

- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

In the Matter of the Petition of Bresnan)
Broadband of Utah, LLC, to Resolve Dispute) DOCKET NO. 08-2476-02
Over Interconnection of Essential Facilities)
and for Arbitration to Resolve Issues Relating) REPORT AND ORDER RESOLVING
to an Interconnection Agreement with UBTA-) INTERCONNECTION DISPUTE
UBET Communications, Inc.)

ISSUED: May 21, 2009

By The Commission:

BACKGROUND

This matter is before the Commission on Bresnan Broadband of Utah, LLC's (Bresnan) Petition for resolution of a dispute with UBTA-UBET Communications, Inc. (UBTA-UBET) over interconnection of essential facilities and for resolution of a dispute regarding the interconnection agreement (Agreement).

The Utah Rural Telecom Association (URTA) and the Division of Public Utilities (Division), along with UBTA-UBET, were intervenors in this docket.

On November 16, 2007, after a hearing before Administrative Law Judge Steven A. Goodwill, the Commission issued a Certificate of Public Convenience and Necessity (CPCN) to Bresnan in Docket No. 07-2476-01.

In 2008, Bresnan requested that UBTA-UBET enter into a mutual traffic exchange agreement pursuant to federal law. Because it felt it had no obligations to interconnect with Bresnan, as Bresnan was a provider of VoIP¹ service, UBTA-UBET declined to interconnect. Bresnan requested mediation and the Commission assigned Commission counsel, Sander J. Mooy,

¹ Voice over internet protocol

as the hearing officer. However, the Commission initially declined to resolve the interconnection dispute because Bresnan's request, as filed with the Commission, solely requested mediation, which authority only arises from federal law. The Commission declined to mediate because it lacked authority to mediate the dispute under state law. In July 2008, Bresnan made a request to "resolve the dispute over interconnection of essential facilities . . . pursuant to Utah Code Ann. § 54-8b-2.2(1)(e)." On September 4, 2008, UBTA-UBET filed its Motion to Intervene and Motion to Dismiss Bresnan's Petition. Bresnan responded to the Motion. (The particulars of the moving and responding papers are contained in the pleadings and in the Commission's November 17, 2008 Report and Order) The Commission denied UBTA-UBET's Motion to Dismiss, ultimately finding that because Bresnan was a certificated provider of telecommunications services, it had the right to have the interconnection dispute resolved by the Commission. The Commission proceeded with the docket to determine whether Bresnan had a right to interconnect, the essential facilities needed for interconnection, and the terms and conditions upon which those essential facilities would be made available.

A hearing was held on January 27, 28, and 29 of 2009. Counsel for Bresnan, Thorvald A. Nelson and Jerold Lambert appeared for Bresnan. Alex Harris testified on behalf of Bresnan. Counsel for UBTA-UBET, Kira Slawson, appeared for UBTA-UBET. Valerie Wimer testified for UBTA-UBET. Stephen Mecham appeared for the URTA. Douglas Meredith testified on behalf of URTA and UBTA-UBET. Michael Ginsberg, Assistant Attorney General, appeared for the Division. Casey Coleman testified for the Division.

At the hearing, the parties agreed to submit their issues matrix February 17, 2009, with initial post-hearing briefs due March 2nd, and post-hearing reply briefs by March 16th. After

additional negotiations, Bresnan and UBTA-UBET agreed to a proposed Agreement, with only six disputed issues related to the language in the Agreement. They submitted those six remaining issues on March 4, 2009, pursuant to a Commission grant of a time extension. Bresnan, UBTA-UBET, the URTA, and the Division all submitted initial post-hearing briefs on March 23, 2009. They submitted reply briefs on April 9, 2009.

UBTA-UBET'S RENEWED MOTION TO DISMISS

At the hearing, UBTA-UBET renewed its previously filed Motion to Dismiss and also renewed it in its post-hearing briefs. UBTA-UBET contended that because Bresnan was a provider of VoIP services, the Commission's issuance of a certificate was not controlling. Rather, the issue was one properly addressed only before the Federal Communications Commission (FCC), and not before a state Commission. The main basis for moving for dismissal was that "federal law preempts the state laws in this matter with respect to timelines, procedures, duties and rights of telecommunications providers." Additionally, UBTA-UBET argued that Bresnan is not entitled to interconnection because "there simply has been no ruling from the FCC in which the FCC has conclusively determined that VoIP services are telecommunications services." *UBTA-UBET Motion to Dismiss*, pp. 6-7.

For the reasons stated in the Commission's November 17, 2008 Report and Order, the Commission denies UBTA-UBET's renewed Motion to Dismiss. Additionally, UBTA-UBET has failed to adequately explain to the Commission how "the federal law preempts the state laws in this matter with respect to timelines, procedures, duties and rights of telecommunications providers." *See id.* UBTA-UBET fails to fully

explain how state law is expressly or impliedly preempted, including, if impliedly preempted, whether such preemption is “occupy the field” or “conflict” preemption.² This would have been especially helpful where, as Bresnan has pointed out, federal law explicitly states that “nothing” in the Telecommunications Act

shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996], or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

or from

imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part

47 U.S.C. § 261.

The Commission does not find that state law is preempted by the Telecommunications Act as argued by UBTA-UBET.

Also, Bresnan is a certificated telecommunications corporation. As such, it clearly has the right to petition the Commission for resolution of a “dispute over interconnection of essential facilities.” *Utah Code Ann. §54-8b-2.2(1) (e)*. The Commission has the obligation to resolve that dispute. *See id.* It would be improper for it to dismiss Bresnan’s petition to resolve the dispute especially where Bresnan has expressly requested Commission action under state law. The Motion must be denied.

² Some case law and commentators additionally refer to “frustration of federal purpose” implied preemption.

The parties submitted their matrix with six unresolved issues. Bresnan and UBTA-UBET submitted their preferred language for each disputed section of the Agreement. The Commission addresses the unresolved issues in the order they were presented in the matrix, as follows: 1) direct vs. indirect interconnection; 2) intercarrier compensation: reciprocal vs. “bill and keep”; 3) compensation, if any, for calls terminated in the areas served by UBTA-UBET's extended area service (EAS)³; 4) reciprocal compensation or call termination charge; 5) if EAS compensation is appropriate, the amount of compensation for traffic terminating in the EAS area; 6) general terms and conditions: rights of parties.

ANALYSIS

Direct v. Indirect Interconnection

The Commission must determine whether applicable statutes and Rules require either indirect or direct interconnection. Bresnan has requested indirect interconnection at the Provo tandem, through a third-party (Qwest) with whom both Bresnan and UBTA-UBET are already interconnected, and for which they already incur expenses. The parties, however, dispute whether Bresnan may request interconnection, and whether its request for interconnection at the Provo tandem is permitted.

UBTA-UBET argues that the Utah Code and Commission Rules require direct interconnection unless the parties mutually agree to indirect interconnection. It argues that the Rules dealing with transport facilities, with types of connections, and with

³ EAS is a service feature provided to a customer, in which the customer pays a higher flat rate to obtain wider geographical coverage without paying per-call charges for calls within the wider area. In this case, the EAS would extend from Vernal to the outlying rural areas.

technical requirement of interconnection, use language that is characteristic of direct interconnection not indirect interconnection. UBTA-UBET also argues that the only Rule addressing indirect interconnection and mentioning third-party involvement, does so only in the circumstance where there is mutual agreement of all parties. As UBTA-UBET does not agree to indirect interconnection, and as Qwest or another possible third party have not agreed on the record to indirect interconnection, indirect interconnection cannot be ordered.

