

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.

Case No. PU-2967-03-666

BRIEF IN SUPPORT
OF
MOTION FOR
CONTINUANCE

BACKGROUND

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.

On June 29, 2005 the Commission issued its Findings of Fact, Conclusions of Law, and Order in this proceeding.

On July 14, 2005 the Commission received a Petition for Reconsideration from SmartNET, Inc. (SmartNET).

On July 14, 2005 the Commission received a Petition for Reconsideration from 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).

On July 22, 2005 complainants filed a response to SmartNET's Petition for Reconsideration.

On July 27, 2005 SmartNET filed a response to complainant's Petition for Reconsideration.

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. In its order, the Commission found there was 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. 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.

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 continues to request that the Commission await direction from the FCC in this proceeding.

On September 21, 2005 the Commission granted Complainants' second petition for reconsideration to the extent that the Commission would schedule and notice a further hearing at a future date. In its decision, the Commission found the record is lacking information to determine whether SmartNET, Inc. (SmartNET) is using Complainants' facilities, and therefore to determine whether SmartNET is liable to Complainants for compensation, and therefore to determine the types of compensation due the Complainants. A public hearing was scheduled beginning January 13, 2006.

On December 8, 2005 the Commission was advised that the parties were engaged in discussions to reach an agreement and the parties requested that the hearing be postponed to allow time for negotiations.

On December 14, 2005 the Commission postponed indefinitely the January 13, 2006 hearing.

A **public hearing** on this matter is scheduled for **July 19, 2006 at 9 a.m. CDT** in the Commission hearing room, State Capitol, 12th Floor, Bismarck, North Dakota 58505.

ARGUMENT

1. INTRODUCTION

In organizing the file in preparation for the hearing scheduled for July 19, 2006 it becomes inherently obvious that delay is the best course of action to resolving this extremely complicated issue. This matter began in 2003. Since this time all parties have survived and suffered the financial burdens and competitive burdens associated with postponing this matter as evidenced in the Commissions Order of October 20, 2004. The

playing field has not changed for either party. That early decision by this Commission to postpone a decision was and still is the most prudent course of action. This early decision to postpone matters came directly after the only hearing on this issue and continues to be the most prudent decision.

It makes SmartNET, Inc. extremely uncomfortable to hold another hearing for the sole and only purpose of allowing Complainants' an additional opportunity to develop a case they failed to develop at the first hearing and attempt to bring in new evidence. It was their burden and responsibility to bring this evidence to this Commission at the initial hearing held on March 30, 2004.

It is intrinsically wrong to give Complainant's a second chance to meet their burden. A hearing at this point will not bring this Commission and the parties any closer to reaching a fair and correct decision. VoIP has not become an idle matter throughout the Nation. In fact, the exact opposite is happening. VoIP is making news every day in Washington, both in Congress, with the FCC, and now the courts are becoming involved. Many states have given orders to suspend VoIP regulation until the FCC has concluded their rule making processes.

The North Dakota Public Utilities Commission (PUC) should postpone the SmartNet hearing until the Federal Communications Commission, the courts and Congress have completed important proceedings relating to the regulatory classification and obligations of Voice over Internet Protocol (VoIP).

2. **COURT PROCEEDINGS**

The North Dakota Public Service Commission is not far away from a controlling decision regarding the jurisdictional issue as to whether the states or the FCC has jurisdiction regarding VoIP. The case which will decide this issue in our Eighth Circuit is *Minnesota Public Utilities Commission v. FCC*, Case Nos. 05-1069, 05-1122, and 05-3118. In this proceeding, the United States Court of Appeals for the Eighth Circuit is considering an appeal of an FCC decision that preempted the application of traditional state telephone company regulation of a VoIP service offered by Vonage. Briefs have been filed and oral argument concluded. A decision is expected sometime this summer.

Another case on point which will assist all parties is *American Council on Education v. FCC*, Case Nos. 05-1404, 05-1438, 05-1441 and 05-1453. In this proceeding, the United States Court of Appeals for the District of Columbia Circuit is considering an appeal of an FCC decision extending the obligations of the Communications Assistance for Law Enforcement Act to providers of VoIP services. One of the questions before the court is whether VoIP services are information services or VoIP services. Briefs have been filed and oral argument concluded. A decision is expected sometime this fall.

This Commission would be remiss to hold a hearing and make a decision because resolution on this issue is just over the horizon.

