

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	§	
	§	
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

**Public Utility Commission of Texas’ Response to Petition  
of UTEX Communications Corporation for Preemption under 47 U.S.C. § 252(e)**

Pursuant to 47 C.F.R. § 51.803(a)(3), the Public Utility Commission of Texas (“PUCT”) files this response to the petition for preemption filed by UTEX Communications Corporation (“UTEX”) on July 13, 2009.

**I. Introduction**

Contrary to UTEX’s allegations, the PUCT is attempting to carry out its responsibility to arbitrate a new UTEX interconnection agreement, and UTEX has not been deprived of a forum for its arbitration request. UTEX has asked for repeated extensions of the procedural schedule for the arbitration, which had been pending for over three years before UTEX and AT&T Texas specifically identified — in a joint decision point list PUCT arbitration rules require — the issues they needed the PUCT to arbitrate. Shortly thereafter, UTEX told PUCT staff arbitrators that the entire interconnection agreement that it sought involved Voice over Internet Protocol (“VoIP”). Thus, the PUCT abated the UTEX new-agreement arbitration, pending the Commission’s VoIP determinations. The PUCT has not refused to arbitrate an agreement, or failed to act diligently,

but has been unable to complete the UTEX arbitration until the Commission establishes the standards for the regulatory classification and treatment of VoIP, including, particularly, the assessment of access charges.

## **II. Factual background and history of the arbitration**

Most of UTEX's petition for preemption consists of a lengthy description of its ongoing disagreements with AT&T and the tortuous history of its new-agreement arbitration from when UTEX filed its first petition for arbitration in 2002 through 2006. UTEX Preemption Petition at 1-9. But nothing in this discussion suggests the PUCT or its staff arbitrators were the reason this arbitration dragged on for several years and could not be completed by the nine-month Federal Telecommunications Act deadline. Indeed, to the contrary, this description shows that UTEX, along with AT&T, requested repeated extensions of the procedural schedule for completion of the arbitration. A brief chronology of selected events in the arbitration illustrating this is attached as Exhibit A.<sup>1</sup>

Eventually, in 2006, the UTEX arbitration was abated. The parties filed a joint populated decision point list ("DPL") outlining the issues for the arbitrators' consideration in November 2005. Shortly after that DPL was submitted, the arbitrators issued an order requesting that UTEX and AT&T "identify which DPL issues in this docket implicate or involve VoIP . . . ."<sup>2</sup>

---

<sup>1</sup> Documents filed with the PUCT and PUCT orders are publicly available on the "Interchange" section of the agency's website, <http://www.puc.state.tx.us>. Documents may be retrieved by entering a docket number (No. 26381, for the UTEX new-agreement arbitration), then searching by date.

<sup>2</sup> The arbitrators also asked the parties to identify which issues are being addressed in Docket No. 32041, a proceeding UTEX initiated to resolve disputes with AT&T over the meaning of its existing interconnection agreement. Tex. Util. Comm'n, *UTex Communications Corporation's Complaint, Request for Expedited Ruling, Request for Interim Ruling, and Request for Emergency*

Exhibit 1 to UTEX Preemption Petition, Order No. 21 Requiring Identification of Issues. UTEX responded that *all* of the issues involved VoIP. It explained:

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 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.

UTex’s Response to Order No. 21 at 2 (Feb. 27, 2006) (emphasis added). UTEX has reiterated this in its recent filing with the Commission. UTEX Preemption Petition at 7 (“UTEX’s basic position was that all parts [of agreement being arbitrated] related to VoIP because its principal business plan was to support IP-enabled services in general and VoIP in particular.”).

The PUCT staff arbitrators then dismissed the case to allow the Commission to determine the regulatory standards for VoIP traffic on a nationwide basis, noting that the PUCT had, in an earlier arbitration of a successor to Texas’ T2A standard interconnection agreement, declined to consider VoIP-related issues for this same reason. Exhibit 2 to UTEX Preemption Petition, Order No. 22 Dismissing Proceeding.<sup>3</sup>

Upon review of the arbitrators’ dismissal, the PUCT Commissioners opted to abate rather than dismiss the arbitration pending the Commission’s establishment of the VoIP standards.

