

MEMORANDUM

TO: Commissioners Clark, Wefald and Cramer

FROM: Bill Binek and Patrick Fahn

DATE: November 3, 2006

RE: Staff Memorandum-BEK Communications v. SmartNET, PU-2967-03-666

Background

On June 29, 2005, the Commission issued its initial order concluding that SmartNET is an interexchange telecommunications company under North Dakota law and ordering SmartNET to obtain a certificate of public convenience and necessity. The Commission found that there was insufficient evidence to determine whether SmartNET is liable to the complainants for compensation for use of the complainants' facilities. On July 19, 2006, the Commission held a further hearing to determine whether SmartNET is using complainants' facilities, whether SmartNET is liable to complainants' for compensation, and determine the types of compensation due the complainants.

Staff Summary

1. Does North Dakota statute make SmartNET liable to pay access fees? No. There is no statute that states an interexchange carrier, alleged to be a using the facilities of the local exchange carrier, must compensate a local exchange carrier for facilities used on the originating end (or terminating end) of a long distance call. Complainants have not shown that such North Dakota statute exists.
2. Do Commission rules make SmartNET liable to pay access fees? No. There is no Commission rule that states an interexchange carrier, alleged to be a using the facilities of the local exchange carrier, must compensate a local exchange carrier for facilities used on the originating end (or terminating end) of a long distance call. Complainants have not shown that such Commission rules exist.
3. Do prior Commission orders make SmartNET liable to pay access fees? No. There is no Commission order concerning access charges that included SmartNET as a party. Complainants have not shown that prior Commission orders apply to SmartNET.
4. Do Complainants' tariffs make SmartNET liable to pay access fees? We agree that a company tariff that sufficiently sets for terms, conditions and prices for the use of facilities 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.
5. Did Complainants prove that Complainant facilities are being used in long distance calls provided via SmartNET services? Yes.
6. Do Complainants have tariffs on file to sufficiently define the terms, conditions and prices for the type of service used in the provision of a SmartNET long distance call? Complainants are Consolidated Telcom, Consolidated

Communications Networks, Inc., and BEK Communications Cooperative. No. The Complainants have not shown that they have sufficient tariffs on file to define charges for the type of switched access service used in the provision of a SmartNET long distance call.

Preliminary Discussion

Complainants' contend that SmartNET is using the complainants' local service facilities to make intrastate interexchange calls and ask that the Commission determine SmartNET is liable for to pay access fees under law, under prior Commission rules and orders, and under Complainant tariffs. Complainants state that they only ask for an order confirming SmartNET's liability for usage under the tariffs.

SmartNET contends that it should not be required to pay access charges to the complainants because SmartNET did not order any services and does not use any services from the complainants. SmartNET states that the complainants are attempting to rely on inapplicable tariffs to support their position. SmartNET argues that the complainants are already being compensated for local calls and EAS services, and that any additional fees such as access charges from SmartNET would be double compensation. SmartNET states there is no direct facility between SmartNET and any of the complainants such as switches, routers or services, and that SmartNET has not and is not requesting to buy access services from any of the complainants.

Discussion of Staff Summary 3

The Commission's December 13, 1983 order in Case No. 10,444 at Finding of Fact 4 states that "a mechanism (access charges) must be implemented to compensate carriers for the origination and termination of interLATA calls." At Finding of Fact 7: "T[t]he exchange carriers will file carrier access charges at the same level as their interstate tariffs; the independents would have the option of concurring in NWB's tariff rather than filing their own." At Finding of Fact 10: "The Commission finds that the Memorandum of Recommendation provides an appropriate mechanism for interLATA toll compensation...." "AT&T/MW raised its strongest objection to the so-called "Premium Access" charge of NWB's tariff. NWB's tariff is in accordance with the FCC's decision that access charges contain a premium charge to AT&T or a discount to the other common carriers (OCC)." [meaning other interexchange carriers]. "No OCC's intervened in this proceeding and none have sought authority to operate in North Dakota. Consequently, there is no evidence in this proceeding as to whether or not a difference in access charges is warranted or what the magnitude of that difference should be. Based upon the record before us, we find that access charges to AT&T and the OCC's should be at the same level."

