

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

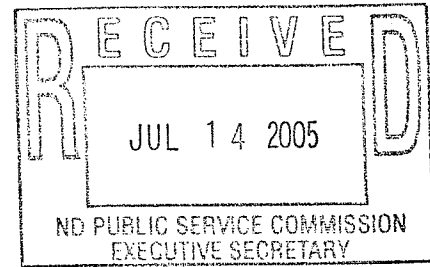
BEK Communications Cooperative,
Consolidated Telcom, Dakota Central
Telecommunications Cooperative, Dickey
Rural Telephone Cooperative, Griggs
County Telephone Company, Inter-
Community Telephone Company, LLC,
Missouri Valley Communications, Inc.,
Moore and Liberty Telephone Company,
Nemont Telephone Cooperative, Inc.,
North Dakota Telephone Company,
Northwest Communications Cooperative,
Polar Communications Mutual Aid
Corporation, and Reservation Telephone
Cooperative,

Complainants,

vs.

SmartNET, Inc., d/b/a CallSmart,

Respondent.



**BRIEF IN SUPPORT OF
SMARTNET'S MOTION FOR
RECONSIDERATION**

Case No. PU-2967-03-666

BACKGROUND FACTS

On November 25, 2003, BEK Communications Cooperative, Consolidated Telcom, Dakota Central Telecommunications Cooperative, Dickey Rural Telephone Cooperative, Griggs County Telephone Company, Inter-Community Telephone Company, LLC, Missouri Valley Communications, Inc., Moore and Liberty Telephone Company, Nemont Telephone Cooperative, Inc., North Dakota Telephone Company, Northwest Communications

Cooperative, Polar Communications Mutual Aid Corporation, and Reservation Telephone Cooperative (Complainants) filed a complaint against SmartNET, Inc. (SmartNET or Respondent).

On December 24, 2003 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.

On June 29, 2005, the Commission issued its Findings of Fact, Conclusions of Law and Order. The Respondent, SmartNET, requests reconsideration of this Order.

ISSUES FOR RECONSIDERATION

The issues before this Commission for reconsideration are:

- (1) The AT&T decision by the FCC this Commission is relying on is only applicable to AT&T and is not applicable to SmartNET, Inc.'s service.
 - (2) SmartNET's service is different than AT&T's.
 - (3) SmartNET, Inc. is an information service business, not a telecommunications company subject to access charges.
 - (4) Texas Court rules VoIP phone to phone not subject to access charges.
 - (5) The Commission's prior decision to wait for guidance from the FCC is the best course of action in order to not stifle the growth of VoIP in North Dakota and to clarify that as of to date no access charges can be charged.
- 1. The AT&T decision by the FCC is only applicable to AT&T and is not applicable to SmartNET, Inc.**

On its face, and as the entire VoIP industry knows, the AT&T FCC Order is limited

to AT&T and its specific services. The Order of the FCC stresses this position continuously throughout their opinion. A few of these examples are as follows:

“We emphasize that our decision is limited to the type of services described by AT&T in this proceeding.” AT&T Order at Page 1.

“This Order represents our analysis on one specific type of service under existing law based on the records compiled in this proceeding.” AT&T Order at Page 7.

“We clarify, therefore, that AT&T’s specific service constitutes a telecommunication service.” AT&T Order at Page 9.

“This Order, however, addresses only AT&T’s specific service”. AT&T Order at Page 9.

In addition, the FCC makes a conscious effort throughout their opinion to always use the word “AT&T’s specific service” when they address this issue. The FCC Commission declined, to make a definitive pronouncement as to the regulatory status of phone-to-phone IP telephony absent a more complete record focused on individual service offerings. The Commission also stated that it would address in future proceedings the regulatory requirements, including interstate access charges, to which specific types of phone-to-phone VoIP services might be subject if they were determined to be telecommunications services. AT&T Order at Page 6.

To date the FCC has not given any direction on access charges. This Commission should continue to wait for guidance from the FCC before making a ruling that could potentially stifle the VoIP Industry in North Dakota. To date the FCC has not ruled whether

services like SmartNET are subject to access charges. SmartNET fears that the Cooperatives may misinterpret this current Order and conclude that they can charge access charges. SmartNET asks for clarification of the Order to insure that this issue is unresolved and that this Commission is waiting for direction from the FCC regarding access charges.

