

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

**UTEX Communications Corporation, Petition for Preemption** )  
 )  
 ) **WC Docket No. 09-134**

**In the Matter of FeatureGroup IP Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1) and Rule 69.5(b)** )  
 )  
 ) **WC Docket No. 07-256**

**UTEX COMMUNICATIONS CORPORATION WRITTEN *EX PARTE* REGARDING  
PETITION FOR PREEMPTION AND PETITION FOR FORBEARANCE**

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September 23, 2009

## **EXECUTIVE SUMMARY**

UTEX Communications Corporation (“UTEX”)<sup>1</sup> implemented a business plan that did what the Commission said it wanted carriers to do in the 2001 *ISP Remand Order*.<sup>2</sup> The Commission admonished carriers to stop relying on intercarrier compensation revenues and, instead, get their money from their customers. While the rest of the industry ignored that instruction and continued their addiction to intercarrier revenues, UTEX obtained an ICA that provided for an unqualified and complete mutual waiver of transport and termination recovery for all § 251(b)(5) traffic, including traffic to or from enhanced/information service providers. UTEX eschewed any attempt to bill other carriers and tried to build a business based solely on the revenues it could get from enhanced service customers that chose to buy UTEX’s services.

## **STATE VS. FEDERAL JURISDICTION – TEXAS PUC AND AT&T ARE NOW FILLING THE VACUUM**

On June 22, 2006, citing the need for guidance from the Commission related to intercarrier compensation for VoIP,<sup>3</sup> the Texas PUC “abated” an ongoing arbitration proceeding designed to secure a replacement agreement for the long-expired current “evergreen” ICA. The Texas PUC then began to follow AT&T Texas’ lead and completely mangled the current agreement to the point of inoperability. Under the Texas PUC/AT&T Texas regime, UTEX cannot obtain a DS3 Loop or DSL-capable Loop UNEs because AT&T Texas refuses to provide

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<sup>1</sup> UTEX is the Texas CLEC operation for the group of “FeatureGroup IP” companies that sought forbearance in Docket 07-256.

<sup>2</sup> Order on Remand and Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, WC Docket 01-92, FCC 01-131, 16 FCC Rcd 9151 (2001) (“ISP Remand Order”), remanded, *WorldCom v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002). See especially ¶¶ 66, 68, 69, 71, 80, 84, 85, 94, 95, 110.

<sup>3</sup> Petitioner will refer to “VoIP” in this written *ex parte*. This is the predominate terminology employed in the Texas PUC case, the petition for preemption in WC Docket 09-134 and many of the Commission’s decisions. We note that the petition for forbearance in WC Docket 07-256 addressed “voice-enabled Internet-based services and applications” and distinguished between certain kinds of “VoIP.” The term employed herein is for convenience only and is not intended to and does not change the precise scope of the request for forbearance in WC Docket 09-136.

them. The Texas PUC's tentative decision in a still-pending dispute case<sup>4</sup> interprets the current ICA to mean UTEX pays access charges to AT&T Texas for all LEC-LEC traffic AT&T Texas terminates, but AT&T Texas does not pay UTEX anything for LEC-LEC traffic UTEX terminates.

The tentative decision interprets the agreement to mean that UTEX cannot use the numbering resources it has been assigned to provide service to customers, and must rely on its customers to signal originating calling number to UTEX, which must passively pass it on without any change. This also means that UTEX cannot provide service to IP-based providers that communicate call set-up information in ways other than SS7. If taken literally, the Texas PUC's interpretation of the ICA means that UTEX cannot even provide basic analog telephone exchange service, even though that was the very purpose of the 1996 amendments to the Act.

For 7 years, AT&T Texas and the Texas PUC played rope-a-dope, hoping UTEX would just give up and go away. It has not. Nonetheless, AT&T Texas and a majority of the Texas PUC have finally decided to deliver the *coup de grace* and just put UTEX out of business.

## **FEATUREGROUP IP FORBEARANCE REQUEST RECONSIDERATION**

The FeatureGroup IP petitioners' predicted in WC Docket 07-256 that unless forbearance was granted the ILECs' position would prevail by default or because of state-level decisions, and AT&T Texas would ultimately disconnect interconnection with UTEX as part of the parties' access charge dispute. The predictions are about to come true. The Commission's inaction is

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<sup>4</sup> As UTEX previously reported, one month ago, two of the three Texas PUC Commissioners tentatively indicated they would reverse an Award issued by a Texas PUC Arbitrator on three seminal issues. The then-majority agreed that – just like the contract says – the parties had agreed to a complete mutual waiver for ESP traffic. But after receiving comments from the parties and Embarq, one PUC Commissioner “switched” his vote on the access charge and CPN issues. As it stands today, the Texas PUC is issuing a plurality decision that finds UTEX's customers are ESPs but nonetheless imposes access charges based on various theories described below.

about to let AT&T Texas and two Texas PUC Commissioners<sup>5</sup> destroy a small leading-edge high-technology company that did what the FCC said in 2001 and as a result has suffered through more than 7 years of ruinous litigation and uncertainty while the Commission contemplated various potential intercarrier compensation rules.

