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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 REPLY BRIEF Docket No. 08-2476-02 April 9, 2009
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UBTA-UBET Communications, Inc. ("UBET"), hereby submits its Post Hearing Reply 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.

REPLY

I. INDIRECT INTERCONNECTION

UBET demonstrated in its initial Post Hearing brief that an indirect connection is not required by Utah code or PSC rules. Utah rules require a direct physical connection between the two interconnecting parties. As demonstrated by UBET, an indirect connection under Utah rules can only be implemented if all parties involved agree to the arrangement including the intermediary tandem provider. Bresnan seeks indirect interconnection as an interim arrangement prior to a permanent direct connection. Both Bresnan and the Division of Public Utilities (the "Division") urge the Utah Public Service Commission (the "Commission") to require UBET to interconnect with Bresnan indirectly. In reaching this conclusion, both Bresnan and the

Division urge this Commission to disregard entire provisions of PSC Rules; rely on Federal law; and improperly consider other interconnection agreements and arrangements that were negotiated and/or arbitrated under Federal law and regulations.

A. Economically Efficient Interconnection

At the outset, the Division claims that the Commission should adopt the “most economically efficient method of interconnection between both parties.”¹ However, the Division apparently ignores that basic premise and recommends indirect interconnection. Facts presented in the proceeding demonstrate that the most efficient method of interconnection is indisputably a direct interconnection using the existing facilities that are currently used in Vernal. UBET and Bresnan have identified a POI in Vernal where both parties have facilities. Bresnan does not dispute the fact that its existing transport can be used with the addition on one piece of equipment.² Both the Division’s argument and Bresnan’s argument fail to persuade that indirect interconnection is required. Bresnan attempts to establish the sole requirement of technical feasibility without context to the entire rubric of state law. Under Bresnan’s claim, technical feasibility is achieved by establishing any tandem switching location in the world as the “technically feasible” point of interconnection. Such an interpretation leads to an absurd result because the technically feasible point, in the context of the law, requires that the POI be on the network of the interconnecting incumbent carrier.³ The Commission should not rely on Bresnan’s tortured interpretation that makes all switch locations possible POI’s for the exchange of traffic originating and terminating in Vernal Utah.

¹ Division Brief p. 2.

² T at 60 2-9 – there is equipment that will encapsulate voice traffic on an IP network and transport to Grand Junction.

³ See reference to VW’s comments about the ATT MCI Qwest interconnection.

B. Inappropriate Application of Federal Law

In urging indirect interconnection, the Division recommends the Commission “not ignore the 1996 Telecommunications Act or the regulations adopted by the FCC.”⁴ This recommendation is fatally flawed in this proceeding because the Commission has already declared it would proceed with this essential facilities proceeding “solely under Utah law.” By attempting to shoehorn the Federal Act and regulations into this proceeding, the Division is recommending the Commission reverse its prior decision. In doing so, the Division’s proposal is a travesty of justice as has been noted by the brief filed by the URTA.⁵ The Commission cannot rely on federal law or regulations to decide this case without being arbitrary and capricious in its decision to first rely solely on Utah law to initiate this proceeding. Reliance on or “guidance” from federal law and regulation to decide this proceeding is absolutely inappropriate given the prior Commission decision.⁶

Moreover, the Division suggests that the Commission should refer to or rely on certain aspects of the Federal Telecommunications Act, without providing UBET the opportunity to avail itself of the protections afforded to it, as a rural carrier. This is wholly inappropriate. Either this matter is being determined solely under state law, as previously indicated by the Commission in its November 17, 2009 Order, or Federal law applies, in which case UBET is entitled to assert all of the protections afforded to it under the Federal Regulations and guidelines.

Even if this Agreement were being implemented under the Federal Regulations that the Division wants to consider, UBET would have the right to a direct interconnection with a POI within the UBET network. Section 251(c) of the Act states:

(2) Interconnection.--The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

⁴ Division Brief p. 2.