3. **FCC PROCEEDINGS**

We have been waiting for a ruling regarding the *IP Enabled Services Rulemaking*, FCC Docket WC 04-36 (released March 10, 2004). In this proceeding, the FCC has

asked dozens of questions concerning the regulatory status of VoIP, including whether VoIP is an information or telecommunications service. As part of that inquiry, the FCC will address how, if at all, it should differentiate among various VoIP services to ensure that any regulations applied to such services are limited to those cases in which they are appropriate. The FCC also asks whether there are technical or other characteristics of particular VoIP services that suggest that providers use the underlying network in different ways or provide different functionality to end users that warrants differential regulatory treatment. Other issues include whether, and on what grounds, one or more classes of VoIP service should be deemed subject to exclusive federal jurisdiction with regard to traditional common carrier regulation, including the extent to which access charges should apply to VoIP. The comment period has closed and a decision is expected by the end of the year.

Also before the FCC is the issue of access charges. First there is pending the petition of a *Development Unified Intercarrier Compensation Regime, FCC Docket 01-92* (released March 3, 2005). In this proceeding, the FCC is considering proposals to overhaul the system whereby carriers compensate each other for the origination or termination of telecommunications traffic on the public switched telephone network. The FCC specifically notes that the current intercarrier compensation system does not take into account recent developments in service offerings, including VoIP services. These developments blur traditional industry and regulatory distinctions among various types of services and service providers, making it increasingly difficult to enforce the existing

regulatory regimes. The formal comment period has closed and it is uncertain when the FCC will issue a decision.

Second there is pending the petition of AT&T Petition, Docket No. 05-276. In this petition, AT&T has asked the FCC to allow it to recover access charges revenue related to certain VoIP traffic. The formal comment period has closed and it is uncertain when the FCC will issue a decision.

Also pending is the petition of Frontier Petition, Docket No. 05-276 - In this petition, Frontier is seeking payment for Feature Group A call services it provided for the origination of certain VoIP traffic. The formal comment period has closed and it is uncertain when the FCC will issue a decision.

There have been two other petitions, filed by VarTec and Grande, Docket nos. 05-276 and 05-283, respectively and they raise the issue of the liability of certain carriers for routing VoIP traffic. The formal comment period has closed and it is uncertain when the FCC will issue a decision.

4. **FEDERAL LEGISLATION**

Both the House and Senate are considering substantive telecommunications legislation that would, among other things, define certain VoIP services and specify the right and obligations of VoIP service providers. The Senate bill, which was introduced by Ted Stevens, is called the “Communications, Consumer’s Choice, and Broadband Deployment Act of 2006.” In the House, the bill under consideration is the Communications Opportunity, Promotion, and Enhancement Act of 2006, which was

introduced by Joe Barton.

5. **STATE PROCEEDINGS**

A number of state utility commissions that initiated proceedings to investigate the appropriate regulatory structure for VoIP have subsequently either postponed decisions or terminated those proceedings since it appears that the FCC will be asserting federal jurisdiction over the services. See for example:

Alabama - Docket No. 29016, established August 2003 - no decision.

California - Docket I.04-02-007 - Draft decision by Administrative Law Judge issued May 4, 2006 recommending that VoIP proceeding be closed.

Colorado - Docket 03M-220T - Proceeding continued pending completion of FCC proceeding.

Michigan - Docket U-14073 - In an order issued, April 28, 2005, the Commission finds that it does not have the statutory authority to regulate VoIP.

Missouri - Case No. TW-2004-0324-Proceeding to study VoIP closed without any action.

Pennsylvania - Case No. - 00031707 - By Order issued May 24, 2004, the docket was closed because the Commission found that it is premature to make conclusive jurisdictional or policy determinations or to take action until the FCC provides guidance.

6. **VOIP BENEFITS TO RURAL NORTH DAKOTA**

There is no doubt that the Commission's decision to reconsider the petition of the Complainants has stifled innovation and delayed SmartNet's plans to bring broadband enabled VoIP benefits to rural North Dakota. VoIP will make calling more affordable, create rural jobs and make rural phone competition less remote. This Commission must delay a decision to accelerate VoIP benefits for rural North Dakotans. Long distance is

changing. This is evident from the fact that cell phone users have exceeded land lines in North Dakota.

One of the great advantages of VoIP, is that almost anyone with a good idea and an Internet connection can now become their own Internet based voice provider. This low barrier to entry is enabling the kind of voice competition envisioned by the 1966 Telecom Act. As a result, VoIP providers become small businesses - the economy's engine for job creation and economic growth.

Rural Americans have perhaps the most to gain from VoIP and broadband deployment. SmartNET believes we are on the verge of a vast new Internet-driven voice communications revolution that promises a new wave of rural benefits and advancements just over the horizon. It can bring jobs, deliver new economic opportunities, and reconnect distant families. VoIP can make it easier for rural Americans to connect to higher paying jobs without moving out of town. VoIP can be an economic, educational and medical growth engine for rural America. Advances in VoIP services can help improve the quality of life in rural America.

Technology has advanced to the point that VoIP can help erase the disadvantages of distance that kept rural areas too often in the backwaters of economic growth. This communications revolution, driven by new breakthrough Internet voice technologies, can stimulate a new era of rural economic growth and opportunity.

