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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

Bresnan Broadband of Utah, LLC, a Utah limited liability company, Petitioner, vs. UBTA-UBET Communications, Inc., a Utah corporation, Respondent.	UBTA-UBET COMMUNICATIONS, INC.'S PRE-HEARING BRIEF Docket No. 09-2476-01 September 4, 2009
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UBTA-UBET Communications, Inc. ("UBET"), through its undersigned counsel, hereby submits its initial Pre-Hearing Brief in the matter of Bresnan Broadband of Utah, LLC's ("Bresnan") Complaint for Injunctive and Other Relief Against UBET.

INTRODUCTION

On May 21, 2009 the Utah Public Service Commission (the "Commission") issued its Order Resolving Interconnection Dispute. The Commission ordered that:

- 1) Bresnan has a right to interconnect with UBET;
- 2) UBET shall permit Bresnan to obtain indirect interconnection with UBET's essential facilities at the Provo tandem (or another location if the parties mutually agree); and

- 3) the parties' interconnection shall be governed by the terms of the parties' agreement and the Commission's resolution of the disputed items shall be incorporated into the Agreement;
- 4) the Commission shall retain jurisdiction to ensure compliance with the Commission's Order;
- 5) Bresnan is to provide a status report within one month updating the Commission regarding the parties' interconnection.

(May 21, 2009 Order at 36).

On June 18, 2009, Qwest sent a letter to the Commission indicating that it is not presently possible for Qwest to provide and bill for a transit function involving calls that are local in UBET's service territory, but are not local in Qwest's service territory. (A Copy of Qwest's Letter is attached hereto as **Exhibit A**). Qwest indicated that Qwest does not presently offer local transit service outside of its service territory, and that Qwest's network and billing systems do not presently have the capability to process and bill for local transit service for traffic that both originates and terminates in local calling areas outside of Qwest's service territory. Qwest suggested that for Qwest to be able to provide a local transit service involving traffic that both originates and terminates in local calling areas outside of Qwest's service territory would require significant and costly modifications to Qwest's systems.

On June 22, 2009, UBET petitioned for review, rehearing and reconsideration. The Commission agreed to review the matter, and issued its Order on Reconsideration on August 3, 2009. The Commission affirmed its previous order and merely modified Section 3.1.1 of the Agreement to provide that "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.

On August 4, 2009, Bresnan sent by email (followed by overnight mail) a letter to Counsel for UBET requesting UBET's signature on the Essential Facilities Agreement. On August 6, 2009, Counsel for UBET contacted Qwest regarding implementation of indirect interconnection with Bresnan at the Qwest Provo Tandem. Specifically, UBET has requested information from Qwest regarding how, technically, indirect interconnection will be accomplished; what such indirect interconnection would cost; how long such interconnection will take; and whether Qwest will permit UBET to transport local traffic on the existing toll trunks to the Provo Tandem. Counsel for UBET was told that Qwest would get back to us. Counsel for UBET contacted Qwest two more times between August 6, 2009 and August 17, 2009, with no success. On August 17, 2009, Counsel for UBET was told to contact Karla Quintana at Qwest, which was immediately done via email and voicemail. (Copies of the emails to and from Karla Quintana are attached hereto as **Exhibit B**).

Counsel for UBET was initially told that Qwest was looking into the matter and would get back to us. Ultimately, Counsel for UBET was told that Qwest had had no meaningful discussions with Bresnan and did not have an understanding of what Bresnan might be seeking from Qwest. Qwest indicated that until it had heard from Bresnan, it was premature for Qwest to discuss these matters with UBET.

On August 21, 2009, Bresnan filed the Complaint against UBET alleging that UBET had not signed the Essential Facilities Agreement and alleging that as a result of UBET's failure to sign the Agreement, Bresnan's efforts to interconnect with UBET were being thwarted. While there is no dispute that UBET has not signed the Agreement,

there is absolutely no support for the allegation that Bresnan has been unable to interconnect with UBET as a result of UBET's failure to sign the Agreement.

In fact, the evidence above demonstrates that Bresnan has taken no steps to implement indirect interconnection with UBET through the Qwest tandem, whereas UBET has tried numerous times to implement interconnection through Qwest, but has been unable to move forward as a result of Bresnan's refusal to contact Qwest.

A. Bresnan Has Undertaken No Efforts to Implement Interconnection.

Throughout the pendency of this matter Bresnan has complained about the delay caused by UBET exercising its legal rights. Bresnan also argued tenaciously for the right to indirectly interconnect through the Qwest Provo Tandem. However, since receipt of the Commission's Order on Reconsideration Bresnan has had "no meaningful discussions" with Qwest, and Qwest remains uncertain as to how Bresnan wants to interconnect, or what Bresnan needs from Qwest. As demonstrated above, UBET is the only party who has undertaken efforts to interconnect. In fact, on September 2, 2009, counsel for UBET sent counsel for Bresnan an email requesting that the parties meet to discuss interconnection, and to suggest that the parties jointly meet with Qwest. In response to UBET's email, counsel for Bresnan indicated, among other things, that Bresnan's would expect UBET to push back hard on any efforts by Qwest to charge unreasonable or inappropriate charges.

UBET is concerned that Bresnan's has some form of interconnection planned to which Qwest will not be agreeable, or that Bresnan is expecting an argument with Qwest over the appropriateness of Qwest's charges for indirect interconnection implementation. UBET does not want to become involved in an argument with Qwest

and Bresnan over how Qwest must permit the parties to interconnect at the Provo tandem. The Commission's Order on Section 3.1.1 provides that: "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." In the event that Qwest believes that Bresnan is imposing obligations on Qwest which would not normally apply to Qwest, in violation of the Commission's Orders, UBET wants no part of that fight between Bresnan and Qwest.

