

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

THORVALD A. NELSON  
HOLLAND & HART LLP  
8390 East Crescent Pkwy, Suite 400  
Greenwood Village, CO 80111  
Telephone: (303) 290-1601  
Facsimile: (303) 975-5290

JAMES A. HOLTKAMP (BAR NO. 1533)  
HOLLAND & HART LLP  
60 E. South Temple, Suite 2000  
Salt Lake City, UT 84111-1031  
Telephone: (801) 799-5847  
Facsimile: (801) 799-5700

Attorneys for Bresnan Broadband of Utah, LLC

---

**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.	<b>Bresnan Broadband of Utah, LLC's Response to UBTA-UBET Communications, Inc.'s Petition for Reconsideration and Rehearing and Utah Rural Telecom Association's Petition for Reconsideration, Review or Rehearing</b>  <b>Docket No. 08-2476-02</b>
--	--

---

Bresnan Broadband of Utah, LLC ("Bresnan"), hereby submits the following Response to UBTA-UBET Communications, Inc.'s ("UBET") Petition for Reconsideration and Rehearing ("UBET Petition") and Utah Rural Telecom Association's ("URTA") Petition for Reconsideration, Review or Rehearing ("URTA Petition") in the above-referenced Docket and requests that the respective Petitions be denied.

## **I. Introduction**

On January 27-29, 2009, the Public Service Commission of Utah (“Commission”) held hearings on Bresnan’s Petition to Resolve Dispute Over Interconnection of Essential Facilities and for Arbitration to Resolve Issues Relating to Interconnection Agreement with UBET.

Following the hearings, all Parties submitted post-hearing briefs and related pleadings. After fully considering all of the evidence before it, including testimony provided at the hearings and the Parties’ pleadings, the Commission issued its Report and Order Resolving Interconnection Dispute on May 21, 2009 (“Commission Order”). As relevant to the issues addressed in this Response, the Commission held as follows: (1) Bresnan has the right to interconnect with UBET; (2) UBET shall permit Bresnan to obtain indirect interconnection with UBET’s essential facilities at the Provo tandem, or as otherwise mutually agreed; (3) Bresnan is not required to pay an extra EAS charge, flat-rate or other, for use of UBET’s EAS network; and (4) there should not be any extra charge by UBET to Bresnan for calls that terminate outside of Vernal (i.e., in the EAS area) and that EAS traffic would already be compensated as local traffic.

On June 22, 2009 UBET and URTA petitioned the Commission for reconsideration and rehearing and requested that the Commission reverse its Order with regard to the following issues: (1) whether UBET is obligated to interconnect to Bresnan as a VoIP provider; (2) whether, under state law or otherwise, UBET is required to indirectly interconnect with Bresnan at the Qwest Provo tandem; (3) whether UBET has essential facilities at the Provo tandem; (4) whether interconnection between UBET and Bresnan at the Provo tandem is technically feasible; (5) whether Bresnan would be required to pay a flat-rate charge for use of UBET’s EAS network; and (6) whether UBET can charge Bresnan any additional charge to

terminate calls outside of the Vernal exchange. URTA also argues that the Commission erred in its interpretation of Utah Code Ann. § 54-8b-2.2.

The positions advocated by UBET and URTA in this matter would, if adopted, raise substantial and unwarranted barriers to Bresnan's competitive entry in the Vernal Exchange by establishing anticompetitive and discriminatory terms and conditions for interconnection and the mutual exchange of traffic. On November 16, 2007, after a hearing before Administrative Law Judge Steven A. Goodwill, the Commission issued a Certificate of Public Convenience and Necessity ("CPCN") to Bresnan in Docket No. 07-2476-0 1. Since then, Bresnan has experienced numerous delays to its entry in the Vernal Exchange. Utah law requires the Commission to "encourage the development of competition as a means of providing wider customer choices for public telecommunications services throughout the state" and "encourage competition by facilitating the sale of essential telecommunications facilities and services on a reasonably unbundled basis."<sup>1</sup> To meet these legislative policies and based on the evidence presented, the Commission ruled as noted above. By doing so, the Commission made it possible for the telephone customers in Vernal to enjoy the benefits of competition. Bresnan appreciates this opportunity to respond to the petitions submitted by UBET and URTA and requests that the Commission deny UBET's and URTA's Petitions for relief.

## **II. Bresnan Has the Right to Interconnect with UBET**

### **A. The State has Jurisdiction Over This Proceeding**

In its Petition, UBET again argues that the state does not have jurisdiction to determine whether Bresnan is a telecommunications service provider and that federal law preempts state

---

<sup>1</sup> Utah Code Ann. § 54-8b-1.1(3) and (6).

law in the matter.<sup>2</sup> The Commission has already had two separate occasions to consider this argument and has denied UBET's Motions to Dismiss on both occasions.<sup>3</sup> UBET offers no additional information nor does UBET provide new arguments with regard to this issue. Therefore, reconsideration would not likely result in a different outcome and UBET's request for reconsideration should be denied.