In sum, UBTA-UBET contends that while the “Utah Code does not specifically state whether that interconnection must be made by direct or indirect interconnection, review of the Utah Code together with the PSC Rules suggests that direct interconnection within the ILEC’s service territory is contemplated, unless the parties agree otherwise.” *UBTA-UBET Initial Brief*, p. 7. UBTA-UBET argues that Utah law “requires a direct physical interconnection.” *Id.* (emphasis added).

URTA makes similar arguments with regards to indirect interconnection. It stated that when Utah Code Ann. § 54-8b-2.2 and R746-348-3 were enacted and promulgated, Qwest was the only ILEC to which the law applied⁴. No one contemplated that Qwest would have to interconnect outside of its territory. It also argued that indirect interconnection could only be recommended by looking at federal law, and not state law, as state law made no reference to it. It argued as well that neither state law nor Commission Rules explicitly compel an ILEC to indirectly interconnect outside of its network.

⁴ Incumbent local exchange carrier

The Division contends that state law and Commission rules permit either direct or indirect interconnection. It also argues that indirect interconnections through a tandem are not prohibited, and that interconnection need not take place within the local calling area or even within the certificated service territory of the ILEC. The Division did state that the Rules require that interconnection must take place where the ILEC has facilities, which would not be at the Provo tandem.

Utah law states that “interconnecting telecommunications corporations shall permit the mutual exchange of traffic between their networks without unreasonable blocking or other unreasonable restrictions on the flow of traffic.” *U.C.A. 54-8b-2.2(1)(a)(ii)*. Pursuant to section 54-8b-2.2(1)(a)(i) of the Utah Code, the Commission “may require any telecommunications corporation to interconnect its essential facilities with another telecommunications corporation that provides public telecommunications services in the same, adjacent, or overlapping service territory.” “Essential facilities” as defined in Utah Code section 54-8b-2(5)

means any portion, component, or function of the network or service offered by a provider of local exchange services: (a) that is necessary for a competitor to provide a public telecommunications service; (b) that cannot be reasonably duplicated; and (c) for which there is no adequate economic alternative to the competitor in terms of quality, quantity, and price.

With regards to this interconnection, Utah Admin Code R746-348-3 states that an

incumbent local exchange carriers shall allow any other public telecommunication service provider to interconnect its network *at any technically feasible point*, to provide transmission and routing of public telecommunication services. A local exchange service provider requesting interconnection with an incumbent local exchange carrier shall identify a desired point of interconnection. (emphasis added)

UBTA-UBET is correct in stating that neither the Rules nor the statutes explicitly state whether interconnection must be made by direct or indirect interconnection. UBTA-UBET and URTA attempt to “interpret” the statutes and Rules applicable to interconnection to show that interconnection may only be made directly, when an interconnection dispute arises. Initially, when interpreting a statute like 54-8b-2.2, or Commission Rules, the Commission must “look first to [their] plain language to determine [their] meaning.” *Utah State Tax Comm’n v. Stevenson*, 2006 UT 84, ¶ 32; *see also Burns v. Boyden*, 2006 UT 14, ¶ 19 (stating that “we interpret court rules, like statutes and administrative rules, according to their plain language”). However, “only when [] a statute [or rule] is ambiguous do we look to other interpretive tools.” *Id.* Bresnan is a certificated telecommunications corporation and has the right to request interconnection. In this instance, the language of the statute is clear. It states simply that Bresnan—not UBTA-UBET, may identify a “desired point of interconnection” with UBTA-UBET's essential facilities “at any technically feasible point”—including at the Provo tandem. Therefore, the question is twofold: if UBTA-UBET has essential facilities at the Provo tandem and if indirect interconnection is technically feasible. There is no dispute that UBTA-UBET has essential facilities at the Provo tandem. It already has a portion, component, or function of its network (a trunk) that it uses to provide public telecommunications service, specifically, to carry toll-traffic at the Provo tandem. That cannot be reasonably duplicated by Bresnan and there is no other “adequate economic alternative to the competitor *in terms of quality, quantity, and price.*” Otherwise, Bresnan would have to directly connect, which process would, at least in terms of price, be significantly more expensive than indirect

interconnection, as detailed below. UBTA-UBET has the essential facilities at the Provo tandem.

In this matter, it is technically feasible for UBTA-UBET to interconnect with Bresnan at the Provo tandem. First, UBTA-UBET and URTA's own witness, Mr. Meredith admitted on cross-examination that the indirect interconnection requested by Bresnan was technically feasible. *See Transcript*, p. 9, ll. 7-25, p 210-218. Additionally, as evidenced by the Union Telephone Company and UBTA-UBET interconnection agreement submitted by the Division as Exhibit DPU 2, UBTA-UBET already provides for indirect interconnection with a wireless company. *See DPU Exhibit 2*, § 3.4.1 (stating: "Indirect Network Interconnection: Either party's traffic may be transited through one or more intermediaries for interconnection with the other Party's system."). UBTA-UBET would not have allowed the indirect interconnection with Union had it not been technically feasible. It is technically feasible for UBTA-UBET to interconnect with Bresnan at the Provo tandem.

UBTA-UBET and URTA both contend that statutory language requiring UBTA-UBET "to interconnect its essential facilities with another telecommunications corporation that *provides public telecommunications services in the same, adjacent, or overlapping service territory*," U.C.A. 54-8b-2.2(1)(a)(i), when interpreted with other related statutes and Rules, mean that Bresnan must request interconnection "within [UBTA-UBET's] service territory", i.e. "within the Vernal exchange." *UBTA-UBET Initial Brief*, p. 7. In fact, Mr. Meredith when examined as to that portion of 54-8b-2.2(1)(a)(i), opined that the statute requires interconnection to "happen *within* the same,

adjacent, or overlapping service territory.” *Transcript*, p. 207, ll. 15-21. The Commission agrees with Bresnan, however, that the plain language of the statute refers to “who has to interconnect, not how that interconnection is to be accomplished. *Bresnan Reply Brief*, p.5. Under the rule of construction known as the “‘last antecedent’ rule, [UBTA-UBET’s] formulation is the least plausible. ‘Qualifying words and phrases are generally regarded as applying to the immediately preceding words, rather than to more remote ones.’” *Day v. Meek*, 1999 UT 28, ¶ 10 (quoting *Salt Lake City v. Salt Lake County*, 568 P.2d 738, 740(Utah 1977)). Therefore, the phrase “telecommunications corporation that provides public telecommunications services in the same, adjacent, or overlapping service territory” describes the entities which provide services “in the same, adjacent, or overlapping service territory,” but does not mandate the location in which those entities must indirectly interconnect.

The Division contended that the interconnection must take place at a location “where the ILEC has facilities. A CLEC⁵ cannot require interconnection where the ILEC has no facilities.” The Division, however, provides no support for its contention that “a CLEC cannot require interconnection where the ILEC has no facilities.” In fact, its own expert, Mr. Coleman, stated: “[i]f both Bresnan and UBTA-UBET have trunks and the other technology needed to have a meet point be in the Provo exchange, or any other switch or tandem, and this meet point is economically efficient for both parties, then the Division would recommend using that [] option.” *DPU Exhibit 1, Direct Testimony of Casey Coleman*, at p. 11, ll.230 to 233.