Unless the Commission vigilantly enforces the rules, AT&T Texas will never allow a competitor to interconnect and then compete unless it pays AT&T Texas a tithe. While AT&T Texas of course enjoyed not paying transport and termination charges to UTEX, it still insists on being paid – at the highest possible rate – when the traffic goes the other way. Now, the Texas PUC is on the verge of affirming a tentative decision that even when an the ICA says in clear and unambiguous terms that “No compensation is due or payable to either Party for traffic that is destined for or received from an Enhanced Service Provider,” then the ILEC can still bill access charges to a CLEC for VoIP communications the CLEC hands off to the ILEC for termination to the desired recipient of the call session if (1) the CLEC does not signal “valid CPN” to the ILEC or (2) there is “valid CPN” but the telephone number in the CPN parameter is not “local” to the called number. The Texas PUC is about to hold that the ILEC can bill intrastate access charges for “invalid CPN” calls – regardless of whether the communication is jurisdictionally interstate and subject to § 201. The Texas PUC is ready to rule that “telephone numbers” are appropriate proxies for geographic location and a proper intercarrier compensation rating tool for VoIP even though this Commission has repeatedly recognized that a telephone number is not a reliable indicator of location or jurisdiction when it comes to VoIP.

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<sup>5</sup> Although they differ regarding the regulatory status of UTEX’s customers, two Texas Commissioners are effectively for the ILEC-preferred result. One Texas Commissioner is for the Internet and has correctly decided to read the contract and apply the law.

## COMMISSION MUST TAKE ACTION NOW

By doing nothing, the Commission effectively cedes its exclusive jurisdiction to regulate these issues to ILECs and state regulators. Doing nothing will result in (i) the practical and retroactive grant of Embarq's withdrawn petition for forbearance in WC Docket 08-8; (ii) the practical and retroactive grant of NECA's request for interim relief on signaling in CC Docket 01-92; and, (iii) the retroactive grant of AT&T Texas' request in WC Docket 08-152. Texas' ruling will become the nationwide default and the Commission will become a mere passenger on the ship it is chartered to captain until it finally gets around to promulgating new, prospective rules in the long running and never-ending intercarrier compensation rulemaking (CC Docket 01-92).

## TEXAS PUC ADOPTS NEW ANTI-COMPETITIVE TELCO-SPONSORED "INDUSTRY STANDARDS" FOR VOIP

To be clear, the Commission must recognize the new plurality "Texas Rules" that may take effect absent some action:

- **ILECs Never Pay But Always Get Paid Access.** ILECs never pay CLECs *anything* for calls from ILEC legacy customers to VoIP users supported by CLEC networks, but CLECs *always* pay ILEC *access charges* and quite often *intrastate access charges* for calls from VoIP users supported by CLEC to ILEC legacy customers. The statutorily required "mutual," "reciprocal" and "cost-based" intercarrier compensation for "telecommunications exchanged with LECs" is gone.
- **Texas PUC Reverses FCC Decisions.** The Commission's recent decision that LEC-LEC traffic that contains or supports Internet communications is subject to § 251(b)(5) has no effect and is overruled.
- **ILEC Tariffs Trump ICAs and CLEC Tariffs.** ILEC state and federal tariffs trump interconnection agreements with CLECs, while CLEC tariffs are void.
- **ILECs Unilaterally Determine Billing Rules For VoIP.** Now that VoIP is subject to access, an ILEC can unilaterally decide to treat CLECs that provide the physical connection to an ESP customer as the access customer (rather than sending the access bill to the actual VoIP provider) and wholly ignore the terms

for LEC jointly provided access in the interconnection agreement and the MECAB provisions in both LECs' tariffs. In other words, the "Texas Rule" reinstates "Single Company Billing" which the Commission held was unlawful in 1984 and compounds it by allowing the ILEC to force the CLEC to be the sole access billing entity, "settle" with the ILEC and be individually responsible for the ILEC's share. Under the Texas Rules, Single Company Billing applies only to VoIP traffic whereas MECAB "meet-point"/multiple billing will continue to apply to traditional telephone toll. And, in the height of illogic, this separate treatment is imposed in the name of treating VoIP like traditional telephone toll for intercarrier compensation purposes.

