

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
6380 South Fiddlers Green Circle, Suite 500
Greenwood Village, CO 80111
Telephone: (303) 290-1601
Facsimile: (303) 975-5290

MICHELLE BRANDT KING
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, CO 80202
Telephone: (303) 295-8356
Facsimile: (303) 416-4415

JAMES A. HOLTKAMP (BAR NO. 1533)
JOHN P. HARRINGTON (BAR NO. 5242)
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

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 RESPONSE BRIEF**

Petitioner BRESNAN BROADBAND OF UTAH, LLC (“Bresnan”) by and through its counsel of record, Holland & Hart LLP, hereby submits its response brief to the arguments made by UBTA-UBET Communications, Inc. (“UBET”) in its Pre-Hearing Brief.

I. BY APPROVING THE ESSENTIAL FACILITIES AGREEMENT, THE COMMISSION INHERENTLY ORDERED UBET TO SIGN IT.

At the center of Bresnan’s complaint is one simple issue – are the parties to a Commission-approved Essential Facilities Agreement required, by virtue of the Commission’s approval, to sign that Agreement? Bresnan maintains that once the Commission approves the form of the Essential Facilities Agreement (“Agreement”) each party is then obligated to sign it. That way, once both parties sign the document it becomes, as the Commission intends, a contract between the parties. Such a contract not only specifies the terms of the relationship between the parties, it also secures their respective obligations to adhere to those terms (absent a Commission or Court order to the contrary). Further, once bound by contract, each party may seek to enforce its rights under the contract in accordance with its provisions.

The fact that the Commission intended for the parties to sign the approved Agreement and create a bilateral contract is self-evident. On its face, the document is called an Essential Facilities Agreement. The form of the Agreement, as approved, contains signature lines for the representatives of each party. Had the Commission intended for its Order to be treated as a substitute, in lieu of the terms provided for in the Agreement, it would have so indicated. Instead, the Commission’s Order approved the terms of the Agreement and as such, intended for that Agreement, once signed, to govern the parties’ rights and obligations on a going-forward basis. It is routine and common practice for such agreements, once approved, to be signed and filed with the Commission.

Notwithstanding the logical implication of the Commission's Order, the plain language of the Agreement, and common practice at the Commission, UBET makes the novel argument that even though the Commission approved the form of an Agreement there is no subsequent obligation to sign it. Of course, if UBET's position were adopted, the parties would not be operating under a bilateral contract. Rather, they would be operating under a Commission order. As such, the contract could not be enforced according to its terms but instead all enforcement would have to be done by the Commission. In essence, the parties would not have a bilateral agreement at all and the Commission's approval would have been a mere exercise in the abstract, and a waste of its and the parties' resources.

Further, UBET's argument is internally inconsistent. UBET argues Bresnan should not be concerned about UBET's failure to sign the Agreement based on the unsupported assertion that, "[a] signed Agreement is not required by the Commission's Orders and adds nothing to Bresnan's rights."¹ Yet, at the same time as saying that Bresnan's rights are fully intact without having a signed Agreement in place, UBET argues that it should be relieved from one or more of its obligations under the Agreement or that the terms of the Agreement should be modified. For example, UBET states:

- "UBET's ability to perform under the terms of the Agreement is unknown at this time."²
- "In fact, complying with the terms of the Essential Facilities Agreement and Commission's Orders without proper permission from Qwest may be viewed as an unlawful act subjecting UBET to potential legal liability."³

¹ UBET Pre-Hearing Brief at p. 7.

² *Id.* at p. 5.

³ *Id.* at p. 6.

- “Voluntarily signing an agreement with an undefined financial obligation is not prudent under any reasonable business standard.”⁴

Clearly, if by failing to sign the Agreement, UBET enjoys the right to decide unilaterally whether or not to perform under the Agreement, Bresnan’s rights are affected. Likewise, if by failing to sign the Agreement, UBET enjoys the ability to decide unilaterally what financial obligations it will or will not incur, Bresnan’s rights are affected. Were Bresnan’s rights indeed unchanged as UBET asserts, then whether UBET signs or not should make no difference. In that instance, there would be no reasonable basis for UBET to object to signing. UBET cannot have it both ways.

Finally, the fact is that UBET’s failure to sign is significant because that failure prevents a bilateral contract from being formed, despite the Commission’s intention to the contrary. UBET’s Pre-Hearing Brief makes it abundantly clear that UBET will not sign because UBET is unhappy with the Commission decision. Yet as a regulated public utility UBET is bound by the Commission’s Order and does not get the right to unilaterally decide not to comply with that Order. The Commission is empowered to order UBET to sign. The Commission ordered UBET to sign. UBET has refused to comply with that Order. As such, the Commission should reaffirm its Order that UBET sign the approved Agreement and further should penalize UBET for its blatant refusal to comply with the prior Commission Order to do so.

