

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Petition of UTEX Communications)
Corporation for Preemption of the Jurisdiction) WC Docket No. 09-134
of the Public Utility Commission of Texas)
Pursuant to Section 252(e)(5) of the)
Communications Act)

**COMMENTS
of the
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.**

By Public Notice released July 28, 2009, the Commission has requested comment on a petition for preemption filed by UTEX Communications Corporation (“UTEX”).¹ UTEX asks the Commission to preempt the jurisdiction of the Public Utility Commission of Texas (the “TPUC”) and to arbitrate, pursuant to section 252(e)(5) of the Act, certain pending interconnection disputes between UTEX and Southwestern Bell Telephone Company d/b/a AT&T Texas (“AT&T”).²

NECA was not a participant in the proceedings before the TPUC, and therefore does not intend to comment on specific details of interconnection disputes between UTEX and AT&T. Nevertheless, it appears the TPUC’s decision to abate proceedings in TPUC Docket No. 26381

¹ *Pleading Cycle Established on Petition of UTEX Communications Corporation For Preemption of the Jurisdiction of the Public Utility Commission of Texas Pursuant to Section 252(e)(5) of the Communications Act*, WC Docket No. 09-134, Public Notice, DA 09-1643 (July 28, 2009).

² *See* Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas, WC Docket No. 09-134 (July 13, 2009) (*UTEX Petition*).

was based to some extent on the fact this Commission is considering issues relating to the regulatory treatment of VoIP services in its IP-Enabled Services proceeding.³

In this regard, the TPUC's decision is similar to a number of other cases where state regulators and federal courts have deferred resolving intercarrier compensation disputes based on claims the traffic at issue is "IP enabled" or "VoIP." NECA has recently provided evidence to the Commission as to the effects regulatory uncertainty in this area is having on rural telephone companies in California and New England.⁴ NECA tariff participants are experiencing rapid growth in the numbers of access minutes sent by interconnected VoIP providers and other carriers, who refuse to pay tariffed charges based on claims "the FCC hasn't decided whether access charges apply."⁵

This growth is part of a national trend expected to continue as VoIP inevitably enjoys broader adoption. NECA has shown in this regard how courts and PUCs in various States throughout the country have been tied up in VoIP litigation pending resolution of open issues in the Commission's Intercarrier Compensation and IP-Enabled Services proceedings.⁶

Disturbingly, in some instances decisionmakers have deferred consideration of claims for

³ See *Id.* at 7-8 (explaining the TPUC has declined to consider VoIP "in light of the FCC's intent to address such issues" in federal rulemaking proceedings).

⁴ See Letter from Joe A. Douglas, NECA, to Marlene H. Dortch, FCC, WC Docket No. 04-36 (May 15, 2009) (*NECA May 15th Ex Parte*); Letter from Joe A. Douglas, NECA, to Marlene H. Dortch, FCC, WC Docket No. 04-36 (July 9, 2009).

⁵ See *e.g.*, Letter from Joe A. Douglas, NECA, to Marlene H. Dortch, FCC, WC Docket No. 04-36 (May 23, 2008) (attaching letters from CommPartners, dated Jan. 29, 2008 and Dec. 20, 2006).

⁶ *May 15th Ex Parte*, attachment, at 7.

payment even with respect to “IP in the Middle” traffic, which the Commission unequivocally addressed in its 2004 *AT&T Order*.⁷

In other cases, state regulators and courts have “seen through” absurd arguments advanced by VoIP providers seeking free termination for their traffic, and have ordered these entities to pay charges owed to interconnecting carriers. Earlier this year, for example, the Illinois Commerce Commission (ICC) rightly rejected a request by Global NAPs to defer a ruling in a collections proceeding. In the ICC’s view, “whatever the outcome [of the FCC’s pending rulemaking proceedings], the new rules will surely operate prospectively and not apply retroactively or impinge on existing interconnection agreements. . . . delaying resolution of the instant dispute serves no legitimate purpose.”⁸

Similarly, the Georgia PUC recently adopted in pertinent part a Hearing Officer’s earlier decision finding traffic sent by Global NAPs to several independent telephone companies in Georgia is subject to the companies’ intrastate access tariffs notwithstanding claims the traffic

⁷ See *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361, Memorandum Opinion & Order, 19 FCC Rcd 7457 (2004) (*IP in the Middle Order*). In 2005, SBC Corp. filed a petition with the Commission explaining how the U.S. District Court for the Eastern District of Missouri had referred a case against an “IP in the middle” carrier based on supposed uncertainties as to the application of the Commission’s order. See *Petition of the SBC ILECs for a Declaratory Ruling*, WC Docket No. 05-276 (Sept. 21, 2005). No decision has been reached in that case. More recently, a federal district court in Montana stayed consideration of a lawsuit against a carrier refusing to pay for interexchange traffic, even though plaintiffs in that litigation had shown most, if not all, of the traffic at issue was probably “IP in the middle” and therefore clearly subject to access charges. See Letter from Stephen Brown, Garlington Lohn Robinson; Richard Askoff, NECA; and Gregory Vogt, to Marlene H. Dortch, FCC, WC Docket No. 04-36 (June 24, 2009). Fortunately, in that proceeding the court has allowed discovery to proceed so as to determine the extent to which traffic is actually “IP originated.”

