

**STATE OF NORTH DAKOTA**  
**PUBLIC SERVICE COMMISSION**

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

**Case No. PU-2967-03-666**

**SUPPLEMENTAL FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

**May 16, 2007**

**Appearances**

Commissioners: Susan E. Wefald, Tony Clark, 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 & Nordsven, 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 9<sup>th</sup> Street - Lower Level, Bismarck, North Dakota 58501-1882, appearing as procedural Hearing Officer.

**Preliminary Statement**

On June 29, 2005 the Commission issued its Findings of Fact, Conclusions of Law and Order in this proceeding. On August 10, 2005 the Commission amended its June 29, 2005 Order in response to the petition for reconsideration from BEK Communications Cooperative (BEK), Consolidated Telecom (Consolidated), 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 September 21, 2005 the Commission issued an order on granting a Second Petition for Reconsideration from Complainants 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 lacked 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.

On November 17, 2005 the Commission issued a Notice of Hearing scheduling a public hearing 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. On March 27, 2006 Complainants' counsel filed a letter advising the Commission that it is necessary to reschedule the hearing. On May 24, 2006 the Commission issued a Notice of Rescheduled Hearing for July 19, 2006 beginning at 9 a.m.

On June 7, 2006 the Commission issued an Order to Amend Complaint adding Consolidated Communications Networks, Inc. (CCNI) as an additional complainant party to this action.

On June 12, 2006 SmartNET filed a Motion for Continuance together with a Brief in Support of Motion for Continuance. On June 19, 2006 the Complainants filed a Brief in Opposition to Motion for Continuance. On June 22, 2006 the Commission denied SmartNET's request.

A hearing was held as scheduled on July 19, 2006.

On August 17, 2006 Complainants filed a Post-Hearing Brief and Proposed Amended Findings of Fact, Conclusions of Law and Order. On August 31, 2006 SmartNET filed the Respondent's Reply Brief and Proposed Amended Findings of Fact, Conclusions of Law and Order.

On January 16, 2007, CCNI filed a copy of a April 2, 1998 transmittal letter to the Commission regarding the filing of an intrastate access tariff and a copy of its intrastate access tariff effective May 22, 1998.

### **Findings of Fact**

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

2. Complainants' Exhibit RTCG-15 and RTCG-16 shows SmartNET web pages that advertise the long distance service provided by SmartNET. The web pages list telephone numbers that a customer will dial when using SmartNET's long distance service (SmartNET calling-plan numbers).

### ***Use of Complainants' Facilities***

3. Exhibit RTCG-9 shows calls that were originated by end users in BEK's local exchange areas to SmartNET calling-plan numbers from June 19, 2006 through July 11, 2006. Exhibit RTCG-10 shows calls that were originated by end users in Consolidated's local exchange areas to SmartNET calling-plan numbers from February 22, 2006 through May 21, 2006. Exhibit RTCG-11 shows calls that were originated by end users in CCNI's Dickinson local exchange area to SmartNET calling-plan numbers from March 22, 2006 through June 21, 2006. No evidence was provided to show that end users in Complainants' local exchange areas other than those of BEK, Consolidated, and CCNI are making calls to SmartNET calling-plan numbers.

4. SmartNET acknowledges that end users in the local exchange areas served by BEK, Consolidated and CCNI are able to originate long distance calls by dialing a SmartNET calling-plan number and then dialing the telephone number associated with the terminating point of the call. SmartNET acknowledges that it owns no facilities to transport a call originated by an end user in those local exchange areas. Therefore, we find the facilities used to transport a call originated by an end user in a local exchange area served by the BEK, Consolidated or CCNI, must be facilities provided by those Complainants.

### ***SmartNET's Liability for Compensation***

5. Complainants ask that the Commission affirm SmartNET's liability for use of Complainants facilities.

6. The Commission's June 29, 2005 order in this proceeding determined that SmartNET is an interexchange carrier. In other proceedings<sup>1</sup>, the Commission has determined the obligations for payment of switched access charges by certain long distance carriers for origination and termination of intrastate long distance calls using facilities of certain local exchange carriers. SmartNET was not a party in any of those proceedings. However, since SmartNET is using the facilities owned by Complainants, SmartNET is liable to compensate Complainants. Compensation is typically determined in accordance with published price schedules, tariffs or contracts. If such arrangements do not exist, they must be established by negotiation or Commission action under

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<sup>1</sup> Case Nos. 10,444; 10,694; 10,699; PU-314-94-688, and PU-2096-99-241

N.D.C.C. § 49-21-09 which provides authority to prescribe reasonable compensation, terms and conditions for the use by one telecommunications company of the facilities or services of another telecommunications company.

