

- 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.)

DOCKET NO. 08-2476-02
ORDER ON RECONSIDERATION,
REVIEW OR REHEARING

ISSUED: August 3, 2009

SYNOPSIS

UBTA-UBET Communications, Inc. petitioned for Reconsideration and Rehearing. The Utah Rural Telecom Association also petitioned for Reconsideration, Review or Rehearing. We affirm our previously entered order resolving interconnection dispute, except that we modify Section 3.1.1 of the Interconnection Agreement as detailed below.

By The Commission:

This matter is before us on UBTA-UBET Communications, Inc.'s (UBTA-UBET) Petition for Reconsideration and Rehearing and Utah Rural Telecom Association's (URTA) Petition for Reconsideration, Review or Rehearing.

This matter involves an interconnection dispute between Bresnan Broadband of Utah, LLC (Bresnan) and UBTA-UBET. The administrative law judge (ALJ) of the Commission held a hearing on the dispute resolution January 27, 28, and 29, 2009, where Bresnan, UBTA-UBET, URTA—an intervenor, and the Division of Public Utilities (Division) all presented evidence and testimony related to the issues related to the interconnection dispute. Pre-filed testimony was also submitted prior to the hearing. Subsequent to the hearing, Bresnan and UBTA-UBET resolved some of the issues they

raised at the hearing and submitted the remaining six disputed issues to the Commission. The Commission addressed the six unresolved issues as follows: 1) whether applicable statutes and rules require either indirect or direct interconnection; 2) whether the intercarrier compensation rate would be reciprocal vs. “bill and keep” compensation; 3) whether there should be any extra compensation for calls terminated in the areas served by UBTA-UBET's extended area service (EAS)¹; 4) the rate of the reciprocal compensation rate or call termination charge; 5) if the EAS compensation was appropriate, the amount of compensation for traffic terminating in the EAS area; 6) which provision regarding the rights of parties should be included in the Agreement. *See Report and Order Resolving Interconnection Dispute, May 21, 2009* (Interconnection Order), pp. 4-5.

In addition to selecting among competing provisions of the Interconnection Agreement (Agreement), the Interconnection Order also found Bresnan had the right to interconnect with UBTA-UBET, either directly or indirectly, that UBTA-UBET had essential facilities at the Provo tandem² as defined in U.C.A. § 54-8b-2(5), and that UBTA-UBET must “permit Bresnan to obtain indirect interconnection with UBTA-UBET’s

¹ EAS is a service feature provided to a customer, in which the customer pays a higher flat rate to obtain wider geographical coverage without paying per-call charges for calls within the wider area. In this case, the EAS would extend from Vernal to the outlying rural areas.

² “Tandem switch: Tandem is a telephony term meaning to ‘connect in series.’ Thus a tandem switch connects one trunk to another. A tandem switch is an intermediate switch or connection between an originating telephone call location and the final destination of the call.” HARRY NEWTON, NEWTON’S TELECOM DICTIONARY 778 (19th ed. 2003). *See also Transcript*, p. 102, ll.2-25 (“Q: And what is a tandem? A: . . . end offices are offices that directly terminate to customers. Tandem switches are switches that connect various end offices together. And the reason you have tandems is because they’re aggregation points. Because you [may have] tens or hundreds of end offices potentially servicing a single LATA (local access and transport area, or service area), for instance. And it would be inefficient to have direct [connectivity] between each and every end office and each and every other end office”

essential facilities at the Provo tandem.”³ The Interconnection Order further ordered that the “interconnection agreement should begin with the reciprocal compensation arrangement and the reciprocal compensation language proposed by UBTA-UBET [but that the parties could] choose to move to “bill and keep” later.” *See Interconnection Order*, p.25. The Interconnection Order also ordered that Bresnan would not be required to pay an extra charge for calls terminated “in the areas served by UBTA-UBET’s extended area service (EAS)” *See Id.* at p. 29, and p. 5. The Commission also ordered that the compensation rate for the transport and termination of traffic between Bresnan and UBTA-UBET would be \$.01/MOU. The Commission also selected Bresnan’s language for Section 36 of the Agreement dealing with the rights of the parties.

