

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Application of Bresnan Broadband, LLC, for a Certificate of Public Convenience and Necessity to Operate as a Competitive Local Exchange Carrier in Utah)))))	<u>DOCKET NO. 07-2476-01</u> <u>REPORT AND ORDER</u>
---	-----------------------	---

ISSUED: November 16, 2007

SYNOPSIS

By this Report and Order, the Public Service Commission of Utah (the “Commission”) grants the request of Bresnan Broadband of Utah, LLC (“Applicant”) for a Certificate of Public Convenience and Necessity (“Certificate”) authorizing Applicant to provide public telecommunications services within the Vernal exchange in and around Vernal, Utah. The Commission, having considered the record in this proceeding and the applicable law, hereby makes, adopts, and enters the following Report and Order.

DOCKET NO. 07-2476-01

-2-

TABLE OF CONTENTS

I. PROCEDURAL HISTORY	1
II. BACKGROUND AND DISCUSSION	3
A. Bresnan and It's Application	3
B. Granting a Certificate to a CLEC in a Rural ILEC's Territory	4
1. Technical, Financial, and Managerial Resources and Abilities	7
2. The Public Interest.....	9
a. Competitive Choice.....	9
b. Effect on USF	12
C. Discussion Regarding Granting the Certificate	15
D. Whether to Require Bresnan to Serve the Entire Exchange	18
III. FINDINGS AND CONCLUSIONS	19
IV. ORDER.....	21
EXHIBIT A.....	23
EXHIBIT B.....	24

By The Commission:

I. PROCEDURAL HISTORY

On February 5, 2007, pursuant to Utah Code Ann. § 54-8b-1 *et seq.*; Utah Admin. Code § 746-349-1 *et seq.*; and the federal Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, Bresnan Broadband of Utah, LLC (“Applicant” or “Bresnan”) filed a Verified Application (“Application”) for a certificate of public convenience and necessity (“Certificate”) to operate as a Competitive Local Exchange Carrier (“CLEC”) and provide local exchange services in areas in and around Vernal, Utah served by UBTA-UBET Communications, Inc. (“UBTA-UBET”) as the Incumbent Local Exchange Carrier (“ILEC”), as well as in areas in and around Cedar City, Utah served by Qwest Communications as the ILEC. Bresnan also requested waiver of Commission Rule 746-349-3.A.2 requiring Bresnan to post a bond, seeking in lieu thereof to post a letter of credit. Finally, Bresnan requested waiver of Commission Rule 746-349-3.A.12 to permit the Application to rely on various financial statements in lieu of the required five-year projection of Bresnan’s *pro forma* income and cash flow. The Application was assigned to Docket No. 07-2476-01.

On February 20, 2007, UBTA-UBET filed a Petition to Intervene. On March 9, 2007, the Utah Rural Telecom Association (“URTA”) also filed a Petition to Intervene. On March 14, 2007, the Commission issued its Order Granting Intervention to UBTA-UBET. By similar order issued April 12, 2007, the Commission granted URTA leave to intervene.

On April 17, 2007, Applicant filed a Motion to Bifurcate Docket No. 07-2476-01 (“Motion”) requesting the Commission separate the Application into two separate dockets for the convenience of all parties, and to expedite the proceedings. On May 18, 2007, the Division of

Public Utilities (“Division”) filed a memorandum recommending approval of the Motion and the splitting of the Application into two dockets. On June 14, 2007, following a duly-noticed Technical Conference held on June 1, 2007, as well as the establishment of a procedural schedule based on the agreement of parties present at the Technical Conference, the Commission issued an Order Granting Motion to Bifurcate and Opening Docket No. 07-2476-02. Pursuant to said Order, that portion of the Application relating to Applicant’s request to operate as a CLEC in the Cedar City exchange in and around Cedar City, Utah was transferred to Docket No. 07-2476-02¹ while the portion of the Application relating to Applicant’s request to serve the Vernal exchange in and around Vernal, Utah (“Application”) remained in Docket No. 07-2476-01.

Hearing in Docket No. 07-2476-01 convened on September 4-5, 2007, before the Administrative Law Judge. Applicant was represented by Thorvald A. Nelson, of Holland & Hart, LLP. Katherine Kirchner, Bresnan Communications Vice President of Telephone Operations, testified on behalf of Applicant. UBTA-UBET was represented by Stanley K. Stoll and Kira M. Slawson of Blackburn & Stoll. Bruce H. Todd, General Manager and Chief Executive Officer of UBTA-UBET, and Raymond A. Hendershot of GVNW Consulting testified on behalf of UBTA-UBET. Steve Mecham of Callister, Nebeker & McCullough appeared on behalf of URTA. Douglas Meredith of John Staurulakis, Inc., testified for URTA. The Division was represented by Michael L. Ginsberg, Assistant Attorney General. Laura L. Scholl, Manager of the Division’s Telecommunications Section, and Casey J. Coleman, Technical Consultant,

