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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition of Bresnan Broadband of Utah, LLC to Resolve Dispute Over Interconnection of Essential Facilities and for Arbitration to Resolve Issues Relating to an Interconnection Agreement with UBTA-UBET Communications, Inc.	Post Hearing Memorandum of the Division of Public Utilities Docket No. 08-2476-02
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The following is the Post Hearing Memorandum of the Division of Public Utilities (Division or DPU) in the above-entitled matter.

INTRODUCTION

On November 16, 2007 Bresnan was issued a Certificate of Public Convenience and Necessity to provide public telecommunication services in the Vernal exchange. The Commission found that it was in the public interest to allow competition to develop in Vernal even though UBTA-UBET opposed the issuance of the Certificate. In early 2008, Bresnan requested that UBTA-UBET enter into an interconnection agreement to exchange traffic. That request for voluntary negotiations was unsuccessful. As a result, over the next few months Bresnan attempted to obtain mediation from the Commission, which also failed. Finally, Bresnan filed this Docket asking the PSC to establish an interconnection agreement between the parties through adjudication. They asked the Commission to resolve the dispute both under

federal and state law. A Motion to Dismiss was filed by UBTA-UBET that eventually resulted in the November 17, 2008 Order denying the Motion to Dismiss but stating that the Commission would decide the dispute using state law. The issuance of the Certificate in Vernal was the first certificate issued in a non Qwest ILEC territory. In this docket and in the Certificate proceeding, both UBTA-UBET and the Utah Rural Telephone Association have made it difficult for a CLEC to compete in the Vernal exchange. The point of this discussion is that both the public interest finding of the Commission when they issued the Certificate and the policy declarations of the legislature to promote competition are not being achieved in Vernal.

The Commission when making its decisions should consider some general observations.

These include:

- a. Although the Commission is adjudicating this interconnection agreement under state law, the Commission should not ignore the 1996 Telecommunications Act or the rules adopted by the FCC, particularly, where the state statute and rules are silent.¹
- b. In determining the point of interconnection, direct or indirect,² it should be technically feasible and economically prudent for both parties. In other words, the point of interconnection should represent the most economically efficient method of interconnection for both parties. The cost of the interconnection should not be unreasonably high for one party over the other.³
- c. Either company should be compensated when completing a call. There should be compensation to UBTA-UBET when a call is being completed outside of Vernal but

¹ See DPU Ex. 1 P. 4-5. The Commission has adopted numerous interconnection agreements under the federal and state rules. Those agreements were adopted not to be inconsistent with state law. Even the federal rules recognize that state law is to be preserved when it meets the requirements of 251(d)(3).

² The Division believes that under Utah law there is no requirement that the point of interconnection be located with the local calling area of the ILEC and that both direct and indirect interconnection are permitted.

³ DPU Ex. 1 P. 8-9.

within the EAS calling area.⁴ That compensation, however, should be on a minute of use basis and not a flat charge per customer.

The following is a summary of the Division's recommendations after reviewing the issues matrix and the positions of the parties:

a. Direct and indirect interconnections are permitted under Utah law. The point of interconnection does not need to be within the local calling area of the ILEC. However, for the Provo tandem route, UBTA-UBET's facilities appear to end at the Whisky Springs POI with Qwest. The decision to require a connection at this point should be based on the economic impact of that decision on both parties.

b. Reciprocal Compensation assures that each party is compensated for its own traffic while Bill and Keep operates on the assumption that traffic is in balance. When traffic is not in balance, some time would elapse before specific rates were in effect. Therefore, the DPU believes that the PSC should start with a reciprocal compensation plan. If traffic is in balance no one is harmed. If Bill and Keep is adopted, the DPU recommends the use of the 55% out of balance factor. The DPU supports the use of a \$0.01/MOU rate within Vernal and an additional \$0.002/MOU rate for calls outside of Vernal but within the EAS calling area. A flat EAS charge imposed on Bresnan's customers is not reasonable.

Issue 1- Interconnection

Section 251(a)(1) of the 1996 Federal Telecommunications Act imposes an affirmative duty on all telecommunications companies to interconnect directly or indirectly with the facilities of other telecommunications companies. That interconnection is to be based on

⁴ DPU Ex. 1 P. 12.

their most efficient and economic choices.⁵ This obligation is consistent with the Utah Statute and rules and decisions of this Commission. UCA 54-8b-2(1)(a)(i) imposes an obligation to interconnect a company's essential facilities with another telecommunications corporation that provides public telecommunications services in the same, adjacent, or overlapping service territory. The use of the same adjacent or overlapping service territory does not restrict where the point of interconnection will be but instead defines when the obligation to interconnect arises.

