

Stanley K. Stoll (3960)
Kira M. Slawson (7081)
BLACKBURN & STOLL, LC
257 East 200 South, Suite 800
Salt Lake City, Utah 84111
Telephone (801) 521-7900

Attorneys for UBTA-UBET Communications, Inc.

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of
Bresnan Broadband of Utah, LLC For a
Certificate of Public Convenience and Necessity
to Operate as a Competitive Local Exchange
Carrier in Utah

**UBTA-UBET COMMUNICATIONS,
INC.'S POST HEARING BRIEF**

DOCKET NO. 07-2476-01

UBTA-UBET Communications, Inc. ("UBTA-UBET"), hereby submits its Post Hearing Brief in opposition to Bresnan Broadband of Utah, LLC's ("Bresnan's") Application for a Certificate of Public Convenience and Necessity, in the above-referenced Docket.

Statement of the Case

On February 5, 2007, Bresnan filed an Application with the Public Service Commission of Utah (the "Commission") for a Certificate of Public Convenience and Necessity ("CPCN") to act as a competitive local exchange carrier ("CLEC") in the Vernal exchange. UBTA-UBET and Utah Rural Telecommunications Association ("URTA") intervened in the proceeding. The Division of Public Utilities ("Division") and the Committee of Consumer Services ("CCS") are statutory parties and have participated in the proceeding.

Each of the parties conducted discovery and filed testimony. The Division and the CCS supported Bresnan's Application on the basis that, in their opinion, the benefits of competition

outweighed any adverse impacts on rural telephone rates and service and impacts on the Utah Universal Service Fund (“USF”). UBTA-UBET and URTA opposed Bresnan’s Application on the grounds that there would be little or no benefit to competition since the services proposed to be provided by Bresnan was already being provided by UBTA-UBET, and that there would be adverse impacts on the other exchanges served by UBTA-UBET and the State USF, as well as rural telephony generally.

A hearing on Bresnan’s Application for CLEC Status in the Vernal Exchange was held before the Commission on Tuesday, September 4, 2007, and Wednesday, September 5, 2007. As noted above, prior to the hearing, testimony had been pre-filed by Bresnan; UBTA-UBET; URTA; the Division; and the CCS. Specifically, the individuals providing testimony in the matter were as follows:

1. Katherine Kirchner as Vice President of Telephone Operations of Bresnan;
2. Bruce Todd as GM and CEO of UBTA-UBET Communications, Inc.;
3. Ray Hendershot as Expert Witness for UBTA-UBET;
4. Douglas Meredith as Expert Witness for URTA;
5. Eric Orton for the Committee for Consumer Services;
6. Laura Scholl for the Division of Public Utilities; and
7. Casey Coleman for the Division of Public Utilities.

Following the testimony and cross-examination of the witnesses, the Commission invited the parties to the proceeding to file Post Hearing Briefs and Argument.

Argument

Utah Annotated Section 54-8b-2.1 governs the Commission's granting of a CPCN to a telecommunications corporation authorizing it to compete in providing local exchange services or other public telecommunications services in the service territory of an incumbent telephone corporation. Specifically, competitive entry into a local exchange is governed by U.C.A. Section 54-8b-2.1(2) which provides:

- (2) The commission shall issue a certificate to the applying telecommunications corporation if the commission determines that:
 - (a) the applicant has sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for; and
 - (b) the issuance of the certificate to the applicant is in the public interest.

According to the Division, this is the first contested application for a CPCN in a rural independent exchange in Utah (Coleman Hearing Testimony, p.448, lns. 17-19). The issues to be determined by the Commission are: 1) whether Bresnan has the financial, managerial and technical resources to provide the telecommunication services applied for; and 2) whether this application is in the public interest.

I. Bresnan Has Not Adequately Demonstrated that it Possesses the Required Technical, Financial and Managerial Resources.

The Commission has an affirmative duty to first determine whether the applicant has the appropriate technical, financial and managerial resources and abilities to provide the services it states it will offer. UBTA-UBET is concerned that the information supplied by Bresnan to demonstrate its resources is inadequate, its application was incomplete, and more importantly, that the Division and the Committee failed to undertake the appropriate inquiry in these areas as required by Utah code.

