

1 JEROLD C. LAMBERT
2 BRESNAN COMMUNICATIONS, LLC
3 1 Manhattanville Road
4 Purchase, NY 10577
5 Telephone: (914) 641-3338
6 Facsimile: (914) 641-3438

7 THORVALD A. NELSON
8 HOLLAND & HART LLP
9 6380 South Fiddlers Green Circle, Suite 500
10 Greenwood Village, CO 80111
11 Telephone: (303) 290-1601
12 Facsimile: (303) 975-5290

13 MICHELLE BRANDT KING
14 HOLLAND & HART LLP
15 555 17th Street, Suite 3200
16 Denver, CO 80202
17 Telephone: (303) 295-8356
18 Facsimile: (303) 416-4415

19 JAMES A. HOLTKAMP (BAR NO. 1533)
20 JOHN P. HARRINGTON (BAR NO. 5242)
21 HOLLAND & HART LLP
22 60 E. South Temple, Suite 2000
23 Salt Lake City, UT 84111-1031
24 Telephone: (801) 799-5847
25 Facsimile: (801) 799-5700

26 Attorneys for Bresnan Broadband of Utah, LLC

27 **BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH**

28 BRESNAN BROADBAND OF UTAH, LLC,
a Utah limited liability company,

Petitioner,

vs.

UBTA-UBET COMMUNICATIONS, INC.,
a Utah corporation,

Respondent.

**BRESNAN BROADBAND OF UTAH,
LLC'S VERIFIED COMPLAINT FOR
INJUNCTIVE AND OTHER RELIEF
AGAINST UBTA-UBET
COMMUNICATIONS, INC.**

Docket No. 09_____

GENERAL ALLEGATIONS

1
2 7. Bresnan incorporates the foregoing allegations stated in paragraphs 1 through 6 as
3 though fully set forth herein.

4 8. On November 16, 2007, in Docket No. 07-2476-01, the Commission issued a
5 CPCN authorizing Bresnan to provide telecommunications services within the Vernal exchange.

6 9. In so doing, the Commission determined that, as a matter of both convenience and
7 necessity, the people of Vernal, Utah were entitled to enjoy the benefits of competition by having
8 the option to select Bresnan as their telecommunications provider of choice.

9 10. The Commission's determination was in accord with its statutory responsibility to
10 "encourage the development of competition as a means of providing wider customer choices for
11 public telecommunications services throughout the state," and to "encourage competition by
12 facilitating the sale of essential telecommunications facilities and services on a reasonably
13 unbundled basis." *Utah Code* § 54-8b-1.1(3) and (6), respectively.

14 11. Like Bresnan, UBET is authorized to provide telecommunications services in the
15 Vernal area. UBET already provides telecommunication services to customers in the Vernal
16 exchange and may potentially lose customers and revenues should Bresnan's services be
17 requested by customers.

18 12. In order to successfully complete calls between future Bresnan customers and
19 UBET customers, to seamlessly transfer customers from UBET to Bresnan, to allow Bresnan to
20 obtain telephone numbers for new customers, and to cement the governing terms of
21 interconnection between Bresnan and UBET, Bresnan and UBET must execute and implement
22 an agreement providing for such network interconnection and related matters.

23 13. Nearly two years ago, the Commission issued Bresnan its CPCN, and in that time,
24 UBET has continuously refused to permit Bresnan to obtain interconnection and denied
25 Bresnan's right to interconnect as ordered by the Commission.

26 14. As a result of UBET's willful defiance of the Commission, since November,
27 2007, customers in Vernal have been deprived of the benefit of competition.
28

1
2 15. In response to UBET's refusal to interconnect with Bresnan, Bresnan petitioned
3 the Commission to resolve the dispute over the interconnection of essential facilities and sought
4 arbitration to resolve the issues relating to interconnection with UBET.

