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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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| 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 Response To UBTA-UBET Communications, Inc.'s Motion For Stay Pending Judicial Review Docket No. 08-2476-02 |
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Bresnan Broadband of Utah, LLC (“Bresnan”), through its undersigned counsel, hereby submits this response to UBTA-UBET Communications, Inc.’s (“UBET”) Motion For Stay Pending Judicial Review. Bresnan respectfully requests that the Pubic Service Commission of Utah (“Commission”) deny UBET’s motion and prevent further delay in allowing Bresnan to enter the Vernal market consistent with the Commission’s orders in this proceeding and the prior

CPCN docket.

I. INTRODUCTION

On February 5, 2007 Bresnan filed a Verified Application with the Commission to provide competitive telecommunications services in the Vernal exchange. Bresnan was the first competitive local exchange carrier (“CLEC”) in Utah to seek to offer local service outside of the Qwest service territory. On August 3, 2009, a full two years and seven months later, the Commission issued its final order on the terms and conditions for interconnection between Bresnan and UBET – setting the stage for Bresnan to finally be able to enter the market. Throughout these extensive proceedings, Bresnan, UBET, the Utah Rural Telephone Association (“URTA”), the Division of Public Utilities, and the Committee of Consumer Services have sponsored numerous witnesses, filed extensive legal briefs, and participated in multiple rounds of hearings. The Commission, for its part, has carefully and judiciously sorted through all of the evidence and arguments and reached a series of decisions that, in the end, have rejected all of UBET’s and URTA’s multitude of objections to Bresnan entering the Vernal market under reasonable interconnection terms and conditions.

UBET has now asked the Commission to impose another stay pending UBET’s appeal of the Commission’s decisions to the Utah Supreme Court. Given the normal timeline for such appeals, this stay, if granted, would result in the passing of an additional 12 to 18 months before Bresnan could offer local exchange services in Vernal. That would mean that the process for Bresnan to seek to enter the Vernal exchange would have taken, in the end, a total of up to four years to resolve before even offering service to one customer. By comparison, in 1997, merely two years after passage of the 1995 telecommunications statute in Utah and one year after the

passage of the federal Telecommunications Act of 1996, and despite tremendous controversy and with little or no roadmap in place, there were already at least ten CLECs operating in the Qwest territory, collectively earning over \$3.5 million in local exchange revenues.¹

There is simply no reasonable basis in law or public policy to grant UBET a stay, thereby enabling it to act as a monopolist for another 12 – 18 months, while it exhausts the appellate process. This Commission has made correct and reasonable decisions throughout the pendency of this, and the underlying CPCN, proceeding. The Legislature has clearly declared it the public policy in Utah to promote competition. The Commission has followed that policy to the letter in its orders in these proceedings and, as such, those orders should be allowed to take effect without further delay.

II. LEGAL STANDARD

It is long established that “[a] stay is an ‘intrusion into the ordinary process of administration and judicial review’ and, accordingly, ‘is not a matter of right, even if irreparable injury might otherwise result to the appellant.’”² Instead, a stay is ‘an exercise of judicial discretion,’ and ‘the propriety of its issue is dependent upon the circumstances of the particular case.’”³ Additionally, “[t]he party requesting a stay bears the burden of showing that the

¹ See, The State of the Telecommunications Industry in Utah, First Biannual Report to the Governor, Legislature, the Public Utilities and Technology Interim Committee, and the Information Technology Commission by The Public Service Commission of Utah, October 21, 1998.

² *Nken v. Holder*, 129 S.Ct. 1749, 1757 (2009) (quoting *Virginia Petroleum Jobbers Ass’n. v. Fed. Power Comm’n*, 259 F.2d 921, 925 (C.A.D.C. 1958) and *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926)).

³ *Nken*, 129 S.Ct. at 1760 (quoting *Virginian R. Co.*, 272 U.S. at 672-673).

circumstances justify an exercise of that discretion.”⁴

Courts traditionally have looked to four factors when considering a request for a stay:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.⁵

III. ANALYSIS

UBET has failed to meet its burden with respect to any of the elements of the traditional four-part test. To the contrary, UBET’s appeal is highly unlikely to succeed on its merits. There is no evidence UBET will suffer irreparable injury absent a stay. Bresnan and the people and of Vernal will be substantially injured if Bresnan is kept out of the Vernal market for an additional 12 to 18 months. Finally, the public interest as set forth by the Utah legislature is clearly in favor of encouraging competition. For these reasons, the Commission should reject UBET’s request for a stay.