The Application filed by Bresnan (Bresnan Exhibit 2) was not complete. First, Bresnan failed to provide its own financial information in support of its application. Bresnan attached the financial information of its parent company to support its Application. It was not until after the Division received Data Requests from UBTA-UBET regarding the inquiry it had undertaken with regard to Bresnan's financial statements that the Division decided to request Bresnan's own financial information in support of the application. Therefore, on August 28, 2007, Bresnan, in response to a Data Request by the Division, finally provided its own financial statements. However, it is clear that the Division did not rely on this information since the Division made its recommendation to approve Bresnan's application a month earlier, on July 27, 2007. Moreover, the financial information filed by Bresnan is so limited that it is of virtually no use in determining or evaluating the financial condition and/or resources of the company.

Additionally, Bresnan's application is incomplete in that it failed to provide any 5-year pro forma as required by R746-349-3. Rather, Bresnan asked that this requirement be waived by the Commission. Bresnan has produced no evidence of its business plan, by which the Commission can determine the feasibility of Bresnan's success in the Vernal exchange. Furthermore, without those pro formas, neither the Division or the other parties to this proceeding can assess the impact of Bresnan's competitive entry on the Vernal exchange, the other exchanges in the UBTA-UBET service areas, or the State USF. Additionally, when the Division was asked about the statutory requirement that Bresnan prepare a 5-year pro forma, Ms. Scholl's testimony was that the Division was not too concerned about that since pro formas, in her experience, are largely "works of fiction" anyway. (Scholl Hearing Testimony, p. 359, ln. 24).

Despite the inadequacies of Bresnan's Application, Casey Coleman, on behalf of the Division, stated that the "Division has reviewed the application of Bresnan" and "evaluated the materials provided by Bresnan in a technical conference," and the "Division believes that Bresnan has shown sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for." (Direct Testimony of Casey Coleman, ln. 44-48). However, when the Division was asked in Data Requests to explain exactly what information the Division relied upon in reaching that conclusion, the Division indicated it had relied solely on Bresnan's Application for CPCN. (Division Responses to UBTA-UBET's First Set of Data Requests, 1.1).

At the hearing, however, Casey Coleman testified that the Division relied upon the Application of Bresnan and Data Request Responses from Bresnan in determining that Bresnan had the financial, managerial and technical resources. (Coleman Hearing Testimony, p. 438, lns 17-25). However, Bresnan Exhibit 2, Confidential attachment F, and Bresnan Confidential Exhibit 3, demonstrate that even the documents supplied by Bresnan do not paint a portrait of financial strength. The Exhibits raise questions as to Bresnan's cash flow which the Division did not seem overly concerned about. In fact, Ms. Scholl testified that she did not undertake any independent investigation beyond the application, documents supplied by Bresnan, and the technical conference. (Scholl Hearing Testimony, p. 363, lns. 9-25, p. 364, lns. 1-20).

It is clear that the Division relied on the information supplied, in each instance, by Bresnan. Yet, even the documentation supplied by Bresnan was not adequate to demonstrate financial stability. As indicated above since Bresnan did not provide any 5 year pro-formas, the Division could not look at Bresnan's plan for the future to determine whether Bresnan has the

requisite financial resources. It does not appear from the evidence that the Division completed any independent verification of Bresnan financial, managerial, and technical resources and abilities to provide the public telecommunications services. Without any independent verification, the Division has not undertaken adequate measures to ensure that Bresnan in fact possesses the adequate financial, technical and managerial abilities to provide the telecommunication services it seeks to provide, and its Application should be denied.

II. Granting Bresnan's Application is Not in the Public Interest.

In the event that the Commission determines that, despite the lack of evidence, Bresnan meets the first element of Utah Code Ann. Section 54-8b-2.1, the Commission must still find that granting Bresnan's application is in the public interest. Bresnan, the Division and the Committee argue that Bresnan's certification as a CLEC promotes competition in the Vernal exchange, and thus benefits the consumers. UBTA-UBET is primarily opposed to Bresnan's Application for CPCN to act as a CLEC in the Vernal exchange because Bresnan's entry as a competitive local exchange carrier in the Vernal exchange is not in the public interest. As was shown at the hearing, what little benefit Bresnan's certification actually might offer is more than offset by its adverse impacts on the State Fund, the other exchanges in the Uintah Basin, and rural telephony in Utah as a whole.

