

EXHIBIT 3



Control Number: 26381



Item Number: 109

Addendum StartPage: 0

DOCKET NO. 26381

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PUBLIC UTILITY COMMISSION
FILING CLERK

PETITION BY UTEX §
COMMUNICATIONS CORPORATION §
FOR ARBITRATION PURSUANT TO §
SECTION 252(b) OF THE FEDERAL §
TELECOMMUNICATIONS ACT, AND §
PURA FOR RATES, TERMS AND §
CONDITIONS OF INTERCONNECTION §
AGREEMENT WITH SOUTHWESTERN §
BELL TELEPHONE, L.P. D/B/A SBC §
TEXAS §

PUBLIC UTILITY COMMISSION
OF TEXAS

ORDER NO. 23
CLARIFICATION

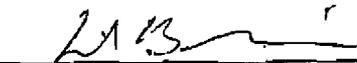
This Order clarifies Order No. 22 issued on April, 27, 2006. Order No. 22 stated that "[t]he Arbitrators note that the parties may seek relief under 47 U.S.C. § 252(e)(5)." Order No. 22 does not state that the parties may *only* seek relief under 47 U.S.C. § 252(e)(5). Order No. 22 in no way limits any otherwise available recourse.

SIGNED AT AUSTIN, TEXAS on the 17th day of May, 2006.

FTA § 252 PANEL



ANDREW KANG
ARBITRATOR



DAVID SMITHSON
ARBITRATOR

EXHIBIT 4



Control Number: 26381



Item Number: 113

Addendum StartPage: 0

DOCKET NO. 26381

PETITION BY UTEX COMMUNICATIONS CORPORATION FOR ARBITRATION PURSUANT TO SECTION 254(b) OF THE FEDERAL TELECOMMUNICATIONS ACT, AND PURA FOR RATES, TERMS, AND CONDITIONS OF INTERCONNECTION AGREEMENT WITH SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A SBC TEXAS) § § § § § § § § § §

PUBLIC UTILITY COMMISSION OF TEXAS

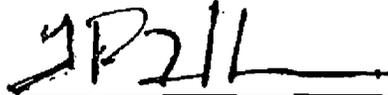
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COMMUNICATIONS SECTION

ORDER ABATING PROCEEDING

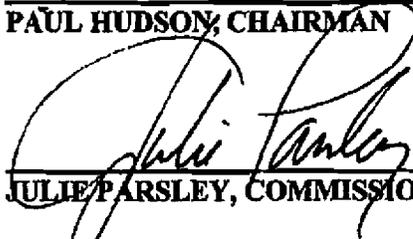
At the open meeting of June 7, 2006, the Commission took the view that, while Order No. 22 in this proceeding should be overruled, it was nevertheless not appropriate to consider the issue of the regulatory classification of Voice over Internet Protocol (VoIP)—a matter that the Commission had deferred in Docket No. 28821, and a matter that has industry-wide implications—in the context of this arbitration. Accordingly, it is the decision of the Commission that this proceeding should be abated. Therefore, this proceeding is, in accordance with the discussion at the June 7, 2006 open meeting, hereby **ABATED**.

SIGNED AT AUSTIN, TEXAS the 22nd day of June 2006.

PUBLIC UTILITY COMMISSION OF TEXAS



PAUL HUDSON, CHAIRMAN



JULIE PARSLEY, COMMISSIONER



BARRY T. SMITHERMAN, COMMISSIONER

EXHIBIT 5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UTEX COMMUNICATIONS CORP.,	§	
Plaintiff,	§	
	§	
v.	§	
	§	No. A-06-CA-567-LY
THE PUBLIC UTILITY	§	
COMMISSION OF TEXAS,	§	
PAUL HUDSON, IN HIS OFFICIAL	§	
CAPACITY AS CHAIRMAN OF THE	§	
PUBLIC UTILITY COMMISSION OF	§	
TEXAS, JULIE CARUTHERS PARSLEY,	§	
IN HER OFFICIAL CAPACITY AS	§	
COMMISSIONER OF THE PUBLIC	§	
UTILITY COMMISSION OF TEXAS,	§	
BARRY SMITHERMAN, IN HIS OFFICIAL	§	
CAPACITY AS COMMISSIONER OF	§	
THE PUBLIC UTILITY COMMISSION	§	
OF TEXAS, and SOUTHWESTERN BELL	§	
TELEPHONE, L.P. D/B/A AT&T TEXAS	§	
F/K/A SBC TEXAS,	§	
Defendants.	§	

