

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

BEK Communications Cooperative, et al.
vs. SmartNET, Inc.
Complaint

Case No. PU-2967-03-666

AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

August _____, 2006

Appearances

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

Don Negaard, Attorney, Pringle & Herigstad, P.C., P.O. Box 1000, Minot, North Dakota 58702, appearing for the Complainants.

Michael J. Maus, Attorney, Hardy, Maus & Nordsvan, P.C., P.O. Box 570, Dickinson, North Dakota 58602, appearing for the Complainants.

Jerod E. Tufte, Attorney, P.O. Box 139, Steele, North Dakota 58482, appearing for the Complainants.

Glenn S. Richards, Attorney, Shaw Pittman, LLP, 2300 N Street NW, Washington, D.C. 20037, appearing for the Respondent.

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

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

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

Preliminary Statement

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 an Order on the Complainants' second Petition for Reconsideration. On November 17, 2005, the Commission issued a Notice of Hearing. This was continued at the request of the parties. On May 24, 2006, the Commission reissued a Notice of Rescheduled Hearing to be held on July 19, 2006. On July 19, 2006, the Commission conducted a supplemental hearing in this matter and now issues these Amended Findings of Fact, Conclusions of Law and Order.

Findings of Fact

1. The Commission hereby readopts and incorporates by reference paragraphs 1-20 of the Findings of Fact adopted on June 29, 2005.

2. We hereby delete paragraph 21 of the Findings of Fact adopted on June 29, 2005, and replace it with the following paragraph 21:

21. We find there is sufficient evidence to determine that SmartNET's traffic can be measured with the detail required by North Dakota law for billing purposes.

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.

2. 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.

3. A service being provided by SmartNET is a telecommunications service under North Dakota Century Code section 49-21-01(20).

4. SmartNET is a telecommunications company under North Dakota Century Code section 49-21-01(19).

5. SmartNET is a public utility under North Dakota Century Code Section 49-03.1-02(2).

6. 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.

7. 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).

8. 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. It appears the Commission has done so in prior tariff proceedings.

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 if it has not yet done so.

2. The Commission has sufficient evidence of record to determine that SmartNET has a liability to pay access charges to the Complainants for the origination or termination of interexchange telecommunications services. It is hereby ordered that SmartNET pay the Complainants for originating and terminating access charges due under North Dakota intrastate tariffs filed by the Complainants.

3. This Order applies only to SmartNET's phone-to-phone services as discussed in this Order. SmartNET has failed to address or show what portions of its services are exempt from this Order and, therefore, we find all of its services are covered by this Order.

PUBLIC SERVICE COMMISSION

Susan E. Wefald
Commissioner

Tony Clark
President

Kevin Cramer
Commissioner