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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

BRESNAN BROADBAND OF UTAH, LLC, a Utah limited liability company,	Docket No. 09-2476-01
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Petitioner,

vs.

UBTA-UBET COMMUNICATIONS, INC.,
a Utah corporation,

Respondent.

**BRESNAN BROADBAND OF UTAH,
LLC'S INITIAL BRIEF**

Petitioner BRESNAN BROADBAND OF UTAH, LLC, (“Bresnan”) by and through its counsel of record, Holland & Hart LLP, hereby submits its initial brief. Attached to this brief is an Affidavit from Mr. Alex J. Harris of Bresnan.

I. INTRODUCTION

Bresnan respectfully requests that the Public Service Commission of Utah (“Commission”) issue an order that UBTA-UBET Communications, Inc. (“UBET”) immediately execute the Essential Facilities Agreement (“Agreement”) approved in Docket No. 08-2476-02. Further, given UBET’s refusal to comply with the prior lawful Commission order, Bresnan requests that the Commission also order UBET to pay the maximum penalties permitted by law for every day that UBET has failed and continues to fail to execute the ordered Agreement beginning August 10, 2009.

Bresnan makes these requests because in order to successfully complete calls between future Bresnan customers and UBET customers, to seamlessly transfer customers from UBET to Bresnan, to allow Bresnan to obtain telephone numbers for new customers, and to cement the governing terms of interconnection between Bresnan and UBET, Bresnan and UBET must execute and implement the approved Agreement.

The Commission’s orders issued in this matter are unambiguous and are binding upon UBET. The Commission clearly ordered that Bresnan is entitled to interconnect with UBET and that the interconnection shall be governed by the terms of the Agreement between Bresnan and UBET, which the Commission specifically mandated and approved. All of the issues regarding the language in the Agreement were fully and completely litigated in Docket No. 08-2476-02. Based on the record in that proceeding, the Commission ordered and approved the terms of the

Agreement. In so doing, the Commission not only affirmed Bresnan's right to interconnect with UBET, but also defined the terms of that interconnection.

Bresnan provided to UBET a signed Agreement in strict accordance with the form specifically prescribed and mandated by the Commission in its binding and final orders. UBET is likewise obligated, not only to sign the Agreement in the form ordered and approved by the Commission, but also to comply with its terms. UBET's failure to execute and implement the Agreement approved by the Commission, is a direct, willful, and unlawful violation of the Commission's Orders.

As a result of UBET's failure to comply with the Commission's Orders, Bresnan is unable to interconnect with UBET, unable to enter the Vernal market, and unable to offer the benefit of competitive services to customers in Vernal.

II. STATEMENT OF FACTS

The essential facts in this docket are simple and undisputed. UBET admits in its Answer that it was ordered to interconnect with Bresnan on August 3, 2009 pursuant to an Essential Facilities Agreement approved by the Commission in that same Order.¹ UBET admits that Bresnan signed the Agreement in the precise form ordered by the Commission on August 4, 2009.² UBET admits that Bresnan presented the executed Agreement to UBET for UBET's signature on August 4, 2009, and that Bresnan requested such signature by August 10, 2009, a full week after the Commission's Order was issued.³ UBET admits that it has affirmatively

¹ UBET Answer at ¶¶ 13 and 18, p. 3-4.

² UBET Answer at ¶¶ 22-23, p. 5.

³ *Id.*

decided not to sign the ordered Agreement notwithstanding their further admission that UBET is bound by the Commission's Interconnection Orders.⁴

III. ARGUMENT

Despite these undisputed facts, UBET asserts four excuses for its failure to comply with the Commission's Orders – (1) the Agreement as “drafted” fails to address the potential for significant costs to the parties to implement indirect interconnection through Qwest at the Provo Tandem; (2) UBET has been attempting to implement indirect interconnection through the Qwest Provo Tandem but Qwest refuses to meet with UBET; (3) the Commission has no jurisdiction over this Complaint; and (4) Bresnan is at fault because it has failed to contact Qwest to implement indirect interconnection. However, these excuses, individually and collectively, are insufficient to warrant UBET's failure to comply with the Commission's Orders.

