

Stanley K. Stoll (A3960)
Kira M. Slawson (7081)
Blackburn & Stoll, LC
257 East 200 South, Suite 800
Salt Lake City, Utah 84111
Tel: 801/521-7900
Fax: 801/521-7965
Attorneys for UBTA-UBET
Communications, Inc.

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition of Brenan Broadband of Utah, LLC, to Resolve Dispute Over Interconnection of Essential Facilities and for Arbitration to Resolve Issues Relating to Interconnection Agreement with UBTA-UBET Communications, Inc.	UBTA-UBET COMMUNICATIONS, INC.'S POST HEARING BRIEF Docket No. 08-2476-02 March 23, 2009
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UBTA-UBET Communications, Inc. ("UBET"), hereby submits its Post Hearing Brief in opposition to Bresnan Broadband of Utah, LLC's ("Bresnan's") Petition to Resolve Dispute Over Interconnection of Essential Facilities and for Arbitration to Resolve Issues Relating to Interconnection Agreement with UBET in the above referenced docket.

Statement of the Case

On February 14, 2008, Bresnan Broadband of Utah ("Bresnan") requested, pursuant to 47 U.S.C. § 251(a) and (b), that UBET enter into a mutual traffic exchange agreement with Bresnan. The parties exchanged additional information, and based upon that information UBET concluded that Bresnan did not qualify for an interconnection agreement under applicable federal law because Bresnan was not intending to use the interconnection arrangement for telecommunications services as that term is defined by federal law. On the contrary, Bresnan intends to deploy a VoIP service, and there has been no determination at the federal level that VoIP services are telecommunications services. On May 14, 2008, Bresnan submitted a request

for mediation to the Utah Public Service Commission. Thereafter, on July 3, 2008 the Utah Public Service Commission concluded that it would not act on Bresnan's request for mediation. The Utah Public Service Commission indicated that Bresnan's February 14, 2008 request for interconnection only referenced federal law (47 U.S.C. Section 251 (a) and (b)). The Utah Public Service Commission also noted that Bresnan's May 14, 2008 mediation request also referenced only federal law (47 U.S.C. Section 252 (a)(2)). The Public Service Commission determined that Bresnan's position was that the IP enabled service it intends to provide is not a public telecommunications service as defined by Utah Code 54-8b-2(16). The Commission determined that Bresnan's request for interconnection for the VoIP services that Bresnan intends to provide would have required the Commission to proceed under federal law in order to determine whether UBTA-UBET has an interconnection obligation with Bresnan. The Commission declined to do so, stating that the FCC is currently reviewing this very issue in the *Vermont Telephone Petition*.

Upon receipt of the Commission's ruling, Bresnan filed the above-captioned Petition to Resolve Dispute Over Interconnection of Essential Facilities and for Arbitration to Resolve Issues Relating to an Interconnection Agreement with UBET. Bresnan sought an arbitration proceeding with UBET to resolve alleged disputes regarding interconnection with UBET. UBET moved for, and was granted intervention in that matter. UBET further moved the Commission to dismiss Bresnan's Petitions on the grounds that the Utah Public Service Commission lacks jurisdiction to determine matters of interconnection related to VoIP services. The Commission denied UBET's Motion to Dismiss and a hearing was held before Judge Arredondo on January 27, 28, and 29, 2009. Prior to the hearing testimony was prefiled by UBET, URTA, Bresnan, and the Division of Public Utilities. Specifically, the individuals providing testimony, prefiled and rebuttal, were as follows: 1) Alex Harris on behalf of Bresnan; 2) Douglas Meredith as Expert

Witness for UBET and URTA; 3) Valerie Wimer as Expert Witness for UBET; and 4) Casey Coleman for the Division of Public Utilities.

Additionally, both UBET and Bresnan provided draft Interconnection Agreements. Following the testimony and cross-examination of the witnesses, the Commission invited the parties to work together to narrow the open issues relating to the Interconnection Agreement. Specifically, the Commission directed UBET and Bresnan to provide an Open Issues Matrix to identify the open issues between the parties related to the Interconnection Agreement. The Commission also requested a joint form of Interconnection Agreement that identified the open issues with competing language inserted as necessary. Finally, the Commission invited the parties to file Post Hearing Briefs and Argument.

Motion to Dismiss

UBET previously made a motion to dismiss Bresnan's Petition for Arbitration of Interconnection. This motion was denied by Judge Arredondo, and UBET was ordered to interconnect with Bresnan under State law. UBET renewed this Motion at the beginning of the hearing. UBET is entitled to have Bresnan's request for interconnection dismissed. The Utah State statute and rules pursuant to which Bresnan seeks interconnection require compliance with 47 U.S.C. § 251 and 252, and cannot be implemented in the absence of reference to federal law. Further, because the substantive state law provisions relating to interconnection were enacted prior to the Act, the federal law preempted state law provisions regarding timelines, procedures, duties, and rights of telecommunications providers.