According to the testimony of Laura Scholl and Casey Coleman, there is no clear public interest test that should be applied to the facts of this case. Ms. Scholl indicates that "consumer choice in and of itself is what we [the Division] have largely relied on here." (Scholl Hearing Testimony, p. 361, lns. 21-22). Mr. Coleman talks about the "positive benefits that could be perceived out there by allowing a competitor to serve in an area versus the negative impacts of

that competitor going into that area as well.” (Coleman Hearing Testimony, p. 440, lns. 8-13).

While both acknowledge that the Commission set forth a public interest test in the *Matter of the Petition of WWC Holding Co., Inc., for Designation as an Eligible Telecommunications Carrier*, Docket No. 98-2216-01, Order Dated July 21, 2000 (“*Western Wireless*”), Mr. Coleman and Ms. Scholl maintain that the public interest test articulated in *Western Wireless* is not applicable in this case. Mr. Coleman and Ms. Scholl distinguish the facts of this case from *Western Wireless* on the basis that the applicant in *Western Wireless* was seeking ETC status, whereas Bresnan is merely seeking a CPCN.

UBTA-UBET does not believe that the distinction warrants an abandonment of the public interest test articulated by the Commission in the *Western Wireless* case. In the *Western Wireless* case, Western Wireless filed a Petition with the Public Service Commission for designation as an Eligible Telecommunications Carrier (ETC) to receive Federal Universal Service Support under the Telecommunications Act of 1996. Western Wireless requested ETC designation in the U.S. West local exchanges and in each rural telephone company’s exchanges inside Western Wireless’ signal coverage area in Utah. Granting of ETC status is governed by 47 C.F.R. §54.101. However, when ETC status is sought in areas served by a rural telephone company, 47 U.S.C. §214(e)(2) further requires the State Commission to determine that the designation of an additional ETC is in the public interest. While the Utah Public Service Commission found that Western Wireless satisfied all criteria for Federal ETC designation and exchanges served by U.S. West that are in Western Wireless’ signal coverage area, the Commission found that Western Wireless’ designation as a second ETC to the URTA Company’s service areas at this time was not in the public interest.

In analyzing the public interest, the Commission reviewed the potential impact of the designation on the state's Universal Public Telecommunications Service Support Fund. The Public Service Commission indicated that independent companies are currently regulated under rate-of-return regulation. The Commission explained the role of the State Fund, and acknowledged that after all other sources of funds for the rural companies are considered, the State Fund makes up the difference between reasonable costs and all revenues. The Commission reasoned that if, by designating an additional ETC in the respective study areas of the rural telephone companies, the effect is to reduce the rural company's revenue without an equal reduction in costs, the State Fund would be called upon to make up the difference. The Public Service Commission suggested that in such a situation there would have to be public benefits to offset the negative impact on the State Fund. They called this the public interest test.

The Commission looked at the following public benefits that designating a second ETC provider could accomplish: 1) offering lower cost service; or, 2) offering service in areas that were not already being served by the incumbent carrier. However, in evaluating these public benefits in the Western Wireless case, the Commission found that neither *potential* benefit was actually present in the Western Wireless case, and thus it was *not* in the public interest to grant Western Wireless ETC status.

First, Western Wireless testified that their prices would actually be higher than the incumbent LEC's prices. Therefore, the public benefit of lowering costs for services was not present in the Western Wireless case. Additionally, the Public Service Commission found that the primary potential benefit of designating Western Wireless as a rural ETC *could have been* that Western Wireless could have provided service in areas that were not already being served by

any incumbent but which were within Western Wireless' signal coverage area. However, Western Wireless had only asked for designation in areas that were already being served. Therefore, the Commission found that this potential benefit was not present in the public interest analysis.

