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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Petition of Brenan Broadband of Utah, LLC, to Resolve Dispute Over Interconnection of Essential Facilities and for Arbitration to Resolve Issues Relating to Interconnection Agreement with UBTA-UBET Communications, Inc.	UBTA-UBET COMMUNICATIONS, INC.'S MOTION FOR STAY PENDING JUDICIAL REVIEW Docket No. 08-2476-02 September 2, 2009
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UBTA-UBET Communications, Inc. ("UBET"), pursuant to Utah Code Ann. § 63G-4-405 hereby respectfully moves the Utah Public Service Commission ("Commission") to stay this proceeding and its May 21, 2009 Order and August 3, 2009 Order pending the Utah Supreme Court's ruling on UBET's petition for review.

FACTS

Bresnan Broadband of Utah ("Bresnan") desires to deploy a VoIP service in the market area currently served by UBET. On February 14, 2008, Bresnan requested that UBET enter into a mutual interconnection arrangement with it pursuant to 47 U.S.C. ' 251(a) & (b). UBET concluded that Bresnan was not entitled to the interconnection agreement under federal law because Bresnan was providing IP enabled services.

On May 14, 2008, Bresnan requested mediation from the Utah Public Service Commission ("Commission"), pursuant to 47 U.S.C. ' 252 (a)(2). The Commission denied the request for mediation.

In July 2008, Bresnan filed a Petition to Resolve Dispute over Interconnection of Essential Facilities and for Arbitration to Resolve Issues Relating to Interconnection Agreement with UBET (“Petition”). UBET moved the Commission to dismiss Bresnan’s Petition because the Commission lacked jurisdiction to determine whether UBET is obligated to interconnect with Bresnan, a VoIP provider. After denying the motion to dismiss, the Commission held a hearing on January 27-29, 2009. Upon the conclusion of the hearing, the Commission ordered UBET to interconnect with Bresnan under Utah law. Over UBET’s objections, the Commission determined that Bresnan is entitled to interconnection under state law to provide its VoIP services even though the issue pertaining to VoIP rights under 47 U.S.C. §§ 251 & 252 is presently before the FCC. The Commission’s order to interconnect is subject to the jurisdictional challenge raised by UBET.

In support of its decision, the Commission found that Bresnan was a certificated telecommunications corporation and that it had the “right to petition the Commission for resolution of a ‘dispute over interconnection of essential facilities.’” See May 21, 2009 Report and Order Resolving Interconnection Dispute (“May 21, 2009 Order”), on file herein. The Commission found that indirect interconnection at Qwest’s Provo tandem was appropriate. The Commission rejected UBET’s arguments that indirect interconnection required the consent of all the parties, including Qwest. The Commission also disregarded UBET’s arguments that interconnection cannot be compelled outside of a provider’s certified service territory. *Id.*

The Commission found that under Utah Code Ann. §§ 54-8b-2.2(1)(a) and -2(5) UBET had “essential facilities” at the Provo tandem and that interconnection there was “technically feasible.” May 21, 2009 Order at 7–9. The Commission found that UBET’s use of toll trunks to provide for toll-traffic satisfied the “essential facilities” prong of the analysis to interconnect with Bresnan’s VoIP local traffic. The Commission also rejected UBET’s argument that indirect interconnection, if compelled by statute, must take place within the service territory of UBET, the

Vernal exchange. The Commission determined that Utah Code Ann. § 54-8b-2.2(1)(a)(i) contemplated who must interconnect, not where the interconnection must take place. See May 21, 2009 Order at 10.

The Commission was not persuaded by UBET's other arguments, including, the fact that the costs on implementing interconnection at the Provo tandem may be significantly more costly for UBET than Bresnan, *id.* at 14–21; that the arrangements and agreements with other parties for the compensation and business arrangements would be costly to obtain, *id.* at 14–16; that Bresnan is not responsible for any EAS charges, though such charges are currently borne by the customers of UBET, *id.* at 27–32.

Ultimately, the Commission ordered (i) that Bresnan had the right to directly or indirectly interconnect with UBET, (ii) that UBET must “permit Bresnan to obtain indirect interconnection with UBTA-UBET's essential facilities at the Provo tandem,” and (iii) Bresnan would not be required to pay an extra charge for calls terminating in UBET's EAS area. See *generally* May 21, 2009 Order.

On June 22, 2009, UBET filed a Petition for Reconsideration and Rehearing of the May 21, 2009 Order. Other than amending Section 3.1.1 of the interconnection agreement, the Commission declined to revise its prior order. Denying the Petition for Reconsideration, the Commission summarily rejected the jurisdictional challenge raised by UBET. The Commission also reiterated its holding that UBET has essential facilities at the Qwest Provo tandem based on UBET's use of toll traffic trunks at the Provo tandem. Finally, the Commission reaffirmed its decision allowing Bresnan to terminate traffic in UBET's EAS areas without paying the EAS fees currently paid for by UBET customers. See August 3, 2009 Order on Reconsideration, Review or Rehearing, on file herein.