UBTA-UBET filed its Motion for Stay of our Interconnection Order on or about June 22, 2009. We granted a stay of the Interconnection Order on June 25, 2009. UBTA-UBET additionally filed its Petition for Reconsideration and Rehearing on or about June 22, 2009. It requested we reconsider and reverse our 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.

UBTA-UBET’s Petition, p.2. UBTA also petitioned for Reconsideration, Review or Rehearing. It contended that we should reconsider our Interconnection Order and hold that Utah law does not permit indirect interconnection through a third party intermediary, that

³ The Commission also stated that if “the parties mutually select another location, they may also interconnect at that location.” *Interconnection Order*, at p. 34.

we reverse our finding that UBTA-UBET has essential facilities at the Provo tandem, and that we reverse our finding that it is technically feasible for UBTA-UBET to indirectly interconnect at the Provo tandem. It also asks that we reverse our holding that UBTA-UBET permit Bresnan to indirectly interconnect at a location outside of UBTA-UBET's service territory. URTA also claims we denied UBTA-UBET compensation for terminating Bresnan traffic in its EAS area, and requests we reverse this decision.

Bresnan responded to the Motions for reconsideration, review, and rehearing on or about July 8, 2009. It argued that it did have a right to interconnect with UBTA-UBET and that we had jurisdiction to resolve this interconnection dispute. It also agreed that Utah state law permits indirect interconnection, including at the Provo tandem. It further reiterated that the Commission's conclusion that UBTA-UBET has essential facilities at the Provo tandem is correct, and that interconnection at the Provo tandem was technically feasible.

ORDER

We have reviewed UBTA-UBET's and URTA's Petitions and decline to reverse our decision in the Interconnection Order for the reasons below. (We do, however, amend section 3.1.1 of the Agreement as stated below.)

First, for the reasons stated in the Interconnection Order and for reasons stated in previous orders denying UBTA-UBET's Motion to Dismiss, we do not find that our jurisdiction is preempted by federal law in this matter.

Second, there is substantial evidence that UBTA-UBET does have essential facilities at the Provo tandem. Both URTA and UBTA-UBET dispute that UBTA-UBET has essential facilities at the Provo tandem. Specifically, UBTA-UBET argues:

Th[e] conclusion [that UBTA-UBET has essential facilities at the Provo tandem] is not reasonably supported by the evidence. In fact, the undisputed evidence is that UBET has facilities to Whiskey Springs, where its facilities meet Qwest's facilities, not to the Provo tandem. There was absolutely no evidence presented during the three day hearing that indicated that UBET owns, controls, or maintains facilities at the Provo tandem. 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".

UBTA-UBET Petition, pp.7-8. URTA argues as follows:

Utah Code Ann. § 54-8b-2.2(1)(a)(i) allows the Commission to "...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." . . . The Commission identified trunks⁴ in Qwest's Provo tandem office as the essential facilities under Utah Admin. Code § R746-348-7 to which it is requiring UBET to interconnect with Bresnan. The Commission, however, has mistaken Qwest's facilities at the Provo tandem for UBET's and therefore its Order requiring UBET to interconnect Bresnan's facilities to Qwest's is contrary to law. The Commission can only require a telecommunications corporation to interconnect its facilities with another telecommunications corporation. UBET does not own, control, or manage the trunks at Qwest's Provo tandem or the tandem itself. URTA testified at hearing that UBET's facilities end at Whiskey Springs and everything beyond that to and within the Provo tandem belongs to Qwest.

URTA Petition, pp. 2-3 (emphasis added in original).

We disagree with UBTA-UBET and URTA. We recognize that UBTA-UBET and URTA maintain that UBTA-UBET has no essential facilities at the Provo tandem. In fact, we

⁴ "Trunk: A communication line between two switching systems." HARRY NEWTON, NEWTON'S TELECOM DICTIONARY 825 (19th ed. 2003). See also *Transcript*, p.109, ll.7-8 ("A trunk group is a unique hardware interface on a switch.")

note that Valerie Wimer, witness for UBTA-UBET, testified that UBTA-UBET did not have essential facilities at the Provo tandem.⁵ Douglas Meredith, witness for URTA, opined that UBTA-UBET's essential facilities ended at Whiskey Springs.⁶ He further testified that Qwest owns the trunks from “Whiskey Springs to the Provo tandem.” *Transcript*, p.250, ll.20-21.