Because Bresnan seeks to provide VoIP services, and will not be providing telecommunications services, UBET has no obligation to interconnect with Bresnan's facilities. The FCC has not yet determined if VoIP providers are entitled to interconnection pursuant to 47 U.S.C. § 251 and 252 as telecommunications carriers. In fact, this very issue is currently before

the FCC in the *Vermont Telephone* docket.¹ Therefore, the Utah Public Service Commission's attempt to resolve an issue squarely before the FCC is untimely and inappropriate.²

While the Commission attempts to avoid the issue of federal preemption by indicating that it will proceed solely under state law, this is a legal fiction. The state laws under which the Commission seeks to proceed, refer explicitly to Federal rules. The Commission simply does not have the jurisdiction to order UBET to interconnect with Bresnan, a VoIP provider. As such, Bresnan's Petition should be dismissed, and UBET should not be ordered to interconnect with Bresnan under state law.

Proceeding With Negotiations

While UBET continues to take the position that it is not required, and should not be obligated to interconnect its telecommunications facilities with Bresnan's VoIP facilities, UBET, in compliance with Judge Arredondo's order, engaged in lengthy discussions and good faith negotiations with Bresnan regarding the open and/or unresolved terms of an interconnection agreement. UBET's participation in this process does not constitute its acquiescence of any interconnection obligation. Rather, as set forth above UBET renews its motion to dismiss for lack of jurisdiction.

Nevertheless, in the event that UBET's Motion to Dismiss is denied, and it is finally determined that UBET has an obligation to interconnect with Bresnan, the parties have negotiated all but five terms of an acceptable Interconnection Agreement. The open/unresolved issues are as follows: 1) Indirect v. Direct Connection; 2) Bill and Keep v. Reciprocal Compensation; 3); the Reciprocal Compensation Rate; 4) Additional Charge for EAS Access and 5) Language Reserving UBET's Appeal Rights. Each of these issues is set forth in detail below.

¹ **Error! Main Document Only.** DA 08-08-916.

² Additionally, the FCC has previously pre-empted state regulation of certain VoIP and other IP enabled services. *In the Matter of Vonage Holdings*, FCC Order 04-267.

OPEN ISSUES

Issue No. 1: Whether Utah regulations require competing local carriers to establish an indirect connection versus a direct connection, when there is not mutual agreement by both Parties.

Bresnan suggests that UBET should be required to indirectly connect with Bresnan's facilities at either the Qwest Provo Tandem, or the UFN Tandem in Salt Lake City. UBET does not agree to the indirect connection, or the involvement of a third party. The Rules promulgated by the Public Service Commission ("PSC") require a direct facilities connection between the two competing parties and do not contemplate an indirect interconnection. Additionally, indirect connection only serves to have UBET subsidize Bresnan's entry into the market.

A. Utah Code Contemplates Direct Connection Unless by Mutual Agreement of the Parties.

Utah Code allows carriers providing telecommunications services in the same, adjacent or overlapping service territory to interconnect.³ The PSC Rules further define this requirement. Under the PSC Rules, the physical interconnect between the two interconnecting carriers is known as the Point of Interconnection (POI).⁴ The Rules provide that the POI may be at any technically feasible point on the Incumbent local exchange carrier's (ILEC) network⁵. While the Rules provide that the requesting carrier can identify a desired point of interconnection,⁶, but

³ U.C.A. Section 54-8b-2.2(1)(a)(i).

⁴ R746-348-3 A; R746-348-3 A1; R746-348-5 A; R746-348-5 B

⁵ R746-348-3 A "Points of interconnection – 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 telecommunication services"

⁶ R746-348-3 A1. A local exchange service provider requesting interconnection with an incumbent local exchange carrier shall identify a desired point of interconnection.

the requesting carrier does not dictate that POI. The Rules further state that each Party is responsible for construction and maintenance of the facilities on its side of the POI⁷.

The PSC rules further identify that the interconnection may be made at a negotiated meet point⁸ where each party is responsible for the “cost of constructing its facilities”⁹, and the Rules identify the types of interconnection as a DS-3, DS1, or a DS-0.¹⁰ These types of connection are characteristic of a direct connection dedicated between the two parties. An indirect connection through a third party tandem typically handles traffic to and from all carriers at the tandem on a single trunk group. In an indirect connection, the Tandem provider, such as Qwest or UFN, and the directly connecting party, Bresnan or UBET, would determine the size of trunk group based on the total amount of traffic from all carriers. Therefore, in an indirect interconnection, the requesting carrier cannot choose the specific interface type or trunk size of the ILEC as contemplated by the PSC rules. The requesting carrier can only designate the type of interface required, as contemplated in the PSC Rules, in a direct connection where the facilities are sized only for the traffic of the two parties.

