

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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

Case No. PU-2967-03-666

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

June 29, 2005

Appearances

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

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

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

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

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

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

Preliminary Statement

On November 25, 2003, BEK Communications Cooperative, Consolidated Telecom, Dakota Central Telecommunications Cooperative, Dickey Rural Telephone Cooperative, Griggs County Telephone Company, Inter-Community Telephone Company, LLC, Missouri Valley Communications, Inc., Moore and Liberty Telephone Company, Nemont Telephone Cooperative, Inc., North Dakota Telephone Company, Northwest Communications Cooperative, Polar Communications Mutual Aid Corporation, and Reservation Telephone Cooperative (complainants) filed a complaint against SmartNET, Inc. (SmartNET or respondent).

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

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

The issues to be considered in this matter include:

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

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

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

On October 20, 2004, the Commission issued an Order postponing the final decision in this proceeding pending Federal Communications Commission (FCC) decisions on issues relevant to the merits of this proceeding.

Findings of Fact

1. Complainants are North Dakota corporations operating as local exchange carriers in North Dakota.
2. SmartNET, d/b/a CallSmart, is a North Dakota corporation with offices at 288 First Avenue West, Dickinson, North Dakota 58601.
3. Complainants allege that SmartNET (1) operates as an intrastate long distance telecommunications provider without authority from the Commission in violation of North Dakota law including North Dakota Century Code Chapter 49-21, Chapter 49-02, and Chapter 49-03.1 and lawful regulations and orders of the Commission and (2) operates as an intrastate long distance telecommunications provider without paying the

Complainants for access fees for the use of their local switched network facilities in accordance with North Dakota law and prior Commission rules and orders.

4. SmartNET asserts that it is not providing a telecommunications service as defined by the Federal Communications Commission and is not required to obtain a certificate of public convenience and necessity from the Commission. SmartNET contends it is not required to pay access fees since it is not providing a telecommunications service.

5. Commission jurisdiction over the matters in this proceeding is predicated upon a determination that the service provided by SmartNET is telecommunications rather than a form of internet broadband service subject to the jurisdiction of the FCC.

6. Under North Dakota Century Code Section 49-03.1-01 public utilities must obtain a certificate of public convenience and necessity from the Commission before beginning operation of a public utility. North Dakota Century Code Section 49-03.1-02 defines a public utility to include persons furnishing product or service to the public generally which is statutorily subject to the jurisdiction of the Commission. Under North Dakota Century Code Section 49-02-01 the general jurisdiction of the Commission includes telecommunications companies furnishing telecommunications services as provided for in North Dakota Century Code Chapter 49-21. A “telecommunications company” means a person engaged in the furnishing of telecommunications.¹ “Telecommunications service,” under North Dakota law “means the offering for hire of telecommunications facilities, or transmitting for hire telecommunications by means of such facilities whether by wire, radio, lightwave, or other means.”² North Dakota law provides no definition for the term “telecommunications.”

7. SmartNet operates at three physical locations in North Dakota, those being Bismarck, Fargo and Dickinson. CallSmart’s residence and business subscribers can originate a voice communication to destinations anywhere in the 48 states and Canada and anywhere in the world. SmartNET’s customers simply use a plain dial-up phone to originate a call using SmartNET’s network. The plain dial-up phone is an ordinary customer premises equipment (CPE) with no enhanced functionality.

8. The customer dials the local seven digit number associated with the SmartNET service. SmartNET customers in certain towns adjacent to Fargo, Bismarck and Dickinson are able to dial SmartNET’s seven digit number as a local phone call because of arrangements the adjacent local exchange companies have with Qwest Communications, called extended area service. SmartNET’s customers are using their local lines to access SmartNET’s network.

9. All SmartNET customer calls originate from the public switched telephone network (PSTN) and are transported to a SmartNET gateway. The customer then dials

¹ N.D.C.C. §49-21-01(19).

² N.D.C.C. §49-21-01(20).

the long distance telephone number associated with the destination of the call. The gateway then attaches Internet protocol to the transmission before it enters the Internet.

10. On the Internet, calls that do not have termination destinations in Qwest's Bismarck, Fargo or Dickinson local exchanges are sent to SmartNET's two voice-over-internet protocol (VoIP) termination providers who make arrangements for terminating the calls. SmartNET does not know whether those calls are terminated on the PSTN. Calls that have termination destinations in Qwest's Bismarck, Fargo or Dickinson local exchanges return from the Internet to a SmartNET gateway where the Internet protocol is removed from the transmission so the call can be terminated on the public switched telephone network to a dial-up phone. For these calls, the voice information received at the call destination is in the same form and content as sent by the call originator.

