

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

BEK Communications)
Cooperative, et al.,)
)
Complainants,)
)
-vs-) Case No.PU-2967-03-666
)
SmartNET, Inc.,)
)
Respondent.)

TRANSCRIPT OF HEARING

Taken At
Commission Hearing Room
State Capitol, 12th Floor
Bismarck, North Dakota
May 25, 2004

BEFORE THE HONORABLE ALLEN C. HOBERG
-- ADMINISTRATIVE LAW JUDGE --

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A P P E A R A N C E S

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COMMISSIONERS PRESENT:

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SUSAN E. WEFALD, Commissioner
KEVIN CRAMER, Commissioner

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FOR THE PUBLIC SERVICE
COMMISSION.

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1 (The following proceedings were had and
2 made of record herein, commencing at 9:03 A.M., on
3 Tuesday, May 25, 2004:)

4 JUDGE HOBERG: Okay. We're on the record.
5 It's approximately 9:00 A.M. on May 25, 2004. This
6 is the time and place scheduled in the Public
7 Service Commission Hearing Room in Bismarck, North
8 Dakota, for the administrative hearing in the
9 matter of BEK Communications Cooperative, et al.,
10 versus SmartNET, Incorporated. This is a complaint
11 hearing.

12 In February of this year the Office of
13 Administrative Hearings received a request from the
14 Public Service Commission to provide an
15 administrative law judge to preside in this matter.
16 For the record, my name is Allen Hoberg, and I'm
17 the duly designated procedural hearing officer
18 presiding.

19 Let's take appearances from the parties
20 for the record, beginning with the complainant,
21 BEK. Mr. Negaard, will you state your appearance,
22 please.

23 MR. NEGAARD: Don Negaard appearing for
24 the complainants, commonly referred to as the Rural
25 Telephone Company Group. And with me today is

1 Mr. Dean Anagnost. He's a professional engineer
2 with Kadrmas, Lee & Jackson here in Bismarck.

3 COMMISSIONER WEFALD: Could you spell that
4 for me, please.

5 MR. ANAGNOST: It's A-n-a-g-n-o-s-t.

6 MR. SELINGER: Bruce Selinger from
7 Dickinson. I'm appearing on behalf of
8 SmartNET/CallSmart, the respondent in this action.
9 I have Bruce Burke with me. He's the president of
10 CallSmart/SmartNET. And Glenn Richards is
11 assisting, and he is from Washington, D.C.

12 JUDGE HOBERG: Who will be making the
13 presentation, Mr. Selinger?

14 MR. SELINGER: Mr. Richards.

15 JUDGE HOBERG: As I understand it, there's
16 been a request under 69-02-01-06 for Mr. Richards
17 to practice before the Commission. I don't think
18 there's been a formal action on that, but if
19 there's no objection or no concerns expressed by
20 any of the parties or the Commission, I will grant
21 the authority to Mr. Richards to practice before
22 the Commission today. Any concerns or objections?

23 COMMISSIONER CLARK: None here.

24 COMMISSIONER KRAMER: No.

25 COMMISSIONER WEFALD: None.

1 MR. NEGAARD: We have no objection.

2 JUDGE HOBERG: Permission is granted. Mr.
3 Binek, will you state your appearance.

4 MR. BINEK: My name is William Binek, and
5 I'm counsel for the Commission. And with me is Pat
6 Fahn, an analyst with the Public Utilities
7 Division.

8 JUDGE HOBERG: Thank you, Mr. Binek. And,
9 of course, also present today are members of the
10 Public Service Commission. To my left,
11 Commissioner Kevin Kramer, Commission President
12 Tony Clark, and Commissioner Susan Wefald.
13 Beginning with Commissioner Clark, who has the
14 telecommunications portfolio, I'll ask for opening
15 comments. Commissioner Clark.

16 COMMISSIONER CLARK: I'd just like to
17 welcome everyone here today. It seems as though
18 every year or so in the regulatory community
19 there's kind of one big issue. VOIP seems to be
20 the buzz word for this year and for the -- maybe
21 into the foreseeable future. And I do look forward
22 to the record before us. It should be a very
23 interesting case.

24 One thing that I would certainly encourage
25 both parties to do is -- as we all know, North

1 Dakota's telecom statutes are not necessarily the
2 cleanest and easiest to use. I'm sure we'll be
3 talking a lot about FCC precedent, rules, so on and
4 so forth. And I notice that in the materials that
5 we've looked through already that the Commission's
6 been observing, and I certainly look forward to
7 that discussion, but I would encourage folks to
8 take that next step as well and tie how you either
9 believe or don't believe that North Dakota law and
10 the Commission specifically has jurisdiction over
11 specific issues, because there is that two-tiered
12 approach to the state and federal rule
13 applicability, and North Dakota's laws are, as I
14 indicated, not necessarily the easiest to use.

15 So to the extent that you can tie both the
16 federal and state jurisdictions and rules together,
17 that would certainly be to your advantage. And I
18 notice that everyone has their copies of the North
19 Dakota Century Code next to them, so I'll look
20 forward to that as well.

21 With that, again, thank you. I look
22 forward to the testimony. And I'll turn it over to
23 my fellow Commissioners.

24 JUDGE HOBERG: Commissioner Kramer.

25 COMMISSIONER KRAMER: I too want to

1 welcome everyone to the Public Service Commission
2 Hearing Room. Thank you for being here. And as
3 I'm sure you all know, there are parties outside of
4 North Dakota around the country that have some
5 interest in what's going to happen here today and
6 further down the line, so it's an important day.
7 We know all of you and appreciate you and look
8 forward to a very good, clean hearing, and we're
9 very interested in the information that's going to
10 be presented. Thank you for being here.

11 JUDGE HOBERG: Thank you, Commissioner
12 Kramer. Commissioner Wefald, please.

13 COMMISSIONER WEFALD: I also issue a
14 welcome to all of you. And I have, as the other
15 Commissioners, examined the materials that have
16 been already placed in the case file. What I was
17 interested in is that there's not a lot in the case
18 file yet. A lot of it will be presented to us here
19 today, which is different for the Commissioners.
20 Many times we have all the materials or just about
21 all of them before us before we get started.

22 So I'm going to be listening very intently
23 to all of your arguments and to all of the
24 information, all the facts that you wish to put on
25 the record as well as any conclusions of law.

1 Thank you.

2 COMMISSIONER CLARK: Mr. Hearing Officer,
3 if you could just make one reminder. Bring, as you
4 discuss, the microphones fairly close to you,
5 especially where there may be only one on each
6 table. As Commissioner Kramer indicated, there is
7 some interest in this case and it is on the
8 internet. We do broadcast all our meetings on the
9 internet. So if you're either a witness or counsel
10 using a microphone, if you could bring it close
11 when you're talking, I would very much appreciate
12 it.

13 JUDGE HOBERG: Thank you, Commissioner
14 Clark. For the record, our court reporter is Ron
15 Harnden with Emineth & Associates.

16 I think just briefly a summary of the
17 application for the record and for those on the
18 internet, on November 25th of this year -- last
19 year, BEK Communications and several other
20 complainants filed a complaint alleging that
21 SmartNET, one, operates an interstate long-distance
22 telecommunications provider without authority from
23 the Commission, in violation of North Dakota
24 Century Code, Chapters 49-21, 49-02 and 49-03.1,
25 and lawful regulations and orders of the

1 Commission; and, two, operates as an intrastate
2 long-distance telecommunications provider without
3 paying the complainants for access fees for the use
4 of their local switched network facilities in
5 accordance with North Dakota law and prior
6 Commission rules and orders.

7 Initially on January 28th of this year the
8 Commission issued an order scheduling a March 30th
9 hearing. The hearing officer subsequently issued
10 an order for indefinite continuance on March 23.
11 On April 14 the Commission issued a notice of
12 rescheduled hearing scheduling the hearing for
13 today.

14 In the original notice the issues were
15 stated for the hearing, and the issues are as
16 follows: First, whether the respondent is subject
17 to the jurisdiction of the Commission; second,
18 whether the services provided by the respondent are
19 subject to the jurisdiction of the Commission; if
20 the respondent and services provided by the
21 respondent are subject to the jurisdiction of the
22 Commission, whether respondent is properly
23 authorized to provide such services; whether
24 respondent is using the local service facilities of
25 the complainants; and if respondent is using the

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

4 And we have a matter of trade secret
5 application to deal with. As you know, SmartNET
6 has sought and obtained certain trade secret
7 protection for certain information, and we also
8 know that BEK Communications has requested as of
9 yesterday that the entire hearing in this matter be
10 closed for the record to protect all of the trade
11 secret information that should be protected if
12 necessary.

13 I considered that yesterday and did e-mail
14 to counsel for the parties, and we discussed it
15 briefly this morning too. And I think we've come
16 to a bit of a resolution. I don't think there's
17 going to be a lot of trade secret information
18 presented. There's a particular concern, however,
19 about two documents that fall under arguably the
20 trade secret order but have not actually been
21 offered yet for the Commission. They're not in the
22 documents that were submitted.

23 Those documents will be generically
24 referred to today as V and T, and they will be
25 offered and perhaps admitted for the record, but

1 they will be subject to trade secret protection,
2 and all of the counsel and the witnesses and I
3 guess I should caution anybody else including the
4 Commission referring to those documents during the
5 hearing should refer to them as document V and T.

6 Other than that, if there's a trade secret
7 utterance in the form of a statement made by one of
8 the witnesses or counsel, or a document offered,
9 I'd advise counsel to bring that to my attention
10 prior to the utterance so we can deal with it if we
11 need to. But I think it's mostly the concern of
12 those two documents.

13 Any questions or further comment about
14 trade secret from counsel? Does that adequately
15 summarize our agreement, Mr. Binek?

16 MR. BINEK: Just one other comment, that
17 we did talk about SmartNET filing a request -- a
18 formal request for trade secret protection with the
19 Commission, realizing that's not going to be done
20 prior to the hearing today, but so that we have an
21 official record of it and the Commission can
22 formally act on it.

23 JUDGE HOBERG: It's my understanding,
24 Mr. Binek -- and correct me if I'm wrong -- that
25 this is the way it's viewed, but there has been a

1 request made, and it's fairly broad, and arguably
2 the request made and the grant of protection issued
3 by the Commission would cover these documents.
4 However, those documents that were going to be
5 offered today were not actually submitted with that
6 first request.

7 MR. BINEK: I guess I'm not sure if the
8 first request would cover the documents or not. If
9 that request does cover these documents, then I
10 don't have a problem.

11 JUDGE HOBERG: In any event --

12 MR. BINEK: The document -- I have not
13 seen these documents, so I don't know what they
14 contain.

15 JUDGE HOBERG: In any event, SmartNET, as
16 I understand it, will, if needed, make a further
17 request and, of course, submit the documents. They
18 will be submitted today, as I understand it,
19 through the presentation of BEK Communications as
20 evidence. So anything that is designated as trade
21 secret information, of course, will need to be
22 protected either, if it's documentary evidence, by
23 sealing it, or if it's verbal utterance at this
24 hearing, we'll need to clear the hearing room of
25 those who are not allowed to view or hear that

1 information.

2 So, again, counsel, bring that to our
3 attention as we proceed through this hearing when a
4 trade secret document or utterance is about to be
5 made, please.

6 Here's the hearing procedure we'll follow
7 today. I'll call on the complainant first to
8 present its case by calling witnesses and
9 presenting evidence. Each witness called by the
10 complainant will be subject to cross-examination by
11 the respondent. Thereafter, I'll ask Commission
12 staff counsel if he has any questions. Then I'll
13 ask Commissioners if they have any questions.
14 Following that, I'll allow such further questions
15 of the witness as the parties and the Commission
16 deem necessary.

17 Mr. Negaard, you have just one witness
18 today?

19 MR. NEGAARD: Yes, sir.

20 JUDGE HOBERG: Okay. So after he has
21 completed his presentation, calling his one witness
22 and presenting the documents that he will be
23 offering, I'll call on CallSmart, the respondent,
24 to present a case.

25 Mr. Richards, do you anticipate calling

1 witnesses?

2 MR. RICHARDS: We do. We have one
3 witness, sir. Mr. Burke.

4 JUDGE HOBERG: Mr. Burke. Okay. It will
5 be the same procedure there, direct by the
6 respondent, cross by the complainant, questions by
7 Mr. Binek, questions by the Commissioners, then
8 such further questions as are necessary of the
9 witness.

10 If you have documentary evidence, we need
11 seven copies of that evidence to be submitted, one
12 for the record and one for everybody else
13 participating, the three Commissioners and three
14 parties.

15 No decision is being reached on this
16 matter today. The proceedings are being
17 transcribed by our court reporter and recorded.
18 They will be reviewed by the Commission later, and
19 the Commission will thereafter issue its findings
20 of fact, concussions of law and its order on this
21 complaint.

22 Any party not agreeing with the final
23 decision of the Commission may have appeal rights
24 or other rights under Chapter 28-32 of the
25 Administrative Agencies Practice Act. The expense

1 of transcribing these proceedings, if necessary,
2 will be borne by the party appealing the decision.
3 The burden of proof today is on the complainant to
4 show by the greater weight of the evidence that the
5 allegations of the complaint are proven.

6 Any questions about the procedures today?
7 Mr. Negaard?

8 MR. NEGAARD: No, sir.

9 JUDGE HOBERG: Mr. Richards?

10 MR. RICHARDS: No, sir.

11 JUDGE HOBERG: Mr. Binek?

12 MR. BINEK: No.

13 JUDGE HOBERG: Questions by Commissioners?

14 COMMISSIONER WEFALD: No.

15 JUDGE HOBERG: Mr. Negaard, do you wish to
16 begin with an opening statement?

17 MR. NEGAARD: I would.

18 JUDGE HOBERG: Please.

19 MR. NEGAARD: Good morning. Thanks for
20 hearing the case today. I appear on behalf of the
21 Rural Telephone Company Group. And these folks --
22 these companies have provided reliable
23 telecommunications services in North Dakota for 50
24 years. There's been some bumps in the road at
25 times, but they have tried to comply with the

1 rules, regulations and orders of this Commission.
2 They've followed the procedures that have been set
3 forth by the Commission and the legislature.

4 This case represents a company that has
5 not followed those rules. In the 1980s the FCC had
6 a line of decisions that was called the computer
7 cases, and those cases were cited by the FCC in its
8 recent AT&T decision. The FCC in the 1980s said
9 phone-to-phone telecommunications is
10 telecommunications. They said phone-to-computer,
11 we're not sure. It depends on what it is. They
12 said computer-to-computer, we think that that's
13 information services. And those issues were left
14 to rest, and there was really nothing much more
15 said about it at that time.

16 The evidence today will show that the
17 method that CallSmart is using doesn't comply with
18 those 1980 decisions by the FCC. In 1996 Congress
19 passed the Telecommunications Act. It defined
20 telecommunications services. It defined
21 information services. The evidence today will show
22 that the services provided by SmartNET/CallSmart
23 don't fit under those definitions of the '96
24 Telecommunications Act.

25 There were a couple of early decisions

1 that came out of the Ninth Circuit involving
2 telecommunications. Those decisions really had
3 nothing to do or provided no clear guidance to
4 authorize CallSmart to do what they were doing.
5 Those decisions had to do with local jurisdiction,
6 local regulation of broadband cable services.
7 Again, there was no approval for the method of
8 business being done by CallSmart.

9 Recently and just last year in Minnesota,
10 the Minnesota District Court issued an order
11 prohibiting the Minnesota Public Service Commission
12 from regulating the services provided by Vonage.
13 Vonage required DSL service from its users in order
14 for them to use its services. And the court said
15 that in those cases -- in that particular case it
16 considered that to be information services.

17 The evidence is going to show that
18 CallSmart does not use DSL, does not require its
19 customers to have those kind of capabilities. And,
20 again, there was no approval from anyone for the
21 type of business being done by CallSmart. Access
22 was an issue in the Vonage case, and that's a big
23 issue in this case.

24 Pulver -- on February 19th of this year
25 the FCC approved a method of doing business by

1 Pulver called free world dial-up. Again, this was
2 computer-to-computer transmission of information
3 and communications. It was totally Internet.
4 Again, there was still no approval of the method
5 that CallSmart is using here to do business in
6 North Dakota.

7 AT&T was filed in 2002 with the FCC. At
8 the time they knew what they were doing was very
9 questionable, and they escrowed the funds that they
10 withheld for terminating access to carriers, and
11 AT&T did, in fact, pay originating access to the
12 carriers when calls were originated to use AT&T
13 so-called voice over internet services.

14 Again, nothing -- no approvals for
15 anything or any methods that CallSmart is using.
16 And, in fact, the FCC recently ruled that AT&T's
17 method of doing business was not voice over
18 internet, it was phone-to-phone, and the FCC
19 clearly said phone-to-phone communications is
20 telecommunications services.

21 Commissioner Clark asked about the North
22 Dakota statutes, and I would agree with you that
23 there perhaps could be more definitiveness and
24 clarity in those statutes. What I can tell you --
25 and I'd be happy to brief it after the hearing --

1 49-21-01-08 talks about inter-exchange carriers,
2 and it defines an inter-exchange telecommunications
3 company as a person providing telecommunications
4 services to end users located in separate local
5 exchange areas. So that's how our Century Code
6 defines inter-exchange companies.

7 COMMISSIONER WEFALD: Would you state the
8 cite again.

9 MR. NEGAARD: 49-21-01(8). It's one of
10 the subsections. In that same statute in
11 subsection 20 the North Dakota legislature has said
12 that telecommunications services means the offering
13 for hire of telecommunications facilities or
14 transmitting for hire telecommunications by such
15 means or facilities, whether by wire, radio, light
16 wave or other means. So the legislature has
17 clearly broadly defined telecommunications.

18 In 49-21-01.7 the legislature has said
19 that the North Dakota Public Service Commission has
20 the power to investigate all methods and practices
21 of telecommunications companies. And because of
22 the previous definition, we believe CallSmart is
23 clearly a telecommunications company.

24 In the next section in the same statute it
25 says that this Commission has the power to require

1 telecommunications companies to conform to the laws
2 of the state and to all rules, regulations and
3 orders of the Commission. In the same statute in 3
4 it says that the Commission can require
5 telecommunications companies to require copies of
6 reports as to rates, prices and terms and
7 conditions of service in effect and used by that
8 company. And I apologize for jumping back to
9 49-21-01(4), but it defines essential
10 telecommunications to include switched access.

11 49-21-06 authorizes the Public Service
12 Commission to hear complaints and investigate
13 prices for essential and nonessential services. In
14 this particular case, CallSmart, there is no price
15 because they haven't been paying for the services
16 that they've been using for other communications
17 services. We believe that those statutes clearly
18 authorize the Commission to investigate those
19 practices.

20 I would go back to the divestiture of AT&T
21 in 1983, and this Commission at that time held an
22 access rate case, 10444, and it issued an order on
23 December 10th of 1983 setting forth and requiring
24 telecommunications carriers within this state to
25 pay access, and it has often been referred to as

1 inter-exchange compensation. And this Commission
2 has had a long history of ordering and governing
3 rates for inter-carrier compensation in this state.

4 That case was followed up with Case Number
5 10694 and 10699, and there were a series of
6 supplemental orders issued after that date
7 implementing and updating the requirements for
8 access charges to be paid inter-carrier
9 compensation in the state of North Dakota.

10 We aren't here today to give you numbers.
11 We're here today to talk about principles and
12 concepts. We don't have all the records we need to
13 quantify the amount of access that we think that
14 CallSmart owes. We envision that taking place in
15 maybe a different forum, a different proceeding.

16 What we do ask for is that the Commission
17 give us an order that these services are
18 telecommunications services. In their most recent
19 filings in April and during discovery before the
20 AT&T decision came out, CallSmart said that they
21 were providing phone-to-phone VOIP services.

22 I suspect that some of what we're going to
23 hear today is some smoke and mirrors about
24 different types of services that may be being
25 provided or that CallSmart hopes and plans to

1 provide. But the truth of it is, by going to their
2 Web site -- anyone can access it -- they advertise
3 themselves as being a long-distance phone-to-phone
4 transmission provider. Their customer calls a
5 local phone number and then dials a 1 plus
6 destination number after accessing their local
7 phone number.

8 You'll hear evidence from Dickinson to
9 Bismarck, that a customer in Dickinson of CallSmart
10 would use a local trunk to dial a local telephone
11 number. Then the call is routed over DCN
12 transport, facilities leased from Dakota Carrier
13 Network, from Dickinson to Bismarck. It comes into
14 Bismarck, and at that point there are two
15 possibilities. It can be terminated onto the local
16 network through an arrangement that CallSmart has
17 with Qwest for local services, or it could be sent
18 out over the internet.

19 And they've said that at that point some
20 of the traffic is sent out on the internet, brought
21 back into the very same computer, and then
22 terminated on the local switch network, and they
23 feel that that qualifies this as voice over IP
24 information services because it is sent out on the
25 internet for a mere moment of time before it comes

1 back into their switch and terminated. And we're
2 saying that that's a form that hasn't been approved
3 in any method.

4 Calls from Bismarck to Dickinson go back
5 the same way. They originate in Bismarck, and
6 these calls are sent out -- when they get to the
7 Qwest switch, the problem is that they're not
8 identified. The calls don't have a tag on them so
9 anybody knows that it's a long-distance call, so
10 they're difficult and in some cases perhaps
11 impossible to identify because they don't have the
12 1 plus code that comes in that any other
13 inter-exchange carrier would use.

14 And what we're asking for is an order from
15 this Commission that would require CallSmart to
16 keep track of this traffic and report to the other
17 carriers of what traffic they are originating and
18 terminating on each of these networks.

19 They also route traffic within the state
20 of North Dakota to Fargo. They have another office
21 in Fargo. And according to Mr. Burke, when we took
22 his testimony, some of that traffic is terminated
23 directly into Fargo, comes off the gateway in
24 Fargo.

25 We're going to talk about two different

1 termination agreements, V and T. And when we took
2 Mr. Burke's deposition, he said that he didn't have
3 any arrangements with anybody to terminate traffic
4 into North Dakota. And one of the agreements that
5 we obtained just last week, agreement T, does
6 require that traffic be terminated into North
7 Dakota for that particular carrier.

