

**BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA**

BEK Communications Cooperative, )  
Consolidated Communications Networks, Inc., )  
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

**COMPLAINANTS'  
POST-HEARING BRIEF**

**BACKGROUND**

On May 25, 2004, the North Dakota Public Service Commission (hereinafter "the Commission") held a hearing on the Complaint of BEK Communications Cooperative, et al, that the Respondent, SmartNET, Inc., d/b/a CallSmart, (hereinafter "SmartNET") was conducting an interexchange telecommunications operation in North Dakota without paying access charges to the Complainants for interexchange toll usage.

On June 29, 2005, the Commission issued an Order finding that SmartNET was an interexchange telecommunications company. Following a series of requests for reconsideration, on September 21, 2005, the Commission ordered a supplemental hearing and on November 17, 2005, a notice of hearing was issued to determine

“whether SmartNET, Inc. (SmartNET) is using Complainants’ facilities, and . . . whether SmartNET is liable to Complainants for compensation, and . . . to determine the types of compensation due the Complainants.” The hearing scheduled for January 2006 in this matter was postponed at the request of the parties to pursue settlement. Following a failure of the parties to reach an agreement, a hearing was held on July 19, 2006.

### **FACTS**

This Commission has previously issued its Order on June 29, 2005, finding that SmartNET is an interexchange telecommunications company. The sole issue is what additional evidence there is to show that the intrastate interexchange calls placed by SmartNET are using the local service facilities of the Rural Telephone Company Group (hereinafter “the RTCG”).

Three companies presented evidence on this issue; namely, BEK Communications Cooperative (hereinafter “BEK”), Consolidated Telcom (hereinafter “Consolidated”), and Consolidated Communications Networks, Inc. (hereinafter “CCNI”).

BEK presented usage reports for the period of June 19, 2006, to July 11, 2006, (Exhibit RTCG-9) showing that calls from BEK customers in BEK exchanges were placed to phone numbers advertised by SmartNET on its internet site as numbers SmartNET customers in the BEK and Bismarck area use to place long distance (interexchange) telephone calls using SmartNET’s long distance services (see Exhibit RTCG-15).

Consolidated and CCNI presented evidence in the form of usage reports as well. In the case of Consolidated, this report shows usage from April, May, and June of 2006 (Exhibit RTCG-10) and from CCNI for the period of May, June, and July of 2006 (Exhibit

RTCG-11) to numbers used and advertised by SmartNET for its Dickinson, North Dakota, area customers.

Consolidated also presented its Access Billing Records from December 15, 2003, to June 16, 2006 (Exhibit RTCG-12). CCNI presented Access Billing Records from August 1, 2003, to June 1, 2006 (Exhibit RTCG-13). In each case, these contain evidence of interexchange calls using the local facilities of these companies.

The evidence also showed, conclusively and with no evidence to the contrary, that the access bills were sent to SmartNET and SmartNET has never objected to or claimed irregularity in the originating access bills sent to it by Consolidated or CCNI, except to claim it was exempt from paying the bills. (See Transcript of July 19, 2006, hearing (herein "July 19, 2006, Tr.") at 66:12-18.) This assertion by SmartNET, that it was exempt, was rejected by the Commission in its Order of June 29, 2005.

The record also establishes that in a series of tariff proceedings throughout the 1980s and 1990s this Commission established a method for North Dakota local exchange carriers to implement and file tariffs for the use of their local facilities by interexchange carriers for intrastate interexchange telecommunications traffic and that they were allowed to mirror Northwestern Bell tariffs. (See documents and copies of official Commission proceedings previously filed and again filed with this Commission on August 30, 2005, and of which are proof of the record, including, but not limited to:

1. Case No. 10,444
2. Case No. 10,694 (including Supplemental Orders)
3. Case No. 10,699 (including Supplemental Orders)
4. Case No. PU-1540-99-222

5. BEK tariffs
6. Consolidated tariffs
7. CCNI tariffs

As explained by Dean Anagnost, the Complainants have used the only method reasonably available to them to establish SmartNET's usage of local facilities by CallSmart's long distance customers. (See July 19, 2006, Tr. at 19:24-23:6.) SmartNET produced no evidence to the contrary.

