

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

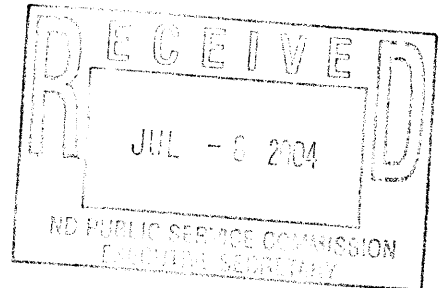
BEK Communications Cooperative, Consolidated Telcom, Dakota Central Telecommunications Cooperative, Dickey Rural Telephone Cooperative, Griggs County Telephone Company, Inter-Community Telephone Company, LLC, Missouri Valley Communications, Inc., Moore and Liberty Telephone Company, Nemont Telephone 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

**RESPONDENT'S
POST-HEARING BRIEF**

This case involves a Complaint by thirteen Telephone Cooperatives (ILECs) that Respondent, SmartNET, Inc. has failed to pay intrastate access charges. The issues as set out by the Commission to be considered in this matter are:

1. Whether the Respondent is subject to the jurisdiction of the Commission.
2. Whether the services provided by the respondent are subject to the jurisdiction of the Commission.

3. If the respondent and the services provided by the respondent are subject to the jurisdiction of the Commission, whether respondent is properly authorized to provide such services.
4. Whether respondent is using the local service facilities of the complainants.
5. If respondent is using the local services facilities of the complainants, whether respondent is liable to the complainants for compensation for the use of those facilities.

FACTS

SmartNET, Inc. is a two-person operation located in Dickinson, North Dakota that provides VoIP services in Bismarck, Fargo and Dickinson. Both, Bruce Burke and Clay Kerner are former employees of Consolidated Telcom, one of the Complainants. The owners of SmartNET, Inc. have made a substantial investment in both time and money to begin this business in 2000, after their employer declined any interest in this new wave of technology.

SmartNET, Inc. began this VoIP service in Bismarck. It expanded to Fargo in the fall of 2000, and in 2002 began offering the service in Dickinson. This endeavor has been very expensive and it has been quite a challenge to develop this VoIP service to a quality product that SmartNET can finally be proud of. 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. SmartNET, Inc. is a VoIP provider which needs the *public* internet to run its service and as such, is not subject to access charges.

At the hearing, the Complainants offered only one witness in support of their Complaint, namely Dean Anagnost. Mr. Anagnost is an engineer with Kadrmas, Lee & Jackson. Mr. Anagnost and his employer were at one time customers of SmartNET, Inc. Mr. Anagnost testified that they discontinued the service because of the quality issues often associated with VoIP long distance services as opposed to long distance services offered by telecommunications companies. The Complainants have requested that SmartNET provide some sort of tracking on originating calls in order to determine access charges. Their expert, Dean Anagnost has testified that with current technology no such tracking or measurement can be done. This is important for two reasons: One it highlights the difference between VoIP and PSTN based long distance. Second, if the carrier cannot distinguish interstate and intrastate, the carrier won't know whether to charge for access from interstate or intrastate tariffs. Generally, the intrastate access rates are higher than interstate rates.

Mr. Burke testified and his testimony was not challenged or refuted by Mr. Anagnost, that all calls go out over the *public* internet. It is true that a small number of these calls may go out to the internet and come back to a Gateway that is within the same co-location area. This minor traffic from Dickinson to Bismarck is incidental traffic. This incidental traffic is much the same as traffic leaking

through local lines from the state of North Dakota's University PBX system. SmartNET, Inc. uses this Dickinson to Bismarck route for testing and monitoring quality issues with VoIP traffic, since its office is located in Bismarck. SmartNET does not use the route to avoid any potential charges, as the Complainants would like to have the Commission believe.

SmartNET, Inc. does not provide an intralata long distance services. 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 unlike AT&T, SmartNET customers must dial a local access number in order to access the service and all calls go out to the *public* 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. SmartNET, Inc. is also beta testing new service products which include "phone home" which allows our military personnel to call home from Iraq without a per minute charge, "callback" and "voice to e-mail".