⁵ Competitive local exchange carrier

UBTA-UBET raises other arguments which it contends argue against indirect interconnection. First, UBTA-UBET and URTA both argued that it would not be technically feasible for UBTA-UBET to indirectly interconnect because it lacked the capacity on existing trunk groups between UBTA-UBET and the Qwest tandem switch to which UBTA-UBET's end office switch currently subtends. In response to Bresnan's contentions that the trunk group on the Provo tandem had sufficient capacity to interconnect, Mr. Meredith and Ms. Wimer both testified that the trunk group was at or near capacity and that Bresnan would not be able to use the trunk for local traffic. *See Transcript*, p. 352, ll. 20-25, p. 353, ll. 1-4. In Exhibit UU-2, UBTA-UBET stated that the Provo tandem's full capacity was 4,250,000 minutes of use (MOU), and that its total MOU was at about 4,124,953, or 97.06% utilization. Ms. Wimer contended that "essentially they're fully utilized." Therefore, it was not technically feasible to indirectly interconnect.

Mr. Harris, however, pointed out that ultimately, even assuming the MOU's in UU-2 as correct, UBTA-UBET will have the capacity to carry Bresnan's traffic. Under one scenario, by Ms. Wimer's admission, UBTA-UBET will already have to increase its capacity of the trunk group. Referring to Exhibit UU-2, she stated that "the Qwest trunk group to the Provo tandem is at 97.06 percent utilization. . . .[U]sually you augment the trunk group . . . somewhere between 85 and 93 percent utilization. Q. [Kira Slawson] And so they need to augment the trunk group there? A. It seems like it should be augmented." *Transcript*, p. 352, ll.7-15. Mr. Harris responded that "they're very likely . . . based on her testimony, going to be augmenting this trunk group very soon. So the available capacity will increase, and will be available regardless of whether or not we exchange traffic over

that trunk group.” *Transcript*, p. 625, ll. 22-25, p. 625, ll. 1-2. The second scenario, one in which “the traffic stays flat and they don’t augment,” *Transcript*, p.625, 20-21, Harris testified the following would occur:

[as Bresnan wins] an access line in that market, we can assume that 210⁶ minutes will be removed from that trunk group . . . because when that customer comes to Bresnan, we will have our own trunk group to that tandem, and that traffic to and from that customer will travel over our separate trunk group that we will purchase, own and maintain, and will be removed from this trunk group. So that, as we win customers, in addition to the 125,000 that’s currently available, according to their exhibit, we will be freeing up minutes per customer.

Id. at p. 626, ll.8-19.

Harris admitted that Bresnan would also be adding minutes so that the freeing-up of capacity will not be a “one-to-one relationship,” *See id.* at p.626, ll. 20-25, p. 627, ll. 1-25, but that in the end, even with Bresnan adding its traffic to UBTA-UBET’s trunk group, and even if traffic stays static and UBTA-UBET does not augment, there is capacity for Bresnan traffic.⁷

Mr. Meredith also criticized Bresnan’s assumptions about the usage and capacity of each remote UBTA-UBET switch to the Vernal host switch—in Bresnan assuming that such trunk groups were “not operating at or near exhaust level.” *See Exhibit B-2, Spreadsheet 5*, “Bresnan Response to Staff Data Requests 2.2BB and 2.3BB-Host-Remote Expense.” Bresnan made these assumptions (and Mr. Harris testified regarding these assumptions) in spreadsheet 5, attached to Exhibit B-2, *See Transcript*, p. 192, ll.19-

⁶ “According to the numbers here, [UBTA-UBET has] about 4,125,000 minutes of use currently going over that trunk group.” *Transcript*, p.625, 23-25. “That comes to about 210 minutes of use for every one of UBTA-UBET’s access lines.” *Id.* at p 626, ll. 6-7.

⁷ Harris also testified that assuming Bresnan is correct in stating that most of their traffic on the trunk group is toll traffic, and assuming that most of Bresnan’s traffic is local and EAS traffic, then those traffic types have peak periods which don’t align, which may provide additional capacity. *Transcript*, p. 627, ll. 16-23.

25, p.193, ll.1-12. Mr. Meredith contended that because Bresnan “inflate[ed] the denominator of their ratio, they achieve a very small number” *Id.* at p. 193, ll. 8-12 and that its assumptions about capacity for these areas were wrong. But Mr. Meredith admitted he had no data with which to counter Bresnan’s assumption:

Q. (Mr. Nelson) If the information is not available to say what the actual [MOU] are on these trunk groups between Vernal and these various remote sites, isn’t it true that you have no basis in fact or knowledge, to challenge the assumption[] made by Mr. Harris in his exhibit?

A. (Mr. Meredith) . . .to assume that we have 250,000 [MOU] per trunk . . . to those locations . . . seems a little unreasonable

Q. I understand that. But you have no better information to give us as to what the actual numbers are?

A. I have no information, that’s correct.

Transcript, p. 197, ll.8-13, 24-25, p. 198, ll.1-3, 17-20.

Even UBTA-UBET admitted it did not have the information for those remote sites. *See Transcript*, p. 195, ll.2-19, p. 196, ll.9-11. Absent contrary evidence, the Commission must assume that the spreadsheet assumptions about usage and capacity made by Bresnan which were based on the best evidence available to it⁸ and the best available evidence before the Commission, are correct.

Second, UBTA-UBET also stated that because their Provo tandem trunk group is used “exclusively for toll traffic, and . . . [is] not set up to do local traffic,”

Transcript, p. 353, ll. 2-4. It contended that Bresnan would not be able to use the capacity

⁸ Bresnan used the Qwest Schedule of Generally Available Terms (SGAT), *See Transcript*, p. 12, ll.15-25, p. 13, ll.1-8, and responses to data request from UBTA-UBET, *see id.* at p. 13, ll.12-25, p. 14, ll.1-10 in making assumptions used on the spreadsheets for B-2. An SGAT, “schedule of generally available terms” is filed under 47 U.S.C. § 252(f), by a Bell operating company with a state commission. It sets forth its standard contract offering for items required under section 251 of the Federal Telecommunications Act. The SGAT, once approved, provides a comprehensive set of local interconnection terms that allows a CLEC without an existing interconnection agreement to opt-in to the SGAT.

for local traffic, *see id.* at p. 352, ll.20-25, p. 353, ll. 1-4, or that UBTA-UBET would have to “establish a separate trunk group for local traffic.” *UBTA-UBET Initial Brief*, p. 11. Mr. Harris testified that it would still be technically feasible to use the trunk group for Bresnan’s local and EAS traffic, that it was “nothing more than translations . . . it’s a simple matter of updating the translations in the switch” and that the process for indirect interconnection provided a process that was “easy and quick, and inexpensive for both parties.” *Transcript*, p. 88, ll. 5-18. Ms. Wimer, later confirmed that this process of translation to allow the trunk group to be used for local traffic was “technically” correct. *See id.* at p. 353, ll.6-13 ([Mr. Harris] was stating that all that needs to be done is to do translations and you could add traffic on to these trunk groups. Technically that is correct . . .”). Therefore, even though the UBTA-UBET trunk group at the Provo tandem is used for toll traffic, it is technically feasible to use it for Bresnan’s local and EAS traffic.