8 That would be an interstate inter-exchange
9 call, and we know that this Commission doesn't have
10 jurisdiction over those inter-exchange calls. But
11 it does, to us, help identify the scope of the
12 problem, because we're not sure that we have all
13 the information we need to identify how much of
14 this local traffic is actually taking place.

15 I could talk about the AT&T decision. I
16 think you've all read that. I think that the FCC
17 very clearly, in the AT&T decision, said that they
18 clearly wanted to provide an opinion that would
19 provide clarity to the carriers until they can
20 reach and arrive at more definitive decisions. And
21 in that decision, clearly on Page 2 -- I'm sorry --
22 clearly on Page 2 that decision said: Our analysis
23 in this order applies to services that meet these
24 three criteria, regardless of whether one
25 inter-exchange carrier uses IP transport or,

1 instead, multiple service providers are involved in
2 providing IP transport.

3 And the three principles that they talked
4 about were: Whether or not the customer uses
5 ordinary customer premises equipment. CallSmart
6 does that. Number two, whether the call originates
7 and terminates on the public switched telephone
8 network. CallSmart does that. Three, whether or
9 not the information undergoes no net protocol
10 conversion and provides no enhanced functionality
11 to the user or to the providers of IP technology.
12 In this case, that's what CallSmart does.

13 There are no enhanced functionalities to
14 the end user. They pick up their telephone, they
15 make a call. The only thing is that in some cases
16 the internet is used as a transport mechanism to
17 get the call from one place to another. It is then
18 terminated onto a public switched network. It's a
19 local call. It works just like any other normal
20 call.

21 There has been some information provided
22 that V and T may provide some -- may actually pay
23 terminating access on the inter-exchange calls.
24 Again, we don't have all the information we need in
25 order to evaluate that.

1 In short, we think that CallSmart has been
2 collecting and accepting revenue in North Dakota
3 from its customers without following the regulatory
4 requirements in North Dakota, and that the evidence
5 will show that it does not even pretend to be an
6 information provider. It does not encourage its
7 users to use any type of internet services that it
8 could offer. They encourage their people to go use
9 the telephone service.

10 I think an order from this Commission
11 following the hearing and after we get done with
12 the evidence would send a signal to North Dakota
13 that this Commission has respect for companies that
14 do comply with established principles in North
15 Dakota and that they will not condone companies
16 that do not follow those regulations.

17 I will talk a little bit more after the
18 hearing. I would imagine there will be some briefs
19 filed at that time. Mr. Anagnost, my witness --
20 obviously there will be opening remarks by the
21 respondent, but when they're done, I will have
22 Mr. Anagnost tell you about -- he's an engineer,
23 and he'll tell you about the features of their
24 system.

25 JUDGE HOBERG: Thank you, Mr. Negaard.

1 Mr. Richards, do you have an opening to make?

2 MR. RICHARDS: Sure. First of all, I'd
3 like to say that it's a real honor and pleasure to
4 be here. This is my first time in North Dakota.
5 And I guess I was asked to come from Washington,
6 D.C., and bring the smoke and mirrors.

7 You have before you a real opportunity
8 today to sort of talk about what the future is
9 going to look like in North Dakota, and your
10 options go as to -- you know, same as it ever was
11 or looking ahead to the next generation of
12 telephony which is all moving towards VOIP in a
13 packet switched world.

14 I'm going to leave here probably this
15 afternoon or tomorrow and may or may not ever come
16 back to North Dakota, but the decision that you
17 make is going to have long-term implications as to
18 not only the future of CallSmart but the future of
19 all the CallSmarts that may or may not decide to do
20 business in your state.

21 And I think that in terms of the
22 ramifications for Mr. Burke's company and for the
23 future of this telecommunications economy in this
24 state are much broader than the payment of access
25 charges and whether Mr. Burke's company is required

1 to get a license or not under the law.

2 Just in response to a few points made by
3 plaintiffs' counsel, it sounds as though they're
4 going to rely quite heavily on the AT&T decision.
5 I think that after this proceeding is done today,
6 it will be pretty evident to you that the type of
7 service provided by CallSmart is nothing like the
8 service provided by AT&T and that the AT&T order
9 issued by the FCC in no way was meant to be read to
10 expand itself to the types of services offered by
11 CallSmart.

12 Mr. Negaard also referred to distinctions
13 between information services and telecommunications
14 services. The FCC, as you probably know, has a
15 very far-ranging notice of proposed rulemaking for
16 which comments are due on Friday which will go to
17 the heart of a lot of the questions that are before
18 you today.

19 At the end of the day, we may not know
20 whether this is an information service
21 telecommunications service, but at the end of this
22 FCC proceeding there will be some guidance as to
23 what types of VOIP services are information
24 services, what types are telecommunications
25 services, whether those services are or are not

1 subject to federal or state regulation. And I
2 think this Commission would be getting ahead of
3 itself to issue a decision in this case given that
4 these specific questions are before the FCC.

5 At least two other state commissions, both
6 in Colorado and Pennsylvania, have recently
7 terminated VOIP investigations in order to give the
8 FCC its opportunity to sort of get the lay of the
9 land. And we would respectfully request that this
10 Commission, at the end of the day, either deny this
11 complaint or at least hold it in abeyance until
12 such time as the FCC issues its ruling on matters
13 that we believe are directly relevant to this case.

14 We're also going to hear a little bit
15 today from Mr. Burke who -- despite plaintiffs'
16 counsel, this network is not a telecommunications
17 network. Mr. Burke's network looks -- and we're
18 going to see some pictures that will show that it
19 clearly looks a lot like an information service
20 provider network, an ISP, no different than
21 probably how an AOL or any other type of ISP sets
22 up its network.

23 The fact that voice rides over this
24 network is just simply an application. Data can
25 ride over this network. Voice can ride over this

1 network. The fact that one of the services that
2 CallSmart currently offers is a phone-to-phone
3 service, that is step one in what we believe will
4 be an evolution of services that the company is
5 planning to offer.

6 And you're going to hear from Mr. Burke,
7 and he'll have an opportunity to explain to you the
8 type of network that he offers and the types of
9 services that he's planning to offer to North
10 Dakota consumers in the very near future.

11 We're also going to hear a lot about the
12 relationships that Mr. Burke has with other
13 companies. And I would offer to you to ask
14 yourself at the end of the day, because these folks
15 have the burden of proof, whether those
16 relationships are anywhere illegal. Who Mr. Burke
17 chooses to contract with to originate services, how
18 he chooses to originate these services, how he
19 chooses to terminate those services are not
20 prescribed by North Dakota law.

21 The plaintiffs would like you to think
22 that independent phone companies are the toll booth
23 at every bridge. Well, I can drive two blocks
24 north and go over a bridge that maybe doesn't
25 charge me a toll. If I've come up with a better

1 way to originate a phone call or to terminate a
2 phone call, then unless the law somehow prohibits
3 that -- and we don't believe that it does -- then
4 Mr. Burke is free to enter into relationships with
5 other communications companies, whether they be
6 subject to or not subject to this Commission's
7 jurisdiction.

8 There's no requirement, at the end of the
9 day, that my client has to pay the plaintiff 16
10 cents a minute for terminating telephone calls or
11 originating telephone calls in the state of North
12 Dakota. And I would challenge the plaintiffs, at
13 the end of the day, to prove that they do, because
14 the weight of the evidence in this case is on them.

15 You have a real opportunity today here in
16 North Dakota and as we're talking to the rest of
17 the world over the internet. You're involved in
18 probably the most contentious, most exciting area
19 of telecommunications law there is. Our firm
20 represents Pulver.com, which is one of the
21 companies that Mr. Negaard refers to. We also
22 represent the Voice on the Net Coalition, which is
23 a trade association of companies made up of some of
24 the largest communications companies in the world
25 that is out there offering and trying to promote

1 VOIP.

2 When Mr. Burke's company called and
3 said -- asked us to come out here and participate
4 with him, he said, Glenn, we don't have a lot of
5 money to do this case, but our livelihood depends
6 on this. Whether we win or lose this case will
7 determine whether CallSmart stays in business. The
8 ILEC's will continue in business tomorrow whether
9 or not you issue a decision in their favor. But
10 the fate of Mr. Burke's company will probably rely
11 on the decision that you issue here today. And,
12 again, that decision will not only affect
13 Mr. Burke, CallSmart, but it will affect the future
14 of telecommunications in North Dakota. Thank you.

15 JUDGE HOBERG: Thank you, Mr. Richards.
16 Mr. Negaard, do you want to call your first
17 witness, please?

18 MR. NEGAARD: Yes, sir. We'd like to call
19 Mr. Dean Anagnost.

20 JUDGE HOBERG: Mr. Anagnost, I'm required
21 to tell you, by law, as I always tell witnesses at
22 administrative proceedings, the maximum penalty for
23 perjury in this state is a Class C felony
24 punishable by a maximum five years' imprisonment, a
25 \$5,000 fine, or both. Being advised of the

1 penalties for perjury, do you promise to tell the
2 truth in the matter being heard? If so, answer "I
3 do."

4 THE WITNESS: Yes, I do.

5 JUDGE HOBERG: Thank you. Mr. Negaard,
6 please.

7 DEAN ANAGNOST,
8 being first duly sworn, was examined and testified
9 as follows:

10 DIRECT EXAMINATION

11 BY MR. NEGAARD:

12 Q. Please state your name.

13 A. Dean F. Anagnost.

14 Q. And, Mr. Anagnost, what is your current
15 occupation?

16 A. I'm a consulting engineering with Kadrmas,
17 Lee & Jackson.

18 Q. And what is your business address?

19 A. 3237 East Broadway Avenue in Bismarck,
20 North Dakota.

21 Q. What is your current position with
22 Kadrmas, Lee & Jackson?

23 A. I'm a principal owner of Kadrmas, Lee &
24 Jackson, as well as having responsibilities for the
25 direction of telecommunications engineering

1 operations with the company.

2 Q. Would you tell us about your background,
3 where you were born and raised.

4 A. I was born and raised in North Dakota. I
5 was born in Jamestown and lived throughout the
6 state in many different communities in the state as
7 well as several communities outside the state. I
8 was educated at North Dakota State University where
9 I received a bachelor's of electrical engineering
10 in 1985, and also attended advanced business
11 training at the University of North Dakota in Grand
12 Forks.

13 Q. And could you tell us about your
14 employment history in the field of engineering and
15 in telecommunications.

16 A. My first position was with a consulting
17 engineer other than my current employer. There I
18 had project management and project engineering
19 roles as a telecommunications engineer in the cell
20 phone industry. That was here in North Dakota as
21 well. Since coming to Kadrmas, Lee & Jackson, I
22 have focused on telecommunications engineering and
23 have performed that for just about 19 years now.

24 Q. And what services does Kadrmas, Lee &
25 Jackson provide to its clients in the field of

1 telecommunications?

2 A. We present a full range of services to our
3 telecommunications clients: Planning, long-range
4 planning, business feasibility, technical analysis,
5 network planning, and equipment installation
6 management services.

7 Q. Could you tell the Commissioners where
8 these personnel that perform these functions --
9 where they're located?

10 A. We have our telecommunications individuals
11 in two primary locations, Bismarck, North Dakota,
12 being one of them, Helena, Montana, being the
13 other.

14 Q. And how many people does Kadrmas, Lee &
15 Jackson employ in the telecommunications area?

16 A. We have about 26 employees in our
17 telecommunications division today.

18 Q. And how many people in total does that
19 firm employ?

20 A. Approximately 285.

21 Q. Have you ever testified before the North
22 Dakota Public Service Commission?

23 A. No, I have not.

24 Q. In this case have you reviewed the
25 discovery requests, the documents that have been

1 produced as a result of discovery and participated
2 in some of the discovery in this proceeding?

3 A. Yes, I have.

4 Q. Were you present when the deposition
5 testimony of Mr. Bruce Burke was taken on February
6 3, 2004, in Dickinson, North Dakota?

7 A. Yes, I was.

8 Q. Okay. Are these the types of materials,
9 the materials that you've received during this
10 discovery, are these the types of materials you
11 would normally review in rendering your opinion on
12 the matter?

13 A. Yes.

14 Q. Okay. I have a series of exhibits to
15 offer, and my understanding is since they're
16 documents -- contracts produced by CallSmart, that
17 there's no necessity for foundation. The first one
18 is Exhibit Number 1. And I think by agreement,
19 we've agreed to refer to this contract as company T
20 contract?

21 A. Yes.

22 JUDGE HOBERG: This is the T contract?

23 MR. NEGAARD: Company T.

24 JUDGE HOBERG: Then I would advise all the
25 participants to refer to this contract in their

1 questions and discussion as company T contract.

2 MR. NEGAARD: If there's no objection, I
3 would offer Exhibit 1.

4 MR. RICHARDS: No objection.

5 COMMISSIONER WEFALD: I have a question.
6 Is the only thing that we're required to keep
7 secret about this contract in our questions, since
8 we're on the internet, is the name of the party,
9 and so that's why we call it company T, or are we
10 going to be discussing parts of the contract that
11 are also trade secrets and so we should close the
12 hearing?

13 JUDGE HOBERG: That remains to be seen.
14 However, it's my understanding that the document
15 itself is going to be the subject of a trade secret
16 request. Is that not true, Mr. Richards?

17 MR. RICHARDS: That is true. The concern,
18 Commissioner -- we discussed with counsel for
19 plaintiffs what it was that they were interested in
20 in this contract. And I don't want to say what
21 their testimony is going to be, but it has to do
22 with the existence of these termination
23 arrangements, which we don't object to them
24 discussing. What we would object to -- or would be
25 concerned about, excuse me, are the commercial

1 terms that are in the back of that agreement which
2 talk about pricing and things of that sort, which
3 we understand from the plaintiffs that that is not
4 what they are going to be discussing. To the
5 extent that you have questions related to the
6 commercial terms of that arrangement, including the
7 pricing, that would then -- we would want that part
8 of this closed and not discussed in a public forum.

9 COMMISSIONER CLARK: Mr. Hearing Officer,
10 you're talking about Exhibit A to the contract?

11 JUDGE HOBERG: It's marked RTCG 1.

12 COMMISSIONER CLARK: Within the exhibit
13 itself, the commercial terms are listed on Exhibit
14 A, the last page. Is that what we need to avoid
15 talking about on the record?

16 MR. RICHARDS: I believe that's correct.

17 JUDGE HOBERG: So it will be Exhibit A as
18 well as the name of the company is forbidden.
19 Mr. Negaard, please.

20 MR. NEGAARD: And I'll tie these in as we
21 go, but just to get it on the record. Exhibit 2,
22 then, I think is what we would refer to today as
23 company V. And I would offer Exhibit 2.

24 JUDGE HOBERG: Mr. Richards, what else on
25 this exhibit besides the name of the company are

1 you concerned about for trade secret purposes?

2 MR. RICHARDS: Just the name, Your Honor.

3 JUDGE HOBERG: Just the name. All right.
4 Commissioner Wefald.

5 COMMISSIONER WEFALD: Excuse me. I'm
6 having trouble making out whether it's company B,
7 as in Bob, or company V, as in victory.

8 JUDGE HOBERG: V as in victory.

9 COMMISSIONER WEFALD: Thank you.

10 JUDGE HOBERG: All right. Mr. Negaard has
11 offered Exhibits RTCG 1 and 2. Any objections to
12 those being admitted?

13 MR. RICHARDS: No.

14 JUDGE HOBERG: Exhibits 1 and 2 are
15 admitted.

16 MR. NEGAARD: I would now offer Exhibit 3,
17 which is an internet service agreement with Sprint.

18 JUDGE HOBERG: This is not subject to the
19 trade secret protection?

20 MR. NEGAARD: It's my understanding not
21 today.

22 MR. RICHARDS: No.

23 JUDGE HOBERG: Any objection to Exhibit 3?

24 MR. RICHARDS: No, sir.

25 JUDGE HOBERG: Exhibit 3 is admitted.

1 MR. NEGAARD: Next is Exhibit 5, which is
2 a PRI agreement.

3 MR. RICHARDS: 4 or 5?

4 MR. NEGAARD: I'm sorry, 4, which is a PRI
5 agreement or local service agreement with Qwest for
6 the city of Dickinson. And I apologize. I know
7 some of this could have been prefiled. We just got
8 some of this information this past week, so we're
9 still working on that. I'd offer Exhibit 5.

10 JUDGE HOBERG: Four, isn't it?

11 MR. NEGAARD: Four. Excuse me.

12 JUDGE HOBERG: Any objection to Exhibit 4?

13 MR. RICHARDS: No objection.

14 MR. BINEK: And this is not trade secret?

15 JUDGE HOBERG: This is not trade secret
16 either, Mr. Negaard; is that correct?

17 MR. NEGAARD: It's my understanding no,
18 that it is not.

19 MR. RICHARDS: Correct.

20 JUDGE HOBERG: Exhibit 4 is admitted.

21 MR. NEGAARD: And Exhibit 5, an agreement
22 between CallSmart and Dakota Carrier Network for
23 the transported traffic from Dickinson to Bismarck
24 and vice versa. I'd offer Exhibit 5.

25 JUDGE HOBERG: This is not trade secret,

1 Mr. Richards?

2 MR. RICHARDS: No.

3 JUDGE HOBERG: Any objection to Exhibit 5?

4 MR. BINEK: Do you have any more copies of
5 Exhibit 5?

6 MR. NEGAARD: Did I give you a copy?

7 MR. BINEK: No. Oh, yes, you did. I'm
8 sorry.

9 JUDGE HOBERG: Any objection to Exhibit 5?

10 MR. RICHARDS: No.

11 JUDGE HOBERG: Exhibit 5 is admitted.

12 MR. NEGAARD: Next is Exhibit 6, which is
13 a local service agreement with Qwest for the
14 Bismarck location, between CallSmart and Qwest for
15 Bismarck. I'd offer Exhibit 6.

16 JUDGE HOBERG: Exhibit 6 is not a trade
17 secret; is that correct?

18 MR. RICHARDS: Correct.

19 JUDGE HOBERG: Any objection to Exhibit 6?

20 MR. RICHARDS: No objection.

21 JUDGE HOBERG: Exhibit 6 is admitted.

22 MR. NEGAARD: Exhibit 7 is a local service
23 agreement between CallSmart and IdeaOne in Fargo,
24 North Dakota. I'd offer Exhibit 7.

25 JUDGE HOBERG: Exhibit 7 is not trade

1 secret; is that correct?

2 MR. RICHARDS: Correct.

3 JUDGE HOBERG: Any objection to Exhibit 7?

4 MR. RICHARDS: No.

5 JUDGE HOBERG: Exhibit 7 is admitted.

6 MR. NEGAARD: Exhibit 8, again, a DCN
7 agreement for transported traffic between Bismarck
8 and Dickinson. I'd offer Exhibit 8.

9 JUDGE HOBERG: Exhibit 8 is not trade
10 secret; is that correct?

11 MR. RICHARDS: One moment, Your Honor,
12 please. Your Honor, it appears as though Exhibit 5
13 and Exhibit -- proposed Exhibit 8 are the same.

14 MR. NEGAARD: They appear to be the same,
15 but the schedule attached to the back is different.

16 MR. RICHARDS: Okay. Thank you.

17 JUDGE HOBERG: Exhibit 8 is not trade
18 secret; is that correct?

19 MR. RICHARDS: That's correct.

20 JUDGE HOBERG: Mr. Binek?

21 MR. BINEK: I just have a question
22 concerning the number of the exhibits that have
23 been admitted here as being nontrade secret. Are
24 some of these documents ones that are under trade
25 secret protection with the Commission right now?

1 MR. RICHARDS: Yes. The Qwest documents
2 are.

3 MR. BINEK: Okay. Would you identify the
4 documents that are? And I'm assuming that you no
5 longer are asking that those be covered by the
6 Commission's trade secret order.

7 MR. RICHARDS: That's correct. It appears
8 to be documents 4 and 6.

9 JUDGE HOBERG: Four and 6 were originally
10 under the trade secret request --

11 MR. RICHARDS: Yes.

12 JUDGE HOBERG: -- but are no longer?

13 MR. RICHARDS: Correct.

14 JUDGE HOBERG: Are you offering Exhibit 8,
15 Mr. Negaard?

16 MR. NEGAARD: Yes, I am.

17 JUDGE HOBERG: Any objection to Exhibit 8?

18 MR. RICHARDS: No.

19 JUDGE HOBERG: Exhibit 8 is admitted.

20 MR. NEGAARD: Just for the record, I think
21 Exhibit Number 7 was also filed under trade secret.

22 JUDGE HOBERG: That's withdrawn too?

23 MR. RICHARDS: Yes, sir.

24 MR. NEGAARD: As long as we're on the
25 trade secret issue, we might as well -- there's one

1 other document that was filed under trade secret.
2 It's Exhibit Number 20.

3 MR. RICHARDS: And we'll withdraw trade
4 secret on this, as well, to make this easier.

5 MR. NEGAARD: We'd offer Exhibit 20.

6 MR. RICHARDS: We have no objection.

7 MR. BINEK: Then I believe that those are
8 all of the documents that currently are under trade
9 secret order. So there's no longer any documents
10 under our previous order.

11 JUDGE HOBERG: No objection being stated
12 to Exhibit 20, 20 is admitted.

13 So if I understand this right, then, all
14 of the previous documents submitted under trade
15 secret protection have been withdrawn from trade
16 secret protection?

17 MR. RICHARDS: Correct.

18 JUDGE HOBERG: But we now have two
19 documents, Exhibits 1 and 2, which will be referred
20 to as the T and V agreement, which will be the
21 subject of later action by SmartNET to come under
22 trade secret protection.

23 MR. SELINGER: Yes. And if I can explain
24 a little bit, those documents weren't produced and
25 weren't offered for trade secret protection until

1 after your order that required us to produce those.
2 So that's the reason that they never got, I guess,
3 put into the protection file.

4 JUDGE HOBERG: Thank you, Mr. Selinger.
5 Mr. Negaard, please.

6 MR. NEGAARD: And I apologize again.
7 Thanks for your patience.

8 Q. (MR. NEGAARD CONTINUING) Now let's go
9 back and talk about the exhibits briefly,
10 Mr. Anagnost. Exhibit Number 1 has been
11 identified, a reference in the record. That is an
12 agreement for termination of services coming off
13 the internet; is that correct?

14 A. This agreement doesn't stipulate where the
15 traffic originates. It is an agreement to
16 terminate interstate or international voice
17 telecommunications services, and the type of
18 delivery mechanism is not stipulated, to my
19 knowledge.