As a result, the Commission found that without any corresponding public benefit, and because of the possible negative impact on the Utah State Fund, it was not in the public interest to add a second ETC to the rural areas. Western Wireless petitioned the Supreme Court to review the Public Service Commission's Order denying its rural ETC status. The Utah Supreme Court affirmed the decision of the Public Service Commission and found that the Commission's Order was not against competition per se, but rather merely recognized that in some instances, competition in rural areas by multiple ETC's receiving state universal service support may not be in the public interest. The Supreme Court indicated that the PSC could look at the negative impact on the State Fund in determining public interest. The Supreme Court further found that the record contained expert testimony stating that there was a strong probability that designating a second ETC in many areas would reduce revenues to all ETC's. This, in turn, could result in either: (1) an increase in the total cost of providing universal service support; or (2) a reduction in funding to the ETC's resulting in rate increases, decreases in infrastructure investment and/or service. The Supreme Court found that the likely effect of either scenario would be to increase financial demands on the State Fund. The Supreme Court found that the record was sufficiently substantial to support the PSC's finding on that issue.

The Supreme Court found that the fact that the State Fund would be negatively impacted by designation of Western Wireless as an additional ETC was not fatal to Western Wireless'

application so long as there was an offsetting public interest. In Western Wireless' application, there was no such offsetting public interest. In *Western Wireless*, the Commission "recognized that in rural areas of the state where rate-of-return carriers operate, it is not in the public interest to have a second provider because of the negative impact on the State Fund." (Meredith Direct Testimony, p. 6, lns. 18-20).

Bresnan's application for CPCN in the Vernal exchange is very similar to the Western Wireless application for ETC status. In this Application, the Commission is again faced with a petition for CPCN in a rural area. Regardless of whether or not the applicant is seeking ETC status, the issues facing the Commission and the rural exchanges are the same: What impact will the granting of the CPCN have on the State Fund as end-user and access revenues are siphoned away from the incumbent, rural, rate-of-return carrier? What is the public interest test that should be applied in this case and the cases that follow this case?

Both Ray Hendershot and Douglas Meredith have testified at length to the potential negative impact to the State Fund. The testimony of Ray Hendershot and Douglas Meredith indicates that granting Bresnan's Application will have a negative impact on the State Fund by reducing UBTA-UBET's revenues and internal cross subsidies without an equal reduction in costs. (Hendershot Direct Testimony, ln. 170-176, 182-191; Hendershot Hearing Testimony, p. 179, lns. 21-25; p. 180, lns. 1-8). Specifically, Mr. Hendershot estimates that Bresnan's competitive entry could impact the State Fund in the amount of \$450,000-\$550,000. (Ray Hendershot Hearing Testimony, p. 204, lns. 9-13). Mr. Meredith suggests that granting Bresnan's application could result in UBTA-UBET's current disbursement from the State fund increasing by 50.5 percent. Mr. Meredith further suggests that establishing a policy of granting a

CPCN to cable operators in rural areas generally would result in a 0.75 percent State Fund surcharge without any corresponding benefit. (Meredith Direct Testimony, p. 8, Ins. 8-10 and p. 9, Ins. 4-10).

The Division and the Committee admit there will be *some* impact on the State Fund if the Commission were to grant Bresnan's application. (Scholl Hearing Testimony, p. 371, Ins. 11-15; Coleman Hearing Testimony, p. 426, Ins. 1-5). However, they underestimate the impact on the State Fund and claim that the actual impact will be within reason, given the offsetting public benefit of consumer choice. (Coleman Direct Testimony, lines 184-186); (Scholl Hearing Testimony, p. 350, Ins. 9-23). The testimony of the Division and the Committee is that the likely impact to the State Fund will be in the \$125,000-250,000 range. (Coleman Hearing Testimony, p.426, ln. 5). Casey Coleman and Laura Scholl stated that the State Fund surpluses could easily absorb any such impact. (Scholl Hearing Testimony, p. 352, Ins. 15-19). However, this approach does not accurately reflect the impact on the public's interest. As Mr. Mecham pointed out in his cross examination of Ms. Scholl, even if the surpluses in the State fund can absorb the impact that Bresnan's competitive entry will have, absorption of these additional costs will impact the continued surpluses, and thus the USF surcharge will not decrease, as it normally would when the fund is in a surplus.