⁴ *Id.*

II. UBET'S OTHER ARGUMENTS ARE IRRELEVANT TO THIS COMPLAINT.

UBET's Pre-hearing Brief tries to distract the Commission's attention from this simple issue by injecting a series of smokescreens into the discussion. Each of these irrelevant arguments should be ignored by the Commission.

The first smokescreen is UBET's argument that it is meeting its obligation to strive to implement indirect interconnection at the Provo tandem.⁵ Unless and until UBET signs the Agreement, there is no contract and no such obligation. Further, Bresnan is not even asserting that UBET has failed to implement indirect interconnection on a timely basis, but rather is complaining that UBET has failed to sign the ordered Agreement. Once that Agreement is signed, Bresnan anticipates that both parties would move forward in accordance with the terms of the Agreement to implement all of its provisions – not just indirect interconnection.

Second, UBET argues that Bresnan has failed to perform under the terms of the Agreement. There are several things wrong with this argument as well. Again, until the Agreement is signed by both parties, neither UBET nor Bresnan is obligated by its terms. Further, UBET both inappropriately and in error relies on the statements made in an e-mail by a single Qwest employee to support UBET's contention that Bresnan has not taken steps to implement indirect interconnection.⁶ As Mr. Harris states in his sworn affidavit, Bresnan has initiated interconnection discussions with Qwest and is currently reviewing a draft interconnection agreement for execution.⁷

Finally, UBET essentially reiterates its arguments that the Agreement, as ordered by the Commission, should be modified or that UBET's performance under the Agreement should be

⁵ See, e.g., UBET Pre-Hearing Brief at p. 2-4.

⁶ See UBET Pre-Hearing Brief at Exhibit B.

⁷ Affidavit of Alex J. Harris at ¶ 11, p. 3-4.

excused because of Qwest. Again, these arguments are well beyond the scope of Bresnan's Complaint and should be disregarded. UBET had a full opportunity to litigate the terms and conditions of this Agreement in Docket No. 08-2487-02. UBET has stated its intention to appeal the Commission's decision. Because UBET is required to comply with the Commission's Orders irrespective of its dealings with Qwest, none of its assertions about what Qwest will or will not do, even if true, relieve UBET of its obligation to sign the Agreement with Bresnan.

III. CONCLUSION.

For the foregoing reasons and notwithstanding UBET's arguments and alleged defenses, Bresnan respectfully requests that the Commission issue an order that UBET immediately execute the Essential Facilities 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 9th day of September, 2009.

HOLLAND & HART, LLP

/s James A. Holtkamp

James A. Holtkamp (Bar No. 1533)

John P. Harrington (Bar No. 5242)

60 E. South Temple, Suite 2000

Salt Lake City, UT 84111-1031

Telephone: (801) 799-5847

Facsimile: (801) 799-5700

*Attorneys for Petitioner Bresnan Broadband of
Utah, LLC*

CERTIFICATE OF MAILING

I hereby certify that on this 9th day of September, 2009, an original and five copies of **BRESNAN BROADBAND OF UTAH, LLC'S RESPONSE BRIEF**, were hand delivered to the following:

Ms. Julie Orchard, Secretary
Public Service Commission of Utah
Heber M. Wells Building
300 South 160 East, 4th Floor
Salt Lake City, UT 84111

and copies were also served via electronic mail to the following:

Jennifer Watts
Office Specialist
Public Service Commission of Utah
jwatts@utah.gov
(.pdf and in Word)

Paul Proctor
pproctor@utah.gov

Bill Duncan
wduncan@utah.gov

Judge Ruben Arredondo
raredondo@utah.gov

Eric Orton
eorton@utah.gov

Stanley K. Stoll
sstoll@blackburn-stoll.com

Phil Powlick
philippowlick@utah.gov

Kira M. Slawson
KiraM@blackburn-stoll.com

Paul Anderson
panderson@utah.gov

Dennis Miller
dennismiller@utah.gov

James A. Holtkamp
jholtkamp@hollandhart.com

Casey Coleman
ccoleman@utah.gov

Thorvald A. Nelson
tnelson@hollandhart.com

dpudatarequest@utah.gov

Michelle Brandt King
mbking@hollandhart.com

Michael Ginsberg
mginsberg@utah.gov

Jerold C. Lambert
jlambert@bresnan.com

Patricia Schmidt
pschmid@utah.gov

Alex Harris
aharris@bresnan.com

s/ Michelle Farnsworth
