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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. | **Docket No. 08-2476-01**<br><br>**PETITION TO RESOLVE DISPUTE OVER INTERCONNECTION OF ESSENTIAL FACILITIES**<br><br>**AND**<br><br>**PETITION FOR ARBITRATION** |

# RESPONSE OF BRESNAN BROADBAND OF UTAH, LLC TO UBTA-UBET COMMUNICATIONS, INC.'S MOTION TO DISMISS PETITIONS

Bresnan Broadband of Utah, LLC ("Bresnan"), through its undersigned counsel and pursuant to Utah Admin. R. 746-100-4.D, respectfully submits this Response to UBTA-UBET

Communications, Inc.'s ("UBTA-UBET") Motion to Dismiss Petitions ("Motion to Dismiss") filed on September 3, 2008. Bresnan timely submits this Response pursuant to Utah Admin. R. 746-100-4.D, which provides that a response to pleadings other than applications, petitions or requests for agency action may be filed with the Commission within 15 calendar days of the service date of the pleading to which the response is addressed. In this Response, Bresnan requests that the Commission not consider, or alternatively, deny UBTA-UBET's Motion to Dismiss. In support of this request, Bresnan states the following:

## I. UBTA-UBET's Motion To Dismiss Is Untimely.

Bresnan filed a *Petition to Resolve Dispute Over Interconnection of Essential Facilities and Petition for Arbitration* ("Petitions") on July 17, 2008. Bresnan served the Petitions on UBTA-UBET that same day. The Petitions relate to claims under both state law [Utah Code Ann. § 54-8b-2.2(1)(e)] and federal law [47 U.S.C. § 252(b) of the Telecommunications Act of 1996 ("Telecommunications Act")]. Likewise, UBTA-UBET's Motion to Dismiss relates to both the state and federal law claims within Bresnan's Petitions. UBTA-UBET's Motion to Dismiss was filed on September 3, 2008, 48 days after Bresnan's Petition was filed and served on counsel for UBTA-UBET.

Pursuant to Utah Admin. R. 746-100-4.D, motions directed toward initiatory pleadings shall be filed before a responsive pleading is due. The Commission's rules specify that responsive pleadings to requests for agency action shall be filed with the Commission and served upon opposing parties within 30 days after service of the request for agency action. *Id*. Therefore, under the Commission rules, since Bresnan filed its initiatory pleading and request for agency action on July 17, 2008, UBTA-UBET's Motion to Dismiss Bresnan's Petitions was due

on August 18, 2008. Since UBTA-UBET did not file until 18 days after the due date provided by rule, the Motion to Dismiss is untimely and should be rejected.

Additionally, with respect to the portions of Bresnan's Petitions filed under federal law, pursuant to 47 U.S.C. § 252(b)(2)(B)(3), UBTA-UBET's response to Bresnan's request for arbitration was due within 25 days after service of the Petition, or August 11, 2008. Under this requirement as well, UBTA-UBET's Motion to Dismiss is untimely and should be rejected.

## II. Bresnan's Petition For Relief Under Utah State Law Is Valid And Should Be Considered.

If and to the extent the Commission considers UBTA-UBET's Motion to Dismiss, the Motion should be denied as to Bresnan's Petition for Relief under Utah state law since Bresnan's Petition sets forth a valid claim for relief.

First, in its Motion to Dismiss, UBTA-UBET incorrectly asserts that Bresnan has only requested interconnection with UBTA-UBET pursuant to 47 U.S.C. Section 251 (a) and (b). On February 14, 2008 Bresnan sent a letter requesting interconnection under 47 U.S.C. § 251(a) and (b) of the Telecommunications Act. *See* Attachment 1. UBTA-UBET is correct that, at that time, Bresnan did not specifically invoke Utah state law with respect to its request for interconnection. However, in response to that letter, UBTA-UBET sent Bresnan a series of questions on April 11, 2008 with respect to Bresnan's request for interconnection. *See* Attachment 2. In response to that request for further information, Bresnan sent a second letter to UBTA-UBET on April 24, 2008, wherein Bresnan clearly expanded its request for interconnection to include a request under Utah state law. *See* Attachment 3. In particular, Bresnan stated in that April 24, 2008 letter, "The Utah Public Service Commission's decision to

grant Bresnan a CPCN to provide public telecommunications services is presumptive proof that it has the right to interconnect under both state and federal law." Bresnan's letter goes on to cite and quote the Utah state law requiring interconnection.