Quest, the company that would be impacted the most by this decision, has failed, neglected, or refused to take part in these proceedings. It thus becomes very obvious that the Complainants motive is to discourage all new technology to

the detriment of the North Dakota consumer. Because all calls are internet calls and thus, interstate calls, this Commission either lacks jurisdiction or SmartNET is authorized to use this service and is not liable for access charges.

LAW AND ARGUMENT

As was stated by the Commission at the beginning of the hearing, the North Dakota laws regarding telecommunication services are outdated and vague, especially when it comes to the new technology of VoIP, thus the North Dakota statutes are of little help when addressing the issues as put forth by the Commission.

1. WHETHER THE RESPONDENT IS SUBJECT TO THE JURISDICTION OF THE COMMISSION.

The Federal Communications Commission (FCC) has determined that the VoIP service provided by pulver.com's Free World Dialup is an unregulated information service subject to the FCC's jurisdiction, and has commenced a comprehensive rule-making proceeding to address IP services generally. *Petition for declaratory ruling that pulver.com's Free World Dialup is neither telecommunications nor a telecommunications service, WC Docket # 03-45, Memorandum Opinion and Order, FCC 04-27 (February 19, 2004).* The FCC is struggling with this complicated issue, but in its struggle, it is mindful of the strong federal interest of insuring that regulation does nothing to impede the growth of

the internet-which has flourished under the FCC's "hands-off" regulatory approach-or the development of competition.

The problem this state faces in attempting to assert jurisdiction over SmartNET's internet based service is to determine whether the calls placed by the service are "interstate" or "intrastate". From the information presented to this Commission by the testimony of Mr. Burke, and not refuted by Mr. Anagnost, all calls placed through this service go to the *public* internet. Also, it should be clear to this Commission that our statutes do not allow regulation of internet service providers. The make-up and functionality of SmartNET's network is identical to the network setup of any internet service provider except SmartNET's network offers an enhanced functionality.

2. WHETHER THE SERVICES PROVIDED BY THE RESPONDENT ARE SUBJECT TO THE JURISDICTION OF THE COMMISSION.

The Complainants have provided the Commission with all types of definitions from the North Dakota Century Code relating to telecommunications companies, but have completely failed to apply any of the facts relating to the services offered by SmartNET that were presented in the hearing to these inapplicable definitions. The Complainants, in their brief, then go on and provide numerous outdated rulings of this Commission that relate only to the regulation of telecommunications companies pricing and structure, or issues not relevant to this hearing. We don't question the Commission's authority to regulate telecom-

munications companies, but the Complainants have completely failed to offer any evidence that SmartNET is a telecommunications company subject to this Commission's jurisdiction or regulations.

VoIP technologies, including those used to facilitate IP telephony, enable real-time delivery of voice and voice-based applications. When VoIP is used, a voice communication traverses at least a portion of its communications path in an IP packet format using IP technology and IP networks. VoIP can be provided over the *public* internet or over private IP networks. VoIP can be transmitted over a variety of media (e.g., copper, cable, fiber, wireless). Unlike traditional circuit-switched telephony, which establishes a dedicated circuit between the parties to a voice transmission, VoIP relies on packet-switching, which divides the voice transmission into packets and sends them over the fastest available route. Thus, VoIP uses available bandwidth more efficiently than circuit-switched telephony and allows providers to maintain a single IP network for both voice and data.

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. What happens to this data once it hits the internet is out of SmartNET's control. Keep in mind that SmartNET contracted with Consolidated Communications Networks, Inc., a wholly owned subsidiary of one of the

Complainants, Consolidated Telcom, to initially set up its internet service without question or concern for any access charges. Now, almost two years later, they along with the other Complainants are attempting to shut down or stifle this new technology instead of embracing it head on for the good of all consumers in the state of North Dakota.

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.

3. IF THE RESPONDENT AND THE SERVICES PROVIDED BY THE RESPONDENT ARE SUBJECT TO THE JURISDICTION OF THE COMMISSION, WHETHER RESPONDENT IS PROPERLY AUTHORIZED TO PROVIDE SUCH SERVICE.

