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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

**BRESNAN BROADBAND OF
UTAH, LLC'S REPLY TO PETITIONS
FOR RECONSIDERATION, REVIEW,
AND REHEARING**

DOCKET NO. 07-2476-01

I. INTRODUCTION

On December 17, 2007, UBTA-UBET Communications, Inc. and the Utah Rural Telecom Association each filed separate Petitions for Reconsideration, Review, and Rehearing of the Commission's Report and Order issued on November 16, 2007 in the above captioned docket. Bresnan Broadband of Utah, LLC respectfully requests that the Commission deny these Petitions and affirm its Report and Order granting a Certificate of Public Convenience and Necessity ("CPCN") for Bresnan to operate as a Competitive Local Exchange Carrier ("CLEC")

in the Vernal local exchange in accordance with Utah Code Ann. § 54-8b-2.1, Utah public policy as set forth in Utah Code Ann. § 54-8b-1.1, and the Commission's rules regarding competitive entry.

II. ARGUMENT

A. Bresnan Has Sufficient Technical, Financial, And Managerial Resources

The Petitions argue that there is insufficient evidence to support the Commission's finding that Bresnan has sufficient technical, financial, and managerial resources to operate as CLEC in the Vernal exchange.¹ However, both Petitions ignore critical evidence and testimony introduced at the hearing. Under Utah law, the Commission's findings must be supported by substantial evidence.² Substantial evidence has been defined as "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion."³ Further, expert testimony alone, even if contradicted by other expert testimony, can provide the Commission with sufficient evidence to meet this legal standard.⁴ As such, the expert testimony offered by Bresnan, the Division, and the Committee, along with the extensive documentation provided by Bresnan are sufficient to support the Commission's Report and Order.

First, Bresnan's financial resources were documented in the record in the financial statements attached to Bresnan Exhibit 2 (Bresnan's Verified Application) and in Bresnan Exhibit 3 (the supplemental financial statements provided to the Division in response to its investigation in this docket). The later exhibit provided financial information that specifically applied to Bresnan Broadband of Utah, LLC and not its parent company.

¹ See UBTA-UBET Petition at pp. 3-6; URTA Petition at p. 7.

² Utah Code Ann. § 63-46b-16(4)(g).

³ *Boston First National Bank v. Salt Lake County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990).

⁴ See, e.g., *U.S. West Communications v. Public Service Commission of Utah*, 882 P.2d 141, 146-7 (Utah 1994).

Second, Bresnan's expert witness, Ms. Katherine Kirchner, Bresnan's Vice President of Telephony Operations, testified that Bresnan has the technical ability to deliver high quality service to customers in the Vernal exchange and that Bresnan is currently doing this very thing in 40 other markets.⁵ Ms. Kirchner further testified that Bresnan is a financially-sound company with more than adequate financial resources.⁶ Finally, Ms. Kirchner testified that Bresnan has an experienced group of managers who are well capable of providing local exchange services.⁷ The specific experience of Bresnan's management team was documented in the attachments to Bresnan Exhibit 2.

Third, upon review of the documentation and evidence provided by Bresnan, the Division of Public Utilities also reached the conclusion that Bresnan met this part of the statutory test.

Mr. Casey Coleman testified:

The Division believes that Bresnan has shown sufficient technical, financial, and managerial resources and abilities to provide the public telecommunications services applied for. Specifically, Bresnan indicated that they are currently serving over 82,000 telephone customers in Montana, Wyoming and Colorado. The areas they are serving would be communities similar to those in this Docket and the managerial team assembled by Bresnan appears to have the ability to run a telecommunications company in those areas. Therefore the Division believes they would be able to offer the similar expertise and experience to customers in Vernal.⁸

Fourth, Mr. Eric Orton on behalf of the Committee of Consumer Services, agreed with Ms. Kirchner and Mr. Coleman and testified that Bresnan met the requirements to be a CLEC as outlined in Utah Code Title 54.⁹

Finally, both UBTA-UBET and URTA argue that Bresnan's failure to provide a five year proforma of its expected operations in Vernal is fatal to the Commission's finding that Bresnan

⁵ See Bresnan Exhibit 1 at p. 3-4.