⁵ See generally URTA Brief.

⁶ It is clear that the Bresnan request under federal law is not valid. This conclusion is implicit in the decision by the Commission that it would rely solely on Utah law to decide this case.

- (A) for the transmission and routing of telephone exchange service and exchange access;
- (B) at any technically feasible point *within* the carrier's network;

Nothing in the Telecommunications Act nor the FCC regulations require an indirect connection. The Federal Regulations, similar to Utah requirements, provide that the Parties may mutually agree to an indirect connection, but the indirect connection cannot be forced upon any carrier. These FCC requirements are contrary to the Division's statements there are no restrictions on where the POI is located.⁷ Clearly, the FCC regulations and Utah Rules require the interconnection to be within the ILEC's network⁸.

UBET does not agree that the FCC regulations should be considered in making determinations in this arbitration, but even if the PSC were to consider FCC regulations, it would have to determine that under federal regulations, UBET is entitled to a direct connection with a POI within the UBET network.

C. AT&T/MCI Qwest Arbitration

The Division also refers to the Utah arbitration between ATT and MCI and Qwest⁹ to rationalize an indirect connection. However, review of this arbitration does not justify indirect interconnection in this matter. Rather, analysis of the ATT/MCI arbitration justifies UBET's request for direct interconnection. In the ATT/MCI and Qwest arbitration, MCI and ATT were already connected directly to Qwest at the Qwest tandem¹⁰. There was no indirect connection through a third party. The Division is confusing connection at each calling area with a connection within an ILEC's network. In the ATT/ MCI arbitration, Qwest wanted MCI to have

⁷ Division Brief at 4 'There does not seem to be any restriction on where that POI is located, It could be located outside of the ILEC's exchanges.

⁸ In addition, on page 3 of the Division's brief, the Division confuses the requirement to interconnect within a network and the requirement to interconnect "within the local calling area of the ILEC." The Division somehow seeks to place emphasis on the local calling area of the ILEC, even where the Federal law and Utah law require interconnection within the carrier's network.

⁹ Division Brief at 5

¹⁰ Arbitration Order for AT&T of Mountain West and MCIMETRO Access Transmission Services, Inc. Docket No. 96-087-03 and 96-095-01 Order issues April 28,1998 at 59 "We find that AT&T/MCI should be able to interconnect with USWC's network at the point of access to tandem switching."

POIs in each local calling area. A single direct connection to Qwest's tandem was not at issue. In this case, however, UBET is requesting a single direct connection with Bresnan. There is no request for several connections to each exchange or local calling area. Therefore, in this instance, UBET's direct connection only proposal is completely consistent with the MCI and ATT – Qwest arbitration order.

D. Other Interconnection Agreements.

Both Bresnan¹¹ and the Division¹² encourage the Commission to refer to other interconnection agreements and arrangements in Utah, and to adopt language from such interconnection arrangements. Specifically, the Division and Bresnan refer to the Western Wireless and Union agreements along with the Qwest Statement of Generally Available Terms and Conditions, and other unnamed agreements. However, as stated above, the UBET/Bresnan interconnection is unique from all other interconnection agreements in Utah in that it is solely governed by state law and is not being implemented pursuant to Federal law. Because of the unique nature of this Agreement, the terms of other interconnection arrangements are inapposite and are not applicable or appropriate in this case. Only Utah code and PSC rules should be considered, and therefore, other agreements negotiated under Federal law, cannot be used as a benchmark for this agreement. Additionally, Bresnan and the Division have attempted to pick and choose specific parts of those agreements that are favorable to one party while ignoring the other terms in the agreements. Under FCC regulations, it is not appropriate to pick and choose terms from other agreements¹³. A carrier opting into an existing agreement takes all of the terms and conditions of the agreement, not just those they find appealing.¹⁴

¹¹Bresnan Brief at 3 “Indirect interconnection ... is a well-established means in Utah and throughout the nation”

¹² Bresnan Brief at 3; Division Brief at 4

¹³ 47 CFR § 51.809

¹⁴ *Bell Atlantic-Delaware, Inc. v. Global NAPs South, Inc.*, 77 F. Supp. 2d 492, 503 (D. Del. 1999).