This Commission would have to assume jurisdiction over all internet providers and deny authorization to them as well if it would rule in favor of Complainants. The equipment and system design of SmartNET is identical to the system design of all dial-up internet service providers. The consumer is the ultimate beneficiary of this new technology. Think back to the days when telephone companies charged the consumer for each telephone jack they had in

their home and justified this cost to us all. The Respondent's use of the Complainants' facilities is no different than any other internet service provider and costs the Complainants nothing.

4. WHETHER THE RESPONDENT IS USING THE LOCAL SERVICE FACILITIES OF THE COMPLAINANTS

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. On the originating end SmartNET pays Quest for EAS service and other lines: on the terminating, calls are terminated through CLECs-presumably who are paying reciprocal compensation to the Complainants. This issue becomes one of carrier choice. There is no statute or order that requires SmartNET to use the ILEC facilities. This Commission directed the Complainants to provide some justification that access tariffs are applicable to SmartNET. The Complainants have offered nothing in this regard. Access is made up of many components. It is much too simple to say that SmartNET has to pay without considering what they should pay or whether they need the service or whether they need all the components. The idea that SmartNet should be required to keep track of records so they can get billed by the LECs is unreasonable and once again shows that access charges do not apply to this *public* internet service. The Complainants incur no cost for allowing this service to pass through their network.

The method by which SmartNET's internet service providers terminate the calls is of no concern to SmartNET.

5. IF RESPONDENT IS USING THE LOCAL SERVICE FACILITIES OF THE COMPLAINANTS, WHETHER RESPONDENT IS LIABLE TO THE COMPLAINANTS FOR COMPENSATION FOR THE USE OF THOSE FACILITIES.

The Respondent should not be liable to Complainants for any fees or charges other than those paid by any other internet service provider. In fact, Complainants have taken a position different from the LEC's. This position has cost them money in refusing to allow the use of their facilities to implement the ISP service. Making VoIP service subject to access charges in favor of the Complainants will put North Dakota at the bottom of this new technology. Ruling in favor of the Complainants will stifle competition and new ideas and will not stop the inevitable that VoIP is here to stay, and will force North Dakota to be a follower instead of a leader all to the detriment of the North Dakota consumer. Complainants must accept, embrace and deal with this new wave of technology or be left behind. This is a matter that needs to be left to the FCC. It is unfair to both parties to make a decision that could easily be changed by the FCC in short order. Delay will not affect the Complainants but an adverse decision will leave North Dakota behind the rest of the country and world and put SmartNET out of business.

BURDEN OF PROOF

The Complainants have the burden of proof as to the Complaint brought forth to this Commission. The Complainants offered little, if any evidence in support of their complaint. This is ever so obvious from their brief. Complainants have presented no facts, testimony or applicable law that helps the Commission with these issues. As a matter of law, the Complainants have completely failed to meet their burden of proof.

CONCLUSION

As is obvious from this hearing, and from hearings of the other states, the issue of VoIP access charges is a very new and complicated unresolved issue. The dialogue on VoIP is just beginning. This Commission should exercise restraint when faced with new technologies and services. If regulation is too oppressive while a technology is developing, it will dampen the growth and development of this technology and put the developer and state behind the rest of the world. Regulatory restraint is more prudent until the technology is understood and viable. This Commission should not leap into a regulatory scheme until we understand its full impact of this technology

VoIP presents a world of opportunities for North Dakota consumers. The technology will allow for different options and applications that will ultimately give consumers more control. VoIP also changes the competitive complexion of the market place in a way that might bring more choices and has already lowered costs for the North Dakota consumer.

For the reasons set forth in this brief, it seems that it is premature to make conclusive jurisdictional or policy determinations or to take action until the FCD provides some guidance.

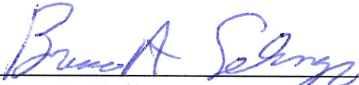
ORDER

Respondent, as an internet service provider, respectfully requests an order that the Complaint be dismissed, or in the alternative, that this matter be continued until the FCC completes its full hearing on the pending Rule Making regarding VoIP , which will give all companies some direction.

Dated this 7th day of July, 2004.

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CERTIFICATE OF SERVICE

I certify that I caused a true and correct copy of the foregoing RESPONDENT'S POST-HEARING BRIEF to be mailed, by first class mail with postage duly prepaid, on the 7th day of July, 2004, to the following person:

Don Negaard
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Bruce A. Selinger