

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

**BEK Communications Cooperative, et al.
Vs SmartNET, Inc.
Complaint**

Case No. PU-2967-03-666

ORDER

October 20, 2004

Appearances

Commissioners: Tony Clark, Susan E. Wefald, Kevin Cramer.

Don Negaard, Attorney, Pringle & Herigstad, P.C., PO Box 1000, Minot ND 58702, appearing for the Complainants.

Glenn S. Richards, Attorney, Shaw Pittman, LLP, 2300 N St NW, Washington DC 20037, appearing for the Respondent.

Bruce A. Selinger, Attorney, Kubik, Bogner, Ridl & Selinger, P.L.L.P., PO Box 1173, Dickinson, ND 58602-1173, appearing for the Respondent.

Allen C. Hoberg, Director, Office of Administrative Hearings, 1707 North 9th Street - Lower Level, Bismarck, ND 58501-1882, appearing as procedural Hearing Officer.

William W. Binek, Chief Counsel, Public Service Commission, State Capitol, 600 East Boulevard, Bismarck, ND 58505, appearing for the Public Service Commission.

Preliminary Statement

On November 25, 2003, BEK Communications Cooperative, Consolidated Telecom, 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) filed a complaint alleging that the respondent SmartNET, Inc. (SmartNET) (1) operates as an intrastate long distance telecommunications provider without authority from the Commission in violation of North Dakota law including North Dakota Century Code Chapter 49-21.

Chapter 49-02, and Chapter 49-03.1 and lawful regulations and orders of the Commission and (2) operates as an intrastate long distance telecommunications provider without paying the Complainants for access fees for the use of their local switched network facilities in accordance with North Dakota law and prior Commission rules and orders.

On December 24, 2003 the respondent filed its Answer and Reply to Complaint.

On January 28, 2004 the Commission issued a Notice of Hearing setting the hearing for March 30, 2004.

On March 23, 2004 the Administrative Law Judge issued an Order for Indefinite Continuance.

On April 14, 2004 the Commission issued a Notice of Rescheduled Hearing setting the hearing for May 25, 2004. The hearing was held as scheduled.

The issues to be considered in this matter include:

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 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 service facilities of the complainants, whether respondent is liable to the complainants for compensation for the use of those facilities.

Discussion

The primary issue in the case is whether VoIP constitutes a "telecommunications service" subject to Commission jurisdiction or whether it is a form of internet broadband service subject to the jurisdiction of the Federal Communications Commission (FCC). If VoIP is a telecommunications service, SmartNET is required to have a certificate of public convenience and necessity to provide the service in North Dakota and may be subject to the imposition of access charges for use of the local network.

The FCC is currently considering issues relevant to the merits of this proceeding in its Notice of Proposed Rulemaking, IP-Enabled Services, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 (March 10, 2004).

A Commission decision prior to guidance from the FCC regarding state commission jurisdiction over VoIP could have damaging and potentially irreparable consequences to one or more of parties. The Commission prefers to wait for guidance from the FCC, however, postponing a decision for too long a time could also have damaging consequences to one or more of the parties. Therefore, the Commission is delaying a final order in this proceeding to a time uncertain.

Order

The Commission orders:

1. Final decision in this proceeding is postponed.
2. Respondent and Complainant shall provide quarterly reports on the status of the Federal Communications Commission rulemaking in WC Docket No. 04-36 and on any decisions of other state commissions on these issues that either party wishes to bring to this Commission's attention..
3. The Commission is not precluded from receiving complaints from Respondents customers about service or billing, recording such complaints in the Commission's Public Contact database, referring such complaints to Respondent and offering to provide non-binding mediation of disputes if Respondent cannot resolve the complaints. Respondent shall provide a contact name, telephone number, and e-mail address for purposes of complaint correspondence.

PUBLIC SERVICE COMMISSION


Susan E. Wefald
Commissioner


Tony Clark
President


Kevin Cramer
Commissioner