2. SmartNET's service is different than AT&T's.

The evidence is clear that the service provided by SmartNET is distinguishable from AT&T's specific service in a number of material ways, including, but not limited to, the following:

1. SmartNET is a dial-up internet information service.
2. SmartNET customers must order a different service.
3. SmartNET customers must dial a local access number. (AT&T is a one + long distance service.)
4. The efficiencies of SmartNET's network results in reduced rates for its customers.
5. SmartNET's system provides its customers with enhanced capabilities.
6. SmartNET's system changes the content of every call that passes through it.

SmartNET's service offering is not an AT&T specific service. There are many differences. The FCC order states on Page 9, paragraph 12 regarding AT&T's specific service, "End-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long

distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T". CallSmart differs in many ways. 1. CallSmart customers must order this service. This service is not like AT&T's 1+ long distance service. (CallSmart does not offer 1+ long distance service.) 2. CallSmart customers pay a different rate for the VoIP service. 3. CallSmart customers must dial a local access number in order place a call through CallSmart. 4. The customer is making the decision to use the VoIP services, not some other carrier like AT&T as to whether the call is sent over the Internet by using CallSmart or over the circuit-switched network by dialing 1+. All SmartNET calls go through the internet and must go through a net protocol conversion.

The FCC made it clear at Page 9, paragraph 12 regarding AT&T's specific service, "the decision to use its Internet backbone to route certain calls is made internally by AT&T". The fact is, AT&T's customer had no idea any part of their call was using AT&T's Internet backbone. The customer simply dialed 1+ and AT&T made the decision where to route the calls. CallSmart has more similarities to the Vonage service than to the AT&T service. Prior rulings seem to agree that the Vonage services are not telecommunications services". Nor is SmartNET a telecommunication service like Vonage. "The FCC made it clear that this is their decision, not the State Commission's decision." Again, if the FCC has made it so clear that this is an FCC decision, then why is this Commission making a premature decision to an actual FCC decision? It is almost certain that this decision may contradict what the FCC ultimately decides.

The FCC is still struggling with the issue as to whether local exchange carriers, telephone companies, shall receive appropriate compensation for the use of their networks. In fact, the FCC has recently issued a Notice of Proposed Rule Making to realign intercarrier compensation and transition to a unified intercarrier compensation regime. The FCC does not want VoIP or any Internet based services to be burdened with the existing telecommunications taxes. On the other hand, Cooperatives like Consolidated do not want change because today they are on the receiving end of the problem. For example, Consolidated is attempting to bill CallSmart customers \$.16/minute for a Consolidated member in Richardton, ND to use CallSmart. This is just plain wrong and shows the benefits to the consumer in using the internet for long distance service. Technology is changing and the old telecommunications rules don't fit the future communications topology. The FCC realizes this fact and is responding by adopting a Notice of Proposed Rulemaking (NPRM) to consider a change. All interested parties, nation-wide, have the opportunity to comment and influence the FCC's decision. This is a much bigger issue than the Cooperatives verses CallSmart. VoIP is being addressed on a national level and both parties agree that this decision belongs with the FCC and must wait for some direction by the FCC.

3. SmartNET, Inc. is an information service business not a telecommunication business potentially subject to access fees.

When comparing the service of CallSmart to the current laws, the Plaintiff cannot charge fees based upon the following statutes:

The term "enhanced service" is defined at 47 CFR § 67.702(a) as follows:

For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.

The term "information service" is defined at 47 USC § 153(20) as follows:

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

The definition of "enhanced service" and "information service" differ slightly, to the point that all enhanced services are information services, but not all information services are enhanced services. See First Report and Order, *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, as amended, 11 FCC Rcd 21905 (1996) at ¶ 103.

The Telecom Act defines the terms "telecommunications" and "telecommunications service" in 47 USC § 153(43) and (46), respectively, as follows:

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, *without change in the form or content* of the information as sent and received (emphasis added).

The term "telecommunication service" means the offering of *telecommunications* for a fee directly to the public, or to such class of users as

to be effectively available directly to the public, regardless of the facilities used (emphasis added).

These definitions make clear that a service that routinely changes either the form or the content of the transmission would fall outside of the definition of “telecommunications” and therefore would not constitute a “telecommunication service”.