### **LAW AND ARGUMENT**

The Complainants request that the Commission enter an Order stating that CallSmart is responsible to the Complainants under their intrastate tariffs for access charges. Although the Complainants bear the burden to prove their case by the greater weight of the evidence, they need not prove their case by clear and convincing evidence, nor is it the burden of the Complainants to present a defense on behalf of CallSmart. Had CallSmart chosen to contest the evidence produced by the Complainants it could have done so. It chose not to do that. CallSmart has never contested the accuracy of the access bills received. At the hearing on July 19, 2006, the Complainants went above and beyond what was required of them by providing the Commission with detail in the form of reasonable industry averages of the percentage of intrastate and interstate toll calls in the Dickinson, North Dakota, area exchanges. (See corrections in late-filed Exhibit RTCG-22.) The Complainants also offered the Commission a method of computing a reasonable percentage to show the appropriate intrastate breakdown of such calls.

A tariff is a list of filed rates at which a regulated company provides services to users of its services. It is, in effect, a publicly filed contract, which has the force of law, that users of its services consent to by usage of its services and substitutes as a signed contract with customers or users of its services.

Complainants only ask for an Order confirming SmartNET's liability for the usage under the contracts filed as tariffs. Even if the Complainants were asking the Commission for an Order for a dollar amount, they would have met their burden of proof. In that case, Complainants need not prove the exact amount owed them, as it has long been the law in North Dakota that in contract cases a complainant need not prove its right to compensation (damages) with exact certainty.

“Uncertainty as to the amount of damages (compensation) does not preclude recovery, and mathematical certainty as to the amount of recovery is not necessary. If a reasonable basis for computing an approximate amount of damages is provided, that is all that the law requires.

....

Thus the uncertainty which prevents recovery of damages is the uncertainty as to the fact of damages, not the uncertainty as to the amount thereof.”

North American Pump Corp. v. Clay Equipment Corp., 199 N.W.2d 888, 895-896 (N.D. 1972). See also Symington v. Mayo, 590 N.W.2d 450 (N.D. 1999); Ellendale Farmers Union v. Davis, 219 N.W.2d 829 (N.D. 1974).

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This Commission's prior decisions in this matter and the decision requested by Complainants are in conformity with decisions in other jurisdictions, copies of which are attached hereto. See Washington Exchange Carrier Association, et al vs. LocalDial Corporation, Docket No. UT-031472 (Final Order of Washington State Utilities and Transportation Commission dated June 11, 2004); In re Complaint of Frontier Telephone of Rochester Against US DataNet Corporation, Case No. 01-C-1119, Order Requiring Payment of Intrastate Carrier Access Charges (New York Public Service Commission dated May 31, 2002).

As in the present case, both the Washington and New York cases involved an interexchange carrier doing business by having its customers dial a local access number and then dial the number they wished to reach. All calls begin and end on the public switched telephone network. In each case, the interexchange carrier employed an IP-in-the-middle technology and claimed to be exempt from access charges; and in each case, the service was determined to be subject to local access charges. As noted in the New York case, an interexchange carrier is required by tariff to provide a percentage of intrastate usage (PIU) yet DataNet refused to do so in New York. Compare to testimony of Jim Howard that North Dakota tariffs also require PIUs (July 19, 2006, Tr. at 83:12-85:10) and that SmartNET has failed to provide any. The New York Commission, with less evidence available to it than this Commission has, found this to be no impediment to order payment of the access charges by a similar company called DataNet.

As both the Washington and New York Commissions noted, both of the providers in those cases imposed the same burdens on the local networks of local exchange

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carriers as any other interexchange carrier and there was no reason to exempt them from paying access charges. In fact, the law compelled the Commissions to require them to pay access fees to prevent subsidies to one carrier to the detriment of the public and other carriers.

Were it not for SmartNET in North Dakota, these calls would be placed with another interexchange carrier that abides by Commission rules and the Complainants would have already been paid intrastate access. As such, SmartNET should pay for its fair share of costs, like any other interexchange carrier.

As a last point, it was noted and unrefuted at the hearing that the long distance phone calls in question are not Extended Area Service (EAS) phone calls because they do not terminate in Bismarck or Dickinson like an EAS call would. The calls are long distance tariff calls because Bismarck and Dickinson are merely routing exchanges, not destinations.

### **CONCLUSION**

The Complainants have more than met their burden of proof in this case. The prior conclusions of this Commission in its Order of June 29, 2005, that SmartNET is an interexchange carrier are correct.

This Commission should now enter a supplemental Order that SmartNET is responsible for payment of intrastate access charges to the Complainants.

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Dated this 17th day of August, 2006.

PRINGLE & HERIGSTAD, P.C.



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**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing Complainants' Post-hearing Brief was served by mail on the 17th day of August, 2006, on the following:

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A handwritten signature in black ink, appearing to read 'DN', is written over a horizontal line.

Don Negaard