---

*Action (Injunction) regarding Disputes with Southwestern Bell Telephone, L.P. dba SBC Texas, Docket No. 32041.*

<sup>3</sup> In Docket No. 28821, the PUCT had earlier found “it appropriate to defer consideration of VoIP issues . . . . The FCC’s recent [notice of proposed rulemaking] specifically questions the applicability of access charges, indicating the FCC’s intent to address this issue.” Tex. Util. Comm’n, *Arbitration of Non-Costing issues for Successor Interconnection Agreements to the Tex. 271 Agreement*, Docket 28821 (Apr. 19, 2004) (Order Addressing Threshold Issues and Motion to Dismiss at 7).

Exhibit 4 to UTEX Preemption Petition, Order Abating Proceeding. The PUCT explained that it was “not appropriate to consider the issue of the regulatory classification of Voice Over Internet Protocol (VoIP)—a matter that the [PUCT] has deferred in Docket No. 28821, and a matter that has industry-wide implications—in the context of this arbitration.” Exhibit 4 to UTEX Preemption Petition. Indeed, the Commission has stressed the importance of consistency in the regulatory treatment of VoIP and other IP-enabled services, and stated that it will address these issues.<sup>4</sup> As the Commission has yet to establish the national standards for the regulatory treatment of VoIP, the UTEX arbitration has remained abated.

### **III. The PUCT is not “failing to act” under 47 U.S.C. § 252(e)(5).**

The PUCT has not “failed to act to carry out its responsibility” to arbitrate the new UTEX agreement within the meaning of 47 U.S.C. § 252(e)(5).<sup>5</sup>

---

<sup>4</sup> See, e.g., *In the Matter of Vonage Holdings Corp.*, 19 FCC Rcd 22404 at ¶ 1 (2004) (“this Commission, not state commissions, has the responsibility and obligation to decide whether certain regulations apply to Digital Voice and other IP-enabled services having the same capabilities”), affirmed *Minnesota Public Utilities Comm’n v. FCC*, 483 F.3d 570 (8<sup>th</sup> Cir. 2007); *In the Matter of IP-Enabled Services*, 19 FCC Rcd 4863 (2004) (Notice of Proposed Rulemaking for issues relating to service and applications making use of Internet Protocol, including but not limited to VoIP services).

<sup>5</sup> That provision states:

(5) COMMISSION TO ACT IF STATE WILL NOT ACT.—If a State Commission fails to act 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 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.

47 U.S.C. § 252(e)(5).

**A. *The PUCT is not declining to arbitrate a new UTEX agreement.***

The PUCT has not refused to arbitrate a new UTEX agreement. Before the abatement the PUCT arbitrators diligently attempted to complete the arbitration. The four-year delay in the arbitration from 2002-2006 was the result, at least in large part, of UTEX's own conduct. Its own preemption petition shows this. *See, e.g.*, UTEX Preemption Petition at 4 ("The case slowly moved forward with periods of frenzied activity and a few months of nothing."). Since 2006, the PUCT has been unable to complete the arbitration, given UTEX's representation that the entire contract involves VoIP, as the Commission has stated that it will establish the regulatory standards for VoIP and other IP-enabled services.