Rural Americans lag behind other Americans in their broadband adoption. Among those who do not have broadband, approximately 70 percent report that broadband is too

expensive. VoIP, however, can overcome price barriers by effectively lowering the cost of broadband. While urban dial-up users can often offset the high cost of broadband by upgrading their dial-up and voice telephone services to VoIP and broadband - savings on average \$8 a month or \$96 a year - rural Americans often don't have VoIP options to do the same. As FCC Commissioner Adelstein has said, "*we have to make sure that all consumers can benefit from the promises that VoIP may hold.*" While VoIP providers are being asked to subsidize analog phone service for rural Americans, we ask that the NDPSC take steps to enable VoIP providers to also service rural Americans with the lower costs, new services, and advanced features VoIP can deliver.

The following are some examples where VoIP has been helping rural providers become more profitable:

- a. Rural Texas Co-op uses VoIP to ring up savings and advanced features.

Coleman County Telephone Cooperative (CCTC) in rural Texas was able to use VOIP to deliver cutting edge services to its rural subscribers and put the company on a more profitable footing. Because of VoIP, CCTC was able to deliver a profitable Triple Play of next-generation services – voice, video and data - and a host of new voice features not possible with the PSTN.

- b. Rural Oklahoma phone company with declining revenues uses VoIP to create a more profitable triple play.

Cross Telephone in rural Oklahoma faced declining subscriber

revenue. But it embraced VoIP and a triple play of voice, video and data over a converged IP network. This end-to-end IP solution enabled Cross Telephone to deliver new advanced services, to include VoIP, digital TV, and high-speed Internet access.

- c. VoIP enabled a Montana Wireless Company to deliver cost effective voice, video and data on one network.

Teton Wireless has launched VoIP Services in Montana - making their Internet Phone service available in rural markets. As Jessica Peters of Teton Wireless in Montana put it, “our customers are looking for one source for their television, Internet and phone services, just like customers in big cities.” “And they want to save money when they buy all these services from one provider” she said. Using VoIP they have “got a triple play” solution now that is cost effective and widely available.”

- d. VoIP: creating new rural and remote job opportunities.

Companies are finding VoIP is much more cost effective at enabling them to serve remote and rural workers. For example, some companies have found that serving employees in remote locations with traditional telecommunications costs them \$150 to \$300 per month per employee in the field. But VoIP allows the cost to be dropped to essentially the cost of a broadband connections and enables the employee to access job opportunities they wouldn't have had previously and potentially save

enormous commute times to jobs that are far away.

- e. JetBlue using VoIP to create jobs where people live.

Using VoIP, JetBlue was able to create a virtual call center for its 700-plus reservation agents where it no longer matters if you live in Salt Lake City, Utah to work there. JetBlue has taken this mobility to the extreme, creating completely distributed, virtual-IP-based call centers in which their entire staffs are actually working with IP phones in their homes across wide areas of the US. VoIP gives them access to labor pools in rural America that didn't have access to before. Their commute to work is as quick as a mouse click for the reservation agents. So rather than outsourcing jobs, companies like JetBlue can now insource them, or as JetBlue refers to its work-at-home reps, "homesource."

CONCLUSION

The prudent time for the North Dakota Public Service Commission (NDPSC) to hold a hearing and make a ruling on BEK vs. SmartNET is after the federal government, the courts or the House and Senate have completed their analysis and developed the proper regulator frame work for Voice over Internet Protocol (VoIP), **not before**. Any decision by the NDPSC would most likely require a hearing after the FCC VoIP rule making process is completed and then this Commission could make a just and proper final ruling based on how SmartNET's exact application fits into this new VoIP regulatory environment.

Also, there is the matter of cost in dollars and time. With 13 telephone companies sharing the hearing and attorney costs, the financial burden is minimal. The same does not hold true with SmartNET. SmartNET alone is responsible for one half the hearing costs and 100% of their attorney fees. This is a huge financial burden for SmartNET. In reality no matter what this Commission decides, the matter will come right back to this Commission after either the FCC, Congress or the courts give us all more guidance.

Once the Federal Communications Commission, the courts and Congress have completed important proceedings relating to the regulatory classification and obligations of VoIP, we will all have a better understanding what rules apply to VoIP and also, what the states role is in administering these rules. For these reasons SmartNET respectfully moves for a continuance.

Dated this 9th day of June, 2006.

KUBIK, BOGNER, RIDL & SELINGER, P.L.L.P.



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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of a Notice of Motion for Continuance, Motion for Continuance, and Brief in Support of Motion for Continuance, to be mailed, by first class mail with postage duly prepaid, on the 9th day of June, 2006, to the following person:

Donald A. Negaard
2525 Elks Drive
P.O. Box 1000
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By: 

~~Bruce A. Selinger, Attorney #04368~~