⁶ *Id.*

⁷ *Id.*

⁸ DPU Exhibit 2 at p. 3.

⁹ CCS Exhibit 1 at lines 96-98.

has the requisite technical, financial, and managerial resources to be entitled to a CPCN.

However, this argument should be rejected. The requirement that a five year proforma be filed with an application for a CPCN is established by rule, therefore the Commission is empowered to waive that rule as it deems appropriate. In this instance, the Commission's decision to grant a waiver was supported by the following facts: (a) Bresnan filed extensive financial information with its application, (b) Bresnan filed proof of a letter of credit sufficient to protect customers should Bresnan fail or exit the market, (c) Bresnan provided evidence that it is currently operating in 40 rural markets in three other states and serving approximately 82,000 customers, and (d) Ms. Laura Scholl's expert testimony that when the Division gets these projections of proforma income and cash flow they find they are typically "largely fiction."¹⁰

B. The Issuance Of A CPCN To Bresnan Is In The Public Interest

Both UBTA-UBET and URTA argue in their Petitions that there is insufficient evidence to support the Commission's finding that granting a CPCN to Bresnan is in the public interest.¹¹

Both Petitions largely base these arguments on the assertion that there is no evidence in the record that Bresnan's entry would bring benefits to consumers other than competitive choice.¹²

However, this assertion is flatly wrong and ignores large portions of the evidence in this proceeding. Indeed, the record is replete with expert testimony that Bresnan's entry would significantly benefit consumers. Further, both Petitions ignore the critical fact that the Utah legislature stated that (a) competition should be encouraged because competition can be a means to provide wider customer choices, enhance customer welfare and encourage the growth of the economy of the state¹³ and (b) regulatory policies should be modified to allow greater

¹⁰ Hearing Transcript, Sept. 5, 2007 at p. 359:19-24.

¹¹ See UBTA-UBET Petition at pp. 6-11, URTA Petition at pp. 4-6.

¹² See UBTA-UBET Petition at p. 8, URTA Petition at p. 5.

¹³ Utah Code Ann. § 54-8b-1.1(3) and (9).

competition in the telecommunications industry.¹⁴

With respect to the expert testimony in this proceeding, Ms. Kirchner testified that allowing Bresnan 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), as a result, promote economic development in the Vernal exchange.¹⁵ As a result, Ms. Kirchner concluded, many of the public policies goals articulated by the legislature would be furthered by Bresnan's competitive entry.

The Division concurred with Ms. Kirchner's analysis. Mr. Coleman's expert testimony was, "The Division's analysis has shown that customers in Vernal will benefit from having a competitor offering telecommunications services. Some of those benefits include reduced costs, better service quality, and increased choice. These benefits tip the 'public interest' scale in favor of granting a CPCN when the maximum perceived negative would be a projected cost to individual customers throughout the state of Utah of \$0.012 annually."¹⁶ Indeed, UBTA-UBET Petition so completely ignores Mr. Coleman's expert testimony that it asserts on page 7, "There was no evidence that customers would benefit from lower prices." To the contrary, Mr. Coleman expressly testified that the prices charged by Bresnan would be competitive and actually lower for many customers.¹⁷ Mr. Coleman reached this conclusion by properly reflecting the fact that Bresnan's prices include unlimited long distance calling, a service that is often charged on a per-

¹⁴ Utah Code Ann. § 54-8b-1.1(8).

¹⁵ Bresnan Exhibit 1 at p. 5-9.

¹⁶ DPU Exhibit 2 at p. 21.

¹⁷ DPU Exhibit 1 at p. 19.

minute basis and, thus, can be very expensive for some consumers.