R746-348-3 provides the State rules for interconnection. Basically, the CLEC can request the Point of interconnection at any technically feasible point. There does not seem to be any restriction on where that POI is located. It could be located outside of the ILEC's exchanges. That meet point cannot impose significantly greater costs of the interconnection on one party over the other.

In evaluating the Point of Interconnection requested by Bresnan, the Commission should ask if the POI is technically feasible, do both parties have access to the POI and does the requested POI impose unreasonable costs on the ILEC. These state rules do not seem inconsistent with any federal rules.

In support of indirect interconnection, UBTA-UBET has entered into an interconnection agreement with Union Telephone Company's wireless operations that permits indirect interconnection through a third party. Indirect interconnection will be subject to reciprocal compensation described in Section 3.2.1.⁶

One of the first interconnection agreements arbitrated after the passage of both the State and Federal laws provide some guidance to the Commission on how to evaluate the

⁵ Federal Telecommunications Law Second Edition Section 5.5.1.1.

⁶ DPU Ex. 1 P. 9.

interconnection issues raised here.⁷ At issue was whether Qwest can require AT&T and MCI to have a POI in each local calling area or can the CLEC interconnect through a tandem that would allow calls to be completed through the entire LATA.⁸ The Commission reviewed both federal and state law, including the then-recently adopted state rules under R746-348 in reaching its decision that state law does not prohibit interconnection through a tandem and that there is no requirement that the POI must be within the local calling area of the ILEC. Further, the Commission held that the burden rests on the ILEC to show that the proposed POI is technically infeasible and economically unreasonable.⁹ One final observation from the AT&T MCI decision is that both local and toll traffic could be carried on the same trunk group.¹⁰ UBTA-UBET seems to say in Paragraph 3.1.2 that the trunk group must be for the exchange of local traffic. There does not appear to be any evidence presented that limiting a trunk group to local traffic is technically and economically required. Some evidence was presented that there would be some unmeasured economic impact on UBTA-UBET if local traffic is carried on the Provo trunk. That economic impact was not well defined and it is UBTA-UBET's burden to show that impact.

Bresnan, in response to DPU Data Request 2.2 and 2.3 (admitted as Bresnan Ex. 2), presented the only attempt at a cost study of the differences between direct and indirect interconnection. That analysis assumed the POI would be at the Qwest tandem rather than at Whisky Springs where apparently UBTA-UBET interconnects with Qwest. We see nothing in the record that would make it technically infeasible or uneconomic to interconnect where Qwest and UBTA-UBET currently interconnect. The record is not so clear as to interconnection at the Provo tandem where apparently UBTA-UBET does not have facilities.

⁷ Arbitration Order for AT&T of the Mountain West and MCIMETRO ACCESS TRANSMISSION SERVICES, INC. Docket No. 96-087-03 and 96-095-01 Order issued April 28, 1998.

⁸ Id. Issue 4 P. 58.

⁹ Id. P. 60-61.

¹⁰ Id. At P 62.

With respect to the UFN tandem, it appears both technically feasible and economic to interconnect at that point. UBTA-UBET carries traffic to that tandem.

It does not seem as if the Commission needs to decide which tandem or POI Bresnan would choose, but may only need to make a basic decision and let the parties negotiate the POI.

Issue 2- Reciprocal Compensation vs. Bill and Keep

The Division's position is 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. Bill and Keep operates under the premise that each carrier will collect its costs from its own end users. At the Federal level Bill and Keep is appropriate when "neither carrier had rebutted the presumption of symmetrical rates and the volume of terminating traffic that originates on one network and terminates on another network is approximately equal to the volume of terminating traffic flowing the other direction, and is expected to remain so."¹¹ Bill and Keep is not discussed in either the Utah Statute or rules, however, many interconnection agreements have included bill and keep. This, therefore, is another example when the State statute and rules adopted are silent on when Bill and Keep is appropriate. Utah seems to require reciprocity and that companies make available terms and conditions no less favorable than they offer themselves or has on file with the Commission. Further, the interconnection agreements that UBTA-UBET have entered into include reciprocal compensation and not bill and keep.

The issue seems to be which way should an arrangement between Bresnan and UBTA-UBET begin. Should it begin with the presumption that the traffic is in or out of balance? Neither party presented any empirical evidence on this subject. UBTA-UBET asserts that reciprocal compensation should be the standard. Bresnan, on the other hand, based on its asserted past experience, claims traffic will be in balance. With the ability to measure traffic, the DPU

¹¹ Federal Telecommunications Law Second Edition, 2004 Cumulative Supplement P. 222.

believes that the Commission should require reciprocal compensation. Such an arrangement will ensure that UBTA-UBET will be compensated for traffic that is 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.