A. UBET Is Unlikely To Succeed On The Merits.

The Commission has issued decisions throughout this proceeding and the prior CPCN docket that are clearly written, well thought out, and thoroughly researched and analyzed. While boldly asserting that the Commission has made a series of errors in these decisions, UBET’s Motion for Stay raises no new arguments to support this claim. The Motion instead simply rehashes the same arguments UBET has been making for years – arguments that the Commission

⁴ *Nken*, 129 S.Ct. at 1761.

⁵ *Id.* (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

has, after careful deliberation, repeatedly rejected. Ultimately, UBET fails to make the requisite “strong showing” that it is “reasonably likely” to succeed on appeal. Rather, given the strength of the Commission’s analysis and decisions, UBET is almost certain to lose on appeal.

B. UBET Will Not Be Irreparably Injured Absent A Stay.

UBET’s Motion argues that UBET will be harmed without a stay because UBET will need to incur costs associated with implementing indirect interconnection and, in the event UBET prevails on appeal, such interconnection will not be needed. UBET’s concerns in this regard are not well founded and certainly cannot establish an “irreparable injury.”

UBET raised these same concerns in response to Bresnan’s Complaint, Docket No. 09-2476-01. In that docket, UBET argued it should not be required to sign the ordered Essential Facilities Agreement (“EFA”) because of costs Qwest *may* impose on UBET to implement indirect interconnection. However, UBET had incorrectly understood how indirect interconnection would work under the ordered EFA. Bresnan and UBET thus executed a Letter Agreement (attached to this Response as Attachment A) that clarifies how the EFA should be interpreted and applied. In that Letter Agreement, the parties indicated that indirect interconnection would only occur if the Qwest tandem switch is “enabled,” meaning that: (a) traffic completes correctly over trunk groups otherwise maintained between the parties and Qwest, (b) the per minute charge for transiting the Qwest switch is the same or less than the standard transiting charge applicable to local traffic, and (c) any lawful one-time charges imposed by Qwest are paid by Bresnan – not UBET. In light of the language of the EFA as clarified by the Letter Agreement, there is no basis to conclude that UBET will suffer any injury, much less “irreparable injury,” associated with the implementation of indirect interconnection.

C. Bresnan And The People Of Vernal Will Suffer Substantial Injury If A Stay Is Granted.

If a stay is granted, Bresnan will be barred from entering the Vernal market for an additional 12 to 18 months. Such a delay will substantially injure both Bresnan and the people of Vernal. First, given this additional delay and the expense of defending against the appeals from UBET and URTA with no corresponding opportunity for revenues from new customers in Vernal, there is the real possibility that Bresnan will simply be forced to abandon its plans to compete for local exchange customers in Vernal altogether. Simple economic realities in today's world dictate that a rational business cannot continue, on an indefinite basis, to incur costs without any offsetting revenues. That unfortunate outcome alone would result in a substantial injury to Bresnan. Second, even if Bresnan commits the resources to continuing this fight, the delay will cost Bresnan real lost business opportunities and revenues for a substantial period of time. UBET's Motion completely ignores the impact such a stay would have on Bresnan and Bresnan's ability to compete in the Vernal market.

Furthermore, also ignored in the UBET motion are those residential and business customers in Vernal who would desire to take, and benefit from taking, local telephone service from Bresnan. Those customers will also be seriously injured by a stay. As the Legislature and the Commission both recognized, customers benefit merely from having the option to select its service provider.⁶ Moreover, Bresnan submits that its products and services will provide real value to customers in Vernal. Customers who switch may well experience a drop in prices, an increase in service quality, an expansion of features and capabilities, and the added convenience of receiving their telephone, data, and cable TV services from a single company. If Bresnan is

⁶ See Utah Code Ann. § 54-8b-1.1, discussed *infra*, p. 7.

barred from entering the market, those customers will miss out on those opportunities and, as a result, will experience a substantial injury.

D. The Public Interest Dictates That The Stay Be Denied.

Granting UBET's requested stay is contrary to the public interest. First, the Utah Legislature defined that it shall be the policy of the State of Utah 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."⁷ The Commission declared that allowing Bresnan to compete in the Vernal exchange will, "provide customers with a wider range of choices in meeting their telecommunications needs and will support the development of competition."⁸ Therefore, the Commission further concluded that, "[t]he issuance of a Certificate to [Bresnan] to provide the telecommunications service for which it has applied is in accord with the legislative policy declarations set forth in Utah Code § 54-8b-1.1."⁹ Granting a stay, and preventing Bresnan from competing in the Vernal market, will compromise this public interest without purpose.

