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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

IN THE MATTER OF THE PETITIONS 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.	**Bresnan Broadband of Utah, LLC's Reply Brief** **Docket No. 08-2476-02**

Bresnan Broadband of Utah, LLC ("Bresnan"), hereby submits the following Reply Brief in the above-referenced Docket.

I. Introduction

The positions advocated by UBTA-UBET Communications, Inc. ("UBET") and the Utah Rural Telecom Association ("URTA") would, if adopted, raise substantial and unwarranted

barriers to Bresnan's competitive entry in the Vernal Exchange by establishing anticompetitive and discriminatory terms and conditions for interconnection and the mutual exchange of traffic. Utah law requires the Commission to "encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state" and "encourage competition by facilitating the sale of essential telecommunications facilities and services on a reasonably unbundled basis."[1] To meet these legislative policies, the Commission should adopt the pro-competitive recommendations made by Bresnan in this proceeding. By doing so, the Commission can make it possible for the telephone customers in Vernal to enjoy the benefits of competition.

Bresnan appreciates this opportunity to respond to the arguments advanced by both UBET and the URTA in their initial briefs. In particular, Bresnan intends to reply to the following arguments advanced by UBET and the URTA : (1) the role of Federal law in this proceeding; (2) the UBET Motion to Dismiss; (3) UBET and the URTA's arguments with respect to indirect interconnection; (4) their arguments with respect to Bresnan's proposal to use bill and keep; (5) their arguments with regard to the charges for terminating calls outside Vernal or EAS calls; and (6) the URTA's recommendation that the Commission should accept UBET's proposal language absent a compelling reason not to.

II. The Role Of Federal Law In This Proceeding Should Be Limited

In the Report and Order rejecting UBET's Motion to Dismiss the Administrative Law Judge stated, "The Commission proceeds with this matter solely pursuant to state law. It does not proceed under any authority conferred by federal law. The relief that may be provided will

[1] Utah Code. Ann. § 54-8b-1.1(3) and (6).

be provided pursuant to state law."[2] Consistent with that Order, in its initial brief Bresnan set forth how its proposals and recommendations were consistent with, and supported fully by, Utah state law.

However, as the Commission is well aware, this is a case of first impression in Utah. Until this proceeding, every interconnection filing and dispute in this state invoked, at least in part, the 1996 Federal Telecommunications Act. As a result, the Commission and the parties have little specific state law precedent upon which to rely in this case.

Therefore, even though this proceeding is going forward purely under state law, Bresnan supports the notion articulated by the Division that the Commission can, if it wishes, reasonably look to prior cases that analyzed concepts or terms in the federal law that are identical or similar to concepts or terms in state law.[3] Clearly such authority would not be binding on the Commission, but again those decisions may nevertheless be helpful as the Commission interprets concepts or terms that appear in both state and federal law.

Having said that, Bresnan encourages the Commission to exercise caution when using decisions made under federal law to inform how the Commission might interpret state law in this case. The practical reality is that UBET has made it abundantly clear through its words and actions that it intends to do everything in its power to keep Bresnan out of this market or, at least, delay or obstruct Bresnan's entry to the maximum extent possible. All of UBET's proposals and recommendations seem clearly to be made with this objective in mind. Consistent with this strategy, UBET has made it very plain that it intends to appeal the decision of this Commission. Given this continued threat, Bresnan urges the Commission to be cautious about how federal law

[2] Report and Order, Docket No. 08-2476-02, November 17th, 2008, p. 9.

[3] *See* Post Hearing Memorandum of the Division of Public Utilities at p. 2.

is discussed in its Order and only use federal law and precedent as one of perhaps several data points in how identical or similar concepts or terms in state law might reasonably be understood or interpreted. By doing so, the Commission would certainly limit UBET's ability to claim error on appeal.

