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BEFORE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petitions of Bresnan Broadband of Utah, LLC, to Resolve Dispute Over Interconnection of Essential Facilities and for Arbitration to Resolve Issues Relating to an Interconnection Agreement with UBTA-UBET Communications, Inc.	**DOCKET NO. 08-2476-02** Initial Brief of the Utah Rural Telecom Association

I. PROCEDURAL HISTORY

This dispute between Bresnan Broadband of Utah, LLC ("Bresnan") and UBTA-UBET Communications, Inc. ("UBTA-UBET") arose when Bresnan sought to interconnect its facilities with the essential facilities of UBTA-UBET to provide VoIP service. UBTA-UBET filed a motion to dismiss on grounds that Bresnan's proposed service is not a public telecommunications service and, therefore, there is no requirement to interconnect with Bresnan.

The Utah Rural Telecom Association ("URTA") filed a petition to intervene in the proceeding November 4, 2008 which the Public Service Commission ("Commission") granted November 25, 2008. URTA is interested in this case because it is a case of first of impression: the Commission must decide UBTA-UBET's obligations to interconnect its essential facilities with Bresnan's network solely under state law setting precedent that could substantially affect the legal rights of URTA members now and in subsequent cases. In addition, this is the first agreement between a rural Incumbent Local Exchange Carrier ("ILEC") and a Competitive

Local Exchange Carrier ("CLEC"). To date in Utah, all agreements to interconnect have been interconnection agreements approved under the federal Telecommunications Act of 1996 (the "federal Act"). This is also significant because UBTA-UBET has a rural exemption under 47 U.S.C § 251(f)(1) of the federal Act from having to arbitrate an interconnection agreement under the terms of 47 U.S.C § 252 of the federal Act if the Commission were applying federal law in this case.

On November 17, 2008 the Commission issued an order denying UBTA-UBET's motion to dismiss and stated its intention to proceed solely under Utah state law. On November 19, 2008, the Commission established a schedule for the proceeding.

URTA co-sponsored the testimony of Douglas D. Meredith who argued two principal points: 1) any interconnection the Commission requires between Bresnan and UBTA-UBET should be direct, not indirect; and, 2) since the agreement the Commission approves in this proceeding can be adopted by other providers, the provisions UBTA-UBET proposes should be the Commission's default position unless there are significant public interest considerations to reject them.

This matter came on for hearing January 27 - 29, 2009 before Administrative Law Judge Ruben Arredondo. Alex Harris testified for Bresnan, Douglas Meredith testified for URTA and UBTA-UBET, and Valerie Wimer testified for UBTA-UBET. Following the hearing, Bresnan and UBTA-UBET continued negotiating to settle some of the outstanding issues. On March 2, 2009, these two parties filed a draft Essential Facilities Agreement reflecting the state of their agreement and enumerated six issues that continue to be in dispute.

II. ARGUMENT

1. The Commission Should Make Its Decisions in this Proceeding Based Solely on Utah Law, Not on Federal Law

In its November 17, 2008 order in this docket, the Commission stated that, "[t]he Commission proceeds with this matter solely pursuant to state law. It does not proceed under any authority conferred by federal law. The relief that may be provided will be provided pursuant to state law."

The Division of Public Utilities ("Division") recommended that the Commission use the federal Act as a reference[1] in resolving issues in this case despite the Commission's explicit statement that "[t]he relief that may be provided will be provided pursuant to state law." Taking the Division's approach to introduce federal law and standards ultimately leaves UBTA-UBET subject to the obligations of the federal law without any of the benefits of the federal law. URTA witness Meredith explained that under the federal Act, rural ILECs like UBTA-UBET have an exemption under Section 251(f)(1) from having to arbitrate or interconnect with other providers' networks until the Commission finds that interconnection is technically feasible, not economically burdensome, and in the public interest.[2] The state law has no comparable protection. The Commission concluded that it is not "… required to conduct a 'rural exemption proceeding' before moving forward with resolution of the interconnection dispute between Bresnan and UBTA-UBET[3]" when it is acting under state law. Additionally, the Commission

[1] DPU Exhibit 1, Lines 57 - 94.

[2] URTA Exhibit 1, Lines 89 - 100.

