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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 PETITION FOR REVIEW,
RECONSIDERATION AND
REHEARING AND MOTION TO
STAY.**

DOCKET NO. 07-2476-01

UBTA-UBET Communications, Inc. (“UBTA-UBET”), hereby submits its Petition for Review, Reconsideration, or Rehearing pursuant to Utah Code Section 63-46b- 12 and Section 54-7-15 and requests that the Utah Public Service Commission (the “Commission”) review its Order dated November 16, 2007 granting Bresnan Broadband of Utah, LLC’s Application for a Certification of Public Convenience and Necessity (“Bresnan Order”). UBTA-UBET further requests that the Commission stay the Bresnan Order pending consideration of this Petition pursuant to Utah Code Section 54-7-17.

Statement of the Case

On February 5, 2007, Bresnan Broadband of Utah, LLC (“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.

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. Following the testimony and cross-examination of the witnesses, the parties to the proceeding filed Post Hearing Briefs and Argument. On November 16, 2007, the Commission issued the Bresnan Order granting Bresnan the authority to provide public telecommunications services within the Vernal exchange in and around Vernal, Utah. UBTA-UBET requests that the Commission: 1) reconsider the sufficiency of Bresnan's financial, technical and managerial resources; 2) modify the Bresnan Order to set forth a definitive public interest test under Section 54-8b-2.1; and 3) deny Bresnan's Application for failing to meet such standard.

UBTA-UBET further requests that the Commission stay or suspend the Bresnan Order pursuant to U.C.A. Section 54-7-17.

Argument

Competitive entry into a local exchange is governed by U.C.A. Section 54-8b-2.1(2) which provides that 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.

The Bresnan Order concludes that Bresnan's Application was sufficient and that Bresnan possesses sufficient technical, financial, and managerial resources to be able to provide the public telecommunication services. The Commission should revisit this decision.

Bresnan initially failed to provide its own financial information in support of its application, but rather attached the financial information of its parent company to support its

Application. After UBTA-UBET asked the Division what inquiry the Division had undertaken with regard to Bresnan's financial statements, the Division requested Bresnan's own financial information in support of the application. However, the Division's decision to recommend Bresnan's application was not influenced in any way by Bresnan's financial information because by the time that the financial information was actually provided by Bresnan, the Division had already recommended that the Commission approve Bresnan's application. Therefore, it is clear that the Division failed to consider Bresnan's financial information in making its decision to approve the application.

Moreover, the Commission's order makes absolutely no reference to Bresnan's financial, managerial or technical resources or abilities other than concluding that Bresnan's parent "appears to possess sufficient financial resources to support Bresnan's Utah Operation, if authorized" and its "parent and affiliates already operate the requested telecommunications services in numerous other jurisdictions so its technical and managerial qualifications cannot reasonably be questioned."¹ However, it is not Bresnan's parent or affiliates who are applying for the Certificate of Convenience and Necessity. Nor is it Bresnan's affiliates or parents who will actually be provisioning the telecommunications services in Utah. The Utah Statute does not merely require that the Applicant's *parent or affiliates* have sufficient technical, financial, and managerial resources and abilities. Rather, the statute requires that the *Applicant* possess the requisite resources and abilities to provide the public telecommunications services applied for.

The record does not support this conclusion in Bresnan's case. There is no evidence or testimony that would permit the Commission to conclude that *Bresnan* has the required

¹See Bresnan Order, p. 8.

resources. On the contrary, the only evidence of Bresnan's financial resources is a conclusory statement by Ms. Kirchner that Bresnan is a financially-sound company with more than adequate resources to support rolling out Digital Voice in Vernal. However, the financial statements of Bresnan do not evidence "more than adequate resources." Additionally, the Commission's statement that Bresnan's "parent appears to possess sufficient financial resources to support Bresnan's Utah operations if authorized" is unavailing. While Bresnan's application states that Bresnan Communications, LLC will supply Applicant with the financing and capital necessary to conduct its telecommunications operation as specified in this application, Bresnan's parent is not the applicant; Bresnan's parent has not guaranteed Bresnan's Utah operations; and Bresnan's parent is not obligated in any way to support Bresnan's Utah operations. Reliance on the financial, managerial and technical experience of Bresnan's affiliates or parent is contrary to the Commission's Rules. The statute requires that the Commission review the applicant's resources and determine their sufficiency. This was not done in this case.

Further, the Order, in Findings of Fact #7, concludes that Bresnan 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. However, there is no testimony or evidence in the record upon which the Commission could have relied to make reach this conclusion because there is no evidence in the record of Bresnan's projected capital and operating expenses, or of its business plans. Rather, the evidence in the record demonstrates that at the time of the hearing, Bresnan's witness, Katherine Kirchner, did not know of Bresnan's business plans in the Vernal community. Ms. Kirchner did not know whether Bresnan had plans to extend its facilities to brownfield subdivisions in Vernal, or whether it intended only to

construct new facilities in greenfield subdivisions. (Testimony of Katherine Kirchner, p. 29, Ins. 5-9).