A. The Agreement Fully Addresses The Necessary Terms Of Indirect Interconnection.

UBET argues that it should be excused from signing the ordered Agreement because, “the Essential Facilities Agreement, as drafted, fails to address the potential for significant costs to the parties to implement indirect interconnection through Qwest at the Provo Tandem.”⁵ This assertion is clearly wrong. The Commission fully addressed the costs of indirect interconnection and the ordered Agreement sets forth precisely how those costs are to be handled. Just because UBET is disappointed in the outcome of the Commission's order does not give them leave to choose to ignore it.

⁴ UBET Answer at ¶ 24, p. 5 and ¶ 25, p. 6.

⁵ UBET Answer at ¶ 12, p. 3.

First, Paragraph 3.1.1 of the ordered Agreement provides that indirect interconnection is only available “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.”⁶ Thus, if UBET’s concern is that the Qwest’s Provo Tandem might not be enabled for transiting Local/EAS traffic, the Agreement as ordered already addresses that situation by defaulting to direct interconnection. Conversely, to the extent Qwest’s Provo Tandem is enabled for transiting between the parties, there will be no special one-time costs to implement such transiting.

Second, Paragraph 3.1.3 of the Agreement sets forth with particularity how any costs of indirect interconnection are to be handled. Specifically, the Agreement states, “Each Party shall be solely responsible for all connectivity between its network and the 3rd party tandem switch. Each Party shall be responsible for paying any transiting charges which the 3rd party tandem provider may impose on traffic originated by that Party.”⁷ Thus, contrary to UBET’s assertions, the issue of how costs are to be handled is fully and definitively addressed in the ordered Agreement.

Third, UBET asserts that the issue of the cost of indirect interconnection was not fully and completely litigated and alleges that “Qwest has subsequently indicated that indirect interconnection at the Qwest Provo Tandem may not be possible without significant technical modifications resulting in high costs to the parties.”⁸ This assertion is plainly baseless. In its Order dated May 21, 2009 the Commission committed nearly 7 pages to an analysis of the evidence presented by the parties on the costs associated with indirect interconnection.⁹ In that

⁶ See Bresnan Complaint, Exhibit D at ¶ 3.1.1 of the Interconnection Attachment.

⁷ *Id.* at ¶ 3.1.3 of the Interconnection Attachment.

⁸ UBET Answer at ¶ 25, p. 6.

⁹ Report and Order Resolving Interconnection Dispute, Docket No. 08-2476-02, May 21, 2009, p. 14-21.

analysis the Commission noted extensive testimony on this issue by Mr. Meredith for UBET and URTA, Ms. Wimer for UBET, Mr. Harris for Bresnan, and Mr. Coleman for the Division. Ultimately, the Commission concluded that, “there is simply no evidence of those costs alleged by UBTA-UBET.”¹⁰ Indeed, UBET’s Petition for Reconsideration and Rehearing specifically raised the possibility of special one-time costs to enable transiting within the Provo tandem to support indirect interconnection between the Parties. In response, the Commission modified the Agreement to specifically eliminate the indirect interconnection requirement in the event transiting is not enabled in the Provo tandem at the time the Parties initially interconnect.¹¹ Thus, in no instance will UBET be obligated to incur any charges to implement indirect interconnection pursuant to the Agreement.

B. UBET’s Efforts To Contact Qwest Do Not Relieve UBET Of Their Obligations To Abide By The Commission’s Orders.

UBET’s next excuse for not following the Commission’s Order is that since the Order, “UBET has been attempting to implement indirect interconnection through the Qwest Provo Tandem as ordered by the Commission, but Qwest has heretofore refused to meet with UBET to discuss the technical implementation of indirect interconnection including timing, cost, and technical requirements.”¹² But regardless of what Qwest has done or said (or not done or said), UBET has an obligation to comply with the Commission’s Orders and sign the approved Agreement. There is simply no provision in the Agreement or the Commission’s Orders excusing UBET from performance on this basis.

¹⁰ *Id.* at p. 15.

¹¹ Order on Reconsideration, Review or Rehearing, Docket No. 08-2476-02, August 3, 2009, p. 11.

¹² UBET Answer at ¶ 13, p. 3-4.

Additionally, the approved Agreement covers many more topics than indirect interconnection. As explained in the attached Affidavit of Mr. Harris, UBET's refusal to sign the Agreement is preventing or hampering Bresnan's efforts to obtain telephone numbers, put processes in place with UBET for the transfer of customers, and otherwise cement and implement the terms of the entire Agreement. UBET's myopic focus on indirect interconnection ignores the critical importance of the Agreement as a whole to Bresnan.