20 Q. So Exhibit 1 -- and that's company T that
21 we described?

22 A. Correct.

23 Q. It does not specify how -- or discuss
24 where the traffic originates. It just discusses
25 how this company T would terminate the traffic; is

1 that correct?

2 A. It does.

3 Q. And you were at Mr. Burke's deposition on
4 February 3rd. Was this one of the companies
5 identified -- used to terminate traffic coming off
6 the internet?

7 A. Yes, it was.

8 Q. And then Exhibit 2 is the same type of
9 agreement with a different company, company V as in
10 victory; is that correct?

11 A. That's correct. This is a similar
12 agreement. The difference between these two
13 agreements is simply that the agreement with
14 company T stipulates jurisdiction as interstate or
15 international, and the agreement with company V
16 stipulates domestic or international traffic.

17 Q. And then Exhibit 3 we talked about
18 briefly. That's an agreement with Qwest -- or
19 excuse me -- Sprint for internet services for
20 CallSmart; is that correct?

21 A. Correct. This is for the local access
22 connection and for the internet service itself.

23 Q. And you're familiar with these types of
24 agreements?

25 A. Yes, I am.

1 Q. Is this the same type of an agreement any
2 business company could get with Sprint?

3 A. This is a very typical agreement, yes.

4 Q. It's just an internet service agreement?

5 A. It's referred to as an enterprise grade
6 agreement, yes.

7 Q. And then Exhibit 4 is an agreement with
8 Qwest. And I believe we discussed earlier that's
9 for Dickinson?

10 A. Yes.

11 Q. This is an agreement that CallSmart has
12 for its offices or its phone numbers in Dickinson;
13 is that correct?

14 A. That's correct.

15 Q. This is the same type of an agreement that
16 any businessman might get if he bought business
17 services from Qwest?

18 A. That's correct.

19 JUDGE HOBERG: Mr. Negaard, please move
20 your mike over.

21 MR. NEGAARD: Okay.

22 JUDGE HOBERG: Thank you.

23 MR. NEGAARD: I've been accused of having
24 a soft voice. If anyone can't hear me, please
25 speak up.

1 Q. (MR. NEGAARD CONTINUING) Exhibit Number
2 5. This, then, is an agreement with DCN that was
3 identified earlier. And you were present at
4 Mr. Burke's deposition. What does this agreement
5 do for Mr. Burke's company?

6 A. This agreement provides private line
7 transport services between Dickinson and Bismarck,
8 North Dakota, a T-1 capacity which is 1.5 megabits
9 per second of telecommunications transport.

10 Q. Is that the same kind of transport
11 agreement or facility lease agreement that DCN
12 would provide to any telecommunications carrier
13 that wanted to lease facilities from them?

14 A. Yes, it is.

15 Q. Exhibit Number 6 we identified as a Qwest
16 local service agreement. And I believe that was
17 for Bismarck?

18 A. That's correct.

19 Q. And, again, this is an agreement -- the
20 same type of agreement that any business owner
21 could acquire from Qwest?

22 A. Yes.

23 Q. Exhibit 7, then, is for Fargo. And this
24 completes, then, the three locations that CallSmart
25 has offices at, Bismarck, Dickinson and Fargo?

1 A. That's correct.

2 Q. And this agreement provides -- it's with a
3 CLEC; correct?

4 A. Yes, it is.

5 Q. And the CLEC is IdeaOne?

6 A. Correct.

7 Q. And this, again, is the same type of
8 business arrangement that any business customer
9 could acquire with IdeaOne for business services?

10 A. Yes, it is.

11 Q. And then Exhibit 8 we discussed. It seems
12 to be a duplicate but, again, that's just some more
13 detail on the DCN arrangement for the transport
14 from Dickinson to Bismarck?

15 A. That's correct.

16 Q. Okay. And then if you would, after
17 reviewing these documents and these agreements and
18 listening to the testimony of Mr. Burke, have you
19 had an opportunity to form an opinion as to the
20 types of services being offered by Mr. Burke
21 through his company, CallSmart?

22 A. Yes. Based on the information that has
23 been presented to me and the consideration given to
24 the CallSmart service type, it's my opinion that
25 CallSmart is doing business in voice

1 telecommunications, particularly long-distance
2 services for intrastate and interLATA services.

3 Q. And when we say intrastate, are you saying
4 that he is originating and terminating traffic --
5 inter-exchange traffic in the state of North
6 Dakota?

7 A. That's correct.

8 MR. RICHARDS: Your Honor, I'm going to
9 object. I'm not sure of the foundation of these
10 agreements. All it says is that he has -- I would
11 like the witness to qualify his answers. He is
12 using the terms that "he is doing" or "doing." All
13 these agreements suggest is that he has the
14 capability to do any of these things. I don't know
15 whether the plaintiffs' witness has some firsthand
16 knowledge of the business that's actually being
17 done versus the existence of the agreements that
18 allow him to do that business.

19 JUDGE HOBERG: Mr. Negaard, do you have a
20 response?

21 MR. NEGAARD: Yes. This gentleman sat
22 through three hours of Mr. Burke's deposition in
23 Dickinson and listened to Mr. Burke testify about
24 how traffic is originated and terminated within the
25 state of North Dakota, and he's merely giving his

1 opinion based on his experience, almost 20 years in
2 the telecommunications business, about the
3 jurisdiction of the traffic that Mr. Burke is
4 originating and terminating within North Dakota
5 based on these agreements and the testimony of
6 Mr. Burke himself.

7 JUDGE HOBERG: Are you offering the
8 testimony of Mr. Burke through his deposition?

9 MR. NEGAARD: It's in the record. I guess
10 I presented it yesterday.

11 JUDGE HOBERG: It's not in the record
12 actually yet.

13 MR. RICHARDS: We would be concerned that
14 that transcript also, I think, has references to
15 information that we have now agreed would be
16 protected. I'll let him continue the line of
17 questioning. I'll withdraw my objection so we can
18 keep this moving. But I just don't believe that
19 the foundation was built.

20 JUDGE HOBERG: In any event, you're going
21 to be calling Mr. Burke.

22 MR. RICHARDS: Exactly. And I will have a
23 chance to cross-examine the witness as well.

24 JUDGE HOBERG: Then I'll remove the
25 objection. It's withdrawn. Please proceed,

1 Mr. Negaard.

2 MR. NEGAARD: Thank you.

3 Q. (MR. NEGAARD CONTINUING) Could you
4 describe to the Commission the three main locations
5 where CallSmart has its equipment located, and
6 describe how it handles intrastate traffic from
7 those facilities, beginning with a customer in
8 Dickinson who wants to call Bismarck?

9 A. Yes. Based on the information that was
10 made available to me, my understanding is that the
11 three physical locations operated by CallSmart in
12 the state of North Dakota are Dickinson, Bismarck
13 and Fargo. Each of these locations is similar but
14 a little bit different.

15 Bismarck appears to be one of their main
16 locations as it is a location that terminates the
17 Sprint connection that we discussed in one of the
18 prior exhibits onto a gateway device, which is a
19 device reported to convert voice traffic to voice
20 over internet traffic.

21 The Dickinson location is then an
22 extension of the Bismarck location via the DCN
23 transport facility that we just discussed in this
24 agreement as well.

25 And then Fargo is a location that stands

1 relatively on its own where there is a gateway that
2 connects directly to the internet through Sprint --
3 through the Sprint agreement that we've reviewed
4 here.

5 In the particular call example that you've
6 asked for, the Dickinson customer or originator
7 calling a Bismarck customer, the general calling
8 scenario would be: The caller in Dickinson would
9 dial a local directory number, which is a CallSmart
10 directory number, would receive a second
11 announcement tone of some gender, and then be
12 prompted to dial 1 plus the long-distance number
13 that they want to reach. In this example that
14 number would be in Bismarck. That call would then
15 be terminated -- excuse me. That call would be
16 transported from Dickinson to Bismarck over the DCN
17 transport facility that CallSmart leases.

18 Q. And before we go further, just so we
19 understand, voice over IP takes the information and
20 converts it to a packet and sends it down the line;
21 correct?

22 A. That's correct.

23 Q. Has this call yet been converted to a
24 packet of information when it leaves Dickinson and
25 travels to Bismarck?

1 A. No, it has not.

2 Q. Okay.

3 A. The call is transported into Bismarck
4 where it's connected to the gateway device. The
5 gateway device does the conversion. In Mr. Burke's
6 deposition testimony, he indicated that calls were
7 then terminated gateway-to-gateway so that the call
8 was then terminated over the local service
9 connection that CallSmart purchases from Qwest.

10 Q. Okay. So the call is transported with no
11 change in form from Bismarck to Dickinson, or vice
12 versa, and when it gets to Bismarck it's then sent
13 out on the internet, terminated back off the
14 internet in Bismarck and delivered to the network?

15 A. As I understand Mr. Burke's testimony, the
16 call may or may not be actually delivered over the
17 internet based on the particular telephone number
18 that is being called. Some Bismarck numbers do go
19 over the internet; some Bismarck numbers do not go
20 over the internet.

21 Q. And other than the dialing codes that
22 these customers use to call CallSmart, is there
23 anything different on how that traffic is taken
24 from Dickinson to Bismarck or Bismarck to
25 Dickinson? Is that any different than any other

1 telecommunications carrier does in North Dakota
2 today?

3 A. In form, it is no different. The
4 logistics probably differ in that there's a more
5 advanced switching architecture in place with the
6 local phone companies. But, in essence, the
7 transport mechanisms and the routing mechanisms are
8 the same.

9 Q. And then could you tell the Commissioners
10 about a call going from Bismarck to Fargo, how
11 that's handled on CallSmart's network?

12 A. A call from Bismarck to Fargo was reported
13 to be originated in Bismarck by the same method,
14 the local Bismarck customer dialing a local
15 seven-digit calling number that's kept by
16 CallSmart. The call is then terminated in the
17 gateway in Bismarck where it is converted to a
18 packet call. It is pushed onto the Sprint
19 connection which is leading to the internet, and
20 then it is routed to the gateway in Fargo via that
21 Sprint connection in Fargo where it is converted
22 back to a normal voice call and delivered to the
23 local switch and terminated to the local directory
24 number.

25 Q. And then the final call from Fargo -- that

1 originates in Fargo to Dickinson.

2 A. That call would be similar to the
3 Bismarck/Fargo call in reverse, except the call
4 would obviously originate in Fargo by having the
5 customer dial a local Fargo directory number and
6 then over-dialing the destination directory number
7 or the number in Dickinson. That call would be
8 transported over the internet in packetized form to
9 the Bismarck gateway. In Bismarck it would be
10 converted back to a normal voice call and
11 transported from Bismarck to Dickinson over the
12 facility leased by DCN and terminated to the local
13 Qwest switch by the facility purchased by Qwest
14 where it would be connected to the local directory
15 number.

16 Q. On normal inter-exchange traffic within
17 the state of North Dakota, are there methods that
18 companies can use to identify that traffic so they
19 know what carrier has originated that traffic and
20 so that they can understand the compensation
21 arrangements that are in place?

22 A. When the call is a long-distance call or
23 something other than a local calling area call, and
24 it is an inter-exchange call, that call is normally
25 delivered to an inter-exchange carrier, and that

1 inter-exchange carrier has a designated carrier
2 code. That code is included in the call signaling
3 between the switching points so that that call can
4 be recorded and associated with the carrier that
5 has originated that traffic.

6 Q. Some of these companies in the state have
7 extended area service agreements with each other;
8 is that correct?

9 A. That is correct.

10 Q. So in the Dickinson area there are rural
11 areas that have extended area service that can call
12 into Dickinson; is that correct?

13 A. That's correct.

14 Q. And that traffic is exchanged with Qwest,
15 who's the incumbent local exchange carrier in
16 Dickinson?

17 A. Some of that traffic would be exchanged
18 with Qwest, correct.

19 Q. And then the same thing in Bismarck.
20 Certain companies in the rural Bismarck area have
21 extended area service agreements with Qwest for
22 traffic in and out of the city of Bismarck; is that
23 correct?

24 A. That's correct.

25 Q. So when Mr. Burke's traffic is originated,

1 does it have these carrier codes with it as it's
2 sent down the line so that these companies can
3 identify it as his traffic?

4 A. My understanding is no. Because the call
5 is being originated as a local call, a subscriber
6 dialing a local directory number and then control
7 of the calling stream taken over by Mr. Burke's
8 equipment, there is no association made with a
9 carrier.

10 Q. So a company like BEK, for instance, they
11 don't have any way to measure or to identify this
12 traffic going in and out of their exchange area
13 that may, in fact, be -- is transported to
14 Dickinson by conventional methods? They have no
15 way to measure that traffic?

16 A. There are -- there are ways that that
17 traffic could be measured, but it is not measured
18 by the standard methods used with the rest of the
19 industry.

20 Q. Okay. But in any event, it's kind of
21 flying under the radar right now?

22 A. Correct.

23 JUDGE HOBERG: Is this a good place to
24 take a break, Mr. Negaard?

25 MR. NEGAARD: Sure.

1 JUDGE HOBERG: Let's take a ten-minute
2 recess here.

3 (Recessed at 10:15 A.M. until 10:28 A.M.)

4 JUDGE HOBERG: Mr. Negaard, do you want to
5 continue, please?

6 MR. NEGAARD: Yes, Your Honor.

7 Q. (MR. NEGAARD CONTINUING) Mr. Anagnost,
8 have you been given enough information to determine
9 whether or not CallSmart is paying terminating or
10 originating access for intrastate calls in North
11 Dakota?

12 A. No, I have not.

13 Q. According to Mr. Burke, is he paying such
14 terminating or originating access?

15 A. I believe Mr. Burke responded that he was
16 not aware of any payments that he was making for
17 either of those two elements.

18 Q. Do CallSmart customers require DSL
19 services or customer premises equipment in order to
20 use CallSmart service for long-distance phone
21 calls?

22 A. No.

23 Q. Are you familiar with Vonage, a company
24 that was challenged in Minnesota for providing VOIP
25 services?

1 A. Yes, I am.

2 Q. And how does CallSmart's operation differ
3 from Vonage?

4 A. Vonage customers are required to have a
5 broadband connection and a special piece of
6 customer premise equipment, either what they term a
7 soft phone or an IP-based phone or an access
8 termination device, that will work with the
9 broadband connection to convert voice calls to
10 voice over IP calls at the customer premise. Those
11 requirements are not the same as CallSmart's.

12 Q. And are you familiar with the recent
13 ruling by the FCC approving VOIP services provided
14 by Pulver --

15 A. Yes, sir.

16 Q. -- Free World Dial-Up?

17 A. Yes.

18 Q. And how are those services, as you
19 understand it, different from what CallSmart does?

20 A. My understanding of the Free World Dial-Up
21 is that it is technically a computer-to-computer
22 call and that internet access, essentially
23 broadband access, is required along with, again, a
24 mechanism at the customer premise, be that either a
25 computer or a special type of telephone set that

1 works with the IP protocol or a terminating device
2 in order to complete calls.

3 Q. Okay. And on the traffic from Dickinson
4 to Bismarck that we discussed using the DCN
5 circuit --

6 A. Yes.

7 Q. -- that's different than the way AT&T
8 asked the FCC to approve in their request for
9 classification for VOIP services, is it not?

10 A. Yes, it is.

11 Q. And what's the difference there?

12 A. My understanding from the AT&T scenario is
13 that long-distance services were being used at the
14 local exchange office to originate calls.

15 Q. Was AT&T paying originating access?

16 A. The FCC document indicated that they were.

17 Q. Okay. And the information -- or the
18 traffic that AT&T was calling was converted to a
19 packet of information before it was transported to
20 the destination; is that correct?

21 A. My understanding is that the conversion
22 took place when the call reached the AT&T broadband
23 network, yes.

24 Q. Okay. You were at the deposition of
25 Mr. Burke. Does he encourage his customers to use

1 information services or, as we like to think of it,
2 internet services on his network?

3 A. During his testimony Mr. Burke indicated
4 that they actually discourage their customers from
5 using internet-type services over their facilities.

6 Q. Before we conclude, do you have any other
7 opinions or observations that you could offer the
8 Commissioners?

9 A. I think my only other observation is that
10 it appears that Mr. Burke's method of doing
11 business with CallSmart is very similar to what we
12 termed back in the late eighties and early nineties
13 as feature group A service, which was just another
14 method of allowing the end user to access the
15 long-distance network, a method that used the local
16 switching and the local access to receive the
17 benefits of a different rate structure.

18 Q. And those were where the customer had to
19 dial a ten-digit code in order to access a
20 long-distance carrier?

21 A. Correct. Typically a customer would dial
22 a local number, receive a second tone, and then
23 over-dial the destination number, very much like
24 the CallSmart network works today.

25 Q. At that time, was that traffic then

1 branded because of -- or identified because of the
2 carrier code the customer was calling?

3 A. I don't believe I can state that
4 definitively.

5 Q. But in any event, those inter-exchange
6 carriers were paying terminating and originating
7 access for those calls?

8 A. My understanding is that, yes, they were.

9 MR. NEGAARD: I would like to offer as
10 Exhibit 21 the deposition of Bruce Burke from
11 February of 2004. The witness testified that it
12 was a basis for his foundation. And Rule 26 of the
13 North Dakota Rules of Civil Procedure does specify
14 that I can use the deposition of a party for any
15 purpose at a proceeding. And I would offer that as
16 foundation for his opinions, subject to the trade
17 secret issues that have been identified by
18 CallSmart. I believe those take place from Page 58
19 on during the deposition, 58 through 73. And I
20 would agree that those portions could remain
21 nonpublic.

22 MR. RICHARDS: We're going to object to
23 that. We are concerned not only about -- we
24 haven't been through the entire deposition, and I
25 don't know whether there were other issues raised

1 there that would require protection. But more
2 fundamentally, Mr. Burke is prepared to take the
3 stand, and I would argue that plaintiffs' counsel
4 is more than able to ask whatever questions he
5 would like, unless he's trying to use the
6 deposition to discredit the witness. Then he can
7 actually read those portions from the deposition.
8 We would object to admission of the transcript.

9 JUDGE HOBERG: Any further response,
10 Mr. Negaard?

11 MR. NEGAARD: Your Honor, Judge Meschke,
12 who sat on our North Dakota Supreme Court, educated
13 me very early on that it's not a proper objection
14 to a deposition that the person is present in
15 court. The main hinge under the rules is that the
16 deponent was a party to the matter, was deposed in
17 the course of testimony during the matter, and that
18 the rule specifically says that it can be offered
19 for any purpose at the hearing. It does not tie
20 into any hearsay or any other issues. It's the
21 person's own testimony under oath.

22 MR. RICHARDS: If I'm not mistaken, I was
23 not present at that deposition, but I understand
24 that Mr. Selinger objected to a number of the
25 questions, suggested that they may have been

1 proprietary, and none of those objections have been
2 ruled on.

3 JUDGE HOBERG: Well, the objection you're
4 concerned about are trade secret?

5 MR. RICHARDS: Well, Your Honor, I don't
6 have the transcript in front of me, but I think
7 there may have been other objections as well as to
8 over-broad and proprietary, irrelevant. So are we
9 going to -- how are we going to deal with those
10 issues, as well? If he's going to then use that
11 transcript to pull pieces out and recite in his
12 brief, then I've got a real concern about that.

13 JUDGE HOBERG: I think in light of the
14 fact that we have the witness here, Mr. Negaard,
15 and any of the questions that were asked there can
16 be asked here, and because of the concern we have
17 with trade secret and other objections that were
18 made and how to segregate those, I'm going to
19 sustain the objection to the deposition.
20 Commissioner Wefald.

21 COMMISSIONER WEFALD: I have a question in
22 that last night and previously I read through the
23 whole deposition. It's been in our case file for
24 quite a while, looking at the date that it was sent
25 in to the Commission and placed in our case files.

1 JUDGE HOBERG: But that doesn't mean it's
2 necessarily of record yet.

3 COMMISSIONER WEFALD: I understand that.
4 But it's been available all this time to whoever
5 wanted to look at it. So are you telling me, then,
6 that there are certain parts of it that I should
7 not take -- cannot take notice of as I prepare
8 my -- as I think about this case?

9 JUDGE HOBERG: If my ruling still is, and
10 it is as of now, that the deposition should not be
11 considered as part of the evidence in this record,
12 yes, then none of it should be. The reason I'm
13 concerned about it is because of the trade secret
14 protections that are offered. Mr. Richards
15 indicated many of the questions that were asked at
16 the deposition were objected to, and we'd have to
17 go through and segregate those.

18 So, en masse, I think it's better to not
19 admit it. Mr. Burke is here. Any of those
20 questions can be asked of him at this hearing if
21 they're deemed to be relevant. We can deal with
22 any trade secret concerns that may come up in the
23 questioning of Mr. Burke. With a deposition, we
24 cannot do that. If Mr. Burke was not present, I
25 wouldn't hesitate to admit it and then deal with

1 those trade secret concerns or objections. But
2 Mr. Burke is present here.

3 COMMISSIONER WEFALD: Thank you.

4 MR. NEGAARD: Could I offer an item of
5 clarification for the record?

6 JUDGE HOBERG: Sure.

7 MR. NEGAARD: The parts of the deposition
8 that Commissioner Wefald looked at are Pages 1
9 through 58 that were submitted in response to a
10 motion asking for production of documents. The
11 confidential portion of that deposition was after
12 Page 58. That has not been filed. There were 15
13 pages or 25 pages of testimony that were not filed
14 with that motion.

15 JUDGE HOBERG: So the deposition she has
16 is different than the one you're offering today?

17 MR. NEGAARD: It's the same deposition.
18 The only thing is, she has a portion of it. She
19 doesn't have the end of it.

20 JUDGE HOBERG: Mr. Binek? Did you have a
21 comment?

22 MR. BINEK: I was just going to raise the
23 issue that Mr. Negaard raised.

24 JUDGE HOBERG: So I'm not admitting the
25 deposition at this time.

1 A. Yes.

2 Q. Can you identify which of those plaintiffs
3 you've done work for?

4 A. All of them.

5 Q. All of them?

6 A. Pretty much, in one form or another, yes.

7 Q. Can you describe generally the types of
8 work that you've done for those plaintiffs?

9 A. Yes. We're typically retained as their
10 technical consultant. We help them with their
11 long-range planning. We help them with their
12 feasibility in implementing technology. We help
13 them discern what technologies and what operations
14 functions will help their business need the best.