**B. *UTEX's own conduct and the Commission's forthcoming IP and VoIP rules have made it impossible for the PUCT to complete the new-agreement arbitration by the statutory deadline.***

The history of the UTEX new-agreement docket also shows that this is not a simple failure to complete an arbitration within the statutory time limits or a lack of diligence by a state commission. Thus, although Commission rules say that a state commission fails to act if it "fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act," 47 CFR § 51.801(b), UTEX's own conduct in the arbitration rendered it impossible for the PUCT to complete the arbitration by the nine-month statutory deadline.<sup>6</sup>

---

<sup>6</sup> UTEX attempted, unsuccessfully, to challenge the PUCT's abatement of the arbitration in federal court under 47 U.S.C. § 252(e)(6), arguing then that because the PUCT had responded to UTEX's arbitration request, it was *not* "failing to act" within the meaning of 47 U.S.C. § 252(e)(5) and the Commission's rules. The federal court dismissed this claim for lack of jurisdiction. *UTex Commc'ns Corp. v. Pub. Util. Comm'n*, 514 F.Supp.2d 963, 970 (W.D. Tex. 2007), *appeal pending*.

UTEX, along with AT&T, sought repeated extensions in the procedural schedule that delayed the arbitrators' ability to consider the issues the parties wanted resolved.<sup>7</sup> The parties themselves sought to "reset" the statutory deadline for completion of the arbitration several times. UTEX Preemption Petition at 4; Exhibit A. The nine-month deadline calculated from the filing of UTEX's first arbitration petition was in April 2003. UTEX filed two amended arbitration petitions, one in February 2003<sup>8</sup> and a second in February 2005.<sup>9</sup> UTEX and AT&T did not even submit a joint populated decision point list — an essential part of the arbitration process required under the PUCT's arbitration rules<sup>10</sup> — until the fall of 2005, more than three years after it filed its original petition. A few months later, after UTEX told the PUCT arbitrators that all of the terms of the new interconnection agreement it sought involve VoIP, the PUCT abated the proceeding.

---

<sup>7</sup> *E.g.*, Tex. Util. Comm'n, *Petition of UTex Communications Corporation for Arbitration Pursuant to Section 225(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1976, and PURA for Rates, Terms, and Conditions of Interconnection Agreement with Southwestern Bell Telephone Company*, Docket 26381 (Apr. 7, 2005) (Joint Stipulation Regarding Negotiation Date and Proposed Procedural Schedule); *id.* (Sept. 7, 2005) (Joint Proposed Procedural Schedule); *id.* (Feb. 8, 2006) (Letter to Judges regarding Scheduling Dispute).

<sup>8</sup> Docket 26381 (Feb. 6, 2003) (Amended Petition for Arbitration).

<sup>9</sup> *Id.*, (Feb. 17, 2005) (UTEX Second Amended Petition).

<sup>10</sup> Under the PUCT's current FTA arbitration rules, which took effect March 1, 2004, the arbitration petition must include a Decision Point List ("DPL"). 16 Tex. Admin. Code § 21.95(a)(5)(C). The parties must file a revised DPL, jointly populated to the extent practicable in light of the status of discovery, ten days after the filing of a response. 16 Tex. Admin. Code § 21.95(o)(1). A jointly populated DPL, in a format approved by the presiding officer, must be filed no later than five working days before the beginning of the hearing. 16 Tex. Admin. Code § 21.95(o)(2).

In the *Local Competition Order*,<sup>11</sup> which adopted 47 CFR § 51.801, the Commission explained that it “will not take an expansive view of what constitutes a state’s ‘failure to act.’” The Commission instead interprets “failure to act” to mean a state’s failure to complete its duties in a timely manner. This would limit Commission action to instances in which a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete an arbitration within the time limits of section 252(b)(4)(c). *Local Competition Order*, ¶ 1285. But in this situation, the PUCT is unable to complete the UTEX arbitration by the statutory deadline because the Commission has not yet established the standards for the regulatory treatment of VoIP that the PUCT must apply in the arbitration. The PUCT is not “failing to act.”

UTEX’s Preemption Petition asserts that the last agreed-to nine-month deadline under § 252(b)(4)(C) was December 24, 2005. UTEX Preemption Petition at 4. In fact, in early 2006 UTEX proposed yet another extension of the statutory deadline, calling for a March 2006 hearing on the merits and an arbitration award by May 31, 2006.<sup>12</sup> Under these circumstances the June 2006 abatement should be deemed to toll the nine-month period, pending the Commission’s VoIP determinations.

