

Stanley K. Stoll (A3960)
Kira M. Slawson (7081)
Blackburn & Stoll, LC
257 East 200 South, Suite 800
Salt Lake City, Utah 84111
Tel: 801/521-7900
Fax: 801/521-7965
Attorneys for UBTA-UBET
Communications, Inc.

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition of Brenan Broadband of Utah, LLC, to Resolve Dispute Over Interconnection of Essential Facilities and for Arbitration to Resolve Issues Relating to Interconnection Agreement with UBTA-UBET Communications, Inc.	UBTA-UBET COMMUNICATIONS, INC.'S PETITION FOR RECONSIDERATION AND REHEARING Docket No. 08-2476-02 June 22, 2009
--	--

UBTA-UBET Communications, Inc. ("UBET"), pursuant to Utah Code Ann. § 63G-4-301, Utah Code Ann. § 54-7-15, and Utah Administrative Code R746-100-11.F hereby petitions the Public Service Commission ("Commission") to reconsider the order the Commission issued in this matter on May 21, 2009 ("Order"), and review and rehear the issues enumerated below.

I. INTRODUCTION

On January 27-29, 2009, the Commission held hearings on Bresnan's Petition to Resolve Dispute Over Interconnection of Essential Facilities and for Arbitration to Resolve Issues Relating to Interconnection Agreement with UBET.

At the hearing the parties presented evidence and their positions on numerous disputed issues in the proposed Essential Facilities Agreement ("Agreement"). At the conclusion of the hearing, the ALJ asked the parties to work together to 1) narrow the open issues relating to the Agreement; 2) provide an Open Issues Matrix to identify the open issues between the parties related to the Agreement; and 3) provide a joint form of Agreement that identified the open issues with competing language inserted as necessary.

After significant negotiation between the parties, the parties reduced the open issues to six disputed terms. The open/unresolved issues that were submitted to the Commission were: 1) Whether UBET has an obligation to interconnect with Bresnan as a VoIP provider; 2) Indirect v. Direct Connection; 3) Bill and Keep v. Reciprocal Compensation; 4) the Reciprocal Compensation Rate; 5) Additional Charge for EAS Access; and 6) Language Reserving UBET's Appeal Rights. UBET and Bresnan provided post-hearing briefs based on the evidence presented on these six issues. The Division of Public Utilities ("Division") and the Utah Rural Telecom Association ("URTA") also submitted post-hearing briefs on the open issues.

After reciting the parties' positions, the Commission ruled as follows:

1) Bresnan has the right to interconnect with UBET; 2) UBET is required to *indirectly* interconnect with Bresnan at Qwest's Provo Tandem (and adopted Bresnan's proposed 3.1.2 and 3.1.6 of the Agreement); 3) Bresnan and UBET are initially subject to reciprocal compensation and not bill and keep under the Agreement; 4) the reciprocal compensation rate would be \$.01 per minute of use; 5) Bresnan is not required to pay a flat-rate charge for use of UBET's EAS network; 6) Bresnan is not required to pay any extra charge for terminating its customers' inter-exchange calls originating within the Vernal exchange and terminating to other exchanges within the UBET serving area; and 7) the Commission declined to include language concerning UBET's appeal rights in the Agreement.

UBET requests that the Commission reconsider and reverse its decisions on: 1) whether UBET is obligated to interconnect to Bresnan as a VoIP provider; 2) whether UBET is required to indirectly interconnect with Bresnan at the Qwest Provo Tandem; 3) whether Bresnan would be required to pay a flat-rate charge for use of UBET's EAS network; and 4) whether UBET can charge Bresnan any additional charge to terminate calls outside of the Vernal exchange.

Support for this Petition for Reconsideration of the Commission's decisions on these four issues is as follows:

II. ARGUMENT

A. Interconnection Obligation

The Commission determined that UBET is obligated to interconnect its essential facilities with Bresnan under state law notwithstanding the fact that Bresnan will be providing VoIP services only. The Commission concluded that state law is not preempted by the Telecommunications Act; that UBET failed to adequately explain to the Commission how federal law preempts state laws in this matter; and that Bresnan has a right to petition the Commission for a resolution of a “dispute over interconnection of essential facilities.”¹ UBET seeks reconsideration and rehearing of these conclusions.

