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July 28, 2008

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *In the Matter of the Petition for Declaratory Ruling Whether Voice Over Internet Protocol Services Are Entitled to Interconnection Rights of Telecommunications Carriers, WC Docket No. 08-56, Ex Parte Communication*

Dear Ms. Dortch:

Bresnan Communications, LLC (“Bresnan”) urges the Commission to take immediate action in this proceeding to dismiss Vermont Telephone Company’s (“VTel”) petition seeking to deny, or otherwise limit, the interconnection rights of Comcast Corporation, and other similarly situated entities.

Bresnan’s interests in this matter are significant, and pressing, as a rural telephone company in Utah is now relying upon the unresolved status of this proceeding as a pretext for summarily denying Bresnan’s federal statutory rights of interconnection. The Commission must, therefore, take the necessary steps to conclude this proceeding as soon as possible by reaffirming the interconnection rights of Comcast, and other cable telephony providers like Bresnan who offer competitive residential and business voice services throughout the country.

I. BRESNAN COMMUNICATIONS BRINGS COMPETITIVE RESIDENTIAL AND BUSINESS VOICE SERVICES TO MANY RURAL MARKETS

A provider of voice, video and broadband services in four states, Bresnan (and its affiliates) currently provide cable and/or telephony services to hundreds of thousands of customers in its four-state territory. Indeed, in many ways Bresnan epitomizes the facilities-based competitive telephony provider that Congress hoped, and expected, would emerge

following enactment of the local competition provisions of the Communications Act. 47 U.S.C. § 251, *et. seq.* To that end, Bresnan has leveraged its high capacity video and broadband network and now offers competitive voice services to hundreds of thousands of subscribers in the more than forty (40) different markets in its four-state territory.

Due to the location of Bresnan's network and facilities, many of the markets it serves are generally found in rural, and less densely populated areas of these states. Indeed, the largest markets that Bresnan serves are the cities of Grand Junction, Colorado, and Billings, Montana. It comes as no surprise, then that in such areas many telephone subscribers have, until now, never had any competitive choice of service providers. More often than not, the incumbent rural telephone company is the only provider offering such services. As a result, where Bresnan has initiated its voice services in such markets, its service is often the very first *competitive* residential voice service available in these markets.

Many residents of these smaller markets are very pleased with Bresnan's competitive offerings, as evidenced by the success of its initial voice service offerings. Not surprisingly, however, the incumbent telephone companies in these markets are not eager to see Bresnan's entry in to that market. Indeed, that very situation has arisen in Utah, where Bresnan's Utah affiliate¹ recently decided to begin offering competitive voice services in the local exchange service area of the town of Vernal, Utah ("the Vernal exchange").

II. BRESNAN'S ATTEMPTS TO BRING COMPETITIVE VOICE SERVICES TO SMALLER, RURAL COMMUNITIES IN UTAH

The incumbent local exchange carrier ("LEC") in the Vernal exchange is a company known as UBTA-UBET Communications, Inc. ("UBTA Communications" or "UBTA"). In preparing for the initiation of voice services in the Vernal exchange Bresnan took several operational, and legal, steps to prepare for the delivery of voice calls to, and from, the public switched telephone network (PSTN). Most notably, Bresnan applied for, and received, a certificate of public convenience and necessity ("CPCN") from the Utah Public Service Commission ("PSC"). In its CPCN Order, the PSC authorized Bresnan to provide competitive telecommunications services in the Vernal exchange.

Notably, that CPCN was granted to Bresnan after the Commission initiated a formal adjudication to consider Bresnan's application. That adjudication included the receipt of testimony, a live hearing, and full briefing on the issue. Following that adjudication the PSC concluded that "the public interest is served by the competitive choice Bresnan's presence in the

¹ Bresnan Broadband of Utah, LLC.

Vernal exchange will bring to the marketplace and Utah consumers, ...”² Moreover, the PSC also found that Bresnan’s service offerings “will provide customers with a wide range of choices in meeting their telecommunications needs and will support the development of competition.”³ Thus, it is clear that the grant of the CPCN was predicated, at least in part, on the fact that Bresnan’s entry would enhance consumer choices and further develop competition in that market. For these reasons the PSC authorized Bresnan to provide public telecommunications services in the Vernal exchange currently served by UBTA Communications.