Bresnan and the Division refer to the Union Agreement.¹⁵ While the Union Wireless agreement does incorporate a reference to an indirect connection similar to the reference in the federal regulations 251(a), this agreement is specifically in accordance with federal regulations and not Utah rules.¹⁶ In fact, wireless CMRS carriers are exclusively subject to federal regulation and not state jurisdiction. Wireless-wireline agreements are very different from agreements between two wireline companies that are both governed by PSC rules. Because of the different circumstances, the Union Interconnection Agreement should not be used as precedent in this case.

However, even if the Union agreement were considered, it is consistent with the UBET position in this Bresnan agreement. The Union agreement requires Union to deliver traffic to the UBET network¹⁷ and to establish a POI within the UBET service territory¹⁸. In fact, Union has established dedicated trunk groups for the wireless traffic. Even under the terms for an indirect connection, Union would be responsible for all the costs to the POI within the UBET service territory. If an indirect connection were required in the Bresnan agreement, the arrangement described in the Union Contract is the same as that proposed by UBET, that Bresnan would be responsible for the costs to the POI within the UBET service territory.

When only Utah rules are considered, the Utah code and PSC rules state that interconnection will be at a Point of Interconnection, and that the requesting carrier shall identify a desired point of interconnection. However, the rules also state that the ILEC and the requesting LEC shall negotiate meet point for interconnection.¹⁹ There is no requirement for the

¹⁵ *Id.*

¹⁶ See Exhibit DPU 2 at 13 Section 4.16 “For all claims under this Agreement that are based upon issues within the primary jurisdiction of the FCC, the exclusive jurisdiction and remedy for all such claims shall be as provided for by the FCC and the Act.”

¹⁷ Union Agreement Section 3.5.1 “Union shall be responsible for the delivery of traffic from its network to UBTA-UBET’s network”

¹⁸ Union Agreement Section 4.3.3 “traffic subject to this Agreement from the UBTA-UBET switch to the Union POI within the UBTA-UBET services area”

¹⁹ R746-348-3 B 1

ILEC to actually interconnect at the requested location. Rather, the parties must negotiate a physical location where the two party's networks connect.

An indirect connection in this case is also not consistent with Utah code and PSC rules because Bresnan is not requesting a single POI as required by PSC rules²⁰. Bresnan is requesting two POIs so that the originating party will be responsible for the transiting fee through the tandem. The language regarding direct connection arrangements in Section 3.2 and 3.3 of the Essential Facilities Agreement are fully compliant with the PSC rules, and should be the only method of interconnection in the agreement.

If the Commission requires an indirect connection, the UBET language concerning the POI within the service area; payment of transit fees; use of a tandem for local traffic; billing records; and threshold for moving to a direct connection should be adopted.

E. Location of the POI and Transit Fees

The Commission rules require a single POI²¹. The Bresnan proposal requires two POI's; one on each side of the third party Qwest or UFN tandem²². If there were one POI, one party or the other would be responsible for the transit fees through the tandem. This is precisely what UBET is recommending if an indirect connection is required. Under the UBET proposed wording, both parties are responsible for the transport to the POI on the UBET network. UBET will incur costs to the location of the POI on UBET's network contrary to the Bresnan statements.²³ Then Bresnan will be responsible for the transport including any transit fees on its side of the POI according to PSC rules. Even under an indirect arrangement, Bresnan can be

²⁰ R746-348-3 A 1 "identify *a* point of interconnection" R746-348-3 B 1 "Responsible for the construction and maintenance of facilities on its side of *the* point of interconnection" (emphasis added); Arbitration Order for AT&T of Mountain West and MCIMETRO Access Transmission Services, Inc. Docket No. 96-087-03 and 96-095-01 Order issues April 28, 1998 at 60

²¹ Arbitration Order for AT&T of Mountain West and MCIMETRO Access Transmission Services, Inc. Docket No. 96-087-03 and 96-095-01 Order issues April 28, 1998 at 60 "we find "point of interconnection" used in the singular rather than the plural tense throughout state and federal rules."