Finally, the PSC rules require each terminating provider to make available to each originating provider any documents and technical references issued by industry standards bodies or equipment manufacturers which define the engineering specification necessary for the originating provider’s equipment to interface with the terminating provider’s essential interconnection facilities¹¹. Again, without a direct interface of the equipment of one carrier to the other carrier, no such requirement is necessary.

Each of the above referenced elements requires a direct physical interconnection, and does not include, or contemplate, interconnection by way of intermediary third parties. There

⁷ R746-348-5 A “Each local exchange service provider shall be responsible for construction and maintenance of facilities on its side of the point of interconnection”

⁸ Newton’s Dictionary definition of Meet Point – “A location at which the facilities of two carriers connect.”

⁹ R746-348-3 B 1

¹⁰ R746-348-3 C

¹¹ R746-348-5 B1

simply is no reference in the Utah Code, or the PSC Rules, to a third party network. Therefore, while Utah Code does not specifically state whether that interconnection must be made by direct or indirect interconnection, review of the Utah Code together with the PSC rules suggests that direct connection within the ILEC's service territory is contemplated, unless the parties agree otherwise. In this case, Bresnan is only seeking to provide VoIP telephone service in the Vernal area, which is the same area served by UBET. Therefore, the interconnection should occur within the Vernal exchange. Utah law does not extend the obligation for connecting facilities that are outside the area where the carrier is offering service.

In further support of direct connection, R746-348-5 A states:

“Each local exchange service provider shall be responsible for construction and maintenance of facilities on its side of the point of interconnection, *unless two or more providers mutually agree to another arrangement.*” (emphasis added)

This language is the only reference in the Rules where third party involvement is contemplated in the interconnection arrangement. In the case of an indirect connection, the tandem provider is responsible for construction and maintenance of the tandem facilities between the two parties. The use of an indirect interconnection arrangement is restricted to situations where there is mutual agreement of all parties.

UBET does not agree to the indirect connection or involvement of a third party. Under Bresnan's proposal, either Qwest or UFN would be the third party. Neither of these carriers has been involved in the proceeding, nor have they agreed to be an intermediary. UBET would have to negotiate terms, conditions and pricing for handling local transit traffic which could take significant time and effort. The PSC cannot require an indirect connection absent an agreement by all Parties.

Bresnan has not presented any evidence that an indirect connection is required by Utah law or regulatory rules. Bresnan's "evidence" in support of indirect interconnection seems to be limited to "we have indirect interconnection in other Interconnection Agreements." However, this

argument is unavailing. Bresnan admitted at the hearing that this is the first interconnection agreement that it has ever negotiated strictly under state law.¹² Moreover, even the claims that Bresnan makes with regard to agreements negotiated under federal rules and law are not accurate. The Bresnan agreement with Qwest does not include an indirect connection; Bresnan must connect directly with Qwest without any third party intermediary.¹³ In addition, Ms. Wimer has personally negotiated over 30 agreements with rural carriers that do not include an indirect connection.

Finally, Bresnan's testimony that federal law and industry standards require indirect interconnection is not accurate and is inapposite. Section 251(c)(2) of the Federal Act, which applies specifically to ILECs, mandates a direct connection on the ILECs network.¹⁴ Moreover, interconnection between Bresnan and UBET is governed solely by state law and rules which do not require indirect connection.

2. Indirect Interconnection Requires UBET to Subsidize Bresnan's Entry Into the Market.

Both Parties have already agreed to all of the terms for a direct connection. The POI will be located at the Bresnan headend where UBET has agreed to bear all of the transport costs for the interconnection facility. Bresnan has agreed to arrange their equipment to allow this connection to be accomplished at their headend location. Bresnan has testified that even if the Commission permits an indirect connection, Bresnan expects to move to a direct connection in the "not too distant future."¹⁵ Therefore, in addition to the fact that the PSC does not have the authority under Utah law and Rules, to require an indirect connection, an indirect connection

¹² T at 42 14:17

¹³ Bresnan Qwest Agreement – Colorado Agreement Number CDS-061024-0010 August 24, 2006 Section 7.2.1 "the Parties will directly exchange traffic between their respective networks without the use of third party transit providers"

¹⁴Federal Telecommunications Act Section 251(c)(2), "The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network"

¹⁵ T at 89 122:25

does not make sense in this instance because the indirect connection is an interim arrangement that benefits Bresnan at the expense of UBET. Bresnan argues that establishing the direct connection is not an efficient use of capital, yet the capital expenditures are insignificant¹⁶ and will admittedly have to be spent in the “not too distant future”.