Third, UBTA-UBET raised issues regarding the costs it would incur in establishing an indirect interconnection, arguing that indirect interconnection would disproportionately impose costs on it. The Division witness opined that, in addition to the technical feasibility of indirect or direct interconnection, the Commission should look at economic feasibility as well. R746-348-3 does not make a mention of economic feasibility. Regarding costs, however, Bresnan noted that when parties negotiate meet points for interconnection, “neither party may impose a meet point that would require that one party incur significantly greater construction costs to build to the meet point than the other party.” *R746-348-3(B)(1)*. Therefore, the Commission will make a determination, in part, on the economic feasibility of interconnection based on whether establishing the

indirect or direct interconnection would “require that one party incur significantly greater construction costs to build to the meet point than the other party.”

The evidence in the record shows that indirect interconnection at the Provo tandem would impose about the same costs on Bresnan and UBTA-UBET, and does not show that UBTA-UBET would incur significantly greater costs than Bresnan. UBTA-UBET argued that “[s]ignificant effort is required by . . . UBET to implement an indirect interconnection” and that if required to establish a separate trunk group for local traffic . . . this activity would be at UBET’s expense . . .” *UBTA-UBET Initial Brief*, p.11. The Division also noted that UBTA-UBET raised “significant economic . . . objections to the Commission ordering an indirect interconnection.” *Division Reply Brief*, p. 2. In fact, Ms. Wimer, though admitting that translations allowing local traffic to be carried on trunk groups carrying toll traffic were possible, stated that “you have to have the arrangements and agreements [with] the other parties to make sure you have all of the compensation and business arrangements set up to do that,” *Transcript*, p. 353, ll. 9-13, which would impose costs on UBTA-UBET. Mr. Meredith also stated that two of the “costs” that could be incurred would be either those incurred for a new trunk group, or those incurred in establishing agreements necessary to have local traffic go over the existing trunk group. *See Transcript*, p. 213, ll. 19-25, p. 214, ll.1-15.

However, even with those allegations, there is simply no evidence of those costs alleged by UBTA-UBET. UBTA-UBET’s own witnesses admitted as much. Upon questioning regarding costs, Ms. Wimer stated as follows:

Q. (Mr. Nelson) Has UBTA-UBET performed any cost studies that you have offered up into evidence in this proceeding with respect to the costs associated with any of the services that are being contemplated in the Interconnection Agreement that we've been discussing?

A. (Ms. Wimer) No.

. . . .

Q. And so it would be fair to say that at this point there's nothing in the record that would document what UBTA-UBET's costs are?

A. []—as far as this hearing goes . . . although there's been costs provided by UBET in other proceedings, there are not costs that have resulted in this proceeding itself.

Transcript, p. 357, ll.4-23.

Although Mr. Meredith alleges that there will be costs for having UBTA-UBET having to “go out of its network and pay a fee in order to get interconnection to Bresnan,” *Transcript*, p. 212, ll.14-16, that there were costs for a new trunk group, and that there would be costs incurred in establishing agreements necessary to have local traffic go over the trunk group, *See id.* at p. 213, ll. 19-25, p. 214, ll.1-15, UBTA-UBET provided no evidence of those costs.

The Division's witness, Mr. Coleman, stated that the Division had asked for cost data from UBTA-UBET— “some cost numbers that we would be able to look at to be able to determine what the costs would be for both parties for direct and indirect interconnection,” but apparently had not received that information. *Transcript*, p. 673, ll.4-10. “Absent any hard cost data, which the Division did try [to obtain]” Mr. Coleman opined that if indirect interconnection did not impose significantly greater costs for a company, then either option should be permissible. *Id.* The Division also noted in its Initial Brief that neither Bresnan nor UBTA-UBET had performed any cost studies for this

docket, and evidence of costs were limited mainly to proxies for what the costs would be, or only Bresnan's evidence of costs.

There is no dispute that UBTA-UBET already has existing trunk groups between it and the Qwest tandem switch in Provo to which the UBTA-UBET end office subtends. Therefore, regardless of whether Bresnan interconnects, UBTA-UBET will have costs for maintaining the trunk group at the Provo tandem⁹, where Bresnan is seeking to indirectly interconnect. Absent any evidence of UBTA-UBET's claimed costs, the Commission cannot find support for UBTA-UBET's alleged "significant" costs of indirect interconnection, nor that it would bear costs of indirect interconnection disproportionately. It appears that indirect interconnection would impose roughly the same costs on Bresnan and UBTA-UBET and is preferable.

Although there might not be evidence of costs developed specifically for this docket, Bresnan did submit some evidence of what an appropriate proxy of those costs might be. In the second spreadsheet of Exhibit B-2, "Bresnan Response to Staff Data Requests 2.2BB and 2.3BB-indierect and Direct Interconnection (Scenario 1)", Bresnan estimated that "each party's total monthly cost of interconnection, transport, and termination for local/EAS traffic at various DS1 traffic capacity levels was as follows:

<i>Capacity %</i>	<i>Minutes/Month</i>	<i>UBET total</i>	<i>Bresnan total</i>
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⁹ Q. (Mr. Mecham) So with respect to an indirect connection, are there greater cost burdens on one party over another? A. (Mr. Harris) To the extent that both parties have . . . independent requirements to be connected to that tandem, and already have the trunk groups in place, no. . . . [T]he cash out-of-pocket is not really a difference . . . both sides are going to have to undertake the same translations ('that means just telling your switch to point bearing certain NPA and XX, or certain local routing number, at a certain destination'). You have to do that for all traffic, so it doesn't matter whether you're going direct or indirect. There's one other advantage of indirect interconnection. . . . you haven't set up anything special for indirect. You're just using what's already there. . . . The other costs are costs that they're already bearing. So the cash out-of-pocket is really just the transiting fee." *Transcript*, p.90, ll. 3-23, p. 91, ll. 14-25, p. 92, ll.1.

0%	0	\$0	\$ 0
25%	62,500	\$34.93	\$34.93
50%	125,000	\$69.86	\$69.86
75%	187,500	\$104.80	\$104.80
100%	250,000	\$139.73	\$139.73

In calculating these costs, Bresnan used mileage and transit charges from the Qwest SGAT to estimate costs for Bresnan and UBTA-UBET. The information used in the SGAT “were originally created based on cost characteristics of a group of rural exchanges, including the Vernal, Roosevelt, and Duchesne exchanges which UBET subsequently purchased.”

Exhibit B-2, spreadsheet 2, “Bresnan Response to Staff Data Requests 2.2BB and 2.3BB-

Indirect and Direct Interconnection (Scenario 2).” Absent any other evidence, this is the

best evidence before the Commission of what such transiting charges would be. Based on

these numbers each party’s total incremental costs (money they would each pay to Qwest,

assuming they are already connected) would be equal, ranging from \$34.93 a month to

\$139.73 a month, according to usage and capacity.¹⁰ Neither party would incur greater

costs than the other as a result of indirect interconnection. Bresnan did make an

assumption that neither party’s trunk group is at or near capacity, so that neither will have

to add another trunk group. This assumption was later shown not to be so, when UBTA-

UBET submitted the information in Exhibit UU-2, showing that its trunk group was near

capacity. But Mr. Harris addresses this concern in the hearing, and as discussed herein.