There is no dispute that Bresnan will be using VoIP technology in its provisioning of voice service in Vernal.² The FCC has not yet determined whether VoIP service is a telecommunications service or an information service, and that decision is under the jurisdiction of the FCC. In fact, the FCC is currently considering that issue in the Vermont Telephone Petition³. If the FCC determines that VoIP service is an information service, the Utah Commission’s regulation of Bresnan’s VoIP service would be preempted by federal law.⁴ UBET’s position is, and has been, that the state does not have jurisdiction to determine whether Bresnan’s VoIP service is a telecommunications service or an information service, and thus the determination of whether UBET has an obligation to interconnect with Bresnan’s VoIP service is a question of federal law.

This position was affirmed by the Utah Public Service Commission when it declined to order UBTA-UBET to mediate an interconnection agreement with Bresnan. The Commission in

¹ *Order*, p.4.

² *Transcript (T)*, p. 46.

³ *See Vermont Telephone Petition*, DA 08-08-916

⁴ 47 C.F.R. §64.702(a); *see generally Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, 290 F.Supp. 993, 998-999 (D. Minn. 203)

its letter by Sandy Mooy⁵ determined that Bresnan's position is that IP enabled services are not public telecommunications services as defined by Utah Code Annotated §54-8b-2(16), and thus are not within the state's authority or jurisdiction.

The Commission further found that while the Commission granted Bresnan a state certificate to provide public telecommunications services under state authority and definitions, the service that Bresnan will provide, and for which it seeks an interconnection agreement, is not a public telecommunications service under Utah law, the provision of which would be permitted pursuant to the state granted certificate. In granting Bresnan's Certificate of Public Convenience and Necessity, the Commission merely granted Bresnan authority to provide telecommunications services; it made no determination that VoIP Service, the service that Bresnan seeks to provide, is a telecommunications service. The Commission determined that Bresnan's request for interconnection for the VoIP services it intends to provide would require the Commission to proceed under federal law in order to determine whether UBTA-UBET has an interconnection obligation with Bresnan. The Commission declined to do so citing the *Vermont Telephone Petition ("VTel Petition")*,⁶ and stating that the Commission would not act to preempt or compete with the FCC to resolve these issues.⁷

In denying UBET's Motion to dismiss, the Commission decided it could proceed with an arbitration regarding interconnection of essential facilities under state law only. The Commission proceeded to resolve the dispute over interconnection of essential facilities between Bresnan and UBET pursuant to Utah Code Annotated §54-8b-2.2(1)(e) and R746-348. However, even the Utah Rules refer to and require compliance with, *inter alia*, 47 USC Sections 251 and 252 of the Federal Telecommunications Act of 1996. Moreover in the *Vonage Order*, the FCC preempted state regulation of Vonage's VoIP service, and stated that "to the extent

⁵ See *Commission Letter dated July 3, 2008 ("Commission's Letter")*

⁶ See *Vermont Telephone Petition, DA 08-08-916 at 1-8.*

⁷ *Commission's Letter*, p. 2

other entities, such as cable companies, provide VoIP services, we would preempt state regulation to an extent comparable to what we have done in this Order.”⁸ While the *Vonage Order* leaves open the question of federal preemption of fixed VoIP, the FCC stated that it “would” preempt state regulation of cable companies and other VoIP services as it had done for Vonage’s nomadic service. This indicates the likelihood of a federal preemption of this matter if and when the matter were raised at the federal level.

The fact that Utah’s Public Service Commission has issued Bresnan a certificate to operate as a CLEC is not controlling on the issue of whether VoIP service providers are telecommunications service providers. As acknowledged by this Commission in its letter dated July 3, 2008 as set forth in detail above, Bresnan’s status as a telecommunications service provider is an issue of federal law, not state law, and should be determined by the FCC. In fact, the very issue of whether a local exchange carrier is obligated to interconnect with a VoIP provider is currently pending before the FCC in the *VTel Petition*.