It is also not appropriate for two competing carriers to be forced to have an indirect connection. Bresnan argues that they will connect with Qwest at the Qwest tandem. However, this does not amount to an indirect connection. In fact, Bresnan’s agreements with Qwest only have provisions for a direct connection. Although the connections maybe at the Qwest owned tandem, the connection is a direct connection with Qwest, and not through a third party. In addition, Qwest is compensated for its provision of tandem functions in the reciprocal compensation rate. That is not the case with UBET where the cost of transit is not included in its mutual compensation rate. Mr. Harris has testified that in agreements where indirect connections were established, that the indirect connections were of mutual benefit to both carriers.¹⁷ When ILECs have EAS beyond their service territory where the CLEC is also competing, it could be advantageous for both parties to connect indirectly via the tandem. But, again, that is not the case with UBET. In UBET’s case, one hundred percent of the local and EAS traffic is within the UBET service territory. In addition, UBET is not competing in neighboring Qwest exchanges. The indirect connection also does not provide any substantial redundancy for UBET. Therefore, the indirect connection provides no benefit to UBET. Bresnan claims that the indirect connection provides a secondary path once a direct connection is established to prevent blocking.¹⁸ However, UBET already has a secondary path to prevent blocking via their operator services arrangements. Establishing two secondary paths is not an

¹⁶ T 251 18:22 “there is technology that can do that, and actually, for a very reasonable amount of money, a box, or a piece of equipment can be placed there that can then use the same facilities that they’re running over to Grand Junction.”

¹⁷ T 89 line 12:21 “....It was to their advantage,, its’ to our advantage.”

¹⁸ T 91 2-9

efficient use of resources. While an indirect connection may delay some of Bresnan's capital costs for a short period of time, the arrangement has no benefit to UBET and will cause UBET unnecessary costs.

Additionally, an indirect connection is not appropriate for two competing facilities based carriers. There is no dispute that Bresnan has physical facilities to end user customers in the Vernal exchange¹⁹. Bresnan made a business decision to locate their switch not only outside of the Vernal area, but outside of the state in Grand Junction, CO. This practice is common among CLECs, but typically the CLEC establishes a POI in the area where it is competing.²⁰ However, unlike the typical CLEC practice, Bresnan wants to shift part of their costs of having switch located out of state to UBET by requiring an indirect connection where UBET will be responsible for transit costs outside its service territory. Bresnan wants UBET to bear the cost of transport to Provo or Salt Lake City each over 100 miles away from Vernal for calls that originate and terminate within Vernal. This request seems especially egregious given the fact that the distance between Grand Junction and Vernal is 75 miles less than between Grand Junction and Provo. Both carriers have to transport the call further under Bresnan's proposal.

In fact, Bresnan currently transports data traffic from Vernal to its location in Grand Junction today.²¹ Once Bresnan starts to offer voice service in Vernal, Bresnan will have to add voice transport between their Vernal Headend and their Grand Junction switch. Bresnan describes these facilities to be Ethernet or IP facilities which are intermingled with data.²² Bresnan acknowledged that they will eventually need to purchase a router to allow local traffic to be handed off in Vernal instead of being routed to Grand Junction.²³.. Bresnan also admits that it will eventually incur these costs. However, Bresnan wants to delay the minimal expenditure

¹⁹ T 51:52 line 33-3

²⁰ T 60 line 20:21 "And we would backhaul—you know, have a POI in every LATA or *market*" (emphasis added)

²¹ T 52 9:10

²² T52 14:18

²³ T 251 15:22

as long as possible even though it expects to reach the threshold for a direct connection in the not-too-distant future. Again, Bresnan is just seeking to shift the costs of their decision to locate a switch outside the state to UBET.

Finally, an indirect connection is not appropriate because of the significant effort needed to establish an admittedly temporary indirect connection. Bresnan's proposed wording regarding indirect interconnection is as follows:

Section 3.1.2 . "Such Indirect Interconnection shall be effected through the tandem switch of a 3rd party to which both Parties are interconnected for the exchange of local traffic."