In Bresnan's initial Petition which commenced this matter, Bresnan stated that it "is a telecommunications corporation as that term is defined in Utah Code Ann. § 54-8b-2(18)."<sup>4</sup> The Commission likewise held in its Report and Order issued November 17, 2008, that "Bresnan is a certificated provider of telecommunications services," and "state law is unambiguously invoked in Bresnan's July 17, 2008 Petition."<sup>5</sup> In both the Commission's November 17, 2008 and its May 21, 2009 Report and Order, the Commission indicated that UBET had failed to show that Utah state laws are inconsistent with provisions of the 1996 Federal Telecommunications Act ("Act").<sup>6</sup> Furthermore, the Commission noted that UBET "failed to adequately explain to the Commission how 'the federal law preempts the state laws in this matter'" or "explain how state law is expressly or impliedly preempted, including, if impliedly preempted, whether such

---

<sup>2</sup> UBET Petition at p. 3.

<sup>3</sup> Commission Report and Order issued November 17, 2008; Commission Report and Order Resolving Interconnection Dispute issued May 21, 2009 ("Commission Order").

<sup>4</sup> Bresnan's Petition to Resolve Dispute Over Interconnection of Essential Facilities and Petition for Arbitration submitted July 17, 2008, at p. 2.

<sup>5</sup> Commission Report and Order issued November 17, 2008 at p. 7. The Commission's denial to mediate the interconnections dispute (Commission Order at p. 2), is not tantamount to a determination that "Bresnan does not qualify for interconnection under federal law," as URITA asserts (URITA Petition at p. 1). Indeed, Bresnan disputes this characterization.

<sup>6</sup> Commission Report and Order issued November 17, 2008 at p. 8; Commission Order at p. 3.

preemption is ‘occupy the field’ or ‘conflict’ preemption.”<sup>7</sup> UBET’s Petition again fails to address these issues and does not provide any new arguments which the Commission has not already considered. Therefore, the Commission should deny UBET’s request for reconsideration and rehearing on this issue.

**B. State Law Permits Interconnection Via a Third Party’s Tandem**

In its Petition, URTA argues that Utah Code Ann. § 54-8b-2.2(1)(a)(i) does not permit indirect interconnection through a third party intermediary.<sup>8</sup> The Commission articulated the “fundamental principle of indirect interconnection” as “where two carries 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.”<sup>9</sup> The Commission also fully considered the arguments raised by UBET, URTA, and the Division of Public Utilities (the “Division”) in analyzing whether applicable statutes and rules require either indirect or direct interconnection,<sup>10</sup> and found that “neither the Rules nor the statutes explicitly state whether interconnection must be made by direct or indirect interconnection.”<sup>11</sup> Therefore, the Commission relied on the “plain language” of the statute and found that “the language of the statute<sup>12</sup> is clear” – Bresnan may identify a desired point of interconnection with UBET’s

---

<sup>7</sup> Commission Order at p. 3-4.

<sup>8</sup> URTA Petition at p. 2.

<sup>9</sup> Commission Order at p. 23.

<sup>10</sup> *Id.* at p. 5-7.

<sup>11</sup> *Id.* at p. 8.

<sup>12</sup> The Commission states “statute,” but is actually referring to the language of the “rule.”

essential facilities at any technically feasible point, including the Provo tandem.<sup>13</sup> The Commission's analysis and holding are sound and should not be disturbed.

**III. UBET Shall Permit Bresnan To Obtain Indirect Interconnection With UBET's Essential Facilities, Whether at The Provo Tandem or Another Location Mutually-Selected by the Parties**

The Commission ordered that UBET shall permit Bresnan to obtain indirect interconnection with UBET's essential facilities at the Provo tandem; however, the Commission's Order also provided that if Bresnan and UBET mutually select another location, they may also interconnect at that location.<sup>14</sup> In support of this order the Commission held that UBET has essential facilities at the Provo tandem and it is technically feasible for UBET to interconnect with Bresnan at the Provo tandem. In an attempt to support their arguments that indirect interconnection as directed by the Commission is not a feasible economic alternative, UBET and URTA cite to a letter filed by Qwest with the Commission on June 18, 2009 ("Qwest Letter").<sup>15</sup> For a host of procedural and substantive reasons, the Commission should not consider the Qwest Letter. UBET's ability to materially comply with the Commission's Order is unaffected by the assertions contained in the Qwest Letter, whether accurate or not, because UBET is able to permit Bresnan to interconnect indirectly. Finally, while Bresnan submits it is wholly unnecessary, to the extent the Commission desires to put a finer point on this issue, Bresnan is willing to accept a modification to Section 3.1.1 of the Interconnection Attachment to the Essential Facilities Agreement Between UBTA-UBET Communications, Inc. and Bresnan

---

<sup>13</sup> Commission Order at p. 8.