**PUBLIC UTILITY COMMISSION OF TEXAS AND COMMISSIONERS'
MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1) AND (6)
AND SUPPORTING BRIEF**

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September 29, 2006

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

UTEX COMMUNICATIONS CORP.,	§	
Plaintiff,	§	
	§	
v.	§	
	§	No. A-06-CA-567-LY
THE PUBLIC UTILITY	§	
COMMISSION OF TEXAS,	§	
PAUL HUDSON, IN HIS OFFICIAL	§	
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OF TEXAS, and SOUTHWESTERN BELL	§	
TELEPHONE, L.P. D/B/A AT&T TEXAS	§	
F/K/A SBC TEXAS,	§	
Defendants.	§	

**PUBLIC UTILITY COMMISSION OF TEXAS AND COMMISSIONERS'
MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(1) AND (6)
AND SUPPORTING BRIEF**

TO THE HONORABLE LEE YEAKEL, UNITED STATES DISTRICT JUDGE:

The Public Utility Commission of Texas and its Commissioners, Paul Hudson, Julie Caruthers Parsley, and Barry Smitherman, in their official capacities ("PUCT and Commissioners"), Defendants, file this Motion to Dismiss Counts 1 through 9 of Plaintiff's First Amended Complaint under FED. R. CIV. P. 12(b)(1) for lack of subject matter

jurisdiction and under FED. R. CIV. P. 12(b)(6) for failure to state a claim for which relief can be granted.¹

I. INTRODUCTION

The Federal Telecommunications Act of 1996 ("FTA")² grants Federal courts limited jurisdiction to review the determinations that state utility commissions make under the FTA. Federal district courts have only appellate jurisdiction, and only over state commissions' final decisions approving, rejecting or interpreting interconnection agreements. Any claim that a state utility regulator is failing to carry out its responsibility under the FTA must be presented to the Federal Communications Commission ("FCC"). In this suit, UTex Communications Corporation ("UTex") complains in numerous counts about the PUCT's alleged inaction in two of its FTA dockets, Nos. 26381 and 32041. The court has no jurisdiction over these complaints, and the Federal Arbitration Act does not authorize ordering commercial arbitration. Counts 1 through 7 should be dismissed.

With regard to the third PUCT docket UTex complains of, No. 30459, UTex does not state a claim for which relief can be granted. As explained below, this docket was a change-of-law proceeding instituted to amend certain existing interconnection agreements, pursuant to their terms, to conform them to the latest FCC pronouncements on the incumbent carriers'

¹ This combined motion and brief does not address the counts asserting claims only against Defendant Southwestern Bell Telephone, L.P. (Counts 10 through 16).

² Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

network element “unbundling” obligations. The PUCT has no authority to require Defendant Southwestern Bell Telephone, L.P. (“SBC”)³ to provide UTex the unbundled network elements (“UNEs”) that UTex requested, under any of provisions it invoked, Section 271 of the FTA or the Texas Utilities Code. UTex’s requests were in any event outside the scope of the change-of-law docket. Thus, because these remaining counts against the PUCT do not state a claim under the FTA, Counts 8 and 9 should also be dismissed.⁴

II. STATEMENT OF FACTS

In a single lawsuit, UTex challenges the PUCT action, or alleged inaction, in three different PUCT dockets. Docket 26381 requests arbitration of a new interconnection agreement between UTex and SBC; Docket 32041 asks the PUCT to interpret an existing interconnection agreement between UTex and SBC; and Docket 30459 was initiated to effectuate the change-of-law provisions in some existing UTex-SBC interconnection agreement in light of new FCC rules adopted after prior rules were invalidated. Each PUCT docket must be considered in the context of PUCT’s authority under the FTA.