However, UBET is not connected to either Qwest or UFN for local traffic, and Bresnan does not currently have a connection to either Qwest or UFN for any traffic.²⁴ Bresnan claims that there is sufficient capacity in the current UBET trunks to the Qwest tandem, and suggests that translations are the only effort required to make the interconnection.²⁵ However, this is not accurate. Significant effort is required by both Bresnan and UBET to implement an indirect connection. If the indirect connection were via the Qwest tandem in Provo, UBET would need to establish additional a separate trunk group for local traffic. This activity would be at UBET's expense and would take time to establish. Directing new traffic through the Qwest tandem is contrary to UBET network design, which is to transition away from the Qwest tandem due to significant unresolved phantom traffic issues²⁶. Additionally, an agreement stating the terms, conditions, and rates for handling local transit traffic would also have to be established with Qwest or UFN. Translations established for an indirect connection would be short lived and

²⁴ T 124 4:7

²⁵ T 89 6:7

²⁶ UBET Responses to Bresnan Second set of data requests January 22, 2009 Request 2.3 "UBET-UBET has moved all the UBTA-UBET originating traffic from the Qwest Provo tandem" ; T 311 22:25 "There was a particular problem with the Qwest tandem, and so they moved some of their traffic to have more control of their toll traffic to the UFN tandem."

would be replaced with new translations when the direct connection is implemented in the not too distant future.

Bresnan also has significant effort to establish an indirect connection. Bresnan has not established a connection to either the UFN or the Qwest tandem. Bresnan will actually have to establish transport facilities and trunks to one of these tandems and establish business arrangements via an interconnection agreement or a contract for the provision of transit services. Finally, under an indirect connection, both parties would need to track the traffic to determine when the direct connect threshold is met. Since threshold suggested by Bresnan is based on the busy hour, not only would the minutes need to be tracked via billing, but additional calculations to determine the busy hour would also be required.

3. If Indirect Connection is Required, UBET's Proposed Language in Section 3.1 of the Interconnection Attachment Should be Adopted by the PSC for the Interconnection Agreement.

The PSC should not require UBET to establish an indirect connection with Bresnan for reasons stated above. However, if the PSC does require an indirect connection the proposed UBET wording should prevail. UBET has three issues with the proposed Bresnan language. 1) the financial responsibility involved in indirect interconnection; 2) the ability to identify the local and EAS traffic actually exchanged between the Parties; and 3) how the threshold is measured.

a. Financial Responsibility for Indirect Interconnection

UBET and Bresnan disagree on how the financial responsibility of the indirection connection should be shared between the two companies. The agreed upon POI for the direct connection is located at the Bresnan location in Vernal. Since each Party is responsible for the construction and maintenance of facilities on its side of the POI,²⁷ Bresnan has **no** responsibility for any of the transport between the two Parties for the direct connection. For the indirect

²⁷ R746-348-5 A

connection, Bresnan argues that no POI is required between Bresnan and UBET.²⁸ The PSC rules are contrary to this position. The PSC rules define interconnection as the “linking of two networks for the exchange of Traffic”²⁹ The definition does not accommodate linking via an intermediary or a third party, but the linking of “two networks”. If Bresnan wants to purchase part of their network from a third party, it is free to arrange such a subcontract. In fact, Bresnan does subcontract its switching today.³⁰ Under that arrangement Bresnan is fully responsible for all the costs and the performance of the subcontractor. If Bresnan wants to subcontract the interconnection trunks via a third party, it can establish a subcontractor arrangement where Bresnan has the responsibility for all the costs of that arrangement. UBET should not be required to pay for Bresnan’s subcontractor, which is exactly what Bresnan is suggesting with their proposed language.

Bresnan also claims there is no POI between the two Parties in the indirect arrangement. Yet the PSC rules are clear that the construction and maintenance responsibly transfer at “the point of interconnection”.³¹ This is a single location. Bresnan want to set up two locations where the construction and maintenance responsibilities are transferred depending on which party is originating the call. For example, if UBET originates the call, UBET would pay for the transport to the POI³² between Qwest and Bresnan. When, Bresnan originates a call, Bresnan would pay for transport to the POI between Qwest and UBET³³. These are two different locations not a single POI as required by the commission rules.

Not only do the Commission rules require a single POI, as set forth in detail above, the POI needs to be located within the service territory. The Qwest tandem and the UFN tandem

²⁸ T 155 1:16

²⁹ R746-348-2 section 5

³⁰ T 45 14:17

³¹ R746-385-3

³² Note that this is a Bresnan POI with Qwest and not a POI between Bresnan and UBET

³³ Harris Direct AJH-1 Interconnection Attachment Section 5.2 “For the purposes of compensation, the designated IP for Local Traffic delivered between the Parties via Indirect Interconnection shall be the IP between the terminating Part and the 3rd party tandem switch.”

are beyond where either party is offering service. Requiring UBET to extend their financial responsibility beyond where it offers Public Telecommunications service is not supported by the PSC rules.