7. Complainants ask that the Commission affirm SmartNET is liable for usage under the Complainants' existing tariffs.

8. 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 Senate Bill 2320 during the 1989 legislative session. The amendment to N.D.C.C. § 49-21-04 changed the term "tariffs" to "price schedules."

9. A tariff is "a document that lists a public utility's services and rates for those services."<sup>2</sup> "Tariffs are those terms and conditions which govern the relationship between the utility and its customers."<sup>3</sup> "Tariff," as defined in N.D. Admin. Code §69-02-01-09, "includes any rate, joint rate, fare, toll, schedule, price schedule, classification, contract, practice, rule, regulation, or service, which is required by law to be filed with the commission." "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 . . . ."<sup>4</sup>

10. "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."

11. The law requires all telecommunications companies to file price schedules in such form and detail as the Commission may require.<sup>5</sup> The price schedules must show all prices, including prices set by contract and the individual unbundled or unpackaged price for any essential service, 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.

12. Neither North Dakota law nor the Commission's rules establish the minimum requirements of a tariff or price schedule.

13. The RTCG contends that, since the Commission has determined that SmartNET is an interexchange telecommunications carrier, the Complainant's should charge SmartNET for switched access the same as any other interexchange telecommunications carrier. RTCG further contends that the switched access tariffs by

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<sup>2</sup> 64 Am. Jur. 2d, Public Utilities, § 61.

<sup>3</sup> *NSP v N.D. Public Service Com'n*, 502 N.W.2d 240, 244 (N.D. 1993) (citing *Southwestern Bell Tel. V. State Corp. Com'n.*, 233 Kan. 375, 644 P.2d 798, 800 (1983)).

<sup>4</sup> *Id.*

<sup>5</sup> N.D.C.C. §49-21-04

law must be applied uniformly to all interexchange carriers to avoid undue preference and to make sure there are no discriminatory rate practices. The phone-to-phone calls of SmartNET customers basically impose the same burdens on ILECs and CLECs as other interexchange carrier calls.

14. Based on Commission records and the evidence presented, we have researched and identified existing switched access tariffs for the Complainants:

a) Consolidated was formed effective December 31, 1999 as a result of the merging of Consolidated Telephone Cooperative and Consolidated Telcom, Inc. Consolidated Telcom, Inc. was formerly known as CTC Communications, Inc. It appears Consolidated has no switched access tariff filed with the Commission. However, we agree that in a merger, the surviving entity holds all of the rights, privileges, property, powers, duties, obligations, and liabilities of the merging entities.

b) Consolidated Telephone Cooperative's switched access tariffs filed 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 that was effective January 1, 1984 and prices were mirrored with the exception of the Common Line element. For intraLATA switched access, Consolidated Telephone Cooperative filed terms, conditions, and prices in compliance with a stipulation in Case no. PU-2096-99-241, effective August 23, 1999.

c) CTC Communications, Inc., as a condition of the purchase of exchanges in 1996, stipulated that it would adopt U S WEST Communications, Inc.'s price schedules and terms and conditions of service for interLATA switched access, with the exception of the switched access prices which were specified, stipulated and agreed upon. The U S WEST tariff in place at that time was the tariff filed by Northwestern Bell Telephone Company in Case Nos. 10,694 and 10,699. For intraLATA switched access, CTC Communications, Inc. filed terms, conditions, and prices in compliance with a stipulation in Case No. PU-2096-99-241 to be effective August 23, 1999.

d) BEK Communications Cooperative purchased BEK Communications I Inc effective January 1, 2001. BEK Communications Cooperative's switched access tariffs filed 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 that was effective January 1, 1984 and prices were mirrored with the exception of the Common Line element. For intraLATA switched access, BEK Communications Cooperative filed terms, conditions, and prices in compliance with a stipulation in Case no. PU-2096-99-241, effective August 23, 1999.