UBTA-UBET does have or will have capacity to carry Bresnan’s traffic, with little, if any,

¹⁰ The reason the costs are the same in scenario one is “because each party already has the transmission facilities in place. Neither [one] is going to be establishing new facilities.” *Transcript*, p.13, ll.9-14.

out-of-pocket costs besides those that would already be incurred for maintaining the trunk group at the Provo tandem.

Bresnan additionally submitted evidence in its third spreadsheet to Exhibit B-2, “Bresnan Response to Staff Data Requests 2.2BB and 2.3BB-Indirect and Direct Interconnection (Scenario 2).” This scenario used information from the SGAT and showed allocated (not actual out-of-pocket) costs of interconnecting with the Provo tandem. According to this scenario, each party’s total allocated monthly costs of interconnection, transport, and termination for local/EAS traffic were estimated as follows:

<i>Capacity %</i>	<i>Minutes/Month</i>	<i>UBET total</i>	<i>Bresnan total</i>
0%	0	\$0	\$ 0
25%	62,500	\$134.49	\$159.37
50%	125,000	\$268.97	\$318.74
75%	187,500	\$403.46	\$478.11
100%	250,000	\$537.95	\$637.48

Even according to this scenario, with an allocated internal transport and termination expense for use of already existing capacity on the existing trunk groups, the costs are roughly equal, but with Bresnan’s costs slightly higher. Again, Bresnan assumes that the UBTA-UBET trunk is not near capacity and used Qwest’s SGAT reciprocal compensation rates as a “reasonable proxy for UBET’s internal per-MOU costs.” In the end, however, the proxy is the best evidence of what UBTA-UBET’s transport expense would be.

Bresnan also submitted evidence of what the costs might be for direct interconnection. *See Exhibit B-2*, “Bresnan Response to Staff Data Requests 2.2BB and 2.3BB-Indirect and Direct Interconnection (Scenario 3: Direct Interconnection).” Under this scenario, Bresnan “illustrated how one might compare cost of direct interconnection

trunking/transport to indirect interconnection.” *See id.* Bresnan put forth the “actual monthly recurring lease price” if it leased DS1 from its Grand Junction, Colorado switch to the point of interconnection at Bresnan’s Vernal head end, per UBTA-UBET’s proposal. *See id.* The cost for a UBET entrance facility to the point of interconnection for direct interconnection would be \$1,598 per month. The Division questioned Mr. Harris, and stated that absent this cost, the monthly amortized incremental expense for a dedicated DS1 switch port would be only \$100 per month, which would make direct interconnection the cheapest choice. Mr. Harris stated that at some level that would be correct, but that the costs associated with direct interconnection, with the “physical interface that each party is putting on their own switch” *Id.* at p.129, ll. 6-18, are incurred “at minute zero. The time you establish that direct connection, you’ve got all of the costs associated with that connection.” *Id.* Therefore, the monthly recurring charge for Bresnan would be about \$1,698. Bresnan also assumed that UBTA-UBET’s costs for direct interconnection at Bresnan’s Vernal head end would be about \$175 per month. Mr. Harris did admit that the \$175 was “an assumption . . . I can’t vouch that they’re true costs,” *Id.* at p.134, ll. 9, 24-25, but did state how he arrived at that number.

[UBTA-UBET] list in their access tariff a dedicated entrance facility price of \$125. And so I said, well maybe their costs [are] \$75, maybe it’s much closer to \$125. And for trunk ports . . . looking out at what different players have, as amortized trunk, \$100 is probably to low. But I didn’t want to bias this by making it look like, oh this is extremely expensive. . . . But, you know, it could be higher or lower. . . but, it’s probably not terribly far removed.

Id. at p. 135, ll. 1-17. Absent any better evidence to the contrary, the Commission finds that the cost for direct interconnection for UBTA-UBET would be about \$175. In scenario

three, for direct interconnection, if the costs for Bresnan would be about \$1,698, and the costs for UBTA-UBET would only be about \$175 per month, then direct interconnection would impose significantly greater costs on Bresnan than it would on UBTA-UBET. In such a case, the Commission must find that direct interconnection, at least initially, is not the most economically symmetric way for both parties to interconnect.

The language the legislature implemented does not make direct and indirect interconnection mutually exclusive. Utah Admin Code R746-348-3 states an “incumbent local exchange carriers shall allow any other public telecommunication service provider to interconnect its network at any technically feasible point, to provide transmission and routing of public telecommunication services. A local exchange service provider requesting interconnection with an incumbent local exchange carrier shall identify a desired point of interconnection.”

In this instance, both indirect and direct interconnections are technically feasible. The plain language of the statute allows Bresnan to pick its method for interconnection with UBTA-UBET’s essential facilities and Bresnan has selected indirect interconnection at the Provo tandem. The costs of indirect interconnection do not impose significantly greater costs on one party than the other. The costs of direct interconnection would impose significantly greater costs on Bresnan than UBTA-UBET, however. Therefore, the Commission finds that Bresnan’s request for indirect interconnection at the Provo tandem is permissible under our state laws and Rules and that UBTA-UBET must permit interconnection at the Provo tandem.

Having determined that indirect interconnection is permissible, the Commission determines whether Bresnan's or UBTA-UBET's proposed language for indirect interconnection should be used. Having reviewed the language submitted by both parties in the issues matrix, having reviewed the parties' briefs, and based on the analysis discussed previously on the appropriateness of indirect interconnection, the Commission determines that Bresnan's language is that which is most consistent with this Order and more reasonable. First, UBTA-UBET's Section 3.1.2 mandates that if indirect interconnection is permitted, then such indirect interconnection "shall be effected through the tandem switch of a 3rd party to which both parties are interconnected for the exchange of local traffic." See *Issues Matrix*, Section 3.1.2. As Bresnan points out, UBTA-UBET does not connect to any third party tandem for purposes of exchanging local traffic. It specifically stated that it connects to the Qwest Provo tandem for toll traffic only. Therefore, selecting this section would undermine the purpose of this Order requiring indirect interconnection.

Second, UBTA-UBET's proposed language in Section 3.1.3 would impose duties on Bresnan inconsistent with Commission Rules and ultimately make indirect interconnection significantly more expensive for Bresnan than for UBTA-UBET. Rule 746-348-4(B)(1) states each party is responsible for "the costs of constructing its facilities to the meet point." UBTA-UBET's language proposes that "each party shall be solely responsible for all connectivity between its network and a POI inside the UBET service area." This, however, would require Bresnan to pay all transiting charges, even for calls originating from UBTA-UBET customers. Bresnan's language, however, would make

each carrier responsible for its own network. Additionally, UBTA-UBET's language would render meaningless the Commission's order to indirectly interconnect at the Provo tandem. As Bresnan notes, the provision "makes no sense" because the third party tandem will not be in the UBTA-UBET service area. It will be managed by UBTA-UBET or the third party, and Bresnan could not be "solely responsible" for that connection. Finally, as Bresnan points out, this provision ignores the "fundamental principle of indirect interconnection", i.e. that where two carriers exchange minimal amounts of traffic, it is more efficient to use existing trunks that carry traffic to a common tandem, so that no carrier bears the burden of constructing an entirely new facility. Forcing Bresnan to construct a new facility would impose greater costs for indirect interconnection on Bresnan than on UBTA-UBET. Thus Bresnan's language for this section is more appropriate.

