

- 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 ) DOCKET NO. 08-2476-02  
Over Interconnection of Essential Facilities )  
and for Arbitration to Resolve Issues )  
Relating to an Interconnection Agreement ) REPORT AND ORDER  
with UBTA-UBET Communications, Inc. )  
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ISSUED: November 17, 2008

By the Commission:

THIS MATTER is before the Commission on Intervenor UBTA-UBET's (UBTA-UBET) Motion to Dismiss. For the reasons stated below, UBTA-UBET's Motion is DENIED.

BACKGROUND AND SUMMARY

On November 16, 2007, the Commission issued a Certificate of Public Convenience and Necessity (CPCN) to Bresnan Broadband of Utah (Bresnan) in Docket No. 07-2476-01.

On February 14, 2008, Bresnan requested that UBTA-UBET enter into a mutual traffic exchange agreement with Bresnan, pursuant to U.S.C. § 251(a) and (b). In response, UBTA-UBET sent an April 11, 2008 letter inquiring about Bresnan's request for interconnection. UBTA-UBET noted that Bresnan, in its application for CPCN, had stated that it believed its IP-enabled voice services were not a local exchange telecommunications service, pursuant to the 1996 Federal Telecommunications Act (Act). UBTA-UBET essentially inquired how Bresnan's position was consistent with Bresnan's February 2008 demand for interconnection under the Act. In its response to that letter, Bresnan, in part, stated that "The

[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" and also cited state law relevant to interconnection. UBTA-UBET declined to interconnect with Bresnan.

On May 14, 2008, Bresnan submitted a request for mediation to the Commission, "pursuant to 47 U.S.C. § 252(a) (2)." The Commission assigned Sandy Mooy, Commission counsel, as mediator. UBTA-UBET objected to the mediation, arguing that Bresnan's request for interconnection was made under federal law, was governed by federal law, and that the mediation should be declined. In an attempt to clarify some uncertainties, Mr. Mooy sent various inquiries to Bresnan regarding its mediation request. Bresnan submitted its responses to those inquiries on June 5, 2008, which responses were also served on UBTA-UBET. In that letter, Bresnan again references 47 U.S.C. § 252(a) (2) for its request. Bresnan stated that UBTA-UBET had an interconnection responsibility "under both federal and state law," referencing U.C.A. § 54-8b-2.2 and Rule 746-348. Bresnan, however, did not seek nor make any amendment to its May 14, 2008 request for mediation to request relief pursuant to any state law or authority.

In a responsive letter, the Commission noted that Bresnan's February 14, 2008 request for interconnection made to UBTA-UBET referenced only federal law, i.e. 47 U.S.C. § 251(a) and (b). It also noted that Bresnan's May 14, 2008 request for Commission mediation also referenced only federal law, i.e. 47 U.S.C. § 252(a) (2). Bresnan's request, as filed with the Commission, solely requested mediation. Mediation authority of the Commission is not

conferred by any state law and only arises from federal law. The Commission reasoned that Bresnan's apparent position impliedly meant that Bresnan proceeded only under federal law, it was not within Commission jurisdiction, nor was its service being provided pursuant to the CPCN. As Bresnan invoked only federal law, the Commission declined to mediate as it lacked authority to respond to the requested mediation under state law.

On July 17, 2008, Bresnan filed its Petition to Resolve Dispute over Interconnection of Essential Facilities and Petition for Arbitration. Bresnan petitioned the Commission to "resolve the dispute over interconnection of essential facilities . . . pursuant to Utah Code Ann. § 54-8b-2.2(1) (e)." In addition, Bresnan separately included a request for arbitration "pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996."

On September 4, 2008, UBTA-UBET filed its Motion to Intervene and Motion to Dismiss Bresnan's Petition. UBTA-UBET noted that Bresnan had requested Commission intervention to resolve the pending dispute between the parties regarding interconnection. UBTA-UBET argued, however, that Bresnan's request was premature, given that it claimed Bresnan had never sought interconnection pursuant to state law, but had only been made pursuant to 47 U.S.C. § 251(a) and (b).

UBTA-UBET also contended that the state Administrative Code rules cited by Bresnan required compliance with 47 U.S.C. § 251 and 252. Further, because the substantive state law provisions relating to interconnection were enacted prior to the Act, UBTA-UBET suggested the federal law preempted state law provisions regarding timelines, procedures, duties, and rights of telecommunications providers.