¹On September 26, 2007, the Commission issued its Report and Order in Docket No. 07-2476-02 granting Bresnan the requested Certificate to serve the Cedar City exchange in and around Cedar City, Utah.

testified on behalf of the Division. The Committee of Consumer Services (“Committee”) was represented by Paul H. Proctor, Assistant Attorney General. Eric Orton testified on behalf of the Committee.²

At the conclusion of hearing, the Administrative Law Judge, at the request of the Division and with the concurrence of all parties, extended to September 26, 2007, the deadline for filing of post-hearing briefs. However, on September 21, 2007, in response to a request from counsel for Applicant, with the concurrence of the other parties, the Commission issued a Scheduling Order extending to October 10, 2007, the deadline for filing of briefs.

On October 10, 2007, Applicant, UBTA-UBET, URTA, and the Division filed post-hearing briefs.

II. BACKGROUND AND DISCUSSION

A. Bresnan and It’s Application

Bresnan is a limited liability company organized under the laws of the State of Utah with its principal place of business in Cedar City, Utah. Bresnan is a wholly-owned subsidiary of Bresnan Communications, LLC, which, in conjunction with its subsidiaries, provides cable and telephony services to over 300,000 customers in Colorado, Wyoming, Montana, and Utah.

According to the Application, if granted a Certificate, Bresnan intends to provide

²Although parties pre-filed and offered into evidence testimony and exhibits marked as confidential, the evidentiary hearing remained open at all times. This Order discloses no confidential information; no confidential order has been prepared or issued in this docket.

business services over traditional circuit switched technology, and to provide residential services as part of its Internet Protocol-Enabled (“IP-Enabled”) digital voice service called “Digital Phone.” Bresnan believes its IP-Enabled service is not a public telecommunications service as defined by Utah Code Ann. § 54-8b-2(16), but acknowledges said belief remains a matter of dispute at the state and Federal level and so has filed its Application so that it can act in all respects as if its IP-Enabled services are a local exchange telecommunications service in Utah.

If granted a Certificate, Bresnan will offer residential service through cable telephony, whereby a call will originate via a telephone connected to a modem and routed over Bresnan’s coaxial cable IP plant to a telephony switch and transported via the Public Switched Telephone Network for termination on traditional phone lines. Bresnan intends to offer business services using its own switch, as well as the facilities of the ILEC, UBTA-UBET, where necessary, and will provide access to ordinary intraLATA and interLATA message toll calling, operator services, directory assistance, directory listings, and emergency services such as 911 and E911 either through its own operations or by purchasing those services from third parties.

B. Granting a Certificate to a CLEC in a Rural ILEC’s Territory

This docket presents the Commission with the first contested application for a Certificate to operate in a rural independent telephone exchange. UBTA-UBET and URTA therefore believe the Commission’s decision in this case may well set precedent for subsequent CLEC applications to enter rural exchanges, and will establish precedent for exchanges with more than 5,000 access lines. However, we note that under current statutory authority a CLEC requesting to operate in the Vernal exchange is treated no differently than is a CLEC requesting authority to serve in Qwest territory. The only statutory differences apply to exchanges of less

than 5,000 access lines controlled by an incumbent with fewer than 30,000 access lines in the state.³ However, all parties agree the Vernal exchange contains more than 5,000 access lines.

Therefore, in deciding whether to grant the requested Certificate to Applicant, the Commission is guided by the same statutory provisions we have routinely applied in prior dockets when deciding whether to grant a Certificate to requesting CLECs. Specifically, the Legislature, at Utah Code Ann. § 54-8b-2.1(2), has established a two-part test for issuance of a Certificate:

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.

All parties agree application of this two-part test is determinative of our decision in this matter.

In deciding what is in the public interest, the Commission's analysis is necessarily informed by the Legislature's policy declarations found in Utah Code Ann. §54-8b-1.1:

The Legislature declares it is the policy of the state to:
(1) endeavor to achieve the universal service objectives of the state

³Utah Code Ann. § 54-8b-2.1(4) requires the Commission to impose upon a CLEC approved to operate in such an exchange an obligation to provide public telecommunications services to any customer or class of customers who request service within said exchange. In conjunction with its Application, Bresnan has offered to assume this obligation even though not required by statute, an offer the Commission addresses later in this Order.

as set forth in Section 54-8b-11;0

(2) facilitate access to high quality, affordable public telecommunications services to all residents and businesses in the state;

(3) encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state;

(4) allow flexible and reduced regulation for telecommunications corporations and public telecommunications services as competition develops;

(5) facilitate and promote the efficient development and deployment of an advanced telecommunications infrastructure, including networks with nondiscriminatory prices, terms, and conditions of interconnection;

(6) encourage competition by facilitating the sale of essential telecommunications facilities and services on a reasonably unbundled basis;

(7) seek to prevent prices for tariffed public telecommunications services or price-regulated services from subsidizing the competitive activities of regulated telecommunications corporations;

(8) encourage new technologies and modify regulatory policy to allow greater competition in the telecommunications industry;

(9) enhance the general welfare and encourage the growth of the economy of the state through increased competition in the telecommunications industry; and

(10) endeavor to protect customers who do not have competitive choice.

