

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

In the Matter of	)	
	)	WC Docket No. 09-134
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	)	DA 09-1643

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION  
REPLY COMMENTS**

The National Telecommunications Cooperative Association (NTCA)<sup>1</sup> responds to the initial comments filed August 11, 2009,<sup>2</sup> regarding the Federal Communications Commission's (Commission's or FCC's) July 28, 2009 Public Notice<sup>3</sup> seeking comment on UTEX Communications Corporation (UTEX)'s July 13, 2009 petition for preemption (Petition) of an arbitration decision by the Public Utility Commission of Texas (PUCT).<sup>4</sup> UTEX asks the Commission to preempt the PUCT's June 22, 2006 decision to abate or suspend the arbitration proceedings between UTEX and Southwestern Bell Telephone Company d/b/a AT&T Texas

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<sup>1</sup> NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents over 585 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

<sup>2</sup> Silence on any positions raised by parties in these proceedings connotes neither NTCA's agreement nor disagreement with their positions or proposals.

<sup>3</sup> *Pleading Cycle Established for Comments 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, DA 09-1643, Public Notice (rel. July 28, 2009) (Public Notice).

<sup>4</sup> *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 (filed Jul. 13, 2009) (Petition).

(AT&T), regarding the regulatory classification of Voice over Internet Protocol (VoIP) for intercarrier compensation purposes.<sup>5</sup> The Commission should deny UTEX's Petition as procedurally inappropriate and should instead address the VoIP classification issues that prompted the UTEX Petition through existing intercarrier compensation dockets. In resolving the VoIP regulatory classification, the Commission should subject all interconnected VoIP providers to the same intercarrier compensation obligations, including the payment of access charges, as any other traffic using the public switched telephone network (PSTN).

## **I. BACKGROUND.**

In July 2002, UTEX filed its petition for arbitration of interconnection issues with Southwestern Bell (later AT&T). After agreeing on a procedural schedule and repeatedly revising that schedule, UTEX and AT&T were ordered by the PUCT arbitrators to identify those issues subject to arbitration that concerned VoIP.<sup>6</sup> On June 22, 2006, the PUCT voided an April 2006 arbitrator's decision that dismissed the arbitration and, instead, the PUCT abated the arbitration proceeding pending resolution by the FCC of the regulatory classification of VoIP traffic for intercarrier compensation purposes.<sup>7</sup> The PUCT decision was litigated in federal court, and the federal district court judge dismissed UTEX's claims.<sup>8</sup> The federal court's order became final on March 18, 2009.<sup>9</sup> UTEX filed the instant Petition on July 13, 2009, and the Commission sought comment by Public Notice released July 28, 2009. Comments were filed August 11, 2009.

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<sup>5</sup> PUCT Comment, pp. 1-2.

<sup>6</sup> PUCT Comment, Exhibit A (history of PUCT Docket No. 26381).

<sup>7</sup> *Id.* at 2.

<sup>8</sup> Petition at 8.

<sup>9</sup> *Ibid.*

Preemption of a state arbitration proceeding is warranted when a state commission “fails to act to carry out its responsibility” under Section 252 of the Telecommunications Act.<sup>10</sup> Section 51.801(b) of the Commission’s regulations further defines that responsibility as completing “an arbitration within the time limits established in section 252(b)(4)(C) of the Act.”<sup>11</sup>

**II. THE COMMISSION SHOULD DENY THE UTEX PETITION AND SHOULD RESOLVE THE UNDERLYING INTERCARRIER COMPENSATION ISSUES.**

UTEX has inappropriately attempted to use the preemption provisions of Section 252 of the Telecommunications Act to achieve a piecemeal resolution of one of the telecommunications industry’s most vexing problems – achieving a rational solution to intercarrier compensation disputes involving VoIP traffic. Rather, the Commission should deny the Petition and concentrate its efforts to resolve the underlying issue of classifying VoIP for regulatory treatment of intercarrier compensation. The Commission already has appropriate vehicles, such as the *IP Enabled Services* proceeding, WC Docket No. 04-36, to address VoIP compensation classification.

While the UTEX-AT&T arbitration has been pending quite a while, the PUCT has amply demonstrated that the PUCT responded to UTEX’s arbitration petition and has proceeded with arbitration as far as possible, given the intervening federal court litigation and the FCC’s delay in determining the appropriate regulatory treatment for VoIP services for intercarrier compensation purposes.<sup>12</sup> The delay was also caused in large part by UTEX itself in requesting numerous

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<sup>10</sup> 47 U.S.C. § 252(e)(5).

<sup>11</sup> 47 C.F.R. § 51.801(b).

<sup>12</sup> PUCT Comment, Exhibit A.

continuances.<sup>13</sup> Rather than officially terminate the arbitration proceeding, the PUCT chose to abate (or suspend) the proceedings in June 2006 and await resolution of the Commission's VoIP classification dockets.<sup>14</sup> This was an enlightened approach given the unsettled regulatory issues for VoIP traffic.