<sup>14</sup> Commission Order at p. 36 ("UBTA-UBET shall permit Bresnan to obtain indirect interconnection with UBTA-UBET's essential facilities at the Provo tandem. If the parties mutually select another location, they may also interconnect at that location").

<sup>15</sup> UBET Petition at p. 9.

Broadband of Utah, LLC to explicitly excuse both UBET and Bresnan from any exposure with respect to a third party tandem being disabled from providing transiting in support of indirect interconnection.

**A. UBET has Essential Facilities at the Provo Tandem**

UBET and URТА assert that no reasonable evidence supported the Commission’s conclusion that UBET has essential facilities at the Provo tandem.<sup>16</sup> Contrary to UBET’s contention that “[t]here was absolutely no evidence presented during the three day hearing that indicated that UBET owns, controls, or maintains facilities at the Provo tandem,”<sup>17</sup> and URТА’s contention that “[t]o 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,”<sup>18</sup> the Commission cited directly to the hearing transcript in holding that UBET “already has existing trunk groups between it and the Qwest tandem switch in Provo to which the [UBET] end office subtends. Therefore, regardless of whether Bresnan interconnects, [UBET] will have costs for maintaining the trunk group at the Provo tandem.”<sup>19</sup> In fact, UBET witness Valerie Wimer testified that UBET subtends the Qwest tandem in Provo for Intralata toll traffic routing.<sup>20</sup>

“Essential facilities” are defined in Utah Code section 54-8b-2(5) as

[A]ny 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

---

<sup>16</sup> UBET Petition at p. 7; URТА Petition at p. 2.

<sup>17</sup> UBET Petition at p. 7-8.

<sup>18</sup> URТА Petition at p. 3.

<sup>19</sup> Commission Order at p. 17, *citing* Transcript of Proceedings (“Transcript”) p. 90, ll. 3-23, p. 91, ll. 14-25, p. 92, ll. 1.

<sup>20</sup> Wimer Testimony at p. 15, ll. 269-272.

there is no adequate economic alternative to the competitor in terms of quality, quantity, and price.

After fully analyzing UBET's and URTA's arguments and evaluating the definition of "essential facilities," the Commission found that UBET "already has a portion, component, or function of its network (a trunk) that it uses to provide public telecommunications service, specifically, to carry toll-traffic at the Provo tandem."<sup>21</sup>

UBET's argument that "[i]ndirect interconnection is not an essential facility as defined by the Utah Code,"<sup>22</sup> is misplaced. As the Commission accurately determined, UBET's trunk which it uses to carry toll-traffic at the Provo tandem is an essential facility,<sup>23</sup> and is the essential facility that makes indirect interconnection possible. While Bresnan is *capable* of providing telecommunications services through a direct connection with UBET, the Commission correctly held that direct interconnection would be significantly more expensive for Bresnan than indirect interconnection, and therefore there is no other adequate economic alternative to Bresnan in terms of quality, quantity, and price.<sup>24</sup>

URTA contends that the Commission has mistaken Qwest's facilities at the Provo tandem for UBET's and therefore its Order requiring UBET to permit Bresnan to obtain indirect interconnection with UBET's essential facilities is contrary to law.<sup>25</sup> The Commission made no such error. The Commission identified the "fundamental principle of indirect interconnection,"

---

<sup>21</sup> Commission Order at p. 8.

<sup>22</sup> UBET Petition at p. 8.

<sup>23</sup> Commission Order at p. 8 ("[UBET] already has a portion, component, or function of its network (**a trunk**) that it uses to provide public telecommunications service, specifically, to carry toll-traffic at the Provo tandem.") (Emphasis added.)

<sup>24</sup> *Id.*

<sup>25</sup> URTA Petition at p. 2-3.

as identified above, and acknowledged that “Bresnan ... requested indirect interconnection at the Provo tandem, through a third-party (Qwest) with whom both Bresnan and UBTA-UBET are already interconnected, and for which they already incur expenses.”<sup>26</sup>

**B. Indirect Interconnection at the Provo Tandem is Technically Feasible**

UBET’s Petition correctly summarizes the Commission’s analysis of the language of Utah Code Ann. § 54-8b-2.2(1)(a)(i) and Rule 746-348-3 under which the Commission held that (1) UBET has essential facilities at the Provo tandem, and (2) it is technically feasible for UBET to interconnect with Bresnan at the Provo tandem.<sup>27</sup> However, UBET’s and URTA’s analyses of the Commission’s holding are flawed in several respects.

UBET and URTA contend that the Commission erroneously concluded that it is technically feasible for UBET to interconnect with Bresnan at the Provo tandem.<sup>28</sup> The issue of whether indirect interconnection is technically feasible has been thoroughly considered by the Commission through witness testimony and UBET’s and Bresnan’s pleadings. UBET claims that “there is no evidence in the record that the third party tandem providers have the technical capabilities to provide local transit service for the UBET service territory.”<sup>29</sup> URTA contends that the Commission’s finding that interconnection at the Provo tandem is technically feasible is not supported by substantial evidence.<sup>30</sup> Notwithstanding these assertions, the technical capabilities of third party tandem providers to provide local transit service for the UBET service territory has not been called into question in this proceeding. On the contrary, the evidence

---

<sup>26</sup> Commission Order at p. 5.