Moreover, the testimony is clear that Vernal is the most densely populated area in the Uintah Basin. As a result, the Vernal exchange is the lowest cost area in the Uintah Basin to provide telephone service to. Therefore, the revenues obtained by UBTA-UBET in the Vernal exchange offset the cost of provisioning service in the outlying high-cost areas in the Uintah Basin. The experts, Ray Hendershot and Douglas Meredith, refer to this as offsetting internal

cross subsidies. Revenues from lower cost areas subsidize the incumbent's higher costs associated with providing service to the sparsely populated outlying areas. By permitting Bresnan to cherry pick the Vernal exchange¹ from the entire Uintah Basin, the costs of providing service to every UBTA-UBET customer will increase. This will mean that either rates will go up, or reliance on the State Fund will increase. This potential impact on the rate payers and the State Fund is not offset by the limited potential benefit of having competition in the Vernal exchange. As indicated by the Commission and the Supreme Court in the *Western Wireless* decision, in some instances, competition in rural areas may not be in the public interest.

Given the fact that there will undisputedly be some negative impact on the State Fund, *Western Wireless* requires that there be some public benefit that offsets that negative impact. While Bresnan's application asserts that granting the CPCN would be in the public interest, Bresnan offered no testimony to support this. In its application, Bresnan indicates that Bresnan's services would provide customers with a high quality and affordable choice for land line service, and that issuing Bresnan a CPCN will lower the cost of providing service. However, when asked about these issues in the hearing, Bresnan's own witness could not articulate how Bresnan's entry into the Vernal exchange will be in the public interest. When asked how Bresnan's entry into the Vernal exchange will serve to facilitate access of high quality, affordable telecommunications services to all residents of the State of Utah, Ms. Kirchner indicated, "I can't answer that." (Kirchner Hearing Testimony, p. 23, ln. 14). This response, despite the fact that Ms. Kirchner, in her direct testimony (lines 77-102), makes the conclusory statement that

¹In fact, Bresnan would prefer to not be required to provide service to all customers within the Vernal exchange, even further "cherry picking" the area.

Bresnan's entry into the Vernal exchange serves to facilitate access of high quality affordable telecommunications services to the residents of the State of Utah, and is, thus, in the public interest. Ms. Kirchner also states in her pre-filed direct testimony (lines 187-194), that Bresnan's entry into the Vernal market will encourage economic development. However, on cross-examination, Ms. Kirchner admitted that she had no evidence to support that statement either. (Kirchner Hearing Testimony, p. 28, ln. 23).

The testimony from Ms. Scholl didn't add much to clarify the public benefit that Bresnan's competitive entry would have in the Vernal exchange. Ms. Scholl indicated that Bresnan's entry into the Vernal exchange would offer the public benefit of "consumer choice." In fact, Ms. Scholl indicated that "consumer choice" was the only public interest benefit reviewed by the Division in this docket. (Laura Scholl Hearing Testimony, p. 352, lns. 24-25, p. 353, ln. 1, p. 361, lns. 21-25, p. 362, lns. 1-15).

Q. (Slawson) So is that the only factor that you relied on, the consumer choice?

A. (Scholl) In terms of overt decision making, I would say yes.

Notwithstanding the importance of "consumer choice," the Division acknowledged that not all customers in the Vernal exchange would benefit from the competitive choice of Bresnan's Digital Voice product. Customers whose homes Bresnan's facilities don't pass might end up with only the UBTA-UBET phone service—which they currently already have. (Kirchner Hearing Testimony, p. 27, lns. 23-24; Scholl Hearing Testimony, p. 363, ln. 1). Thus, the customer choice that the Division and Committee have relied so heavily on in determining the public interest, is not available to all customers in the Vernal exchange, let alone the customer in the Uintah Basin as a whole.

Casey Coleman, on the other hand, articulated additional factors that he found demonstrated that granting the CPCN was in the public interest. Specifically, Mr. Coleman suggested that the public would benefit by Bresnan's competitive entry by reduced costs, increased service quality, and increase in technological innovation. However, the Division, in response to Data Requests, acknowledged that there had been no complaints of poor service quality from UBTA-UBET, and there is no evidence in the record that Bresnan's product is superior in quality to that offered by UBTA-UBET. With regard to Mr. Coleman's suggestion that Bresnan's competitive entry would increase technological innovation, Mr. Coleman admitted that his premise for that statement was merely his belief that if Bresnan offered a service in Vernal that was innovative, under normal market conditions, UBTA-UBET would offer the same services, if possible. Mr. Coleman had no studies to back up his assertion, nor has the Division researched this issue in other markets.