In response to a complaint by AT&T against the North Dakota local exchange companies alleging that the access charges assessed to AT&T by the local exchange companies were discriminatory and unreasonable (Case No 10,694), Northwestern Bell filed a revised interLATA access tariff on August 12, 1985. The Commissions October 8, 1985 order in Case Nos. 10,694/10,699 directed that the local exchange companies

file access charge proposals in accordance with the Findings of Fact of the order. On page 31 of the order: "...we direct the implementation of intraLATA access charges equal to the local exchange companies interLATA access charges effective January 1, 1986..." On page 33: "With the adoption of intraLATA toll access charges, Northwestern Bell will act...as the designated toll carrier." On page 34: "Even if the Commission never approves a competitive provider of intraLATA toll service, we believe a separation of Northwestern Bell's intrastate investment and expense is necessarily to properly and equitably set intraLATA access charges and toll rates in the future..." Northwestern Bell filed its compliance interLATA access charge tariff including terms, conditions, and prices (no intraLATA access tariff since NWB was the designated carrier), in Case No. I-7059. The independent local exchange companies filed intraLATA switched access tariffs (prices only) equal to their interLATA access charges, with an additional rate element called the intraLATA access adjustment rate. For companies whose interLATA access prices, when applied as intraLATA access rates, would not recover the company's intraLATA access revenue requirement, the intraLATA access adjustment rate would serve to balance the over/under recovery.

Case No. PU-314-94-688 involved the purchase and sale of U S WEST local exchanges. The Commission's May 17, 1995 order in Case No. PU-314-94-688 approves stipulations entered into by U S WEST, ITCG, AT&T and Firstel (Stipulation 1), and by U S WEST, ITCG and the Staff (Stipulation 2). Amended Schedule 2.4 (E) attached to Stipulation 1, details the prices to be charged by the ITCG companies for access services to the purchased exchanges. Amended Schedule 2.4 (E) also states that each ITCG member will establish an intrastate tariff with intrastate switched access rates capped at \$.067 per access minute for at least a five year period, for the purchased Exchanges, as follows: Carrier Common Line = \$.0229; Local Switching = \$.0220; Transport Facility \$.0076; and Transport Termination = \$.0145. In addition, Intermediate Transport = \$.0005 per minute per mile. No AAR would apply and no true-up would apply to the purchased exchanges. Each ITCG agreed to establish meet point bill percentages. Each ITCG would bill terminating switched access to USWC using current North Dakota industry standards for determining Terminating/Originating ratios until such time as actual measured terminating minutes can technically be measured. Stipulation 2 states that the Buyers will adopt U S WEST's price schedules and terms and conditions of service, except for switched access prices which have been stipulated and agreed to by the Buyers, U S WEST, Firstel and AT&T. Stipulation 2 again states that the Buyers will provide the same service as currently provided by U S WEST with the same facilities using the same price scheduled terms and conditions of service. Conclusion: the switched access tariffs of the Buyers of U S WEST exchanges, to be effective May 17, 1995 should be the tariffs with terms and conditions as filed by NWB in 10,694/10,699 except with prices that were stipulated. It appears the companies did not file interLATA or intraLATA access tariffs for terms and conditions.

The Commission's July 16, 1999 order in Case No. PU-2096-99-241 involved the provision of long distance service by U S WEST, as the designated intraLATA long distance carrier, for customers originating intraLATA toll from the exchanges of the

RTCG companies. The order dismissed the RTCG complaint based on a Stipulation for Dismissal. The Stipulation states that the RTCG member companies, both price cap and rate of return companies, will file revised intraLATA access charges with the Commission. The RTCG member companies filed revised intraLATA access charges prices, terms and conditions.

