

BEFORE THE PUBLIC SERVICE COMMISSION OF NORTH DAKOTA

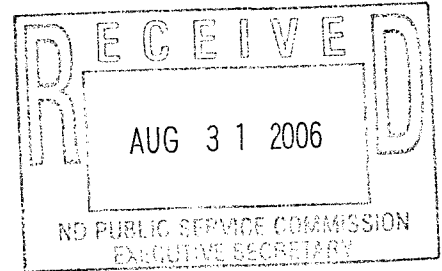
BEK Communications Cooperative,  
Consolidated Telcom, Dakota Central  
Telecommunications Cooperative, Dickey  
Rural Telephone Cooperative, Griggs  
County Telephone Company, Inter-  
Community Telephone Company, LLC,  
Missouri Valley Communications, Inc.,  
Moore and Liberty Telephone Company,  
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

RESPONDENT'S  
POST HEARING  
REPLY BRIEF

BACKGROUND

A supplemental hearing was held on July 19, 2006 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". You will recall that SmartNET elected to orally

present their post-hearing argument to the Commission rather than submit a written brief.

### FACTS

The Complainants are attempting to collect access charges from SmartNET even though SmartNET did not order nor does SmartNET use any services from the Complainants. There is no direct facility between SmartNET and any of the Complainants nor is there any evidence presented by the Complainants that requires SmartNET to order any services from the Complainants.

The evidence offered by Complainants simply do not apply to the type of services offered by SmartNET. Complainants admitted they are already being compensated for local calls and EAS Services. Complainants are asking the Commission to change their previous order so the Complainants can receive double compensation for the same services. If SmartNET is required to pay access charges at the rate of 14¢ per minute, as attempted by Complainants, SmartNET would no longer exist.

### LAW AND ARGUMENT

The Respondent requests that the Commission uphold the previous order stating that SmartNET/CallSmart is not responsible to Complainants for access charges and again denying the Complainants request for reconsideration. Complainants' witness Jim Howard stated "There is compensation for calls that are being made between the Sterling customers of BEC to customers of Quest that are originating in Sterling and terminating in Bismarck". What Mr. Howard described is an extended area service (EAS) call. Since

the Complainants are already compensated for local service and EAS, any additional fees, such as access charges from SmartNET, would be double compensating the Complainants. The Complainants have the burden of proof to prove that SmartNET is using Complainants' facilities. They have simply failed to meet their burden.

First, there is no direct facility between SmartNET and any of the Complainants such as switches, routers or services. SmartNET is not now nor are they requesting to buy access services from any of the Complainants. The Complainants were unable to offer any testimony as to which of the elements make up access charges applicable to the service being provided by SmartNET. Mr. Howard clearly testified that certain elements that make up access charges do not apply to SmartNET's services.

Second, the Complainants are attempting to rely on inapplicable prior Orders of the Commission in the form of tariffs to support their position. There is nothing in the Order RTCG-14 that requires SmartNET to purchase access services from the Complainants. Further Order RTCG-14 does not describe or relate to SmartNET like services nor does it address what access charges would be applicable to SmartNET's services.

Third, the Complainants testified they are already being compensated for their customers local service and extended area services.

Finally, the two cases cited in support of Complainants position are not applicable because the Complainants have not shown that the legal requirements in those

states are similar to North Dakota. The legal effect of any decision appears to be up in the air. VOIP issues are currently being addressed by the FCC; the House and Senate are analyzing these issues; and the Courts are also debating these issues. It would be totally inappropriate to pick a decision from some other jurisdiction when resolution of this VOIP issue is pending at the FCC, Congress and the Courts.

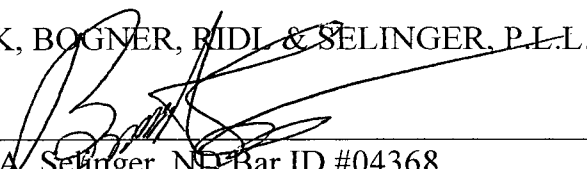
Let competition and the consumers decide who wins in the market place. What is certain is that if the NDPSC finds in favor of Complainants, SmartNET is out of business and the North Dakota consumer and the VOIP technology industry in North Dakota will have to become a follower instead of a leader.

#### CONCLUSION

Since Complainants have failed to meet their burden of proof as to the three issues directed by this Commission and the Commission should not accept any form of double compensation, the Commission should affirm their present ruling that SmartNET is not liable for access charges.

Dated this 30 day of August, 2006.

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

  
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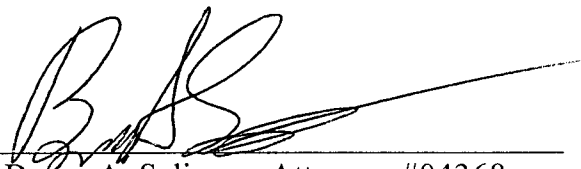
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of Respondent's Reply Brief and Proposed Amended Findings of Fact, Conclusions of Law and Order, to be mailed, by first class mail with postage duly prepaid, on the 30<sup>th</sup> day of August, 2006, to the following person:

Donald A. Negaard  
2525 Elks Drive  
P.O. Box 1000  
Minot, ND 58702

By: \_\_\_\_\_

  
Bruce A. Selinger, Attorney #04368