²² Note that both tandem's are owned by a third party so the tandem itself cannot be the actual POI because is not on the UBET network.

²³ Bresnan Brief at 6

responsible for the facilities its side of the POI because it would be subcontracting for the Tandem switching and transport facilities from the third party.²⁴ The UBET arrangement is much more equitable since it is Bresnan's own business decision to place its switch out of state. UBET should not be required to bear these costs.

Bresnan rationalizes the indirect connection because it claims the cost to UBET is less than a direct connection. In making this claim, Bresnan has used an example of its own design that uses "assumed" transport costs²⁵ that are not supported by UBET. The inaccurate transport costs also do not include billing and other costs required by the indirect connection. As a result of their inaccuracies, Bresnan's references to these costs should be disregarded. Lastly, the Bresnan example, shows a cost to lease a circuit from Grand Junction to Vernal. Bresnan does not need separate transport facilities because it already has transport between the Bresnan headend location and Grand Junction. Although this connection is currently Ethernet, there is no technical reason why Bresnan cannot allocate part of this bandwidth to carry voice traffic. Making these modifications is similar to asking UBET to add local traffic to connections to the Tandem. UBET will incur cost to add facilities or trunks to establish an indirect connection via transport, trunk terminations, and equipment additions and will have changes to the revenue received from federal settlements on these facilities²⁶. The value of the expenditures of these costs would be short lived since Bresnan expects to have a direct connection in the "not too distant future."

The total costs for establishing an indirect connection do meet the Division's requirement of being unreasonable and imposing significantly greater cost on one Party over the other.²⁷ In this case, an indirect connection imposes more costs to UBET at every turn. All calls

²⁴ UBET Brief at 13

²⁵ See Exhibit B-2, Attachment Bresnan Response to DPU 2.2BB and 2.3BB Indirect and Direct Interconnection spreadsheet at 1 and 3

²⁶ T at 213 15:17 "Their NECA settlements would go down. They would actually realize a loss, or a decline in support."

²⁷ Division Brief at 4

exchanged between the two parties originate and terminate within the UBET service territory. UBET should not be responsible for any additional distance beyond where the calls originate and terminate. Bresnan located their switch outside the state based on business decisions beyond that of serving the Vernal service territory. Requiring UBET to incur over a 100 miles of transport beyond where the calls originate and terminate is imposing unreasonable costs on UBET. Bresnan already has a transport facility to Vernal which it is refusing to utilize. However, rather than using the facility it already has, Bresnan inexplicably desires to obtain additional facilities for 180+ miles to Provo, Utah, thereby causing UBET to incur costs for an additional 113 miles to Provo. This is inefficient and results in costs to UBET that it would otherwise avoid. UBET has offered to be responsible for 100% of the transport for the direct interconnection facility between Bresnan Headend and the UBET Vernal CO. Thus, lowering the cost of the direct connection beyond what is required by PSC . In addition to the transport, the indirect costs are unreasonable because UBET will incur costs to negotiate arrangements for local tandem functions with the tandem provider; incur costs for new trunk groups; and have billing costs associated with the calls routed through the third party. These additional costs alone make the indirect connection unreasonable.

F. Connection to a Tandem for Local traffic

The UBET proposed language in Section 3.1.2 requires indirection interconnection be limited to a tandem that both Parties are interconnected to for the exchange of local traffic.²⁸ Bresnan's proposed language does not specify the type of traffic²⁹. There are several problems with Bresnan's proposed language.