However, UBTA-UBET and URTA interpret the term “essential facilities” as requiring that UBTA-UBET “owns, controls, or maintains,” *UBTA-UBET Petition*, p.9, or “own, control, or manage,” *URTA Petition*, p.3, some or the entire Provo tandem. They focus solely on whether UBTA-UBET maintains some physical plant, or equipment, etc., or whether UBTA-UBET owns the trunks at the Provo tandem, or the tandem itself. They ignore the language of U.C.A. § 54-8b-2(5) defining “essential facilities.” As stated in the Interconnection Order, a telecommunication corporation’s “essential facilities”

means *any portion, component, or function* of the network or service offered by a provider of local exchange services: (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.

U.C.A. § 54-8b-2(5) (emphasis added). UBTA-UBET is a local exchange service provider.⁷ It has a “portion, component, or function” of its “network *or service*” located at the Provo tandem, i.e. trunks, which it—as a local exchange service provider, uses to provide public

⁵ “Q: Does UBET have facilities to the Qwest Tandem? A: No. . . . UBET only subtends the Qwest tandem for IntraLATA toll traffic routing and not for local or feature Group D.” *Pre-filed Direct Testimony of Valerie Wimer on Behalf of UBTA-UBET Communications, Inc.*, p. 15, ll.269-272.

“Q: Does UBET have essential facilities at the Bresnan proposed location at the Qwest tandem? A: No. As mentioned earlier, the only traffic from UBET customers to the Qwest tandem is Qwest toll traffic. UBET does not own any facilities to the Qwest tandem.” *Id.* p. 19, ll.352-355, p. 20, l. 356.

⁶ “However, if Bresnan is connecting with the essential facilities of UBTA-UBET, those essential facilities exist in the network of UBTA-UBET. And we’ve talked about Whiskey Springs as the point of terminus, a point of termination for UBET’s facilities, and where Qwest’s facilities and network actually begins.” *Transcript*, p. 191, ll.17-23.

⁷ “UBTA-UBET is a rural incumbent local exchange carrier (“ILEC”)” *Pre-filed Direct Testimony of Valerie Wimer on Behalf of UBTA-UBET Communications, Inc.*, p. 4, l. 40.

telecommunications service, specifically, to carry toll-traffic at the Provo tandem.⁸ The statute does not state that the essential facilities are “essential” in nature only if owned—or even managed, controlled, or maintained, by the provider of local exchange service, in this case UBTA-UBET. Neither does the statute require the “portion, component, or function” of the “network or service” be used to transport local traffic. It simply states that the “essential facility” be “any portion, component, or function of the network or service offered by a provider of local exchange services.” In our view, UBTA-UBET and URTA’s interpretation would mean that interconnection would occur only where an ILEC has physical facilities that it owns, controls, maintains, or manages, and only when a CLEC could sustain the costs to directly interconnect its end office to an ILEC’s end office or other physical facilities. In effect, if we were to adopt UBTA-UBET’s and URTA’s interpretation, only direct interconnections would be permitted. The costs involved in having “direct connectivity between each and every end office and each and every other end office”, *Transcript*, p. 102, ll.18-19, would not only be inefficient, but would create a significant barrier to competition.

The other components of the definition of “essential facilities” we consider is that they be “(a) [] necessary for a competitor to provide a public telecommunications service; (b) [] cannot be reasonably duplicated; and (c) for which there is no adequate economic alternative to the competitor in terms of quality, quantity, and price.” *U.C.A. § 54-8b-2(5)*. It is necessary for

⁸ See e.g. Exhibit UU-2; *Transcript*, p.180, ll. 15-20 (“existing feature group C, intraLATA toll trunk group that is used between UBTA-UBET and Provo—or Qwest’s Provo tandem”); *Transcript*, p.309, ll. 2-16 (“we have only toll trunks to the two tandems we go to. There’s only toll traffic on those trunk groups . . . we build the trunks based on meeting the traffic”); *Transcript*, p.112, ll.3-6 (“because we would be employing trunk groups that are already in place. . . .”); *Transcript*, p.118, ll.9-11 (“ . . . according to the LERG (local exchange routing guide), there’s already a trunk group in place for intraLATA toll and feature group B [] traffic”).