The parties also offer competing language for section 3.1.5. Bresnan states that it is willing to accept the list of information proposed by UBTA-UBET so long as its introductory language is used and that the acronyms are spelled out for clarity. The new language for 3.1.5 would read:

For all Local, EAS and ISP-Bound Traffic exchanged between the Parties via Indirect Interconnection, the originating Party shall supply to the terminating Party, at no charge to the terminating Party, call records which include: Record ID, Date of Call, Called Party Number (CdPN), Calling Party Number (CPN), CIC (if applicable), Time of Call, Elapsed Minutes, Elapsed Seconds, and valid OCN (Operating Company Number).

Bresnan Initial Brief, p.7.

The Commission finds Bresnan's language more reasonable. As Bresnan notes, UBTA-UBET's language refers to "all indirectly routed traffic" which might be

construed to cover long-distance traffic, which is not covered by the Agreement, but which Bresnan might route through the tandem. Also, UBTA-UBET's language refers to a specific report, the Call Detail Record (CDR). Bresnan noted that a provider might charge for such a record, but Bresnan's language would allow Bresnan to provide the information requested in the CDR with more generic, and less-expensive options. The Commission feels this less-expensive and less burdensome option is preferable.

Finally, the parties differed as to section 3.1.6, related to the threshold that must be met before the parties switch to direct interconnection. UBTA-UBET proposes that the parties switch to direct interconnection upon the first occurrence of the traffic exceeding 512 CCS¹¹ in the busy hour. This provision, however, would not account for simple "one time or transitory increase in traffic." *Bresnan Initial Brief*, p. 8. The more reasonable approach would be that suggested by Bresnan, where the 512 CCS threshold would have to be met for three consecutive months. That way, the parties would have a more certain basis upon which to proceed before incurring costs for direct interconnection.

Intercarrier Compensation: Reciprocal v. "Bill and Keep"

Bresnan and UBTA-UBET also differed as to whether the interconnection agreement should require reciprocal compensation¹² or "bill and keep"¹³ compensation. Bresnan presented testimony that, based on experience gained in other markets in which it operates, the traffic exchanged between it and UBTA-UBET would be in balance. *See*

¹¹ Centi-call seconds

¹² Reciprocal compensation is designed to compensate a local exchange carrier (LEC) for completing a local call from another LEC, e.g. the originating caller's LEC compensates the LEC who completed the call.

¹³ Bill and keep is an arrangement where each LEC recovers from its own end users the cost of both originating traffic that it delivers to the other LEC and terminating traffic that it receives from the other LEC.

Bresnan Initial Brief, p. 8; *Transcript*, p. 631, ll. 22 to p. 632, ll.3. Because the process of billing and collecting reciprocal compensation payments could be time-consuming and costly, the Commission should order “bill and keep” methods of compensation. Bresnan stated that “bill and keep” is widely used across the country. Additionally, Bresnan proposed that if traffic is out of balance, then a party may initiate and pay for traffic studies to determine if traffic is out of balance. If so, then Bresnan proposed language for a reciprocal compensation agreement. *See Issues Matrix-Bresnan*, 4.2.1.

UBTA-UBET opposes “bill and keep” for various reasons. First, it stated that there was no evidence that traffic would be in balance. In her pre-filed direct testimony, Ms. Wimer testified that Bresnan would only compete for residential customers, and that “business customers will remain with UBTA-UBET,” *see Pre-filed Direct Testimony of Valerie Wimer (Wimer Direct)*, p. 29, ll.531-532, so traffic would likely be out of balance. (Mr. Harris, however, later testified that Bresnan intends to compete for residential and business customers. *See Transcript*, p. 620, l. 24.) She also stated that more customers would be on UBTA-UBET's network than Bresnan’s initially. UBTA-UBET secondly argued that only under a reciprocal compensation arrangement will “each party be compensated for every minute of traffic that it completes. There is a direct correlation between the number of minutes and the compensation.” *Wimer Direct*, p.29, ll. 541-543. Additionally, with the party’s moving to reciprocal compensation only when traffic is in balance 60%/40%, UBTA-UBET argues the “other party would have to subsidize the party with the high traffic for up to 20% of the traffic. In a competitive market a 20% cost difference can be significant.” *Id.*, ll. 544-546. Additionally, UBTA-UBET argues that

since other carriers, e.g. wireless carriers, will be able to “opt in” to a similar “bill and keep” arrangement in the interconnection agreement, UBTA-UBET could have significant reduction in its revenues.

The Division opined that “each party should compensate the other party for carrying and terminating the other party’s traffic. That objective can only be accomplished through rates charged each carrier.” *Division Initial Brief*, p. 6. It further contended that the Utah laws and Rules were silent on whether reciprocal compensation or “bill and keep” should be required, although it noted that many interconnection agreements have included “bill and keep” provisions. The Division also noted that although Bresnan asserted that in its past experience, traffic would be in balance, “neither party presented any empirical evidence on this subject.”

There is no empirical evidence as to whether the traffic between Bresnan and UBTA-UBET would be in balance. Despite Bresnan’s relevant testimony that in all other markets where they have had experience the traffic is in balance, the Commission is concerned with some of the issues raised by Ms. Wimer. The Commission is concerned that in such a small market as UBTA-UBET’s, the 20% cost difference mentioned by Ms. Wimer can be significant, and that, combined with the possibility of other carriers opting-in to the same “bill and keep” arrangement, could lead to potential downturn in revenue. It is unlikely that any meaningful empirical evidence regarding traffic being in balance could be gathered until after the parties interconnect. At this point, neither party disputes that reciprocal compensation (though, as alleged by Bresnan “time consuming and costly”), would compensate the parties for traffic terminated on its network from the moment they

interconnect. It will ensure that UBTA-UBET is compensated for traffic terminated on its network, while “Bresnan will not be harmed by such an arrangement if their asserted claim of in-balance traffic is proven to be correct.” *Division Initial Brief*, p.7. The Commission therefore finds that the interconnection agreement should begin with the reciprocal compensation arrangement and the reciprocal compensation language proposed by UBTA-UBET. If the parties choose to move to “bill and keep” later, they may do so.

Compensation for Calls Terminated in UBTA-UBET's EAS Network

The parties dispute whether there should be a charge for Bresnan’s use of UBTA-UBET's EAS area. The parties submitted various alternatives for compensation for calls terminated in UBTA-UBET's EAS area. The most disputed choice was the proposed \$1.80 flat-rate charge UBTA-UBET would charge Bresnan per customer, per month, for use of UBTA-UBET's EAS area. UBTA-UBET argues that this rate is a cost-based rate developed in another docket, and compensates UBTA-UBET for costs of delivering calls to the EAS area. The flat-rate charge is a retail rate charged by UBTA-UBET to each of its customers for use of the EAS. UBTA-UBET contends that without the ability to use its EAS, a customer’s calls (including Bresnan’s) to locations in the EAS area would be intrastate toll calls, subject to intrastate access charges. The flat-rate charge allows customers to make toll-free calls to the EAS area for one small flat-rate. UBTA-UBET argues that since Bresnan customers will have use of the EAS, Bresnan should pay the flat-rate charge for each customer it gains. *See UBTA-UBET Initial Brief*, p.18.

