

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

BEK Communications Cooperative,)
Consolidated Telcom, Dakota Central)
Telecommunications Cooperative, Dickey)
Rural Telephone Cooperative, Griggs)
County Telephone Company, Inter-Community)
Telephone Company, LLC, Missouri Valley)
Communications, Inc., Moore and Liberty)
Telephone Company, Nemont Telephone)
Cooperative, Inc., North Dakota Telephone)
Company, Northwest Communications)
Cooperative, Polar Communications Mutual)
Aid Corporation, and Reservation Telephone)
Cooperative,)

Complainants,)

vs.)

SmartNET, Inc., d/b/a CallSmart,)
Respondent.)

Case No. PU-2967-03-666

COMPLAINANTS'
POST-HEARING
BRIEF

This case involves a Complaint by properly licensed telecommunications providers that the Respondent, SmartNET, Inc., d/b/a CallSmart, has failed to obtain proper licensure and to follow proper protocols for payment of intrastate access charges as established by prior Orders of the North Dakota Public Service Commission.

FACTS

The hearing in this case showed the following events have occurred. Bruce Burke (herein Burke) is a major owner and principal officer of SmartNET, Inc. Burke has a history of employment with local exchange telecommunications carriers spanning 22 years of employment. In November 2000, Burke incorporated SmartNET, Inc., and began doing business as CallSmart (herein CallSmart). CallSmart has offices and equipment located in

Dickinson, Bismarck, and Fargo, North Dakota. CallSmart obtained a Long Distance Reseller's License from the North Dakota Public Service Commission (herein NDPSC or Commission) on August 16, 2002. CallSmart has never used this license to provide services in North Dakota.

CallSmart provides interstate voice telecommunications services in North Dakota. The Complainants do not maintain or contend that these interstate services are involved in this Complaint.

CallSmart does provide intrastate intraLATA and intrastate interLATA long distance voice telecommunications services in North Dakota (herein NDIX Services). Although CallSmart does offer services using a "soft phone," an "IP phone," or a "gateway," these methods of service offerings are not the subject of this Complaint to the NDPSC. The majority of CallSmart customers use only a telephone to access CallSmart's long distance voice services. These NDIX Services utilize the facilities of ILECs and CLECs (herein LECs) which are routed through Extended Area Services (EAS) between the LECs and Qwest to utilize CallSmart's NDIX Services. CallSmart has not denied that its services are described at www.getcallsmart.com. CallSmart advertises and Burke testified that no customer premises equipment (CPE) is needed to utilize its services. All that is needed is the customer's telephone.

CallSmart obtains local telecommunications services from Qwest in Dickinson and Bismarck, North Dakota. In Fargo, it obtains local services from a CLEC. As explained by witness Anagnost, these facilities can be utilized through exchanges belonging to the Complainants by virtue of Extended Area Service (EAS) arrangements with Qwest in these communities. CallSmart leases a circuit between Dickinson and Bismarck and hauls its

interexchange traffic between Bismarck and Dickinson on that circuit. According to CallSmart, it only has three gateways to the internet that are involved in this Complaint. Those gateways are located in Bismarck and Fargo.

Burke testified that CallSmart carries traffic from Dickinson to Bismarck and from Bismarck to Dickinson via a leased circuit and not via the internet. He called companies that engage in these type of operations abusive if they use the "six inch" rule. He testified that if their traffic is hauled on the internet and terminated six inches away it was abusive. Yet, he readily admits the CallSmart NDIX between Dickinson and Bismarck traffic is only transported on the internet 26 inches at his Bismarck facilities. He suggests the 26 inches is permissible.

CallSmart has not registered to obtain a Certificate of Public Convenience and Necessity to offer its NDIX in North Dakota. Because CallSmart has not operated in conformity with North Dakota law and does not operate in standard protocols, the Complainants are unable to fully document CallSmart's activities in North Dakota offering NDIX Services. The majority of customers who utilize CallSmart for North Dakota Services call a CallSmart telephone number obtained from a LEC and then dial a destination number to place a long distance call. They use 1+ dialing code to do so.

CallSmart now holds itself out as an Internet Service Provider (ISP), but its services offering of NDIX Services consists essentially of voice long distance services. While it may have customers who utilize the company's services to hook up their computer and access the internet, it does not encourage this use of its services.