5 16. This dispute was resolved over the course of a fully adjudicated proceeding in
6 Docket No. 08-2476-02, in which the Commission took evidence concerning the interconnection
7 dispute from Bresnan, UBET, Utah Rural Telecom Association ("URTA"), and the Division of
8 Public Utilities ("Division").

9 17. On May 21, 2009, after fully considering the substantial evidence and testimony
10 before it, the Commission issued its Report and Order Resolving Interconnection Dispute
11 ("Interconnection Order") in Docket No. 08-2476-02. In the Interconnection Order, the
12 Commission clearly and unequivocally ordered, *inter alia*:

- 13 1. Bresnan has a right to interconnect with UBTA-UBET;
- 14 2. The parties' interconnection shall be governed by the terms of
15 the parties' [Essential Facilities] Agreement.

16 Interconnection Order, p. 36, a copy of which is attached hereto as **Exhibit A**.

17 18. Importantly the Interconnection Order specified the exact form and language of
18 the Essential Facilities Agreement to be executed and implemented by Bresnan and UBET.

19 19. The Commission temporarily stayed the effect of its Interconnection Order, by
20 Order issued on July 2, 2009, pending its review and final determination of petitions for
21 reconsideration, review or rehearing filed by UBET and URTA.

22 20. On August 3, 2009, the Commission issued its final determination of the
23 interconnection dispute in its Order on Reconsideration, Review or Rehearing ("Final
24 Interconnection Order"), whereby it affirmed the holdings of its previous Interconnection Order,
25 subject to one minor modification to clarify Section 3.1.1 of the Interconnection Attachment,
26 featured in the Essential Facilities Agreement, which the Commission directed the Parties to
27 execute. A copy of the Final Interconnection Order is attached hereto as **Exhibit B**.

1 21. By its Final Interconnection Order, the Commission lifted the temporary stay of
2 the prior Interconnection Order; approved the Essential Facilities Agreement, subject to the
3 modification noted above; and made final its resolution of the issues raised in the underlying
4 interconnection dispute between Bresnan and UBET.

5 22. In compliance with the Commission's Final Interconnection Order, Bresnan
6 modified Section 3.1.1. of the Interconnection Attachment to the Essential Facilities Agreement
7 to conform to the specific language approved by the Commission.

8 23. On August 4, 2009, Bresnan sent a letter to UBET's counsel (a copy of which is
9 attached hereto as **Exhibit C**), which presented two signed originals of the Commission-
10 mandated Essential Facilities Agreement (a copy of which is attached hereto as **Exhibit D**) for
11 execution by UBET. In good faith, Bresnan requested that UBET return the signed Essential
12 Facilities Agreement by August 10, 2009.

13 24. However, in willful violation of the Commission's explicit orders, UBET has
14 refused to sign the Commission-mandated agreement. Instead, UBET's counsel sent a letter to
15 Bresnan's counsel on August 13, 2009 (a copy of which is attached hereto as **Exhibit E**)
16 providing the new excuse that the issue of the allocation of costs associated with indirect
17 interconnection at the Qwest Provo Tandem "must be addressed in the Essential Facilities
18 Agreement *before* [UBET] can execute the Agreement." (Exhibit E, emphasis added.)

19 25. The Commission's orders issued in this matter are unambiguous and are binding
20 upon UBET. The Commission clearly ordered that Bresnan is entitled to interconnect with
21 UBET and that the interconnection shall be governed by the terms of the Essential Facilities
22 Agreement between Bresnan and UBET, which the Commission specifically mandated and
23 approved. All of the issues regarding the language in the Essential Facilities Agreement were
24 fully and completely litigated in Docket No. 08-2476-02. Based on the record in that
25 proceeding, the Commission ordered and approved the terms of the Essential Facilities
26 Agreement. In so doing, the Commission not only affirmed Bresnan's right to interconnect with
27 UBET, but also defined the terms of that interconnection. UBET is therefore required by law to
28

1 execute the Essential Facilities Agreement in the form specifically approved by the Commission
2 without requiring or making any unilateral or unapproved amendments or conditions. Bresnan
3 provided to UBET a signed Essential Facilities Agreement in strict accordance with the form
4 specifically prescribed and mandated by the Commission in its binding and final orders. UBET
5 is likewise obligated, not only to sign the Essential Facilities Agreement in the form ordered and
6 approved by the Commission, but also to comply with its terms.