15 Q. Would you say a significant or a large
16 percentage or all of your revenues are derived from
17 projects on behalf of the plaintiffs?

18 A. A significant portion, yes.

19 Q. Have you ever consulted or counseled the
20 plaintiffs about starting an IP voice service
21 similar to CallSmart?

22 A. Excuse my pause, but I'm trying to think
23 of the particular plaintiffs listed. And, no, we
24 have not actively engaged with any of the
25 plaintiffs in IP voice service.

1 Q. Have you spoken to any of the plaintiffs
2 about changing their network to an IP network?

3 A. I don't believe we have.

4 Q. Have you ever consulted with any of the
5 plaintiffs concerning an ISP network?

6 A. Yes.

7 Q. Can you explain?

8 A. Several of the -- several of the plaintiff
9 companies are our regular clients, and we have
10 developed ISP networks and ISP applications for
11 them.

12 Q. And what was your role in that, sir?

13 A. Again, as their consulting engineer, we
14 helped them develop the business plan, the
15 architecture, make equipment recommendations and
16 selections and worked through operational
17 implementation issues with them.

18 Q. I think you've testified -- and correct me
19 if I'm wrong -- that you have not consulted with
20 any of the plaintiffs about starting an IP carrier
21 class network; is that correct?

22 A. I don't believe any of the plaintiffs, no.

23 Q. Have you consulted with any other parties
24 that are not plaintiffs to this case generally in
25 your practice about starting IP carrier class

1 networks?

2 A. Yes.

3 Q. Have you ever designed or installed an IP
4 carrier network?

5 A. We're currently doing that today, but we
6 have not completed a design or implementation as of
7 yet.

8 Q. And that is not for one of the plaintiffs
9 in this case?

10 A. No, it is not.

11 Q. Is that in North Dakota?

12 A. No, it is not.

13 Q. Mr. Anagnost, have you ever been certified
14 by Cisco or any other manufacturer of IP equipment?

15 A. No, I have not.

16 Q. Have you ever visited any of the
17 facilities of CallSmart?

18 A. No.

19 Q. We've got a fairly large number of
20 plaintiffs in this proceeding. But as I understand
21 it, there are also some folks that provide
22 telephone services in North Dakota that are not
23 plaintiffs to this proceeding; is that correct,
24 sir? For example, do you know whether Qwest --
25 Qwest is a local phone company in North Dakota; is

1 that correct?

2 A. Yes, they are.

3 Q. Are they a plaintiff in this proceeding?

4 A. To my knowledge, no.

5 Q. Do you know whether Qwest was asked to be
6 a plaintiff in this proceeding?

7 A. No, I do not.

8 Q. Any speculation why the largest local
9 phone company in the state of North Dakota which
10 arguably might be subjected to -- have more of an
11 economic interest in this proceeding than any of
12 the plaintiffs would not want to be a plaintiff in
13 this proceeding, sir?

14 MR. NEGAARD: I'd object to the form of
15 the question. It calls for speculation.

16 JUDGE HOBERG: The question is asking him
17 to speculate, Mr. Richards. I'll sustain it.

18 Q. (MR. RICHARDS CONTINUING) Would you
19 agree, Mr. Anagnost, given what you heard from the
20 testimony during the deposition of Mr. Burke and
21 what you know about CallSmart, that the majority of
22 the revenues at stake and the customer base are
23 located in cities in North Dakota where Qwest is
24 the primary local exchange carrier?

25 A. Yes.

1 Q. And is West River Telephone Company a
2 plaintiff in this proceeding?

3 A. I do not know.

4 Q. And is Souris River Telephone a plaintiff
5 in this proceeding?

6 A. I believe they are. They may not be. I'm
7 not familiar with the complete list. It's always
8 been referred to me as BEK Telephone, et al.
9 Pardon my ignorance.

10 Q. In preparation for your testimony in this
11 case, did you meet with individuals from these
12 phone companies?

13 A. No, I did not.

14 Q. So your entire preparation for this case
15 was based on your attendance at Mr. Burke's
16 testimony and your review of the documents in this
17 proceeding?

18 A. And discussions with Mr. Negaard, correct.

19 Q. One of the issues in this case,
20 Mr. Anagnost, is whether CallSmart should be
21 required to pay intrastate access charges; is that
22 correct?

23 A. I believe that's correct, yes.

24 Q. Have you ever drafted an ILEC access
25 tariff?

1 A. No, sir.

2 Q. Have you ever reviewed the terms of ILEC
3 access tariffs?

4 A. Yes.

5 Q. Are you familiar with the charges that
6 plaintiffs charge for intrastate access in the
7 state of North Dakota?

8 A. In a general way, yes.

9 Q. And do you know what components go into
10 making up those rates?

11 A. Yes, I do.

12 Q. Would you agree that access tariffs,
13 Mr. Anagnost, based on your many years of
14 experience in the industry, were created for
15 traffic on the circuit switched or the public
16 switched telephone network?

17 A. Yes.

18 Q. Are you familiar -- I think you mentioned
19 that you had done some consulting with respect to
20 the plaintiffs concerning an ISP network; is that
21 correct?

22 A. Yes.

23 Q. So you're familiar generally with the
24 network design of a typical ISP?

25 A. Yes.

1 Q. Would a typical internet service provider
2 have a POTS or a PRI connection for access between
3 the ISP facility and the public switched network?

4 A. Yes.

5 Q. Would they have an access gateway?

6 A. A router or some type of device, yes.

7 Q. Would you know whether they would have an
8 authentication server?

9 A. That is one possible component in an ISP
10 network, yes.

11 Q. What about a billing server?

12 A. Again, it depends on operational
13 parameters of the company, but that could be a
14 component, yes.

15 Q. And a router to the internet?

16 A. Yes.

17 Q. And an internet connection; is that
18 correct?

19 A. Yes.

20 Q. Do you know generally how internet service
21 providers such as AOL or BTI route their -- how end
22 users access those companies in North Dakota
23 generally?

24 A. Yes.

25 Q. Can you describe that briefly to me?

1 A. Either via dial-up connection or broadband
2 connection. Dial-up connection would use the local
3 loop access facility provided by the local phone
4 company.

5 Q. And what type of facility is that, sir?

6 A. Generally, a copper two-wire pair.

7 Q. A business line?

8 A. Business line, residential line.

9 Q. And let's focus on the dial-up for a
10 second. So how does that operationally work?

11 A. Generally, the ISP will contract with the
12 local phone company for some method of connecting
13 the local switch to the ISP, and then the end user
14 will access the ISP's facility by dialing a local
15 directory number with the computer.

16 Q. And in our example, whether it's AOL or
17 BTI, are they paying originating access for that
18 facility?

19 A. I would assume that that depends on the
20 contract negotiated between the two parties, but I
21 don't know that one way or another.

22 Q. Well, I think you testified that you're
23 sort of generally familiar with the ISP networks
24 that are developed by your plaintiffs. Do you know
25 whether the ISP's in those cases pay access charges

1 back to the ILEC's for those types of calls?

2 A. Define "access charges."

3 Q. Intrastate originating access charges.

4 A. No.

5 Q. Can somebody who's a dial-up customer on
6 either AOL or BTI make a telephone call over their
7 computer using a microphone and a dial-up
8 connection?

9 A. If they have the proper software, I assume
10 they could, yes.

11 Q. Would it be your position, Mr. Anagnost,
12 that an AOL or BTI customer that makes a call using
13 his computer with the proper software should be
14 subject to intrastate access charges?

15 A. I don't really have a personal position on
16 that, no.

17 Q. Do you know whether today ISP's would be
18 required to pay access charges -- intrastate access
19 charges in North Dakota?

20 A. My understanding is that internet
21 services, in general, are classified as interstate
22 in jurisdiction so, no, they would not have to
23 provide intrastate access charges.

24 Q. Thank you. Are you generally aware,
25 Mr. Anagnost, of the FCC's notice of proposed

1 rulemaking on IP-enabled services?

2 A. I'm aware that it exists. I have not read
3 it.

4 Q. So you have not read that document?

5 A. No, I have not.

6 MR. RICHARDS: I have a question now for
7 Your Honor. Would we then -- we believe that --
8 can we take administrative notice of a federal --
9 of an FCC document? We did not bring -- I've got
10 one copy. I was not proposing to admit it. But to
11 the extent that I want to make any references to
12 that document, I would agree to show them to the
13 witnesses. I wasn't planning on entering it as an
14 exhibit because generally we don't need to.

15 JUDGE HOBERG: If you ask me to take
16 administrative notice, I will.

17 MR. RICHARDS: Okay.

18 JUDGE HOBERG: Are you asking me to take
19 administrative notice?

20 MR. RICHARDS: Yes, I am, sir.

21 JUDGE HOBERG: Please tell me again
22 specifically what you're asking me to take
23 administrative notice of.

24 MR. RICHARDS: It's the notice of proposed
25 rulemaking issued by the Federal Communications

1 Commission in WC -- whiskey Charlie -- Docket
2 Number 04-36 entitled: In the Matter of IP-Enabled
3 Services.

4 JUDGE HOBERG: We can have that submitted
5 as a late-filed exhibit. Mr. Negaard, do you have
6 any objection to the Commission taking
7 administrative notice of that document?

8 MR. NEGAARD: No. I can't dispute that it
9 exists. I would -- I'm not sure where we're going
10 with this. I don't think it's appropriate to start
11 talking about comments that people have filed in
12 that proceeding.

13 MR. RICHARDS: The comments haven't been
14 filed yet. The comments were not due until Friday.
15 But I was just going to ask the witness to look at
16 some paragraphs in this document, and I have a
17 couple questions about those.

18 MR. NEGAARD: Could I see the document?

19 MR. RICHARDS: Sure.

20 MR. NEGAARD: I don't have any problem
21 with this body obviously taking notice of a
22 proceeding that the FCC is doing. My only concern
23 is that document is 55 pages long plus 15, 20 pages
24 of attachments. Mr. Anagnost has never seen this.
25 We have not been provided copies of it. I would

1 think that the document speaks for itself, and I'm
2 not really sure where we're going with this.

3 JUDGE HOBERG: We'll see what his
4 questions are. Mr. Binek, any objection to taking
5 official notice of that?

6 MR. BINEK: No.

7 JUDGE HOBERG: I think it's appropriate
8 for the Commission to take official notice of that
9 in light of the jurisdictional questions in this
10 matter, so I will. But depending on your
11 questions, Mr. Richards, if Mr. Negaard objects,
12 we'll see where you're going on that. I will take
13 administrative notice on behalf of the Commission
14 for the document you referenced.

15 MR. RICHARDS: Thank you.

16 JUDGE HOBERG: Will you provide copies of
17 that for the Commission then?

18 MR. RICHARDS: Yes. If you'd like copies,
19 we can provide copies. May I approach the witness?

20 JUDGE HOBERG: You may.

21 MR. NEGAARD: I have no objection.

22 MR. RICHARDS: Thank you.

23 Q. (MR. RICHARDS CONTINUING) With an
24 understanding, sir, that you have not seen this
25 document -- let me ask a previous question. Were

1 you asked to review any FCC documents in
2 preparation for this proceeding?

3 A. Yes.

4 Q. And what documents were those?

5 A. The recent opinion issued in the AT&T
6 case.

7 Q. Any others?

8 A. No.

9 Q. Did you review the Pulver decision?

10 A. Reviewed summaries of the Pulver decision,
11 not the actual FCC documentation.

12 Q. So your testimony earlier about the
13 differences between the Pulver service and the
14 CallSmart service were based on summaries and not
15 actually reviewing that document?

16 A. That is correct.

17 Q. Were you aware that the FCC had issued a
18 proposed rulemaking on IP-enabled services prior to
19 your testimony today?

20 A. Yes.

21 Q. And as an expert on behalf of the
22 plaintiffs, did you not think it would be necessary
23 to review a proposed rulemaking on IP-enabled
24 services prior to this hearing?

25 A. No.

1 Q. Thank you. I just have a couple of
2 questions on this. Thank you. I'd like to turn
3 your attention to Page 41. I'm looking here at
4 Paragraph 61. Can you just read the first
5 sentence.

6 A. Paragraph 61 states: The Commission seeks
7 comment on the extent to which access charges
8 should apply to VOIP or other IP-enabled services.

9 Q. Thank you. Are you familiar generally
10 with notices of proposed rulemaking at the FCC?

11 A. Describe "familiar." Do I know they take
12 place? Yes.

13 Q. Do you know that there's a process by
14 which a notice gets issued, comments get filed, and
15 then the Commission generally issues a decision?

16 A. Yes. I don't know the specifics of the
17 process, but I'm aware there is a process.

18 Q. So based on, again, this one sentence, it
19 appears as though the issue of whether access
20 charges should apply to VOIP is an issue that is
21 being investigated by the FCC; is that correct?

22 A. Yes.

23 Q. Thank you. In your complaint you
24 discussed, if I'm not mistaken, that there was also
25 some concern that by not paying access charges that

1 it may have some implications for universal service
2 in North Dakota; is that correct?

3 A. I believe that is correct.

4 Q. Can you read the first sentence, sir, of
5 Paragraph Number 63?

6 A. Paragraph 63, the first sentence states:
7 We seek comment on how the regulatory
8 classification of IP-enabled services, including
9 VOIP, would affect the Commission's ability to fund
10 universal service.

11 Q. Thank you. And I have one last question
12 on this document. On Page 29, can you please read
13 the first sentence of Paragraph 40, please.

14 A. Yes. Paragraph 40, the first sentence
15 states: We seek comment on the appropriate basis
16 or bases for asserting federal jurisdiction over
17 the various categories of IP-enabled services.

18 Q. Thank you. And then, lastly, the first
19 sentence of Paragraph 41.

20 A. Paragraph 41 states: We further seek
21 comment regarding whether and on what grounds one
22 or more classes of IP-enabled services would be
23 deemed subject to exclusive federal jurisdiction
24 with regard to traditional common carrier
25 regulation.

1 Q. Thank you.

2 A. You're welcome.

3 Q. Would you agree, Mr. Anagnost, that to the
4 extent the FCC asserts exclusive jurisdiction over
5 IP-enabled services that this Commission would not
6 have any jurisdiction over CallSmart?

7 MR. NEGAARD: It calls for a legal
8 conclusion, a legal argument. The Commission has
9 legal counsel available to them. We all know that
10 the FCC is looking at this rulemaking. It seems
11 more in the way of argument, Your Honor, than a
12 question.

13 MR. RICHARDS: Well, Your Honor, we've
14 been provided one expert. We were provided a
15 complaint that suggested that we were violating
16 unspecified rules. I think we should have some
17 latitude here to be able to -- we were not
18 permitted to do any discovery, so this is our one
19 opportunity to present our case.

20 JUDGE HOBERG: It does sound like a legal
21 argument to me, Mr. Richards. You're perfectly
22 capable of making that legal argument.

23 MR. RICHARDS: I'll rephrase the question.

24 Q. (MR. RICHARDS CONTINUING) You said that
25 you had read summaries of the Pulver decision; is

1 that correct?

2 A. That's correct.

3 Q. Were you aware in the Pulver order that
4 the FCC stated that the service offered by Pulver
5 would not be subject to state regulation?

6 A. Yes.

7 MR. RICHARDS: Now, Mr. Negaard, you asked
8 your witness a number of questions about the AT&T
9 decision. Is that in the record? Or did you
10 propose to -- there were a number of references to
11 AT&T. I've got a few questions on that. Again, I
12 will then ask that the decision which the
13 plaintiffs have also relied on, that the Commission
14 take judicial notice of the AT&T decision.

15 JUDGE HOBERG: I haven't been asked to
16 take judicial notice of it.

17 MR. RICHARDS: Pardon me?

18 JUDGE HOBERG: I haven't been asked by
19 anybody to take judicial notice of it.

20 MR. RICHARDS: We're asking that you take
21 official notice of it.

22 MR. NEGAARD: And I would too.

23 JUDGE HOBERG: Would you read for me and
24 specify specifically what that document is?

25 MR. RICHARDS: Sure. It's an order of the

1 Federal Communications Commission in WC -- whiskey
2 Charlie -- Docket Number 02-361, in the matter of
3 petition for declaratory ruling that AT&T's
4 phone-to-phone IP telephony services are exempt
5 from access charges.

6 JUDGE HOBERG: You have no objection,
7 Mr. Negaard?

8 MR. NEGAARD: No. In fact, it has been
9 submitted to the Commission earlier as part of
10 supporting documentation for my motion on
11 discovery.

12 MR. BINEK: No objection.

13 JUDGE HOBERG: I will take official notice
14 on behalf of the Commission of the aforementioned
15 document.

16 MR. RICHARDS: Thank you.

17 Q. (MR. RICHARDS CONTINUING) Mr. Anagnost,
18 do you have a copy of this decision available to
19 you or not?

20 A. Not with me, no.

21 MR. RICHARDS: Mr. Negaard, do you have an
22 extra? If not, I can approach the witness again,
23 if you have no objection. He's going to need to
24 see this. Or you can show him your copy. However
25 you want to do it. I can go up there again.

1 Whatever is easiest for you.

2 MR. BINEK: I think I have a clean copy of
3 it.

4 THE WITNESS: Thank you.

5 Q. (MR. RICHARDS CONTINUING) I'm looking,
6 sir, at Paragraph Number 1. If you look at the --
7 about 8, 9 lines down, starting with the words "We
8 emphasize," do you see that?

9 A. Yes.

10 Q. It says, if I'm reading correctly: We
11 emphasize that our decision is limited to the type
12 of service described by AT&T in this proceeding.
13 Is that correct?

14 A. That's correct.

15 Q. Was it your testimony that the type of
16 service that CallSmart provides is similar or the
17 same as the type of service that AT&T provides?

18 A. There are similarities.

19 Q. Thank you. If we can now turn to Page 8,
20 I'm on Paragraph 11, and I'd like to walk through
21 this paragraph for a moment, starting with the
22 second sentence. The second sentence states:
23 AT&T's specific service consists of a portion of
24 its inter-exchange voice traffic routed over AT&T's
25 internet backbone. Is that correct?

1 A. That's correct.

2 Q. Are you aware whether CallSmart has an
3 internet backbone, or does it use the public
4 internet when it routes its call?

5 A. My understanding is that CallSmart uses a
6 combination of leased facilities and access to the
7 public internet backbone.

8 Q. Thank you. And then the next sentence
9 reads: Customers using this service place and
10 receive calls with the same telephones they use for
11 all circuit switched calls. The initiating caller
12 dials 1 plus the called party's number just as in
13 any other circuit switched long-distance call.
14 Does a CallSmart customer need to dial another
15 phone number before it's able to dial the
16 destination phone number?

17 A. Yes, they are.

18 Q. Thank you. Are you aware whether in this
19 case AT&T had any special pricing for its
20 internet-based long-distance calls?

21 A. No, I'm not.

22 Q. And, in fact, in this case, didn't the FCC
23 point out that the service provided by AT&T here
24 was transparent to the end user because it was just
25 part of the regular long-distance calls that those

1 customers were making?

2 A. I don't recall that particular point being
3 made.

4 Q. But you're not aware that there's a
5 specific service that AT&T provides here that's
6 called their internet long-distance or their VOIP
7 long-distance? This was just part of their regular
8 long-distance service; is that correct?

9 A. I'm not aware of how AT&T branded their
10 particular service offering.

11 Q. Then if I can just turn your attention to
12 Paragraph Number 12.

13 A. Page 9?

14 Q. Page 9. About 10 lines down there's a
15 sentence that begins "End user customers."

16 A. Yes. Right after Footnote 52?

17 Q. Right. Can you read that sentence into
18 the record, please.

19 A. End user customers do not order a
20 different service, pay different rates, or place
21 and receive calls any differently than they do
22 through AT&T's traditional circuit switched
23 long-distance service. The decision to use its
24 internet backbone to route certain calls is made
25 internally by AT&T.

1 Q. Thank you. And, finally, one last point
2 I'd like to make on this and then we'll move on.
3 I'd like to turn your attention to Page 10,
4 Footnote Number 58. Can you read Footnote 58,
5 please.

6 A. Footnote 58 states: The ISP/VOIP
7 coalition asks the Commission to rule that if --
8 even if some forms of VOIP are found to be
9 telecommunications services, services that do not
10 use 1 plus dialing are information-enhanced
11 services. ISP/VOIP coalition would apply at 4-5
12 because AT&T's specific service does utilize 1 plus
13 dialing. Other VOIP services that do not are
14 beyond the scope of this proceeding.

15 Q. And CallSmart does not utilize 1 plus
16 dialing; is that correct? It uses two-stage
17 dialing?

18 A. It uses two-stage dialing, the second
19 stage being 1 plus.

20 Q. But there's an initial phone call that has
21 to be made before a customer -- a customer can't
22 pick CallSmart as its long-distance carrier?

23 A. That is correct.

24 Q. Thank you. What's the purpose of a
25 gateway, Mr. Anagnost?

1 A. Gateways can have many different
2 functions. A gateway is primarily, in generic
3 terms, used to trans-code or transition between two
4 different types of protocols.

5 Q. And as you understand the use of the
6 gateway in the CallSmart network, is it fair to say
7 that the purpose of the gateway is to convert voice
8 traffic into IP so that it can be routed over the
9 internet?

10 A. My understanding is that that is how
11 CallSmart is using gateways in their network, yes.

12 Q. Thank you. And that traffic has to be
13 converted again before it can be terminated; is
14 that correct?

15 A. That is my understanding, yes.

16 Q. And why is that?

17 A. Because they're terminating the call over
18 the local switched network.

19 Q. Just a few more questions, sir. Your
20 firm, KLJ, how long have you been with them?

21 A. Since 1991.

22 Q. Do you know whether KLJ was at any time a
23 customer of CallSmart?

24 A. Yes, they were.

25 Q. Were you involved in the decision to

1 choose CallSmart for its VOIP long-distance
2 service?

3 A. Yes, I was.

4 Q. Why did KLJ subscribe to CallSmart?

5 A. Rate.

6 Q. Can you give me a sense of what the
7 comparison was at that time?

8 A. I believe our agreement with CallSmart was
9 in the 3-cent-per-minute range, and our negotiated
10 agreement with another major carrier was about 4.9
11 or 4.8 cents.