The Commission's only previous pronouncement relating to the "public interest" in a matter involving competing telecommunications operations in the territory of a rural ILEC occurred in Docket No. 98-2216-01, *In the Matter of the Petition of WWC Holding Co., Inc., for Designation as an Eligible Telecommunications Carrier ("Western Wireless")*, in which the Commission determined the anticipated increased burden on the state Universal Public Telecommunications Service Support Fund ("USF") outweighed any unidentified and

indeterminate public benefit that may have accrued from designating the petitioner wireless communications company an Eligible Telecommunications Carrier (“ETC”) in accordance with 47 C.F.R §§ 54.101 and 214(e) in rural areas where it was already providing service.

Mindful of these statutory requirements and the Commission’s decision in *Western Wireless*, the Commission analyzes the present docket as follows:

1. Technical, Financial, and Managerial Resources and Abilities

In its Application, entered into evidence at hearing, Bresnan notes the extensive telecommunications and managerial experience of the key personnel who will be responsible for Bresnan’s telecommunications operations in Utah. Bresnan also notes its parent, Bresnan Communications, has already deployed Digital Phone in thirty-three markets in Colorado, Montana, and Wyoming. Though Bresnan does not have and did not file a five-year *pro forma* income or cash flow projection and has requested waiver of this requirement, Bresnan did file various financial statements it believes indicate Bresnan Communications enjoys a positive net worth and sufficient cash flow to provide an adequate source of funding for Applicant. Furthermore, Bresnan testified that it has the technical ability to deliver high quality service to customers in the Vernal exchange and is currently providing similar service in numerous other markets.

The Division also concludes that Bresnan has shown sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for. Likewise, the Committee testified Bresnan satisfies the statutory requirements to be a CLEC.

UBTA-UBET and URTA, on the other hand, argue Bresnan has not adequately

demonstrated that it possesses the required technical, financial, and managerial resources, and that the Division and Committee failed to undertake the appropriate inquiry regarding these issues, as required by statute. In their view, Bresnan's Application is incomplete because Bresnan provided financial information for its parent company rather than for itself, the financial information it finally provided in response to Division data requests was not relied upon by the Division in making its recommendation, and said information is so limited that it is of virtually no use in determining or evaluating Bresnan's financial condition or resources. Additionally, UBTA-UBET notes Bresnan failed to provide the required five-year *pro forma* and has produced no evidence of its business plan by which the Commission could determine the feasibility of Bresnan's success in the Vernal exchange. URTA notes its own analysis of Bresnan's financial strength was hampered by the lack of a *pro forma* and argues the financial information admitted at hearing indicates Bresnan may not have the necessary financial resources to provide the public telecommunications services applied for. According to UBTA-UBET, the Division and the Committee failed to undertake the appropriate inquiry as required by statute by relying solely on information supplied by Bresnan to reach their conclusion regarding Bresnan's financial, technical, and managerial status.

While we agree with UBTA-UBET and URTA that Bresnan's failure to provide *pro forma* statements is a departure from normal procedure in requesting a Certificate, the Commission does not agree with these parties' conclusion that Bresnan has therefore failed to provide evidence sufficient to prevail on this point. Bresnan's parent and affiliates already operate the requested telecommunications service in numerous other jurisdictions so its technical and managerial qualifications cannot reasonably be questioned. Furthermore, its parent appears

to possess sufficient financial resources to support Bresnan's Utah operations if authorized. Therefore, the Commission finds sufficient evidence to conclude Bresnan possesses the requisite technical, financial and managerial resources to support issuance of the requested Certificate.