The fact of the matter is that the residents of the Vernal exchange, and the Uintah Basin, as a whole, already receive high quality, affordable telecommunications from the incumbent local service provider, UBTA-UBET. UBTA-UBET has been solely responsible for significant technological advancements in the Uintah Basin. Prior to UBTA-UBET's acquisition of the Vernal, Roosevelt and Duchesne exchanges, the subscribers of Qwest in those exchanges did not receive and, given the antiquated technologies available to them, could not have received the services provided by the new technologies which the UBTA subscribers enjoyed. Qwest had done little, if anything, to introduce digital technologies, fiber optic facilities and broadband capabilities to the subscribers in those exchanges. By acquiring the Qwest exchanges, UBTA-UBET was able to upgrade the antiquated facilities and provide the subscribers in the Vernal,

Roosevelt and Duchesne exchanges with digital technologies, fiber optic facilities and broadband capabilities-- a comparable level of services enjoyed by their counterparts in the other UBTA exchanges. Customers in Vernal and throughout the Uintah Basin already have access to a high quality, affordable technology. Moreover, they already have the alleged benefit of consumer choice, as the evidence is clear that there is already unregulated competition in the Uintah Basin. It is difficult to see what public benefit is brought to the table by Bresnan's service, offered only to select residents in Vernal.

Another public benefit that the Commission looked at in *Western Wireless* was whether the competitor would offer service in a previously unserved area. The evidence in this case demonstrates that Bresnan seeks a CPCN only in the Vernal exchange. The evidence indicates that UBTA-UBET currently serves every customer in the Vernal exchange, so the public benefit of providing telephone service to an unserved area is not met. While the Division and Bresnan will likely argue that Bresnan seeks to offer a service in Vernal that is not currently provided to the residents of Vernal, there is absolutely no evidence that this service will be superior, nor will the service be available to all residents of Vernal. Bresnan has indicated, both in its Application and in the testimony of Katherine Kirchner, that Bresnan will only be able to offer digital telephone to those customers in the Vernal exchange whose homes Bresnan's cable facilities pass. (Testimony of Kirchner, p. 27, lns. 23-24). To those customers whose homes Bresnan's cable does not pass, Bresnan will merely resell the same service that is currently provided by UBTA-UBET. Again, it is difficult to see what public interest is being served in that instance.

With regard to the Division's claim that Bresnan's competitive entry would reduce customer's costs, this simply is not borne out by the facts. The testimony indicates that Bresnan's

Digital Phone service will be offered in the Vernal exchange at the rate of \$39.99 as a bundled service, or \$49.99 for unbundled service. As pointed out by Laura Scholl, this price is slightly higher than UBTA-UBET's service in the Vernal exchange. (Laura Scholl Direct Testimony, Ins. 252-253). Thus, the evidence in the record demonstrates that reduced costs will not necessarily result from Bresnan's mere entry into the market.

In analyzing the public benefit, Douglas Meredith and Ray Hendershot point out that if customers are heavy users of long distance services, an "all you can eat" long distance package would likely result in reduced costs to those customers. However, this would not necessarily result in a *public* benefit. For one, the Division has no evidence Bresnan is even covering its costs when it offers a bundled package with all you can eat long distance for \$39.99.

Q. (Slawson) Do you know if Bresnan's price of \$39.99 covers its costs?

A. (Coleman) I have no idea as far as if it covers their costs or not. They provided financial statements, but we didn't have a cost study that was done.

(Coleman Hearing Testimony, p. 436, Ins. 2-5). If such a price-point does not cover its costs, then Bresnan is in violation of Utah Code Ann. Section 13-5-7, which provides:

It is hereby declared that any advertising, offer to sell, or sale of any merchandise, either by retailers or wholesalers, *at less than cost* as defined in this act with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impairs and prevents fair competition, injures public welfare, is unfair competition contrary to public policy and the policy of this act and is declared to be a violation of this act.

Specifically, Utah Code Ann. Section 13-5-7 provides that offering to sell a product at less than cost with the intent of unfairly diverting trade from a competitor, or otherwise injuring a competitor "injures public welfare" and "is unfair competition contrary to public policy." The

Commission does not have the information necessary to ascertain that Bresnan is covering its cost at a price point of \$39.99. If Bresnan's price is lower than its costs, its competition in the Vernal exchange is contrary to public policy.

