

Stephen F. Mecham (Bar No. 4089)
Callister Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, Utah 84133
Telephone: 801 530-7300
Facsimile: 801 364-9127
Email: sfmecham@cnmlaw.com

BEFORE 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 Petition of the Utah Rural Telecom Association for Reconsideration, Review or Rehearing
--	---

The Utah Rural Telecom Association (“URTA”), pursuant to Utah Code Ann. § 63G-4-301 and Utah Code Ann. § 54-7-15, hereby petitions the Public Service Commission (“Commission”) to reconsider the Commission’s May 21, 2009 (“Order”) issued in this matter and review and rehear the issues enumerated below.

I. INTRODUCTION

On January 27 – 29, 2009, the Commission held hearings to resolve disputes between Bresnan Broadband, LLC (“Bresnan”) and UBTA-UBET Communications, Inc. (“UBET”) in an interconnection agreement filed under state law. The Commission has resolved many interconnection disputes under federal law; however, since Bresnan does not qualify for interconnection under federal law, the Commission moved forward solely under state law. This is the first time in 14 years the Commission has applied state law to resolve interconnection disputes. During the proceeding, UBET, URTA, and Bresnan each presented testimony addressing whether UBET could be forced to interconnect with Bresnan indirectly through a

third party intermediary where UBET has no facilities. In the Order the Commission concluded it had the authority to coerce UBET to interconnect indirectly with Bresnan in Qwest Communication's ("Qwest") Provo tandem switch.

The Commission also concluded that UBET should be paid no compensation for terminating Bresnan's traffic between UBET's Vernal exchange and UBET's other exchanges. URTA believes these decisions are incorrect and establish harmful precedent for all its members in future interconnection proceedings. For these reasons URTA seeks reconsideration.

II. ARGUMENT

A. Utah Code Ann. § 54-8b-2.2(1)(a)(i) Does Not Permit Indirect Interconnection Through a Third Party Intermediary

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." (*Emphasis added.*) In the Order the Commission found "[t]here is no dispute that UBTA-UBET has essential facilities at the Provo tandem"¹ and required UBET to interconnect with Bresnan in Qwest's tandem in Provo. The Commission's finding is not supported by substantial evidence on the record; UBET has no facilities, essential or otherwise, in Qwest's Provo tandem.

The Commission identified trunks 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.² 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

¹ Order, at p. 8.

² *Id.*

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. URТА testified at hearing that UBET's facilities end at Whiskey Springs and everything beyond that to and within the Provo tandem belongs to Qwest.³ The Commission apparently ignored this testimony in finding that UBET has essential facilities at Qwest's Provo tandem. To the degree evidence on the record in this case is indisputable it shows that UBET has no essential facilities in the Provo tandem to which Bresnan can interconnect. The only agreement UBET has with Qwest at Whiskey Springs is to mutually exchange intralata toll traffic, so while UBET may use Qwest's trunks for this purpose, it is not authorized to allow Bresnan to use them. At hearing, URТА and UBET testified that Bresnan would have to make arrangements directly with Qwest to accommodate Bresnan's local traffic.⁴ Neither UBET nor Bresnan can deliver or receive local traffic at the Provo tandem without separate agreements with Qwest.

URТА also challenges the Commission's finding that "...it is technically feasible for UBTA-UBET to interconnect with Bresnan at the Provo tandem."⁵ Without ownership or control of the trunks from Whiskey Springs to the Provo tandem, UBET cannot interconnect

³ Transcript p. 246, lines 12-25; p. 247, lines 1-3; p. 250, lines 11-21. *See also* Qwest's letter dated and filed with the Commission June 18, 2009 which makes clear that UBET does not own or control facilities in Qwest's Provo tandem.

⁴ Transcript p. 246, lines 12-25; p. 247, lines 1-3; p. 353, lines 2-20. Qwest's June 18, 2009 letter shows that Bresnan's assumptions presented as evidence at hearing are wrong. It takes considerably more than changing translations at the Qwest Provo tandem to accommodate local traffic and will be "very expensive and would likely take a significant amount of time to implement."

⁵ Order at p. 9. The Commission introduced technical feasibility in Utah Admin. Code § R746-348-3A in implementing Utah Code Ann. § 54-8b-2.2.

with Bresnan in that tandem.⁶ Nor does UBET have authorization or access to enable Bresnan to interconnect to Qwest's facilities in the Provo tandem.

The Commission's findings that UBET has essential facilities at the Provo tandem and that interconnection at the Provo tandem is technically feasible are not supported by substantial evidence. In addition, the Order violates Utah Code Ann. § 54-8b-2.2(1)(a)(i). The Commission cannot order a telecommunications corporation to interconnect another telecommunications corporation's facilities to yet a third telecommunications corporation's facilities. Even if this arrangement were technically feasible it is contrary to law. URTA therefore strongly urges the Commission to reconsider and reverse this decision.

B. The Commission's Interpretation of Utah Code Ann. § 54-8b-2.2(1)(a)(i) Requiring Interconnection Outside an Incumbent Provider's Service Territory Where There are no Facilities is Incorrect and Leads to Unreasonable Results

In the Order, the Commission interpreted Utah Code Ann. § 54-8b-2.2(1)(a)(i) to require UBET to interconnect with other telecommunications corporations inside or outside of its service territory, even where UBET has no facilities.⁷ Though the Division opposed URTA and UBET by advocating interconnection outside an incumbent provider's service territory, it acknowledged that a telecommunications corporation could not request interconnection where the incumbent has no facilities.⁸ Surprisingly, the Commission responded that "[t]he Division, however, provides no support for its contention that 'a CLEC cannot require interconnection where the ILEC has no facilities.'" ⁹

⁶ Qwest's June 18, 2009 letter also illustrates that without significant modification, it is not technically feasible to interconnect to Qwest's essential facilities in the Provo tandem. Currently, even if UBET had authority to allow Bresnan to interconnect at the Provo tandem, Qwest's trunks cannot accommodate Bresnan's local traffic.

