answered by PSAPs during call processing equipment outages.
149. Contractor had a contractual obligation to ensure alarming and notification capabilities within the NG9-1-1 system.
150. Contractor failed to ensure the NG9-1-1 system had alarming and notification capabilities.

151. Contractor had a contractual obligation to monitor the NG9-1-1 system twenty-four hours per day, seven days per week.
152. Contractor failed to adequately monitor the NG9-1-1 system.
153. Contractor had a contractual obligation to ensure the geo-diverse redundancy failover capability of the NG9-1-1 system in South Dakota.
154. Contractor failed to ensure the geo-diverse redundant failover capability of the NG9-1-1 system in South Dakota.
155. Contractor has a contractual obligation to support and maintain the hardware within South Dakota's PSAPs throughout the term of the Contract.
156. Contractor had a contractual obligation to ensure no single point of failure existed in the NG9-1-1 system in South Dakota.
157. Contractor failed to ensure that no single point of failure existed in the NG9-1-1 system in South Dakota.
158. Contractor had a contractual obligation to ensure automatic re-routing of 9-1-1 traffic within the NG9-1-1 system.
159. Contractor failed to ensure automatic re-routing of 9-1-1 traffic within the NG9-1-1 system.
160. Contractor had a contractual obligation to ensure operability of the NG9-1-1 system to the 99.999% up time standard.
161. Contractor failed to ensure operability of the NG9-1-1 system meeting the 99.999% standard.
162. The State has paid the required monies under the Contract.

163. Contractor has breached the Contract by not providing the NG9-1-1 system as contractually required.
164. The State has been injured by these Contract breaches and suffered damages as a result, including the inability to timely provide emergency services to the public it serves.

**COUNT 2: FRAUD**

165. The State re-alleges and incorporates by reference paragraphs 1 through 164 as though set forth herein.
166. Contractor promised to provide a NG9-1-1 system with no single point of failure but suppressed pertinent facts Contractor was required to disclose about the readiness and fitness of the NG9-1-1 system, which misled the State into believing the NG9-1-1 system had no single point of failure.
167. Contractor promised that the NG9-1-1 system had geo-diverse redundancy failover capability but suppressed facts that Contractor was required to disclose about the NG9-1-1 system which misled the State into believing the NG9-1-1 system had geo-diverse redundancy failover capability.
168. Contractor falsely informed the State that failover between Sioux Falls and Rapid City had been successfully tested.
169. Contractor promised that the NG9-1-1 system had automatic internet protocol rerouting, but suppressed facts that Contractor was required to disclose about the NG9-1-1 system which misled the State into believing the NG9-1-1 system could automatically re-route calls.
170. Contractor falsely informed the State that alarm capabilities existed in the NG9-1-1 system.

171. Contractor falsely promised the State that the NG9-1-1 system had fault monitoring that would detect network problems, notify the network operations and provide timely notification to the PSAP(s) and the State. And Contractor falsely informed the State that these capabilities existed in the NG9-1-1 system when the PSAPs were being cutover to the network.
172. The State and the public were harmed by Contractor's conduct in that 9-1-1 calls did not go through to the PSAPs on October 16, 2018.
173. The State and the public were harmed by Contractor's conduct in that 9-1-1 calls were lost during the west river network failure from October 27, 2018 through November 3, 2018; and when calls did go through, 9-1-1 service was severely diminished because there was no Automatic Number Identifier or Automatic Location Identifier data while calls were being routed to administrative lines.
174. The State and the public were harmed by Contractor's conduct in that 9-1-1 calls did not go through to the PSAPs on December 16, 2018.
175. The State and the public were harmed by Contractor's conduct in that tax payer funds from South Dakota citizens, by way of the 9-1-1 surcharge, were paid to Contractor and entrusted to Contractor, yet Contractor willfully failed to use such funds in order to comply with its contractual obligations.
176. By reason and as a consequence of Contractor's fraud and breaches of their contractual obligations, the State was harmed is owed compensatory damages in an amount to be determined at trial.
177. Punitive damages are also warranted and should be imposed to deter and punish Contractor for its wrongful conduct.