In the *VTel Petition* the FCC is going to determine (1) whether only telecommunications carriers are entitled to interconnection with local exchange carriers pursuant to sections 251 and 252; (2) whether a VoIP provider is entitled to interconnection pursuant to sections 251 and 252 when, in separate proceedings, that provider has taken a position that it is not a telecommunications carrier; and (3) whether Comcast Phone of Vermont, LLC, as a VoIP provider, is a telecommunications carrier and, therefore, entitled to interconnection pursuant to Sections 251 and 252.⁹ If the FCC determines that VoIP providers provide information services, and are thus not entitled to interconnection, a state rule requiring interconnection would, in fact, be preempted. Therefore, UBET requests reconsideration and rehearing on this issue.

⁸ 19 F.C.C.R. 22404 at ¶46 (2004).

⁹ See *Vermont Telephone Petition, DA 08-08-916 at 1-8*.

B. Indirect Interconnection

Bresnan petitioned the Commission to resolve a dispute over the interconnection of essential facilities pursuant to Utah Code Ann. § 54-8b-2.2(1)(a)(i). U.C.A. §54-8b-2.2(1)(a)(i) provides:

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.

According to the Rules promulgated by the Commission, R746-348-3:

A. Points of Interconnection—Incumbent local exchange carriers shall allow any other public telecommunications service provider to interconnect its network at any technically feasible point, to provide transmission and routing of public telecommunications services.

1. A local exchange service provider requesting interconnection with an incumbent local exchange carrier shall identify a *desired* point of interconnection.

Bresnan sought indirect interconnection with UBET at the Qwest Provo Tandem. The Commission concluded that UBET is required to indirectly interconnect with Bresnan at the Qwest Provo tandem.¹⁰ In reaching this conclusion, the Commission erroneously interpreted the Utah statutes and rules.

The Commission concluded that Bresnan is permitted, under R746-348-3 to mandate the point of interconnection. The Commission concluded that “language of the statute¹¹ is clear. It states simply that Bresnan—not UBTA-UBET, may identify a ‘desired point of interconnection’ with UBET’s essential facilities ‘at any technically feasible point’—including the Provo tandem.”¹² The Commission indicates it is interpreting the rule according to its plain language.¹³ However, the plain language provides that Bresnan shall identify its “desired” point of interconnection. If the legislature had intended that the competitive local exchange carrier was

¹⁰ *Order*, p. 21.

¹¹ The Commission states “statute,” but is actually referring to the language of the “rule”.

¹² *Order*, p. 8.

¹³ *Id.*

entitled to mandate the point of interconnection, the plainest language that the legislature could have used would have been “a local exchange service provider requesting interconnection with an incumbent local exchange carrier shall identify *the* (rather than “a desired”) point of interconnection.”

Based on the Commission's interpretation of R746-348-3, the Commission concludes that UBET is required to connect its essential facilities at the Provo tandem. In this case, as demonstrated below, this leads to the absurd result that UBET is required to interconnect its “essential facilities” at a location where UBET has no facilities. Under this interpretation, a CLEC could request interconnection with an ILEC at any place in the world, without consideration of any other factors, such as economic factors, so long as it were “technically feasible.” This result cannot be what the Commission intended. UBET requests reconsideration and rehearing on this issue.

1. UBET Does Not Have Essential Facilities at the Qwest Provo Tandem.

In determining whether Utah statutes and rules permit Bresnan to require UBET to indirectly interconnect its essential facilities at the Provo tandem, the Commission stated that “the question is twofold: if UBTA-UBET has essential facilities at the Provo tandem and if indirect interconnection is technically feasible.”¹⁴ The ALJ erred in his conclusion on both of those questions. The ALJ erroneously concluded that “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, specifically, to carry toll-traffic at the Provo tandem.”¹⁵ This conclusion is not reasonably supported by the evidence. In fact, the undisputed evidence is that UBET has facilities to Whiskey Springs, where its facilities

¹⁴ *Order*, p.8.