11. SmartNET asserts it is an Internet Protocol (IP) communications service provider, and therefore is really an internet service provider and consequently is not providing telecommunications. The design of SmartNET's network is the same as any dial-up internet service provider infrastructure with a PSTN connection for customer access to the Internet service provider facility, a router or some type of gateway device, an authentication server, a billing server, a router to the Internet, and an Internet connection. End users access the Internet service provider either via dial-up connection or broadband connection. Dial-up connection uses the local loop access facility which is generally a copper two-wire pair provided by the local phone company, a residence or business line. Generally, the ISP will contract with the local phone company for some method of connecting the local switch to the ISP, and then the end user will access the ISP's facility by dialing a local directory number with the computer.

12. In its 1998 *Stevens Report*,³ to Congress the FCC stated that deciding whether any IP telephony providers meet the statutory definitions of offering "telecommunications" or "telecommunications service" depends on the functional nature of the end-user offering. The FCC noted that "telecommunications" is defined as a form of "transmission." Companies that only provide software and hardware installed at customer premises do not fall within this category, because they do not transmit information and only offer customer premises equipment (CPE) that enables end users to engage in telecommunications by purchasing local exchange and interexchange service from carriers. These CPE providers transport no traffic themselves. The FCC stated that Internet service providers, over whose networks "computer-to-computer" IP telephony passes, do not appear to be "providing" or "offering" telecommunications to subscribers because individuals use software and hardware at their premises to place calls between two computers connected to the Internet. The IP telephony software is an application that the subscriber runs, using Internet access provided by its Internet service provider. However, the FCC stated that "phone-to-phone" IP telephony lacks the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services" if the

³ *Federal-State Joint Board on Universal Service*, CC Docket No 96045, Report to Congress, 13 FCC Rcd 11501 (1998) (*Stevens Report*).

provider (1) holds itself out as providing voice telephony service, (2) allows the customer to place a call using an ordinary touch-tone phone over the PSTN, (3) allows the customer to call telephone numbers assigned under the NANP, and (4) transmits customer information without net change in form or content. The FCC further stated that it would not be appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings.

13. SmartNET holds itself out as providing voice telephony service, allows the customer to place a call using an ordinary touch-tone phone over the PSTN, allows the customer to call telephone numbers assigned under the NANP, and transmits customer information without net change in form or content service.

14. Since the *Stevens Report*, the FCC has issued three decisions in an attempt to establish regulatory certainty to providers of IP-enabled services—the *Pulver Declaratory Ruling*⁴, the *AT&T Declaratory Ruling*⁵ and the *Vonage Declaratory Ruling*⁶. In addition the FCC has a pending *IP-Enabled Services Proceeding*⁷ to address remaining questions regarding the regulatory treatment of IP-enabled services. The FCC ruling in the *AT&T Declaratory Ruling* provides guidance to the Commission in this proceeding. AT&T's service was determined to be a telecommunications service because: (1) it uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) it originates and terminates on the public switched telephone network (PSTN); and (3) it undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology.

15. SmartNET's service is similar to the service provided by AT&T in that it uses ordinary CPE with no enhanced functionality, originates and terminates on the PSTN, and undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology. The calling sequence is slightly different for a SmartNET call than a call using the AT&T service. With AT&T's service the customer dials only a long distance number, so from the customer perspective, the call is made just like a regular long distance call with no service difference. With SmartNET, the call is initiated as a local call, and the customer is prompted by SmartNET's equipment to dial the long distance number. With AT&T's service, the portion of the call route that involves the IP is owned by AT&T (a private facility), with SmartNET's service, that portion of the call route is on the public Internet. With AT&T IP service, end users do not order a service other than AT&T's traditional long distance service and they do not pay different rates, so the end users had no knowledge of receiving an IP-enabled instead of traditional circuit-switched long distance service.

⁴ *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307 (2004) (*Pulver Declaratory Ruling* or *Pulver*).

⁵ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 (2004) (*AT&T Declaratory Ruling*).

⁶ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, ___ FCC Rcd ____ (2004) (*Vonage Declaratory Ruling*).

⁷ *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (*IP-Enabled Services Proceeding*).

16. Even though the SmartNET service dialing pattern is not exactly the same as the AT&T service dialing pattern, SmartNET's dialing pattern includes 1+ dialing as does AT&T's service. Even though AT&T uses a private IP network while SmartNET uses the public Internet, the functional nature of the end-user offering is the same for both companies. We find that SmartNET's service is telecommunications because it uses ordinary CPE with no enhanced functionality, originates and terminates on the PSTN, the protocol processing that takes place incident to SmartNET's phone-to-phone IP telephony results in no net protocol conversion to the end user, and SmartNET's service provides no enhanced functionality to end users due to the provider's use of IP technology. We find that the phone-to-phone IP services provided by the SmartNET are subject to the jurisdiction of the Commission.