[3] November 17, 2008 Commission Order, p.9.

stated that "… state law clearly provides a basis to proceed with resolution of the dispute between two state-certificated providers ….[4]"

Having made these two determinations, it would be unjust, unreasonable, and arbitrary now for the Commission to use the federal law as a reference or otherwise without giving UBTA-UBET the protections under the federal law. The "hundreds" of other interconnection agreements that include provisions allowing indirect interconnection to which the Division refers in its testimony that the Commission has approved provide no precedent for this proceeding because every one of them was decided pursuant to the federal Act.[5] In addition, all but a very few were negotiated voluntarily under Section 252(a)(1) without regard to the requirements of Section 251 and therefore have no effect on the Commission's decisions in an arbitration. Parties are free under Section 252 to negotiate virtually any provision as long they are not discriminatory, but state commissions are not free to impose negotiated provisions not mandated by the federal law. URTA urges the Commission to use only the state law in resolving the remaining disputed issues consistent with its November 17, 2008 order.

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[4] *Id.*

[5] DPU Exhibit 1, Lines 83 - 86. The Division made this argument to justify its recommendation that Bresnan be allowed to interconnect indirectly under Section 251 of the federal Act because there is no reference to indirect interconnection elsewhere. Section 251(a) imposes a duty on all telecommunications carriers to interconnect directly or indirectly with facilities of other carriers. In paragraph 997 of the Local Competition Order (*Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 4 CR 1, 11 FCC Rcd 15499, 61 FR 45475), the Federal Communications Commission clarified that the duty to interconnect under Section 251(a), is a general requirement for all carriers to interconnect to enable the smooth flow of traffic on the public switched network. The method of interconnection under this section is the choice of the carrier to ensure the most efficient, technical, and economic choice. The duty to interconnect imposed by Section 251(c), unlike Section 251(a) is only imposed on local exchange carriers and requires direct interconnection at any technically feasible point on the local exchange carrier's network.

2. The Commission Should Order that Interconnection Between Bresnan and UBTA Should Be Direct, Not Indirect, Within UBTA-UBET's Service Territory

The first remaining disputed issue between Bresnan and UBTA-UBET is Bresnan's proposal to require UBTA-UBET to interconnect initially with Bresnan indirectly in Qwest's tandem switch in Provo outside UBTA-UBET's network and service territory. This is the principal issue URTA witness Meredith addressed and opposed in his pre-filed direct testimony and on the witness stand at hearing.

Utah Code Ann. § 54-8b-2.2 empowers the Commission to "… require any telecommunications corporation to interconnect its essential facilities with another telecommunications corporation that provides public telecommunications services in the same, adjacent, or overlapping service territory." The corresponding Commission rule is Utah Admin. Code § R746-348-3 A. in which the Commission required that "Incumbent local exchange carriers shall allow any other public telecommunications service provider to interconnect its network at any technically feasible point, to provide transmission and routing of public telecommunications services."

When the legislature enacted 54-8b-2.2 in 1995 and the Commission promulgated R746-348-3 in 1997, Qwest was the only ILEC that could be compelled to interconnect with CLECs. No one contemplated that Qwest would have to interconnect to another carrier through a third party intermediary outside Qwest's service territory.[6] The law makes clear that interconnection is only available to telecommunications service providers serving in the same geographic area so

[6] Although the Commission was applying federal law, it recently recognized in Docket No. 04-049-145 that an ILEC need only interconnect with another carrier in the ILEC's service territory. *See* April 3, 2008 Commission order Docket No. 04-049-145 at pp. 34 - 35.

it simply does not follow that an ILEC can be compelled to interconnect outside the area it is serving.

In this instance, Bresnan is asking the Commission to order UBTA-UBET to interconnect indirectly with Bresnan at Qwest's Provo tandem switch not just outside UBTA-UBET's service territory, but also outside of its network, to serve the Vernal exchange. Apart from making no economic sense when both parties are serving customers in the Vernal exchange,[7] there is no express support in state law for that request.

In testimony the Division took the position that the Commission should permit both direct and indirect interconnection in the parties' Essential Facilities Agreement. As noted in Section 1, however, the Division had to apply the federal Act to make that recommendation and the Commission has made it amply clear that this proceeding is not governed by or conducted under federal law. Section 251(a) of the federal Act is the only place that addresses indirect interconnection. It is not found in state law.

