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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application 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.

UBTA-UBET COMMUNICATIONS, INC.'S MOTION TO INTERVENE

AND

MOTION TO DISMISS PETITIONS

DOCKET NO. 08-2476-01

UBTA-UBET Communications, Inc. (“UBTA-UBET”), pursuant to Section 63-46b-9 Utah Code Ann. (2001) and Utah Admin. R. 746-100-7, respectfully petitions the Public Service Commission of Utah for leave to intervene in the above-captioned docket. UBTA-UBET seeks to intervene on the following grounds:

On February 14, 2008, Bresnan Broadband of Utah (“Bresnan”) requested, pursuant to 47 U.S.C. § 251(a) and (b), that UBTA-UBET enter into a mutual traffic exchange agreement with Bresnan. (A Copy of Bresnan’s Letter dated February 14, 2008 is attached hereto). UBTA-UBET requested additional information from Bresnan by letter dated April 11, 2008. Based upon Bresnan’s responses to UBTA-UBET’s request for additional information, UBTA-UBET concluded that Bresnan did not qualify for an interconnection agreement under applicable federal law because Bresnan was not intending to use the interconnection arrangement for telecommunications services as that term is defined by federal law. On the contrary, Bresnan clearly intends to deploy a VoIP service, and there has, as of yet, been no determination at the federal level that VoIP services are telecommunications services. As indicated in Bresnan’s February 14, 2008 letter, the only request for interconnection was a request made pursuant to 47 U.S.C. Section 252(a) and (b). At no time did Bresnan request

interconnection pursuant to state law.

In fact, upon receipt of UBTA-UBET's letter declining interconnection pursuant to federal law (47 U.S.C. Section 252(a) and (b)), Bresnan did not clarify its request as seeking interconnection under state law. Rather, on May 14, 2008, Bresnan submitted a request for mediation to the Utah Public Service Commission. In response to this Request, the Public Service Commission assigned Sandy Mooy as mediator. On May 21, 2008 Mr. Mooy sent the parties an email indicating he would like to set the matter for mediation. On May 22, 2008, UBTA-UBET indicated that Bresnan's request for mediation should be denied on the grounds that the issue of UBTA-UBET's interconnection obligations with Bresnan as a VoIP provider, under 47 U.S.C. Section 252 (a) and (b) is a matter of federal law and should be determined by the FCC. In fact, UBTA-UBET pointed out that the issue was squarely before the FCC in the *Vermont*

Telephone Petition, DA 08-08-916. UBTA-

UBET's position is, and has been, that it has no interconnection obligations with Bresnan under 47 U.S.C. Section 252 (a) and (b) because, as a VoIP provider, Bresnan's status as a telecommunications carrier under federal law has not yet been determined.

As a result of UBTA-UBET's position, Mr. Mooy, on behalf of the Utah Public Service Commission, in order to better understand the issues, requested responses to several questions. Bresnan served its responses on June 5, 2008 (a copy of which is attached as **Exhibit 1**) UBTA-UBET served its responses on June 13, 2008 (a copy of which is attached as **Exhibit 2**). Thereafter, on July 3, 2008 the Utah Public Service Commission concluded that it would not act on Bresnan's request for mediation. The Utah Public Service Commission indicated that Bresnan's February 14, 2008 request for interconnection only referenced federal law (47 U.S.C. Section 251

(a) and (b). The Utah Public Service Commission also noted that Bresnan's May 14, 2008 mediation request also referenced only federal law (47 U.S.C. Section 252 (a)(2)).

After reviewing Bresnan's responses to the Commission's questions, the Public Service Commission determined that Bresnan's position is, and has been, that the IP enabled service it intends to provide is not a public telecommunications service as defined by Utah Code 54-8b-2(16).

