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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of Bresnan Broadband of Utah, LLC for a Certificate of Public Convenience and Necessity to Operate as a Competitive Local Exchange Carrier in Utah	DOCKET NO. 07-2476-01 Petition for Reconsideration, Review, and Rehearing
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The Utah Rural Telecom Association (“URTA”), pursuant to Utah Code Ann. § 63-46b-12 and Utah Code Ann. § 54-7-15, hereby petitions the Public Service Commission (“Commission”) to reconsider the order the Commission issued November 16, 2007 (“Order”) in this matter and review and rehear the issues enumerated below.

INTRODUCTION

On September 4th and 5th, 2007 the Commission held hearings on the application Bresnan Broadband, LLC (“Bresnan”) filed seeking to provide public telecommunications services in the Vernal exchange in competition with incumbent provider, UBTA-UBET. This is the first time the Commission has addressed an application to provide service in a rural exchange of an incumbent with fewer than 30,000 access lines where the incumbent receives distributions from the state universal service fund (“USF”) to promote universal service.¹ Bresnan, the Division of Public Utilities, and the Committee of Consumer Services presented evidence in support of

¹ Order p. 4.

Bresnan's application. UBTA-UBET and URTA presented evidence in opposition to the application. On November 16, 2007, the Commission issued the Order granting Bresnan's petition, finding that Bresnan has the technical, financial, and managerial capability to provide services and that granting the application is in the public interest.

ARGUMENT

Utah Code Ann. § 54-8b-2.1(2) establishes a two-pronged test for issuing the certificate of public convenience and necessity that Bresnan Broadband, LLC ("Bresnan") seeks in this case: the applicant must demonstrate that it has sufficient technical, financial, and managerial resources; and, the application must be in the public interest. Since the Commission identified public interest as the primary issue in this case, URTA first urges the Commission to reconsider and reverse its determination that Bresnan's application is in the public interest.² URTA also challenges the Commission's finding that Bresnan has the necessary resources to provide the services in its application. Support for this petition and reversal of the Commission's decisions is as follows:

A. Public Interest

1. The Commission erroneously interpreted and applied *WWC Holding Co., Inc. v. Public Service*, 44 P.3d 714 (Utah 2002) ("Western Wireless")

The Commission erroneously interpreted and applied Western Wireless in this proceeding.³ Although stating it was mindful of Western Wireless in its analysis, the Commission concluded that Western Wireless was not "controlling precedent" for this case.⁴ According to the Commission, Bresnan's application is distinguishable from Western Wireless because Bresnan is seeking a certificate of public convenience and necessity, not designation as

² Order p. 9.

³ Utah Code Ann. § 63-46b-16(4)(d).

⁴ Order p. 16.

an eligible telecommunications carrier (“ETC”), which is what the applicant in Western Wireless was seeking. The Commission further distinguished Western Wireless from this case by stating “...that docket was primarily guided by Federal public interest considerations focusing on the expansion of universal service balanced against the anticipated USF impact, rather than, as here, by Utah statutory authority regarding the benefits of competition and the public interest.”⁵

Western Wireless is the only pronouncement the Commission has made on the public interest of an application to provide service in a rural exchange.⁶ Without Western Wireless, there is no public interest standard for granting or denying certificates in these areas. Whether an application addresses a certificate or designation as an ETC is immaterial; the direct or indirect effect on customers and the area served continues to be the principal consideration of the public interest test.

The Commission’s distinction between this case and Western Wireless on grounds that the Western Wireless was based on federal public interest considerations is also flawed. In spite of the fact that Western Wireless addressed ETC designation pursuant to 47 U.S.C. § 214, designating ETCs has been delegated to state commissions. In addition, it is Utah Admin. Code R746-360-6 that requires ETC status to qualify for state universal service support and it was the impact granting ETC status would have on the state fund that the Commission considered in making its public interest finding in Western Wireless. Federal public interest standards, whatever they may be, were not at issue in Western Wireless. Even if they were, the Commission did not elucidate them in the Order or distinguish them from public interest considerations based on state statutory authority the Commission indicated that it had applied in

⁵ Id.

⁶ Id. p. 6.

granting Bresnan's application. This, combined with the Commission's misinterpretation of Western Wireless is clear error that the Commission should review, reconsider, and correct.

The Commission misapplied Western Wireless as well by giving weight to claimed public interest considerations for which there is no record support. As explained below in Section A.2., giving greater weight to factors such as technological innovation where there is no supporting evidence than to the undisputed harm Bresnan's application will cause to the USF is a misapplication of the law. As such, the Commission's action is arbitrary and capricious and should be reversed and corrected on reconsideration.

2. The Commission's finding of fact that granting Bresnan's application is in the public interest is not supported by substantial evidence viewed in light of the whole record

The Commission's finding that granting Bresnan's application is in the public interest is not supported by substantial evidence viewed in light of the whole record.⁷ In the Order it appears that the Commission relied almost exclusively on competitive choice in the Vernal exchange to find that Bresnan's application is in the public interest. The Order mentions other considerations such as lower prices, increased technological innovation, improved customer service, and improved quality of service, but there is no evidence on the record showing that any of these claimed benefits will occur.⁸ Bresnan is a telecommunications service provider in other states and could have supplied the Commission with evidence of the benefits that have materialized in those jurisdictions, but it either chose not to do so or they had no such evidence. Either way the record here is devoid of support for the Commission's finding that granting the application is in the public interest. Statements from a textbook about what competition may do are not substantial evidence.

⁷ Utah Code Ann. § 63-46b-16(4)(g).

⁸ Order p.17.