In contrast, UBET's proposed wording for Section 3.1 of the Interconnection attachment establishes a single POI directly between UBET and Bresnan within UBET's service area, as required by the PSC rules. Additionally, UBET's language on the financial responsibility for the facilities is consistent with the PSC rules for an actual direct physical interconnection, in that both parties are responsible for the connection on its side of the POI.

b. Identification of the Local and EAS Traffic Exchanged

The second issue of dispute in Bresnan's proposed language concerns the identification of the traffic routed indirectly. When traffic is routed via a tandem, some of the information on the originated carrier may be lost or changed prior to delivery to its destination. UBET wants to be able to validate the traffic received from the tandem by comparing the traffic measurements between those measured at the UBET terminating switch, and the traffic Bresnan actually sent to UBET. UBET has encountered continuing problems with unidentified traffic from Qwest.³⁴ If Qwest is an intermediary, UBET expects the same phantom traffic issue to arise, thus reversing improvements UBET has gained by migrating traffic to UFN. As indicated above, UFN does not currently provide local tandem transit to UBET, so there is no information on whether UFN is willing to offer such a service. Most importantly, Bresnan only offers to provide records on the local and EAS traffic, and not on all the Bresnan traffic that is delivered directly to the tandem. Therefore, Bresnan could send toll traffic over the indirect group and not properly identify the traffic. If the toll traffic is sent via an IXC, UBET does not have an issue. However, UBET does not want toll traffic to be treated as local because it is handled over the indirect group. In addition, Bresnan will not provide the Operating Company Number (OCN) in the electronic

³⁴ Phantom Traffic from Qwest is one of the driving forces behind UBET's migration of traffic to the UFN tandem.

record; therefore UBET would have to process the records manually. If an indirect connection is required, The Commission should adopt the UBET language concerning billing records.

c. Measurement of Threshold

Bresnan's proposed language for the indirect connection outlines the process for a direct connection to be implemented once a traffic threshold has been reached. Bresnan's original language simply stated the threshold as "volume of two way aggregate local, EAS, and ISP bound traffic between there respective end office switches exceeds 512 CCS".³⁵ UBET has proposed a clarification to the threshold language of Bresnan. The UBET language simple clarifies that the 512 CCS is measured in the busy hour. However, during discussions Bresnan added other criteria that the threshold must be met for three consecutive months. Three month duration is not appropriate because Bresnan will be growing their market share during that three month period. Once the threshold is met the first time, it is unlikely to reverse direction since Bresnan will be adding new customers. UBET is concerned not only that the direct connection will be delayed, but also that UBET would have to add capacity to the indirect trunk group to accommodate the increase in traffic. Bresnan's proposed language also guarantees Bresnan at least three months of an indirect connection even if the threshold were met in the first month. If an indirect connection required, the commission should reject this additional requirement and use the UBET language.

In summary, the Commission should not require an indirect connection because it is inconsistent with Utah code, only serves to have UBET subsidize Bresnan's entry into the market, and is contrary to the PSC rules that only allow such a connection when all parties mutually agree. If the Commission does require an indirect connection, the UBET wording for the arrangement should prevail because the UBET wording establishes a POI consistent with

³⁵Hearing Exhibit B-2 Interconnection Attachment Section 3.1 "the Parties agree to implement a Direct Interconnection when the volume of two way aggregate local, EAS, and ISP bound traffic between there respective end office switches exceeds 512 CCS."

the PSC rules, allows traffic to be identified, and simply clarifies the threshold without and does not delay the implementation of the direct connection.

Issue No. 2: How Should Mutual Compensation be Implemented Under the Interconnection Agreement.

Utah law and PSC Rules are not specific on mutual compensation. Yet, the terms offered in this agreement may be adopted by any other requesting carrier. Therefore, this agreement sets a precedent for any other carrier who may want an interconnection agreement in the Vernal Exchange. UBET already has several agreements with wireless carriers. All of these agreements charge a mutual compensation rate for all the local traffic that is exchanged between the two carriers.³⁶ In other words, there is no time when the two parties are not charging for the traffic exchanged. UBET wants the agreement with Bresnan to be consistent with its current practices.

Bresnan proposes a bill and keep scheme whereby the parties would not bill each other for local traffic exchanged when the traffic is in balance by 60%/40%. UBET is opposed to a bill and keep system. Not only is it contrary to its current practices with wireless carriers, but it could also expose a large number of minutes to free compensation. Even when traffic is out of balance by a small percentage, the number of minutes terminated by each party can be significantly different and substantial. For example, if there were 1 M minutes exchanged and the traffic was out of balance 45/55 the resulting compensation at \$.01 would be \$1000 per month. Under Bresnan's proposal of a 60/40 balance, these minutes would not be billed. If a wireless carrier were to seek a similar "bill and keep arrangement and/or percentage, UBET could have a significant reduction in its revenues. Moreover, under Bresnan's proposed language, UBET would have to implement additional billing practices which would increase its

³⁶ T at 586 3:19

costs. UBET requests that the Commission not require UBET to change its current practice where there are no Commission rules requiring such a change.