Because of the methods used by CallSmart, the Complainants are not paid originating or terminating access charges. Because CallSmart does not operate according

to accepted protocols in the industry, CallSmart's intrastate originating and terminating access services for NDIX Services are not properly measured and registered on the local public switched network.

CallSmart has not provided any records of originating and terminating calls in North Dakota for its NDIX Services.

LAW AND ARGUMENT

All telecommunications companies providing "telecommunications services" in the state of North Dakota are "common carriers." These common carriers are affected with the public interest and are subject to regulation and general supervision by the NDPSC. N.D. Cent. Code § 49-21-02.

"Telecommunications services' means the offering for hire of telecommunications facilities, or transmitting for hire telecommunications by means of such facilities whether by wire, radio, lightwave, or other means." N.D. Cent. Code § 49-21-01(20).

"Telecommunications Company' means a person engaged in the furnishing of telecommunications service within this state." N.D. Cent. Code § 49-21-01(19).

"Interexchange telecommunications company' means a person providing telecommunications service to end users located in separate local exchange areas." N.D. Cent. Code § 49-21-01(8). (Emphasis added.)

The NDPSC has the power to:

1. Investigate all methods and practices of telecommunications companies.
2. Require telecommunications companies to conform to the laws of this state and to all rules, regulations, and orders of the commission not contrary to law.
3. Require copies of reports as to rates, prices, and terms and conditions of service in effect and used by the company, and all other information deemed relevant and necessary by the commission in the exercise of its authority.

....

N. D. Cent. Code § 49-21-01.7 (Emphasis added.)

In Chapter 49-02 of the North Dakota Century Code, the powers of the Commission are set forth. N.D. Cent. Code § 49-02-01 has some limitations on the jurisdiction of the Commission but also expressly reserves to the Commission the power to regulate the “conditions of access services or connection between facilities and transfer of telecommunications between two or more telecommunications companies.” (Emphasis added.)

This power in N.D. Cent. Code § 49-02-01 is expressly given and is further buttressed by N.D. Cent. Code § 49-21-06, which provides as follows:

There is a rebuttable presumption that prices for essential telecommunications services in effect on July 1, 1989, are fair and reasonable. Any person may complain to the commission, or the commission on its own motion may complain and begin investigation, of the reasonableness, fairness, or adequacy of any price for any essential or nonessential service. Any notice and hearing by the commission will be provided in accordance with chapter 28-32 and the commission can only set aside, after notice and hearing, any price for a service it investigates pursuant to this section which it determines to be unreasonable, unfair, or inadequate. This section must be construed to authorize the commission to set aside any unreasonable, unfair, or inadequate price set by a

telecommunications company for the connection between facilities of two or more telecommunications companies and for the transfer of telecommunications, provided this section may not be construed to set aside any price set by contract between telecommunications companies and in effect on July 1, 1989, upon complaint by one of the parties to the contract that the price is unreasonably high.

This section gives the Commission the power, on its own initiative, or upon complaint of any person, to investigate “reasonableness, fairness, or adequacy of price for any essential or nonessential service.” (Emphasis added.)

N.D. Cent. Code § 49-21-01(4) defines essential telecommunications to include “switched access.” Switched access is defined in N.D. Cent. Code § 49-21-01(18) as follows:

“Switched access” means access to include:

- a. Local exchange central office switching and signaling;
- b. Operator and recording intercept of calls;
- c. Termination of end user lines in the local exchange central office;
- d. The carrier common line charge for the line between the end user’s premises and the local exchange carrier central office;
- e. Billing and collection recording for interexchange carriers to which the local exchange carrier provides feature group C access service; and
- f. Telecommunications service, including connections, provided to allow transmission service and termination between an interexchange company’s premises and the local exchange central office switch for the origination or termination of the interexchange company’s switched telecommunications services.

N.D. Cent. Code § 49-21-06 authorizes the NDPSC to hear complaints and investigate prices for essential and non-essential services. In this particular case, there is no price; access compensation is not being paid for the use of the facilities of the LECs for the origination of NDIX traffic.

The NDPSC has a long history of regulating prices for intercarrier compensation. Access rates replaced settlements in this Commission’s Case No. 10,444 on December 10,

1983. These rulings were modified and further progressed in Case Nos. 10,694 and 10,699, with a number of Supplemental Orders issued after that date to provide for intrastate intraLATA and interLATA interexchange, intercarrier compensation. CallSmart has failed to pay these rates or keep records to ascertain necessary information as established by the Commission's Orders.