³ Defendant Southwestern Bell Telephone, L.P. now does business as AT&T Texas. It formerly did business as SBC Texas. As most of the materials in the PUCT proceedings at issue in this case refer to SBC or SBC Texas, this motion and brief refers to the company as “SBC.”

⁴ In compliance with Local Rule CV-12, the PUCT and PUCT Commissioners also assert in this brief that 11th Amendment immunity protects the PUCT Commissioners from any claims the Plaintiff may be making against them for attorneys’ fees.

*Triennial Review Remand Order*¹⁷ (“TRRO”)) addressing these unbundling issues. Many of these have been challenged in the courts, and on several occasions, reversed in certain respects and remanded to the FCC for further proceedings.¹⁸ The current FCC rules provide the definitive standards for how the ILECs such as SBC are required to provide UNEs to CLECs such as UTex, which determinations are then carried out by the state regulators through their arbitration proceedings. Because most interconnection agreements include a change-of-law provision, the revised FCC rules triggered proceedings at the PUCT to determine how to revise existing agreements to reflect the changed law.

B. PUCT dockets challenged in this lawsuit.

1. The 2000 UTex-SBC Interconnection Agreement and the post-interconnection dispute (Docket 32041).

FCC 99-370, 15 F.C.C.R. 1760, 1999 WL 1065185 (Nov. 24, 1999), *clarified*, FCC 00-183, 15 F.C.C.R. 16,346, 2000 WL 6302 (Jan. 7, 2000).

¹⁶ Appendix Tab L, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket I-338, 18 F.C.C.R. 16,978, 2003 WL 22175730 (rel. Aug 21, 2003), *vacated in part, dismissed in part*, *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004).

¹⁷ Order on Remand, FCC 04-290, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket I-338, 20 F.C.C.R. 2533, 2005 WL 289015 (rel. Feb. 4, 2005).

¹⁸ *See, e.g., U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004) (vacating in part and reversing in part the Triennial Review Order); *U.S. Telecom Ass'n v. F.C.C.*, 290 F.3d 415 (D.C. Cir. 2002); *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999) and *Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467 (2002) (both reversing in part and remanding the Local Competition Order).

UTex and SBC negotiated an FTA interconnection agreement, which the PUCT approved in 2000.¹⁹ A dispute developed over the amount SBC was billing under the agreement and whether UTex could bill and collect amounts it contended were owed under certain liquidated damage provisions in the agreement. Ultimately, a lawsuit filed over the contract dispute was dismissed, on exclusive jurisdiction grounds, to allow the PUCT to decide the contract interpretation issues involved.²⁰ Several months thereafter, UTex initiated Docket 32041, a complaint proceeding, asking the PUCT to resolve these issues. This docket is active, with briefing on the disputed issues to be submitted to PUCT staff arbitrators this fall.²¹

2. The arbitration of a new UTex-SBC agreement (Docket 26381).

In 2002, UTex filed a petition with the PUCT pursuant to 47 U.S.C. § 252(b) to arbitrate certain terms of a new interconnection agreement between SBC and UTex that the parties could not agree upon. Although the FTA contemplates that such arbitrations be completed in nine months from the CLEC's request for interconnection, *see* 47 U.S.C. § 252(b)(4), progress toward a final decision in the UTex arbitration was repeatedly delayed due

¹⁹ FTA Section 252(e)(1) requires that state utility commissions approve all interconnection agreements, whether voluntarily negotiated or arbitrated.

²⁰ Appendix, Tab A, *UTex Comm'n Corp. v. Southwestern Bell Telephone, L.P.*, No. A-05-CA-262-SS (W.D. Tex. June 6, 2005)(Order at 5-7).

²¹ Appendix Tab H, Tex. Util. Comm'n, *UTex Communications Corporation's Complaint, Request for Expedited Ruling, Request for Interim Ruling, and Request for Emergency Action (injunction) regarding Disputes with Southwestern Bell Telephone, L.P. dba SBC Texas*, Docket 32041 ("Docket 32041") (Sept. 1, 2006) (Order No. 4 – Ruling on AT&T's Response to UTex's First Amended Complaint and Motion to Dismiss at 3).

to uncertainty as to the issues PUCT arbitrators needed to decide. UTex and SBC submitted several agreed scheduling orders over time extending the deadlines for their submissions of evidence and briefing and, thus, the arbitrators' ultimate decision. A chronology of the some of the key events in Docket 26381, describing these agreements and the progress of the arbitration is included in the Appendix, Tab B.