---

<sup>11</sup> First Report and Order, FCC 96-325, *In the Matter of Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 15,499, 1996 WL 452885 (rel. Aug. 8, 1996), *corrected*, 11 F.C.C.R. 22,301, 1996 WL 925088 (Aug. 19, 1996); *modified*, FCC 96-394, 11 F.C.C. 13,042, 1996 WL 557116 (Sept. 27, 1996); *aff’d in part, rev’d in part*, *Iowa Util. Bd. v. F.C.C.*, 120 F.3d 753 (8th Cir. 1997); *aff’d in part, rev’d in part*, *AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999) (“Local Competition Order”).

<sup>12</sup> Tex. Pub. Util. Comm’n, Docket No. 26381, UTEX letter to PUCT arbitrators (February 8, 2006).

The Commission may waive or suspend its rules at any time for good cause, subject to the requirements of the Administrative Procedure Act, on its own motion or petition. 47 CFR § 1.3. Should the Commission interpret 47 CFR § 51.801(b) to require the Commission to preempt the PUCT's jurisdiction to arbitrate the case, the circumstances provide good cause to waive that rule.

***C. The PUCT abatement is not delaying the arbitration of a new UTEX agreement.***

Whether or not the Commission decides to preempt the PUCT's jurisdiction, it must first establish the IP and VoIP standards before the arbitration of a new UTEX agreement may be completed. Once those standards have been established, the Commission<sup>13</sup> or the PUCT may then apply them in the arbitration of UTEX's agreement.

**IV. Conclusion**

The PUCT has not declined to arbitrate a new interconnection agreement for UTEX or failed to carry out its responsibility to do so. Because the Commission has stated that it — and not the state commissions — must establish the rules for the regulatory classification and treatment of VoIP, the PUCT was required to abate the arbitration pending their issuance.

---

<sup>13</sup> If the Commission assumes jurisdiction over the UTEX arbitration, it may not be returned to the PUCT after the Commission establishes the national IP and VoIP standards. The Commission has stated that once it assumes jurisdiction over an arbitration under 47 U.S.C. § 252(e)(5), it cannot later remand the proceeding to the state commission. *Local Competition Order* at ¶ 1289 (“We agree with those parties who argue that, once the Commission assumes jurisdiction of a proceeding or matter, it retains authority for that proceeding or matter. . . . Therefore, once the proceeding is before the Commission, any and all further action regarding that proceeding or matter will be before the Commission. We note that there is no provision in the Act for returning jurisdiction to the state commission . . .”)

Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas

C. ANDREW WEBER  
First Assistant Attorney General

DAVID S. MORALES  
Deputy Attorney General for Civil Litigation

BARBARA B. DEANE  
Chief, Environmental Protection and  
Administrative Law Division

DAVID PREISTER  
Chief, Environmental Protection Section

/s/ John R. Hulme  
JOHN R. HULME  
Assistant Attorney General  
State Bar No. 10258400

Environmental Protection and  
Administrative Law Division  
P.O. Box 12548  
Austin, Texas 78711-2548  
Telephone: (512) 475-4229  
Facsimile: (512) 320-0911

ATTORNEYS FOR THE PUBLIC UTILITY  
COMMISSION OF TEXAS

**Certificate of Service**

I certify that a true and correct copy of the foregoing Public Utility Commission of Texas' Response to Petition of UTEX Communications Corporation for Preemption under 47 U.S.C. 252(e) has been sent to the parties below by first class mail on the 27<sup>th</sup> day of July, 2009.