Case No. 10,444 arose after the divestiture of AT&T in 1983 (the Modified Final Judgment [herein MFJ]). The Commission issued an interim order (herein Order #10,444) on December 13, 1983, to deal with the MFJ. The primary focus of Order #10,444 was to provide a mechanism of access charges to replace separations and settlements that had existed in the telecommunications industry since the early 1900s. Access charges were implemented in Order #10,444 to make sure interexchange carriers paid a fair price for the use of local exchange carrier's network to initiate and complete intrastate interexchange traffic.

The MFJ was scheduled to take effect on January 1, 1984. Under the MFJ, AT&T was broken up into the Regional Bell Operating Companies (herein RBOCs) and AT&T, an interLATA carrier. AT&T was prohibited from providing local service and the RBOCs were prohibited from engaging in interLATA interexchange traffic. Northwestern Bell (now Qwest) and the local rural exchange carriers formulated and developed a formula for interexchange access charges that were adopted by this Commission in Order #10,444. Under this Order, independent local exchange companies were required to file access charge tariffs with the Commission.

Order #10,444 directed that intrastate interLATA charges were to be paid for through access charges. Northwestern Bell was to file tariffs for access charges. Other LECs could mirror the Northwestern Bell charges or mirror their interstate access charges.

In its Conclusions of Law, the Commission stated “[n]on-rate regulated exchange carriers are, however, subject to the Commission’s jurisdiction over carrier interconnection and compensation. This Commission has jurisdiction of this proceeding.” (Order #10,444 at 14.)

In Case Nos. 10,694 and 10,699, the Commission issued an Order on October 8, 1985 (herein Order #10,694). It noted compensation for intraLATA access charges was based on the settlement of its previous Order #10,444. Order #10,694 directed “[t]he implementation of intraLATA access charges equal to the local exchange companies interLATA access charges effective January 1, 1986, or as soon thereafter as they may be implemented.” Order #10,694 at 31. After again finding it had jurisdiction, the Commission concluded by requiring local exchange carriers to file interexchange intrastate access charges in accordance with its Orders.

On December 9, 1985, the Commission adopted a Supplemental Order. A Second Supplemental Order was issued on January 1, 1986; a Third Supplemental Order was issued on April 1, 1986; Supplemental Findings were issued on August 7, 1986; a Fourth Supplemental Order was issued on October 14, 1988; and a Fifth Supplemental Order was issued on July 19, 1990.

From the date of and since the date of these Orders, the Complainants have complied with the lawful orders of this Commission on access.

The Complainants now submit the Respondent has failed to obtain a license for intrastate interexchange telecommunications services or to pay the Complainants for the use of their facilities.

The primary goal of the Commission in its access charge orders was to insure the affordability of local telephone services or universal services, as it was termed.

CallSmart has not filed for licensure as required by North Dakota, it has not compensated other carriers for compensation due other carriers for use of their facilities, and it operates in a fashion similar to any other interexchange carrier in North Dakota except that it does so without compensation for the use of the networks of the LEC that it uses to originate and terminate its NDIX traffic.

The only difference between AT&T and CallSmart, besides the obvious, is that CallSmart leases its circuits to send voice traffic on the internet whereas AT&T owned its own internet facilities. Any other difference CallSmart tries to use or explain is smoke and mirrors and is a difference without a distinction.

ORDER

The Complainants request an order that CallSmart is required to keep records and pay for access fees it owes to local exchange carriers in North Dakota.

Dated this 8th day of June, 2004.

PRINGLE & HERIGSTAD, P.C.

Don Negaard, ND Bar ID #03598
Second Floor, Bremer Bank Building
P.O. Box 1000
Minot, ND 58702-1000
Telephone: (701) 852-0381
Fax: (701) 857-1361
pringle@ndak.net
Attorney for Complainants

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing Complainants' Post-hearing Brief was served by fax transmission on the 8th day of June, 2004, on the following:

Bruce A. Selinger
KUBIK, BOGNER, RIDL & SELINGER
26 East Third Street
P.O. Box 1173
Dickinson, ND 58602-1173

Glenn S. Richards
SHAW PITTMAN LLP
2300 N Street, NW
Washington, D.C. 20037-1128

Don Negaard, ND Bar ID #03598