

**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  
RESPONSE BRIEF

The Complainants in this case filed a Post-Hearing Brief and proposed Findings of Fact, Conclusions of Law, and Order on or about June 8, 2004. The Respondent filed its Brief and proposed Findings of Fact, Conclusions of Law, and Order on July 7, 2006. The Complainants now file this Response Brief.

FACTS

The facts, as stated by the Complainants and as set forth in its proposed Findings of Facts have not been disputed by the Respondent.

## LAW AND ARGUMENT

### A. Misstatement of Facts.

The Complainants dispute the following “facts” supplied by or suggested by the Respondent. The Complainants also dispute the Respondent’s proposed Findings of Fact.

1. “The owners of SmartNET, Inc. . . . after their employer declined any interest in this new wave of technology.” Respondent’s Brief (herein “RB”), p. 2. (The record is devoid of testimony on this issue.).

2. “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.” RB, p. 2. (This issue was not pled. The record, we believe, is devoid of evidence on this statement, that access was not an issue. It is irrelevant to this proceeding)

3. “SmartNET, Inc. is a VOIP provider which needs the *public* internet to run its service and as such, is not subject to access charges.” RB, p. 3. (This was not pled or proven at hearings. To the contrary, the evidence was that SmartNET uses the public switched network. There is no such thing as a “public internet.” See Newton’s Telecom Dictionary. It contains no such term as “public internet.” It does define the “Internet” and the “public switched telephone network.”)

4. “Their expert, Dean Anagnost has testified that with current technology no such tracking or measurement can be done.” RB, p.3. (The Complainants believe Mr. Anagnost testified that the current way in which SmartNET delivers calls into the system

prevents or hinders the LEC from tracking the calls. He did not testify that the calls could not be tracked.)

5. “Generally, the intrastate access rates are higher than interstate rates.” RB, p.3. (Complainants do not believe testimony was offered on this issue. It is totally irrelevant. This is not a rate case.)

6. “Mr. Burke testified and his testimony was not challenged or refuted by Mr. Anagnost, that all calls go out over the *public* internet.” RB, p. 3. (Again, the internet is not a “public” facility. It exists by virtue of connectivity among a variety of telecommunications carriers. See the definition of internet in Newton’s Telecom Dictionary (Attachment 4).)

7. “It is true that a small number of these calls get 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.” RB, pp. 3-4. (There is no record of Mr. Burke saying this. In fact, he “apologized” for this traffic because he knows he cannot defend it.)

8. “SmartNET, Inc., uses this Dickinson to Bismarck route for testing and monitoring quality issues with VOIP traffic, since its office is located in Bismarck.” (The Complainants dispute that this was in the record. The record established traffic is hauled on this route.)

9. “SmartNET, Inc. does not provide an intralata long distance services [sic]. All Internet services are considered interstate in nature.” RB, p. 4. (To the contrary, Mr. Burke testified that his company does originate and terminate traffic to different exchanges in North Dakota. This by definition is intrastate traffic.)

10. “Qwest [sic], 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.” RB, pp. 4-5. (This is not a fact. Obviously, Qwest was not a party to the proceedings. Their motives or reasons are immaterial and are not part of the record. There is no evidence to support an argument that these calls are interstate calls. Even if this “fact” were proven, it lacks logic and reason because any company could deprive the PSC of all jurisdiction by routing its traffic across one of North Dakota’s four adjoining borders. It is not the “path” of the traffic but rather its originating and terminating point that determines its jurisdiction.)

For the reasons stated above, the Complainants object to the Respondent’s proposed Findings of Fact, which are not supported by the record in this case.

B. Lawful Orders.

SmartNET has offered absolutely no authority to show this Commission’s prior orders (see Attachment 1, which is attached hereto and incorporated by reference) are not in effect. The records of this Commission show that, pursuant to Commission orders, Qwest previously filed and established state access tariffs. The other ILECs in the state have mirrored these tariffs. Any reference to “elements of a tariff” can be found in Qwest’s access tariff filings. The Complainants submit no such analysis of rate elements is necessary.