⁷ Order at p. 10.

⁸ April 9, 2009 Reply Memorandum of the Division of Public Utilities, p. 2.

Utah Code Ann. § 54-8b-2.2(1)(a)(i) only permits the Commission to require a telecommunications corporation to interconnect “**its essential facilities**” with those of another telecommunications corporation. (*Emphasis added.*) This provision is the authority and support for the Division’s position. A telecommunications corporation cannot interconnect its essential facilities with another telecommunications corporation if the first telecommunications corporation has no facilities in the territory with which to interconnect. This, coupled with the Commission’s interpretation of the statute allowing interconnection inside or outside an incumbent provider’s service territory leads to results that are completely unreasonable and unsustainable. It means the Commission could require UBET to interconnect with another telecommunications corporation anywhere in the state, country, or world to serve the same, adjacent, or overlapping service territory if interconnection were technically feasible and imposed no greater costs on one party than on the other.¹⁰ Otherwise, anything goes.

The Commission’s interpretation is not what the legislature intended when it passed the Telecommunications Reform Act in 1995 and the interpretation is not supported by the words of the statute. The emphasis on providers serving the same, adjacent, or overlapping territory where the providers are in close proximity presumes interconnection with the incumbent in the incumbent’s territory where it has essential facilities. It does not mean an incumbent must build facilities where it has none outside of its service territory to accommodate an entering telecommunications corporation. That makes no sense and a statute is to be interpreted in a way that makes sense and results in an unreasonable outcome. Consequently, URTA petitions the Commission to reconsider its interpretation of Utah Code Ann. § 54-8b-2.2 to reflect results that are reasonable.

⁹ Order at p. 10.

¹⁰ Order at pp. 14-15.

C. The Commission's Denial of Compensation to UBET for Terminating Traffic to Other UBET Exchanges is Incorrect and Violates the Law

The Commission concluded that charging Bresnan UBET's EAS for terminating traffic outside of the Vernal exchange in UBET's other exchanges would violate Utah Code Ann. § 54-8b-2.2(1)(b)(ii).¹¹ Irrespective of the Commission's rationale, failure to compensate UBET for this traffic violates Utah Code Ann. § 54-8b-2.2(1)(b)(ii). The traffic from the Vernal exchange to UBET's other exchanges is interexchange traffic for which access charges would be imposed if the Commission had not approved an EAS charge. That the Commission has approved a flat-rate EAS charge as a substitute for access charges does not relieve Bresnan from its obligation to pay access charges. The Commission's decision treats Bresnan's customers differently than UBET treats its own customers in violation of the law, the substantial evidence on the record does not support it, and URITA therefore urges the Commission to reconsider and reverse this decision.

III. CONCLUSION

The Commission erred in finding that UBET has essential facilities in Qwest's Provo tandem and under state law it cannot require UBET to interconnect Bresnan's facilities to Qwest's facilities which UBET does not own, control or manage. Additionally, the Commission erred in finding that interconnection between UBET and Bresnan in the Provo tandem is technically feasible. The Commission also erred in its interpretation of Utah Code Ann. § 54-8b-2.2; the interpretation leads to results that are unreasonable and unsustainable. Finally, the Commission also erred in failing to compensate UBET for traffic outside its Vernal exchange to its other exchanges. URITA, therefore, requests that the Commission reconsider and reverse the Order in accordance with this petition.

¹¹ Order at p. 30.

Respectfully submitted this 22nd day of June, 2009.

CALLISTER NEBEKER & MCCULLOUGH

Stephen F. Mecham

Certificate of Service

I hereby certify that on June 22, 2009, I caused a true and correct copy of the foregoing Petition for Reconsideration of the Utah Rural Telecom Association in Docket No. 08-2476-02 to be emailed to the following:

Michael Ginsberg
Patricia Schmid
Assistant Attorneys General
160 East 300 South, Fifth Floor
Salt Lake City, Utah 84111
mginsberg@utah.gov
pschmid@utah.gov

Bill Duncan
Division of Public Utilities
160 East 300 South, Fourth Floor
Salt Lake City, Utah 84111
wduncan@utah.gov

Thorvald A. Nelson
Holland & Hart
PO Box 8749
Denver, Colorado 80201-8749
TNelson@hollandhart.com

Jerold C. Lambert
Bresnan Communications
1 Manhattanville Road
Purchase, NY 10577
jlambert@bresnan.com

Paul Proctor
Assistant Attorney General
160 East 300 South, Fifth Floor
Salt Lake City, Utah 84111
pproctor@utah.gov

Eric Orton
Committee of Consumer Services
160 East 300 South, Second Floor
Salt Lake City, Utah 84111
eorton@utah.gov

Stanley K. Stoll
Kira M. Slawson
BLACKBURN & STOLL, LC
257 East 200 South, Suite 800
Salt Lake City, Utah 84111
ssoll@blackburn-stoll.com
kiram@blackburn-stoll.com