¹⁵ *Id.*

meet Qwest's facilities, not to the Provo tandem.¹⁶ There was absolutely no evidence presented during the three day hearing that indicated that UBET owns, controls, or maintains facilities at the Provo tandem.¹⁷ In this case, where the Commission is considering a proceeding relating to interconnection of essential facilities (not an interconnection agreement subject to, and governed by the Federal Telecommunications Act), the primary question that must be answered is whether the ILEC has essential facilities at the Qwest tandem. In this case, the answer to that question is unequivocally "no". Just because traffic that originates on UBET's network ultimately may end up going through the Qwest Provo tandem, is not evidence that UBET has essential facilities at the Provo tandem. In following this reasoning, we are left to conclude that UBET has essential facilities at every location in the world where a third party's trunks carry traffic originated by UBET's customers— this example shows *reductio ad absurdum* the error in the Commission's determination. In this case, the undisputed evidence is that UBET does not have any facilities at the Qwest Provo Tandem. Therefore, pursuant to U.C.A. §54-8b-2.2(1)(a)(i), the Commission cannot require UBET to interconnect with Bresnan at the Provo tandem. The Division also contended that interconnection must take place at a location where the ILEC has facilities. "A CLEC cannot require interconnection where the ILEC has no facilities."¹⁸ But the Commission rejected this on the basis that the Division had provided no support for this contention. UBET suggests that the support is in the plain language of the statute, U.C.A. §54-8b-2.2(1)(a)(i), that provides that the Commission may only require a telecommunications provider to interconnect *its* essential facilities with another telecommunications provider. An ILEC cannot interconnect its facilities at a point where it has no facilities. UBET seeks reconsideration and rehearing on this issue.

¹⁶ *Transcript*, at ps.191 L.20; 192 L.9; 246, Ls 12-25; 247 Ls 1-3; 250 Ls 11-21.

¹⁷ In each and every instance in the transcript where "essential facilities" are referred to, there is no testimony that indicates that UBET has essential facilities at the Provo tandem. *See T. at ps. 56, 191, 192, 207, 209, 246, 259, 478, 479, 608.*

¹⁸ DPU Post Hearing Reply Brief, p. 2.

Additionally, UBET can only be required to interconnect its “essential facilities”. Indirect interconnection is not an essential facility as defined by the Utah Code. U.C.A. Section 54-8b-2(5) provides:

“Essential facility or service” means any portion, component, or function of the network or service offered by a provider of a local exchange service:

(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.

There was no evidence presented at hearing that indirect interconnection is an essential facility as set forth under the terms of the statute. No one testified that indirect interconnection cannot be reasonably duplicated, or that it is necessary for Bresnan to provide public telecommunications services. In fact, there is no dispute that Bresnan is capable of providing telecommunications services through a direct connection with Bresnan.¹⁹ Additionally, in light of the Qwest Letter filed with the Commission on June 18, 2009 (“Qwest Letter”), indirect interconnection as directed by the Commission is not an economic alternative. Rather, as evidenced in the hearing record, direct connection is likely the most economic alternative. Indirect interconnection is not an essential facility, and UBET cannot be required to interconnect in such manner. UBET requests reconsideration and rehearing on this issue.

2. Indirect Interconnection at the Qwest Provo Tandem Is Not Technically Feasible.

As set forth above, the Commission concluded that the second question that must be answered in determining whether to permit indirect interconnection at the Provo Tandem is whether indirect interconnection at the Provo tandem is technically feasible.²⁰ The Commission erroneously concludes that it is technically feasible for UBET to interconnect with Bresnan at the

¹⁹ See generally the testimony of Alex Harris, Transcript, ps. 8-169.

²⁰ Order, p. 8

Provo tandem.²¹ In support of this conclusion, the ALJ relies on the testimony of Mr. Meredith. The ALJ finds that Mr. Meredith “admitted on cross-examination that the indirect interconnection requested by Bresnan was technically feasible. The Commission cites to “Transcript, p. 9, ll.7-25, p 210-218.”²² While on the stand, under cross examination (page 210 of the Transcript), Mr. Meredith admits that under the hypothetical example provided by Mr. Nelson, it would be “technically feasible” to indirectly interconnect. However, Mr. Nelson’s hypothetical example assumed that the only actions necessary to direct traffic over a trunk group to the tandem were translations that would be made by Bresnan and UBET. There was no discussion of the third party tandem provider’s technical capabilities. Additionally, there is no evidence in the record that the third party tandem providers have the technical capabilities to provide local transit service for the UBET service territory, and as seen in the Qwest letter, Qwest, in fact, does not have such technical capabilities. Moreover, Mr. Meredith qualified his admission and stated “I don’t agree with the assumption that you can physically interconnect anywhere.”²³