In its Local Competition Order, the Federal Communications Commission explained that indirect interconnection does not mean using an intermediary outside a carrier's service territory to interconnect networks as Bresnan is proposing.[8] While the federal Act may allow indirect interconnection, it does not compel it. In addition, it is not persuasive or relevant that interconnection agreements approved by the Commission have provisions allowing indirect interconnection when all of those agreements were approved under inapplicable federal law and virtually all of them were voluntarily negotiated. Since state law does not compel indirect

[7] See Transcript p. 251. There are converter boxes that Bresnan can use at the existing point of interconnection in Vernal that would allow the delivery of Voice over Internet Protocol calls to Grand Junction, Colorado at Bresnan's switching center.

[8] *See* Footnote 5.

interconnection, URTA urges the Commission to deny Bresnan's proposed language in the draft agreement that requires it.

In addition to there being no support in state law or Commission rule to compel an ILEC to permit indirect interconnection outside its service territory, there is also no support for requiring an ILEC to interconnect outside its network. Bresnan's request would require UBTA-UBET to interconnect with Bresnan at Qwest's Provo tandem switch which is well beyond UBTA-UBET's network. UBTA-UBET's meet point with Qwest is at Whiskey Springs in a field on the edge of but within UBTA-UBET's service territory.[9] The facilities beyond the Whiskey Springs meet point belong to Qwest and are part of Qwest's network. Interconnection beyond Whiskey Springs therefore would be interconnection with Qwest, not with UBTA-UBET. The only circumstance under which the Commission should authorize Bresnan's indirect interconnection request at Qwest's Provo tandem switch is if Bresnan assumes responsibility for the costs of using Qwest's network.[10] Otherwise, the Commission should order that Bresnan interconnect directly with UBTA-UBET where interconnection is technically feasible within UBTA-UBET's service territory. That certainly meets the requirements of state law and the Commission's rule. Additionally, it meets Bresnan's ultimate objective of directly interconnecting with UBTA-UBET's network.[11]

[9] *See* Transcript pp. 153 - 158, 192 - 193, 245 - 252.

[10] *See* Transcript pp. 245 - 246.

[11] *See* Transcript p. 53 where Bresnan witness Harris stated that Bresnan intends to directly interconnect with UBTA-UBET's network.

3. If the Essential Facilities Agreement will be Available for all Providers, the Commission Should Accept UBTA-UBET's Proposed Language to Protect UBTA-UBET Unless there are Significant Public Interest Reasons Not To Do So

Under Utah Code Ann. § 54-8b-2.2(b), all telecommunications providers serving in the same or overlapping area have the right to interconnect with the essential facilities and to purchase essential services of all other telecommunications providers serving the area. If that means that the Essential Facilities Agreement that is the subject of this case will be available to all other service providers entering the Vernal exchange, the Commission should approve the protective provisions proposed by UBTA-UBET to reduce UBTA-UBET's vulnerability now and in the future when other providers adopt the agreement. Bresnan may not even care about some of these provisions because they have no intention of engaging in practices that cause the concern. Examples Mr. Meredith gave in his testimony include proper billing and identification of traffic, strict provisions for the exchange of traffic, and remedies for failure to perform.[12] Adopting these and other similar provisions is in the public interest because it offers important protections to the ILEC and helps ensure good business practices that ultimately will serve to protect customers. URTA urges the Commission to adopt these provisions and to establish a policy of accepting them in future essential facilities agreements or interconnection agreements.

III. CONCLUSION

This is an important case of first impression for rural ILECs. URTA urges the Commission to permit only direct interconnection between Bresnan and UBTA-UBET in UBTA-UBET's service territory. There is no express support to do otherwise under state law. Even the federal Act, though inapplicable in this proceeding, does not support the imposition of

[12] URTA Exhibit 1 p. 6; Transcript p. 178.

indirect interconnection on telecommunications providers unwilling to enter into this arrangement voluntarily.

URTA also urges the Commission to adopt the protective provisions of the draft Essential Facilities Agreement proposed by UBTA-UBET's as being in the public interest. This will ensure that the parties to this agreement and any telecommunications providers who adopt it generally engage in good business practices and have appropriate remedies if a party fails to do so.

Respectfully submitted this 23rd day of March, 2009.

CALLISTER NEBEKER & MCCULLOUGH

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Stephen F. Mecham

Certificate of Service

I hereby certify that on March 23, 2009, I caused a true and correct copy of the foregoing Initial Brief of the Utah Rural Telecom Association to be emailed to the following:

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