Discussion of Staff Summary 4

The terms “tariff” and “price schedule” are used interchangeably in this proceeding. The term “price schedule” came about as a result of the enactment of SB 2320 during the 1989 legislative session. The amendment to N.D.C.C. § 49-21-04 changed the term “tariffs” to “price schedules.” Additional language was added that requires all telecommunications companies to file price schedules in such form and detail as the Commission may require. The price schedules must show all prices in effect for any telecommunications service rendered and must include all rules and regulations which in any manner affect the prices charged for such services. Subsection 3 provides that no price or price change is effective until filed in accordance with the law. “Price” is defined in N.D.C.C. § 49-21-01(14) as “any charge set and published in accordance with chapter 49-21 and collected by a telecommunications company for any telecommunications service offered by it to the public or other telecommunications companies.”

A tariff is defined as “a document that lists a public utility’s services and rates for those services.”¹ “A tariff that has been approved by a public service commission becomes law and has the same force and effect as a statute enacted by the legislature; it amounts to a binding contract between the utility and its customer”²

Complainant witness, Jim Howard, testified that Consolidated’s access tariff has one rate called premium access that would normally stand for feature group D (1 plus equal access). He stated that the complainants still have functionality feature group A, B, C and D, but there is only one rate. Howard acknowledged that not all of the services that make up the tariffed rate may be required to provide the SmartNET service. See Discussion of Staff Summary 6 for summary of tariffs on file with Commission.

The switched access services of BEK Communications Cooperative are subject to Commission rate of return regulation. It appears the switched access services of Consolidated Telcom and CCNI are price capped since neither company has opted for regulation by the Commission.

Discussion of Staff Summary 5

Complainants provided an exhibit showing a SmartNET web page that advertises the long distance service provided that SmartNET. The web page describes the lists telephone numbers that the SmartNET customer will dial is providing long distance . Complainants provided an exhibit proving that calls are originated by end users in their

¹ 64 Am. Jur. 2d, Public Utilities, § 61.

² Id.

local exchange areas to the SmartNET calling-plan telephone numbers. This exhibit does not show the termination point of the such calls and Complainants agree they do not know the termination point of such calls. However, SmartNET admits that end users in the local exchange areas of Complainants are able to originate long distance calls by dialing a SmartNET calling-plan telephone number and then dialing the telephone number associated with the terminating point of the call. SmartNET admits that it owns no facilities to transport a call originated by an end user in the local exchange area served by facilities owned by Complainants, therefore the facilities used to transport the call originated by an end user in a local exchange area of Complainants must be facilities provided by Complainants. If Complainants do not provide such facilities, they would not be able to bill for the use of such facilities. [did complainants show they own the facilities].

A telephone call telephone call originating with an end user in one of the Complainants' local exchange areas and TERMINATING at one of SmartNET's calling-plan numbers uses facilities owned by Complainants. However, if the caller fails to dial an additional telephone number associated with a destination other than the SmartNET calling-plan number, the Complainants are compensated for these calls with extended area service charges to the originating end user. Complainants' must have a price schedule, including terms, conditions and price, in order to remit a bill the end user for the facilities provided to place the extended area call.

An interexchange call originating with an end user in one of Consolidated's local exchange areas and terminating to an end user in an exchange other than Dickinson uses facilities owned by Consolidated. Use of the facilities of a provider constitutes acceptance of the provider's facility offering. Complainants' must have a price schedule, including terms, conditions and price, in order to remit a bill for the facilities provided.

Therefore, Complainants did prove that Complainants' facilities are being used in long distance calls provided via SmartNET services.

Discussion of Staff Summary 6

The Complainants are Consolidated Telcom, Consolidated Communications Networks, Inc., and BEK Communications Cooperative.

Consolidated Telcom was formed effective December 31, 1999 (the merging of Consolidated Telephone Cooperative and Consolidated Telcom, Inc). It appears that Consolidated Telcom has no tariffs for switched access on file with the Commission.

Consolidated Telcom's predecessors are Consolidated Telephone Cooperative and Consolidated Telcom, Inc. Consolidated Telcom, Inc. was formerly known as CTC Communications, Inc.