Furthermore, as set forth in Mr. Harris's Affidavit, there is no need whatsoever for UBET to negotiate or coordinate with Qwest for effectuation of indirect interconnection with Bresnan. UBET is already interconnected to the Qwest tandem for purposes of originating and terminating Switched Access traffic from IXC's, and originating and terminating intraLATA toll (non-IXC) traffic from other ILECs, CLECs or wireless carriers. As explained by Mr. Harris, once Bresnan has established its own trunk groups to that same tandem for those same purposes pursuant to a standard Qwest interconnection agreement which Bresnan is currently reviewing for execution, it is a simple matter for the Parties to effectuate indirect interconnection by programming their respective switches to route traffic over those existing trunk groups, without any involvement from Qwest. To the extent Qwest may subsequently refuse to provide such transiting, or allege that such transiting is not enabled, it will at that point be incumbent upon Bresnan to either: (i) forego indirect interconnection and proceed to implement direct interconnection with UBET; or (ii) suspend its interconnection efforts with UBET, and proceed to negotiate or arbitrate with Qwest in order to enable such transiting. In either case, UBET will bear no exposure, no obligation and no liability related to such negotiation, arbitration or resultant enabling of transiting in the Provo tandem.

C. The Commission Has Already Decided It Has Jurisdiction Over This Complaint.

The third excuse UBET provides for its failure to comply with the Commission's Orders and sign the Agreement is that UBET continues to deny that the Commission has jurisdiction over these issues.¹³ This issue was briefed at length in the prior docket and Bresnan will not repeat all of those arguments here. Bresnan will simply note that the Commission has concluded repeatedly that the Utah state law is not preempted by Federal law and that Utah state law provides the Commission with the authority and discretion to order interconnection on terms and conditions deemed reasonable by the Commission.¹⁴ UBET has the right to appeal the Commission's Order and has already filed its intention to do so. However, until and unless the Commission or the Courts grant a stay of the Commission's Orders, or a Court reverses the Commission's Orders, UBET is not and cannot be excused from compliance with those Orders on this basis.

D. Bresnan Has Followed The Commission's Order To The Letter.

UBET's final excuse for not complying with the Commission's Orders is that Bresnan has not contacted Qwest to discuss implementation of indirect interconnection. But again, this excuse cannot justify UBET's actions. Bresnan has fully complied with the Commission's Orders by immediately signing the approved Agreement. Once UBET signs, Bresnan will be authorized and empowered to proceed forward under the Agreement to implement interconnection and perform the other tasks necessary to compete in Vernal. However, until

¹³ UBET Answer at ¶ 6, p. 2.

¹⁴ See Report and Order Resolving Interconnection Dispute, Docket No. 08-2476-02, May 21, 2009, p. 3-4.

UBET signs, Bresnan believes it is inappropriate to talk with 3rd parties on a hypothetical basis about how an unsigned agreement might or might not be implemented. The Commission's Order is to comply with the Agreement as approved. Bresnan has done so. UBET has not. Finally, as explained by Mr. Harris in his Affidavit, just as there is no need for UBET to negotiate or coordinate with Qwest to effectuate indirect interconnection, there is no need for Bresnan to do so either at this time.

IV. CONCLUSION

For the foregoing reasons, Bresnan respectfully requests that the Public Service Commission of Utah ("Commission") issue an order that UBTA-UBET Communications, Inc. ("UBET") immediately execute the Essential Facilities Agreement ("Agreement") approved in Docket No. 08-2476-02. Further, given UBET's refusal to comply with the prior lawful Commission order, Bresnan requests that the Commission also order UBET to pay the maximum penalties permitted by law for every day that UBET has failed and continues to fail to execute the ordered Agreement beginning August 10, 2009.

DATED this 4th day of September, 2009.

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CERTIFICATE OF MAILING

I hereby certify that on this 4th day of September, 2009, an original and five copies of **BRESNAN BROADBAND OF UTAH, LLC'S INITIAL BRIEF AND AFFIDAVIT OF ALEX J. HARRIS**, with a cd containing a Word version of the Initial Brief, were sent via overnight mail to the following:

Ms. Julie Orchard, Secretary
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