Bresnan is correct that UBET does not connect to any tandem for local traffic.

Therefore, if an indirect connection were required, arrangements would have to be made

²⁸ Draft Essential Facilities Agreement provided to the Commission on March 2, 2009: Section 3.1.3.

²⁹ Draft Essential Facilities Agreement provided to Commission on March 2, 2009: Bresnan wording interconnection section 3.1.3 "...Each Party shall be responsible for paying any transiting charges which the 3rd party tandem provider may impose on traffic originated by that Party."

between UBET and the third party tandem provider to establish the ability to pass local traffic. UBET cannot assume that the terms and conditions that apply to toll traffic that transits a Tandem will be the same for local traffic. In fact, the Bresnan proposed language anticipates that the tandem provider will charge the originating carrier a transit charge for the use of the tandem. If the language in the Essential Facilities Agreement does not specify that the connection to the tandem is for local traffic, there is no recognition that additional work is required to establish the connection for local traffic. If such arrangements are not made, the tandem provider may block the traffic. Therefore, UBET cannot agree to language that requires it to pass traffic without making such arrangements.

Bresnan also assumes that UBET can route the local traffic on the existing toll trunk groups³⁰. UBET has no arrangements that would allow both local and toll traffic to be routed on the same trunk group. Additionally, trunks may well be required by the tandem owner. This, again, will require additional work prior to the implementation of an indirect connection that should be recognized.

UBET's intent is not to block implementation of the indirect connection if an indirect connection is required but to ensure that UBET can actually establish the right to pass local traffic through a third party tandem

G. Billing Records

UBET should be given the means to ensure the traffic received through that connection is identified in the proper jurisdiction. UBET has had issues in identifying traffic received through the Qwest tandem. In order to identify the traffic all the traffic originated by Bresnan that is not sent to an IXC must be identified. Bresnan's proposed language would only identify the Local, EAS, and ISP bound traffic. However, the toll traffic also needs to be identified to distinguish that traffic from the Local, EAS and ISP bound traffic if handled by Bresnan directly.

³⁰ Bresnan Brief at 5

If the toll traffic is handed to a third party IXC say ATT, the toll traffic would not have to be identified. This is an issue because often CLECs handle their intraLATA toll traffic directly without an IXC. UBET needs to distinguish this traffic from any local traffic on the indirect group.

Also associated with billing, UBET has requested the records in a CDR format so it can process the records mechanically. CDR format is an industry standard for billing records. The Bresnan language does not specify any format. Although the records provided by Bresnan may have some base data, UBET has no assurance that the records could even be used by its system or readable at all.

None of these billing and record requirements is an issue with a direct connection because there is not intermediary to lose or change data in the call records. Both Parties can directly measure and bill without additional information from the other party. If an indirect connection is required, the UBET language should be adopted because it allows UBET to track and bill all calls from Bresnan that are directed through the indirect connection in a format that is an industry standard.

H. Threshold for Establishing a Direct connection

The Commission should rule that only a direct connection is required because it is consistent with Utah Code and PSC rules. Bresnan has proposed that the threshold for a direct connection be met for a three month period. This is unreasonable especially based on Bresnan's statements that a direct connection is anticipated in the "not too distant future." The three month requirement guarantees that Bresnan will have at least three months of an indirect connection before the planning for a direct connection can even begin. Once the threshold is met, service orders, and provisioning must occur prior to the direct connection actually being operational. However, UBET does not intend to require Bresnan to implement a direct connection if traffic is significantly below the threshold normally and there is a single spike of

traffic that exceeds the threshold. To that end, UBET can agree that the threshold would need to be once in three consecutive weeks 3 times during a single month to meet the criteria. The modified language would be as bolded below:

Section 3.1.6 Unless otherwise mutually agreed, the Parties shall implement Direct Interconnection when the two-way aggregate Local, EAS and ISP-Bound traffic volume between there respective End Office Switches exceeds 512 CCS in the busy hour **at least one day in three consecutive weeks in a single month**. Upon verification by both Parties that such traffic volume has been achieved, or is projected to be achieved within 60 days, the Parties shall use their mutual best efforts to implement Direct Interconnection within 40 Business Days. . .