<sup>27</sup> *Id.* at 8-9.

<sup>28</sup> UBET Petition at p. 9; URTA Petition at p. 4.

<sup>29</sup> *Id.* at p. 10.

<sup>30</sup> URTA Petition at p. 4.

produced during these proceedings and cited by the Commission,<sup>31</sup> establish that indirect interconnection at the Provo tandem is technically feasible. Bresnan submitted evidence in this case, subject to cross-examination, of its current indirect interconnection arrangements between itself and an independent ILEC with which it directly competes in Colorado, along with descriptions of how those arrangements operate via a Qwest tandem in exactly the same manner as Bresnan has proposed in this case.<sup>32</sup> The evidence provided by Bresnan as to the technical feasibility of indirect interconnection via the Provo or any other third party tandem is not in question, and was in fact conceded by UBET's witnesses on cross-examination.<sup>33</sup>

By virtue of its statements, UBET demonstrates the technical feasibility of indirect interconnection at the Qwest Provo tandem. Indeed, UBET correctly explains on page 6 of its Post Hearing Brief,

An indirect connection through a third party tandem typically handles traffic to and from all carriers at the tandem **on a single trunk group**. In an indirect connection, the Tandem provider, such as Qwest or UFN, and the directly connecting party, Bresnan or UBET, would determine the size of the trunk group based on the total amount of traffic from all carriers.

(Emphasis added.) UBET's statement is perfectly consistent with Mr. Harris' testimony that there is no technical reason why Bresnan and UBET cannot use trunk groups established

---

<sup>31</sup> Commission Order at p. 9.

<sup>32</sup> See Transcript at p. 89, ll. 12-21; p. 93, ll. 6-10 ("we have interconnections, for instance, in Colorado, with Century Tel, where we are exchanging local – not EAS, but actually local traffic, because we're directly competing with them in that market. But we're both completing that traffic through a Qwest tandem, because we're both below the 512 ccs threshold for direct connection.... [In Colorado, where] we are exchanging traffic indirectly, even though we're exchanging local traffic within the Century exchange, but we're both exchanging it via our trunk groups to a Qwest tandem that's far distant.")

<sup>33</sup> See Transcript at p. 210-218, p. 353, ll. 5-18.

primarily for toll traffic to also route local traffic until traffic volumes justify the expense of a direct connection.<sup>34</sup>

URTA also relies on the fact that additional arrangements will have to be made for the ordered indirect interconnection as support for its argument. However, the Commission was fully aware of such allegations when it made its determination in this matter. The Commission specifically quoted Ms. Wimer’s testimony that “you have to have the arrangements and agreements [with] the other parties” and that there would be costs “incurred in establishing agreements necessary to have local traffic go over the existing trunk group.”<sup>35</sup> The Commission noted that “there is simply no evidence of those costs.”<sup>36</sup> Furthermore, the fact that additional arrangements may have to be put in place for the ordered indirect interconnection, does not mean that the interconnection is not technically feasible.

For the reasons stated above, the Commission should deny UBET’s and URTA’s requests that the Commission reconsider and reverse this decision.

**1. The Commission’s Interpretation of Utah Code Ann. § 54-8b-2.2(1)(a)(i) is Completely Reasonable**

UBET incorrectly concludes that the Commission’s interpretation would lead to an “absurd result” under which “a CLEC could request interconnection with an ILEC at any place in the world, without consideration of any other factors, such as economic factors, so long as it were ‘technically feasible.’”<sup>37</sup> Similarly, URTA incorrectly concludes that the Commission’s

---

<sup>34</sup> Transcript at p. 623, l. 4 to p. 624, l. 7.

<sup>35</sup> Commission Order at p. 15, *citing* Transcript p. 353, ll. 9-13, p. 213, ll. 19-25, p. 214, ll. 1-15.

<sup>36</sup> *Id.*

<sup>37</sup> UBET Petition at p. 7.

interpretation would lead to “unreasonable results.”<sup>38</sup> URTA claims that “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 the other.”<sup>39</sup> URTA also argues that the language of the Telecommunications Reform Act and the applicable Utah statutes do not mean “that an incumbent must build facilities where it has none outside of its service territory to accommodate an entering telecommunications corporation.”<sup>40</sup>

The Commission’s rules require each party to be responsible for the network on its side of the meet point.<sup>41</sup> Furthermore, Bresnan noted and the Commission acknowledged that “when parties negotiate meet points for interconnection, ‘neither party may impose a meet point that would require that one party incur significantly greater construction costs to build to the meet point than the other party.’”<sup>42</sup> The Commission Order in this case does not require UBET to construct any additional facilities, and if it did those costs would presumably be incorporated into the analysis of whether interconnection would result in one party incurring significantly greater construction costs than the other party. It would be nonsensical for a CLEC to request indirect interconnection with an ILEC at a location that would pose an unnecessary economic burden on itself and the ILEC if there were a more economically and technically feasible alternative.