Finally, as indicated by Ray Hendershot and Douglas Meredith, offering a low cost, all you can eat long distance package often only makes financial sense if the company offering it is not paying terminating access charges, which would contribute to the phantom traffic problem in Utah. There can be no argument that another carrier contributing to the phantom traffic problem is in the public interest. However, the Division has admitted that it has not considered the impact Bresnan's competitive entry might have on the phantom traffic issue. (Data Request Response 1.10.2; Coleman Hearing Testimony of Coleman, p. 455, Ins. 12-20, and pages 456-458 generally).

In fact, it was clear from the testimony of both Mr. Coleman and Ms. Scholl that the Division had not conducted any study or investigation regarding any aspect of this application, even though both Mr. Coleman and Ms. Scholl acknowledge that this is an issue of first impression. (Coleman Hearing Testimony, p. 448, Ins. 17-19; Scholl, p. 349, Ins. 19-25, and pg. 350, ln. 1). The Division has not considered, and perhaps even more disturbing, did not think it was important to consider, the impact that granting Bresnan's application would have on other independent rural areas of the State. Ms. Scholl testified:

Q. (Slawson) You testified that the petition, that Bresnan's petition, if granted may result in impacts, and I believe you called Mr. Hendershot's testimony speculative. But isn't that exactly the issue here? We don't know what the impacts are going to be on USF as a result of Vernal, of competition in the Vernal Exchange, do we?

A. (Scholl) Well, no. But even if we accept URITA's witness worst case scenario, it's my position that those impacts are reasonable.

Q. And we don't know, I think you've testified here today that we don't know the impacts on the State USF in other rural markets which may result as we introduce competition into those areas either, do we?

A. No. And those would be addressed at the point in time those issues came up.

Q. And has the Division looked at the overall impact that competition in the rural areas might have on the rural ILECs or the State USF, I mean competition in all of those rural areas? Have they done a study or commissioned any sort of study on that?

A. Has the Commission done a study? I don't know?

Q. Has the Division?

A. The Division? Not during the time that I have been here.

(Scholl Testimony, p. 375, Ins. 4-25, p. 376, Ins. 1-6). Mr. Coleman testified:

Q. (Slawson) On lines 307-314 of your testimony you say that the Commission should not try to apply the facts of this case to all rural carriers, and you indicate that it seems unfair to deny a company the opportunity to compete in a specific geographic region because there may be companies wanting to serve in other areas. Has the Division conducted any studies on the likelihood of competition in other rural areas?

A. (Coleman) No.

Q. Has the Division looked at the overall impact that the competition in the rural areas might have on rural ILECs or the State USF?

A. Other than what we've provided in this case, no.

Q. So not overall, just, again, facts specific to this case?

A. Correct.

(Coleman Testimony, p. 450, Ins. 19-25, p. 451, Ins. 1-11). The Division has conducted no studies regarding the impact of competition in the rural areas of the State on the rural ILECs or the State USF, and more importantly, didn't conduct any such study before recommending that

Bresnan's application be granted in this instance. In fact, the attitude of the Division regarding the precedential nature of this application is unconcerned at best. Ms. Scholl testified:

Q. So in this case, we don't have to carry this case forward? The next case we just look at the facts and make a determination of what the standard should be in that case based on new facts of the new application?

A. (Scholl) Mr. Mecham, I'm sure that you could construct a hypothetical, as I responded to Ms. Slawson, that would concern me. The facts in this docket don't.

(Scholl Hearing Testimony, p. 391, lns. 23-25, and pg. 392, lns.1-6).

In fact, if the Division is going to reject the public interest test set forth in *Western Wireless*, and take the position that the Division has no obligation to consider, in this docket, the impact that competition in the rural exchanges might have on the State as a whole, the Division is, in effect, putting its blinders on and refusing to acknowledge the precedential nature of this proceeding. The Division has merely determined that consumer choice (even if not for all consumers) is enough of a public benefit to offset the negative impact Bresnan's competitive entry would have on the customers of Vernal, customers of Utah generally, and rural telephony as a whole. The testimony demonstrates that there are important and far-reaching issues that the Commission must consider when determining whether to grant Bresnan's application. This is the first application for CPCN in a rural independent exchange, but it certainly won't be the last. The effects of this decision will have lasting application in future cases, and as a result, the Commission should be well informed of the consequences of its determination and resolute in the standard it sets in this case. Ideally, the Commission would have the benefit of reviewing a Utah study on the impacts that competition in rural areas of the State. However, in the absence of a Utah specific study, the Commission can, and should, rely upon the Balhoff & Rowe study