This compromise will ensure that a freak event alone will not trigger the move to a direct interconnection arrangement.

Again, the Commission should rule that only a direct connection is required because it is consistent with Utah Code and PSC rules. Even if Federal regulations are inappropriately considered, UBET has an absolute right to a direct interconnection with a POI within the UBET network. However, if the Commission decides to require an indirect connection, the UBET wording on location of the POI, transit fees, billing and threshold should be adopted.

II. BILL AND KEEP VS. MUTUAL COMPENSATION

UBET bills for all traffic including local traffic it receives from other carriers. UBET's normal practice is to measure and bill for this traffic. It is not a time consuming and costly process for UBET as claimed by Bresnan. In fact, it could cost UBET more if the process is non-standard. There is no evidence in this case that there are any significant billing costs.

Bresnan refers to agreements negotiated or arbitrated under FCC regulations as rational for bill and keep compensation when it states that bill and keep is widely used across the country.³¹ The FCC regulations that govern those agreements require mutual compensation arrangements. If parties agree to a bill and keep mutual compensation arrangement it can be

³¹ Bresnan Brief at 8

implemented, but bill and keep is never required. UBET cannot be bound by agreements that other carriers have agreed upon based on their own business decisions.

UBET wants to protect itself from other carriers that target traffic that is in one direction. Since this Agreement can be adopted by other carriers, the Commission should give preference to the UBET current practices of billing for all mutual compensation. The Commission should adopt the UBET language for mutual compensation.

While UBET is adamantly opposed to bill and keep compensation, if the Commission does require bill and keep compensation, the threshold should be set at 55%/45% balance. Bresnan does not object to moving to this definition of balanced traffic, and the 55/45 threshold is also supported by the Division. Therefore, in the event that the Commission rejects UBET's request for mutual compensation and requires bill and keep, the 45/55 threshold should be adopted.

Bresnan argues that ISP bound traffic should be included in the balance of traffic calculation because it is included in compensation. Bresnan does not represent the arrangement accurately. ISP bound traffic is handled separately in the agreement. In Section 4.2 of the interconnection attachment, both Parties agree that ISP Bound Traffic is expected to be *de minimis*. However, if the traffic volume is higher than a threshold there will be no compensation during negotiations for the proper handling of the ISP Bound traffic. UBET does not want ISP Bound traffic to be included in the calculation because ISP Bound traffic is one-way traffic in the direction of the ISP. Bresnan, or any other CLEC adopting the agreement, could sway the calculation based on their business plan for ISP traffic. Bresnan could both exceed the ISP Bound threshold, and force mutual compensation at the same time. Mutual compensation is for local voice traffic and not ISP traffic. The traffic balance should be determined only on voice traffic. UBET recommends that the Commission reject bill and keep.

However, if the Commission requires bill and keep, UBET recommends that the Commission adopt UBET's proposed language.

III. APPLICABLE EAS CHARGE

UBET has suggested that the Bresnan Vernal customers be charged a flat rate of \$1.80 for access to the extended service area outside of Vernal within the Uintah Basin (the "Basin"). Bresnan and the Division are opposed to the flat rate of \$1.80 per customer that UBET's Vernal customers now pay and recommend a per-minute-of-use rate. However, Bresnan and the Division attempt to bait-and-switch the Commission when they recommend reverting to per minute-of-use charges for the recovery of EAS network costs, but then fail to recommend the established state approved access traffic charges that were originally used to calculate the flat-rate EAS charge. The Commission should either impose the \$1.80 flat rate established for UBET's Vernal customers under Commission rule, or Bresnan's customers' calls to UBET service areas outside of Vernal should be subject to the state access charges that were used to develop the EAS charge in the first place. This is the only logical option to rejecting the Commission approved EAS network charge adopted to recover network costs associated with the transport of calls beyond the Vernal exchange. Instead, both Bresnan and the Division rely on federal regulations developed under federal law to recommend an EAS network charge that is far below the cost of providing EAS transport service. This should not be permitted.