---

<sup>38</sup> URTA Petition at p. 4.

<sup>39</sup> *Id.* at p. 5.

<sup>40</sup> *Id.*

<sup>41</sup> Utah Admin. Code R746-348-3(B).

<sup>42</sup> Commission Order at p. 14, *citing* R746-348-3(B)(1).

Finally, the Commission made its determination that Bresnan may indirectly interconnect with UBET at the Provo tandem, “in part, on the economic feasibility of interconnection based on whether establishing the indirect or direct interconnection would ‘require that one party incur significantly greater construction costs to build to the meet point than the other party.’”<sup>43</sup> Therefore, since the Commission did in fact consider economic factors in its analysis, UBET’s argument for reconsideration would be an exercise in the hypothetical and an inefficient use of the Commission’s resources and expertise. After fully considering the economic data on the record, the Commission found that “direct interconnection, at least initially, is not the most economically symmetric way for both parties to interconnect.”<sup>44</sup> The Commission’s results in this case are reasonable based on the evidence on the record as applied to UBET and Bresnan.

### **C. The Qwest Letters Should Not be Considered**

UBET and URITA references the Qwest Letter dated June 18, 2009, to bolster their assertions that indirect interconnection at the Provo tandem as directed by the Commission is not a technically feasible economic alternative.<sup>45</sup> Such reliance on the Qwest Letter is an impermissible attempt to introduce extra-record material as evidence after the conclusion of the hearing for the improper purpose of impeding Bresnan’s entry to the competitive marketplace. Both UBET and URITA had, but did not avail themselves of, the opportunity to introduce evidence during the pendency of the hearing in this case regarding the costs of indirect interconnection.<sup>46</sup> UBET or URITA could have performed a cost study for this docket, but did

---

<sup>43</sup> *Id.* at p. 14-15.

<sup>44</sup> Commission Order at p. 21.

<sup>45</sup> UBET Petition at p. 10; URITA Petition at p. 4, fn. 6.

<sup>46</sup> Commission Order at p. 16, *citing* Transcript at p. 673, ll. 4-10 (“the Division had asked for cost data from [UBET]-‘some cost numbers that [the Commission] would be able to look at to be

not do so.<sup>47</sup> The only direct evidence of the cost of interconnection was offered in Exhibit B-2 which establishes that for both UBET and Bresnan, indirect is less expensive than direct interconnection until traffic volumes increase to levels sufficient to support a direct connection. UBET and URTA have failed to provide any substantive cost information to the record in this case that quantifies or documents how indirect interconnection might be more expensive for UBET than direct interconnection.<sup>48</sup> Bresnan filed its original testimony in November 2008, allowing UBET and URTA several months to gather and present evidence in hearing to challenge Bresnan's evidence. Failing to do so, neither UBET nor URTA should be allowed to further delay Bresnan's entry into the market by reference to unsubstantiated hearsay from a third party that lacks standing in the case.

Qwest filed a subsequent letter with the Commission, dated June 30, 2009, (together collectively referred to as the "Qwest Letters"). For a number of procedural and substantive reasons, the Commission should not consider either of the letters filed by Qwest in this proceeding.

### **1. Procedural Defects**

There are procedural defects with the Commission's consideration of and UBET's and URTA's reliance on the Qwest Letters. Qwest is not a party to, or offered as a witness in, this proceeding. Indeed, as a non-party, Qwest concedes that it "takes no position on the issues of the

---

able to determine what the costs would be for both parties for direct and indirect interconnection,' but apparently had not received that information.")

<sup>47</sup> *Id.* at p. 16-17.

<sup>48</sup> *See* Commission Order at p. 15-18, 21. ("[T]here is simply no evidence of those costs alleged by UBTA-UBET.... [T]he Commission must find that direct interconnection, at least initially, is not the most economically symmetric way for both parties to interconnect."; Transcript at p. 357, ll. 4-23.

arbitration.”<sup>49</sup> The letters at issue were not submitted in a timely manner during the pendency of the proceedings, and therefore were never introduced as part of the evidentiary record in this case. Neither the letters’ signatory nor any other Qwest representative has been subject to cross-examination by the Parties or the Commission concerning the matters asserted in the Qwest Letters. Plainly, the unsworn letters are irrelevant to the matters at issue in the proceeding, and are predicated solely on hearsay which is not supported by objective evidence. As such, they should not be considered by the Commission in this proceeding.<sup>50</sup> The Commission should, therefore, disregard the Qwest Letters for purposes of this proceeding.<sup>51</sup>

## **2. Substantive Defects**

In addition to the procedural issues, there are substantive reasons the Qwest letters should not be considered by the Commission. First, even assuming *arguendo*, that the matters contained in the letters are reliable, they are not probative of UBET’s ability, or lack thereof, to comply with the Commission’s Order. Importantly, and despite UBET’s assertions to the contrary,<sup>52</sup> the Commission’s May 21, 2009 Order does not require UBET to indirectly interconnect with Bresnan at the Qwest Provo tandem. Rather, it provides:

UBTA-UBET shall permit Bresnan to obtain indirect interconnection with UBTA-UBET’s essential facilities at the

---

<sup>49</sup> Qwest Letter, June 30, 2009, at p. 1.