12 Q. And was it your intention to use that
13 service strictly for any type of -- strike that
14 question. Was the agreement with CallSmart limited
15 to intra/interstate traffic, or did it specify, or
16 was that rate for all domestic traffic?

17 A. I believe it was for all domestic traffic
18 in the contiguous 48 states.

19 Q. Given your relationship with the
20 plaintiffs in this case, were you ever -- was KLJ
21 ever concerned whether CallSmart was licensed by
22 the North Dakota Commission or whether they were
23 paying access charges?

24 A. That's our business manager's
25 responsibility to take care of, so I can't answer

1 that.

2 Q. Did you ever personally make a call using
3 the CallSmart service?

4 A. Yes.

5 Q. Could you distinguish the quality of
6 CallSmart services versus circuit switched
7 technology that the company had been previously
8 using?

9 A. In certain instances, yes.

10 Q. And what were those differences?

11 A. Just the quality of the voice levels on
12 the call.

13 Q. Can you be a little more specific? Were
14 there echoes? Was there delay? What was the
15 quality issue?

16 A. In my recollection, I've only experienced
17 lower sound levels.

18 Q. So given the choice of using CallSmart or
19 not using CallSmart because you had to make this
20 two-stage call, was it your preference to use the
21 CallSmart service or not to use the CallSmart
22 service?

23 A. Not to use the CallSmart service.

24 Q. And eventually KLJ terminated its
25 agreement with CallSmart; is that correct?

1 A. Yes, we did.

2 Q. And why was that?

3 A. CallSmart wasn't meeting the needs of our
4 business in terms of customer service.

5 Q. And would customer service include the
6 quality of those transmissions?

7 A. The reliability of those transmissions
8 primarily. We were experiencing call drop-offs and
9 a poorly controlled call.

10 MR. RICHARDS: If I may have one moment,
11 please.

12 (Brief pause).

13 MR. RICHARDS: We have no further
14 questions. Thank you.

15 JUDGE HOBERG: Thank you, Mr. Richards.
16 Mr. Binek, did you have some questions of
17 Mr. Anagnost?

18 MR. BINEK: Yes, I have a couple.

19 EXAMINATION

20 BY MR. BINEK:

21 Q. EAS was mentioned earlier, I think, in
22 your direct testimony. There was some reference to
23 EAS. Does Consolidated Telephone have EAS
24 arrangements between exchanges in the Dickinson
25 area?

1 A. Yes, they do.

2 Q. Does Qwest pay originating or terminating
3 access charges to Consolidated for EAS calling
4 between Consolidated and Qwest exchanges?

5 A. I do not know the specifics of the
6 agreement between Qwest and Consolidated.

7 Q. Who owns the gateways? There was mention,
8 I believe, of a gateway in Bismarck. Are there
9 gateways in each of these communities that are
10 being served?

11 A. My understanding is, from Mr. Burke's
12 deposition, that there's a gateway in Bismarck and
13 a gateway in Fargo, and those gateways are owned by
14 CallSmart.

15 Q. When a call -- a call from Dickinson, I
16 believe the testimony was that that call is carried
17 by DCN to Bismarck; is that right?

18 A. Yes.

19 Q. Okay. Is that call converted to packet at
20 any time prior to reaching Bismarck?

21 A. No.

22 Q. Is it digital or analog?

23 A. It is digital.

24 Q. From the end user to Bismarck?

25 A. No. From the local exchange switch, ISDN

1 termination to Bismarck.

2 Q. What happens at the switch? How is it
3 changed from analog to digital?

4 A. The local end user's phone -- conventional
5 telephone is connected to the central office in an
6 analog format. The line side connection of the
7 digital switch converts it from analog to digital
8 using U-255 encoding, and then from that point all
9 the way to Bismarck it remains a digital signal.

10 MR. BINEK: I have no further questions.

11 JUDGE HOBERG: Thank you, Mr. Binek.
12 Commissioner Clark, do you have any questions of
13 Mr. Anagnost?

14 COMMISSIONER CLARK: I do have a few.

15 EXAMINATION

16 BY COMMISSIONER CLARK:

17 Q. You discussed the situations with
18 different calling patterns within towns where
19 CallSmart is located, Dickinson to Bismarck,
20 Bismarck to Fargo, so on and so forth. What
21 happens if someone using CallSmart calls in, say,
22 Fargo, terminating an intrastate call -- I guess it
23 would be interLATA if I used, say, the Bowman case,
24 not a CallSmart, where they have facilities, how
25 does that arrangement work?

1 A. Would you mean like a call from Fargo to
2 Grand Forks, as an example?

3 Q. Fargo to Grand Forks is fine. I don't
4 know if there's interLATA issues with it at all or
5 not. That's why I picked Bowman. Anywhere
6 intrastate but not in an exchange where CallSmart
7 has a physical presence.

8 A. My understanding is the call would be
9 handled the same way whether it was intraLATA or
10 interLATA. The call would be originated as I
11 described earlier where the customer would dial a
12 seven-digit directory number and over-dial the 1
13 plus 10-digit destination number. The call would
14 be transmitted to the gateway. In the case of
15 Fargo there's a gateway locally placed there. At
16 the gateway the call would be converted from a
17 conventional digital signal to a voice over IP
18 packetized signal. It would be placed onto the
19 Sprint connection which leads to the internet. It
20 would then be routed to either company T or company
21 V by the agreements that CallSmart has with those
22 providers, and those providers would then terminate
23 that traffic back into North Dakota by means that
24 we're not aware of. We don't know how the
25 termination providers terminate those calls at this

1 point.

2 Q. Would those be treated as interstate calls
3 then? Even though they take place -- terminate and
4 originate within North Dakota, by virtue of the
5 fact that they're taken by companies T and V, do
6 they become interstate in nature in that case?

7 A. I'm not sure that I'm equipped to render
8 an interpretation on that.

9 Q. It seems to me the Pulver case is pretty
10 straightforward. It's a computer-to-computer
11 broadband-type connection, VOIP, sort of all in
12 network, not necessarily riding over the PSTN.
13 AT&T's -- the AT&T decision -- as you understand
14 it, the way AT&T has its network set up is -- in
15 that case is it all traditional PSTN on the
16 origination and termination? It's handed off to a
17 POP just like a regular ISD would handle a call,
18 and then somewhere in the middle, not necessarily
19 at the POP or at the other end, but somewhere where
20 AT&T handles it its VOIP and converted back. Is
21 that how you understand it?

22 A. That's how I understand it, yes.

23 Q. If you were advising a client from an
24 engineering standpoint as far as setting up an ISP,
25 not considering what the functionality of it is,

1 regardless of what would ride over that ISP,
2 whether it be e-mail or web surfing or voice, would
3 you advise them to set their network up identical
4 to how CallSmart has set theirs up? In other
5 words, is CallSmart an ISP by another name once
6 taking out the functionality of the service which
7 is voice from an engineering standpoint?

8 A. If the ISP customer would like to use
9 dial-up services, services that are not classified
10 as broadband services, the access method would be
11 exactly the same. If they were wanting to be
12 broadband service providers, then the access
13 network would be avoided altogether.

14 Q. And then one last question is in regard to
15 an answer that you gave, and it was with the
16 potential of voice over dial-up ISP internet
17 service. Because as I've understood it in the
18 past, I've always thought of VOIP being used for
19 voice as we think about it really as voice over
20 broadband, and not -- because of the band widths
21 that are available on dial-up, that it is just not
22 a -- although in theory I guess you could have the
23 software application that would enable it, the
24 quality would be so poor that it's really not
25 something that would be advisable to be done. Is

1 that correct?

2 A. There's a difference in quality. I guess
3 that's a perception issue with the end user. The
4 fact is is that to have an equivalent voice over IP
5 stream to a traditional circuit switched call, you
6 need between 90 and 100 kilobits of capacity. The
7 traditional dial-up call provides somewhere between
8 44 and 52 kilobits of capacity. So you can see
9 that there's a compression that needs to take place
10 and a choice that has to be made by the end user.

11 Q. Is the difference here that the VOIP
12 conversion doesn't take place on CallSmart's
13 network until it hits a broadband capability?

14 A. That's correct.

15 Q. That's why you don't have any latency
16 issues or things like that?

17 A. Correct.

18 COMMISSIONER CLARK: Thanks. That's all
19 I've got.

20 JUDGE HOBERG: Any questions by
21 Commissioner Kramer?

22 COMMISSIONER KRAMER: I would yield to
23 Commissioner Wefald. She's got seniority.

24 JUDGE HOBERG: Commissioner Wefald.

25 COMMISSIONER WEFALD: Thank you.

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EXAMINATION

BY COMMISSIONER WEFALD:

Q. You had mentioned feature group A, and you said that services from Dickinson to Bismarck -- it seemed to you that they were similar to the way feature group A uses it which is like a dial-around service.

A. Correct.

Q. I wanted to make sure that you distinguish the service is only from Dickinson to Bismarck.

A. Actually all of the services look very similar to that.

Q. All right. And so the services from Bismarck to Fargo and from Fargo to other places you would also classify as being similar to feature group A?

A. Yes.

COMMISSIONER WEFALD: Thank you. That's all I have.

JUDGE HOBERG: Thank you, Commissioner Wefald. Commissioner Kramer.

COMMISSIONER KRAMER: I have nothing further. I'm curious about something, but it wouldn't be relevant.

JUDGE HOBERG: Thank you, Commissioners.

1 Any further questions?

2 EXAMINATION

3 BY COMMISSIONER CLARK:

4 Q. I do have just one more with regard to
5 the -- I don't know the exact type of term, but the
6 coding of traffic so that for the purposes of
7 access carriers can identify where things originate
8 and terminate to. You may have touched on this,
9 but I just wanted to get it again. In the type of
10 network that CallSmart runs, is it technically
11 feasible to identify that traffic and segregate it
12 out so that you'd know -- let's think of this, say
13 a typical internet service provider -- so that you
14 could figure out what's being used for voice
15 application and what's being used for sending
16 e-mails or anything else? Once bits become bits,
17 how do you -- is it -- is it technically feasible
18 to segregate those out into figuring out whether
19 access should apply or not?

20 A. I would have to say it is technically
21 feasible, but there aren't any well-defined
22 standard methods of doing it today.

23 COMMISSIONER CLARK: Okay.

24 JUDGE HOBERG: Thank you, Commissioner
25 Clark. Any further questions of Mr. Anagnost by

1 the parties? Mr. Negaard?

2 MR. NEGAARD: Just one question, or maybe
3 two.

4 REDIRECT EXAMINATION

5 BY MR. NEGAARD:

6 Q. DCN is also a customer of your company,
7 are they not?

8 A. Yes, they are.

9 Q. So if the dire happens, which I don't
10 think it will, that CallSmart went out of business
11 because the Public Service Commission said this
12 method of handling VOIP is not acceptable in North
13 Dakota, that would decrease traffic to one of your
14 customers --

15 A. Yes.

16 Q. -- Dakota Carrier Network?

17 A. Yes, it would.

18 Q. Okay. Do you provide services to
19 companies other than the Rural Telephone Company
20 Group in North Dakota?

21 A. Yes.

22 Q. In other states?

23 A. Yes.

24 Q. Mr. Burke's services would certainly be
25 available on the technical side if he requested

1 that traffic, but there are no well-evolved
2 standards.

3 Q. And what's that belief based on, sir?

4 A. That belief is based on my understanding
5 of how Mr. Burke is doing business with CallSmart
6 today and how we code traffic in the conventional
7 network.

8 Q. Are you aware of any companies similar to
9 Mr. Burke's that do code that traffic?

10 A. No.

11 MR. RICHARDS: Thank you. No further
12 questions.

13 JUDGE HOBERG: Thank you, Mr. Richards.
14 Mr. Binek, any further questions?

15 MR. BINEK: No questions.

16 JUDGE HOBERG: Any further questions by
17 the Commissioners?

18 (No response).

19 JUDGE HOBERG: Thank you, Mr. Anagnost.

20 THE WITNESS: Thank you.

21 JUDGE HOBERG: Mr. Negaard.

22 MR. NEGAARD: I believe in keeping things
23 short and keeping it simple and trying to get as
24 much information as I can to you decision-makers so
25 you can make your decision. That's the conclusion

1 of our testimony here today. The documents are in
2 the record, and the concepts have been testified
3 about, and that's all we have at this time.

4 JUDGE HOBERG: Just so we're clear on that
5 issue of the record, Mr. Negaard, you've made a lot
6 of filings with the Commission, but because this is
7 a complaint hearing, it's my understanding and I
8 think you understand that the record is what you
9 asked to be admitted here at the hearing today, the
10 testimony and the other documents; is that correct?

11 MR. NEGAARD: Yes, and some of what wasn't
12 admitted. So my objection to that is preserved.

13 JUDGE HOBERG: Are you wanting to make an
14 offer of proof on that?

15 MR. NEGAARD: Under 32(a)1 and 2,
16 testimony of a party is admissible in any
17 proceeding under the rules of evidence.
18 Mr. Anagnost testified that it was foundation for
19 his opinions. The information he relied upon as
20 foundation for his opinions are in those
21 depositions. And I would offer it under that
22 provision, not to be a substitute for Mr. Burke's
23 testimony.

24 JUDGE HOBERG: I understand that. But my
25 concern was with the trade secret protection, that

1 that was a difficulty with this document.

2 MR. NEGAARD: I think my offer or tender
3 was that Pages 58 through 73 be received subject to
4 the trade --

5 JUDGE HOBERG: I didn't understand that.

6 MR. NEGAARD: Okay. I'm sorry.

7 JUDGE HOBERG: Just those pages?

8 MR. NEGAARD: Just Pages 58 through 73
9 would be offered subject to the trade secret issue.
10 CallSmart -- I don't intend to interfere with their
11 request for trade secret status. Those are the
12 only pages where they gave us trade secret
13 information. And the only thing in there is the
14 name of the companies. We didn't talk about any of
15 the prices that they feel are confidential. The
16 only thing in there are the names.

17 JUDGE HOBERG: Mr. Richards? I didn't
18 understand -- I apologize -- that you were just
19 offering that portion.

20 MR. RICHARDS: Can I have one moment,
21 please?

22 JUDGE HOBERG: Sure. Off the record.

23 (Discussion had off the record.)

24 JUDGE HOBERG: Mr. Richards, please.

25 MR. RICHARDS: As an initial matter, we

1 would continue to object to the complainant's
2 request to have the evidence -- the transcript
3 admitted into this record. In just briefly paging
4 through some of these pages -- again, I was not
5 present at the deposition, but it appears as though
6 there were some objections in here. And it also
7 raises the question whether if they are going to
8 rely on this transcript potentially for their
9 briefs, the fact is that we don't have the whole
10 transcript in here, and we may have 15 pages later.
11 And how are we going to file briefs that may need
12 to refer to stuff that Mr. Burke may or may not
13 have said during that deposition? I think you're
14 asking for a very difficult procedural road to take
15 by admitting this at this point, and I would
16 strongly suggest that -- you know, we would
17 maintain our objection to this thing being
18 admitted.

19 JUDGE HOBERG: Yeah, I'm going to stick
20 with my ruling, Mr. Negaard, because he's here,
21 because of -- for all the reasons as stated. I
22 think we'll have a cleaner record, a record that
23 we'll be better able to refer to. All the
24 questions can be asked here if they're relevant. I
25 would rather do that, so I'll sustain the

1 objection.

2 But I want to refer to one thing that
3 Commissioner Wefald just brought to my attention
4 that I guess I wasn't totally aware of but I
5 perhaps should have been aware of. Some of the
6 documents that are trade secret protection -- that
7 are going to be sought as trade secret documents,
8 RTCG 1 and 2 which is the V and T companies, are
9 already in some of the files that were filed with
10 some of the pleadings in this matter. Commissioner
11 Wefald just showed me one of those documents. And
12 they have not been protected to this point.

13 MR. RICHARDS: What was the context for
14 those filings?

15 JUDGE HOBERG: They were included with
16 some of your motions for production of documents.

17 MR. NEGAARD: I didn't get them till last
18 week.

19 MR. RICHARDS: The transcript, I think, is
20 part of the motion, but I'm not sure whether 1 and
21 2 were.

22 JUDGE HOBERG: Commissioner Wefald.

23 COMMISSIONER WEFALD: It's in the Case
24 File Number 34, Document Number 34 in our case
25 file. It's the letter written on April 23, 2004,

1 received by the Commission on April 26, 2004. And
2 in that there are a number of documents. It might
3 be in Number 32. Excuse me. I'm going to have to
4 see. Number 32 was received on April 26, 2004, it
5 was docketed, and that's the one that includes some
6 information.

7 MR. NEGAARD: If I could, that was a
8 filing by CallSmart, those documents.

9 COMMISSIONER WEFALD: All right. And that
10 includes information that they have now said is
11 trade secret.

12 JUDGE HOBERG: Yes, that was a reply to
13 the motion for production and respondent's own
14 motion for production. Is that correct,
15 Mr. Selinger?

16 MR. RICHARDS: Yeah, I think CallSmart was
17 responding to an order that was issued requiring
18 them to file the --

19 JUDGE HOBERG: In fact, is that one of the
20 documents that was trade secret, or is that one of
21 the ones you withdrew?

22 MR. RICHARDS: Pardon me?

23 JUDGE HOBERG: Is that one of the
24 documents you're seeking trade secret protection on
25 now, or is that one of the documents you withdrew?

1 MR. SELINGER: That is one of the
2 documents that we are seeking trade secret. That's
3 the one you directed us to provide.

4 JUDGE HOBERG: Well, then, those need to
5 be considered as protected documents. Again, when
6 that authorization is granted -- presumably it will
7 be -- it should not be part of the public record
8 and should be stricken from the public record and
9 segregated. So, Commissioners, we need to take
10 those out of the public record and segregate those.

11 COMMISSIONER WEFALD: Thank you. The
12 whole of Number 32 should be removed?

13 JUDGE HOBERG: No, not the whole of 32.
14 We have just the one document.

15 MR. SELINGER: Two documents. There's two
16 documents, V and T.

17 JUDGE HOBERG: That's right. There's two
18 of them there.

19 COMMISSIONER WEFALD: See, right here,
20 it's this one here.

21 COMMISSIONER CLARK: I see that one.

22 COMMISSIONER WEFALD: And I think it's
23 this one. I don't know.

24 COMMISSIONER CLARK: Are you talking about
25 the Sprint document?

1 MR. RICHARDS: No, that's not protected.

2 COMMISSIONER CLARK: I'm just curious what
3 the second document is. I can see the first one.

4 JUDGE HOBERG: Are you talking about all
5 three of those pages that were attached?

6 MR. RICHARDS: I'm not sure what you're
7 looking at, sir. This is not even an exhibit.
8 These are not even exhibits.

9 MR. BURKE: Those are the NDA's.

10 MR. RICHARDS: That's all it is is the
11 NDA's.

12 MR. BINEK: Here's the -- that's the trade
13 secret exhibit.

14 JUDGE HOBERG: So this is not part of the
15 trade secret?

16 MR. RICHARDS: No. That's just a
17 confidentiality agreement.

18 COMMISSIONER WEFALD: Okay.

19 MR. RICHARDS: You know what? I'm sorry,
20 sir. Your Honor, the NDA's actually do have the
21 names on them.

22 MR. BINEK: Those have to be included as a
23 part of your request, because that's not a part of
24 any request before the Commission.

25 MR. RICHARDS: Right. And it's not an

1 exhibit in the case, so it doesn't really even need
2 to be in the record.

3 JUDGE HOBERG: The name of the company is
4 there.

5 MR. RICHARDS: I understand, but those
6 documents are not even a part of the record in the
7 case. They were not submitted by the complainants
8 as exhibits.

9 JUDGE HOBERG: That's true. But they are
10 in the Commission file.

11 MR. RICHARDS: Right. I think we'll have
12 to sort this through and have Mr. Selinger sort of
13 work back as to what needs to be done, working with
14 Mr. Negaard.

15 JUDGE HOBERG: And Mr. Binek.

16 MR. RICHARDS: Correct.

17 JUDGE HOBERG: Then I can rely on the
18 three of you to make sure that there are no trade
19 secret protected documents in the files of the
20 Commission that aren't segregated? I want them all
21 segregated that are trade secret protected.

22 MR. BINEK: I think we're going to have to
23 rely on SmartNET to identify what documents are
24 trade secret because, like I say, this has never
25 been identified as a trade secret document until

1 just now.

2 JUDGE HOBERG: Once the request is made
3 and granted of the specific documents, which
4 presumably it will be, I'm going to rely on
5 counsel, then, to make sure that those documents
6 are segregated in the Commission files. You're
7 right, they're not a part of the record right now,
8 other than Exhibit 1 and 2 which are trade secret
9 protected, but you're going to need to remove those
10 that are protected from the Commission files and
11 segregate those. Is that understood? Do you
12 understand that, Mr. Binek?

13 MR. BINEK: Pardon me?

14 JUDGE HOBERG: Do you understand what I'm
15 asking?

16 MR. BINEK: I understand. We're going to
17 have to rely on the parties.

18 JUDGE HOBERG: They have to make the
19 request first.

20 MR. SELINGER: We will make the request.

21 JUDGE HOBERG: Okay.

22 MR. BINEK: I guess another question
23 Mr. Fahn just raised is: How many copies of this
24 are floating around? I don't know.

25 JUDGE HOBERG: Presumably just the ones in

1 the Commission's file and the one in the public
2 file.

3 MR. BINEK: I've got one in my file.

4 JUDGE HOBERG: And the parties should only
5 have them. But they do need to be segregated and
6 protected.

7 MR. BINEK: The other thing, since we've
8 got new documents, our old trade secret documents
9 are no longer trade secret, but we have new
10 documents here, I'm going to request that all of
11 the parties here sign protective agreements like we
12 have signed when people examine documents in the
13 trade secret file, because these additional
14 documents now will be a part of the trade secret
15 file, so there should be a disclosure statement
16 signed -- a nondisclosure statement.

17 JUDGE HOBERG: A separate one in regard to
18 the new documents?

19 MR. BINEK: Right. Unfortunately, at this
20 point I'm not sure we know what all the new
21 documents are going to be.

22 JUDGE HOBERG: Well, they're going to be
23 Exhibit RTCG 1 and 2, as I understand it.

24 MR. SELINGER: And the ones that we just
25 discussed.

1 MR. BINEK: Is this document -- I guess
2 that's another question. Is this document that
3 we've just discussed going to be a part of trade
4 secret, or is it just being withdrawn from the
5 record?