2. The Public Interest

The primary issue in this docket is whether granting Bresnan the requested Certificate is in the public interest. Because this is an issue of first impression, the Commission has not previously enunciated a "public interest test" to be applied when evaluating a CLEC request for a Certificate to operate in the territory of a rural ILEC. However, in evaluating CLEC requests for certification in non-rural ILEC areas, the Commission has routinely looked to whether said certification would provide a "wider range of choices" and would "support the development of competition" in finding that granting the requested Certificates would be in the public interest. Furthermore, as noted above, in *Western Wireless* the Commission relied on the anticipated negative impact to the USF in the absence of any countervailing benefit to determine that granting ETC status would not be in the public interest. These factors therefore guide the analysis that follows.

a. Competitive Choice

Bresnan testified its entry into the Vernal exchange would: (a) allow customers a competitive option for local exchange telecommunications services that is affordable and high-quality; (b) encourage the development of competition in rural Utah; (c) allow for the possibility of flexible regulation for the incumbent; (d) encourage the deployment of advanced

telecommunications networks; (e) encourage the development of new technologies; and (f) promote economic development in the Vernal exchange.

Bresnan also notes that even the modest market penetration rate estimated by the Division proves the point that Bresnan's presence in the market will be beneficial to customers since it stands to reason that only customers who perceive some benefit will choose to switch their telephone service from UBTA-UBET to Bresnan. The Division concurs on this point while the Committee points out that if a higher customer switch rate occurs this too would be indicative of the positive benefits accruing to customers from the competition between Bresnan and UBTA-UBET.

The Division also testified it expects to see better service quality, more rapid introduction of innovative services and reduced costs as a result of the introduction of more competition into the Vernal exchange. The Division notes that while one may not be able to place a dollar value on these benefits they are nonetheless benefits accruing from increased competitive choice.

UBTA-UBET and URTA, on the other hand, argue that approving the Application would provide little or no benefit to competition since the services Bresnan proposes to provide are already being offered by UBTA-UBET. According to UBTA-UBET, what little benefit Bresnan's certification might provide would be more than offset by its adverse impacts on the USF, the other exchanges in the Uintah Basin, and rural telephony in Utah as a whole. UBTA-UBET and URTA argue "consumer choice" was the only public interest benefit reviewed by the Division and point out that at least one Division witness testified consumer choice was the only factor relied upon in the Division's overt decision making. UBTA-UBET then argues that

because Bresnan's Digital Voice product will only be available to those consumers whose homes are passed by Bresnan's facilities, the consumer choice so prized by the Division will not even extend to all customers in the Vernal exchange, let alone all customers in the Uintah Basin. URTA notes choices similar to that proposed by Bresnan are already available in Vernal since customers there can take service from several Voice Over Internet Protocol providers and wireless carriers, thereby diminishing the customer choice value that Bresnan's Application might otherwise have had.

In response to the Division's testimony that Bresnan's entry into the Vernal exchange would reduce costs, increase service quality, and increase technological innovation, UBTA-UBET points out that there have been no complaints of poor service quality from UBTA-UBET and there is no evidence that Bresnan's product is of superior quality to that offered by UBTA-UBET. URTA argues the Division provided no concrete or measurable evidence in support of its conclusions.

URTA further argues Bresnan was unable to demonstrate that there would be any economic benefit accruing from granting the Certificate and Bresnan was unable to even identify whether it planned to build in brownfields, greenfields or both. According to URTA, Bresnan could not even show that all Vernal residents would benefit, let alone any other telecommunications customers in the state. As for customers outside the Vernal exchange, URTA believes Bresnan's service would provide no benefit since overall USF collections would not increase and Bresnan's service would not further progress toward any universal service goals.

Furthermore, according to UBTA-UBET and URTA, rather than fostering

competition, approving Bresnan's Application would not be in the public interest because it would merely permit Bresnan to "cherry-pick" customers from the low cost Vernal exchange, reducing the revenue UBTA-UBET earns from this relatively high density, low cost area and thereby reducing the internal cross-subsidies UBTA-UBET uses to offset the cost of provisioning service in the outlying, high cost areas of the Uintah Basin. According to UBTA-UBET, if Bresnan is permitted to cherry pick the Vernal exchange, the costs of providing service to every UBTA-UBET customer will increase, resulting either in a rate increase or increased reliance on draws from the USF. Within the Vernal exchange, these parties believe Bresnan will only serve those areas in which it currently has cable plant installed, or those areas into which it chooses to expand its cable plant; these areas represent only a fraction of the entire Vernal exchange.

In response, Bresnan points out that its cable facilities currently pass, and are therefore capable of serving, nearly 100% of the residential homes in the Vernal exchange, and that this number is very close to the number of households currently served by UBTA-UBET in the Vernal exchange. Bresnan also points out that Bresnan has accepted, should the Commission choose to impose it, the obligation to serve every customer in the Vernal exchange who requests service.

b. Effect on USF

Utah Code Ann. § 54-8b-15(5) requires operation of the USF to be "nondiscriminatory and competitively and technologically neutral . . . neither providing a competitive advantage for, nor imposing a competitive disadvantage upon, any telecommunications provider operating in the state."