The Commission further found that while the Commission granted Bresnan a state certificate to provide public telecommunications services under state authority and definitions, the service that Bresnan will provide, and for which it seeks an interconnection agreement, is not a public telecommunications service under Utah law, the provision of which would be permitted pursuant to the state granted certificate. In granting Bresnan's Certificate of Public

Convenience and Necessity, the Commission merely granted Bresnan authority to provide telecommunications services; it made no determination that VoIP Service, the service that Bresnan seeks to provide, is a telecommunications service. The Commission determined that Bresnan's request for interconnection for the VoIP services it intends to provide would require the Commission to proceed under federal law in order to determine whether UBTA-UBET has an interconnection obligation with Bresnan. The Commission declined to do so, stating that the FCC is currently reviewing this very issue in the *Vermont Telephone Petition*. The Commission, in no uncertain terms, declined to preempt or compete with the FCC to resolve these issues. A copy of the Commission's ruling is attached hereto as **Exhibit 3**).

Upon receipt of the Commission's ruling, Bresnan filed the above-captioned Petition to Resolve Dispute Over

Interconnection of Essential Facilities and for Arbitration to Resolve Issues Relating to an Interconnection Agreement with UBTA-UBET¹. Bresnan is seeking to enter into an arbitration with UBTA-UBET, and seeking to resolve alleged disputes regarding interconnection with UBTA-UBET. The issues to be considered by the Commission will impact UBTA-UBET. However, because Bresnan's Petitions were not filed in the same docket as Bresnan's Application for CPCN in which UBTA-UBET was an intervening party, UBTA-UBET is not a named party to this proceeding.

The interests of justice and the orderly conduct of these proceedings will not be impaired by allowing UBTA-UBET's participation. Bresnan's Petition was recently filed on or about July 17, 2008; therefore,

¹Interestingly, in these Petitions, Bresnan makes absolutely no mention of the Utah Public Service Commission's position and/or involvement in this matter.

UBTA-UBET's Petition to Intervene is prompt and timely, and its intervention and participation will not delay the proceedings in any way. Therefore, pursuant to Section 63-46b-9 Utah Code Ann. (2001) and Utah Admin. R. 746-100-7, UBTA-UBET should be permitted to intervene in this matter.

MOTION TO DISMISS

As an intervenor, UBTA-UBET further moves this court to dismiss Bresnan's Petitions on the grounds that Bresnan's Petitions are premature. Bresnan is before this Commission requesting that the Commission resolve a dispute over UBTA-UBET's obligations to interconnect with Bresnan under state and federal law. Bresnan's only request for interconnection has been pursuant to 47 U.S.C. Section 251 (a) and (b). As demonstrated above, UBTA-UBET has rejected any request

for interconnection pursuant to Federal law because the services that Bresnan seeks to provide are VoIP services. The FCC has not determined that VoIP services are telecommunications services under federal law and, thus, the law is not settled that UBTA-UBET has an interconnection obligation with Bresnan.

This position was affirmed by the Utah Public Service Commission when it declined to order UBTA-UBET to mediate an interconnection agreement with Bresnan under federal law. The Utah PSC agreed that Bresnan's only request for interconnection has been pursuant to federal law; and that federal law in this matter was undecided. The Utah PSC declined to preempt or compete with federal law on this issue.

Bresnan submits that UBTA-UBET is subject to interconnection under both State and Federal law, pursuant to Bresnan's request for interconnection. Bresnan states that the

Commission has the authority to order UBTA-UBET to interconnect with Bresnan pursuant to Utah Code Ann. Section 54-8b-2.2(1)(b). Bresnan requests that since UBTA-UBET refuses to negotiate an interconnection agreement with Bresnan, the Commission should resolve this dispute pursuant to Utah Code Section 54-8b-2.2(1)(e). First, Bresnan has never sought interconnection pursuant to state law; thus, Bresnan's request for commission intervention pursuant to Utah Code Section 54-8b-2.2(1)(e) is premature.

More importantly, as a matter of law, Bresnan's request is flawed. The Utah Rules cited by Bresnan also apply to telecommunications providers and require compliance with, *inter alia*, 47 U.S.C. Section 251 and 252. 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.