Competition drives prices to cost. The fact that UBTA-UBET qualifies for distributions from the USF means that its service prices do not reflect their actual costs. In addition, the Vernal exchange is only part of the area UBTA-UBET serves. The customers outside the Vernal exchange will lose the Commission-approved internal support from the Vernal exchange if the Commission allows Bresnan to cherry pick Vernal.⁹ The net effect is that customers outside Vernal will pay more, or there will be upward pressure on the USF surcharge. Neither outcome is in the public interest. That the current surcharge can absorb this upward pressure caused by Bresnan's entry does not overcome this negative impact in the Commission's consideration of the public interest. Without the upward pressure, the Commission could decrease the USF fund surcharge and that is a benefit all ratepayers will forgo if Bresnan is allowed to enter the Vernal exchange.

The only remaining public interest consideration on this record is that Bresnan's application offers a choice to customers in the Vernal exchange. That consideration alone is not adequate to meet the public interest requirement of the statute, particularly given the negative impact on the USF, UBTA customers outside the Vernal exchange, and all other telecommunications customers around the state who pay the USF surcharge.¹⁰ According to well established principles of statutory construction, the public interest test contemplated by Utah Code Ann. § 54-8b-2.1(2) means more than just offering competitive choice because otherwise the test would be meaningless. Any applicant with the technical, financial, and managerial resources to provide service would automatically meet the test because simply by applying, the applicant would be offering an alternative and there would be no reason for a two-pronged test.

⁹ The Commission approved this internal support structure in a recent UBTA-UBET rate case by adopting UBTA-UBET's local service rates.

¹⁰ Order p. 14. The Commission acknowledged the position of all parties that USF distributions to UBTA-UBET would increase as a result of Bresnan's entry into the Vernal exchange.

This interpretation is impermissible because it renders the law a nullity. Without the necessary evidentiary support for the Commission's finding of public interest, it is arbitrary and capricious.

The Commission should, therefore, reconsider and reverse the public interest finding.

3. **The Commission's finding that granting Bresnan's application is in the public interest and its refusal to establish a public interest standard is an abuse of discretion delegated to the Commission**

URTA incorporates herein Sections A.1. and A.2. by this reference. The Commission's finding that granting Bresnan's application is in the public interest and its refusal to establish a public interest standard is an abuse of discretion delegated to the Commission by the legislature.¹¹ Treating Bresnan's application to provide service in the Vernal exchange like all other previous applications filed in the state is unreasonable and capricious. This Bresnan case is different because it is the first application to provide service in the rural exchange of an incumbent carrier with fewer than 30,000 access lines. In addition, and perhaps even more importantly, this is the first time the Commission has confronted the issue of competitive entry in an exchange supported by the USF. The effects of this case will be felt statewide.

The legislature gave the Commission the discretion to determine the requirements to meet the public interest test in statute. As noted, public interest requires more than just offering competitive choice and there must be evidence on the record that supports other factors on which the Commission relies to find granting an application is in the public interest.

Given that this is a case of first impression, it is an abuse of that discretion for the Commission not to clearly pronounce a public interest standard. To not do so is arbitrary and capricious and will lead to arbitrary outcomes when similar applications are filed in the future. URTA therefore urges the Commission to reconsider and reverse its decision in this proceeding and to establish a clear public interest standard.

¹¹ Utah Code Ann. § 63-46b-16(4)(h).

B. Technical, Financial, and Managerial Resources

In the Order the Commission found that Bresnan has the technical, financial, and managerial resources to provide the services for which they have applied to provide in accord with Utah Code Ann. § 54-8b-2.1(2).¹² This finding, however, is contrary to the evidence demonstrating serious concerns about the applicant's financial capability in the recent past. The Commission circumvented this evidence by relying on the financial condition of Bresnan's parent and affiliates.¹³ Utah Code Ann. § 54-8b-2.1(2) requires that the applicant, not its parent or affiliates, have the financial wherewithal to provide the services in its application. The Commission's own rule, Utah Admin. Code R746-349-3, assumes that the applicant's viability will form the basis for a Commission finding that the applicant can perform and persist on a standalone basis.

The information Bresnan provided in this proceeding was inadequate for the parties or the Commission to determine Bresnan's financial strength and capability. In the Order the Commission acknowledged URTA's complaint that its financial analysis of Bresnan was hampered by Bresnan not filing the required *pro forma*.¹⁴ If Bresnan is allowed to enter the Vernal exchange and put upward pressure on the USF, and then fails, the telecommunications customers in the Vernal exchange and throughout the state will be harmed by a legacy of higher costs for some time to come. The Commission's finding that Bresnan has the financial resources to provide the services in the application is not supported by substantial evidence on the record and is arbitrary and capricious.¹⁵ URTA urges the Commission to reconsider and reverse its decision and to make findings that align with the evidence in the case.

¹² Order pps. 19-20.

¹³ Order p. 8.

¹⁴ *Id.*

¹⁵ Utah Code Ann. § 63-46b-16(4)(g).

CONCLUSION

Based on the foregoing, the Commission has acted arbitrarily and capriciously and has abused its discretion in granting Bresnan's application in this proceeding all of which has substantially prejudiced URTA.¹⁶ URTA therefore petitions the Commission to reconsider and reverse its decision.

Respectfully submitted this 17th day of December, 2007.

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¹⁶ Utah Code Ann. § 63-46b-16(4)

Certificate of Service

I hereby certify that on this 17th day of December, 2007, I caused to be emailed a true and correct copy of the foregoing Petition for Reconsideration, Review, and Rehearing of the Utah Rural Telecom Association filed in Docket No. 07-2476-01 to the following:

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