The focus on USF impact in this docket stems both from the universal service

policy declarations of Utah Code Ann. § 54-8b-1 and from the Commission's decision in *Western Wireless* since a negative USF impact, standing in isolation as the only impact in evidence, was the deciding factor in that docket. However, the Division, while recognizing that USF impact is among the factors the Commission should consider in the instant matter, argues *Western Wireless* has no precedential value to this docket since *Western Wireless* was decided under a Federal ETC public interest test distinct from the Utah Code Ann. § 54-8b-2.1 factors considered herein. Furthermore, *Western Wireless* concerned an application by a wireless carrier already serving the areas for which it sought ETC status so the Commission's decision in that docket had no impact, positive or negative, on the competitive landscape in the effected exchanges—the petitioning wireless company could continue to serve whether or not it was granted ETC status.

Likewise, Bresnan argues the fact that the Commission denied ETC status to the petitioner in *Western Wireless* does not mean the Commission must or even should deny Bresnan's Application herein. For instance, Bresnan notes, and URTA's own witness conceded at hearing, the impact on the USF is greater in cases where the applicant is requesting ETC status rather than merely CLEC status because, all other things being equal, in addition to the increased draw needed by the incumbent to make up for customers lost to the ETC, the ETC itself would seek its own disbursements from the USF. In the present docket, Bresnan is not seeking ETC status and would therefore not be eligible to draw from the USF.

In contrast, UBTA-UBET and URTA believe *Western Wireless* is directly applicable to analysis of the present Application, noting their view that the public interest test adopted in *Western Wireless* requires public benefits to offset a negative impact to the USF.

According to UBTA-UBET, the Commission looked to the potential public benefits of lowering cost of service and offering service in areas not already served by the ILEC. Finding neither of these, the Commission concluded it would not be in the public interest to grant the requested ETC status. UBTA-UBET then argues that, whether or not Bresnan is seeking ETC status, the issues facing the Commission and the rural exchanges in this docket are the same as they were in *Western Wireless*: What impact will the granting of the Certificate have on the USF as end-user and access revenues are siphoned away from the ILEC, and what is the public interest test that should be applied in this docket and the dockets that will follow?

All parties concede that Bresnan's entry into the Vernal exchange would likely result in increased USF disbursements to UBTA-UBET due to customer migration from UBTA-UBET to Bresnan. The parties differ as to the amount of this increase, its effect on the USF, and the weight such an effect should be given in the Commission's public interest determination.

The Division calculates granting Bresnan the requested Certificate could result in an annual increase in USF disbursements to UBTA-UBET of approximately \$125,000 to \$275,000. To make up for an additional \$275,000 annual disbursement, the Division estimates the USF surcharge would have to increase by about one cent (\$0.012) per Utah customer per year. UBTA-UBET and URTA, on the other hand, calculate Bresnan's telecommunications operations in the Vernal exchange would result in an increased USF draw by UBTA-UBET of as much as \$550,000 per year. In addition, URTA suggests a more appropriate measure of negative impact to the USF would be a comparison of any negative impact with the amount actually distributed from the USF annually to support high cost areas. URTA estimates the impact resulting from granting the requested Certificate would exceed 8% of 2006 USF disbursements.

However, notwithstanding these calculations, the Division testified that, given the current balance of the USF and expected disbursements in the future, the potential additional disbursements to UBTA-UBET anticipated by UBTA-UBET's own "worst case" scenario could actually be absorbed by the USF with no change to the present surcharge.

However, UBTA-UBET and URTA also argue the Commission should extrapolate this impact state-wide because other CLECs may seek certification in other rural ILEC territory throughout the state, greatly increasing USF draws and potentially requiring large increases in the USF surcharge for all Utah customers. UBTA-UBET and URTA note the Division failed to analyze or consider these potential impacts and that, pending such analysis, the Commission should delay any decision on the Bresnan Application or deny the Application. In the absence of Utah-specific analysis, UBTA-UBET and URTA urge the Commission to consider a similar study from Texas indicating that competition in rural areas can have a negative impact. The Division disputes this argument, noting that there are only two other rural ILEC exchanges in the state with more than 5,000 access lines where CLECs might desire to operate. Furthermore, the Division believes it would simply be unreasonable to deny or delay a qualified company's application pending the speculative review of what might happen if other CLECs request certification in other areas of the state.

Finally, in continuing to argue the Commission should apply the public interest test adopted in *Western Wireless*, UBTA-UBET notes that Bresnan seeks a Certificate for only the Vernal exchange, an exchange already served by UBTA-UBET. Therefore, since Bresnan does not propose to extend telecommunications service to any unserved areas, the Application fails to provide the public benefit of extending universal service expounded by the Commission

in *Western Wireless*.