Patricia B. Tomasco  
Richard C. King, Jr.  
MUNSCH HARDT KOPF & HARR, P.C.  
600 Congress Avenue, Suite 2900  
Austin, Texas 78701  
Telephone: (512) 391.6100  
Facsimile: (512) 391.6149

W. Scott McCollough  
General Counsel  
UTEX Communications Corporation  
1250 S Capital of Texas Hwy, Bldg 2-235  
West Lake Hills, Texas 78746

*Attorneys for UTEX Communications Corp.*

Theodore A. Livingston  
Dennis G. Friedman  
Michael T. Sullivan  
Nissa J. Imbrock  
MAYER BROWN LLP  
71 South Wacker Drive  
Chicago, IL 60606  
Telephone: (312) 782.0600  
Facsimile: (312) 701.7711

Mary A. Keeney  
GRAVES, DOUGHERTY, HEARON & MOODY  
A Professional Corporation  
401 Congress Avenue, Suite 2200  
Austin, Texas 78701  
Telephone: (512) 480.5682  
Facsimile: (512) 480.5882

*Attorneys for AT&T Texas*

/s/ John R. Hulme  
JOHN R. HULME

## The History of PUCT Docket No. 26381

As the following chronology of selected events from this arbitration shows, the length of the arbitration proceedings was not attributable to the PUCT staff arbitrators' delay but instead to the parties' agreed schedules for proceeding and the difficulty in defining the issues for the arbitrators' determination.

- July 2002: UTEX files petition for arbitration.
- June 2003: Arbitrators approve UTEX and AT&T's proposed procedural schedule that provided for the filing of a disputed ICA and amended petition and response after the Commission's *Triennial Review Order* became effective (late 2003), with further proceedings on a schedule to be determined.
- August 2004: UTEX and AT&T file another joint agreement regarding scheduling providing for exchange of ICA terms in later 2004, further face-to-face discussions between UTEX and AT&T in late 2004 and early 2005, and filing of a second amended petition and response in February and March 2005. The arbitrators adopted this amended procedural schedule in Order No. 8.
- August 2004: UTEX and AT&T file agreement regarding FTA statutory deadline, stipulating that October 1, 2004 is the date on which AT&T is deemed to have received UTEX's request for interconnection under section 252(a)(1) of the Act and the 9<sup>th</sup> month for the purposes of the FTA statutory deadline is July 1, 2005.
- April 2005: UTEX and AT&T file joint stipulation regarding negotiation dates and proposed procedural schedule, calling for dispositive motions to be filed by August 2005; direct and rebuttal testimony by September 2005; a final decision point list ("DPL") to be filed and hearing on merits in October; and an arbitration award and final ICA in December 2005.
- September 2005: UTEX and AT&T file another joint procedural schedule, pushing the deadlines out again, with final award now in February 2006. The arbitrators adopt this revised schedule in Order No. 15.
- October 2005: After the parties still are unable to meet their own, latest agreed deadlines, the arbitrators issue Order No. 19 abating the proceeding and requiring that a joint DPL including all issues be filed by November 15, 2005. The order notes that "[d]espite the passing of over three years, the parties have yet to identify properly what issues the arbitrators must decide. Even attempts to address what should be uncontroversial matters (such as the format of the DPL) have proven unreasonably difficult." The order further notes that the arbitration is pointless without a proper DPL. The arbitrators give the parties a final opportunity to submit a proper DPL, following the structure of

## Exhibit A

agreement approved in PUCT Docket No. 28821. If a proper DPL not is filed, the arbitrators state they will dismiss the arbitration petition.

- November 2005: Parties file joint DPL
- February 2006: Arbitrators issue Order No. 21, requiring parties to identify issues that implicate or involve VoIP or are also being addressed in Docket No. 32041, the docket addressing the post-interconnection dispute over the existing interconnection agreement.
- February 2006: UTEX proposes another extension to the procedural schedule, with a March 2006 hearing and an arbitration award by May 2006.
- April 2006: Arbitrators dismiss the proceedings, in light of VoIP issues involved and Commission's pending determination of related issues on an industry-wide basis.
- June 2006: Commissioners vacate dismissal and instead abate proceeding pending VoIP determinations by the Commission.