The Division and Bresnan claim that the EAS rate is a retail rate that has nothing to do with a wholesale rate to be charged to Bresnan.³² However, the \$1.80 per customer per month EAS charge is the only reasonable and consistent option available to the Commission for UBTA-UBET to deliver Bresnan originated calls in Vernal to exchanges throughout the Basin. This charge has been approved by the Commission, using the Division's Cost Study, for exactly this purpose and comports with the specific cost standard established for EAS charges – which

³² Division Brief p. 7; Bresnan Brief p. 11.

follow established economic costing principles.³³ Contrary to the assertions by Bresnan and the Division, Commission rules require that EAS rate development reflect the incremental cost of providing EAS network services and are prohibited from incorporating retail “toll” revenue into the calculation.³⁴

Thus, while Bresnan and the Division seem confused by retail and wholesale EAS charges, there is no confusion in the development of the approved \$1.80 EAS charge for those living in Vernal to be able to call Basin-wide using UBET’s EAS network. This charge is an approved cost recovery rate and does not have any retail cost mark-up. Furthermore, the Division’s claim that this charge is unreasonable³⁵ is not supported in the record. The Commission’s establishment of this rate for the Vernal exchange shows the flat rate cost recovery for EAS network costs is appropriate and reasonable compensation in providing Basin-wide calling from Vernal.

Bresnan claims this charge over compensates UBTA-UBET, and is anti-competitive.³⁶ Bresnan proposes a hypothetical example that incorrectly adds the per minute termination charge of \$0.01 to the EAS network charge of \$1.80, and claims that the Bresnan Vernal customer will be paying \$2.95 for 115 minutes for calls to Flattop. This example is misapplied and mischaracterizes the circumstances. Customers do not pay the per minute termination charges. More importantly, however, Bresnan’s example fails to consider all of the relevant facts. Under UBET’s proposal a call from a Bresnan Vernal customer to a UBET Flattop customer would be subject to the \$1.80 flat rate, and a per minute termination charge of \$0.01. However, what Bresnan overlooks in its example is that a call from a UBET Flattop customer to Bresnan’s Vernal customer is also subject to a \$0.01 call termination charge, in addition to a \$5.75 EAS charge. Additionally, UBET’s Vernal customers pay \$1.80 for EAS access, whether

³³ R746-347-4(B)

³⁴ R748-347-4(B) and (D).

³⁵ Division Brief, p. 3.

³⁶ Bresnan Brief, p. 10.

they use it or not. In fact, if any UBET customer calls a Bresnan customer, the UBET customer pays an EAS charge (ranging from \$1.80 in Vernal to \$5.75 outside of Vernal), and the call is subject to a \$0.01 per minute call termination charge. Requiring Bresnan's customers to pay the same EAS charge that UBET is required to charge its customers for the same service is not anti-competitive. However, it would be anticompetitive to UBET if Bresnan were not required to charge its customers the same rate that UBET Vernal customers currently pay for service to the extended areas. The EAS charge as approved by the Commission in a prior hearing is a reasonable approach in this case. Nothing has changed since the Commission approved the Vernal EAS charge: a Vernal customer is able to call Basin-wide using UBET's EAS network. The cost-based recovery charge for this ability is \$1.80 per line per month.