The Commission also relies on the fact that the interconnection agreement between Union and UBET submitted by the Division as DPU 2, already provided for indirect interconnection,²⁴ therefore demonstrating, concludes the ALJ, that indirect interconnection is technically feasible. What the ALJ overlooks, however, is that the Union Interconnection Agreement does not define an indirect connection as a connection via a third party tandem,²⁵ and the Union Agreement is an interconnection agreement governed by Federal law, **not** an Essential Facilities Agreement provided for solely under State law²⁶. Moreover, the Union

²¹ *Order*, p. 9.

²² *Order*, p. 9. The Commission citation to the record appears to be inaccurate. However, in the Transcript, p. 210, lns. 13-24, Mr. Meredith discusses technical feasibility.

²³ *Transcript*, p. 210, lns. 17-24.

²⁴ *Order*, p. 9

²⁵ DPU, Exhibit 2, Section 3.4.1 Indirect Network Interconnection. Either party’s traffic may be transited through one or more intermediaries for interconnection with the other Party’s system.

²⁶ Additionally, the FCC has made it clear that if a company wants to adopt an interconnection agreement, it must take all terms in such agreement. It is not at liberty to pick and choose, which is what the Commission is attempting to do here.

Interconnection Agreement did not provide for indirect interconnection with Union at the Provo tandem.²⁷ While it may have contemplated indirect interconnection in some fashion, the indirect connection anticipated in the Union agreement required the physical interconnection to be within the UBET service territory not some third Party location.²⁸ Additionally, the evidence presented indicates that Union and UBET have never indirectly interconnected.²⁹

The Commission also relies on Mr. Harris' testimony that it would be technically feasible to use the existing Qwest trunk group for Bresnan's local and EAS traffic.³⁰ It is undisputed that the trunk group over which UBET's traffic is carried to the Provo tandem is a Qwest toll trunk.³¹ Mr. Meredith and Ms. Wimer testified that the nature of the trunks would prohibit local traffic from being carried on those facilities.³² Nevertheless, Mr. Harris testified that it would be a "simple matter of updated the translations in the switch" and that the process for indirect interconnection was "easy and quick, and inexpensive for both parties."³³ However, closer inspection of Mr. Harris' testimony reveals that he doesn't know that the process for indirect interconnection in this case will be easy and quick and matter of a few translations. In fact, what Mr. Harris states is:

"the typical reason [for beginning with indirect interconnection] is because it's easy, and quick, and inexpensive for both parties. Because if...the general assumption is...and I expect it's true in this case especially as well. Is that you have existing trunk groups already established. They have available capacity. So the only expense is the transiting charge."³⁴

It is clear from Mr. Harris' testimony that he has no evidence that in this particular case, the indirect interconnection at the Provo tandem will be quick, easy or inexpensive for the parties.

²⁷ DPU, Exhibit 2, p. 5; *Transcript*, p. 105-106.

²⁸ DPU Exhibit 2, at Section 3.5.1

²⁹ *Transcript*, p 581-582.

³⁰ *Order*, p. 14.

³¹ *Transcript*, p. 353, Lns. 2-5.

³² *Transcript*, p. 182, Lns 7-9, p. 353 Lns 2-5.

³³ *Transcript*, p. 88, Lns. 5-18.

³⁴ *Transcript*, p. 88, Lns. 17-24.

Additionally, despite the Commission's classification of Ms. Wimer's testimony³⁵, Ms. Wimer in fact testified that indirect interconnection at the Provo tandem was not technically feasible for several reasons. While Ms. Wimer indicated that Mr. Harris was technically correct that translations could permit one to add traffic on the Qwest trunk groups,³⁶ Ms. Wimer added that in order to make the indirect interconnection work, you would also have to:

"have the arrangements and agreements on the other parties to make sure you have all of the compensation and business arrangements set up to do that, and that it matches the third party's arrangements in their own switch. So just saying technically do the translations, Qwest or UFN can say, no. So we don't have, necessarily, control over adding local traffic to there... And then, there's additional complications."