Bresnan's application didn't shed any light on their business plans, projected capital and operating expenses either. In fact, in its application Bresnan asked the Commission to waive the 5 year pro-forma required by Rule R746-349-3. Yet, despite the complete dearth of information regarding Bresnan's business plan, projected capital and operating expenses, the Division was not troubled by the lack of the proforma. Rather, the Division merely testified that when companies do provide such information "they are largely works of fiction." (Scholl Testimony, p.359, In. 24). The trouble with the Division's approach is that the Commission is required by statute to determine that the Applicant possesses the requisite financial, managerial, and technical resources to permit it to provide the telecommunications services it seeks to provide. Without a 5 year proforma, or any useful testimony or evidence on Bresnan's business plan, there simply is no way for the Commission to reasonably determine whether Bresnan's resources are adequate to ensure Bresnan's success in the Vernal exchange. Furthermore, without a proforma or business plan, neither the Division or the other parties to this proceeding can adequately assess the impact, negative or positive, of Bresnan's competitive entry on the Vernal exchange. Waiver of the Commission Rule requiring the 5 year pro-forma when the Applicant has offered no other evidence of a business plan, projections or even a road map of the applicants plans for the future is arbitrary, capricious and not supported by Utah law.

The Utah Statute requires that the Commission determine that the applicant has sufficient technical, financial and managerial resources and abilities to provide the public telecommunications services applied for. There is no evidence to support the Commission's

finding on this issue and it arbitrary and capricious and contrary to the requirements of the statute, for the Commission to find that Bresnan's parent or affiliates possess sufficient financial resources to support Bresnan's Utah operations if authorized. UBTA-UBET respectfully requests that the Commission review the record and determine that Bresnan has not adequately demonstrated its financial, managerial and technical resources or abilities in this matter.

II. The Commission Should Establish a Definitive Public Interest Test and Should Determine that Bresnan's Application is not in the Public Interest.

Under Utah Code Annotated Section 54-8b-2.1, the second statutory requirement for the issuance of a certificate of convenience and public necessity is a determination by the Commission that granting Bresnan's application is in the public interest. In fact, the Bresnan Order provides that "*the primary issue in this docket*" is determining whether granting Bresnan's application is in the public interest. In analyzing the "public interest" prong of the statutory test, the Commission admitted that it "has routinely looked to whether certification would provide a 'wider range of choices' and would 'support the development of competition' in finding that granting the requested Certificate would be in the public interest."² In the Bresnan Order, the Commission concluded that "the public interest is served by the competitive choice Bresnan's presence in the Vernal Exchange will bring to the marketplace and to Utah consumers." The Commission states that the record clearly demonstrates that customers in the Vernal exchange would have available to them a telephone product and land line telephone

²Bresnan Order, page 9.

service choice that they currently do not enjoy (customer choice).³ The Commission found as fact that:

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.

The Commission also stated in the Order that customers in Vernal “*may* benefit from lower prices, increased technological innovation and improved customer service and service quality typically produced by the introduction of competition into the marketplace.”⁴ However, the Commission did not make any finding of fact to support this statement. This is likely because there was no evidence from which the Commission could establish these facts. There was no evidence that customers would benefit from lower prices. In fact, to the contrary, the evidence was that Bresnan's service would be offered at a slightly higher price than customers currently pay in Vernal. There was no evidence that Bresnan's entry would increase technological innovation. While Casey Coleman hypothesized that “any technological innovations that Bresnan offers, UBTA-UBET would be required to offer the same service to compete,” this is pure speculation. There is no evidence in the record to indicate that UBTA-UBET would be required to offer the same service or that UBTA-UBET would be able to offer the same service. Moreover, Bresnan provides telecommunications services in other states, and certainly could

³Bresnan Order, page 17.

⁴Bresnan Order, page 17.

have provided the Commission with evidence of benefits that have resulted from its competitive entry into those areas, but did not provide any such evidence in this matter.

The record is devoid of any evidence that granting the application brings customers any benefits (beyond choice). Additionally, although the Commission alludes to potential public benefits that customers in Vernal “may” receive, the Commission makes no finding that those benefits will be available. Therefore, based on the “findings” of the Commission, it is patently obvious that the only factor that the Commission considers (and the only factor it considered in this case) in determining the public interest of CPCN applications is whether the granting of the application will promote competition and consumer choice. However, merely asking whether granting an Application for a Certificate of Public Convenience and Necessity supports the development of competition is not an adequate analysis of the “public interest.” In fact, this approach completely eviscerates the “public interest” requirement under the statute, and is arbitrary, capricious and contrary to law. This is because in each and every instance where an applicant is seeking authority to provide telecommunications services, granting the application will result in consumer choice and/or competition, and thus, under the Commission’s approach the public interest test will always be met.