e) BEK Communications I Inc, as a condition of the purchase of exchanges in 1996, stipulated that it would adopt U S WEST Communications, Inc.'s price schedules and terms and conditions of service for interLATA switched access, with the exception of the switched access prices which were specified, stipulated and agreed upon. The U S WEST tariff in place at that time was the tariff filed by Northwestern Bell Telephone Company in Case Nos. 10,694 and 10,699. For intraLATA switched access, BEK Communications I Inc filed terms, conditions, and prices in compliance with a stipulation in Case No. PU-2096-99-241 to be effective August 23, 1999.

f) CCNI's switched access tariff was filed with the Commission on April 2, 1998 with an effective date of May 22, 1998.

### ***Type(s) of Compensation Due to Complainants***

15. A telephone call originating with an end user in one of those Complainants' local exchange areas and terminating at one of SmartNET's calling-plan numbers uses facilities owned by those Complainants.

16. If an end user in a local exchange area of a Complainant dials the SmartNET calling-plan number but fails to dial an additional telephone number associated with a destination other than the SmartNET calling-plan number, the call uses facilities owned by Complainants and is an extended area service (EAS) call. Complainants are compensated for those calls in accordance with Complainant's tariffs setting forth terms, conditions and prices that apply to the originating end user for EAS.

17. If an end user in a local exchange area of a Complainant, after dialing the SmartNET calling-plan number, dials additional numbers associated with a destination in an exchange other than the local exchange areas served by the Complainants, the call is an interexchange call and uses facilities owned by Complainants. Complainants are due compensation for those calls according to Complainants' tariffs.

18. Complainants describe the type of service used by SmartNET as a line-side connection, dial around, and similar to a Feature Group (FG) A call.

SmartNET argues that the Complainants' tariffs do not provide for the types of services that SmartNET needs, which is either FGA or FGB access.

19. Based on Commission records and the evidence presented, we have researched and identified existing switched access terms, conditions and prices for the Complainants:

a) Section 6.1.1 of the Northwestern Bell Telephone Company interLATA switched access tariff filed in Case No. 10,444 (1984 tariff),

mirrored by Consolidated Telephone Cooperative and BEK Communications Cooperative, states that Switched Access Service is provided in five service categories called Feature Groups. Those five groups are FGA, FGB, FGC, FGD, and FGE.

b) The 1984 tariff defines FGA as the provision of “line side access to Telephone Company end office switches with an associated seven digit local telephone number for the IC’s [interexchange carrier’s] use in originating and terminating communications to an IC’s Intrastate Service.” Section 2.6 defines line-side connection as a connection of a transmission path to the line side of a local exchange switching system. Section 6.2.1(A) states that FGA is arranged for use by the IC in the provision of its foreign dial tone service, second dial tone service or switched private network services. FGB is defined as trunk side access to end office switches with an associated uniform 950-10XX access code. Section 2.6 defines trunk-side connection as a connection of a transmission path to the trunk side of a local exchange switching system. FGC is defined as trunk side access to end office switches not equipped for FGD end office switching. FGD is defined as trunk side access to end office switches. FGE is defined as trunk side access to end office switches and is available only to providers of mobile radio telephone and paging services.

c) Section 2.3.14(A) of the 1984 tariff concerning Jurisdictional Report Requirements states that “[w]hen the customer orders service for both interstate and intrastate use, the projected interstate percentage of use and intrastate percentage of use must be provided.... These whole number percentages will be used by the Telephone Company to apportion the use and/or charges between interstate and intrastate until a revised report is received....”

d) Section 6.1.1 of the Northwestern Bell Telephone Company interLATA switched access tariff filed in Case Nos. 10,694 and 10,699 (the 1986 tariff) and mirrored by CTC Communications, Inc. and BEK Communications I Inc. states that Switched Access Service is provided in four service categories called Feature Groups. Those four groups are FGA, FGB, FGC, and FGD.