6 JUDGE HOBERG: That would be one way of
7 handling it is withdrawing it from the record.

8 COMMISSIONER CLARK: Not from the hearing
9 record but from the case.

10 JUDGE HOBERG: Right, from the case.
11 Perhaps you want to do that.

12 MR. SELINGER: That sounds like a real
13 practical approach to solving the matter.

14 JUDGE HOBERG: Again, what you do in
15 regard to that, I'm going to have to rely on
16 counsel to make sure that the record is purged of
17 those documents or protected in some way.

18 COMMISSIONER WEFALD: I'll tear mine out
19 right now if you want me to.

20 MR. BINEK: If that's the company's -- if
21 that's SmartNET's request at this point, I think it
22 can be handled right now. We don't need to deal
23 with it anymore.

24 MR. SELINGER: That's our request.

25 JUDGE HOBERG: Okay.

1 COMMISSIONER WEFALD: Okay. So you want
2 us to take that out of 32.

3 MR. BINEK: If you want to hand me your
4 copies, I'll have them shredded.

5 COMMISSIONER CLARK: Both nondisclosures
6 or just one?

7 MR. SELINGER: Both nondisclosures.

8 MR. BINEK: In the Commission's file it's
9 a document -- I take that back -- it's a part of
10 document 32.

11 COMMISSIONER WEFALD: Okay. We'll hand
12 these to Bill. Or should we give these to you?

13 JUDGE HOBERG: You can just pass them down
14 to me for right now.

15 COMMISSIONER CLARK: Bill and Pat will do
16 the same.

17 MR. BINEK: And just once again for
18 clarification, are we talking about just the three
19 pages that are captioned Confidentiality Agreement,
20 the first page, and the second one is Mutual
21 Nondisclosure Agreement, or are we talking about
22 just the one page?

23 JUDGE HOBERG: All three pages.

24 COMMISSIONER WEFALD: All three pages.

25 JUDGE HOBERG: Okay. So you've concluded

1 your presentation, Mr. Negaard; is that correct?

2 MR. NEGAARD: Yes, sir.

3 JUDGE HOBERG: Mr. Richards. Well, we've
4 got a quarter to here. Perhaps it would be better
5 to start the new witness at 1 o'clock.

6 COMMISSIONER WEFALD: That would be fine.

7 JUDGE HOBERG: Let's recess for lunch
8 until 1 o'clock.

9 (Recessed at 11:45 A.M. until 1:00 P.M.)

10 JUDGE HOBERG: We're back from a luncheon
11 recess, and the complainants have completed their
12 case in this matter. Mr. Richards, you're going to
13 call your first and only witness, Mr. Burke; is
14 that correct?

15 MR. RICHARDS: That is correct, sir.

16 JUDGE HOBERG: Mr. Burke, please take the
17 stand. Mr. Burke, did you hear the admonition I
18 gave to the first witness in regard to perjury?

19 THE WITNESS: I did.

20 JUDGE HOBERG: Being advised of the
21 penalty for perjury, do you promise to tell the
22 truth in this matter being heard? If so, answer "I
23 do."

24 THE WITNESS: I do.

25 JUDGE HOBERG: Why don't you spell your

1 full name for the record.

2 THE WITNESS: Bruce, B-r-u-c-e, Burke,
3 B-u-r-k-e.

4 JUDGE HOBERG: Thank you. Mr. Richards,
5 please.

6 MR. RICHARDS: Thank you.

7 BRUCE BURKE,

8 being first duly sworn, was examined and testified
9 as follows:

10 DIRECT EXAMINATION

11 BY MR. RICHARDS:

12 Q. Good afternoon, Mr. Burke.

13 A. Hi.

14 Q. You've already stated your name. Can you
15 state your business address for the record, please.

16 A. 288 First Avenue West, Dickinson, North
17 Dakota 58601.

18 Q. By whom are you employed and in what
19 capacity?

20 A. What was that?

21 Q. By whom are you employed and in what
22 capacity?

23 A. Right now, with CallSmart. And I act as
24 the marketing manager, office manager, many other
25 titles. Basically, there's two of us that own and

1 operate the business.

2 Q. So you're a shareholder as well?

3 A. Yes.

4 Q. Thank you. Can you briefly describe your
5 experience in the telecommunications industry?

6 A. Sure. I started out with Northwestern
7 Bell in '78, and I spent about nine years with
8 Northwestern Bell/US West, and I was hired by
9 Consolidated Telephone in '86, and I spent 14 years
10 at Consolidated Telephone and worked as a marketing
11 manager, area supervisor, central office
12 supervisor, a couple other titles I can't remember,
13 and ended up as a plant manager.

14 Q. Thank you. Can you briefly tell us when
15 you first got the idea for CallSmart?

16 A. The idea came through an e-mail from a
17 company that was promoting this technology.

18 Q. And what year is this?

19 A. It was in 2000.

20 Q. Thank you.

21 A. And like Commissioner Clark said, at that
22 time VOIP was not a buzz word. Today it's a buzz
23 word. At that time it was -- we believed it was
24 the future, but we didn't -- I mean, it wasn't a
25 buzz word and it wasn't something that anybody even

1 seemed to really notice or care about or gave a lot
2 of credibility to.

3 Q. And when did you start the company?

4 A. The company -- we deployed our first
5 service in February of 2001, and it was in
6 Bismarck. Bismarck was our first location. And so
7 that's how that went.

8 Q. How many employees are there?

9 A. Two.

10 Q. And who's the other employee?

11 A. Clay Kerner.

12 Q. Can you describe the evolution of the
13 CallSmart network in North Dakota?

14 A. Yes, I can. Technically the network
15 evolution started in Bismarck, and the design of
16 that is very similar to or exactly the same as a
17 dial-up internet design. We have a local
18 connection, we have a gateway, an access gateway,
19 we have an authentication server and a billing
20 server, an internet router, and a connection to the
21 internet. And that was completed in February of
22 2001.

23 Then it evolved or grew to Fargo. I think
24 it was the end of that year we were in Fargo. And
25 basically it's an exact duplicate design of our

1 network in Dickinson. And then from there we added
2 another site in Dickinson, another location in
3 Dickinson, and we changed our design --

4 Q. I'm sorry. You earlier said it was an
5 exact duplicate of your network in Dickinson. Did
6 you mean Bismarck?

7 A. Fargo was. Fargo was an exact duplicate
8 of Bismarck.

9 Q. Bismarck. Thank you.

10 A. Okay. I'm sorry. Did I say Dickinson?

11 COMMISSIONER WEFALD: That's okay. We all
12 know what you meant.

13 THE WITNESS: Okay. And so then about six
14 months later, I think it was like the end of -- or
15 the beginning of 2003, I'm not exactly sure of the
16 time frame, we added Dickinson. And as the
17 plaintiffs brought forth, it is designed a little
18 bit different, and for a couple reasons.

19 Dickinson is where Clay and I live, that's
20 where our office is, and it's where we do all of
21 our testing. And so it gave us the opportunity to
22 have services on more of a TDM-type network. We
23 could test them on TDM and migrate them to IP. And
24 our plan was to -- as that -- as that voice circuit
25 or that circuit on the DCN network filled up, that

1 will only handle 24 conversations, or actually
2 23 -- 24 -- 24 conversations.

3 As that filled up, we were going to
4 transition that -- or are going to transition that
5 to another internet circuit or an IP connection.
6 So, I mean, it wasn't an orchestrated effort to do
7 anything other than design and prepare for the IP
8 as it grows into the future with new products and
9 services.

10 Q. (MR. RICHARDS CONTINUING) How much would
11 you estimate that you've invested -- that investors
12 have put into CallSmart today?

13 A. Well over \$200,000.

14 Q. We heard a fair amount of testimony this
15 morning from Mr. Anagnost concerning the routing of
16 your traffic. Is it fair to say that other than
17 the incidental traffic to Dickinson, that all of
18 the traffic goes through the public internet?

19 A. Yes. Yes. And I'd like to explain that
20 incidental traffic. We do have -- as described, we
21 do have traffic that goes between the two
22 communities, and I consider that incidental
23 traffic. We don't have all of the -- not all the
24 traffic that would generally go between there
25 actually takes that route. A lot of it does, you

1 know, what's there, but I actually would relate
2 that to more of a -- if you're familiar with the
3 term a leaky PBX, and actually the state of North
4 Dakota is doing that in their college network.
5 They have connections to their college network
6 around the country, and if someone from Grand Forks
7 wants to make a call to Dickinson, they can do that
8 and leak out the PBX through the PBX at the
9 Dickinson State College. So they can make more
10 like a local phone call through that. And very
11 similarly, that's what we're doing with that
12 connection between Bismarck and Dickinson.

13 Q. We heard some testimony earlier too from
14 Mr. Anagnost about his personal experience with the
15 CallSmart product. How has the quality of the
16 services that you have provided evolved?

17 A. It's evolved a lot. When we got into
18 this, it was marginal at best. You know, as
19 described in earlier testimony, it makes it sound
20 easy, like you just pick whatever conduit you want
21 between point A and point B and you just put it
22 there and it goes there and it's fine. But that is
23 not the case.

24 We worked extremely hard for three years,
25 and we're going on our fourth year now, to get the

1 quality to where it's acceptable and to where it's
2 good enough for the general public and business
3 applications. You know, we got into this, and we
4 believe that it is the future, and we believe that
5 it's an unregulated service that will -- you know,
6 that we can drive features to.

7 Q. Do you have plans to expand your
8 operations in North Dakota?

9 A. Yes.

10 Q. Can you briefly describe those?

11 A. Well, as we -- as we develop -- as we
12 develop these areas and get profitable, we
13 expand -- we plan to expand -- excuse me -- we plan
14 to expand in a couple areas. One area would be the
15 services that we provide. We've spent three years
16 cleaning up voice on the network. We didn't
17 think -- anticipate that we'd have to spend that
18 much time to get the voice quality acceptable, but
19 it took us a lot more time to do that than
20 expected.

21 And so our new service offering has been
22 delayed, but we are looking at new services. We're
23 experimenting with a new product that we call Phone
24 Home, and it's a product that we sent with a dozen
25 servicemen to Iraq, and it gives them the ability

1 to find an internet connection, and they can
2 actually make phone calls to their friends and
3 families in Dickinson through their computer with
4 no charge -- free of charge.

5 We're implementing what we call a callback
6 feature. It's where two calls are established from
7 an internet connection, and it's basically -- the
8 origination point is IP. The terminating points
9 are a call in each direction, and -- let me start
10 over in explaining how it works.

11 You would log onto the internet, to our
12 Web site, you would put in the number that you want
13 the call -- the destination number and the number
14 that you want the call to originate from, and you'd
15 hit enter, and our equipment originates two phone
16 calls. It calls the party that you want to talk
17 to, and then it calls you and ties the two calls
18 together.

19 And we're also working with another group
20 to try and -- to try and change voice to an e-mail
21 and vice versa, change e-mails to voice. We're
22 working with a group to perfect that. We've
23 started those talks. And the application that
24 we're looking at is our senior citizens that really
25 aren't -- they don't have the ability or the

1 interest in using a computer. It gives them the
2 ability to communicate into the internet with
3 voice, have those voice messages converted to wave
4 files and sent out as an e-mail to whomever.

5 Q. Thank you. Can you briefly describe the
6 current voice packages that you're offering to
7 residential and business customers in North Dakota?

8 A. Sure. We started out -- we started out as
9 a flat rate only unlimited product, and since then
10 now we have a couple different options. They
11 can -- they can still pay a flat rate for unlimited
12 long-distance, and that's to the 48 states and
13 Canada, or they can pay per minute to those same
14 areas. And plus about six months ago -- it's been
15 longer than that -- about eight or ten months ago
16 we've got -- we've included international calling.
17 Through CallSmart you can call anywhere in the
18 world now, and the rates are -- if anyone is
19 interested, the rates are very good. We have 3.9
20 cents to many, many international destinations
21 across the world.

22 Q. Are you aware of any other VOIP
23 long-distance or nonVOIP long-distance provider
24 offering a stand-alone long-distance product in
25 North Dakota?

1 A. I don't believe so. I think we're the --
2 as far as I know, we're the only company in North
3 Dakota that's offering this type of service to
4 North Dakotans. I think we're the only one.

5 Q. Just a couple of more quick questions,
6 Mr. Burke. What would be the result from your
7 perspective if the PSC granted the complaint in
8 this proceeding?

9 A. It would be detrimental to our business.
10 It wouldn't fit our business model.

11 Q. And why is that?

12 A. Right now I'm being charged -- I'm getting
13 bills from one of the ILEC's, and I calculated the
14 bill, and it's actually over 16 cents a minute.

15 Q. I'm sorry. What kind of bills are these?

16 A. CABS bills, carrier access bills.

17 Q. What is carrier access?

18 A. On the bill it says -- it describes it as
19 originating intraLATA access charges.

20 Q. And who's sending you those bills?

21 A. Consolidated Telephone.

22 Q. So they're sending you bills for carrier
23 access even though you're not purchasing carrier
24 access?

25 A. Right.

1 Q. How much is that rate again?

2 A. Just over 16 cents a minute.

3 Q. For just the access?

4 A. For just the access.

5 Q. Do you generally know what Consolidated
6 charges for retail long-distance services to its
7 own end user customers?

8 A. I believe they're 8 cents for interstate
9 and 12 cents for intra.

10 Q. For retail?

11 A. For retail.

12 Q. So would it be fair to say that if you had
13 to start adding 16 cents a minute to our intrastate
14 calls in North Dakota that you probably would not
15 have a competitively priced product? Is that
16 correct?

17 A. We don't have a business model that works
18 with that kind of an access charge.

19 Q. What action do you think the Commission
20 should take in this proceeding, Mr. Burke?

21 A. Well, I'd like to see the -- of course,
22 this is a biased opinion. I'd like to see the
23 complaint dropped and referred to -- referred to
24 the FCC and let them make a decision based on their
25 findings.

1 development, do you also understand that those are
2 not part of this complaint today?

3 A. Okay.

4 Q. Isn't it true that most of your customers
5 in North Dakota simply use a telephone -- the plain
6 old telephone system in order to make a call using
7 your network?

8 A. Yes.

9 Q. So you are utilizing the facilities of
10 another telephone company to make long-distance
11 calls on your network without any compensation
12 going to those companies; is that correct?

13 A. I don't know what arrangements our
14 customers have. But for the most part, the
15 customers are using their local lines to access our
16 network, yes.

17 Q. Okay. Have you ever sat down with the
18 ILEC that's sending you a bill and tried to resolve
19 this bill with them?

20 A. I did respond to a notice with them and
21 got a pretty nasty e-mail back, so I just dropped
22 it.

23 Q. Have you ever offered to sit down with
24 them and try and reach some resolution on the
25 issue?

1 infrastructure, and we have -- we have an advanced
2 application that we're putting on the internet.
3 And it took us a long time to get it to work well.

4 MR. BINEK: I have no further questions.

5 JUDGE HOBERG: Thank you, Mr. Binek.
6 Commissioner Clark, do you have some questions of
7 Mr. Burke?

8 COMMISSIONER CLARK: Just a couple.

9 EXAMINATION

10 BY COMMISSIONER CLARK:

11 Q. Getting back to the questions about
12 compensation, and Mr. Negaard had a question about
13 no compensation going to the local carriers, now,
14 there is some compensation going; right? I mean,
15 you're buying a line to dial into, there's
16 transport, all those contracts we looked at this
17 morning. Isn't the real question for the
18 Commission: Is that the right form of
19 compensation, the type of compensation that a
20 typical ISP would provide, the right type of
21 compensation that it should be falling under, or
22 whether access charges should apply? Is that
23 accurate?

24 A. I guess I'm not exactly sure what your
25 question is. I understand what you're saying, but

1 I'm not real sure --

2 Q. You're writing checks to somebody to
3 provide the service; right?

4 A. Right.

5 Q. To transport or -- the local numbers that
6 people call; right?

7 A. Right.

8 Q. So you are making that?

9 A. We are -- that's a true statement, that
10 the telephone companies are being compensated.
11 They're being compensated by the end user for the
12 local lines, and they're being compensated by us
13 for that connection from our internet access point
14 to the local telephone company. So there is some
15 compensation there as well.

16 Q. You mentioned the Consolidated bill that
17 you got. How did Consolidated know the number of
18 minutes to charge you? And was this for -- maybe I
19 should further clarify. Was this for Consolidated
20 customers who are within EAS that were calling the
21 Qwest number in Dickinson, or was it Consolidated
22 customers who are subscribers to Consolidated, the
23 CLEC, in Dickinson calling a Dickinson number?

24 A. Let me back up. Let me back up a ways by
25 saying that when we first deployed service in

1 Dickinson, we went to Qwest and we got a price from
2 Qwest, and we went to Consolidated -- I worked
3 there for 15 years; I got a lot of friends there --
4 and asked them if they were interested in offering
5 us the PRI connection, the local connection. I
6 said, If you're not interested, I understand, but I
7 know who you guys are, and you're in the local
8 community, and I'd like to support the local
9 community, and if you're interested in providing
10 service, I would take service from you if it's a
11 competitive rate to Qwest.

12 And they -- we went into a contract -- a
13 three-year contract to provide those services. We
14 went about six months, I'm guessing -- I'm not
15 sure -- and I met with -- I got called into a
16 meeting because we were trying to -- we were trying
17 to off net calls, terminate calls. They were
18 allowing us to originate calls, but they weren't
19 allowing us to terminate calls. And we asked them
20 for a slight reconfiguration on the PRI to allow us
21 to do that, and they called me in for a meeting and
22 said that they wouldn't make that change.

23 And I said, Well, that's fine. And they
24 said, And by the way, we're going to start charging
25 you local access. And so I said, Well, then

1 obviously you're not interested in our service. I
2 said, We'll just go to Qwest and get our service
3 from Qwest. And I asked them out of the contract,
4 and they let me out of the contract and we went on
5 our way.

6 And so to answer the second part of your
7 question -- or maybe it was the first part. How do
8 they know how much traffic it is? When they --
9 when we had the PRI set up with them, there's a
10 matrix built into the switch network that allows
11 you to look at originating and terminating
12 destinations. And as you cross that matrix, they
13 have measuring points that allow you to tell how
14 much traffic goes through that matrix point. And
15 I'm assuming that that's set up the same way now
16 with a destination to our Qwest phone number, local
17 access number.

18 So they're able to measure how much
19 traffic comes from their network to the Qwest
20 network through that phone number, but there's no
21 way for them to measure whether the calls are going
22 to Bismarck or whether they're going to Fargo or
23 whether they're going to New York, because it's
24 just a local phone call. Does that answer your
25 question?

1 Q. I think so. I just need to run through
2 some of the scenarios. So all that Consolidated or
3 whoever it would be, when a customer of theirs
4 calls your number -- your local number in
5 Dickinson, and then the number of minutes that flow
6 through that; is that correct? And so now that
7 would be the originating side?

8 A. They would be able to know the number of
9 minutes. They wouldn't know if it was a phone call
10 or a computer call or whatever, but they would know
11 that that was a -- that that was a call that
12 originated from their network and went to that
13 destination phone number in the Qwest network.

14 Q. Whether it's an EAS town or Consolidated,
15 the CLEC within Dickinson?

16 A. Yes. Yeah.

17 Q. Now, how about on the terminating side?
18 Would they know a CallSmart call coming into their
19 network on the terminating side or would they not
20 know that?

21 A. I don't believe they could probably
22 measure that. I don't know that for sure though.

23 Q. How would it appear on their or any other
24 phone company's system? It's getting terminated
25 from where? From a gateway; right?

1 A. Right.

2 Q. Is that the Sprint gateway?

3 A. The way it works --

4 Q. I guess it depends on whether it's a town
5 you're located in or not.

6 A. -- the call would come backwards out of
7 the PRI to terminate. And I'm guessing that in --
8 in North Dakota there's very little measured
9 service, if any. I don't know if anybody's even
10 really using it. And I don't believe that anybody
11 measures the local service. So I don't know that
12 that's -- that they're even trying to look for any
13 information that might tell them whether that comes
14 from -- where it comes from. I don't know that for
15 sure though.

16 Q. So the bottom line is, your best guess
17 that the bill that you got from Consolidated was
18 based on originating calls to the number that they
19 could identify, which is your number with Qwest; is
20 that right?

21 A. Yes, the bill is just for originating
22 access.

23 COMMISSIONER CLARK: I had another
24 question. I'll probably come back to it later when
25 I think of it. But that's all I've got for now.

1 sales tax application. And I'm not sure about any
2 other requirements. The accounting staff that we
3 had at that time took care of some of that, that
4 business stuff. We did apply for a reseller's
5 certificate and we have that.

6 Q. You do?

7 A. Yes. We had an application where a
8 customer in Bismarck was not comfortable with VOIP,
9 but they were comfortable with us and wanted to
10 order some type of service through us, and so we --
11 in order to do that, we needed a reseller's
12 certificate. But at the end of the day we didn't
13 get their business for either, and so we've never
14 utilized that reseller.

15 Q. But you have that certificate?

16 A. We applied for it and we got approval for
17 that, yes.

18 Q. And in your mind, that's for -- what
19 you're trying to tell me, though, is that's for a
20 different service than the one that you're here
21 describing today?

22 A. Right. It would be for a circuit switched
23 telephone long-distance service.

24 Q. And when you came in and applied for that
25 reseller's certificate, was it specific to that

1 service?

2 A. For that individual customer?

3 Q. Was it specific to that -- did you say a
4 circuit switched --

5 A. Oh, yes. Yes. It was specific to that,
6 yes.

7 Q. It was?

8 A. Yeah.

9 Q. And what year was that -- did you obtain
10 that?

11 A. I think it was -- I think it was 2002.

12 Q. 2002?

13 A. I believe it was.

14 Q. And under North Dakota law, if you -- if
15 you applied -- if you were required to get a
16 certificate from the Commission for your present
17 service, are you aware of what requirements that
18 would impose upon you?