Additionally, UBTA-UBET argued that, as Bresnan was to provide VoIP services, and was not going to provide telecommunications services, UBTA-UBET had no obligation to interconnect with it. UBTA-UBET noted that the FCC had not yet determined if VoIP providers were entitled to interconnection pursuant to 47 U.S.C. § 251 and 252 as telecommunications carriers. UBTA-UBET noted that the FCC was deciding the issue in the *Vermont Telephone* docket. Therefore, resolving this dispute before the FCC's ruling was untimely.

Bresnan responded to UBTA-UBET's Motion to Dismiss on September 18, 2008. Bresnan moved the Commission to deny UBTA-UBET's Motion as not timely, both under applicable state and federal law provisions.

In its Response, Bresnan argued that its Petition for relief was valid under Utah state law and was not premature. Bresnan clarified its position that it was requesting interconnection under state law and noted previous occasions when it had requested interconnection under state law—although it recognized that initially it did not explicitly invoke state law in its response to UBTA-UBET's February 14, 2008 letter. Nonetheless, Bresnan stated “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 Cod. R746-348.”

Bresnan further responded that state law regarding interconnection was not preempted by federal law. Rather, Bresnan argued that state commissions were granted authority under federal law to enforce provisions of the applicable federal laws, and that state laws

furthering the intent of federal legislation were expressly preserved. Federal case law supports this position, Bresnan argues. Because applicable Utah state laws do not conflict with federal law on the same subject, they are not preempted.

Bresnan also argued that it is a public telecommunications corporation under Utah law and was granted a CPCN to serve the Vernal exchange served by UBTA-UBET. Contrary to UBTA-UBET's arguments, the Commission's order on CPCN noted that Bresnan proposed the provision of public telecommunications services. The CPCN granted specifically included the IP-enabled digital voice product, Bresnan argues, and grants Bresnan the authority to provide its telecommunication services.

Bresnan finally argues that whatever the status of the FCC's determination of the issues in the *Vermont Telephone* petition, that determination has no bearing on UBTA-UBET's present obligations to interconnect. In any case, the *Vermont Telephone* matter is irrelevant because Bresnan has "committed to act in Utah as if [its services] are [a local exchange telecommunication service]," unlike the petitioner in *Vermont Telephone*.

On November 4, 2008, UBTA-UBET sent a letter to the Commission regarding its concerns if the Commission should deny its Motion. UBTA-UBET stated that if the Commission denied the Motion, then it would impliedly be granting Bresnan's Request for Arbitration under 47 U.S.C. § 252(b) (1). UBTA-UBET contended however that as a rural telephone company, it was exempt from the interconnection obligations of 47 U.S.C. § 251(c) until the Commission first determines whether Bresnan's request for interconnection is not "unduly burdensome on UBTA-UBET, is technically feasible, and is consistent with Section 254

of Title 47 of the Telecommunications Act.” Being so exempt, it was also exempt from compulsory arbitration under the Act, unless and until that determination was first made. Therefore, UBTA-UBET argues that the Commission must suspend the standing scheduling order and proceed with a “rural exemption proceeding” before even considering Bresnan’s petition.

#### ANALYSIS

Bresnan argues that the Commission should decline considering UBTA-UBET's Motion as it was not timely. The Commission will consider the Motion as UBTA-UBET was not a party to the docket at the time Bresnan filed its Petition, was permitted intervention on September 24, 2008, and filed its Motion simultaneous with its Petition to Intervene. Additionally, the Commission does not believe Bresnan will be prejudiced if the Commission considers the Motion.

Bresnan has made several requests, to both the Commission and to UBTA-UBET, under provisions of the Act. Bresnan may have initially been less than explicit in initially requesting interconnection pursuant to state law. UBTA-UBET's arguments regarding Bresnan’s rights and UBTA-UBET's obligations under the Act may indeed be valid. The Commission, however, decline’s to exercise any authority conferred by federal law in this dispute. It proceeds solely on the authority conferred by state law, and any relief granted is provided pursuant to state law. The Commission will look to the substance of Bresnan’s Petition in deciding whether to grant UBTA-UBET's Motion. *See Union Pacific RR Co. v. Public Service Comm’n*, 300 P.2d 600, 602 (Utah 1956) (holding that “regardless of the title of the petition, or even of the section

of statute which [petitioner is claimed to be] proceeding under, the law is more concerned with substance than with labels or titles”).