For Consolidated Telephone Cooperative the switched access tariffs on file with the Commission include:

- An interLATA tariff that is a mirror of the terms and conditions of the interLATA tariff filed by Northwestern Bell in Case No 10,444, effective January 1, 1984. The prices are mirrored with the exception of the Common Line element.
- An intraLATA tariff with terms, conditions and prices filed in compliance with the stipulation in the dialing parity complaint, Case No. PU-2096-99-241, effective August 23, 1999.

CTC Communications, Inc. was formed to purchase U S WEST exchanges in 1996. The switched access tariffs on file with the Commission for CTC Communications, Inc. include:

- For interLATA switched access, CTC Communications, Inc. stipulated that it would adopt the interLATA tariff U S WEST's price schedules and terms and conditions of service, except for switched access prices which were been stipulated and agreed to by the Buyers. The U S WEST tariff in place at the time which was the tariff filed by NWB in 10,694/10,699, including terms, conditions. It appears CTC Communications, Inc. did not file a tariff with the Commission.
- An intraLATA tariff with terms, conditions and prices filed in compliance with the stipulation in the dialing parity complaint, Case No. PU-2096-99-241, effective August 23, 1999.

For Consolidated Communications Networks, Inc., the Complainants provided an exhibit in this proceeding which was intended to indicate that Consolidated Communications Networks, Inc. has prices for switched access service. However, it appears there are no CCNI tariffs on file with the Commission for interLATA or intraLATA switched access services.

BEK Communications Cooperative purchased BEK Communications I Inc., effective January 1, 2001. It appears BEK Communications Cooperative has not filed interLATA or intraLATA switched tariffs for the merged company.

For BEK Communications Cooperative prior to the purchase of BEK Communications I Inc., the switched access tariffs on file with the Commission included:

- An interLATA tariff that is a mirror of the terms and conditions of the interLATA tariff filed by Northwestern Bell in Case No 10,444, effective January 1, 1984. The prices are mirrored with the exception of the Common Line element.
- An intraLATA tariff with terms, conditions and prices filed in compliance with the stipulation in the dialing parity complaint, Case No. PU-2096-99-241, effective August 23, 1999.

BEK Communications I Inc. was formed to purchase U S WEST exchanges in 1996. The switched access tariffs on file with the Commission for BEK Communications I Inc. include:

- For interLATA switched access, BEK Communications I Inc. stipulated that it would adopt the interLATA tariff U S WEST's price schedules and terms and conditions of service, except for switched access prices which were stipulated and agreed to by the Buyers. The U S WEST tariff in place at the time which was the tariff filed by NWB in 10,694/10,699, including terms, conditions. It appears BEK Communications I Inc. did not file a tariff with the Commission.
- An intraLATA tariff with terms, conditions and prices filed in compliance with the stipulation in the dialing parity complaint, Case No. PU-2096-99-241, effective August 23, 1999.

It appears that no interLATA or intraLATA access tariffs on file with the Commission by any local exchange company contains terms and conditions for the type of facilities used in the provision of long distance calling via SmartNET service. No switched access tariff on file appears to provide a correct description of the responsibility of the customer to report percent of use by jurisdiction (i.e. interLATA and intraLATA). It also appears there is some question whether the description of service elements (ie. Local Transport, Local Switching, End Office) are detailed enough to identify the elements used in a SmartNET long distance call using Complainants facilities. As testified to by Mr. Howard, not all the elements may apply to the use of Complainants facilities in a SmartNET long distance call.

Staff Recommendation

1. Complainants' facilities are used in the provision of a long distance call placed by an end user in a Complainant's local exchange via SmartNET's long distance services.
2. Consolidated Telcom, Consolidated Communications Networks, Inc., and BEK Communications Cooperative must have tariffs on file with the Commission to serve as a contract with SmartNET for use of those facilities and those tariffs must provide sufficient detail to identify terms, conditions and prices. Complainants must have tariffs on file with the Commission that constitute a contract.
3. SmartNET, Inc. must register with the Commission for provision of intrastate telecommunications services in North Dakota.