Bresnan to indirectly interconnect at the Provo tandem in order to provide a public telecommunications service. Alex Harris, in his pre-filed testimony, responded to the question

Q: Will the interconnection agreement proposed by Bresnan provide the necessary means for Bresnan to compete in the Vernal exchange? A: Yes. In order to compete for telephone subscribers in Vernal, Bresnan only needs a mechanism to ensure that traffic is properly exchanged and that numbers are ported. Once those mechanisms are established, Bresnan will be able to compete with UBTA-UBET.

Pre-filed Direct Testimony of Alex J. Harris, p. 5-6, 111-117. Additionally, Mr. Harris testified that although Bresnan has leased “coax facilities that terminate at [Bresnan’s] head end in Vernal”, *Transcript*, p.50, ll.22-25, p.51, l.1, which carry data and video, they do not and are “not capable of providing a trunk interface to an external carrier”, *Transcript*, p.52, ll. 14-18. This and other evidence before us shows that the indirect interconnection is “necessary for [Bresnan] to provide a public telecommunications service.”

We also find that the tandem switch at which Bresnan proposed indirect interconnection cannot be reasonably duplicated. As stated in footnote 2, a tandem switch “connects one trunk to another. A tandem switch is an intermediate switch or connection between an originating telephone call location and the final destination of the call.” As Mr. Harris stated, “tandem switches are switches that connect various end offices together. And the reason you have tandems is because they’re aggregation points. . . . You [may have] tens or hundreds of end offices potentially servicing a single LATA, for instance. And it would be inefficient to have direct [connectivity] between each and every end office and each and every other end office” Based on the evidence presented by Mr. Harris, it would not be reasonable for Bresnan to duplicate a tandem switch when it will only use the indirect interconnection to interconnect with UBTA-UBET, not to interconnect “various end offices together.” Not only would the tandem be

duplicative, and an inefficient use of resources, but practically useless for Bresnan. In addition, requiring Bresnan to duplicate a tandem switch would violate the underlying purpose of indirect interconnection as stated in the Interconnection Order: “[W]here two carriers exchange minimal amounts of traffic, it is more efficient to use existing trunks that carry traffic to a common tandem, so that no carrier bears the burden of constructing an entirely new facility.”

Finally, as stated more fully in the Interconnection Order, “there is no other ‘adequate economic alternative to the competitor in terms of quality, quantity, and price.’ Otherwise, Bresnan would have to directly connect, which process would, at least in terms of price, be significantly more expensive than indirect interconnection.” The Interconnection Order details the evidence which we relied on to find that Bresnan’s costs as compared to UBTA-UBET’s would be significantly greater if we ordered direct interconnection.

Third, we do not agree with UBTA-UBET and URTA that there should be an additional compensation to UBTA-UBET for terminating Bresnan calls in the EAS area. URTA contends that we denied UBTA-UBET compensation for terminating Bresnan traffic in its EAS area. URTA’s interpretation of the Interconnection Order is not correct, however. The Interconnection Order stated clearly that “there should not be any *extra* charge for calls that terminate outside of Vernal, i.e. in the EAS area.” *Interconnection Order*, p.31. *See also p. 32* (“ . . . the Commission will not order an *extra* EAS charge, flat-rate or otherwise”); *p. 34* (the Commission . . . concluded that there should not be any *extra* charge by UBTA-UBET to Bresnan for calls that terminate outside of Vernal . . . the Commission will not order an *extra* EAS charge”) (emphasis added). We specifically found that UBTA-UBET would be compensated by the \$.01/MOU rate for terminating