III. UBET's Motion To Dismiss Should Be Denied

In its Post-Hearing Brief, UBET renews its Motion to Dismiss this entire proceeding.[4] UBET repeats its prior arguments that there is no independent state law right for telecommunications corporations in Utah to interconnect and that federal law has preempted state law in this regard.[5] UBET's Motion should be again denied. As the Commission stated in its Report and Order denying UBET's Motion, "Utah law clearly requires Utah certified telecommunications corporations to allow interconnection of essential facilities and the mutual exchange of traffic between networks (as each of those terms are used in Utah law, independent of federal law definitions or interpretation of similar words or terms)."[6] The Commission further recognized that UBET's preemption argument goes directly counter to the plain language of the 1996 Telecommunications Act which specifically preserves state law under 47 U.S.C. § 251(d)(3).

Bresnan would request that the Commission, having fully considered this issue again and in view of the evidence presented at the hearing, reaffirm its decision to reject UBET's Motion to Dismiss. In support of this request, Bresnan would again reference not only the Commission's

[4] UBET Post Hearing Brief at p. 3-4.

[5] *Id.*

[6] Report and Order, Docket No. 08-2476-02, November 17th, 2008, p. 7.

Report and Order on Nov. 17, 2008 but also the Response to the Motion to Dismiss filed by Bresnan in this docket on Sept. 18, 2008.

IV. Indirect Interconnection Should Be Permitted

UBET and the URTA both oppose indirect interconnection. However, their arguments completely ignore three critical parts of Utah law. First, the Commission's rules specifically allow the carrier requesting interconnection to select the desired point of interconnection.[7] Contrary to the arguments offered by UBET and the URTA, the plain language of that rule does not require or specify that the point of interconnection must be in the service territory of the incumbent provider.[8] Also, the rule on its face does not prohibit interconnection through third parties.

Second, the Commission's rules only limit the desired point of interconnection to one that is "technically feasible."[9] Nowhere does either UBET or the URTA dispute the fact that indirect interconnection is technically feasible.

Third, the statute states, "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."[10] The plain language of that statute talks about who has to interconnect, not how that interconnection is to be accomplished. The how is governed by Commission rules and those

[7] Utah Admin. Code R746-348-3(A)(1) ("A local exchange service provider requesting interconnection with an incumbent local exchange carrier shall identify a desired point of interconnection.").

[8] *See, e.g.*, UBET Post-Hearing Brief at p. 7 and URTA Initial Brief at p. 5.

[9] Utah Admin. Code R746-348-3(A) ("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.").

[10] Utah Code Ann. § 54-8b-2.2(1)(a)(i).

rules state that the party requesting interconnection has the option to interconnect at any technically feasible point.

Additionally, indirect interconnection does not "subsidize" Bresnan's entry into the Vernal market as alleged by UBET.[11] First, UBET alleges that indirect interconnection will require it to establish new and separate trunk groups.[12] This argument is belied by UBET's own brief. As UBET correctly explains on page 6 of its Initial Brief, "An indirect connection through a third party tandem typically handles traffic to and from all carriers at the tandem on a single trunk group. In an indirect connection, the Tandem provider, such as Qwest or UFN, and the directly connecting party, Bresnan or UBET, would determine the size of the trunk group based on the total amount of traffic from all carriers." (emphasis added) UBET's statement is perfectly consistent with Mr. Harris' testimony that there is no technical reason why Bresnan and UBET cannot use trunk groups established primarily for toll traffic to also route local traffic until traffic volumes justify the expense of a direct connection.[13] By interconnecting indirectly using trunk groups that are either existing or need to be established anyway for other business purposes, both parties defer the costs of a direct connection until the circumstances warrant those expenses.

Further, UBET's unsupported allegation that establishing these arrangements with Qwest or UFN is difficult or time consuming should be rejected.[14] As Mr. Harris explained, these sorts of indirect interconnection arrangements are established every day all over the country.[15] In

[11] UBET Post-Hearing Brief at p. 8-12.

[12] *Id.* at p. 11.

[13] Transcript of Proceedings ("TR") at p. 623, l. 4 to p. 624., l. 7.

[14] UBET Post-Hearing Brief at p. 11.

[15] TR at p. 622, l. 6-7.

Utah, Qwest has an approved Statement of Generally Available Terms and Conditions that is fully approved by the Commission. This SGAT establishes all of the necessary terms and conditions to accomplish indirect interconnection through the Qwest tandem. There simply is no evidence cited by UBET that implementing these industry-standard agreements would be difficult or time consuming.