e) The 1986 tariff defines FGA as the provision of “line side access to Telephone Company end office switches with an associated seven digit local telephone number for the customer’s use in originating communications from and terminating communications to an Interexchange Carrier’s Intrastate Service or a customer-provided intrastate communications capability.” Section 2.6 defines line-side connection as a connection of a transmission path to the line side of a local exchange switching system. FGB is defined as trunk side access to

end office switches with an associated 950-10XX access code. Section 2.6 defines trunk-side connection as a connection of a transmission path to the trunk side of a local exchange switching system. FGC is defined as trunk side access to end office switches not equipped for FGD and the telephone number dialed by the end user is NXX-XXX, 0 or 1+ NXX-XXXX, NPA + NXX-XXX, 0 or 1+ NPA + NXX-XXX. FGD is defined as trunk side access to end office switches with an associated 10XXX access code, and no access code is required if the end user's telephone exchange service is presubscribed to a specific interexchange carrier.

f) Section 2.3.10(A) of the 1986 tariff concerning Jurisdictional Report Requirements states that "[w]hen the customer orders service for both interstate and intrastate use, the projected interstate percentage of use and intrastate percentage of use must be provided.... These percentages will be used by the Telephone Company to apportion the use and/or charges between interstate and intrastate until a revised report is received...."

g) The intraLATA switched access tariff filed in compliance with the stipulation in Case no. PU-2096-99-241 (Stipulation tariff) does not specify to whom the tariff applies. The opening paragraph states that three rate categories apply to Switched Access Service including Local Transport, End Office and Common Line.

h) Under switched access tariff filed by CCNI (CCNI tariff), Section 4.2, FGD is the only type of switched access provided by CCNI. FGD is defined as trunk-side access to local switching center switches, with an associated 10XXX Access code. No access code is required for calls if the end user's telephone exchange service is arranged for presubscription to an interexchange carrier. Section 2.3.3 requires that the interexchange carrier provide its projected percent interstate usage and the percentages will be used by CCNI to apportion the use and/or charges between interstate and intrastate until a revised report is received. If no percent interstate usage is submitted, a default basis of 50% interstate and 50% intrastate is used.

20. Complainants state that there is no rate today for FGA service. The only rate available today is for "premium access" which is FGD access, but that FGD access provides functionality FGA, FGB, FGC and FGD access. We do not agree. We find that while a company may have the ability to provide FGA services, FGD service does not provide that functionality because FGD does not provide line side access.

21. We find that the 1984 tariff and the 1986 tariff have specific terms, conditions and prices for FGA switched access service. We find that there are no provisions in the CCNI tariff for FGA switched access service.

22. The Stipulation tariff is a single page titled “Switched Access Service Tariff” and it defines three rate categories which apply to switched access service and include local transport, end office, and common line. Although the Stipulation tariff does not specifically define switched access, state law defines “Switched access” as access that includes “[t]elecommunications service, including connections, provided to allow transmission service and termination between an interexchange company’s premises and the local exchange central office switch for the origination or termination of the interexchange company’s switched telecommunications services.”<sup>6</sup> “Access” is defined as “telecommunications services to connect a telecommunications customer or end user with a telecommunications company that allows for the origination or the termination, or both, of WATS, 800, and message toll telecommunications services and private line transportation services.”<sup>7</sup> We find that, while the Stipulation tariff does not specifically identify FGA switched access, the tariff is broad and therefore includes all feature group types of switched access.

### ***Jurisdictional Reporting***

23. RTCG witness Bruce Walth testified that this proceeding does not pertain to interexchange calls that are terminating in Complainants’ local exchanges and therefore does not pertain to terminating usage, only originating usage. We agree and our decision will apply only to originating usage.

24. RTCG witness Dean Anagnost stated that SmartNET is not operating under any of the specific protocols required by tariffs that would enable the Complainants to identify the destination of the call. He stated that if SmartNET subscribed to FGD access, calls could be accurately identified to determine whether they are intrastate or interstate calls.

25. Exhibits RTCG-9, RTCG-10 and RTCG-11, showing calls that were originated by SmartNET end users located in Complainants’ local exchanges, do not show the termination point of the calls. Complainants do not know the termination point of the calls. For purposes of billing SmartNET, all of the calls were rated by Complainants as intrastate calls.