The fact that Utah's Public Service Commission has issued Bresnan a certificate to operate as a CLEC is not controlling on the issue of whether VoIP service providers are telecommunications service providers. As acknowledged by this Commission in its letter dated July 3, 2008 as set forth in detail above, Bresnan's status as a telecommunications service provider is an issue of federal law, not state law, and should be determined by the FCC. This Commission has already indicated that Bresnan misunderstood the Commission's position in its order granting the Certificate of Public Convenience and Necessity. The Commission did not conclude that Bresnan's IP enabled services were telecommunications services; rather, the Commission merely

granted Bresnan the authority to provide telecommunications services.

Based upon the position of Bresnan taken in this matter and the responses to questions posed by UBTA-UBET and the Commission, it is clear that Bresnan intends to provide VoIP Services. There are no interconnection obligations for VoIP services. This very issue is before the FCC in *Vermont Telephone Petition*. Bresnan argues that the issue in *Vermont Telephone* is whether VoIP providers are entitled to interconnection pursuant to 47 U.S.C. Sections 251 and 252 when they assert they are not telecommunications carriers. This is not accurate. There are three issues that the FCC is deciding in *Vermont Telephone*: (1) whether only telecommunications carriers are entitled to interconnection with local exchange carriers pursuant to sections 251 and 252; (2) whether a VoIP provider is entitled to interconnection pursuant to sections 251 and 252 when, in separate proceedings, that

provider has taken a position that it is not a telecommunications carrier; and (3) whether Comcast Phone of Vermont, LLC, as a VoIP provider, is a telecommunications carrier and, therefore, entitled to interconnection pursuant to Sections 251 and 252. *See Vermont Telephone Petition, DA 08-08-916 at 1-8.*

Bresnan further argues that there is a widely accepted right of VoIP providers to interconnection. However, it offers no legal support for this assertion. Rather, Bresnan merely takes the term “interconnected VoIP providers” and claims that the FCC’s use of this term proves that VoIP providers are entitled to interconnection. There simply has been no ruling from the FCC in which the FCC has conclusively determined that VoIP services are telecommunications services. Bresnan argues that “examples of the FCC’s repeated decision to extend service obligations to interconnected VoIP providers strongly suggest

that the FCC has long accepted that VoIP providers are permitted to interconnect in the capacity as telecommunications carriers.” This argument, however, simply does not answer the question of whether VoIP services, such as those services that Bresnan seeks to provide, are telecommunications services. In fact, in the *LNP Order* that Bresnan cites (*In the Matter of Bright House Networks, LLC, et al. v. Verizon California, Inc. et al. File No. EB-08-MD-002*), the FCC specifically states in paragraph 41: “Our decision holding the Competitive Carriers to be “telecommunications carriers” for purposes of section 222(b) does not mean that they are necessarily “telecommunications carriers” for purposes of all other provisions of the Act. We leave those determinations for another day.” The issue of whether VoIP service providers are providing telecommunications services that would be eligible for interconnection under Sections 251 and 252 of the Federal Telecommunications

Act is undecided at this time, and it being considered currently at the FCC. As such, this Commission should affirm its previous conclusion that Bresnan is not eligible for interconnection with UBTA-UBET based on the services Bresnan seeks to provide.

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CONCLUSION

Because the Commission has already addressed the above issues with Bresnan in its letter dated July 3, 2008, and because the issue of interconnection obligations with VoIP providers is currently pending at the FCC in the *Vermont Telephone Petition*, the Commission should dismiss Bresnan's Petition and Request for mediation as premature.

DATED this ____ day of
_____, 2008.

BLACKBURN & STOLL, L.C.

Stanley K. Stoll

CERTIFICATE OF MAILING

I hereby certify that on this ____ day of _____, 2008, a true and correct copy of **UBTA-UBET COMMUNICATION, INC.'S MOTION TO INTERVENE AND MOTION TO DISMISS** was served upon the following by email:

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