In October 2005—with UTex and SBC still unable to agree about what the open issues were—the arbitrators issued an order giving the parties a final opportunity to submit a proper decision point list (DPL), a necessary step (required under PUCT rules) in the arbitration of a new interconnection agreement.²² After the parties finally submitted a DPL in response in November, the arbitrators then asked the parties to identify those issues that implicated or involved Voice over Internet Protocol (“VoIP”) (a relatively new technology for providing voice service over a broadband connection using Internet Protocol) or were being considered in the complaint proceeding for the existing interconnection agreement (Docket 30459). Thereafter, the Arbitrators issued an order dismissing UTex's arbitration petition²³ in light of the VoIP issues involved and the pendency of proceedings at the FCC that would address those issues on an industry-wide basis and establish nationally-uniform regulatory treatment for VoIP.²⁴ Upon appeal to the Commissioners, the PUCT vacated the arbitrators' dismissal

²² P.U.C SUBST. R. 21.959(o).

²³ Appendix Tab C, Tex. Util. Comm'n, *Petition of UTex Communications Corporation for Arbitration*, Docket 26381 (“Docket 26381”) (Order 22: Dismissing Proceeding) (Apr. 27, 2006).

²⁴ *E.g.*, Notice of Proposed Rulemaking, FCC 04-28, *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, 19 F.C.C.R. 4863, 2004 WL 439260 (rel. March 10, 2004); *see also* Memorandum Opinion and Order, FCC 04-267, *In the Matter of Vonage Holdings Corp.*, WC

order, opting instead to abate the UTex arbitration pending the FCC's determinations on the VoIP issues.²⁵

3. Change-of-law docket to apply revised FCC rules to non-T2A interconnection agreements (Docket 30459).

In Docket 30459, SBC sought to amend its non-T2A interconnection agreements under their change-of-law provisions to conform these agreements to the FCC's unbundling standards.²⁶ This proceeding was undertaken at the FCC's urging that ILECs move to implement its current policy as to what UNEs the FTA requires ILECs to offer.²⁷

III. ARGUMENT AND AUTHORITIES

- A. **The Court has no jurisdiction over UTex's complaints about Docket 26381 because UTex does not challenge a final PUCT determination (*Dismissal of Counts 1, 2, and 3*).**

Only in a case where state commission makes a final decision does a party have a right to federal court review. The scope of review is set out in FTA Section 252(e)(6), which provides that:

Docket 03-211, 19 F.C.C.R. 22,404, 2004 WL 2601194 (re. Nov. 12, 2004), appeal pending (8th Cir.).

²⁵ Appendix Tab D, Docket 26381, Order Abating Proceeding (June 22, 2006).

²⁶ Tex. Util. Comm'n, *Petition of SBC Texas for Post-Interconnection Dispute Resolution*, Docket 30459 (Nov. 23, 2004) (Petition).

²⁷ The FCC reiterated its earlier instruction that ILECs move to implement its determinations in the *Triennial Review Remand Order*, in which it stated that “[w]e expect that incumbent LECs and competing carriers will implement the commission’s findings [regarding unbundling] as directed by Section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.” *TRRO*, ¶ 233.

[i]n any case in which a State Commission *makes a determination under this section*, any party aggrieved by such determination may bring an action in an appropriate Federal district court *to determine whether the agreement or statement meets the requirements of section 251 and this section.*²⁸

Rather than a PUCT determination, UTex's complaints are about the PUCT's alleged failure to decide—deferring the final decision in the arbitration until the FCC makes core decisions about the regulatory treatment of VoIP. The FTA authorizes state commissions to arbitrate interconnection agreements if they choose to.²⁹ Where a state commission chooses not to act, or allegedly otherwise fails to carry out its responsibility, FTA Section 252(e)(5) plainly states that an aggrieved party's remedy is to go to the FCC, not to Federal district court. If appropriate, the FCC can then preempt state jurisdiction and assume responsibility:

Commission [FCC] to act if state will not act. If the State commission fails to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.³⁰

The provision that UTex cites for this court's jurisdiction, 47 U.S.C. § 252(e)(6), plainly states that a proceeding before the FCC, rather than a Federal court lawsuit, is the *exclusive* remedy for a state commission's failure to act:

²⁸ 47 U.S.C. § 252(e)(5)(emphasis added).