26. Since Complainant’s cannot accurately identify the destination of calls using SmartNET’s service, Complainants argue that SmartNET should follow the protocol in the switched access tariff requiring that certain interexchange carriers report percent of use by jurisdiction in order to apply the appropriate price for the usage by jurisdiction. Intrastate long distance calling is classified as either interLATA or intraLATA. Interstate and intrastate switched access service is classified as either interLATA or intraLATA.

27. We find that the Stipulation tariff does not include specific protocols for reporting percent of use by jurisdiction. The CCNI tariff includes requirements for reporting

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<sup>6</sup> N.D.C.C. §49-21-01(18)(f).

<sup>7</sup> N.D.C.C. §49-21-01(1).

percent of use by jurisdiction for FGD access, not FGA. While the 1984 tariff, the 1986 tariff do include specific protocols for reporting percent of use by jurisdiction under FGA access, but those tariffs require the reporting of interstate vs intrastate percent of use. They do not require the reporting of interLATA or intraLATA percent of use.

28. Therefore, we find that the Complainants' existing tariffs are inadequate since they do not provide a means for pricing of interstate interLATA, interstate intraLATA, intrastate interLATA, intrastate intraLATA jurisdictional access services used by SmartNET.

29. Complainants discussed an alternative method for determining billing to SmartNET using a review of past history of all calling in Complainants' exchanges to determine jurisdictional call patterns.

30. Complainants have not asked for a determination of a dollar amount for usage of their facilities nor have they provided information such as SmartNET's usage or percentage jurisdictional usage necessary to determine compensation.

31. We recommend that Complainants' switched access tariffs be amended to specify the provision of FGA switched access service including tariff language that requires adequate FGA percent interstate interLATA, interstate intraLATA, intrastate interLATA, intrastate intraLATA jurisdictional usage reporting.

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 register with the Commission under North Dakota Century Code Section 49-03.1-09.

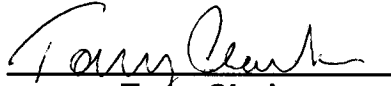
7. SmartNET is providing a telecommunications service to end users located in separate local exchange areas and is an interexchange telecommunications company under 49-21-01(8).
8. Under North Dakota Century Code Section 49-21-09 the Commission may prescribe reasonable compensation, terms, and conditions for the connection made between the facilities of telecommunications companies for the transfer of telecommunications.
9. A company tariff that sufficiently sets forth terms, conditions and prices for the use of facilities is in effect a publicly filed contract which has the force of law, and users of its services consent the contract by usage of the company's services.
10. SmartNET is using facilities owned by BEK, Consolidated and CCNI.
11. SmartNET is liable for compensation to BEK, Consolidated and CCNI for originating switched access service under tariffs published by the companies.
12. Current tariffs published by BEK, Consolidated and CCNI do not sufficiently set forth terms and conditions for the use of facilities.
13. Complainants have not requested the determination of a dollar amount concerning SmartNET's liability for use of facilities.

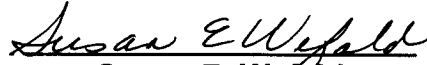
From the foregoing Findings of Fact and Conclusions of Law, the Commission issues the following:

### **Order**

1. SmartNET is liable to compensate BEK, Consolidated and CCNI for the origination of intrastate interexchange telecommunications services.
2. In order for BEK, Consolidated and CCNI to be compensated, they must amend their tariffs to specify the provision of the type of switched access service used by SmartNET including tariff language that requires adequate percent interstate interLATA, interstate intraLATA, intrastate interLATA, and intrastate intraLATA jurisdictional usage reporting for originating.
3. Any switched access tariff changes filed by BEK, Consolidated or CCNI to specify the provision of the type of switched access service used by SmartNET shall not become effective before 20 days from the date of this order, as provided under North Dakota Century Code §§ 49-21-04 and 49-21-25 and 49-05-05, to allow SmartNET an opportunity to provide reasonable advance notice of discontinuation of service to its customers as required under North Dakota Administrative Code § 69-09-05-02.

**PUBLIC SERVICE COMMISSION**

  
**Tony Clark**  
**Commissioner**

  
**Susan E. Wefald** *PM*  
**President**

  
**Kevin Cramer**  
**Commissioner**