Bresnan does not deny that indirect interconnection may be less expensive than direct interconnection for Bresnan. But, if indirect interconnection is also less expensive for UBET there is no "subsidy" for competitive entry. The only direct evidence of the cost of interconnection was offered in Exhibit B-2 which documents that for both parties, indirect is less expensive than direct until traffic volumes increase to levels sufficient to support a direct connection. In response, neither UBET nor the URTA have cited a single piece of substantive cost information on the record in this case that quantifies or documents how indirect interconnection might be more expensive for UBET than direct interconnection. Based on this, if interconnection can be done easier and cheaper – why should the incumbent be allowed to erect a barrier to entry by making the new entrant spend money for no good reason.

Finally, as Mr. Harris explained, there is adequate capacity on the trunk groups UBET has to ensure that traffic is appropriately routed given that the traffic on those trunk groups will decline once Bresnan enters the market.[16] Further, the co-mingling of intrastate toll and local traffic on these trunk groups will not impact UBET's NECA settlements.[17] Those settlements would only be impacted if the trunk groups were carrying interstate toll traffic.[18] Therefore, there is no harm to UBET from indirect interconnection arrangements being established until

[16] TR at p. 624, l. 8 – p. 629, l. 17.

[17] *Id.*

[18] *Id.*

traffic volumes justify a direct connection. UBET's attempt to impose unnecessary costs on Bresnan are an unreasonable barrier to competitive entry and, therefore, contrary to Utah law and policy.

V. Bill And Keep Should Be Established Where Traffic In Balance

UBET argues that a "bill and keep" arrangement would "expose a large number of minutes to free compensation."[19] This argument reflects a flawed way to look at this issue. It is Bresnan's expectation, based on our experience in every other market in which we operate, that the traffic exchanged between Bresnan and UBET will be roughly in balance.[20] If traffic is not in balance, it is impossible to predict whether Bresnan or UBET will have a greater percentage of terminating minutes. Indeed, the party with the higher number of terminating minutes could change from month to month. Therefore, there is no reason to expend the time and effort to bill for reciprocal compensation when, over time, such billings are likely to roughly cancel out.

The vast majority of UBET's arguments opposing bill and keep focus on speculation about what might happen if one or more of the wireless carriers with whom UBET interconnects wants to incorporate this provision into their agreement.[21] However, this concern is raised with absolutely no evidentiary support. There is no evidence cited that would inform the Commission of how many wireless carriers have the interest or ability to modify the terms of their existing agreements. There is no evidence cited of whether the traffic exchanged with these different carriers is generally in balance or generally out of balance. There is no evidence cited about what the net effect on UBET's revenues would be if one or more wireless agreements were

[19] UBET Post-Hearing Brief at p. 16.

[20] TR at p. 631, l. 22 to 632, l. 3.

[21] UBET Post-Hearing Brief at p. 16-17.

modified or what the implications to UBET might be if there was some minor change in their revenues. Given the complete dearth of evidence on these issues, UBET's arguments are mere unsupported speculation and should be disregarded accordingly.

VI. A Flat Rate Charge For EAS Traffic Cannot Be Adopted

UBET states, "Bresnan seeks to avoid payment for use of the UBET EAS network even though it seeks the ability for its customers to be able to call end users with telephone numbers rated in non-Vernal exchanges."[22] There are several critical flaws in this statement. As an initial matter, there is simply no such thing as an "EAS network." In discovery, UBET admitted, "UBET does not have discrete trunk groups for EAS traffic."[23] But more importantly, Bresnan is not seeking to avoid paying reasonable termination rates when UBET terminates a local call in a non-Vernal exchange.

Having said that, Bresnan does have three very specific concerns with UBET's proposed EAS rate. First, Bresnan is adamantly opposed to any flat-rate charge for terminating calls outside of the Vernal exchange. Such a proposal, if adopted, would represent a substantial barrier to competition and run directly counter to the Commission's mandate to promote competition in Utah. In particular, a flat-rate charge for terminating calls outside Vernal would dramatically over-compensate UBET for the services being provided and create an imbalanced competitive playing field.