19 A. I'm not sure if I understand the question.
20 Could you ask that one more time, please. I'm
21 sorry.

22 Q. If the Commission were to require you to
23 apply for a certificate to do business --

24 A. Okay.

25 Q. -- are you aware of what requirements that

1 would -- what requirements North Dakota law has in
2 place, then, for people who hold such a
3 certificate?

4 A. No, I'm not aware.

5 Q. Issue Number 4 is whether the respondent
6 is using the local service facilities of the
7 complainants. Are you using the local service
8 facilities of any of the complainants?

9 A. We actually aren't. Our customers use
10 their local facilities to get to us, but we're not
11 actually using them, no. We're using local -- not
12 of the plaintiffs. We're using local facilities to
13 Qwest Communications and IdeaOne in Fargo.

14 Q. But not of the complainants?

15 A. No. No.

16 Q. Going back to the FCC order that is dated
17 April -- was released April 21, 2004, and it's in
18 the matter of petition for declaratory ruling that
19 AT&T's phone-to-phone IP telephony services are
20 exempt from access charges. And on Page 1 of that
21 order the FCC clarifies -- says: We clarify that
22 under certain rules the service that AT&T describes
23 is a telecommunications service upon which
24 interstate access charges may be assessed. And
25 they're only talking, of course, about interstate

1 access charges, not about intrastate access
2 charges, because they have authority over
3 interstate access charges. Our Commission has
4 authority over intrastate.

5 A. Okay.

6 Q. All right. And then they emphasize -- we
7 emphasize, they say, that our decision is limited
8 to the type of service described by AT&T in this
9 proceeding, an inter-exchange service. And then
10 they go on and they define four things. So I'm
11 just going to ask you: Does your service use
12 ordinary customer premises equipment?

13 A. Yes. Some of it -- yeah. Yes, we do.

14 Q. I should have asked the whole question.
15 Does it use ordinary customer premises equipment
16 with no enhanced functionality?

17 A. The customer premise equipment is just a
18 phone normally.

19 Q. Does the service originate and terminate
20 on the public switched telephone network? Does
21 your service originate and terminate on the public
22 switched telephone network?

23 A. We know that our end of the service
24 originates on -- most of the calls originate on the
25 PSTN. Actually, whether it's a dial-up from a

1 computer or a dial-up from a phone, in that case
2 all the calls do originate from PSTN. On the
3 terminating side, we send our traffic to two VOIP
4 termination providers. And the reason -- I'd like
5 to explain why it's important that we don't -- that
6 we don't -- the names of those companies is what we
7 really want to keep a secret.

8 Through the process of getting the VOIP to
9 the point of where it's a quality product, a key
10 component of that is finding a termination provider
11 that is reliable, that can provide a quality
12 product. And it's taken us -- it's taken us
13 almost -- we've probably gone through six to eight
14 providers before we got to where we're at. And for
15 someone to be able to remove those struggles to get
16 to that point, you know, they don't have to spend
17 the money that we spent to get there.

18 Okay. And now to answer your question,
19 we're not -- we're not privy to where they
20 terminate their calls. If they've got agreements
21 with other companies in other areas to terminate
22 those calls, we don't know if they're all going
23 over the PSTN or if they're going to Vonage or
24 where they're going. We originate the calls and we
25 put them out on the internet, and how they're

1 treated on the other end is -- you know, I can't
2 answer that. I don't know for sure.

3 Q. The company who you deal with, the
4 internet provider, they make the determination of
5 how those calls are terminated? Is that what
6 you're telling me?

7 A. The termination provider, right. The
8 internet termination provider, right, they make
9 that determination.

10 Q. They make that determination of whether
11 they terminate on the public switched network or
12 whether they don't?

13 A. Yes.

14 Q. All right. And then Number 3 says: The
15 type -- I'm asking whether your type of service
16 undergoes no net protocol conversion and provides
17 no enhanced functionality to end users due to the
18 provider's use of IP technology.

19 A. We believe it does -- that it does make a
20 protocol change, and it makes that change in the --
21 at the gateway as it enters the internet. We
22 believe that there is a protocol change at that
23 point.

24 Q. And what is the protocol change that it
25 undergoes as it enters the gateway?

1 A. If the North Dakota Public Service
2 Commission would make a decision in our disfavor
3 and the FCC would make a decision in our favor, it
4 would be too late. And that's why I would -- we
5 would already be out of business. And I think that
6 if the -- really, that's why. We would not want
7 the state to make a decision that at some day -- at
8 some point may have been -- I don't want to
9 necessarily say the wrong decision, but a decision
10 that would be influenced by the FCC and maybe
11 overturned or changed. For us, that would be too
12 late. You know, we would feel like, you know, we
13 put our hearts and souls into this thing and got
14 into it at a time when no one cared. And now that
15 we got the quality where it's at, we're under the
16 gun and feel like we're being punished for bringing
17 the quality to a level to where it maybe worries
18 some of the telephone companies out there.

19 Q. You had testified too, to Mr. Negaard's
20 question, I think, that regarding the one contact
21 or, I guess, a bill or something being sent from
22 Consolidated, and he had asked if you had ever
23 initiated any negotiation or even discussion with
24 any companies about how you might resolve, and
25 maybe there is no resolution, but even negotiate a

1 more favorable access charge or relationship with
2 the companies, and you had stated that you -- you
3 know, you responded once and you got this e-mail
4 back and it seemed futile. But have any of them
5 ever come to you and said, You know, this is
6 interesting, and maybe we should sit down and talk
7 about how we could work something out here?

8 A. That's a good point, because it reminds me
9 that I've gone to Consolidated and West River
10 Telephone -- I don't know if I've gone to anyone
11 else -- and invited them into some joint -- a joint
12 effort, because I know how much power they have and
13 how much clout they have, and they have a lot more
14 depth financially than we do. And there wasn't the
15 interest to do that.

16 Q. Just one other thing. I found interesting
17 your plans for the future, the voice-to-e-mail and
18 e-mail-to-voice technology you're looking at,
19 originating calls via your Web site, calling both
20 parties and connecting it. One of the things
21 that's been rolling through my mind throughout the
22 day is: Okay, so this one gets settled one way or
23 another, this technology. What's next? And it
24 seems to me that could be a never-ending process
25 for regulators. I don't know if you have an answer

1 for that necessarily.

2 A. I would just like to ditto it and say
3 that's a good point, and that's exactly why an
4 early decision might be -- an early decision in our
5 disfavor might be the wrong one.

6 COMMISSIONER KRAMER: That's all I have,
7 Your Honor. Thank you.

8 JUDGE HOBERG: Thank you, Commissioner
9 Kramer. Commissioner Clark.

10 COMMISSIONER CLARK: Yeah, I did have a
11 couple I wanted to follow up on.

12 EXAMINATION

13 BY COMMISSIONER CLARK:

14 Q. Are you familiar with signaling functions
15 generally in the traditional PSTN? And the reason
16 I ask is I'm wondering if there's a difference with
17 the way signaling is handled separate from just the
18 voice itself and the way your network is set up as
19 opposed to the PSTN?

20 A. I would really be the wrong person to get
21 into that discussion with.

22 Q. The reason I asked -- and I'll make this
23 comment to both parties for consideration, because
24 I don't know that our record here today is going to
25 reflect it but I think it needs to at some point,

1 either in the written briefs that are submitted --
2 well, I guess that would be the place to do it. A
3 lot of this case is going to hinge on what is the
4 definition of "switched access" and why one
5 compensation scheme should or should not be
6 preferred over another type of compensation scheme,
7 what goes into switched access, what's the
8 components of that that the Commission has
9 considered in the past and why or why not that
10 should be the regime that applies as opposed to the
11 compensation regime that you've entered into with
12 the local callers -- or the local exchange
13 companies that you have.

14 The reason I ask that in particular was
15 just in looking at the Century Code and trying to
16 ferret out the definition of access, switched
17 access, and even going a step beyond there,
18 essential and nonessential services that are
19 defined in there as well, including packet
20 switching is one of the nonessential services
21 that's put in. I guess this would qualify as
22 probably a packet switched network.

23 I'd like to just go back along the lines
24 that Commissioner Wefald was asking regarding
25 termination, because I'm not sure that I'm entirely

1 clear whether these terminating companies -- and I
2 can understand why you don't want the names
3 revealed. Do the terminating companies handle all
4 of your VOIP termination, whether it's in state,
5 out of state, whether it's in an exchange that you
6 have a presence in or not?

7 A. Yes. They handle -- they handle all the
8 calls that do not get terminated on our own
9 network, through our own -- you know, we'll
10 terminate calls in Bismarck, Dickinson and Fargo
11 through our own PRI connections. Every other call
12 that we have that leaves -- or, you know, that gets
13 terminated gets terminated through those two
14 companies, whether they're in North Dakota, whether
15 they're in the other 49 states, or anywhere in the
16 world really. All the calls terminate in three
17 locations or between the other two termination
18 providers.

19 Q. And whatever your terms and conditions you
20 set up with them is what they are. But you have no
21 knowledge of what type of arrangements those
22 terminating companies have with any of the LEC's
23 that they are terminating to in state or out of
24 state. Do I have that right?

25 A. Yes.

1 Q. So they may be paying some form of access,
2 they may not be. You just don't know what the
3 arrangement is?

4 A. No, I don't know. I couldn't guess.

5 COMMISSIONER CLARK: That's all I've got.
6 Thank you.

7 JUDGE HOBERG: Thank you, Commissioner
8 Clark. Any further questions by the Commissioners?

9 COMMISSIONER KRAMER: None for me.

10 COMMISSIONER WEFALD: Not at this time.

11 JUDGE HOBERG: Mr. Richards, any further
12 questions for Mr. Burke?

13 MR. RICHARDS: No.

14 JUDGE HOBERG: Any further questions by
15 either of the other parties?

16 MR. NEGAARD: I have a couple questions if
17 I could, and I think it will help clarify a couple
18 of the Commissioners' questions.

19 JUDGE HOBERG: Mr. Negaard, please.

20 CROSS-EXAMINATION

21 BY MR. NEGAARD:

22 Q. You answered one of my questions,
23 Mr. Burke. You do terminate your own traffic in
24 North Dakota on your system?

25 A. We do send some calls over some PRI lines

1 that we lease from Qwest and from IdeaOne. We
2 terminate calls through those PRI connections.

3 Q. And because you were a customer of
4 Consolidated in Dickinson, a former employee of
5 theirs, they're obviously more aware of what you're
6 doing in the state, are they not?

7 A. I would think that they have a very good
8 understanding of what we're doing. They terminated
9 me because we started this business, so they have a
10 very good understanding of what we're doing.

11 Q. Isn't it true, Mr. Burke, you were doing
12 that on company time and that's why you were
13 terminated, because you were using company time for
14 your own self-employment efforts? Is that correct?

15 A. Where did you get that information? I
16 believe you're speculating, because they never told
17 me that.

18 JUDGE HOBERG: You can answer yes or no,
19 Mr. Burke.

20 THE WITNESS: No. No, that's not true.

21 Q. (MR. NEGAARD CONTINUING) And obviously
22 those people aren't here today to tell their side
23 of the story, are they?

24 A. I believe they are. Aren't you
25 representing them?

1 Q. Well, I don't see them in the room today.
2 My other question to you had to do with your
3 agreement with company T.

4 A. Okay.

5 Q. Would you agree that that states it's a
6 reciprocal agreement, that you are obligated to
7 terminate their traffic over your facilities in the
8 state of North Dakota?

9 A. That is a reciprocal agreement, and we set
10 that up because they were interested in some
11 international destinations that we had. There was
12 no -- there was no intention to terminate any of
13 their traffic in North Dakota, and we have not
14 implemented any part of the reciprocal agreement.
15 They saw our rates on the Web site, and we had two
16 rates in there to some country, Turkestan or
17 something, and there was a misprint and they --

18 Q. Can I ask you: Does the agreement say
19 that you're obligated to terminate their traffic in
20 the state of North Dakota? Is that what the
21 contract says?

22 A. I don't know. I don't know.

23 Q. But in answer to the Commissioner's
24 question, if this company has contracts -- any
25 traffic that comes in to you, you're not paying

1 terminating charges, are you? You're not paying
2 terminating access?

3 A. I do not know what our rate to them
4 includes. I know what our rates are that they're
5 charging us. Now, whether that includes their cost
6 of termination, I don't know.

7 Q. Well, let me ask you: Any traffic you
8 terminate on the public switched network in North
9 Dakota you do not pay access charges for that
10 terminating traffic, do you?

11 A. On the traffic --

12 MR. RICHARDS: I think that question has
13 already been asked and answered. I think he said
14 earlier that he doesn't know the arrangements that
15 his termination providers had in North Dakota. I
16 think we've sort of been over this already.

17 THE WITNESS: Can I clarify?

18 JUDGE HOBERG: You can respond. Do you
19 want to repeat the question?

20 THE WITNESS: It's kind of a two-part
21 question. There's traffic that terminates in North
22 Dakota that we terminate through our PRI's. Is
23 that what you're asking about?

24 Q. (MR. NEGAARD CONTINUING) Right. You
25 don't pay terminating access on that traffic, do

1 you?

2 A. No. That's a local connection. We're
3 paying our PRI rate for that.

4 Q. Thank you. I think that was my question.

5 A. Okay.

6 Q. And you just said there were two types of
7 traffic that you terminate. That's one of them.
8 What's the other type of traffic?

9 A. The other type of traffic that would
10 terminate in North Dakota is what gets terminated
11 through our VOIP termination providers. That's the
12 other type.

13 Q. Okay. If one of these termination
14 providers was terminating traffic through another
15 carrier such as yourself that wasn't paying
16 terminating access, then the local company wouldn't
17 be getting any terminating access either, would
18 they?

19 A. I don't know what arrangements they would
20 make with their companies.

21 MR. NEGAARD: Thank you. I don't have
22 anything further.

23 JUDGE HOBERG: Thank you, Mr. Negaard.
24 Any further questions of Mr. Burke? Mr. Binek?

25 MR. BINEK: Yes. First of all, though, I

1 just wanted to throw out a possible suggestion
2 concerning Commissioner Clark's request for an
3 explanation of the switched access or access in
4 general. And the suggestion that I would have so
5 that we clearly have it as part of the record is
6 that the parties either separately or possibly
7 jointly provide a statement in response to that
8 request and that it be filed as a late-filed
9 exhibit rather than being included as a part of the
10 briefs.

11 JUDGE HOBERG: Mr. Richards.

12 MR. BINEK: That way it would clearly be a
13 part of the record.

14 MR. RICHARDS: I think it's unreasonable
15 to ask a party that is a defendant in a case to
16 help make the plaintiffs' case. If they haven't
17 done a good enough job for the Commissioner, the
18 chairman here, to understand whether or not access
19 charges apply, the burden is on them to meet this
20 case.

21 My client does not have any experience in
22 this area. I'm not sure what we can lend to any
23 discussion on whether access charges apply or don't
24 apply here. You know, give us the pistol, we'll
25 shoot ourselves. I'm not really sure what the

1 request is and how we can add to a discussion given
2 that it's the ILEC's who write the tariffs who
3 should be the ones that know them inside and out,
4 whether they should apply, what they should apply
5 to, and I'm not sure how we can get into that
6 discussion.

7 I think he has said already that we use
8 facilities to originate traffic using the EAS or
9 other types of connections, PRI connections. He's
10 paying for those facilities. And now the
11 suggestion is from the plaintiffs that we should be
12 buying another type of service to do what they want
13 us to do so we can pay them to do it. So I'm sort
14 of just dumbfounded by the request that we need to
15 sort of help on this when it should have been their
16 burden in the initial complaint to show why these
17 access charges apply.

18 JUDGE HOBERG: Mr. Negaard, is this
19 something your expert can testify on?

20 MR. NEGAARD: It's a statutory definition.
21 It's my understanding it's in the statute.

22 MR. RICHARDS: I think the chairman's
23 request had to do with the components of access
24 charges. And I think your witness has already
25 testified that access charges -- and we can go back

1 and look at the transcript -- don't apply, were
2 meant for a circuit switched telephone network and
3 not an ISP network. So what you're trying to say
4 is: How can we fit a square peg into a round hole?
5 I'm sort of perplexed as to how we can help on that
6 part of the debate.

7 JUDGE HOBERG: Mr. Binek, what are you
8 looking for besides the statutory definition?

9 MR. BINEK: I'm just trying to find a way
10 for the response that Commissioner Clark is asking
11 for to be an exhibit in the record, whatever that
12 response is.

13 JUDGE HOBERG: Well, I think he's
14 conferring with his expert about perhaps whether he
15 might recall him. Mr. Negaard.

16 MR. NEGAARD: I wasn't practicing in front
17 of the Commission when that statute was passed, the
18 switched access. My understanding is that it's a
19 term that's commonly used in the industry and it
20 has a meaning commonly understood in the industry
21 of what switched access is, and NECA has some
22 defined standards about what switched access is.

23 COMMISSIONER CLARK: Perhaps if I can
24 clarify, that would be helpful. I understand that
25 it's in the statute, and I don't think the statute

1 was ever necessarily contemplated with some of
2 these new technologies that are evolving. So what
3 I'm trying to find out -- of course, we have to
4 base our decision on a record in accordance with
5 the statute, and that is what it is. But trying to
6 connect examples such as the ISP, why do we not
7 charge access charges for ISP's, whereas, in this
8 case you're trying to establish why the type of
9 service based on, I guess, the functionality of the
10 service provided should be charged access charges.

11 And I think Mr. Richards is right, it is
12 your obligation to build a case. The burden is on
13 you. So what I'm asking for is any clarification
14 either through the record or the briefs that you
15 submit that you can tie those concepts together
16 which gets to the very heart of what is access, why
17 is it applied in certain situations, and why it
18 should be applied in this situation. I think you
19 get into the factors of what is -- I haven't been
20 through an access case yet, but what specific
21 components go into the Commission deciding access
22 charges and why is it -- I'm trying to link up so
23 that we have a basis to make this decision on the
24 record.

25 MR. NEGAARD: My way of addressing that is

1 that I think that the FCC, in looking at their
2 decisions, and the way Congress has looked at this
3 in the federal act, is to make a distinction
4 between telecommunications providers and to make a
5 distinction between service providers, information
6 providers. I don't think that they've necessarily
7 taken a look at a definition of what components
8 these different companies are using within. They
9 look at the way the service has been offered to the
10 end user and what the functionality of that service
11 is to the end user. And that is where they have
12 given their bright line litmus test.

13 It may be in the notice of proposed
14 rulemaking at some point or another they start
15 using a different definition. But my problem is, I
16 think until now -- and if you'll look back at the
17 court cases and the precedent that's been
18 established, they have not looked at those types of
19 issues. They've looked more at is this what we --
20 does it look like a duck and sound like a duck type
21 analysis, and that is, is it information provision
22 or is it telecommunications provision, and that's
23 the way they made the definition on whether or not
24 access should be paid or not.

25 COMMISSIONER CLARK: I'm also trying to

1 get to -- and I can confer with counsel and
2 Mr. Fahn to help me out with this. As I said, I
3 haven't gone through an access case yet, so I'm at
4 a bit of a disadvantage. But there are
5 undoubtedly -- within access cases there are things
6 that commissions are supposed to take into account,
7 different equipment that's to be accounted for, so
8 on and so forth, depreciation schedules for that
9 equipment.

10 And what I'm curious about is: In the way
11 that this network works, are there things that are
12 taken into account in access that wouldn't be
13 utilized by the type of provider that CallSmart is,
14 which would be something the Commission would want
15 to know and take into consideration whether access
16 should apply here, or does it have all of the same
17 uses of the network that we consider when we figure
18 access rates?

19 MR. NEGAARD: And my answer to that,
20 Commissioner, would be in today's world internet
21 service would be treated like any other service,
22 except Congress said, Hands off. You can't touch
23 it. We're not going to allow that in the
24 telecommunications network to be regulated. And
25 there was no bright line test given except that we

1 all recognize and know in today's world that an
2 internet service provider does not pay access, does
3 not subject themselves to the same regimen that users
4 of the public telephone switch network are.

5 COMMISSIONER CLARK: Did that come out of
6 the ISP order?

7 MR. RICHARDS: It's out of the computer
8 inquiry decision, and there's been a long time
9 exemption from access charges for internet
10 services. Mr. Negaard is correct. I think also,
11 too, you've got an issue here too as to whether
12 we're talking about intrastate and interstate to
13 the extent that the traffic goes out through the
14 internet, at least with respect to reciprocal
15 compensation, and the FCC decided that traffic
16 intended for ISP's was all considered to be
17 interstate.

18 So the question too is whether we -- if at
19 some point you want to look at this, you also,
20 then, have to look at the issue whether it's
21 appropriate even to apply any intrastate access
22 charges to this. Or is it more appropriate that it
23 all be -- if you're going to make that decision, to
24 be at an interstate rate. It gets into a very
25 complicated question. Again, I go back to my very

1 fundamental point. They brought the complaint.
2 This should have been part of their record. And if
3 it's not, then they haven't met their burden at
4 this point.

5 And for them to be able to introduce
6 evidence -- factual evidence as to how this all
7 pieces together in their brief for the first time
8 really concerns me that they didn't put somebody up
9 here that we could cross-examine and have an
10 opportunity to discuss this issue with. It goes
11 to -- you're entirely right, Mr. Chairman, it goes
12 to the heart of this issue.

13 JUDGE HOBERG: We won't be talking about
14 facts in the briefs, but he was asking if perhaps
15 it was a late-filed exhibit. Do you have any
16 further evidence to present in regard to
17 Commissioner Clark's concern and inquiry?

18 MR. NEGAARD: Maybe it would be helpful to
19 me if I understand what the question is. It wasn't
20 laid out as one of the issues, I don't think. I
21 know that you had questions about the
22 jurisdictional issue. We talked about that at the
23 start of the hearing. Are you looking for a
24 definition of switched access as it's used in the
25 North Dakota Century Code? I guess that's my

1 question.

2 MR. BINEK: We can read that.

3 COMMISSIONER CLARK: I can read that.

4 COMMISSIONER WEFALD: That's under Number
5 18, under 49-21-01-18.

6 COMMISSIONER CLARK: Well, I don't know
7 that it's going to be helpful to go around on this
8 much longer. Bill, if you're willing to withdraw
9 the request, that's fine. I think folks understand
10 what the heart of the question is, which is why
11 should -- on one hand, ISP calls it not subject to
12 switched access but this would and trying to tie
13 that somehow to something in the record that's been
14 presented or tie it somehow to state statute. I
15 don't know if you'll find the exact thing I'm
16 looking for.