In fact, Ms. Wimer's testimony is wholly supported by the Qwest Letter to the Commission. Qwest indicates that indirect interconnection between Bresnan and UBET at the Qwest Provo tandem is not presently possible. Qwest indicates that:

Qwest does not presently offer local transit service outside of its service territory. Accordingly, Qwest's network and billing systems do not presently have the capability to process and bill for local transit service for traffic that originates and terminated in local calling areas outside of Qwest's service territory....For Qwest to be able to provide a local transit service involving traffic that both originates and terminated in local calling areas outside of Qwest's service territory would require significant and costly modifications to Qwest's systems....The changes to Qwest's systems described above would be very expensive and would likely take a significant amount of time to implement.

Because the indirect interconnection at the Provo tandem is not technically feasible, UBET is unable to comply with the Commission's order requiring indirect interconnection at the Qwest Provo tandem and seeks reconsideration and rehearing on this issue.

C. The Commission's Action Is in the Nature of a Rulemaking Outside of the Utah Administrative Rulemaking Act.

The Commission's interpretation of U.C. A. Section 54-8b-2.2(1) amount to a rulemaking without the benefit of the required rulemaking proceedings of the Utah Administrative

³⁵ *Order*, p. 14.

³⁶ *Transcript*, p. 353, Lns. 6-13

Rulemaking Act (“ARA”) of U.C.A. Section 63G-3-101 *et.seq.*. Pursuant to the ARA, a rulemaking proceeding is required by law when an agency engages in action that 1) authorized, required, or prohibits an action; 2) provides or prohibits a material benefit; 3) applies to a class of persons...; and 4) is explicitly or implicitly authorized by statute.³⁷ The Agency is also required to engage in the rulemaking process when an agency issues a written interpretation of a state or federal legal mandate.³⁸

In this case a rulemaking proceeding is required because: 1) the Commission’s decision requires UBET to interconnect with Bresnan at a location where UBET has no existing facilities (essential or otherwise); 2) the Commission’s determination provides a material benefit to Bresnan, and all CLEC’s who will seek to indirectly interconnect in the future, in that Bresnan (and all CLEC’s) can designate any point of interconnection of essential facilities whether an ILEC has facilities at that designated point or not; 3) the conclusion of the Commission in this case will apply to a class of persons (all CLEC’s who request essential facilities, and all ILEC’s to whom such request is made); and 4) the Commission’s decision is implicitly or explicitly authorized by U.C.A. Section 54-8b-2.2(1) because the Commission based its decision on that provision of law.

Under the terms of the ARA, the Commission action in this case requires a rulemaking under the terms and provisions of the ARA, and in the absence of such rulemaking proceeding, the Commission’s actions cannot stand.

D. EAS Compensation

UBET contends that Bresnan’s customers should be charged for their use of UBET’s extended area service (EAS) network at the same rate that UBET’s customers are required by Commission Order to pay. The Commission determined that a flat-rate charge would not be appropriate and declined to impose any additional charge for Bresnan’s use of UBET’s EAS

³⁷ U.C.A. §63G-3-201(2).

³⁸ U.C.A. §63G-3-201(3)

network. The Commission also determined that charging EAS to Bresnan would be anticompetitive because it would give UBET knowledge of the number of customers Bresnan has. The Commission erred in failing to consider the competitive disadvantage to UBET if it is required to pass an EAS cost on to its customers, where Bresnan customers, using the exact same facilities, would not be required to pay for that access. If UBET's customers are required to pay for access to the EAS network, Bresnan's customers should bear that cost as well.