<sup>50</sup> Rule 746-100-10(F)(1) (“The Commission is not bound by the technical rules of evidence and may receive any oral or documentary evidence; except that no finding may be predicated solely on hearsay or otherwise incompetent evidence. Further, the Commission may exclude non-probative, irrelevant, or unduly repetitious evidence. Testimony shall be under oath and subject to cross-examination.”)

<sup>51</sup> To the extent the Commission gives any consideration to contentions made in the Qwest Letter, Bresnan should be given an opportunity to question Qwest about such claims and refute Qwest’s statements with its own evidence.

<sup>52</sup> See *e.g.*, UBET’s Motion to Stay at p. 1.

Provo tandem. If the parties mutually select another location, they may also interconnect at that location.<sup>53</sup>

The nuance is important because UBET's compliance with the Commission's May 21, 2009 Order (as well as the Interconnection Agreement between the Parties) is dependent upon whether UBET *permits* indirect interconnection, not upon whether a third party tandem provider permits such indirect interconnection. To the extent UBET does not impair or refuse indirect interconnection, UBET will be in compliance, even if each and every available third party tandem provider impairs or refuses to provide the transiting function necessary for such indirect interconnection to be implemented.

Secondly, much has been made by the Qwest Letters and UBET's and URTA's pleadings relying on the same regarding the technical and economic feasibility of interconnection at the Provo tandem. The evidence in the record, and in the May 21, 2009 Order, settle any questions raised in this proceeding or the letters about the economic or technical feasibility of indirect interconnection between Bresnan and UBET at the Provo tandem.

Nevertheless, even were that not the case, Qwest and UBET are not adversely affected by the Commission's May 21, 2009 Order. That is, since Qwest is not specifically identified in the Order or the Essential Facilities Agreement, it is not subject to any additional obligations. Similarly, UBET is only required to permit indirect interconnection to the extent the third party tandem provider is willing and able. To the extent there is no willingness or ability on the part of the third party tandem provider, UBET is relieved of its obligation.

Qwest has no legally cognizable interest in this matter until such time as Bresnan and Qwest have completed negotiations and have been unable to agree to the provision of transiting.

---

<sup>53</sup> Commission Order at p. 36, ¶ 2.

No Commission action is warranted until such time as Bresnan or Qwest request arbitration or mediation by the Commission. Moreover, it would be wholly inappropriate for the Commission to expand this proceeding to consider the question of Qwest's responsibilities to provide transiting. The Order and the Interconnection Agreement do not create any new obligations on any third party tandem provider, be it Qwest or any other entity. Qwest's concerns, even if valid, are fully addressed by the Essential Facilities Agreement in so far as indirect interconnection requires that both Bresnan and UBET have effective interconnection arrangements with the third party to enable traffic to be transited.

On balance, the issue of whether or not indirect interconnection is feasible at the Qwest Provo tandem is ancillary to the overall findings and conclusions of the Commission's May 21, 2009 Order. Any consideration of the Qwest Letters, which Bresnan submits is procedurally improper and substantively unnecessary, should not interfere with Bresnan's and UBET's ability to execute and fulfill the terms of their Essential Facilities Agreement as ordered by the Commission. For the foregoing reasons, the Commission's Order should, therefore, remain undisturbed.

**D. UBET is Capable of Complying with the Order**

Irrespective of the Qwest Letters, UBET is fully able to materially comply with the Commission's Order to *permit* Bresnan to interconnect indirectly.<sup>54</sup> To the extent a third party refuses, for whatever reason, to enable indirect interconnection, UBET will not be in violation of the order to the extent UBET has otherwise taken all steps within its control to permit such indirect interconnection. Likewise, the Interconnection Agreement does not require UBET to provide indirect interconnection, but rather states that unless otherwise mutually agreed upon,

---

<sup>54</sup> See Commission Order at p. 36.

UBET and Bresnan will indirectly interconnect their respective networks via a third party tandem to which both UBEt and Bresnan are connected. To the extent no third party tandem provider is willing to enable the transiting of traffic between UBEt and Bresnan, neither UBEt nor Bresnan will be in breach of the Interconnection Agreement, since both Parties will have been denied by a third party whose actions are beyond their individual and collective control. Thus, if the third party tandem provider, for whatever reason, disables transiting as contemplated in the Order and the Interconnection Agreement, neither UBEt nor Bresnan will bear any liability or exposure in this regard.