UBET strongly urges the Commission to require reciprocal compensation, and not approve a bill and keep arrangement. However, if the Commission does determine that the Bresnan proposed bill and keep arrangement is required, the traffic imbalance required to move to a billing arrangement should be lower than the 20% (60%/40%) suggested by Bresnan. UBET recommends that a 10% (55%/45%) out of balance arrangement be implemented.

Issue No. 3: Development of A Compensation Rate for the Transport and Termination of Traffic Between UBET and Bresnan.

Bresnan argues that absent cost evidence provided by UBET in the record, the national proxy for reciprocal compensation rate of \$0.0007 per minute of use should apply for all local, EAS and ISP-Bound Traffic. Alternatively Bresnan argues that a Utah-specific proxy should apply and recommends the reciprocal compensation rate from Qwest's SGAT. Lastly, Bresnan recommends that if the Commission wanted to use a UBET-specific rate, the rate should be the same rate used in UBET's wireless interconnection agreements which is \$0.01 per minute of use.

UBET recommends for purposes of this essential facilities agreement, the Commission use \$0.01 per minute of use for the exchange of traffic within the Vernal exchange.

A. Pricing Standard

The pricing standard pertaining to essential facilities agreements is Section 54-8b-2.2³⁷. The Bresnan national and Utah proxies are surrogates based on RBOCs costs. Thus, neither

³⁷ "Each telecommunications corporation shall permit access to an interconnection with its essential facilities and the purchase of its essential services on terms and conditions, including price, no less favorable than those the telecommunications corporation provides to itself and its affiliates." U.C.A. Section 54-8b-2.2(1)(b)(ii).

of these recommendations is appropriate in this proceeding because the foundation upon which these proxy rates were developed is based on a hypothetical network requiring forward-looking cost estimates to be applied. This pricing foundation is far different from an actual cost standard that would allow UBET to assess Bresnan for the actual costs of terminating traffic on its network. The Commission should be sensitive to public interest implications of using a price that is not based on actual cost because by setting prices lower than actual cost, the state universal service fund would be providing subsidy to Bresnan for use of UBET's network for call termination.³⁸ Such action would not be in the public interest.

The last Bresnan recommended rate is the same as UBET's recommendation for the Vernal exchange: \$0.01 per minute of use.³⁹ Absent a cost study establishing the actual cost of call termination service, UBET recommends the Commission adopt the \$0.01 per minute of use rate as a the rate for call termination service by both parties.

Issue No. 4: Cost to Bresnan to Use UBET's EAS Network.

The most contentious pricing issue in this proceeding relates to the UBET charge for Bresnan to use UBET's EAS network for call termination to UBET customers outside the Vernal exchange. Without UBET's EAS network, calls from Bresnan customers would be rated as intrastate toll calls and intrastate access charges would apply. Through the approval of an EAS plan designed and priced to serve the public interest, the Commission allows toll free calls from the Vernal exchange to other UBET exchanges in the Uintah Basin for a \$1.80 per customer per month charge. UBET confirms that this is a cost-based rate established by the Commission in order to compensate UBET for the costs of delivering originating calls in the Vernal exchange to

³⁸ Costs that are not recovered via prices will eventually be recovered by a rate of return carrier via the state universal service fund.

³⁹ See next section for a discussion regarding the additive charge that should apply for EAS. Bresnan would like to receive EAS transport coverage for no additional charge, thus it recommends that the one-cent rate be used for local (Vernal exchange), EAS (Basin-wide call termination) and dial-up ISP bound traffic.

other UBET exchanges. UBET proposes that this charge should be used for every Bresnan customer that will have use of the UBET EAS network.

Bresnan seeks to avoid payment for use of the UBET EAS network even though it seeks the ability for its customers to be able to call end users with telephone numbers rated in non-Vernal exchanges. As a matter of equity, the Commission should recognize that Bresnan is using the UBET EAS network in the same manner as UBET Vernal exchange customers. Consequently, the Commission should require that Bresnan pay the Commission established \$1.80 per customer per month charge for use of the UBET EAS network.

Bresnan suggests that if payment for use of the UBET EAS network is granted, the Commission should use Qwest SGAT rates. This recommendation is unavailing inasmuch as it was shown that the peer group used for this recommended rate was inappropriate. Furthermore, the SGAT rates are based on TELRIC principles that are governed under FCC regulation and have not been established for an essential facilities agreement under Utah law and rule. The Vernal exchange cost-based rate for use of the EAS network has already been established by the Commission. Despite Bresnan's protestations to the contrary, there is no basis to use any other rate other than the rate approved by the Commission.