NTCA joins the National Exchange Carrier Association (NECA), the PUCT, the United States Telecom Association (USTelecom) and AT&T in urging the Commission to deny the Petition.<sup>15</sup> The VoIP regulatory classifications underlying the Petition are similar if not identical to the issues presented and under current debate in the Commission's *IP Enabled Services* docket, WC 04-36. This proceeding provides a broader, more complete record to resolve the VoIP traffic classification than a specific arbitration. NECA correctly contends that "the Commission needs to address issues relating to application of access charges and other forms of intercarrier compensation to IP-enabled traffic" but not through an arbitration preemption petition.<sup>16</sup> The PUCT's actions clearly demonstrate the need for the Commission to set IP and VoIP regulatory classifications for intercarrier compensation, and the PUCT agrees that the Commission should act on its own dockets before attempting to resolve the Texas matter.<sup>17</sup>

USTelecom also insightfully observes that "disputes [such as UTEX] could be vastly reduced if the Commission would complete broad reform of the inter-carrier compensation regime."<sup>18</sup> USTelecom agrees with NTCA that the proper venue to resolve the UTEX issues is

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Id.* at 7.

<sup>15</sup> AT&T Comment, p. 2; NECA Comment, p. 5; PUCT Comment, p. 8; USTelecom Comment, p. 4.

<sup>16</sup> NECA Comment, p. 4.

<sup>17</sup> PUCT Comment, p. 8.

<sup>18</sup> USTelecom Comment, p. 1.

not the preemption Petition.<sup>19</sup> AT&T, whose intercarrier compensation obligations are at the center of the UTEX Petition, likewise acknowledges that the Commission must provide guidance to the telecommunications industry on compensation for VoIP traffic.<sup>20</sup> NTCA and commenters urge the Commission to focus on the larger issues, rather than engage in piecemeal regulation. The Commission should deny the Petition and renew its engagement with the overarching issue of intercarrier compensation for VoIP traffic.

### **III. INTERCONNECTED VOIP PROVIDERS AND ALL WHO USE THE PSTN SHOULD BE SUBJECT TO THE SAME INTERCARRIER COMPENSATION RULES.**

NTCA has expressed its views in the *IP-Enabled Services* docket that interconnected VoIP is a direct substitute for traditional voice telephone service.<sup>21</sup> As such, these providers should be subject to the same intercarrier compensation obligations, including the payment of access charges, as any other traffic using the PSTN. Many commenters in the *IP-Enabled Services* docket supported this common-sense conclusion.<sup>22</sup> VoIP service providers heavily market their services as direct replacements for traditional telephone services. Customers cannot tell the difference between the two. No commenter in the recent round of comments in the *IP-Enabled Services* docket attempted to identify service characteristics that purport to make IP/PSTN services distinct from traditional telephony. There is no way to rationally distinguish

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<sup>19</sup> *Id.* at 3.

<sup>20</sup> AT&T Comment, p. 2.

<sup>21</sup> *IP-Enabled Services*, WC 04-36, NTCA Reply Comments (filed Dec. 22, 2008), pp. 16-17.

<sup>22</sup> See e.g., WC Docket No. 04-36, November 26, 2008 comments filed by NECA; OPASTCO; Iowa Telecommunications Association; Missouri Small Telco Group; Rural ETCs of Arkansas; Toledo Telephone Company; Public Service Telephone Company Inc., South Slope Cooperative Telephone Co., Inc., Townes Telecommunications, Inc., and Venture Telecommunications Cooperative; Texas Statewide Telephone Cooperative, Inc; Embarq; CenturyTel; Nebraska Rural Independent Companies; NASUCA; Massachusetts Department of Telecommunications and Cable; NARUC; Ohio PUC; and Washington Independent Telecommunications Association and Oregon Telecommunications Association Joint Comments (WITA and OTA).

the two. Interconnected interexchange VoIP calls use the network in exactly the same way as traditional long-distance telephone calls and should be subject to the same access obligations. When considering the regulatory classification of VoIP traffic, the Commission should find that VoIP providers should be subject to the same intercarrier compensation obligations as all other voice traffic.

#### **IV. CONCLUSION.**

For these reasons, the Commission should deny the Petition and renew its efforts to resolve the appropriate regulatory classification of VoIP traffic for intercarrier compensation purposes. In resolving the VoIP classification, interconnected VoIP providers should be subject to the same intercarrier compensation rules as those who use the PSTN.

Respectfully submitted,

**NATIONAL TELECOMMUNICATIONS  
COOPERATIVE ASSOCIATION**

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August 18, 2009

## CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Reply Comments of the National Telecommunications Cooperative Association in WC Docket No. 09-134, DA 09-1643, was served on this 18<sup>th</sup> day of August 2009 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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