17. As noted earlier, all SmartNET customer calls originate from the public switched telephone network (PSTN) and are transported to a SmartNET gateway. From SmartNET's gateway the call enters the Internet. Calls that do not have termination destinations in Qwest's Bismarck, Fargo or Dickinson exchanges are sent to the call destination by VoIP termination providers contracted by SmartNET. SmartNET does not know whether those calls are terminated on the PSTN. Calls that do have termination destinations in Qwest's Bismarck, Fargo or Dickinson exchanges return from the Internet to a SmartNET gateway and the call is terminated on the PSTN to a dial-up phone. SmartNET customers in certain towns adjacent to Fargo, Bismarck and Dickinson are able to originate a local call to SmartNET's seven digit number because of extended area service arrangements that some of the complainants have with Qwest Communications.

18. Complainants allege that SmartNET uses the PSTN without paying access fees for the use of their local switched network facilities.

19. SmartNET witness, Bruce Burke, testified that Complainants are compensated by the end users for the use of the local lines, and SmartNET compensates the local exchange companies for the connections from SmartNET's internet access point to the local telephone company central office. SmartNET also compensates Dakota Carrier Network (DCN) for transport services between Dickinson and Bismarck. Complainants agreed that ISPs generally contract with the local phone company for some method of connecting the local switch to the ISP, and then the end user will access the ISP's facility by dialing a local directory number with the computer. ISPs do not pay intrastate originating access charges back to the ILECs. Burke did not know whether VoIP termination providers are paying some form of access charge.

20. Burke testified that SmartNET received a bill from Consolidated setting forth originating switched access charges for calls placed by SmartNET customers in Consolidated's exchanges to SmartNET's local telephone number at Qwest's Dickinson office. Burke believes that Consolidated Telecom (the incumbent local exchange company serving adjacent local exchange with EAS to Dickinson) and Consolidated Communications Networks, Inc. (the competitive local exchange company within Dickinson) are able to measure the amount of traffic (minutes) originating from

Consolidated's networks to SmartNET's local telephone number at Qwest's Dickinson office. However, neither of the Consolidated companies has a way to determine whether the calls are going to Bismarck, to Fargo, or to New York, because it's just a local phone call. He didn't think either of the Consolidated companies would know if a SmartNET call is terminating into their network.

21. We find there is insufficient evidence to determine whether SmartNET's traffic can be measured with the specificity required for billing purposes. It appears that Consolidated, for example, would be unable to determine whether interLATA access charges or intraLATA access charges, or interstate access charges would be applied to a specific call. We also find there is insufficient evidence to determine if compensation is due the complainants.

From the foregoing Findings of Fact, the Commission makes the following:

Conclusions of Law

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding.
1. General jurisdiction of the Public Service Commission extends to and includes telecommunications companies engaged in the furnishing of telecommunications services as provided for in chapter 49-21.
2. A service being provided by SmartNET is a telecommunications service under North Dakota Century Code Section 49-21-01(20).
3. SmartNET is a telecommunications company under North Dakota Century Code Section 49-21-01(19).
4. SmartNET is a public utility under North Dakota Century Code Section 49-03.1-02(2).
5. SmartNET is therefore required to obtain a certificate of public convenience and necessity from the Commission under North Dakota Century Code Section 49-03.1-01.
6. SmartNET is providing a telecommunications service to end users located in separate local exchange areas and is an interexchange telecommunications company under 49-21-01(8).
7. Under North Dakota Century Code Section 49-21-09 the Commission may prescribe reasonable compensation, terms, and conditions for the connection made between the facilities of telecommunications companies for the transfer of telecommunications.

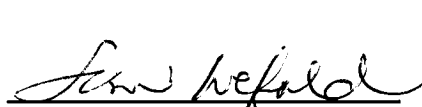

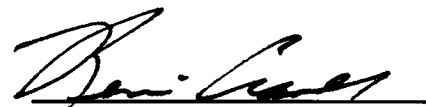
From the foregoing Findings of Fact and Conclusions of Law, the Commission issues the following:

Order

The Commission orders:

1. SmartNET is required to obtain a Certificate of Public Convenience and Necessity from the Commission for the provision of telecommunications services.
2. The Commission has insufficient evidence of record to determine whether SmartNET's has a liability to pay access charges to the Complainants for the origination or termination of interexchange telecommunications services.
3. This order applies only to SmartNET's phone-to-phone services as discussed in this order.

PUBLIC SERVICE COMMISSION

		
Susan E. Wefald Commissioner	Tony Clark President	Kevin Cramer Commissioner