Bresnan also argues that knowing the number of customers it has in Vernal is a competitive advantage to UBET.³⁷ This argument is a red herring intended to lead the Commission astray. The vast majority of customers Bresnan will have will likely port their numbers from UBET. In fact there are specific provisions in the ICA addressing number porting. Thus, UBTA-UBET will know already in a first approximation how many customers Bresnan will have. Any so-called competitive advantage will already be known. The Commission should reject this argument for what it is – a red herring.

The Division also mistakenly refers to other interconnection agreements within the state as supporting its position.³⁸ All of the interconnection agreements referenced relate to those developed under federal law and federal regulation. None of the referenced agreements relate to essential facilities agreements in the state of Utah. If examined specifically, the wireless agreements are distinguishable from Bresnan because the footprint of wireless carriers is larger than Bresnan's one exchange footprint and in all instances covers the entire Basin. Bresnan does not bring any Basin-wide call termination to the table, and thus any focus on additive costs

³⁷*Id.*

³⁸ Division Brief, p. 9.

in existing wireless agreements by the Division or Bresnan is misplaced. Moreover, the cost standard developed under federal law cannot be used to claim discrimination under this proceeding because there is no discrimination under a state essential facilities agreement inasmuch as this is the first of its kind in the state.

UBET recommends that the Commission require Bresnan to pay the Commission established EAS rate of \$1.80. The flat rate cost recovery for EAS network costs is appropriate and reasonable compensation in providing Basin-wide calling from Vernal. If Bresnan does not want to pay the Commission approved EAS network charge, the Bresnan calls to non-Vernal UBET customers should be rated as access charges. Efforts to drive down the already established EAS structure adopted by this Commission should be flatly rejected.

IV. CALL TERMINATION CHARGES

Although, the parties have referred to the call termination charge as “reciprocal compensation,” throughout the proposed Agreement and initial briefs, it is technically inaccurate. The term “Reciprocal Compensation” is born of a specific provision of the federal law and is calculated using a specific federal cost standard. The determination of an essential facilities agreement does not rely on, nor does it reference, this term. The Division and UBET recommend using a \$0.01 per minute charge to compensate the terminating carrier for transport and termination charges within the Vernal exchange. While Bresnan is seeking a lower per minute rate, these referenced rates are all based on a federal cost standard that is inapplicable in this proceeding.³⁹ TELRIC-based rates have no place in this proceeding where the Commission has ruled it will rely solely on state law in making its determination. Therefore, the Commission should adopt UBET and the Division’s recommendation and use a \$0.01 per minute charge for call termination.

³⁹ Bresnan Brief, p. 13-14.

V. RESERVATION OF RIGHTS

Bresnan argues that it is not appropriate for the Commission to issue an order purporting to affect or preserve and appeal right of one of its decisions. UBET's request for the language reserving its right to appeal the Commission's November 17, 2008 Order is necessary because of the procedural history of this case. UBET is not requesting that it be granted appeal rights that don't exist. Rather, UBET merely wants to protect the appeal rights it already has. UBET does not want there to be any confusion in this regard. Although, UBET has negotiated and compromised on several issues in the Essential Facilities Agreement, it has never acquiesced or waived in its position that the Commission does not have jurisdiction to require arbitration of an interconnection agreement or essential facilities agreement between UBET, as a rural ILEC, and Bresnan, as VoIP provider, under these circumstances. The purpose of UBET's proposed language is not to appeal the particular sections to which it has already stipulated, but rather to preserve its right to appeal the Commission's decision regarding UBET's obligation to interconnect under state or federal law in the first place.

VI. CONCLUSION

Based on the foregoing, in the event that the Commission does not grant UBET's Motion to Dismiss, the Commission should adopt UBET's proposed language for the Essential Facilities Agreement.

Dated this 9th day of April, 2009.

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CERTIFICATE OF MAILING

I hereby certify that on this 9th day of April, 2009, I caused to be emailed a true and correct copy of the foregoing UBTA-UBET Communications, Inc.'s Post Hearing Reply Brief to the following:

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