7 26. UBET's failure to execute and implement the Essential Facilities Agreement
8 approved by the Commission, is a direct, willful, and unlawful violation of the Commission's
9 Orders.

10 27. UBET's refusal to execute and implement the Essential Facilities Agreement is
11 tantamount to a refusal to interconnect with Bresnan.

12 28. Without a signed Essential Facilities Agreement in place, Bresnan is deprived not
13 only of the enumerated rights and protections afforded by the agreement, but also, as a practical
14 matter, of the ability to obtain telephone numbers for new customers.

15 29. UBET's anticompetitive behavior further violates the Commission's statutory
16 responsibilities to encourage competition, to afford customers with greater choices for public
17 telecommunications services throughout the state, and to facilitate the sale of essential
18 telecommunications facilities and services on a reasonably unbundled basis.

19 30. As a result of UBET's failure to comply with the Commission's Orders, Bresnan
20 is unable to interconnect with UBET, unable to enter the Vernal market, and unable to offer the
21 benefit of competitive services to customers in Vernal.

22
23
24
25 **FIRST CLAIM FOR RELIEF – EXPEDITED INJUNCTIVE RELIEF**

26 31. Bresnan incorporates the foregoing allegations stated in paragraphs 1 through 27
27 as though fully set forth herein.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

32. *Utah Code* § 54-3-23 provides:

Every public utility shall obey and comply with each and every requirement of every order, decision, direction, rule or regulation made or prescribed by the commission in the matters herein specified, or in any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper in order to secure compliance with and observance of every such order, decision, direction, rule or regulation by all of its officers, agents and employees.

33. According to *Utah Code* § 54-7-24:

Whenever the commission... shall be of the opinion that any public utility is failing or omitting, or is about to fail or omit, to do anything required of it by law, or by any order, decision, rule, direction or requirement of the commission... it shall direct the commencement of an action or proceeding in the name of the state, for the purpose of having such violations or threatened violations stopped or prevented.

34. As a regulated public utility, UBET unquestionably has a duty to comply with the Commission's orders.

35. UBET has failed, and continues to fail, to execute and comply with the Essential Facilities Agreement approved by the Commission.

36. UBET's continued failure to provide an interconnection to Bresnan is a direct and blatant violation of the Commission's effective orders in Docket No. 08-2476-02 that require UBET to permit Bresnan to obtain interconnection.

37. The Commission therefore should enjoin UBET from continuing to violate its orders and should require UBET to immediately comply with its orders, execute the approved Essential Facilities Agreement, and take such other actions as are necessary to provide the interconnection mandated by the Commission. Bresnan requests that the Commission take appropriate steps to prevent UBET from delaying the implementation of the orders .

38. Given UBET's willful and direct violation of the Commission's orders, and the ongoing nature of UBET's refusal to permit Bresnan to obtain interconnection, Bresnan requests

1 that the Commission effect this injunction as soon as practicable pursuant to *Utah Code* § 54-8b-
2 17(1)(d)(i) and (e)(i).

3
4 **SECOND CLAIM FOR RELIEF – EXPEDITED SPECIFIC**
5 **PERFORMANCE**

6 39. Bresnan incorporates the foregoing allegations stated in paragraphs 1 through 35
7 as though fully set forth herein.

8 40. Upon the Commission’s finding that, “either party to an approved interconnection
9 agreement has violated the terms of the agreement.” (*Utah Code* § 54-8b-17(2)(c)), the
10 Commission is statutorily empowered to enforce its orders.