C. Discussion Regarding Granting the Certificate

In arriving at its recommendation for approval, the Division considered the value of competitive choice and concluded that the benefits of Bresnan's Digital Voice service and the existence of customer choice serves the public interest. The Division balanced these benefits against the calculated impact to the USF and concluded that the benefits of reduced costs, better service quality, and increased choice outweigh the negative impact that could be felt by Utah telecommunications customers if the Commission were to increase the USF surcharge to account for Bresnan's presence in the Vernal marketplace. Furthermore, the Division concluded that even under worst-case USF impact scenario offered by UBTA-UBET and URTA the increased USF draws could be absorbed by the USF with no change to the current surcharge rate.⁴

The Committee also testified that granting Bresnan's Application promotes the competition favored by Utah statute and would have an acceptable impact on the USF. The Committee therefore argues there are no valid reasons, from the customer's point of view, why Bresnan's Application should be denied.

In deciding this matter, the Commission does not, as advocated by UBTA-UBET and URTA, look to *Western Wireless* as controlling precedent. Unlike the present docket wherein a CLEC will be denied the opportunity to compete and Utah consumers will be denied the benefits of competitive choice if the Commission denies the Application, *Western Wireless*

⁴The Division also recommends waiver, as requested by Applicant, of the Commission's Rule 746-349-3 requirement that Applicant file proof of \$100,000 bond and a five-year projection of expected operations. The Division notes Applicant proposes to file a \$100,000 letter of credit in lieu of the required bond.

merely involved an ETC request for a wireless provider otherwise free to operate in rural ILEC territory absent ETC status. As such, our determination in that docket was primarily guided by Federal public interest considerations focusing on the expansion of universal service balanced against the anticipated USF impact, rather than, as here, by Utah statutory authority regarding the benefits of competition and the public interest.

Furthermore, as recognized by the Supreme Court in its review affirming the Commission's decision⁵, the Commission in *Western Wireless* did not say that because designating an additional ETC in a rural area may increase the burden on the USF it would never allow competition in rural areas. Instead, the Commission merely determined that "in the *absence* of corresponding public benefits, increasing the burden on the State Fund is not in the public interest."⁶ The Commission does not face a similar absence of evidence of public benefits in this docket. The record clearly demonstrates customers in the Vernal exchange would have available to them a telephone product and land line telephone service choice that they currently do not enjoy. They may also benefit from the lower prices, increased technological innovation, and improved customer service and service quality typically produced by the introduction of competition into the marketplace.

The Commission therefore concludes that in the present docket the public interest

⁵*WWC Holding Co. v. Pub. Serv. Comm'n*, 44 P.3d 714, 719 (Utah 2002).

⁶*Id.* (emphasis in original).

is served by the competitive choice Bresnan's presence in the Vernal Exchange will bring to the marketplace and to Utah consumers, that the projected impact on USF disbursements is acceptable and manageable given the current balance and anticipated revenues to the USF, and that, therefore, said competitive choice opportunities outweigh the concerns raised about the projected impact on disbursements from the USF.⁷

D. Whether to Require Bresnan to Serve the Entire Exchange

When granting a CLEC a Certificate to serve a local exchange with less than 5,000 lines that is controlled by an ILEC with fewer than 30,000 access lines in the state, Utah Code Ann. § 54-8b-2.1(4) requires the Commission to impose upon said CLEC the obligation to provide service to any customer or class of customers who request service within the exchange. The Vernal exchange has more than 5,000 lines so this section is not directly applicable to Bresnan's Application. However, Bresnan, in part, it seems, to alleviate the parties' cherry picking concerns, has offered to provide service to any requesting customer within the Vernal exchange if the Commission imposes such an obligation in conjunction with approval of the

⁷In its post-hearing brief, URTA urges the Commission to establish a clear, predictable public interest standard for entry into rural exchanges with greater than 5,000 access lines, arguing that without such a standard future parties will have no guiding direction and the USF will sustain incremental erosion with each application approved. However, the Commission declines herein to decide under what future circumstance the negative impacts of granting a Certificate might outweigh the public benefits produced by competitive choice. The Commission must necessarily adjudicate each application for CLEC certification based on the facts presented therein. It is therefore appropriate that we employ the same test in this docket that we have routinely used in prior CLEC dockets, i.e., balancing the identified positive and negative impacts of granting the requested Certificate in light of the statutory guidance provided by the Legislature to determine whether said grant would be in the public interest.

Application.⁸ The Division recommends the Commission impose this obligation, but, when questioned at hearing, the Division indicated it would support approval of the Application absent imposition of this obligation and that it essentially recommended imposing the obligation only because Bresnan had made the offer.