**COUNT 3: FRAUDULENT MISREPRESENTATION**

178. The State re-alleges and incorporates by reference paragraphs 1 through 177 as though set forth herein.
179. At all relevant times, Contractor, by and through its officers and employees, made misrepresentations of statements of fact to the State, including, but not limited to, Contractor's performance under the contract; Contractor's progress in performance of the Contract; and the NG9-1-1 system's functionality.
180. Contractor's representations including, but not limited to, Contractor's performance under the Contract; Contractor's progress in performance of the Contract; and the NG9-1-1 system's functionality were untrue.
181. Contractor, by and through its officers and employees, knew the representations were untrue, or recklessly made such representations, including, but not limited to, Contractor's performance under the Contract; Contractor's progress in performance of the Contract; and the NG9-1-1 system's functionality.
182. Contractor made the foregoing assertions with the intent to deceive the State and for the purpose of inducing the State to act upon these assertions.
183. The State justifiably relied upon the representations by Contractor and was induced thereby to act to its injury.
184. The State has suffered damages as a result thereof.

**COUNT 4: FRAUDULENT CONCEALMENT**

185. The State re-alleges and incorporates by reference paragraphs 1 through 184 as though set forth herein.

186. At all relevant times, Contractor, by and through the Contract, had a duty to disclose the material fact that the NG9-1-1 system did not function as contractually required.
187. Contractor, by and through its officers and employees, willfully concealed Contractor's failure to perform under the Contract; Contractor's progress in performance of the Contract; and the NG9-1-1 system's functionality.
188. Contractor, by and through its officers and employees, suppressed the fact of Contractor's failure to perform under the Contract; Contractor's progress in performance of the Contract; and the NG9-1-1 system's functionality.
189. Contractor, by and through its officers and employees, willfully gave the State misleading information and failed to disclose material facts about the Contractor's progress and performance under the contract and the functionality of the NG9-1-1 system.
190. Contractor, by and through its officers and employees, acted with the intent to induce the State to alter the State's position to the State's injury.
191. Contractor's undisclosed information was something the State could not discover by acting with reasonable care.
192. The State, in fact, relied upon the misrepresentations made by Contractor to the State's detriment.
193. The State has suffered damages as a result thereof.

**COUNT 5: NEGLIGENT MISREPRESENTATION**

194. The State re-alleges and incorporates by reference paragraphs 1 through 193 as though set forth herein.
195. At all relevant times, Contractor, by and through its officers and employees, made misrepresentations to the State, including but not limited to, Contractor's performance

under the Contract; Contractor's progress in performance of the Contract; and the NG9-1-1 system's functionality.

196. Contractor, by and through its officers and employees, made representations without reasonable grounds for believing the representations to be true.
197. Contractor, by and through its officers and employees, made misrepresentations to induce the State to continue to pay significant sums of taxpayer money to Contractor.
198. The State actually and justifiably relied upon Contractor's statements and changed its position.
199. The State has suffered damages as a result thereof.

#### **COUNT 6: UNJUST ENRICHMENT**

200. The State re-alleges and incorporates by reference paragraphs 1 through 199 as though set forth herein.
201. As part of the facts and circumstances and the occurrences alleged, the State has conferred a benefit upon Contractor.
202. Contractor has knowledge of the benefit conferred upon it by the State.
203. Contractor has accepted or retained this benefit.
204. The circumstances are such that it would be inequitable for Contractor to retain the benefit.

#### **COUNT 7: DUTY TO INDEMNIFY THE STATE**

205. The State re-alleges and incorporates by reference paragraphs 1 through 204 as though set forth herein.
206. Under Section 8 of the Contract, Contractor has a contractual duty to indemnify the State.

207. Contractor must indemnify the State for any and all costs, including attorney fees, associated with this action.

**COUNT 8: CONTINUITY OF CONTRACTOR'S 9-1-1 SERVICES**

208. The State re-alleges and incorporates by reference paragraphs 1 through 207 as though set forth herein.

209. Pursuant to SDCL 49-31-3.1, Contractor is prohibited from discontinuing 9-1-1 services in South Dakota without the express approval of the South Dakota Public Utilities Commission.

210. Contractor must assure functionality of the portions of the NG9-1-1 system still being used by the State for 9-1-1 purposes until the State can completely transition to a new NG9-1-1 system.

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WHEREFORE, the State requests that this Court enter judgment against Contractor granting the following relief:

1. That the Court finds it has jurisdiction over this action;
2. That Defendant be enjoined from interrupting current 9-1-1 services during the State's transition to a new vendor;
3. That judgment be awarded to the State for its claims in an amount to be determined at trial;
4. That pre-judgment interest be awarded to the State at the rate of 10% through the date of judgment and post-judgment interest from the date of entry of a judgment until paid in full;



By:       /s/ Jenna E. Howell        
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**PLAINTIFF HEREBY REQUESTS TRIAL BY JURY**