Second, when the Commission considers the appropriate usage-based rate to charge, the Commission should consider the rate Bresnan is already paying for the initial termination into

[22] UBET Post-Hearing Brief at p. 19.

[23] *See* Exhibit B-4 at p. 4 (UBET response to Bresnan Data Request 2.2(b)).

Vernal before the call is then routed to one of the other areas. If the rate for the initial termination into Vernal is set as such a level as to fully compensate UBET regardless of whether the call ends in Vernal or ends in one of the other areas, no additional charge is warranted.

Third, if the Commission believes an additional charge is appropriate, the highest nondiscriminatory rate the Commission could approve for termination outside of the Vernal exchange is $0.002 per minute. In both the UBET Wireless and Western Wireless interconnection agreements, the incremental termination charge for traffic going outside the Vernal exchange is $0.002 per minute.[24] That rate was agreed to by UBET and, as such, is presumably fully compensatory for UBET's costs associated with terminating such traffic. It would be unlawful discrimination to charge Bresnan a higher rate for that same service. With regard to UBET's final point on this issue, Bresnan of course understands that for traffic going from UBET to Bresnan there should be no incremental charge because Bresnan's footprint is smaller than the footprint of the wireless carriers.[25] That is why an incremental charge should only be assessed on Bresnan calls to UBET customers and not in both directions as provided for in the wireless agreements.

For all of these reasons, Utah law providing that the Commission should both encourage competition and prohibit discrimination provides all of the legal and policy basis necessary to reject UBET's proposed rate.

[24] *See* Exhibits B-6 at Section 4.2 and DPU-3 at Section 4.2 on p. 12.

[25] UBET Post-Hearing Brief at p. 19.

VII. UBET's Proposed Language Should Not Be Adopted By Default

The URTA argues that, "The Commission should accept UBTA-UBET's proposed language to protect UBTA-UBET unless there are significant public interest reasons not to do so."[26] This position is contrary to Utah law and must be rejected. Further, this issue is now basically moot in light of the very limited range of issues before the Commission.

The Commission is legally obligated to take actions that are just, reasonable, and in the public interest.[27] There is no law cited by the URTA that suggests that in this proceeding one party's views should somehow take precedence over any other party's views. Frankly, the URTA cites no such law because it does not exist. There simply is no standard in the statutes or the Commission rules that suggests that one party's positions must be adopted unless there are "significant" public interest reasons not to. To the contrary, if the Commission concludes that adopting one party's recommendations is even just a little bit more in the public interest than adopting other positions, the Commission must adopt that party's recommendations.

Having said that, this issue is basically moot at this point. There are only a small number of issues still in dispute and all of those issues are very important to Bresnan and Bresnan's ability to compete in Vernal. With the concession made by Bresnan in its Initial Brief with respect to the information exchanged if the Commission orders indirect interconnection, all of the types of issues discussed in the URTA's brief and Mr. Meredith's testimony are no longer in dispute.

[26] URTA Initial Brief at p. 8.

[27] *See* Utah Code Ann. § 54-4-2.

VIII. CONCLUSION

Bresnan strongly desires to vigorously compete for customers in Vernal and provide customers – those who switch and those who stay with UBET – with all of the benefits of such competition. But whether and the extent to which Bresnan can compete on a level playing field is largely a function of what the Commission does in this proceeding. The arguments and proposals advanced by UBET and the URTA are inconsistent with the principles of competitive neutrality and balance. Rather, their recommendations are designed to do everything possible to keep Bresnan from offering competitive telephone service to customers in Vernal and allow UBET to remain the monopoly provider. Since this result would be directly contrary to Utah law and policy, Bresnan respectfully requests that the Commission reject the language proposed by UBET and URTA with respect to the Essential Facilities Agreement now before the Commission.

DATED this 9th day of April, 2009.

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CERTIFICATE OF MAILING

I hereby certify that on this 9th day of April, 2009, I caused to be emailed a true and correct copy of the foregoing Bresnan Broadband of Utah, LLC's Reply Brief to the following:

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