17 JUDGE HOBERG: So are you withdrawing the
18 request, Mr. Binek?

19 MR. BINEK: Yeah, I guess.

20 COMMISSIONER WEFALD: Can we take a short
21 break? I wanted to talk to the staff for a few
22 minutes, and it would be helpful for me to be able
23 to do that.

24 JUDGE HOBERG: Let's take ten minutes now.
25 Let's take a ten-minute recess.

1 (Recessed at 2:06 P.M. until 2:20 P.M.)

2 JUDGE HOBERG: Okay. We're back on the
3 record for, I think, the conclusion of the hearing
4 but we still have Mr. Burke on the stand. Any
5 further questions of Mr. Burke at this time?

6 MR. BINEK: Yes.

7 JUDGE HOBERG: Mr. Binek.

8 MR. BINEK: I do.

9 EXAMINATION

10 BY MR. BINEK:

11 Q. There's been considerable discussion about
12 the AT&T decision that the FCC handed down. I'd
13 like to have you explain the differences between
14 the system that SmartNET has and the system that
15 AT&T was using or is using, if you can distinguish
16 the differences between your systems. And there
17 was some testimony earlier, but I guess I'd just
18 like some clarification.

19 A. Okay. I think the major clarification --
20 there's two points that I'd probably try and get
21 across. The major difference is we truly are what
22 we feel in the -- and what the FCC was really
23 trying to promote was develop products over the
24 internet -- over the public internet, and we truly
25 are sending our traffic out on the public internet.

1 It collects locally, and our traffic does go out
2 onto the internet. And we're not -- we're not just
3 using it as a -- as a piece in between. Okay.
4 That's a major point.

5 Another thing that I see in what I read --
6 and, please, I don't claim to be an expert, but
7 from what I read is that AT&T's customers don't
8 have any idea that they're doing anything different
9 than dialing 1 plus. They have no choice in
10 deciding if they're going to use VOIP to -- if all
11 they're interested in is a better rate.

12 They just -- AT&T has embedded in their
13 infrastructure what they consider -- what they term
14 as a six-inch rule. Somewhere in the network they
15 stick in six inches of IP, and because it converts
16 to IP, they call it internet. And I think it's
17 because of companies like that that we're having
18 this struggle. And I think that's a major impact
19 on why the FCC is really struggling with what's
20 right and what's wrong. It's because you put
21 something out there and some companies use it how
22 they think the FCC intended for it to be, and other
23 companies do it completely different or go to the
24 other end of the spectrum. Does that answer your
25 question, Bill?

1 Q. I think so. There was some earlier
2 mention -- I don't remember who it was -- about the
3 1 plus dialing and that being a distinction between
4 SmartNET and AT&T. Would you explain that
5 difference.

6 A. I'll try to. AT&T -- the way theirs is
7 set up is theirs is truly a 1 plus, an equal access
8 design to where the customer picks a carrier by --
9 with their local telephone company. They pick who
10 they want their long-distance telephone company to
11 be. And because this customer picked AT&T, that's
12 the difference. The 1 plus really is an equal
13 access, I'm going to select a carrier, I pick the
14 phone up, I dial 1 plus, and I go to the carrier
15 that I selected automatically.

16 And the difference with us is you dial a
17 local phone number, and we don't require our
18 customers to dial 1 plus. It accepts it either
19 way. But they dial our local access number and
20 they get a message that says, Please enter the
21 number you wish to call, and you dial the
22 destination number.

23 Q. And is that the distinction that the FCC
24 is talking about in this Footnote 58 in the AT&T
25 decision on Page 10?

1 A. Excuse me. What page?

2 Q. Page 10. I'm referring to the last
3 sentence in Paragraph 58 -- or Footnote 58. I'm
4 sorry.

5 A. I believe that that's what that means. In
6 the telephone industry 1 plus usually is an
7 indication that it is a -- is an equal access 1
8 plus environment, meaning that you select your
9 carrier by picking it when you sign up for local
10 service, and you can pick an intraLATA carrier, and
11 you can pick an interLATA or interstate carrier,
12 and that's usually what the 1 plus indicates is
13 when you pick a carrier when you sign up and you
14 dial 1 plus, you automatically go to the carrier
15 that you previously selected.

16 Q. Do you know what percentage of your
17 intrastate calls are terminated by your ISP
18 providers?

19 A. That we terminate ourselves compared to
20 what our VOIP providers terminate?

21 Q. Yeah.

22 A. We don't. I don't know.

23 Q. Do you know if it's most of the calls that
24 you terminate? Do you terminate the majority of
25 them? You have no idea?

1 Bismarck to Dickinson or the whole number of cities
2 you can call in the state, a customer of yours in
3 Dickinson, you choose to call Fargo or Bismarck, so
4 you're using the PRI connection that you terminate
5 off of, so you're terminating that, not your
6 terminating provider that you contract with, in
7 that case is the call still going out into the
8 public internet at some point? So when you call
9 Dickinson to Bismarck, does it ever get converted
10 at the gateway into VOIP, or is it all just a
11 regular phone call basically?

12 A. We have two gateways in Bismarck. One
13 gateway is connected to the Dickinson PRI, the
14 other gateway is connected to the Bismarck PRI.
15 And every call is converted to IP. Okay. Every
16 call is converted to IP. Every call goes on the
17 internet. Now, there's some question whether that
18 local -- or that leased circuit between DCN -- that
19 seems to be the challenge that everybody is
20 referring to. There's a challenge that that call
21 terminates on one gateway, and if it's to Bismarck,
22 it does traverse the same network that the internet
23 is connected to, goes to the other gateway and gets
24 connected through the PSTN. Our design to do
25 that -- I mean, it wasn't a construction plan

1 design to really get by the system. It's an
2 interim solution, and as the traffic justifies it,
3 that will become an IP connection. That gateway
4 will move to Dickinson.

5 Q. In the case of -- then it would become
6 similar to the situation between a call originating
7 on your -- a customer of yours originating a call
8 from Bismarck and calling Fargo, is that right,
9 where it hits the gateway in Bismarck, goes into
10 the cloud, and then exits the gateway, terminated
11 by you?

12 A. Yeah.

13 Q. Sort of in reverse through your IdeaOne?

14 A. Yeah. Every single call goes IP no matter
15 where it goes. Every call we have makes that IP
16 protocol conversion.

17 Q. The only difference is your private
18 transport between Dickinson and Bismarck?

19 A. Pretty much, yeah.

20 JUDGE HOBERG: Thank you, Commissioner
21 Clark. Any further questions of Mr. Burke?

22 MR. NEGAARD: Just one question.

23 RE-CROSS-EXAMINATION

24 BY MR. NEGAARD:

25 Q. The gateways you have in Bismarck, they're

1 in the same building?

2 A. Yes.

3 Q. Are they more than six inches apart?

4 A. They're probably 26 inches. I don't know.

5 Q. And you indicated that those are some of
6 the systems that you think are not operating within
7 the gambit of what the FCC intended?

8 A. Not necessarily. I think, you know, I've
9 tried to explain that our Dickinson location is
10 under -- is more like our test bed, and there was a
11 few other reasons why that gateway ended up in
12 Bismarck. And I could bore everyone with the
13 details of how we didn't have an office location in
14 Dickinson at the time and many other housekeeping
15 type of issues.

16 The cost to transport that PRI to Bismarck
17 is the same cost to transport internet to
18 Dickinson. So, I mean, it's kind of six of one,
19 half a dozen of the other. The traffic between
20 them is, for the most part, incidental traffic.
21 It's similar to a leaky PBX. I know that -- and
22 I'll just stop there. Otherwise I'll be repeating
23 myself.

24 MR. NEGAARD: I don't have anything
25 further.

1 JUDGE HOBERG: Thank you, Mr. Negaard.

2 Anything further of Mr. Burke?

3 (No response).

4 JUDGE HOBERG: Thank you, Mr. Burke. Any
5 further witnesses, Mr. Richards?

6 MR. RICHARDS: No, sir.

7 JUDGE HOBERG: Mr. Negaard, are you
8 calling any witnesses in rebuttal?

9 MR. NEGAARD: I would like to cover one
10 issue, if I could.

11 JUDGE HOBERG: With a witness?

12 MR. NEGAARD: I would like to reserve the
13 right to call a witness, depending on what the
14 ruling is on an issue that I have.

15 MR. RICHARDS: I'm sorry. I didn't hear
16 that.

17 MR. NEGAARD: I would like to reserve the
18 right to call a witness concerning an issue after I
19 make an offer concerning the records of the Public
20 Service Commission.

21 JUDGE HOBERG: Why don't you make your
22 offer then.

23 MR. NEGAARD: Okay. The question having
24 to do with switched access -- and it wasn't noticed
25 as an issue today. I did not know -- we're not

1 asking today that the Commission issue a ruling
2 specifying the compensation that's due to each
3 complainant. We're not asking for that. What
4 we're asking for is a ruling on the concept that
5 this traffic is subject to intrastate.

6 And if I haven't answered your question,
7 perhaps I can and make this offer, that I would
8 offer that this Commission take notice of the
9 tariffs that are on file from all the companies in
10 the state that define the elements that are
11 included within their switched access tariff. And
12 so the definition of what's included, that element
13 could vary from company to company, and the tariff
14 amount would vary from company to company,
15 depending on what portions of the network that
16 Mr. Burke's company would use.

17 So I'm not asking for a detailed order
18 because we don't yet have the records in order to
19 prove how much of those tariff charges Mr. Burke's
20 company should be obligated to pay. We're just
21 merely asking for an order concept that he is
22 subject to access charges so that then the tariff
23 can be applied in another form to those tariffs.
24 Those tariffs are on file. They're public records.
25 They're part of the Public Service Commission

1 records.

2 It's my understanding -- I'm not a tariff
3 expert, but my understanding is that those tariffs
4 define the element of switched access that are
5 covered by each individual tariff to serve as
6 elements from each one of those companies.

7 And so I would ask that the Commission
8 take notice of those public records that reside
9 here in these offices and those tariffs that are on
10 file.

11 JUDGE HOBERG: Mr. Richards.

12 MR. RICHARDS: I don't know what to say.
13 I'm a little -- their complaint in Number 3 says:
14 Require the respondent to pay the complainants for
15 access fees for the use of their local switched
16 network facilities in accordance with North Dakota
17 law and prior Commission rules and orders.

18 They've had -- this was their complaint.
19 As part of the notice of hearing in this case, one
20 of the issues is whether respondent is liable to
21 complainants for compensation for the use of local
22 service facilities. To come in here and suggest
23 that these were not issues that they should have
24 addressed during this hearing is sort of an affront
25 to the intelligence of this Commission, number one.

1 Number two, to take administrative notice
2 of those tariffs -- Mr. Negaard had the opportunity
3 through his witness to offer up whatever relevant
4 pages of those tariffs. My experience with access
5 tariffs -- and I have been in access charge
6 proceedings -- is those are thousand-page documents
7 potentially, and the question as to whether it's
8 going to apply to or not apply to my client should
9 have been something that they dealt with in this
10 case.

11 And so you can take administrative notice
12 of anything you want, but the reality is: What's
13 the relevance of that issue when they haven't put
14 together the point A and point B? So I don't
15 really object to taking administrative notice of
16 these tariffs, but I don't understand what the
17 point is.

18 We're not talking about the level of
19 compensation. The threshold issue which they were
20 supposed to address is whether these access charges
21 apply to their network. They had an opportunity
22 through deposition, spent a day with Mr. Burke in
23 Dickinson, they've asked us dozens of interrogatory
24 requests, we were not permitted to ask any of the
25 plaintiffs in this case. They've had every

1 opportunity to make a case today.

2 Mr. Burke is half of CallSmart. He has
3 spent hours -- countless hours preparing for this
4 hearing, spending legal fees. He's got two lawyers
5 sitting here with him. Are there even people here
6 from the plaintiffs? Did they even bother to come
7 out? They wrote two checks to their counsel and
8 their consultant. He's half the company who has
9 spent dozens of hours here. And, you know, it's an
10 affront that they haven't made their case.

11 And so do I object? No, I don't object.
12 You want to have the tariffs in there? I have no
13 idea what purpose they're going to serve, how
14 anyone is going to interpret them, how they're
15 going to be used. No one is here to talk about how
16 they apply to the witness here or to the witness's
17 company. But I'm just dumbfounded as to the
18 request at this point.

19 JUDGE HOBERG: Mr. Binek, any comment?

20 MR. BINEK: I have no comment.

21 JUDGE HOBERG: Any further response,
22 Mr. Negaard, to your request?

23 MR. NEGAARD: No, sir. I understand
24 there's no objection.

25 JUDGE HOBERG: No, there's no objection.

1 I'm not sure that they're helpful or relevant
2 either, but I will take official notice on behalf
3 of the Commission of any definitions of switched
4 access that we may have in the tariffs on file that
5 may be applicable to this. Okay. Mr. Negaard,
6 anything further you wanted to present then?

7 MR. NEGAARD: It's been a long day, so
8 I'll just make a brief summary comment, and then
9 I'd like to file a brief.

10 JUDGE HOBERG: You don't have any other
11 evidence to present?

12 MR. NEGAARD: No, sir.

13 JUDGE HOBERG: Okay. Yeah, I'll allow
14 some brief summary comments, but I think your
15 intent is to do a brief. You too, Mr. Richards?
16 Is that correct?

17 MR. RICHARDS: If that's what the
18 Commission would like.

19 JUDGE HOBERG: You would like to file a
20 brief?

21 MR. NEGAARD: Yes, sir.

22 JUDGE HOBERG: We'll talk about a briefing
23 schedule after your final comments. Mr. Negaard.

24 MR. NEGAARD: I just wanted to state,
25 first of all, the intention of the complainants is

1 not to put Mr. Burke out of business. We
2 understand that the world is changing. It's just
3 that there's some concern out there when these
4 companies that have tried to comply with the
5 regulations, have filed and received their PC&N's,
6 have gone in and asked for permission to do things.
7 They want this company to do the same thing.

8 Mr. Burke has chosen the business model
9 and the method that he has chosen to follow. We
10 think that that's an obvious choice that he's made
11 if the decision, as we believe it has, the AT&T
12 decision by the FCC is contrary to that, we would
13 urge that the Commission follow that decision and
14 to ask that Mr. Burke's company comply. We're not
15 trying to be penal. We want his company to comply
16 with the rules and regulations of the state of
17 North Dakota. And I will file a brief.

18 JUDGE HOBERG: Anything you want to say as
19 closing remarks?

20 MR. RICHARDS: Yeah. It's obvious to us
21 that after about six hours that the plaintiffs have
22 failed miserably to try to meet the standard of
23 passing upon any burden of showing that their
24 complaint has any merit.

25 And hopefully this Commission will realize

1 that the world is changing, and I am -- I was most
2 impressed, frankly, by the insightfulness of the
3 questions that came from the Commissioners today,
4 because I think that you have taken a fairly
5 complicated issue and probably gotten to the heart
6 of how complicated it is.

7 All of these matters are before the
8 Federal Communications Commission. We have, I
9 think, established that the AT&T case does not
10 apply to Mr. Burke's company on a number of
11 grounds. The witness for the plaintiffs even
12 testified that the access charges that they are
13 relying on so heavily here were meant for circuit
14 switched technology and not for an ISP network.

15 I think that we have done our best to make
16 it clear that the allegations raised by the
17 plaintiffs in this case are meritless. We've also
18 shown through the testimony of Mr. Burke that an
19 adverse decision in this case will not only be
20 harmful but potentially deathly to Mr. Burke's
21 company.

22 And so through this case you have an
23 opportunity to tell the world how this Commission
24 views VOIP and what the technological and
25 telecommunications landscape is going to be in

1 North Dakota for many years. Thank you.

2 JUDGE HOBERG: Thank you, Mr. Richards.
3 Any closing comments, Mr. Binek?

4 MR. BINEK: No.

5 JUDGE HOBERG: Okay. I want to stress
6 today that we have the red jacket file in this
7 matter, but the record for making the decision is
8 the exhibits that we have offered and admitted
9 today as well as the testimony that will be found
10 in the transcript of the two witnesses today.

11 So we have Exhibits 1 through 8, 20, 21,
12 and then we have official notice taken of the two
13 FCC documents or orders as well as the last
14 official notice that was taken of the Commission
15 tariffs that are on file. That is the basis for
16 making the decision today.

17 And two of those documents are trade
18 secret protected. And I believe if you haven't
19 signed one of these protective agreements, you
20 should sign it before you leave today. You must
21 actually. And presumably there will be an
22 additional filing by the respondent in this matter
23 that will comply with the rule and then be granted
24 trade secret protection for RTCG 1 and 2. And they
25 will be kept in a sealed envelope under that

1 protective order.

2 All right. Mr. Negaard, I'm contemplating
3 that the complainant will file a brief in this
4 matter first and then a brief by the respondent,
5 and a reply brief by you as you deem it necessary.
6 Is two weeks sufficient?

7 MR. NEGAARD: By the 8th? No problem. I
8 can do that.

9 JUDGE HOBERG: An additional two weeks, so
10 is a month from today sufficient for you?

11 MR. SELINGER: Two weeks is tough for us.

12 JUDGE HOBERG: Four weeks from today.

13 MR. SELINGER: Yeah, but from when we get
14 it. We need at least a month just to coordinate
15 everything with Mr. Burke and myself and
16 Mr. Richards.

17 JUDGE HOBERG: Were you intending to have
18 the transcript prepared?

19 MR. NEGAARD: Not at this time.

20 JUDGE HOBERG: Okay. How about three
21 weeks?

22 MR. SELINGER: I guess we'd like a month
23 just to give us time to do things, to figure out
24 where we're going from here. It's a very small
25 company. To be frank, our biggest decision is

1 going to be: Do we incur more legal expenses?
2 Because of this, he has to incur more legal
3 expenses? And is he going to use Mr. Richards to
4 do that or myself? I would just request a month.

5 JUDGE HOBERG: Okay. Do you want a month
6 too then, Mr. Negaard?

7 MR. NEGAARD: No. Two weeks.

8 JUDGE HOBERG: Two weeks, a month, and
9 then another week?

10 MR. NEGAARD: That puts us out to July 8th
11 for their brief?

12 JUDGE HOBERG: Sounds about right.

13 COMMISSIONER WEFALD: At the present time
14 is the only party who's going to receive a copy of
15 the transcript is the BEK group?

16 JUDGE HOBERG: No one has requested a
17 transcript yet. So one will not be prepared unless
18 requested.

19 COMMISSIONER WEFALD: How much does a
20 transcript cost?

21 JUDGE HOBERG: Considerable.

22 MR. BINEK: You have to ask the reporter.

23 JUDGE HOBERG: Can we go off the record?

24 MR. BINEK: Before we do that, I would
25 also request that both parties prepare proposed

1 findings. And is there an Exhibit 21?

2 JUDGE HOBERG: Yes.

3 MR. BINEK: What is that?

4 JUDGE HOBERG: It wasn't admitted. It's
5 the deposition of Mr. Burke. It was not admitted.

6 MR. BINEK: Okay.

7 (Discussion had off the record.)

8 JUDGE HOBERG: Let's go back on the
9 record. We're back on the record. So proposed
10 findings of fact and conclusions of law then.
11 Mr. Negaard will file his two weeks from today, a
12 month later respondents will file their brief and
13 proposed findings, and then a week later
14 Mr. Negaard will file his.

15 COMMISSIONER CLARK: You say a month
16 later. Are you talking a month from today?

17 JUDGE HOBERG: No. A month from their
18 filing. They asked for an additional month. So it
19 will be two weeks from today for Mr. Negaard; six
20 weeks from today, or a month from his filing, will
21 be the respondents; and then seven weeks from
22 today, or a week from their filing of their brief,
23 Mr. Negaard will file a reply brief.

24 MR. NEGAARD: Just a minute. July 8th was
25 when their brief will be due. I'd like -- because

1 of the way that week falls on some things I've got
2 going on, I'd like until the 19th, which will be
3 eleven days.

4 JUDGE HOBERG: That's fine. So the final
5 brief, then, from the complainants will be on the
6 19th of July. Is that clear?

7 Okay. Concluding remarks. Do the
8 Commissioners wish to make concluding remarks?
9 Let's go backwards this time and start with
10 Commissioner Kramer.

11 COMMISSIONER KRAMER: Thank you. I guess
12 I'd just like to say thank you to everyone for
13 being here, and it has been a spirited discussion,
14 and I appreciate that. But I must say that the
15 magnitude of this decision is not lost on me, and I
16 don't think it is on any of the three of us. And
17 we appreciate -- I also want to extend my
18 appreciation to you, Judge, for maintaining a very
19 good decorum and a good discussion. So we look
20 forward to the conclusion of this for sure, but I
21 do hope you all have a good summer through all of
22 this. Thank you.

23 JUDGE HOBERG: Thank you, Commissioner
24 Kramer. Commissioner Wefald.

25 COMMISSIONER WEFALD: Nothing. Just thank

1 you. I think it was very interesting to hear the
2 presentations by both sides today, and I will look
3 forward to reading the materials that you submit to
4 the Commission that we've already asked for.

5 JUDGE HOBERG: Thank you, Commissioner
6 Wefald. Commissioner Clark.

7 COMMISSIONER CLARK: Thanks to everyone
8 for being here. It's, from an intellectual
9 standpoint, a very interesting case as is all the
10 really massive change in the telecommunications
11 industry that's going on, and this is certainly one
12 aspect of it. And I'd just thank both parties for
13 being here today and for offering their
14 perspectives.

15 JUDGE HOBERG: Thank you, Commissioner
16 Clark. It's approximately 2:50. The hearing is
17 closed. Thank you.

18 (The hearing concluded at 2:50 P.M.)

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CERTIFICATE OF COURT REPORTER


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I, Ronald G. Harnden, a Registered Professional Reporter,

DO HEREBY CERTIFY that I recorded in shorthand the foregoing proceedings had and made of record at the time and place hereinbefore indicated.

I DO HEREBY FURTHER CERTIFY that the foregoing typewritten pages contain an accurate transcript of my shorthand notes then and there taken.

Dated at Bismarck, North Dakota, this 29th day of December, 2004.



Ronald G. Harnden
Registered Professional Reporter