The Division opposed the flat-rate charge. It firstly contends that the flat-rate charge is “a retail rate and has nothing to do with a wholesale rate to be charged

Bresnan.” *Division Initial Brief*, p.7. It notes that no interconnection agreement in the state contains such a flat-rate charge. It further stated that UBTA-UBET does not charge this flat-rate charge to its own affiliate, Uintah Basin Electronic Telecommunications (UBET Wireless). *See Exhibit B-6*.

The Division also agreed that such a rate would be anti-competitive. First, Bresnan would have to pay that rate to UBTA-UBET which it collected while a monopoly provider, even when the customer had never been a UBTA-UBET customer. Also, paying the flat-rate would provide UBTA-UBET sensitive information regarding access line count which UBTA-UBET could use against Bresnan, information which no other company is required to provide UBTA-UBET.

Bresnan argues that the flat-rate charge would present a substantial barrier to competition—counter to the legislative mandate found in our State telecommunications statute to promote competition, and over-compensate UBTA-UBET for any costs it might incur. Bresnan argues that “UBET suggests that terminating calls from Bresnan customers in Vernal to other exchanges outside Vernal is the ‘same service’ as terminating a call from a UBET customer in Vernal to a UBET customer outside Vernal.” *Bresnan Initial Brief*, p. 10. In data requests, UBTA-UBET responded that Vernal customers make about 115 minutes of calls per month to other EAS exchanges. Bresnan contends that under UBTA-UBET's proposal, Bresnan would pay \$.01 per minute in termination charges and \$1.80 per month in a flat-rate charge for use of the EAS, totaling \$2.95 in monthly charges. Yet, for same amount of calling, and using the same UBTA-UBET transport facilities, a UBTA-UBET customer would only pay \$1.80 per month for the service. *See id.* at p.11.

However, UBTA-UBET desires to charge Bresnan 64% more for the “same service” using the same facilities.

Bresnan also argued that charging the flat-rate charge would be anticompetitive by “providing competitively sensitive information to UBTA-UBET”—information which UBTA-UBET acknowledged would be sensitive information. *See id.* Bresnan also stated that the flat-rate charge would be paid to UBTA-UBET in perpetuity, regardless of costs, making Bresnan less profitable and UBTA-UBET more profitable. Finally, Bresnan disputes that UBTA-UBET has a legal obligation to charge Bresnan the flat-rate charge. It states that no statute or rule imposes upon UBTA-UBET the obligation to impose charges it assesses to retail customers upon interconnected carriers.

The Commission agrees with the Division and Bresnan that the flat-rate charge is not appropriate and would violate our state statutes. First, the flat-rate charge is not appropriate because there is simply no basis for UBTA-UBET’s desire to use a *retail* rate it charges its customers as a basis for a *wholesale rate* to be charged Bresnan. UBTA-UBET contends that Commission rules and statutes require it to assess the flat-rate charge to Bresnan. It has not established how such a retail charge is properly imposed as a wholesale rate. Although it argues that “this is a cost-based rate” used “in order to compensate UBET for the costs of delivering” calls to the EAS area, *UBTA-UBET Initial Brief*, p.18, it has presented no evidence that the flat-rate would be its actual wholesale costs for terminating calls in the EAS area.

Second, UBTA-UBET does not charge the flat-rate to at least one of its own affiliates. The Division presented evidence that the interconnection agreement between

UBTA-UBET and UBET Wireless contains no such flat-rate charge, even though UBET Wireless customers terminate calls to the EAS area. Also, as Bresnan pointed out, assessing the flat-rate charge would impose greater costs on Bresnan customers than UBTA-UBET charges its own customers for usage of the same transport facilities. As Section 54-8b-2.2(b)(ii) mandates, UBTA-UBET “shall permit access to and interconnection with its essential facilities and the purchase of its essential services on terms and conditions, *including price*, no less favorable than those the telecommunications corporation *provides to itself and its affiliates*.” Assessing the flat-rate charge to Bresnan would be violative of this provision.

Finally, a flat-rate charge would be anticompetitive. UBTA-UBET admitted that the number of access lines a carrier serves is confidential information. *See Exhibit B-4*, pp.4-5; *Transcript*, p. 389, ll.1-25, p. 390, ll.1-15, because it gives information as to “the number of customers there are in the market.” *See id.* As Bresnan stated, UBTA-UBET could use the information obtained from Bresnan “to its competitive advantage to decide, for example, whether and the extent to which marketing efforts are successful or should be increased.” *Bresnan Initial Brief*, p.11. As the Division noted, no other company has this obligation to provide this type of competitively and economically sensitive information to UBTA-UBET, and the Commission concludes that it would not satisfy its legislative mandate to “encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state.” *Utah Code Ann.* §54-8b-1.1 (3).

Even though other alternatives for the use of the EAS were submitted, the Commission concludes, given UBTA-UBET's responses to data requests, that there should not be any extra charge for calls that terminate outside of Vernal, i.e. in the EAS area. Exhibit B-4 contains Bresnan's Second Set of Data Requests to UBTA-UBET. Part of Data Request 2.2 requests as follows: "In regard to your testimony on EAS, please identify each discrete trunk group connecting each UBTA-UBET Remote Switch to the Vernal Host Switch, providing the following information: . . . b) identify the current capacity of each trunk group; c) identify which of the following traffic types was carried over that trunk group during the last twelve months" *Exhibit B-4*, p.2. Sub-part (c) requests various data from UBTA-UBET including "EAS traffic originated from or terminated to UBTA-UBET local exchange service customers physically located in the Vernal exchange, EAS traffic which neither originated from nor terminated to UBTA-UBET local exchange service customers physically located in the Vernal exchange," *Exhibit B-4*, p. 2-3, and other information regarding types of traffic carried over the trunk group.

In response to sub-part (b), UBTA-UBET objected to the information requested "on the grounds that this request is unduly burdensome." It then stated that "UBTA-UBET *does not have discrete trunk groups for EAS traffic.*" *Exhibit B-4*, p.3. In response to sub-part (c), UBTA-UBET again reiterated that "*All of the traffic types identified in [c]i-xii above travel over each of the trunk groups.*" *See id.*

From these statements, in this docket, the Commission must conclude that the costs of originating/terminating calls within the Vernal Host are no different than the costs of originating/terminating calls in remote areas. As Bresnan pointed out in Exhibit

B-2, Spreadsheet 5, “Bresnan Response to Staff Data Requests 2.2BB and 2.3BB-Host-Remote Expense,” all trunk groups “carry all traffic between the Vernal Host and each Remote in a wholly un-segregated manner.” Based on this evidence, the Commission will not order an extra EAS charge, flat-rate or otherwise.

Reciprocal Compensation or Call Termination Charge

The parties also disputed the compensation rate for the transport and termination of traffic between UBTA-UBET and Bresnan.