completed in Texas which specifically looked at competition in rural areas and the impact of that competition on State USF (UBTA-UBET Exhibit 3.1). As indicated by Mr. Hendershot in his Rebuttal Testimony, the “study offers important insights to the significant challenges in high cost areas.” (Rebuttal Testimony of Ray Hendershot, Ins. 70-71). The Balhoff & Rowe study indicates:

- 1) There are clear signs that the current federal universal service system will soon fail to meet the needs of consumers in high-cost areas.
- 2) Although competitors increasingly are serving consumers in rural towns where costs are lower, they generally do not serve consumers outside of those towns where costs are higher; importantly, competitors appear unlikely to offer services in those regions in the foreseeable future.
- 3) Competitors are making the financially rational choice to avoid serving high-cost areas altogether, but carriers of last resort are compelled to serve the areas outside of rural towns, often at a significant loss.
- 4) With growing competition in lower cost areas, regulators increasingly are unable to count on, among other things, averaging costs between rural towns and outlying rural areas to support universal service goals. As such, explicit support mechanisms become more, not less, critical.

(Rebuttal Testimony of Ray Hendershot, Ins. 70-91).

According to Mr. Hendershot, the Balhoff & Rowe study serves as an economic “analysis using actual data of the current situation in Texas, where there is competition in the rural areas of Texas. The current system of investment, rate of return, internal subsidies, and requirements of universal service support are all discussed within the study as it relates to rural areas served by rural telephone companies.” (Rebuttal Testimony of Ray Hendershot, Ins. 87-91). In other words, the Balhoff & Rowe study encompasses all of the issues that the Commission now faces in this docket in determining whether granting Bresnan’s CPCN for competitive entry into the Vernal

exchange is in the public interest. The Balhoff & Rowe study clearly indicates that competition in rural areas can have a negative impact. Based on the findings in the Balhoff & Rowe study (the only comprehensive study available in this case), the Commission can reasonably conclude the competition in the low cost rural areas of the state is not in the public interest, and thus Bresnan's application should be denied.

Conclusion

Based on the foregoing, the Commission should deny Bresnan's Application for CLEC status and CPCN. First, the Commission cannot properly evaluate Bresnan's financial, technical and managerial resources on the evidence presented. Second, and perhaps most importantly, the Commission cannot determine that Bresnan's Application is in the public interest. There are clearly negative impacts that would result from Bresnan's competitive entry, and the public benefit that has been presented amounts to consumer choice for a select few customers in Vernal. There is no analysis or study of the impact of such competitive entry in a rural area on the other rural areas, or on the State as a whole. In the absence of such evidence and/or studies conducted in Utah, the Commission should rely on the Balhoff & Rowe study and err on the side of preserving and advancing universal service in rural areas, even at the expense of developing competition. Bresnan's application should be denied.

DATED this 10th day of October, 2007.

BLACKBURN & STOLL, L.C.

/s/ Kira M. Slawson

Stanley K. Stoll

Kira M. Slawson

Attorneys for UBTA-UBET Communications, Inc.

CERTIFICATE OF MAILING

I hereby certify that on this 10th day of October, 2007, a true and correct copy of UBTA-UBET COMMUNICATION, INC.'S POST HEARING BRIEF was served upon the following by email:

James A. Holtkamp
jholtkamp@hollandhart.com

Thorvald A. Nelson
tnelson@hollandhart.com

Jerold C. Lambert
jlambert@bresnan.com

Michael Ginsberg
mginsberg@utah.gov

Casey Coleman
ccoleman@utah.gov

Paul Proctor
pproctor@utah.gov

Reed Warnick
rwarnick@utah.gov

Laura Scholl
lscholl@utah.gov

Patricia Schmid
pschmid@utah.gov

Dennis Miller
dennismiller@utah.gov

Stephen F. Mecham
sfmecham@cnmlaw.com

Blackburn & Stoll, LC

 /s/Kira M. Slawson
Attorneys for UBTA-UBET