A. Pricing Standard

Since the Commission has established a cost based rate of \$1.80 for each customer calling the EAS network, this is the pricing standard that the Commission should adopt with respect to Bresnan. The \$0.002 that Bresnan suggests is not appropriate. The \$0.002 rate was established for a wireless carrier. Bresnan is not similar to a wireless carrier in that its network foot print is substantially smaller. The Commission should be sensitive to public interest implications of using a price that is different from the price previously established by the Commission for use of the EAS network from Vernal. Such action would not be in the public interest.

Issue No. 5: Reservation of UBET's Appeal Rights

UBET proposes language that will reserve its right to appeal the Interim Order issued by the PSC on November 17, 2009 and any other order entered by the Commission hereafter. The purpose of this language is to ensure that there is no misunderstanding regarding UBET's negotiation of the terms of the Interconnection Agreement. As indicated above, UBET continues to take the position that it is not required, and should not be obligated to interconnect its telecommunications facilities with Bresnan's VoIP facilities. UBET's participation in this process does not constitute its acquiescence of any interconnection obligation, nor does UBET waive any appeal rights it has.

Application of Federal Law

The Commission's November 17, 2008 Order stated that under state law, the Commission has authority to resolve the interconnection dispute between Bresnan and UBET. "If there is a dispute over interconnection of essential facilities, the purchase and sale of essential services, or the planning or provisioning of facilities or unbundled elements, one or both of the disputing parties may bring the dispute to the commission, and the commission, by order, shall resolve the dispute on an expedited basis." *U.C.A. §54-8b-2.2(1)(e)*.⁴⁰ The Commission made a point of stating that this authority is independent from any authority that may be granted to the Commission under the Federal Act. The Commission stated in its order that where state law clearly provides a basis to proceed with resolution of the dispute between two state certificated providers, the Commission may and will proceed solely under state law. The Commission was very clear that it was not proceeding under any authority conferred by federal law, and that any relief that may be provided will be provided pursuant to state law.⁴¹

⁴⁰ Commission Order, November 17, 2008, p. 9

⁴¹ *Id.*

Despite this determination, the Division in its pre-filed testimony and on the witness stand encouraged the Commission to look to federal law and the federal act for reference on how to proceed in this matter⁴². Mr. Coleman suggested that there have been hundreds of interconnection agreements approved by the Commission, and suggested the Commission should treat this interconnection agreement similarly⁴³. However, there is no dispute that not one of the previously approved interconnection agreements was arbitrated solely under State law. It is wholly inappropriate for the Commission to refuse to afford UBET the protections of federal law, while using the federal act as a reference for how to proceed in this matter. Ms. Wimer and Mr. Meredith both testified that if this were a proceeding under federal law, UBET would be entitled to a rural exemption hearing⁴⁴. Additionally, there would be different timelines and additional protections afforded to UBET⁴⁵. In fact, as suggested in UBET's Motion to Dismiss, under federal law there is arguable no interconnection obligation at all. Therefore, if the Commission elects to go forward with this interconnection agreement under state law, the Commission should limit its analysis to state law and should refrain from any considerations of federal law, rules or guidelines.

CONCLUSION

For the reasons set forth above, the Commission should grant UBET's Motion to Dismiss. In the event that UBET's Motion to Dismiss is denied, the Commission should adopt UBET's proposed language in the Interconnection Agreement.

⁴² Coleman Testimony, p. 3-5 Ins 52-94

⁴³ Coleman Testimony, p. 5 Ins 85-86

⁴⁴ T at 176 11:25, T at 177 1:3; T at

⁴⁵ *Id.*

DATED this 23rd day of March, 2009.

BLACKBURN & STOLL, LC

Kira M. Slawson
Attorney for UBTA-UBET Communications, Inc.

CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of March, 2009, I caused to be emailed a true and correct copy of the foregoing UBTA-UBET Communications, Inc.'s Post Hearing Brief to the following:

Stephen F. Mecham
sfmecham@cnmlaw.com

Michael Ginsberg
mginsberg@utah.gov

Patricia Schmidt
pschmid@utah.gov

Paul Proctor
pproctor@utah.gov

Bill Duncan
wduncan@utah.gov

Eric Orton
eorton@utah.gov

James A. Holtkamp
jholtkamp@hollandhart.com

Thorvald A. Nelson
tnelson@hollandhart.com

Jerold C. Lambert
jlambert@bresnan.com

Alex Harris
aharris@bresnan.com

Kira M. Slawson