²⁹ See, e.g., *AT&T Communications v. BellSouth Telecommunications, Inc.*, 238 F.3d 636, 646 (5th Cir. 2001) (state regulatory agencies may accept or decline role in arbitrating FTA agreements).

³⁰ 47 U.S.C. § 252(e)(5).

Review of State commission actions. In a case in which a state fails to act as described in paragraph (5), the proceeding by the Commission [FCC] under such paragraph and any judicial review of the Commission's action shall be the *exclusive remedies* for a State commission's failure to act.³¹

Simply put, if the PUCT has failed to act as UTex alleges, then under the FTA the FCC will arbitrate the agreement; Utex's remedy is to go to the FCC, not to Federal court.

Case law further explains that the right to review under Section 252(e)(6) of the FTA is limited to review of state commission's approval or rejection of interconnection agreements. *E.g., AT&T v. Southwestern Bell Tel. Co.*, 38 F.Supp.2d 902, 903-04 (D. Kansas 1999) (dismissing appeal for lack of subject matter jurisdiction where state commission had not issued final order approving or rejecting interconnection agreement); *GTE Florida Inc. v. Johnson*, 964 F.Supp. 333, 335 (N.D. Fla. 1997), citing *GTE South, Inc. v. Breathitt*, 963 F.Supp. 610 (E.D. Ky. 1997); *GTE South, Inc. v. Morrison*, 957 F.Supp. 800 (E.D. Va. 1997). In no event does a Federal court have jurisdiction to review the interlocutory orders of state commissions *before* final approval or rejection of an interconnection agreement. *E.g., GTE North, Inc. v. Strand*, 209 F.3d 909, 915 (6th Cir. 2000) (Section 252(e)(6) prohibits federal review of interlocutory orders entered in the course of FTA proceedings); *Michigan Bell Tel. Co. v. MFS Intelenet of Michigan*, 16 F.Supp. 2d 817, 823 (W.D. Mich. 1998). In two

³¹ 47 U.S.C. § 252(e)(6) (emphasis added).

previous cases, this Court has dismissed suits seeking review of interlocutory PUCT orders during a pending FTA arbitration.³²

That is the situation here. Undisputedly, what UTex challenges is an interlocutory order abating the arbitration proceedings to allow the FCC to resolve—on a national, industry-wide basis—core issues regarding the regulatory treatment of VoIP-related services. The PUCT found that it was “not appropriate to consider the issue of the regulatory classification of Voice over Internet Protocol (VoIP)—a matter that the Commission has deferred in Docket No. 28821, and a matter that has industry-wide implications—in the context of this arbitration.”³³ Thus, it abated this single-agreement arbitration, pending the FCC’s national determinations.

That these VoIP issues pervade the arbitration of a new UTex agreement also cannot be disputed. UTex admitted in a response to the arbitrator’s Order No. 21 that VoIP issues are woven throughout the entire interconnection agreement with SBC that UTex seeks through arbitration:

UTex does not set out everything that directly or indirectly “implicates” VoIP. If it were to try to do so, the simple answer would be that *the entire contract does*, especially with regard to Docket 26381. This is so because UTex’s business plan almost entirely revolves around new technology IP-enabled services VoIP is involved in almost every aspect of UTex’s relationship

³² Appendix Tab E, *Accutel of Texas, L.P., v. Public Utility Commission of Texas*, No. A-05-CA-433- LY (Order)(July 20, 2005); Appendix Tab F, *Southwestern Bell Telephone Co. v. Waller Creek Communications Co.*, No. SA-00-CA-0026-HG (Order) (April 24, 2001).