Whether a service pays access charges or end user charges is determined by 47 C.F.R. § 69.5, which states in relevant part as follows:

(a) End user charges shall be computed and assessed upon end users...as defined in this subpart, and as provided in subpart B of this part. (b) Carrier’s carrier charges [i.e., access charges] shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities *for the provision of interstate or foreign telecommunications services* (emphasis added).

As such, only telecommunications services pay access charges. The clear reading of the above provisions leads to the conclusion that a service that routinely changes either the form or the content of the telephone call is an enhanced service and an information service, not a telecommunications service, and therefore is not required to pay access charges.

SmartNET’s system fits squarely within the definitions of “enhanced service” and “information service”, as defined above. Therefore, the Commission should find that SmartNET’s system falls outside of the definition of “telecommunications service” because SmartNET’s system routinely makes changes to user-supplied information (content) during the entirety of every communication. Every call goes out over the internet. Such changes fall outside the scope of the operations of traditional telecommunications networks, and are

not necessary for the ordinary management, control or operation of a telecommunications system or the management of a telecommunications service. As such, SmartNET's service is not a "telecommunications service".

SmartNET's service is an "enhanced service" not subject to the payment of access charges. The SmartNET fears that the local telephone cooperatives will attempt to use this current Order to justify access charges if the Order is not clarified.

4. It is in everyone's best interest to wait and see what happens.

The NDPSC has great experience and expertise in regulating the telephone industry. The FCC has even greater experience and expertise regarding the VoIP Industry. This is a very complicated and difficult matter. Because of the complexity and difficulty of the issue the FCC adopted a Notice of Proposed Rulemaking concerning IP-enabled services, including Voice over Internet Protocol (VoIP). In this proceeding, the FCC seeks comments on, among other things, whether access charges should apply to VoIP or other IP-enabled services. This order when completed, will provide clarification about the issues raised in the of FCC rules to AT&T's specific service. *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 (Mar. 10, 2004) (*IP-Enabled Services*). SmartNET is clearly a VoIP service provider. This Commission would be remiss not to wait for direction from the FCC. The FCC was mindful that the Commission may soon decide to reform its intercarrier compensation regime, and of Congress' directive in Section 230 "to foster and preserve the dynamic market for Internet-related services" and "the strong federal

interest in ensuring that regulation does nothing to impede the growth of the Internet - which has flourished under our 'hands off' regulatory approach - or the development of competition." The FCC was also mindful of the equally compelling statutory obligation to preserve and advance universal service, a policy goal that remains intertwined with the interstate and intrastate access charge regime. AT&T Order, at Page 10. The current decision by this Commission may impede the growth of the VoIP industry for our North Dakota consumers and SmartNET. It may eventually kill it, something this Commission was very concerned with when they issue their prior Order to wait. The Internet must continue to be "unfettered by Federal or State regulation". AT&T Order, at Page 12. This Commission must allow the FCC to address and deal with this issue completely. The Plaintiffs have not brought any new arguments to this Commission that forces its' current ruling. The NDPSC must decline to make a ruling until they received some direction from the FCC. The implications of the current ruling is unknown. SmartNET respectfully asks for clarification.

5. Texas Court rules VoIP phone to phone not subject to access charges.

In a bankruptcy court of the Northern District of Texas, Dallas Division, Judge Harlin D. Hale has issued a ruling that could have national implications. In Case No. 05-31929-HDH-11, the Court ruled that one company's VoIP service that supported a variety of features including calls from one phone to another is clearly an information service, not a telecommunication service, and is therefore not subject to access fees.

This case is the first Court decision that has made a ruling on access charges regarding phone to phone VoIP. It is believed that many Courts will follow the rationale in this decision before the FCC settles this issue for the entire nation. I have attached a copy of this Opinion.

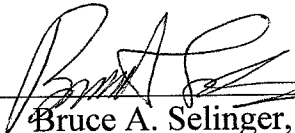
CONCLUSION

It should be very obvious to this Commission that the complexity of this issue and the serious implications of a decision, require this Commission to take a wait and see approach. This is a national issue. It is uncertain as to whether the current Order puts SmartNET out of business or makes them susceptible to further litigation. SmartNET and North Dakota has the opportunity to be a leader in the VoIP industry throughout the nation. The internet is free and SmartNET is allowing North Dakota consumers access to this new world of technology. SmartNET respectfully prays that this Commission reconsider its Findings so as to clarify that access charges are not due until such time as the FCC gives some direction.

Dated this 13th day of July, 2005.

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