Ms. Scholl also testified for the Division and echoed Mr. Coleman's conclusions, "[T]he DPU considered the value of competitive choice for consumers whose interests we also represent and concluded that the benefits of [Bresnan's] Digital Voice service and the very existence of customer choice served the public interest. Our position was fortified by the fact that our projections do not indicate that current contributors to the State USF or the USF itself will be damaged. Since both national and state policy supports competitive entry while preserving Universal Service, and we conclude that both are possible in this instance, we support Bresnan's petition."¹⁸

Mr. Orton on behalf of residential and small business consumers, concluded that granting Bresnan's application promotes the competition favored by Utah policies and has an acceptable impact on the state USF.¹⁹ Therefore, Mr. Orton testified that there are no valid reasons, from the customer's point of view, why Bresnan's application should be denied.²⁰

Ultimately, neither UBTA-UBET nor URTA have any response to Mr. Orton's observation that if a higher switch rate happens than is assumed by the Division for purposes of their analysis of potential USF impacts, such an event would be indicative of even greater benefits from Bresnan's competitive entry such that the balance between the negative impact on the USF from the higher switch rate and the positive benefits from the competitive entry are likely to remain in balance.²¹

C. The PSC Is Under No Obligation To "Pronounce" A Public Interest Standard

¹⁸ Hearing Transcript, Sept. 5, 2007 at 352:25 – 353:11.

¹⁹ CCS Exhibit 1 at line 76-94.

²⁰ CCS Exhibit 1 at line 103-106.

²¹ CCS Exhibit 1 at line 76-83.

Finally, both Petitions argue that the Commission's Report and Order is arbitrary and capricious because the Commission did not pronounce a public interest standard or test that could be used in future proceedings where competitive entry in a rural territory is at issue.²² These arguments should be rejected.

First, neither UBTA-UBET nor URTA cite any statute, rule, or case that requires or even encourages the Commission to pronounce how it will treat a future application when rendering a decision on the application before it.

Second, this process is an adjudication, not a rulemaking. Generally applicable legal standards or tests are more properly addressed in rulemaking dockets where all interested parties can participate. Announcing a generally applicable legal standard or test without having given all affected parties an opportunity to participate is, at best, poor public policy and, at worst, a violation of due process.

Third, the doctrine of stare decisis does not strictly apply to the Commission.²³ Therefore, even if the Commission were to articulate a legal standard or test regarding when competition in rural territories may be in the public interest, a subsequent Commission would not necessarily be bound by that decision. Therefore, to engage in the exercise of setting future policies in the context of a docket such as this may well be wasted effort.

Ultimately, in this case the Commission applied the applicable law and its reasoned judgment to the evidence presented in this proceeding. Based on that analysis, the Commission rendered a decision. By doing so the Commission has fully satisfied its obligations under Utah law.

²² See UBTA-UBET Petition at pp. 10-11, URTA Petition at p. 6.

²³ See *Williams v. Public Service Commission of Utah*, 754 P2d 41, 52 (Utah 1998) ("Although the PSC may not arbitrarily or capriciously reverse a prior decision, administrative agencies, as a general matter, are free from the limitations of stare decisis as they apply in a judicial setting.").

III. CONCLUSION

As stated in the Commission's Report and Order, the evidence in the record supports a finding that Bresnan has sufficient technical, financial, and managerial resources and abilities to provide local exchange service to the customers within the Vernal exchange. Further, the evidence supports a finding that granting Bresnan a CPCN is in the public interest as the benefits from Bresnan's competitive entry outweigh any negative implications on the state USF. Therefore, Bresnan respectfully requests that the Commission deny the Petitions filed by UBTA-UBET and URTA and affirm its Report and Order granting a Certificate of Public Convenience and Necessity ("CPCN") for Bresnan to operate as a Competitive Local Exchange Carrier ("CLEC") in the Vernal local exchange.

DATED this 2nd day of January, 2008.

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CERTIFICATE OF MAILING

I hereby certify that on this 2nd day of January, 2008, I caused to be emailed a true and correct copy of the foregoing Bresnan Broadband of Utah, LLC's Post-Hearing Brief to the following:

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