For the reasons identified above, the Commission should reject UBEt's and URtA's requests for reconsideration and rehearing on this issue. Nothing in the Order or the Interconnection Agreement creates any new obligations on any third parties, nor do they create any liability or exposure for either UBEt or Bresnan in the event that no third party tandem provider will provide transiting through its tandem switch.

**E. Bresnan is Willing to Amend the Interconnection Agreement**

While Bresnan believes it wholly unnecessary, if the Commission is concerned that there is any ambiguity as to the neutral impact of the Interconnection Agreement on any third party tandem provider, or about the inapplicability of the indirect interconnection requirement on UBEt where no third party tandem provider will provide transiting, Bresnan is willing to accept a modification to Section 3.1.1 of the Interconnection Agreement as shown below, provided that the Commission orders such modification with no further delay:

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.**

While, as noted above, Bresnan believes inclusion of such language would be wholly unnecessary and redundant, Bresnan is willing to accept such modification to the extent it would quickly dispose of this issue so that Bresnan may begin to provide competitive service in Vernal pursuant to its CPCN.

#### **IV. The Commission’s Action is Not in the Nature of a Rulemaking**

Contrary to UBET’s assertions, the Orders of the Commission in this proceeding are adjudicatory in nature, and do not amount to a rulemaking under the Utah Administrative Rulemaking Act (“ARA”).<sup>55</sup> The ARA specifically indicates that “orders” and “rulings by an agency in adjudicative proceedings” are not rules under the ARA.<sup>56</sup> Under the Utah Administrative Procedure Act (“APA”),<sup>57</sup> 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,<sup>58</sup> including agency action to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license.”<sup>59</sup> 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.

---

<sup>55</sup> Utah Code Ann. § 63G-3-101 *et. seq.*

<sup>56</sup> *Id.* at § 63G-3-102(16)(c).

<sup>57</sup> *Id.* at § 63G-4-101 *et. seq.*

<sup>58</sup> “‘Person’ means an individual, group of individuals, partnership, corporation, association, political subdivision or its units, governmental subdivision or its units, public or private organization or entity of any character, or another agency.” *Id.* at § 63G-4-103(1)(g).

<sup>59</sup> *Id.* at §§ 63G-4-102(1), 103(1)(a),

Furthermore, the Commission's determinations in this proceeding were fact-specific and apply only under the unique circumstances present in this matter. The Commission's conclusion, based on the evidence presented in the proceeding, grants Bresnan the right to indirectly interconnect with UBET. It is not, as UBET suggests, a blanket declaration applicable in all circumstances to "all CLEC's who request essential facilities, and all ILEC's to whom such request is made."<sup>60</sup> Therefore, under the terms of the APA and ARA, the Commission action in this case was an adjudication and does not require a rulemaking proceeding.

**V. Bresnan is Not Required to Pay a Flat-Rate Charge for Use of UBET's EAS Network**

UBET argues that the "Commission erred in failing to consider the competitive disadvantage to UBET if it is required to pass an EAS cost on to its customers, where Bresnan customers, using the exact same facilities, would not be required to pay for that access."<sup>61</sup> However, the alternative UBET proposes would create an analogous competitive disadvantage for Bresnan, as a flat-rate charge for terminating calls outside Vernal would dramatically over-compensate UBET for the services being provided and create an imbalanced competitive playing field.

Bresnan reiterates its position that any flat-rate charge for terminating calls outside of the Vernal exchange should be rejected. Such a proposal, if adopted, would represent a substantial barrier to competition and run directly counter to the Commission's mandate to promote competition in Utah.<sup>62</sup>

---

<sup>60</sup> UBET Petition at p. 13.

<sup>61</sup> *Id.* at p. 13-14.

<sup>62</sup> Utah Code Ann. § 54-8b-1.1(3) and (6).

According to the Division, “no interconnection agreement in the state contains such a flat-rate charge”<sup>63</sup> and UBET fails to explain why the interconnection agreement in this case should contain one. UBET also fails to justify its proposed flat-rate charge in light of the Division’s finding that “paying the flat-rate would provide UBTA-UBET sensitive information regarding access line count which UBTA-UBET could use against Bresnan.”<sup>64</sup> Contrary to UBET’s position, the Commission considered the competitive advantages and disadvantages to UBET under both scenarios: if Bresnan is or is not required to pay a flat-rate charge for use of UBET’s EAS network.<sup>65</sup>

After carefully weighing the facts, the Commission found that the flat-rate charge would violate state statutes.<sup>66</sup> Utah Code Ann. § 54-8b-2.2(b)(ii) requires that UBET “permit access to and interconnection with its essential facilities and the purchase of its essential services on terms and conditions, **including price, no less favorable** than those the telecommunications corporation **provides to itself and its affiliates.**” (Emphasis added.) UBET argues that its own customers are subject to the flat rate EAS charge,<sup>67</sup> but this fact is irrelevant. What is relevant is whether the interconnection agreement between UBET and its wireless company includes the EAS charge, which UBET admits it does not.<sup>68</sup> UBET attempts to distinguish its interconnection agreement with its wireless company from the interconnection agreement in this matter and in doing so demonstrates how cost-based charges for EAS can vary depending on fact-specific

---

<sup>63</sup> Commission Order at p. 28.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 27-29.