Having considered this matter, the Commission finds little reason to impose such an obligation where, as here, doing so would provide no noticeable benefit to the local exchange in question. Granting Bresnan the requested Certificate will provide additional competitive choice opportunities to a great majority of the customers in the Vernal exchange. In contrast, requiring Bresnan to serve the entire exchange upon request would simply constitute a large step toward awarding Bresnan ETC status, thus potentially opening the USF to additional disbursements as noted above with no corresponding benefit.

III. FINDINGS AND CONCLUSIONS

Wherefore, based upon the foregoing information, and for good cause appearing, the Administrative Law Judge enters the following Report, containing proposed Findings of Fact, Conclusions of Law, and the Order based thereon:

FINDINGS OF FACT

1. Applicant is qualified to do business in Utah.

⁸Having made this offer, Bresnan urges the Commission not to impose upon it this obligation to serve, noting the tremendous amount of regulatory effort that imposing such an obligation would create, such as the need for Bresnan to negotiate an interconnection agreement with UBTA-UBET in order to serve those customers not passed by Bresnan facilities. Alternatively, Bresnan suggests the Commission could order Bresnan to serve any customer who requests service and who is passed by Bresnan facilities.

2. Applicant has requested that the Commission grant a Certificate of Public Convenience and Necessity authorizing it to provide public telecommunications services within the Vernal exchange in and around Vernal, Utah.

3. Applicant is proposing to provide public telecommunication services in the Vernal exchange in and around Vernal, Utah.

4. Applicant will utilize its managerial and technical expertise to support its Utah operations.

5. Applicant has sufficient technical resources and abilities to provide the public telecommunications services for which it has applied for a Certificate.

6. Applicant has sufficient managerial resources and abilities to provide the public telecommunications services for which it has applied for a Certificate.

7. Applicant has a secure and sufficient source of funding for its Utah operations that will enable it to meet projected capital and operating expenses and to implement its business plans.

8. Applicant has sufficient financial resources and abilities to provide the public telecommunications services for which it has applied for a Certificate.

9. In its provision of intrastate services, Applicant will be subject to competition from other certified telecommunications services providers.

10. Applicant's service offerings will provide customers with a wider range of choices in meeting their telecommunications needs and will support the development of competition.

11. The issuance of a Certificate to Applicant to provide public telecommunications services is in the public interest.

12. The reporting requirements in Exhibit B attached hereto are in the public interest and are binding upon Applicant until modified by the Commission.

13. Applicant has applied for exemptions from the requirements of various procedures of the Utah Code and the Commission's Rules and Regulations.

14. The grant of exemptions from the provisions of the Utah Code and the Commission's Rules and Regulations, as set forth in Exhibit B, is in accord with Commission practice and is in the public interest.

15. Applicant has requested waiver of the requirements of Commission Rule 746-349-3 requiring Applicant to file proof of bond in the amount of \$100,000 and a five-year projection of expected operations.

16. Applicant proposes to file a \$100,000 letter of credit in lieu of the required bond.

CONCLUSIONS OF LAW

1. Applicant meets each of the statutory requirements §54-8b-2.1, *et. seq.* UCA 1953, as amended) for issuance of a Certificate as a telecommunications corporation.

2. Applicant meets each of the statutory requirements §54-8b-2.1, *et. seq.*, UCA 1953, as amended) for authorization to provide the public telecommunications services for which it seeks a Certificate.

3. The issuance of a Certificate to Applicant to provide the telecommunications services for which it has applied is in accord with the legislative policy declarations set forth in Utah Code §54-8b-1.1.

IV. ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

§ The Commission hereby grants Applicant the Certificate attached hereto as Exhibit A and, by this reference, made a part of this Report and Order.

§ Applicant shall provide reports to the Commission and to the Division of Public Utilities, Utah Department of Commerce, as set forth in Exhibit B and, by this reference, made part of this Report and Order.

§ Applicant is exempt from certain provisions of the Utah Code and the Commission's Rules and Regulations, as set forth in Exhibit B.

§

The provisions of Commission Rule 746-349-3.A.2 and -3.A.12 are waived. Applicant shall file a \$100,000 letter of credit in acceptable form in lieu of proof of bond.

Pursuant to Utah Code §§63-46b-12 and 54-7-15, agency review or rehearing of this order may be obtained by filing a request for review or rehearing with the Commission within 30 days after the effective date of the order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. If the Commission fails to grant a request for review or rehearing within 20 days after the filing of a request for review or rehearing, it is deemed denied. Judicial review of the Commission's final agency action may be obtained by filing a Petition for Review with the Utah Supreme Court within 30 days after final agency action. Any Petition for Review must comply with the requirements of Utah Code §§63-46b-14, 63-46b-16 and the Utah Rules of Appellate Procedure.