Bresnan traffic to the Vernal area, and that any EAS traffic would already be compensated as local traffic at the \$.01/MOU rate. *Interconnection Order*, p.34. For the same reasons stated in the Interconnection Order, we disagree with UBTA-UBET that the \$1.80 flat-rate charge is charge that may be properly charged to Bresnan as compensation for termination of calls in the EAS area. Additionally, contrary to UBTA-UBET's assertions that Bresnan's customers "would not be required to pay for that access [to the EAS area]," we find the \$.01/MOU rate will be a rate which Bresnan customers will pay to have calls terminated to the Vernal or EAS areas. As stated in the Interconnection Order:

From [UBTA-UBET's own] statements, in this docket, the Commission must conclude that the costs of originating/terminating calls within the Vernal Host are no different than the costs of originating/terminating calls in remote areas. As Bresnan pointed out in Exhibit B-2, Spreadsheet 5, "Bresnan Response to Staff Data Requests 2.2BB and 2.3BB-Host-Remote Expense," all trunk groups "carry all traffic between the Vernal Host and each Remote in a wholly un-segregated manner."

Interconnection Order, pp. 31-32. Given the evidence on cost before us, and given UBTA-UBET's own admissions, our order found that a \$.01/MOU rate was a rate that adequately compensated UBTA-UBET for terminating Bresnan traffic in the Vernal Host and each remote area. We do not find that an extra charge for terminating traffic to the remote areas is proper.

Fourth, we do not agree with UBTA-UBET that our Interconnection Order constitutes rule-making outside of the Utah Administrative Rulemaking Act, U.C.A. 63G-3-101 *et seq.* We have explicitly stated that this docket was commenced to resolve a dispute over interconnection of essential facilities between Bresnan and UBTA-UBET, pursuant to Utah Code § 54-8b-2.2(1) (e). Additionally, as correctly stated by Bresnan:

The ARA specifically indicates that “orders” and “rulings by an agency in adjudicative proceedings” are not rules under the ARA. Under the Utah Administrative Procedure Act, an “adjudicative proceeding” means a state agency action or proceeding “that determines the legal rights, duties, privileges, immunities, or other legal interests of an identifiable person, including agency action to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license.” This proceeding determined the legal right of Bresnan to indirectly interconnect with UBET and the Commission Order in this matter was agency action granting such right.

Bresnan Response, p.19. As such, the proceedings were adjudicative in nature, not rule-making proceedings.

Finally, the evidence before the Commission as presented to the ALJ, and as stated in the Interconnection Order, was that indirect interconnection was technically feasible and that UBTA-UBET could permit Bresnan to indirectly interconnect at the Provo tandem. We will, however, amend the Interconnection Order to be clear about the obligations the Interconnection Order imposes on a third party tandem provider, like Qwest, who is not a party to these proceedings. We modify the Interconnection Order to provide that Section 3.1.1. of the Agreement shall read as follows:

- 3.1.1 Unless otherwise mutually agreed, and only to the extent that transiting of Local/EAS traffic between the Parties is enabled within the tandem switch of a third party to which both Parties are Interconnected, the Parties shall initially employ Indirect Interconnection between their networks for purposes of exchanging Local, EAS and ISP-Bound Traffic between Bresnan End User Customers located in the Exchange Areas listed in Exhibit 1, attached hereto, and UBET End User Customers. Nothing in this Section 3.1 shall be construed to impose any obligations on any third party tandem provider, which would not otherwise apply to such third party tandem provider.

Finally, UBTA-UBET claims that we found “that Bresnan is permitted, under R746-348-3 to mandate the point of interconnection.” *UBTA-UBET Petition*, p.6. Although Bresnan identified the desired point of interconnection, we ultimately agreed that the Provo tandem was a proper location for Bresnan to request indirect interconnection and “mandated” that UBTA-UBET permit indirect interconnection at the Provo tandem, or at another mutually selected location.

ORDER

For these reasons we affirm the Interconnection Order, except that we order Section 3.1.1 of the Agreement be modified immediately as stated previously. The stay previously entered is hereby lifted.

DATED at Salt Lake City, Utah, this 3rd day of August, 2009.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#63054