The Commission concludes that the EAS rate is a retail rate that has nothing to do with a wholesale rate to be charged to Bresnan.³⁹ However, the \$1.80 per customer per month EAS charge is the only reasonable and consistent option available to the Commission for UBET to deliver Bresnan originated calls in Vernal to exchanges throughout the Basin. This charge has been approved by the Commission, using the Division's Cost Study, for exactly this purpose and comports with the specific cost standard established for EAS charges – which follow established economic costing principles.⁴⁰ Contrary to the assertions by Bresnan and the Division, Commission rules require that EAS rate development reflect the incremental cost of providing EAS network services and are prohibited from incorporating retail "toll" revenue into the calculation.⁴¹

The \$1.80 flat rate charge is an approved cost recovery rate and does not have any retail cost mark-up. The Commission's previous establishment of this rate for the Vernal exchange shows the flat rate cost recovery for EAS network costs is appropriate and reasonable compensation in providing Basin-wide calling from Vernal.

The Commission finds that a flat rate charge to Bresnan would violate U.C.A. Section 54-89b-2.2(b)(ii) which mandates that UBET "shall permit access to and interconnection with its essential facilities on terms and conditions, *including price*, no less favorable than those the

³⁹ Division Brief p. 7; Bresnan Brief p. 11.

⁴⁰ R746-347-4(B)

⁴¹ R748-347-4(B) and (D).

telecommunications corporation provides to itself and its affiliates. The Commission erred in this conclusion. UBET's own customers are subject to the flat rate EAS charge. While the interconnection agreement between UBET and its wireless company does not include the EAS charge, that interconnection agreement is not an essential facilities agreement, and the terms and conditions are completely different. For example, the wireless carriers' networks are far more expansive than the Vernal exchange and therefore, cost to exchange traffic Basin-wide is shared by both carriers. The Bresnan network is limited to an area smaller than the Vernal exchange and thus, the cost to exchange traffic Basin-wide is not shared by both carriers. The proposed EAS charge is precisely designed to compensate for the cost of traffic throughout the Basin. Another important distinction is that the Interconnection Agreement with UBET's wireless company was developed under federal law and federal regulation and is distinguishable from Bresnan because under federal law, the local calling area for wireless/wireline traffic is the MTA; under state law, the local calling area for landline calls (which Bresnan calls would be) is the exchange. Therefore, calls from Vernal to the exchanges outside of Vernal in the UBET service territory are inter-exchange. The additional \$0.002 charged for host-remote switching for wireless/wireline is cost-based. Similarly, the charges for EAS are cost-based, but are also predicated on Access Revenue loss due to the implementation of an EAS. The EAS calls are still inter-exchange calls; the EAS charge is a surrogate for the access charges that would otherwise apply. If the Commission allows Bresnan's customers to make interexchange calls without paying either the EAS or other additional charges, the Commission has essentially allowed them to make long-distance calls for free. UBET is entitled to either charge additional amounts for those interexchange calls in the form of an EAS or other charge, or the calls need to be carried by an IXC from which UBET would be entitled to access charges. UBET requests reconsideration and rehearing on these issues.

VI. CONCLUSION

The Commission erred in denying UBET's motion to dismiss. The Commission further erred in concluding that UBET has essential facilities at the Provo Tandem; determining that a CLEC gets to determine the point of interconnection; and that it would be technically feasible to for the parties to indirectly interconnect at the Provo tandem. Finally, the Commission erred in denying any additional compensation for Bresnan's use of UBET's EAS network. UBET requests that the Commission review, reconsider and reverse its previous decisions on these issues.

Dated this 22nd day of June, 2009.

BLACKBURN & STOLL, LC

Kira M. Slawson
Attorney for UBTA-UBET Communications, Inc.

CERTIFICATE OF MAILING

I hereby certify that on this 22nd day of June, 2009, I caused to be emailed a true and correct copy of the foregoing UBTA-UBET Communications, Inc.'s Petition for Reconsideration and Rehearing to the following:

Stephen F. Mecham
sfmecham@cnmlaw.com

Michael Ginsberg
mginsberg@utah.gov

Patricia Schmid
pschmid@utah.gov

Paul Proctor
pproctor@utah.gov

Bill Duncan
wduncan@utah.gov

Eric Orton
eorton@utah.gov

James A. Holtkamp
jholtkamp@hollandhart.com

Thorvald A. Nelson
tnelson@hollandhart.com

Jerold C. Lambert
jlambert@bresnan.com

Alex Harris
aharris@bresnan.com

Kira M. Slawson