Looking to the substance of Bresnan’s petition, it is clear it seeks to resolve a dispute it has with UBTA-UBET regarding interconnection. Under Utah law, Bresnan clearly has the right to seek Commission relief in attempting to resolve the dispute. Bresnan is a certificated provider of telecommunications services. It was granted its CPCN in Docket No. 07-2476-01. Bresnan unequivocally states it seeks to interconnect with UBTA-UBET pursuant to Utah Code Ann. §54-8b-2.2 and Utah Administrative Code. R746-348 and to provide its services under the state CPCN granted it. State law and our authority under state law is unambiguously invoked in Bresnan’s July 17, 2008 Petition. This is a separate and independent basis from federal law upon which to base its request. Utah law clearly requires Utah certificated telecommunications corporations to allow interconnection of essential facilities and the mutual exchange of traffic between networks (as each of those terms are used in Utah law, independent of federal law definition or interpretation of similar words or terms). *U.C.A. §54-8b-2.2(1)(b)(i)*. Utah law does not make a distinction based on technology used. UBTA-UBET has clearly declined to interconnect with Bresnan. Therefore, there is a “dispute over interconnection of essential facilities.” *U.C.A. §54-8b-2.2(1)(e)*.

Bresnan may have also included a request for arbitration under federal law, but it did so in addition to, and not exclusive of, its state law request. Under state law, the Commission has authority to resolve this dispute: “If there is a dispute over interconnection of essential facilities, the purchase and sale of essential services, or the planning or provisioning of facilities

or unbundled elements, one or both of the disputing parties may bring the dispute to the commission, and the commission, by order, shall resolve the dispute on an expedited basis.” *U.C.A. §54-8b-2.2(1)(e)*. This authority is independent from any authority that may be granted to the Commission under the Act. There still are issues to resolve, e.g. identification of the “facilities” needed for interconnection, what facilities are “essential”, the terms and conditions upon which these two Utah certificated telecommunications corporations will exercise their rights and meet their obligations imposed by Utah law, etc. But there is no doubt that Bresnan, presumptively, as a certificated telecommunications corporation is entitled to have the dispute resolved by the Commission. It would be improper for the Commission to dismiss a petition by a Utah certificated telecommunications corporation which invokes state law to have the Commission resolve a dispute between it and another telecommunications corporation.

UBTA-UBET has not shown that our state laws are inconsistent with provisions of the Act, nor does the Commission agree with UBTA-UBET that the Utah statutes have been preempted by the 1995 Federal Telecommunications Act. The 1996 Federal Telecommunications Act clearly preserves state law under 47 U.S.C. §251(d)(3). Indeed the sum of UBTA-UBET's argument is that it has no obligation to interconnect with Bresnan and that the federal act does not apply. UBTA-UBET argues that Bresnan is not an entity under the Act, nor are its services or products those to which the Act applies, neither are any rights conferred to Bresnan under the Act. It is inconsistent, however, to argue an act has no application but at the same time, argue it is preemptive of state law. The Commission concludes that the application of Utah law is not precluded by the Act. State law is specifically preserved by the



Act and its limitation on state law (if it were to “substantially prevent implementation . . . and purposes” of the federal law) does not apply. *See 47 U.S.C. § 251(d)(3) and 261.*

The Commission does not believe it is required to conduct a “rural exemption proceeding” before moving forward with resolution of the interconnection dispute between Bresnan and UBTA-UBET. UBTA-UBET's position stated in its letter of November 4, 2008 may be relevant where the Commission is proceeding under federal law. However, where state law clearly provides a basis to proceed with resolution of the dispute between two state-certificated providers, the Commission may and will proceed without determining whether UBTA-UBET is exempt from 47 U.S.C. § 251(c). The Commission proceeds with this matter solely pursuant to state law. It does not proceed under any authority conferred by federal law. The relief that may be provided will be provided pursuant to state law. Should the Commission or the parties later find that state law has no application, that the Commission does lack authority over the services involved or authority to grant/enforce the relief which may be given, the relief ultimately provided will, consequently, have no further application.

DATED at Salt Lake City, Utah, this 17<sup>th</sup> day of November, 2008.

/s/ Ruben H. Arredondo  
Administrative Law Judge

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Approved and confirmed this 17<sup>th</sup> day of November, 2008, as the Order of the  
Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard  
Commission Secretary

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