Second, UBET's allegation that the public interest will be served by the grant of a stay is unpersuasive. UBET bases its required "public interest" showing on the remote and avoidable possibility that, in the event the Utah Supreme Court sets aside the Commission's

⁷ Utah Code Ann. § 54-8b-1.1.

⁸ Report and Order, *In The Matter Of The Application Of Bresnan Broadband Of Utah, LLC For A Certificate Of Public Convenience And Necessity To Operate As A Competitive Local Exchange Carrier In Utah*, Docket No. 07-2476-01, Nov. 16, 2007, Findings of Fact ¶ 10.

⁹ *Id.* at Conclusions of Law ¶ 3.

interconnection order, “members of the public who have entered into such agreements with Bresnan could be left without service, or the benefit of their bargain with Bresnan because UBET will no longer have the obligation to interconnect its facilities with Bresnan’s and Bresnan will be unable to provide services.”¹⁰

The harm alleged by UBET is an extremely remote possibility for a host of reasons. UBET’s appeal presents only one issue, namely whether Utah law is preempted by the Federal Telecommunications Act of 1996, that, as a practical matter could even result in Bresnan being unable to interconnect at all. By contrast, the remaining issues raised by UBET only seek to modify the manner in which Bresnan interconnects, or to modify the terms and conditions of such interconnection. Therefore, resolution of those issues would not lead to Bresnan’s being barred from competing in the market. Indeed, to the best of Bresnan’s knowledge, to date no court or commission has ever concluded that a certified competitive local exchange telecommunications company is prohibited altogether from interconnecting with an incumbent local exchange telecommunications company. Such an extreme outcome would thus be unprecedented, and is highly unlikely to occur.

Even in the highly remote event that the Utah Supreme Court concluded that Utah Law is preempted by the Federal Telecommunications Act of 1996, it is extremely unlikely the Court would additionally conclude that Bresnan has no right to interconnect and thus invalidate the EFA altogether. Rather, in such instance, it is much more likely that the Utah Supreme Court would either: (i) directly rule that Bresnan is entitled to interconnection under the Federal Telecommunications Act of 1996, and that the Commission’s Orders and the resulting EFA are consistent with the Act and are therefore valid and binding on that basis; or (ii) remand the

¹⁰ UBET Motion For Stay Pending Judicial Review, p.5.

matter to the Commission to reconsider Bresnan's interconnection rights under the Federal Telecommunications Act 1996, and to amend the EFA as needed to conform it to whatever rights Bresnan may possess under Federal Law. Therefore, for all of these reasons, the circumstances alleged by UBET to result in harm to customers is an extremely remote possibility.

Further, even if such extremely remote circumstances did come to pass, the resulting harm alleged by UBET is completely avoidable. CLECs have, from time to time, exited markets for one reason or another, and have on those occasions undertaken orderly processes to transfer customers to the ILEC or other providers, according to those customers' desires. Likewise, in the wholly unlikely event that Bresnan were forced to exit the market as a result of a ruling by the Utah Supreme Court, Bresnan would work with UBET and the Commission not only to notify customers that their service will be discontinued, but also to facilitate the orderly and prompt transfer of customers who desire to be transferred back to UBET (as opposed to simply having their service discontinued). To alleviate any concerns UBET or the Commission may have on this point, Bresnan will commit to UBET and the Commission to take all steps as are reasonable under the circumstances to ensure that customers are left unharmed by such a transfer, in the remote and unlikely event such a transfer is ultimately required.

Since the harm alleged by UBET is both extremely remote and fully avoidable, this alleged public policy concern is substantially outweighed by the clear public interest expressed by the Commission in opening up the Vernal market to competition, as directed by the Legislature.

IV. CONCLUSION

Bresnan respectfully requests that the Commission deny UBET Motion for Stay Pending

Judicial Review. UBET has, in all respects, failed to establish that a stay of the Commission's Orders in this proceeding is reasonable. As such, the Commission's Orders should be allowed to take full effect unless and until the Utah Supreme Court orders otherwise.

DATED this 16th day of September, 2009.

HOLLAND & HART, LLP

/s James A. Holtkamp

James A. Holtkamp

Attorney for Bresnan Broadband of Utah, LLC

CERTIFICATE OF MAILING

I hereby certify that on this 16th day of September, 2009, an original and five copies of the foregoing Bresnan Broadband of Utah, LLC's Response To UBTA-UBET Communications, Inc.'s Motion For Stay Pending Judicial Review, were hand delivered to the following:

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