B. UBET Is Not Comfortable Voluntarily Signing the Essential Facilities Agreement When UBET's Ability to Perform Is Unknown, and Its Obligations Under the Agreement Are Unclear.

Because the Commission's Orders did not require UBET to sign the Agreement, and because the Agreement, as ordered by the Commission does not contain any reservation of rights language to reserve UBET's right to appeal, as requested by UBET, UBET is not comfortable voluntarily signing the Agreement. UBET's ability to perform under the terms of the Agreement is unknown at this time.

Specifically, the Agreement as ordered by the Commission requires UBET to interconnect its essential facilities with Bresnan at the Qwest Provo tandem. The Commission found that the toll trunks utilized by UBET to carry toll traffic to the Provo tandem are UBET's "essential facilities". UBET has no idea whether Qwest will permit UBET to transit local traffic on toll-trunks. Despite the Commission's finding that the toll trunks are UBET's "essential facilities," the fact remains that the facilities from Whiskey Springs to Provo are owned by Qwest, and the property of UBET. At the present time, UBET does not have an agreement with Qwest, or permission from Qwest to use such

facilities for the purpose of transiting local traffic as required by the Essential Facilities Agreement. In the event that Qwest will not permit UBET to transit local traffic on the toll trunks, UBET will be unable to comply with the term of the Agreement and the Commission's Orders. In fact, complying with the terms of the Essential Facilities Agreement and Commission's Orders without the proper permission from Qwest may be viewed as an unlawful act subjecting UBET to potential legal liability.

Additionally, both the Orders and the Agreement are silent as to payment of costs associated with indirect interconnection in the event that Qwest, as indicated in its June 18, 2009 letter, requires substantial modifications to its network to implement the indirect interconnection between UBET and Bresnan, and determines to pass those costs along to Bresnan and/or UBET. Voluntarily signing an agreement with an undefined financial obligation is not prudent under any reasonable business standard.

C. UBET Has Not Violated the Commission's Orders or Any of the Terms of the Essential Facilities Agreement.

Bresnan has alleged in its Complaint that UBET has violated the Commissions Orders and has violated the terms of the Essential Facilities Agreement by failing to execute the Agreement; by failing to comply with the terms of the Essential Facilities Agreement; and by failing to permit Bresnan interconnection. These allegations are patently false.

Despite Bresnan's allegations to the contrary, the Commission did not order UBET to sign the Essential Facilities Agreement. Rather, as demonstrated above, UBET was ordered to implement interconnection pursuant to the terms of the

Agreement. The Commission ordered interconnection between the parties, and the Commission's Orders govern that relationship. A signed Agreement is not required by the Commission's Orders and adds nothing to Bresnan's rights.

Furthermore, Bresnan has generally alleged throughout its Complaint, including but not limited to paragraphs 13, 26, 27, 28, 30, 35, 36, 44, 46, and 59, that UBET has failed to comply with the terms of the Essential Facilities Agreement, but has not offered one specific instance of such failure. In fact, as demonstrated above UBET has acted, at all times since the Commission's August 3, 2009 Order, as if it were bound by the terms of the Commission's Orders, and has sought information on interconnection from Qwest. It is only because Bresnan has failed to have any meaningful conversations with Qwest that Bresnan has not been "permitted" to interconnect. Beyond seeking execution of the Essential Facilities Agreement, Bresnan has not undertaken any actions to implement interconnection. Bresnan seems more concerned with getting a signed Agreement than with interconnecting. As set forth above, UBET has taken several steps to attempt to interconnect with Bresnan. Bresnan has taken no steps towards interconnection, and thus the process has stalled.

Bresnan's request for specific performance and penalties must fail because Bresnan has not specifically alleged, nor has it proven one instance of UBET's failure to implement interconnection. Utah Code Ann. §54-7-25 provides that penalties may be imposed against a public utility if it has violated Title 54 or any order issued under Title 54. As demonstrated above, the Commission's Orders do not require execution of the Essential Facilities Agreement, only an adherence to its terms. UBET has not violated any of the terms of the Essential Facilities Agreement or the Commission's Orders

requiring interconnection. Therefore, an order for specific performance is premature, as is an order for penalties under U.C.A. §54-7-25. Because UBET has not violated any of term of the Commission's Orders, Bresnan is not entitled to an Order from the Commission ordering UBET to comply with implementation of interconnection, or ordering penalties against UBET.

CONCLUSION

Bresnan is before this Commission asking the Commission to order UBET to specifically perform its obligations under the Essential Facilities Agreement and the Commission's Orders. However, as demonstrated above, UBET has not failed to comply with any terms of the Agreement or Orders. On the other hand, Bresnan has taken no steps to perform under the terms as ordered by the Commission. Bresnan is not entitled to the relief requested under its Complaint. Bresnan's Complaint should be dismissed with prejudice.

DATED this 4th day of September, 2009.

BLACKBURN & STOLL, LC

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Attorney for UBTA-UBET Communications,
Inc.

CERTIFICATE OF MAILING

I hereby certify that on this 4th day of September, 2009, I caused to be emailed a true and correct copy of the foregoing UBTA-UBET Communications, Inc.'s Prehearing Brief to the following:

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