³³ Docket 26381, Order Abating Proceeding (June 22, 2006).

with at&t given that the entire ICA will be for the purpose of originating traffic to or terminating traffic from at&t's legacy voice network.³⁴

UTex's First Amended Complaint likewise explains that (1) "UTex's business is principally wholesale in nature, and involves intermediation between the Internet and the Public Switched Telephone Network ("PSTN")"³⁵ and (2) "[t]o date, UTex has established facilities and VoIP Internet Gateway Intermediation Point of Presence Service ("IGI POPs") in six Texas Local Access and Transport Area ("LATAs"). . . ."³⁶

The PUCT's decision to defer a decision on the new UTex agreement parallels its decision in an earlier, industry-wide docket to defer consideration of VoIP issues because the FCC was addressing these questions in pending dockets.³⁷ In Docket 28821, developing a successor T2A agreement, several CLECs asked the PUCT to defer its decision relating to VoIP until the FCC made its determination.³⁸ The PUCT agreed all issues should be

³⁴ Docket 26381, UTex's Response to Order No. 21 at 2 (Feb. 27, 2006) (emphasis added).

³⁵ First Amended Complaint at 6.

³⁶ *Id.* at 7-8.

³⁷ *E.g.*, Notice of Proposed Rulemaking, FCC 04-28, *In the Matter of IP-Enabled Services*, WC Docket No. 04-36, 19 F.C.C.R. 4863, 2004 WL 439260 (rel. March 10, 2004).

³⁸ "[Former] AT&T [then, a CLEC competitor to SBC] requested that the Commission [PUCT] not address VoIP issues in the present arbitration and instead defer the decisions to the FCC. AT&T currently has a pending petition before the FCC for declaratory ruling regarding certain phone-to-phone VoIP services. If the Commission elects to address VoIP, AT&T requested that the Commission sever VoIP and address it in a generic proceeding. MCI concurred with AT&T that the Commission should defer VoIP issues to the FCC. SBC similarly agreed that the Commission should defer to the FCC with respect to calls where calls originate on an IP network and terminate on a circuit-switched network or vice versa. SBC, however, urged that Commission to find that access charges apply to calls originating and terminating on circuit networks. SBC also sought to require CLECs to monitor and escrow VoIP access charges for such traffic until a final determination of this

deferred: “it is appropriate to defer consideration of VoIP issues in this current arbitration. The FCC’s recent [notice of proposed rulemaking] specifically questions the applicability of access charges, indicating the FCC’s intent to address this issue.”³⁹

Although not subject to review in this Court, the decision to abate the UTex arbitration in light of the pending FCC proceedings was not arbitrary or capricious. The abatement allows the FCC to first make the nationally applicable policy determinations that are central to the arbitration of a new UTex agreement. For this very reason, the PUCT declined to make such determinations in the statewide proceeding that developed the successor T2A. In light of the fact that every CLEC is entitled, under FTA, to adopt any agreement an ILEC has with any other CLEC, deciding these issues in the UTex arbitration could have broad impact.⁴⁰ Thus, the PUCT reasonably declined to decide them in the arbitration of one individual CLEC’s agreement, given the impact that one agreement could have throughout the industry. As UTex itself has repeatedly sought to extend the deadlines for completion of the arbitration, it can hardly be heard to complain about such an abatement.

B. UTex does not state a claim under the Federal Arbitration Act because the PUCT has not “declin[ed] jurisdiction” over the UTex arbitration and neither the FAA nor the FTA authorize the Court to order commercial arbitration. (*Dismissal of Count 4*).

issue. . . .” Docket 28821, Order Addressing Threshold Issues and Motion to Dismiss at 6 (Apr. 19, 2004).

³⁹ *Id.* at 7.

⁴⁰ 47 U.S.C. § 252(i).

unbundling requests were outside the scope of that change-of-law docket and, the PUCT has no authority to order the provisioning of UNEs under FTA Section 271 or state law beyond that required by Sections 251 and 252 of the FTA.

Although it is clear that all of UTex's claims should be dismissed, the PUCT and the PUCT Commissioners notify the Court, in compliance with Local Rule CV-12, that the PUCT Commissioners are protected by 11th Amendment immunity from any claims the Plaintiff may be making against them for attorneys' fees, and are prepared to brief the issue in full if such briefing should become necessary.

Respectfully submitted,

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