11 41. Specifically, according to *Utah Code* § 54-8b-17(3)(a), if the Commission finds a
12 party to an approved interconnection agreement has violated the its terms “[t]he commission
13 shall...order the telecommunications corporation to: (i) remedy the violation; and (ii) comply, as
14 applicable, with the terms of ... the interconnection agreement[.]”

15 42. If the Commission considers it appropriate, “the Commission shall... prescribe
16 the specific actions that the telecommunications corporation must take to remedy its violation,
17 including a time frame for compliance and the submission of a plan to prevent future violations.”
18 *Utah Code* § 54-8b-17(3)(b).

19 43. The language and terms of the Essential Facilities Agreement between Bresnan
20 and UBET, were specifically ordered and approved by the Commission in Docket No. 08-2476-
21 02 require UBET to provide Bresnan with an interconnection.

22 44. By refusing to permit Bresnan to obtain interconnection with UBET, whether
23 directly or indirectly, UBET has patently violated the terms of the approved Essential Facilities
24 Agreement.

25 45. UBET should be ordered by the Commission to remedy the violation by executing
26 the Essential Facilities Agreement, permitting Bresnan’s interconnection, and complying with
27 the terms of that Agreement, in the form approved by the Commission.

1 46. Based on UBET’s continued refusal to permit Bresnan to obtain interconnection,
2 UBET should be ordered to immediately remedy its violation and execute and comply with the
3 Essential Facilities Agreement.

4 47. Given UBET’s flagrant violation of the Commission’s orders, it should further be
5 ordered to submit a plan to prevent future violations of the Essential Facilities Agreement.

6 48. Given UBET’s willful and direct violation of the Commission’s orders, and the
7 ongoing nature of UBET’s refusal to permit Bresnan to obtain interconnection, Bresnan requests
8 that the Commission order such specific performance as soon as practicable pursuant to *Utah*
9 *Code* § 54-8b-17(1)(d)(i) and (e)(i).

10
11 **THIRD CLAIM FOR RELIEF – IMPOSITION OF PENALTIES**

12 49. Bresnan incorporates the foregoing allegations stated in paragraphs 1 through 45
13 as though fully set forth herein.

14 50. The Commission has plenary authority to impose penalties upon a public utility in
15 violation of its orders or rules, particularly for offenses concerning interconnection.

16 51. *Utah Code* § 54-7-25 provides:

17
18 (1) Any public utility that violates or fails to comply with this
19 title or any rule or order issued under this title, in a case in which a
20 penalty is not otherwise provided for that public utility, is subject
to a penalty of not less than \$500 nor more than \$2,000 for each
offense.

21 (2) Any violation of this title or any rule or order of the
22 commission by any corporation or person is a separate and distinct
23 offense. In the case of a continuing violation, each day's
continuance of the violation shall be a separate and distinct
offense.

24 (3) In construing and enforcing the provisions of this title
25 relating to penalties, the act, omission, or failure of any officer,
26 agent, or employee of any public utility acting within the scope of
his official duties or employment shall in each case be deemed to
be the act, omission, or failure of that public utility.

27 52. According to *Utah Code* § 54-7-26:
28

1
2 Every officer, agent, or employee of any public utility who violates
3 or fails to comply with, or who procures, aids, or abets any
4 violation by any public utility of any provision of the Constitution
5 of this state or of this title, or who fails to obey, observe, or comply
6 with any order, decision, direction, demand, or requirement, or any
7 part or provision thereof, of the commission, or who procures, aids,
8 or abets any public utility in its failure to obey, observe, and
9 comply with any order, decision, direction, demand, or
10 requirement, or any part or provision thereof, in a case in which a
11 penalty has not been provided for, the officer, agent, or employee
12 is guilty of a class A misdemeanor.