If the Commission adopts Bill and Keep, the Division supports the reduction of the out of balance percent from 60% to 55%.

Issues 3-5 Compensation

Flat Rated EAS charge: UBTA-UBET proposes to charge Bresnan \$1.80 per customer per month. This represents the current EAS charge placed on customers in the Vernal exchange. Although the Division supports a rate for UBTA-UBET for terminating traffic in the EAS area, it opposes the use of a flat rated charge. First, the EAS rate is a retail rate and has nothing to do with a wholesale rate to be charged Bresnan. As far as the Division could determine, no Utah interconnection agreements have a flat rate charge for EAS. In fact UBTA-UBET's own agreements with wireless companies, including their own affiliate, do not charge the flat rated EAS charge.

A charge of a \$1.80 per Bresnan customer also seems anti-competitive. The only purpose to such a flat rated charge is to allow UBTA-UBET to collect a rate they were previously collecting when they were the monopoly provider. Some of the customers Bresnan will serve will never have been a UBTA-UBET customer. Finally, Bresnan would be asked to disclose to its competition the number of customers they are serving. No other company is required to make such disclosures including UBTA-UBET.

Usage Charges:-Neither UBTA-UBET nor Bresnan seem to have any desire to perform a cost study to set rates in the proceedings. In light of that, neither party should be able to

challenge the PSC decision setting rates without a cost study. A variety of alternative rates have been proposed. Bresnan proposes the use of the so-called national proxy for reciprocal compensation of \$.0007/MOU and no additional charge for terminating traffic into the EAS calling area. If a UBTA-UBET specific rate is selected, Bresnan proposes a rate of \$0.01/MOU. Although Bresnan opposes an EAS charge if one is adopted, they propose the use of the Qwest SGAT of \$0.0007913/MOU. Finally, Bresnan proposes that if a UBTA-UBET rate is to be used for transport to the EAS area, that a rate of \$0.002/MOU be used. UBTA-UBET proposes to use UBTA-UBET specific rates. For calls terminating into Vernal they propose the \$0.01/MOU rate. In the absence of a flat rated EAS charge it is not clear what they suggest. The Division assumes it is the \$0.002/MOU rate found in other interconnection agreements UBTA-UBET has executed.

The Division supports the use of the \$0.01/MOU rate for calls into Vernal and an additional charge of \$0.002/MOU for calls into the EAS calling area. The DPU believes that UBTA-UBET specific rates are the most reasonable alternative in the absence of a cost study.

Adoption of the national proxy rate could violate the ruling by the Utah Supreme Court in *Telecommunications Resellers of Utah v. Public Service Commission* 747 P2d 1029(Utah 1987). In that decision the Court reversed the Commission's adoption of national cost data and a national tariff. There was no relationship presented between the national rate and Utah specific cost data. Therefore, the Court found 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."¹² As in the Reseller case, the DPU believes that Utah specific, and, if possible, UBTA-UBET specific rates should be followed.

¹² 747 P2d 1029 at 1030.

As was stated previously the Division supports the use of the \$0.01/MOU rate for traffic into Vernal and an additional charge of \$0.002/MOU for traffic that terminates into the EAS calling area. These rates were established in the Western Wireless Arbitration and have been used in other Interconnection agreements used by UBTA-UBET. There was a great deal of discussion with Mr. Coleman about how the rates were set in the Western Wireless Arbitration. Mr. Coleman was obviously not able to answer Bresnan's questions since he did not participate in that case. The Commission instead took administrative notice of testimonies filed in that Docket.¹³ Presumably, the purpose of Bresnan utilizing the testimonies of the Division presented in the Western Wireless Arbitration was to claim they are out of line with the rates agreed to in the settlement. Even though these rates were set in a settlement, the DPU believes they better reflect UBTA-UBET costs than does the Qwest SGAT. After the settlement was filed with the Commission, the Division sent a Memorandum to the Commission (attached) representing that the settlement rates were within a reasonable range and the parties negotiated a fair and equitable settlement. Although the rates in the Western Wireless docket may not be perfect, they seem best to reflect UBTA-UBET specific data than any of the other choices that were presented, such as the Qwest SGAT or the national rate. This rate has been used in a variety of interconnection agreements and it is reasonable to use it here.

Respectfully submitted this _____ day of March, 2009.

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¹³ It should be pointed out that since there was a settlement the testimonies of the various parties were not admitted into evidence or ever subject to cross examination.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing POST HEARING MEMORANDUM OF THE DIVISION OF PUBLIC UTILITIES was sent by electronic mail ~~and mailed by U.S. Mail, postage prepaid,~~ to the following on March ____, 2009:

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