Shortly after receipt of its CPCN, on February 14, 2008, Bresnan contacted UBTA Communications to formally request negotiations of an interconnection and traffic exchange agreement. Following several rounds of correspondence, on May 13, 2008, UBTA Communications asserted that it has no obligation to interconnect with Bresnan.⁴

III. BRESNAN’S INTERCONNECTION RIGHTS DENIED; UTAH PSC REFUSES TO MEDIATE DISPUTE

As a basis for its refusal to interconnect, UBTA Communications cited this proceeding (WC Docket 08-56), and noted that this Commission has sought comment on “a matter closely related to Bresnan’s request for interconnection.” Citing the claims made by VTel in the petition for a declaratory ruling UBTA asserted that its “interconnection obligations with VoIP providers is unsettled.” It also argued that no further action should occur “until the FCC makes a determination” in this proceeding. Thus, UBTA Communications contends that the existence of this proceeding excuses it from its federal statutory duty to negotiate, in good faith, the terms of an interconnection agreement with Bresnan.

Bresnan did not accept that response, but instead immediately filed a request with the Utah PSC to mediate the dispute with UBTA Communications pursuant to 47 U.S.C. § 252(a)(2). However, on July 3, 2008, the PSC’s legal counsel formally denied Bresnan’s request based, in part, on the fact that the FCC has opened this docket, WC Docket 08-56. Specifically, the PSC’s counsel stated that “it would be a futile effort to attempt to act upon Bresnan’s

² See *In the Matter of the Application of Bresnan Broadband, LLC for a Certificate of Public Convenience and Necessity to Operate as a Competitive Local Exchange Carrier in Utah*, Report and Order, Docket No. 07-2476-01 at 17 (Utah PSC rel. Nov. 16, 2007) (“*Bresnan CPCN Order*”).

³ *Id.* at 20.

⁴ Notably, UBTA Communications’ actions are also in violation of Utah regulations. Although local rules in Utah require ILECs to provide interconnection facilities and services sixty 60 days following receipt of a written request for interconnection, UBTA Communications has refused to negotiate the terms of a traffic exchange agreement with Bresnan.

requests in light of the [FCC] created conundrum relating to internet (sic) based [voice] services and federal law.”⁵

Thus, UBTA Communications has refused to interconnect with Bresnan, and the PSC has thus far been unwilling to intervene to remedy the situation. Notably, both actions are predicated on this Commission’s consideration of the allegedly “unresolved” issues raised by VTel in this proceeding, WC Docket 08-56.⁶

IV. THE DENIAL OF INTERCONNECTION RIGHTS IS BOTH UNLAWFUL, AND CLEARLY DETRIMENTAL TO COMPETITION

The actions of UBTA Communications, the incumbent in the Vernal exchange, are clearly motivated by its attempts to avoid competition with Bresnan. Its refusal to negotiate, its denial of Bresnan’s rights, and the rationales offered in support of these actions, have no basis in the law. Instead, the claims are simply unsupported assertions intended to do nothing more than deny Bresnan’s rights of interconnection, in order to hinder Bresnan’s attempts to offer competitive voice services.

The record before the Utah PSC clearly reflects the public interest, and competitive benefits, of Bresnan’s entry into the rural Vernal, Utah exchange. Facing such competition, the incumbent has now resorted to what amounts to nothing more than a blatant attempt to delay that competition by denying Bresnan’s ability to interconnect, and exchange traffic with the PSTN. The factual evidence is therefore clear: some twelve years after enactment of the Telecommunications Act of 1996 (the “1996 Act”) some incumbents, like UBTA Communications, continue their attempts to undermine competition from competitors like Bresnan.

Similarly, the record in this proceeding is fully developed on the question of the factual flaws of VTel’s petition, and the lack of any legal basis for VTel’s claims that the law is somehow unsettled or unclear. For that reason, Bresnan will not, and need not, restate all of the legal authorities which support its right of interconnection. However, Bresnan will offer the following additional points:

⁵ Letter from Mr. Sandy Mooy, Utah PSC Legal Counsel, to Thorvald A. Nelson, Holland & Hart, Counsel to Bresnan, and Kira Slawson, Blackburn & Stoll, Counsel to UBTA Communications (dated July 3, 2008).