⁸ See *Illinois Bell Telephone Company, Inc. v. Global NAPs Illinois, Inc., Complaint Pursuant to Section 252(e) of the Federal Telecommunications Act of 1996, 47 U.S.C. §252(e), and Sections 4-101, 10-101, and 10-108 of the Illinois Public Utilities Act, 220 ILCS 5/4-101, 220 ILCS 5/10-101, and 220 ILCS 5/10-108*, Case No. 08-0105, Order (Ill. Commerce Comm., Feb. 11, 2009), at 2.

was “ESP” traffic and therefore exempt from access charges, and that Global NAPs had unreasonably refused to pay tariffed charges for such traffic.⁹

And of course, as UTEX mentions in passing, the TPUC itself recently issued an arbitration award under an existing interconnection agreement between AT&T and UTEX which found most of the calls UTEX claims are exempt from access charges were in fact just ordinary telecommunications traffic -- i.e., traffic that “originates with one customer on the PSTN and terminates with another such customer on the PSTN”.¹⁰ Consistent with the Commission’s *IP in the Middle Order*, the TPUC arbitrator noted “[e]ven if a telecommunications provider uses Voice over Internet Protocol (VoIP) for some part of the call between the originating and terminating points on the PSTN, access charges may apply to such a call.”¹¹

Since access revenues are crucial to deployment of advanced services and broadband networks, uncertainty in this area substantially undermines prospects for achieving the Commission’s national broadband deployment goals. NECA agrees, therefore, that the Commission needs to address issues relating to application of access charges and other forms of intercarrier compensation to IP-enabled traffic. But it is by no means clear preempting the TPUC’s jurisdiction and attempting to arbitrate a specific interconnection dispute between UTEX and AT&T would be the best way to accomplish this goal.

⁹ See *Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc.*, Docket No. 21905-U, Order Adopting in Part and Modifying in Part the Hearing Officer’s Initial Decision (Georgia PSC, July 31, 2009).

¹⁰ *Petition of UTEX For Post-Interconnection Dispute Resolution With AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution with UTEX*, Docket No. 33323, Arbitration Award (Texas PUC, June 1, 2009), at 3.

¹¹ *Id.*

A better approach would be for the Commission to focus its resources on resolving the underlying policy issues that led the TPUC to abate the UTEX proceeding in the first place. The Commission could, for example, take action promptly to reform existing intercarrier compensation mechanisms, as proposed by NECA and numerous other parties in the context of CC Docket No. 01-92 and related proceedings, in a way that assures all entities using the public switched telephone network (PSTN) pay fairly and uniformly for the use of that network to originate and terminate local and interexchange traffic.¹²

Recognizing this may take time, however, the Commission could substantially assist the TPUC, other state regulators, and numerous federal courts hearing such cases by promptly issuing an order denying UTEX's petition and confirming that cases involving claims for compensation for traffic should be decided under existing intercarrier compensation rules. Such an order would confirm (as the ICC sensibly found) existing rules *remain in effect* notwithstanding the pendency of various FCC proceedings, and are to be followed by state regulators and courts in resolving such disputes. This would not in any way prejudice ongoing rulemaking proceedings, but would at least be helpful to courts and state regulators in addressing these issues pending overall ICC reform.

CONCLUSION

While it is not clear preemption of the TPUC's jurisdiction is warranted under section 252(e)(5) of the Act, the Commission should act to resolve the underlying issues that led the TPUC to abate its proceeding in the first place. Ideally, the Commission should act soon to address intercarrier compensation reform issues, in a way that assures all entities using the PSTN

¹² See e.g., *NECA Comments*, WC Docket No. 05-337 (Nov. 26, 2008), at 11; *NECA Reply Comments*, WC Docket No. 05-337 (Dec. 22, 2008), at 10.

pay fairly and equitably for their use of the network to originate and terminate traffic. Pending resolution of long-term reform issues, however, the Commission should confirm existing rules governing intercarrier compensation continue to apply notwithstanding the pendency of open rulemaking proceedings at the Commission, and that such rules should be applied by state commissions and courts in resolving outstanding payment disputes.

Respectfully submitted,

NATIONAL EXCHANGE CARRIER
ASSOCIATION, Inc.

August 11, 2009

By:

A handwritten signature in black ink, appearing to read "Richard A. Askoff", is written over a light gray rectangular background.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of NECA's Comments was served this 11th day of August, 2009 by electronic filing and email to the persons listed below.

By: /s/ Elizabeth R. Newson
Elizabeth R. Newson

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