

MEMORANDUM

TO: Commissioners Clark, Wefald and Cramer
Illona Jeffcoat-Sacco, Executive Secretary

FROM: Bill Binek and Pat Fahn

DATE: September 9, 2005

RE: Bek Communications Cooperative vs. SmartNET, PU-2967-03-666

On June 29, 2005, the Commission issued its Findings of Fact, Conclusions of Law and Order in this proceeding. The Commission determined in that order that SmartNET is a telecommunications company under North Dakota law and that it is required to obtain a certificate of public convenience and necessity from the Commission for the provision of telecommunications services. The Commission also determined that it had insufficient evidence of record to determine whether SmartNET has a liability to pay access charges to the Complainants for the origination or termination of interexchange telecommunications services.

Both sides petitioned for reconsideration of the Commission's order. On August 10, 2005, the Commission issued its order on Reconsideration denying SmartNET's Petition for Reconsideration and granting in part the Complainants' Petition for Reconsideration deleting reference to the amount of compensation due to the Complainants, but stated that there is insufficient evidence to determine whether SmartNET is liable to the Complainants for compensation for the use of Complainants' facilities.

On August 24, 2005, the Complainants filed a second Petition for Reconsideration in this proceeding. The Complainants' contend that the finding of insufficient evidence is contrary to the evidence and record in the case and is inconsistent with the Commission's own conclusion that SmartNET is providing a telecommunications service to end users located in separate local exchange areas and is an interexchange telecommunications company. The Complainants' assert that by the virtue of the fact that SmartNET is found to be an interexchange carrier, it is responsible for or is liable for access charges by virtue of prior Commission orders. The Complainants request that the Commission reconsider its order to find that SmartNET is liable to the Complainants for origination and termination of interexchange traffic in accordance with prior Commission orders on intrastate access.

In support of their Request, the Complainants furnished copies of North Western Bell/US West Access Service Tariffs that have been filed with the Commission, an Affidavit by Jim Howard regarding RTCG access rates with attached IntraLATA Access Service Price Schedules for the companies, and an Affidavit by Don Negaard with attached copies of past Commission orders on access as well as the Access Service Tariff and other documents pertaining to Consolidated Telecom.

On September 9, 2005, SmartNET filed a Reply Brief in Opposition to Complainant's Petition for Reconsideration. SmartNET asserts that the tariff approvals and rate approval cases cited by the Complainants do not address VoIP or apply specifically to IP enabled services. SmartNET also asserts that the Complainants have not established how or why those access cases should apply to VoIP or IP enabled services. SmartNET states that VoIP is a completely different service from long distance services for which the original tariffs were intended regarding access charges. SmartNET also states that the Complainants continue to provide new information that was not presented at the hearing. SmartNET continues to request that the Commission await direction from the FCC in this proceeding. SmartNET points out the FCC is currently undergoing policy review and rulemaking proceedings to clarify or categorize VoIP and other IP enabled services, and that it is also addressing intercarrier compensation. SmartNET states that the intercarrier compensation and VoIP NPRM will likely realign access rates and address whether VoIP companies are liable for access rates.

The evidence in the record and the materials submitted by the Complainants do not supply information needed by the Commission to determine whether or not SmartNET should be required to pay originating and terminating access charges to the Complainants. This case is one that does not fit squarely into either a regular access charge or a reciprocal compensation regimen. While it is clear that every telecommunications company is entitled to receive some type of compensation for the use of its network, the record is lacking in information to determine what parts of the various networks are being used, what amounts and types of compensation the carriers are receiving for the parts of the network being used, whether EAS compensation provides all or a part of the compensation due to the Complainants, and whether imposition of access charges would result in a form of double recovery to the Complainants for the use of their networks.