Bresnan gives a range of possible compensation rates ranging from \$.001798/MOU to \$.01/MOU. Bresnan contends that the agreement between UBTA-UBET and Western Wireless contains a negotiated rate for termination within the Vernal exchange of \$.01/MOU. Absent any cost studies by UBTA-UBET, charging a higher rate would be discriminatory, it argues. Bresnan argues that other cost data shows the costs to UBTA-UBET for terminating calls is less than \$.01/MOU. It stated that the “FCC and others across the country have recognized a proxy for a cost-based rate for traffic termination in the absence of a specific cost study to be \$.0007 per minute.” *Bresnan Initial Brief*, p. 13. Second, it stated that a cost study was done to determine Qwest’s wholesale costs for terminating traffic to rural exchanges, including the Vernal, Roosevelt, and Duchesne exchanges, which are now served by UBTA-UBET. That study established a rate of \$.001798/MOU. Given that the cost study covered exchanges now served by UBTA-UBET, the \$.001798/MOU would be the best proxy for what UBTA-UBET costs would be.

UBTA-UBET argues against the \$.0007/MOU rate. It argues that the rate was based on a federal cost standard that has no place in these proceedings, where state law has been used to resolve the interconnection dispute. It states that “absent a cost study establishing the actual cost of call termination service . . . the Commission [should] adopt the \$.01 per minute of use rate as the rate for call termination service by both parties.” *UBTA-UBET's Initial Brief*, p.18. It did not speak to the \$.001798/MOU rate.

The Division argued that the Commission should pick a rate, absent any cost studies that reflects a more specific data than the national proxy rate or the rate reflected in the Qwest SGAT. It argued that the national proxy rate of \$.0007/MOU would violate the ruling in *Telecommunications Resellers of Utah v. PSC*, 747 P.2d 1029 (Utah 1987). In that matter, the Supreme Court set aside a Commission order establishing tariffs based on nationwide cost data and containing no Utah-specific cost data. The Court stated that “there was no reasonable relationship between the tariff rates established by the PSC order and the purpose they are intended to serve, which is the recovery of costs associated with providing access to local networks for resellers.” *Id.* at 1030. The Division contends that the national proxy would violate the holding in *Telecommunications Resellers*. It contends that the Western Wireless compensation rate would better “reflect UBTA-UBET specific data than any of the other choices that were presented” *Division Initial Brief*, p.9, including the rates in the Qwest SGAT.

The Commission finds that the compensation rate most suited to this docket would be the rate found in the Western Wireless interconnection agreement, i.e. \$.01/MOU, a rate which UBTA-UBET conceded, in its Briefs, was a reasonable rate given

no cost data specific to this docket. The national proxy does not have a relation to Utah-specific cost data, and under the analysis of the Court in *Telecommunications Resellers*, is not likely not properly used as a proxy. Although that case dealt with the tariff, its holding would be analogous to this docket, and without any relationship to Utah-specific cost data, the Commission is not willing to order the national proxy as the compensation rate here. The rates listed in the Qwest SGAT do have more of a relationship with Utah-specific cost data, as some of the studies were performed for rural exchanges now served by UBTA-UBET. However, those rates were based on cost data specific to Qwest, and not to UBTA-UBET. Assuming UBTA-UBET negotiates rates that adequately compensate it for the costs of terminating calls, the \$.01/MOU rate in the Western Wireless agreement (being a negotiated rate) would be the best evidence (absent any cost data specific to this docket) of UBTA-UBET's true costs for terminating calls.

If EAS Compensation Is Proper, Compensation for Traffic Terminating in the EAS Area

The Commission, above, concluded that there should not be any extra charge by UBTA-UBET to Bresnan for calls that terminate outside of Vernal, i.e. in the EAS area. Given UBTA-UBET's responses to Bresnan data requests, the Commission must conclude that the costs of originating/terminating calls within the Vernal Host are no different than the costs of originating/terminating calls in remote areas, and that any EAS traffic would be already compensated as local traffic. The Commission will not order an extra EAS charge and section 4.2.2 of the Agreement should be deleted.

General Terms and Conditions: Rights of Parties

The parties also submitted competing language regarding the language of Section 36 of the Agreement dealing with the rights of the parties. Bresnan states that the language is unnecessary as it improperly affects or preserves the appeal rights of the parties to the Commission's order. To the extent the language does not affect the parties' appeal rights, then it is irrelevant. UBTA-UBET argues that it desires the language "to ensure that there is no misunderstanding regarding [its] negotiation of the terms of the Interconnection Agreement." UBTA-UBET argues that at the outset, it has no obligation to interconnect its "telecommunications facilities with Bresnan's VoIP facilities" and that its "participation in this process does not constitute its acquiescence of any interconnection obligation" *UBTA-UBET Initial Brief*, p. 20. Bresnan contends that UBTA-UBET's ability to appeal the "particulars of any provision of the agreement with which it has now agreed by stipulation", or to argue a case for irreparable harm, might be impacted by its actions here and any language ordered by the Commission purporting to affect any such waiver, if it exists, would be improper.

The Division agrees with Bresnan that the appeal language should be stricken, as the Agreement should not limit, enlarge, or otherwise affect the parties' rights of appeal.

The Commission agrees with Bresnan and the Division that the parties' rights exist independent of this Report and Order. The Agreement should not enlarge or modify the parties' rights of appeal with regards to any portion of this Report and Order. The Commission finds that Bresnan's proposed language of Section 36 is more appropriate. It simply states that the Agreement neither restricts nor modifies either party's

ability to petition for relief with the Commission to modify or terminate the agreement should any state or federal court or the FCC later determine that any service rendered by UBTA-UBET or Bresnan is not eligible for interconnection or traffic exchange. This language is also consistent with the Commission's November 17, 2008 Report and Order where it stated that any relief granted might have no further application should it be later determined that state law has no application, or that the Commission lacks authority over the services provided by Bresnan or authority to grant relief given in this docket.

ORDER

Therefore, based on the findings and conclusions listed above, the Commission orders as follows:

1. Bresnan has a right to interconnect with UBTA-UBET;
2. UBTA-UBET shall permit Bresnan to obtain indirect interconnection with UBTA-UBET's essential facilities at the Provo tandem. If the parties mutually select another location, they may also interconnect at that location;
3. The parties' interconnection shall be governed by the terms of the parties' Agreement. With relation to the six remaining disputed terms of the Agreement, the parties' shall incorporate the Commission's resolution of the dispute (as detailed in the Order above) into the Agreement;
4. The Commission retains jurisdiction over this matter and the parties to ensure compliance with this Order and any related orders that may be issued subsequently;

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5. Bresnan shall provide the Commission with a status report within one month after entry of this Order, updating the Commission regarding the parties' interconnection;
6. Pursuant to Sections 63G-4-301 and 54-7-15 of the Utah Code, an aggrieved party may request agency review or rehearing within 30 days after issuance of this Order by filing a written request with the Commission. 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 does not grant a request for review or rehearing within 20 days after the filing of the request, 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 requirement of Sections 63G-4-401 and 63G-4-403 of the Utah Code and the Utah Rules of Appellate Procedure.

DATED at Salt Lake City, Utah, this 21st day of May, 2009.

/s/ Ruben H. Arredondo
Administrative Law Judge

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Approved and confirmed this 21st day of May, 2009 as the Report and Order of the
Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#62137