

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.



Civil No. PU-2967-03-666

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

FINDINGS OF FACT

I.

SmartNET, Inc. is a two-person operation located in Dickinson, North Dakota that provides VoIP services in Bismarck, Fargo and Dickinson.

II.

For almost two years prior to this Complaint, SmartNET, Inc. had a contract to originate this internet bound traffic with Consolidated Communications Networks Inc.,

a wholly owned subsidiary of Consolidated Telcom, one of the Complainants, without even a hint that access charges were an issue or any attempt to charge access charges.

III.

SmartNET, Inc. is a VoIP provider which needs the *public* internet to run its service and as such, is not subject to access charges.

IV.

Mr. Burke testified and his testimony was not challenged or refuted by Mr. Anagnost, that all calls go out over the Public Internet.

V.

SmartNET, Inc. does not provide an intralata long distance service. All Internet services are considered interstate in nature. SmartNET, Inc. does pay the required telecommunication taxes on the lines they have received from the ILEC's and the CLEC's. The service may be accessed by many means, one of which is the telephone. The service cannot be distinguished if access is by telephone or by computer, nor can the CLEC's or the ILEC's determine how the service is accessed because not like AT&T, SmartNET customers must dial a local access number in order to access the service and all calls go out to the internet. The 1 + dialing does not work on this service and every call associated with this service undergoes a net protocol conversion from voice to data.

VI.

CallSmart receives internet services from Sprint. CallSmart uses its gateways Bismarck and Fargo to convert its customers' voice into internet signals and sends the

signals on the internet. CallSmart has contracts with two “terminating providers,” company V and company T.

VII.

CallSmart is not required by federal law to be licensed in North Dakota because it offers an information service and is not a telecommunications company.

VIII.

CallSmart is not required to compensate local exchange carriers through the mechanism of access charges.

IX.

CallSmart is not required to have any licenses.

X.

The Complainants have completely failed to offer any evidence that SmartNET is a telecommunications company subject to this Commission’s jurisdiction or regulations.

XI.

The facilities of SmartNET are set up exactly like the facilities of all dial-up internet service providers. The customer uses a device, either a telephone or a computer to access the gateway, which converts the call to data and sends the information packets out to the Public Internet via SmartNET’s internet service company contracts.

XII.

The Complainants have relied on the FCC decision regarding the AT&T petition in support of their Complaint. SmartNET’s services are not at all related to the offerings

of AT&T. The first major difference is that all SmartNET, Inc. calls go out to the Public Internet. None of the AT&T calls went out into the Public Internet. Secondly, AT&T uses 1 + dialing. SmartNET requires the customer to first dial a local access number to reach the network and then dial the number the customer wishes to call. The AT&T order states that with AT&T's service, "[e]nd user customers do not order a different service, pay different rates, or place or receive calls any differently than they do through AT&T's traditional circuit-switched long distance service; the decision to use its internet backbone to route certain calls is made internally by AT&T." AT&T Declaratory Ruling ¶12. The FCC found that "[e]nd users place calls using the same method, 1 + dialing, that they use for calls on AT&T's circuit-switched long distance network. Customers of AT&T's specific service receive no enhanced functionality by using this service." AT&T Declaratory Ruling ¶15. The FCC also noted that "based on the record before us, end users have received no benefit in terms of additional functionality or reduced prices." AT&T Declaratory Ruling ¶17.

SmartNET's service differs from the AT&T service in each respect cited by the FCC. SmartNET's customers must order a different service from the company's current long distance provider in order to access its VoIP network. The *public* internet is used to transmit all traffic, not just "certain calls." The customers must make two separate calls in order to use the service: one call to a local access number and a second dialed call in order to reach another party. The second call does not require the SmartNET customer to dial 1 +. SmartNET's customers pay different rates from those charged by

their actual long distance carrier, whose service is not displaced by SmartNET's secondary service. SmartNET's customers can and do receive substantially reduced long distance rates. SmartNET can charge this low price in part because of the "enhanced functionality" provided by the company's VoIP Gateway computers.

XIII.

SmartNET must purchase its transportation service lines from the LEC's in order to provide internet services to its customers as does every internet service provider. In that respect, like all internet service providers, they do pay access fees to the universal service fund. The Complainants incur no cost for allowing this service to pass through their network.

CONCLUSIONS OF LAW

I.

The Commission has jurisdiction to hear this Complaint.

II.

SmartNET is not liable to complainants for any fees or charges different than any other internet service provider.

III.

SmartNET is an information service provider (ISP).

ORDER

1. That the Complaint of Complainants is dismissed.
2. That this matter will be reconsidered once the FCC completes its full hearing on the pending Rule Making regarding VoIP.

Dated this _____ day of July, 2004.

PUBLIC SERVICE COMMISSION

Susan E. Wefald
Commissioner

Tony Clark
President

Kevin Cramer
Commissioner