Dated at Salt Lake City, Utah, this 16th day of November, 2007.

/s/ Steven F. Goodwill
Administrative Law Judge

Approved and Confirmed this 16th day of November, 2007, as the Report and Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

DOCKET NO. 07-2476-01

-24-

Attest:

/s/ Julie Orchard
Commission Secretary
G#55340

EXHIBIT A

In the Matter of the Application of Bresnan)	<u>DOCKET NO. 07-2476-01</u>
)	
)	
)	<u>CERTIFICATE</u>
)	

ISSUED: November 16, 2007

By the Commission:

The Public Service Commission of Utah, pursuant to the Utah Code Ann. §54-8b-2.1, *et. seq.*, hereby issues a Certificate of Public Convenience and Necessity authorizing Bresnan Broadband of Utah, LLC (“Grantee”) to provide public telecommunications services within the Vernal exchange in and around Vernal, Utah.

DATED at Salt Lake City, Utah, this 16th of November, 2007.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary

EXHIBIT B

I. Annual Report

Grantee shall file an Annual Report, on or before March 31 of each year, unless said grantee requests and obtains an extension. The Annual Report shall contain the following:

A. **Annual Revenues** from operations attributable to the State of Utah by major service categories. Such information would be provided on a “Total Utah” and “Utah Intrastate” basis. “Total Utah” will consist of the total of interstate and intrastate revenues. “Utah Intrastate” will reflect only revenues derived from intrastate tariffs, price lists, or contracts. Both Total Utah and Utah Intrastate revenues shall be reported according to at least the following classes of service:

- (1) private line and special access,
- (2) business local exchange,
- (3) residential local exchange,
- (4) measured interexchange, and
- (5) vertical services.

Business local exchange, residential local exchange and vertical service revenue will be reported by geographic area, to the extent feasible.

B. **Annual Expenses and Estimated Taxes** attributed to operations in the State of Utah.

C. **Year End Balances by Account for Property, Plant, Equipment, Annual Depreciation, and Accumulated Depreciation** for telecommunications investment in Utah. The Actual Depreciation Rates which were applied in developing annual and accumulated depreciation figures shall also be shown.

D. **Financial Statements** maintained in accordance with generally accepted accounting principles in the ordinary course of business. These financial statements shall at a minimum include an income statement, balance sheet and statement of cash flows.

E. **List of Services** offered to customers and the geographic areas in which those services are offered. This list shall be current and shall be updated whenever a new service is offered or a new area is served.

F. **Number of Access Lines in Service** by geographic area, segregated between business and residential customers.

G. **Number of Messages and Minutes of Services** for measured services billed to end users.

H. **List of Officers and Responsible Contact Personnel** updated annually.

I. **Chart of Accounts.** In addition to the foregoing, said grantee will provide its chart of accounts as existing and updated (no less than annually). Said Grantee will also work with the Division in good faith to develop a method of estimating intrastate expenses and investments.

II. Applicable Statutory Provisions and Exemptions from Statutes and Waiver of Regulations.

Grantee shall be exempted from the following statutory provisions and regulations:

A. Exemptions from Title 54

54-3-8, 54-3-19	--	Prohibitions of discrimination
54-7-12	--	Rate increases or decreases
54-4-21	--	Establishment of property values
54-4-24	--	Depreciation rates
54-4-26	--	Approval of expenditures

B. Waivers of Regulations

R746-340-2(D)	--	Uniform System of Accounts (47 C.F.R. 32)
R746-340-2(E)(1)	--	Tariff filings required
R746-340-2(E)(2)	--	Exchange Maps
R746-341	--	Lifeline ⁹
R746-344	--	Rate case filing requirements
R746-401	--	Reporting of construction, acquisition and disposition of assets
R746-405	--	Tariff formats
R746-600	--	Accounting for post-retirement

III. Obligations with Respect to Provision of Services.

⁹This regulation would be waived only until the Commission establishes Lifeline rules that may include Grantee or until it begins to provide residential local exchange service.

Grantee agrees to provide service within specified geographic areas upon reasonable request and subject to the following conditions:

A. Grantee's obligation to furnish service to customers is dependent upon the availability of suitable facilities on its own network and the networks of underlying carriers. Grantee will provide a map identifying the areas within the state of Utah where it is offering any services. The map will be updated as Grantee serves new areas and no less frequently than annually.

B. Grantee will only be responsible for the operation and maintenance of services that it provides.

IV. Modification

It is anticipated that to the extent such requirements impact competitive entry or impact effective competition that they will be subject to the rule making requirements of the Utah Code Ann. § 54-8b-2.2 and that the provisions set forth herein shall be superseded by any such rule adopted by the Commission.