Under Utah law, however, determining whether an application is in the public interest requires a broader analysis than determining whether the granting the application will increase consumer choice (which it will in every instance). Moreover, the Commission’s approach assumes, without proof, that competition in each instance is good and beneficial and in the public interest. However, even if competitive choices is the only factor that the Commission chooses to consider, there is no evidence that competitive choice is in the public interest. The Balhoffe &

Rowe study offered into evidence by UBTA-UBET, concluded that competition in rural areas can, in fact, have a negative impact.

Rather than focusing only on the perceived benefit of competitive choice, the Commission is charged by the Legislature to balance the policies of the state when determining the public interest. The Commission identified the policy objectives of the Legislature as enacted in Utah Code Annotated Section 54-8b-1.1 in the Bresnan Order. However, in analyzing the public interest, the Commission has arbitrarily focused only on those policy objectives that relate to competitive choice. The Commission has not indicated what analysis it, or the Division, undertook to determine whether Bresnan's application advanced the state's universal service objectives; or how Bresnan's entry into the Vernal exchange might facilitate access to high quality, affordable public telecommunications services to all residents and businesses in the state. In fact, the record indicates that Bresnan offered no evidence that the granting of its application would achieve any of the policy objectives of the state other than increasing competitive choice.

Both URTA and UBTA-UBET provided expert testimony that granting Bresnan's application would not even benefit all of the customers of Vernal, let alone the customers of the state as a whole. Moreover, both URTA and UBTA-UBET offered unrefuted testimony that granting Bresnan's application would result in the loss of internal cross-subsidies between Vernal, a low cost market, and the more remote high cost rural markets in UBTA-UBET's service territory. Both URTA and UBTA-UBET testified that this loss of internal cross subsidy would either increase the cost to serve the non-Vernal customers, or would increase UBTA-UBET's draw on the State Universal Service Fund. The Division did not dispute this evidence, and, in fact, acknowledged that granting Bresnan's application would result in an annual increase



in the USF disbursement to UBTA-UBET. However, the Division, and the Commission, concluded that the projected impact in USF disbursements is acceptable and manageable given the *current balance* and *anticipated revenues*⁵ to the USF. The Commission arbitrarily and capriciously determined that competitive choice opportunities outweigh the concerns raised about the projected impact on disbursements from the USF.

More importantly, the Commission declined to establish a clear, predictable public interest standard for entry into rural exchanges. By refusing to consider under what future circumstance the negative impacts of granting a Certificate might outweigh the public benefits produced by competitive choice, the Commission is heading down a precarious path. While each application might negatively affect the USF in an incremental “acceptable” amount, the cumulative effect on the USF with each application approved could seriously erode the USF in the future, especially when the Commission has not undertaken any thorough analysis of the actual effects of competition on rural ILECs and the State USF. Rather than adopting a policy that competition is good and competition is always in the public interest, UBTA-UBET respectfully requests that the Commission review the Bresnan Order after engaging in a thorough analysis of the effects of competition in rural exchanges. UBTA-UBET encourages the Commission to establish a definitive public interest test for this and future applications.

⁵Both the current balance of the USF and the anticipated revenues to the USF are subject to change in the future, but the Commission’s public interest test does nothing to identify which factors will be weighed and what guidelines the Commission might consider in the future applications.



In establishing the definitive public interest test UBTA-UBET encourages the Commission to follow the lead of the Commission in the *Western Wireless* case⁶. While UBTA-UBET acknowledges that the facts in *Western Wireless* differ from the facts in this case, the analysis undertaken in *Western Wireless* is persuasive. The Commission in *Western Wireless*, like this case, acknowledged an impact on the state's Universal Public Telecommunications Service Support Fund. The Commission recognized that if the effect of granting Western Wireless' application was 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 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 then delineated what it determined to be the public benefits and weighed such benefits against the public burdens. UBTA-UBET respectfully requests that the Commission delineate the public benefits (besides competitive choice) that will be weighed against the public detriments, to establish an articulable public interest test that can be applied in the future. In establishing the public interest test, UBTA-UBET requests that the Commission consider the findings of the Balhoffe & Rowe study. Based on the findings in the Balhoffe & Rowe study (the only comprehensive study available in this case), the Commission should 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.

⁶*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*”).

III. The Commission Should Stay the Bresnan Order Pending the Petition for Rehearing.

Pursuant to U.C.A. Section 54-7-17, the Commission should stay the Bresnan Order.

Pursuant to the statute, if the Commission is agreeable to entry of a stay of the Order, UBTA-UBET shall post a supersedeas bond as required by Utah law.

Conclusion

Based on the foregoing, the Commission should review, reconsider and rehear Bresnan's Application for CLEC status and CPCN, and should deny Bresnan's application for the reasons set forth above. UBTA-UBET further requests that the Commission stay the Bresnan Order pending consideration of this Petition.

DATED this 17th day of December, 2007.

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CERTIFICATE OF MAILING

I hereby certify that on this 17th day of December, 2007, a true and correct copy of
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