<sup>66</sup> *Id.* at 29.

<sup>67</sup> UBET Petition at p. 14.

<sup>68</sup> *Id.* at 14-15 (“[T]he interconnection agreement between UBET and its wireless company does not include the EAS charge.”)

circumstances. This notion directly supports the Commission’s finding that the flat-rate charge proposed by UBET would be paid in perpetuity, regardless of costs, making Bresnan less profitable and UBET more profitable.<sup>69</sup> Therefore, because UBET does not raise any new argument for the Commission to consider on this issue, the Commission should deny UBET’s request for reconsideration and rehearing.

**VI. Bresnan is Not Required to Pay Any Extra Charge for Calls that Terminate Outside of the Vernal Exchange**

UBET uses its arguments regarding flat-rate charges for use of UBET’s EAS network to also support the argument that UBET is entitled to charge additional amounts for what it characterizes as Bresnan’s customers’ “*inter-exchange*” calls.<sup>70</sup> For the reasons stated above, UBET’s arguments are similarly unpersuasive. Similarly, in urging the Commission that it should reconsider denial of compensation to UBET for terminating traffic to other UBET exchanges, URTA simply repeats arguments already considered by the Commission.<sup>71</sup> URTA also asserts that “traffic from the Vernal exchange to UBET’s other exchanges is *interexchange* traffic.”<sup>72</sup> Such characterization is incorrect and misleading. Traffic between Vernal and the other UBET exchanges is properly characterized as EAS traffic (i.e., Local traffic). Indeed, the Commission held that “there should not be any extra charge by UBTA-UBET to Bresnan for calls that terminate outside of Vernal, i.e., in the EAS area” and “that EAS traffic would be

---

<sup>69</sup> Commission Order at p. 29.

<sup>70</sup> UBET Petition at p. 15 (emphasis added).

<sup>71</sup> URTA Petition at p. 6.

<sup>72</sup> *Id.* at p. 6 (emphasis added).

already compensated as local traffic” thereby implicitly holding that such traffic is EAS and not inter-exchange traffic.<sup>73</sup>

The Commission’s holding on this issue was directly related to UBET’s responses to data requests and the fact that UBET neglected to provide information demonstrating that the costs of originating/terminating calls within the Vernal Host are different than the costs of originating/terminating calls in remote areas.<sup>74</sup> UBET has not supplied any additional information responsive to information requests nor have UBET or URTA supplied any information demonstrating that the costs of originating/terminating calls within the Vernal Host are different than the costs of originating/terminating calls in remote areas. Therefore, there is no new information in the record in this proceeding for the Commission to consider on rehearing and for the reasons stated above the Commission should deny UBET’s and URTA’s requests for reconsideration and rehearing and reversal on these issues.

## **VII. CONCLUSION**

After fully considering all of the evidence in the record before it, including testimony provided at the hearings and the pleadings submitted by UBTA-UBET Communications, Inc., the Utah Rural Telecom Association, the Division of Public Utilities, and Bresnan Broadband of Utah, LLC, the Public Service Commission of Utah correctly held that: (1) Bresnan has the right to interconnect with UBET; (2) UBET shall permit Bresnan to obtain indirect interconnection with UBET’s essential facilities at the Provo tandem, or as otherwise mutually agreed; (3) Bresnan is not required to pay an extra EAS charge, flat-rate or other, for use of UBET’s EAS network; and (4) there should not be any extra charge by UBET to Bresnan for calls that

---

<sup>73</sup> Commission Order at p. 34.

<sup>74</sup> *Id.* at p. 31-32.

terminate outside of Vernal (i.e., in the EAS area) and that EAS traffic would already be compensated as local traffic. Neither UBET nor URTA offer additional information or arguments with regard to these issues which the Commission has not already considered. Therefore, Bresnan respectfully requests that the Commission deny UBET's and URTA's requests for reconsideration and rehearing.

DATED this 7th day of July, 2009.

**HOLLAND & HART, LLP**

---

James A. Holtkamp  
Attorney for Bresnan Broadband of Utah, LLC

**CERTIFICATE OF MAILING**

I hereby certify that on this 7th day of July, 2009, I caused to be emailed a true and correct copy of the foregoing Bresnan Broadband of Utah, LLC's Response to UBTA-UBET Communications, Inc.'s Petition for Reconsideration and Rehearing and Utah Rural Telecom Association's Petition for Reconsideration, Review or Rehearing to the following:

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