SmartNET has given absolutely no authority or shown that these prior Commission Orders are invalid. Instead, it characterizes these Orders as “outdated rulings.” This is equivalent to a person issued a speeding ticket arguing that the sign on the street is so old the posted speed is “outdated.” In 1999, the legislature has specifically mandated that these access tariffs are presumed to be “fair and reasonable.” N.D. Cent. Code § 49-21-06. It seems the legislature has spoken on the issue of whether these prior orders are outdated or not, when it adopted prices established in the 1980s as a benchmark for these services.

C. Exemption.

SmartNET argues its services are preempted by federal law. Two state commissions recently disagreed with similar assertions and asserted their jurisdiction.

1. Washington. On June 11, 2004, the Washington State Utilities and Transportation Commission issued its Final order (Order #8) in Docket #UT- 031472 regarding the services of LocalDial. (See Attachment 3.) In its Order, that Commission held:

“LocalDial is a telecommunications company doing business in Washington and is subject to our jurisdiction. LocalDial is an interexchange carrier and subject to Complainants’ tariffs to the same extent as other interexchange carrier and subject to Complainants’ tariffs to the same extent as other interexchange carriers that provide intrastate long distance service in Washington for Complainants’ local exchange service customers. LocalDial must register with the Commission as required by RCW 80.36.350 and must cease and desist from providing jurisdictional services until it complies fully

with all legal requirements for telecommunications companies that do business in Washington.”

The description of the services in that case is remarkably similar to the offerings of SmartNET:

1. Consumers dial a local number (see Attachment 3, p. 11).
2. LocalDial leases circuit or uses the internet to transport calls (Attachment 3, p. 11-12).<sup>1</sup>
3. The product description of LocalDial is almost exclusively for lower cost long distance calling.
4. The LocalDial customer used the same premises equipment to makes its calls as it did for other local and long distance calls (Attachment 3, p. 24, para. 56).

In concluding it had jurisdiction, the Washington Commission held: “We determine, as a matter of law, that we are not preempted.” (Attachment 3, p. 19, para. 46.) The Washington Commission found nothing in the FCC’s AT&T decision cited by SmartNET as giving these types of calling services any exemption.

The Washington Commission concluded by ordering LocalDial to cease and desist providing services until it is properly registered and complies with Washington Commission orders and tariffs requiring it to pay access.

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<sup>1</sup>The Commission called the internet “public.” It is not “public” any more than the public telephone switched network is “public.” It consists of circuits owned by telecommunications companies. See previous discussion and Attachment 4.

2. New York. On May 21, 2004, the Public Service Commission of New York issued an Order concerning Vonage Holdings in Case #03-C-1285 (see Attachment 2).

The New York Commission held that Vonage was a “telephone corporation” as provided by state law and overruled Vonage’s suggestions that since it was an “information provider,” it was exempt from state regulation.

In New York, the Commission stated it would entertain an appropriate request for exemption of Vonage’s services filed under state law. In North Dakota, the legislature has eliminated exemptions for telecommunications services (see N.D. Cent. Code § 49-21-02.1 repealed by Ch. 411 § 13, Session Laws of 1999). This evidences a desire by the legislature that exemptions not be granted in North Dakota and that SmartNET is in violation of North Dakota law.

Vonage actually operated a service more “internet based” than SmartNET. Vonage, in New York, used high speed internet access services (Attachment 2, p. 4). SmartNET uses the local telephone companies’ equipment.

Vonage, like SmartNET, argued its services were interstate in nature and exempt from regulation (Attachment 2, p. 9). The Commission in New York rejected this argument and found Vonage to be in the business of providing “telephonic communication for hire.” (See Attachment 2, p. 10.)

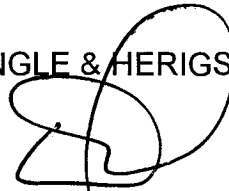
## CONCLUSION

SmartNET did not dispute the facts submitted by the Complainants. The Complainants dispute many of the facts or the significance of facts submitted by SmartNET. This Commission has jurisdiction of this case because of statutes previously cited by the Complainants in their Post-Hearing Brief. The access orders of the Commission are still valid and binding. There is no exemption, state or federal, for the SmartNET services. Two state commissions recently rejected such arguments.

This Commission should issue an order as previously prepared by the Complainants.

Dated this 19th day of July, 2004.

PRINGLE & HERIGSTAD, P.C.



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**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing Complainants' Post-hearing Response Brief was served by mail on the 19th day of July, 2004, on the following:

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