⁶ Bresnan continues to pursue its legal rights before the Utah PSC, and has recently filed a petition for arbitration asking the PSC to order UBTA Communications to interconnect and exchange traffic with Bresnan. However, final action in that proceeding is likely several months away. This Commission should not wait for such action before acting in this docket.

First, this Commission recently determined that CLEC affiliates of cable operators were telecommunications carriers, based in part on the fact that such affiliates had been certificated to provide telecommunications services by the state commissions.⁷ As explained above, Bresnan has obtained a CPCN from the Utah PSC, and therefore is entitled to the rights of a telecommunications carrier in that jurisdiction. Despite that fact, however, the incumbent LEC refuses to interconnect, and the PSC is unwilling to remedy that problem. This Commission, must therefore re-affirm that the issuance of a CPCN to offer telecommunications services is a suitable proxy to establish a *prima facie* case that the certificated entity is a telecommunications carrier, and therefore entitled to interconnection rights under Section 251.⁸

Second, as the Commission knows, an essential element of any competitive voice service offering is the provision of enhanced 911 services to the end user. Consistent with this Commission's policies, and in recognition of the invaluable public safety needs of its potential subscribers, Bresnan's competitive voice services include enhanced 911 services.

In the recent *IP-enabled Services E911 Order* this Commission also affirmed that entities like Bresnan are entitled to "access to the incumbent's 911 databases and interconnection to 911 facilities to all telecommunications carriers, pursuant to sections 251(a) and (c)."⁹ Indeed, the Commission noted that such access was not predicated upon the precise legal status of the voice provider, but was instead conditioned, at least in part, on the manner in which that entity holds itself out in providing such services.¹⁰ Thus, in acting in this proceeding, it would be prudent to re-affirm that entities like Bresnan, regardless of whether they hold a CPCN in any particular state, or whether they have met other indicia of "carrier" status, will continue to have access to the incumbent LECs' 911 databases and facilities to fulfill its obligations under federal law. For that reason, Bresnan also urges the Commission to reaffirm the obligations of incumbents, like VTel and UBTA Communications, to provide access to 911 databases and interconnection to 911 facilities pursuant to sections 251(a) and (c).

In conclusion, Bresnan supports the comments of Comcast, and other entities that have urged this Commission to deny VTel's request and to dismiss the petition in its entirety. Indeed, as Comcast explained in its Reply Comments, a paramount goal of the 1996 Act is to promote

⁷ See *Bright House Networks v. Verizon California*, File No. EB-08-MD-002, Memorandum Opinion and Order, FCC 08-159 at para. 30 (rel. June 23, 2008).

⁸ The FCC's Enforcement Bureau recently affirmed that very principle. See *Salsgiver Telecom, Inc. v. North Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 9285 ¶¶ 9-10 (Enf. Bureau 2007).

⁹ *In the Matters of IP-Enabled Services 911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 para. 38 (2005).

¹⁰ See *id.* at n. 128 ("if a provider of interconnected VoIP holds itself out as a telecommunications carrier and complies with appropriate federal and state requirements, access under these provisions would be available to those providers as well.").

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facilities-based competition in markets throughout the nation, including in those rural and less densely populated markets that have not yet seen the benefits of competitive voice service offerings of cable telephony providers like Bresnan, Comcast and many others.¹¹ The Commission can re-affirm that commitment to enhancing competitive choices in rural markets by acting promptly to deny, and dismiss, the VTel petition. In so doing the Commission will eliminate any basis for incumbent LECs to deny interconnection on claims of alleged ambiguities in current law.

Thank you for your consideration of these issues.

Sincerely,

/s/ K.C. Halm

K.C. Halm
on behalf of Bresnan Communications, LLC

cc: Ms. Amy Bender, Chairman Martin
Mr. Scott Deutchman, Commissioner Copps
Mr. Scott Bergmann, Commissioner Adelstein
Mr. Greg Orlando, Commissioner Tate
Mr. John Hunter, Commissioner McDowell
Ms. Dana Schaffer, Chief, Wireline Competition Bureau

¹¹ See Reply Comments of Comcast Corporation, WC Docket 08-56 at 9-10 (filed June 9, 2008).