On September 2, 2009, UBET filed its petition for appellate review of the Commission's order. UBET now files this motion to stay the Commission's May 21, 2009 Order and the

August 3, 2009 Order on Reconsideration pending its appeal to the Utah Supreme Court. As explained below, UBET seeks a stay of the Commission's order pending judicial review because if UBET is successful in its jurisdictional challenges compulsory interconnection of any kind, direct or indirect, will be not be required, but UBET will have already implemented interconnection with Bresnan. In such case, Bresnan will have likely sold its service to members of the public who will be using Bresnan's service, and who may be harmed if the Supreme Court finds that the Commission lacked jurisdiction to compel UBET to interconnect with Bresnan.. Furthermore, if the order is not stayed, the parties may be required to obtain facilities and enter into agreements with third parties (Qwest) that will become unnecessary upon UBET's successful appeal. In short, it is more efficient and prudent to stay the order until the appeal has been decided.

ANALYSIS

Utah Code Annotated §63G-4-405 states that an agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules. Utah Rules of Appellate Procedure contemplate that a party seeking review of an administrative order, seek a stay from the administrative agency rather than from the appellate court. *See also* Utah R. App. P. 17. Thus, UBET is seeking a stay from the Commission and for the reasons set forth below, the Commission should enter the stay so that significant ramifications of interconnection that will surely be borne by the public and the parties can be avoided or minimized before the matter is finally decided on appeal.

A. The Commission Entered an Order Requiring Interconnection with a VoIP Provider that it Lacked Jurisdiction to Enter.

The Commission is only authorized to order the parties to interconnect if it has the proper jurisdiction to do so. UBET argued to the Commission that interconnection with a VoIP provider is beyond the authority of the Commission to address. By its own actions, Bresnan

evidenced that its claim for interconnection was of a federal nature. Indeed, its very first request was for interconnection under 47 U.S.C. §§ 252 & 252. Only when its requests on federal grounds were denied did it change its tune to a state law approach.

The significant problem is that Bresnan seeks indirect interconnection so that it can provide local VoIP service to customers. The issue of whether such VoIP services amount to telecommunication services or something different is currently pending before the FCC. See *Vermont Telephone Petition, DA 08-08-916*. If the FCC determines that VoIP service is an information service, the Commission's regulation of Bresnan's VoIP service is preempted by federal law.¹ The State of Utah lacks jurisdiction to determine whether Bresnan's VoIP service is a telecommunications service or an information service, and thus the determination of whether UBET has an obligation to interconnect with Bresnan's VoIP service is a question of federal law.

B. Following Interconnection Members of the Public May Request Services from Bresnan, which Services will be Cut-off Immediately Upon UBET's Successful Appeal.

If interconnection is accomplished, per the Commission's order, members of the public may enter into service agreements with Bresnan. If the order requiring interconnection is set aside by the Utah Supreme Court, then members of the public who have entered into such agreements with Bresnan could be left without service, or the benefit of their bargain with Bresnan because UBET will no longer have the obligation to interconnect its facilities with Bresnan's and Bresnan will be unable to provide its services. It is well known that the purpose of a stay pending appeal is to temporarily stop proceedings to preserve the status quo. See 4 C.J.S., Appeal and Error, §§ 626, 662; Melton v. Walker, 209 S.C. 330, 40 S.E.2d 161 (1946) ("The general rule is that the effect of a . . . stay is to suspend proceedings and preserve the

¹ 47 C.F.R. §64.702(a); see generally *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, 290 F.Supp. 993, 998-999 (D. Minn. 203).

status quo pending the determination of the appeal or proceeding in error.”). In this matter, the status quo before Bresnan’s Petition did not require interconnection between Bresnan and UBET. If interconnection is required to go forward notwithstanding the appeal, members of the public, both private individuals and commercial entities, may enter into agreements with Bresnan that may fail of their essential purpose if UBET is successful on appeal. Consequently, both the parties and the members of the public may substantially alter their current positions only to have those decisions rendered null on appeal. It is more prudent to simply stay the matter while the appeal runs its course.

C. Compulsory Interconnection May Require UBET to Obtain Facilities and Enter Agreements with Qwest at the Point of Interconnection.

The Commission’s order requires indirect interconnection with Bresnan. Of necessity, therefore, the interconnection requires the involvement of a third party, i.e., Qwest. To facilitate the indirect interconnection, UBET will be required to enter agreements with Qwest associated with interconnecting at the Qwest Provo Tandem that would not otherwise be necessary but for the Commission’s order. If the Commission’s order regarding interconnection is reversed on appeal but the Commission’s order is not stayed, UBET will have incurred obligations with Qwest that it may not be able to easily terminate, but will not need.

CONCLUSION

Because of the substantial issues raised on appeal that present a tangible risk of mooted the entire interconnection process, the Commission should enter a stay of its interconnection orders to preserve the status quo of the parties, and to prevent the great and irreparable harm that would certainly result if interconnection takes place but is later overturned on appeal. Accordingly, UBET requests that the Commission stay its orders pending judicial review.

Dated this 2nd day of September, 2009.

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CERTIFICATE OF MAILING

I hereby certify that on this 2nd day of September, 2009, I caused to be emailed a true and correct copy of the foregoing UBTA-UBET Communications, Inc.'s Post Hearing Reply Brief to the following:

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