13
14 53. Where the Commission finds that a party to an approved interconnection
15 agreement has violated the terms of that agreement, and if considered appropriate by the
16 Commission, *Utah Code* § 54-8b-17(3)(c), in relevant part, requires the Commission to impose
17 upon the telecommunications corporation a penalty as follows:

18 (i) if the violation is of the duties imposed under Section
19 54-8b-2.2 or 54-8b-16, the commission may impose a
20 penalty for such violation as provided in Section 54-7-25.

21 54. The Commission is authorized to investigate UBET's non-compliance with the
22 Commission's orders for purposes of assessing fines and penalties. *Utah Code Ann.* § 54-8b-
23 17(4)(a).

24 55. According to *Utah Code* § 54-8b-17(4)(b), if corrective or remedial action
25 acceptable to the Commission is not completed by a party found to be in violation of an
26 approved interconnection agreement, the following penalties are to be assessed according to the
27 following schedule:

28 (i) 45 days after the deadline set by the commission, the
commission may increase the penalty up to \$10,000 per violation
per day for a willful or intentional violation; or

(ii) 90 days after the deadline set by the commission, the
commission may increase the penalty up to \$4,000 per violation
per day for a violation that is not willful or intentional.

1 56. Importantly, any penalties issued under *Utah Code* § 54-8b-17(3)(c), “shall be in
2 addition to, and not in lieu of, civil damages or other remedies that may be available to the
3 injured party.” *Utah Code* § 54-8b-17(5)(a).

4 57. *Utah Code* § 54-8b-17(5)(b) outlines key factors at the Commission’s disposal to
5 consider in determining the amount of penalty assessed as follows:

6
7 (i) the appropriateness of the penalty to the size of the violating
8 party;

9 (ii) the gravity of the violation;

10 (iii) the good faith of the defendant telecommunications
11 corporation in attempting to achieve compliance after notification
12 of the violation;

13 (iv) the impact of the violation to the establishment of competition;
14 and

15 (v) the actual economic harm incurred by the plaintiff
16 telecommunications corporation.

17 58. Moreover, each day of a utility’s continuing violation of or failure to comply with
18 its interconnection obligation is a separate offense per *Utah Code* § 54-8b-17(5)(c).

19 59. UBET is in direct contravention of the Commission’s orders and rules by its
20 failure to, *inter alia*, execute the Essential Facilities Agreement in the form approved by the
21 Commission, comply with the ordered and approved terms of the Essential Facilities Agreement,
22 and permit Bresnan to obtain interconnection.

23 60. UBET’s behavior is anticompetitive and deprives customers in Vernal of the
24 benefit of competition.

25 61. UBET’s actions and omissions in violation of the Commission’s orders and rules
26 are willful and intentional.

27 62. UBET should be subject to the maximum penalties, for each and every day since
28 the issuance of the Commission’s Final Interconnection Order, that it refuses to sign the
Essential Facilities Agreement and comply with its terms.

CERTIFICATE OF MAILING

I hereby certify that on this 20th day of August, 2009, I caused to be emailed a true and correct copy of the foregoing Bresnan Broadband of Utah, LLC's Verified Complaint for Injunctive and Other Relief Against UBTA-UBET Communications, Inc.

Stanley K. Stoll
sstoll@blackburn-stoll.com

Bill Duncan
wduncan@utah.gov

Kira M. Slawson
KiraM@blackburn-stoll.com

Eric Orton
eorton@utah.gov

Stephen F. Mecham
sfmecham@cnmlaw.com

Phil Powlick
philippowlick@utah.gov

Dennis Miller
dennismiller@utah.gov

Paul Anderson
panderson@utah.gov

Casey Coleman
ccoleman@utah.gov

James A. Holtkamp
jholtkamp@hollandhart.com

dpudatarequest@utah.gov

Thorvald A. Nelson
tnelson@hollandhart.com

Michael Ginsberg
mginsberg@utah.gov

Jerold C. Lambert
jlambert@bresnan.com

Patricia Schmidt
pschmid@utah.gov

Alex Harris
aharris@bresnan.com

Paul Proctor
pproctor@utah.gov

James A. Holtkamp