Consistent with Bresnan's letter of April 24, 2008, on June 5, 2008, Bresnan sent a letter to Mr. Sandy Mooy of the Utah Commission stating, "Bresnan believes that UBTA-UBET, as an incumbent local exchange carrier, is required under both federal and state law to interconnect with Bresnan. *See* Utah Code Ann. §54-8b-2.2 and Utah Admin. Code R746-348." *See* Attachment 4. That letter was served on UBTA-UBET. Then again on August 20, 2008 a letter was sent to Mr. Mooy and UBTA-UBET stating,

> "In every instance, Bresnan attempted to clearly indicate its position that it has a right under both state and federal law to interconnect with UBTA-UBET. At no time has Bresnan ever expressed the position that federal law alone grants authority for interconnection. At no time has Bresnan refused to acknowledge or invoke state law and authority. To the contrary, Bresnan sought and was granted (over UBTA-UBET's objection) a Certificate of Public Convenience and Necessity from the Utah Commission to provide regulated telecommunications services. Further, Bresnan states now, as it always has, that Bresnan is willing to comply with the rules and regulations of the Commission with respect to the services Bresnan offers pursuant to its CPCN." *See* Attachment 5.

It is inconceivable to Bresnan how UBTA-UBET now asserts that it was somehow unaware that Bresnan seeks interconnection under both Utah state law and federal law. However, in case there is any lingering confusion on this point, Bresnan again restates its request that UBTA-UBET interconnect with Bresnan pursuant to Utah Code Ann. §54-8b-2.2 and Utah Admin. Code R746-348. Bresnan also reiterates its position that Utah state law provides an independent right for Bresnan to interconnect with UBTA-UBET to effectuate the legislature's and Commission's goal of promoting competition in Utah.

Second, UBTA-UBET incorrectly asserts that Utah state law regarding interconnection has been preempted by federal law. In particular, UBTA-UBET asserts in its Motion at p. 6 that,

"The substantive state law provisions allowing for interconnection contained in Utah Code Section 54-8b-2.2 were enacted in 1995 and predate the Federal Telecommunications Act of 1996; therefore, the federal law preempts the state laws in this matter with respect to timelines, procedures, duties and rights of telecommunications providers." As such, UBTA-UBET argues Bresnan has no rights to interconnection under state law but cites no further authority for this proposition.

Contrary to UBTA-UBET's arguments, the law and the courts have made it clear that state interconnection laws were not preempted by the Telecommunications Act. To the contrary, state commissions are granted authority under the Telecommunications Act to enforce its provisions relating to interconnection, to arbitrate related disputes, and approve interconnection agreements. *See* 47 U.S.C. § 252. And significantly, when enacting the Telecommunications Act, Congress expressly preserved existing state laws that furthered Congress's goals under the Act, and authorized states to implement additional requirements that would foster local interconnection and competition. 47 U.S.C. § 261. Similarly, Section 251(d)(3) of the Telecommunications Act states that the Federal Communications Commission ("FCC") shall not preclude enforcement of "any" state regulation, order, or policy that establishes interconnection and is consistent with the Telecommunications Act. 47 U.S.C. § 251(d)(3) (emphasis added).

Additionally, numerous courts have affirmed the validity of state law and state commissions' jurisdiction in this regard. Courts, including the United States Tenth Circuit Court of Appeals, have adopted a bifurcated standard of review of state commission decisions relating to interconnection where the first step is to review the state commission decisions *de novo* to determine compliance with the Telecommunications Act and implementing regulations. *See e.g. U.S. West Communications, Inc. v. Sprint Communications Co., L.P.*, 275 F.3d 1241, 1248 (10th

Cir. 2002). The second step in the bifurcated review is, if compliance with federal law is demonstrated: "all other issues, including state law determinations made by the [commission], are reviewed under an arbitrary and capricious standard" that accords substantial deference to the commission's application and interpretation of relevant law. *Id*. (emphasis added).

Therefore, under this precedent, state laws relating to interconnection are not preempted by associated federal law to the extent that state law, and state commission procedure and decisions that are influenced by such law, do not contravene relevant federal law. Again, this standard of review affirms the breadth of jurisdiction afforded states with respect to regulating interconnection among telecommunications providers. UBTA-UBET's assertion that the provisions of the Utah Code relating to interconnection are preempted by federal law based merely on the relative dates of enactment of each is expressly wrong under both the plain language of the Telecommunications Act and controlling case law in the Tenth Circuit.

