

MEMORANDUM

TO: Commissioners Clark, Wefald and Cramer
PUD

FROM: Bill Binek and Pat Fahn

DATE: August 2, 2004

RE: BEK Communications Cooperative, et al. v. SmartNET, PU-2967-03-666

The Commission held a hearing in this complaint case on May 25, 2004. Both parties have submitted initial and response briefs. The Commission on July 26, 2004 received the last brief filed in the case.

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

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

Staff is concerned that issuance of a Commission decision prior to receiving guidance from the FCC regarding state commission jurisdiction over VoIP could have damaging and potentially irreparable consequences to one or more of parties. Therefore, staff recommends that the Commission delay issuing a final order in this proceeding until the FCC issues its decision in the pending rulemaking proceeding.

N.D.C.C. § 28-32-39 provides that in an adjudicative proceeding an administrative agency shall issue findings of fact, conclusions of law and order based on the findings and conclusions, and that it shall serve a copy of the final order on all of the parties to the proceeding within 30 days after the evidence has been received, briefs filed, and arguments closed, or as soon thereafter as possible. Clearly the language in the statute does not mandate issuance of an order within a specific time period, but rather within a time period that is reasonable under the circumstances.

North Dakota law is consistent with administrative practice and procedure throughout the country. We find in 73 C.J.S. Public Administrative Law and Procedure § 148, the following statement:

In general, an administrative agency has a duty to render a decision within a reasonable period. Statutes providing that an agency is to render a

decision within a specified period after a hearing are considered to be directory only and not mandatory.

Even in cases where a definite time period is established by law, the Courts have determined that the language is directory and not mandatory. *Railroad Commission v. City of Fort Worth*, 576 S.W.2d 899, 903 (Tex.Civ.App.1979); *Lampass Federal Savings and Loan Association v. Lewis*, 558 S.W.2d 913, 917 (Tex.Civ.App.1977); *Village of Port Chester v. Industrial Commissioner*, 222 N.Y.S.2d 779, 782 (N.Y.Sup.Ct. 1961). *Special Care of New Jersey v. Board of Review*, 742 A.2d 1023, 1027 (N.J.Super.A.D. 2000), the Superior Court of New Jersey, Appellate Division, ruled that delay in an administrative disposition will not generally affect the validity of a decision “particularly where no prejudice is shown.”

Based on the evidence presented in the present case, staff does not believe either party would be prejudiced if the Commission delays making its decision until the FCC issues its order in the rulemaking proceeding referred to above. On the other hand, an untimely or premature decision by the Commission could have devastating repercussions on SmartNET if the Commission’s decision is adverse to SmartNET’s position and the FCC were to ultimately determine that the service SmartNET provides is not subject to state commission jurisdiction. Furthermore, a decision by the Commission will likely trigger an appeal from the party or parties adversely affected by the decision. An appeal may be avoided if the decision of the FCC provides clear direction for determining when a VoIP provider is subject to state commission jurisdiction.