Finally, UBTA-UBET argues that Bresnan is not entitled to interconnection because it is not offering a "public telecommunications service" as defined in Utah law. This argument is also incorrect. Pursuant to Utah state law, Bresnan was granted authorization to provide public telecommunications services in the Vernal exchange currently served by UBTA-UBET. *See* Commission Order issued November 16, 2007, in Docket No. 07-2476-01 ("CPCN Order"). While Bresnan argued in that proceeding that its IP-Enabled service was not a "public telecommunications service," the Commission rejected that argument and specifically reached the finding that, "Applicant is proposing to provide public telecommunications services in the Vernal exchange in and around Vernal, Utah." *See* CPCN Order at p. 3-4 and p. 19 (emphasis added). Following that finding, the Commission further concluded that Bresnan meets each of the statutory requirements under Utah Code § 54-8b-2.1, *et. seq*. "for authorization to provide the

public telecommunication services for which [Bresnan] seeks a Certificate." CPCN Order, Conclusions of Law, ¶ 2 at p. 21. The services for which Bresnan was seeking a Certificate were discussed at length in the CPCN Order and specifically included the IP-Enabled Digital Voice product. CPCN Order at p. 4.

Therefore, Bresnan has requested interconnection based on Utah state law, that law was not preempted by the Federal Telecommunications Act of 1996, and that law is fully applicable to the services Bresnan was authorized to offer in the Vernal exchange. Therefore, Bresnan's Petition pursuant to Utah Code Ann. § 54-8b-2.2(1)(e) asking the Commission to resolve this clear dispute regarding interconnection between Bresnan and UBTA-UBET states a valid claim and should not be dismissed.

## III. Bresnan's Petition For Relief Under Federal Law Is Valid And Should Be Considered.

Independent from the issue of whether Bresnan's service is a "public telecommunications service" under Utah state law, UBTA-UBET also argues that Bresnan's service is not a "telecommunications service" under federal law. As such, UBTA-UBET asserts that Bresnan has no right to interconnection under federal law due to consideration by the FCC of *Vermont Telephone Petition, DA 08-08-916*. However, UBTA-UBET's reliance on this case is unpersuasive.

First, while UBTA-UBET's Motion explains that there is a pending dispute before the FCC with respect to whether Comcast is entitled to interconnection with Vermont Telephone, UBTA-UBET cites no statute or case that states that interconnection is, as of today, not required.

Second, the key issue on which Vermont Telephone seeks a declaratory ruling from the

FCC is "(2) whether or not Voice over Internet Protocol ('VoIP') providers are entitled to interconnection pursuant to those sections of the Act [47 U.S.C. §§ 251, 252] when they assert they are not 'telecommunications carriers'…." *Vermont Telephone Petition* at 8. But as discussed above, Bresnan does not assert that it is not a telecommunications carrier for purposes of Utah regulation. To the contrary, unless and until the FCC rules that IP-Enabled services are not local exchange telecommunications services, Bresnan has committed to act in Utah as if they are. So unlike the alleged situation in Vermont, Bresnan is not trying to "enjoy all the benefits from interconnection as a 'telecommunications carrier,' but at the same time dodge the regulatory obligations and statutory duties of a 'telecommunications carrier'." See *Vermont Telephone Petition*, at 6.

The simple fact is that prior to the FCC's determination of the facts and conclusions of law in Vermont Telephone it is not even possible to predict what effect, if any, the FCC's order would have on Bresnan's Utah interconnection request. There is simply no public interest served for the Utah Commission to allow UBTA-UBET to delay interconnection indefinitely while the FCC decides in Vermont Telephone whether to restrict interconnection rights in the future. As such, the Commission should not defer resolution of this dispute pending a future federal determination that may or may not affect the outcome of this proceeding. Again, to do so would frustrate the Commission's clear mandate from the legislature to promote competition in Utah.

## IV. Conclusion

For the foregoing reasons, Bresnan respectfully requests that the Commission deny UBTA-UBET's Motion to Dismiss and proceed forward as quickly as possible to consider the legal and factual merits of Bresnan's Petitions and bring the long-awaited competitive choices to the citizens of Vernal Utah.

Respectfully submitted this 18th day of September, 2008.

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## CERTIFICATE OF MAILING

I hereby certify that on this 18th day of September, 2008, I caused to be emailed a true and correct copy of the foregoing **RESPONSE OF BRESNAN BROADBAND OF UTAH, LLC TO UBTA-UBET COMMUNICATIONS, INC.'S MOTION TO DISMISS PETITIONS** to the following:

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