- **Technology Standards Solely Determined By ILECs.** ILEC cartels can unilaterally establish mandatory "industry standards" for signaling and rating that retroactively amend interconnection agreement terms and LEC tariff terms that were effective long before the alleged "standard" was even conceived. These "standards" are of course strategically designed to discriminate against innovative, new, open technology and require it to be subservient to and subsidize the ILECs' closed legacy networks.
- **Say Goodbye to Internet Signaling.** CLECs and their ESP partners cannot devise innovative and new ways to signal that a call is VoIP and communicate a call-back number. URIs – even those that contain a geographic telephone number in the string, like the "tel" URI that is an accepted Internet routing address – are "invalid" for signaling purposes and intrastate access charges apply.
- **ILECs are the New Numbering Authority.** ILECs can refuse to perform switch translations and code-opening in their networks for numbering resources allocated to CLECs, and thereby ensure that ILEC users cannot call users supported by CLEC users unless the CLEC subscribes to the ILEC's access tariff and pays ruinous "code opening" charges.
- **800 NPAs Now "Invalid" when Signaled** All call sessions where CLECs signal nongeographic numbers – which are universally understood to be "jurisdictionally indeterminate" for access charge purposes – are billed 100% intrastate; any PIU provisions in the interconnection agreement and the ILEC's access tariffs related to indeterminate traffic have no effect.
- **CLECs Cannot Provide Basic Analog Service.** Under the Texas Rules, CLECs can no longer provide traditional analog telephone exchange service, since the user's equipment does not signal CPN to the CLEC and the CLEC's switch is not allowed to populate the CPN parameter with anything other than the "nothing" it gets from the user.
- **ILEC Numbering Authority Can Prohibit New Technology.** Under the Texas Rules, CLECs cannot use numbering resources they have been assigned by NANPA under the Commission's rules and then allocate them to VoIP providers,

despite the Commission's multiple cases approving CLECs as "numbering partners" for interconnected VoIP and arranging for number portability. Instead, the CLEC must signal whatever "CPN" it gets from the VoIP provider and if the VoIP provider does not have a number to signal (since it cannot secure them from CLECs and ILECs refuse to serve them on any basis other than switched access – which usually does not come with a number) then the CLEC pays intrastate access.

- **New Rules Can Have Retroactive Effect to Eliminate Competition.** ILECs can unilaterally decide whether and how much to bill CLECs for access charges for calls on the basis of "invalid CPN" or access charges on VoIP; when the dispute goes to arbitration, the state commission gets to devise *post hoc* rules – like the Texas Rules here – and impose them retroactively. Then the ILEC is allowed to disconnect the CLEC for nonpayment.

The Texas Rules – *which will operate both prospectively and retroactively* – are wholly inconsistent with the Act and the Commission's rules. Since this Commission has not taken control, the ILECs and ILEC-friendly state commissions like Texas are about to step in and determine the result. The Texas Rules exhibit a complete disregard for the provisions in the Act, the Commission's rules, the Commission's past decisions, tariffs, and the actual words of interconnection agreements.

## CONCLUSION

The Commission's abdication of authority to the ILECs and ILEC-Friendly state commissions allows them to hobble the competitive threat to ILEC dominance posed by the Internet. The Texas Rules are purposefully crafted to tax and deter inter-model competition by innovative IP entrepreneurs, and force new networks and technologies to subsidize legacy networks. These rules are the polar opposite of any policy that would favor IP-based, efficient networks and innovation.

The FCC must preempt the Texas Commission in WC Docket 09-134 and it must grant rehearing and then approve the forbearance request in WC Docket 07-256.

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Texas PUC Docket 33323 is a post-ICA dispute between UTEX and AT&T Texas.<sup>9</sup> An Arbitrator for the Texas PUC rendered an Award on June 1, 2009.<sup>10</sup> The post-ICA dispute contained 100 discrete issues on a broad range of topics, and the Arbitrator ruled in favor of AT&T Texas and against UTEX on every single issue. UTEX requested the full Texas PUC to review the Award, as is allowed under the Texas PUC's post-ICA dispute resolution rules. The Texas Commissioners have taken the matter up in two open meetings.

As reported previously, on August 13, 2009 by a 2-1 vote a majority of the Texas PUC initially indicated it would overturn the Arbitrator's Award on three issues: (1) whether UTEX's customers were Enhanced Service Providers; (2) whether access charges applied to traffic from UTEX's ESP customers to users on the rest of the PSTN; and (3) whether under the ICA AT&T Texas could assess "intraLATA toll" charges on calls that did not meet AT&T Texas' "validity test" for "CPN."<sup>11</sup> The balance of the non-major issues were left to a subsequent meeting.

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Order Requiring Status Reports, *Feature Group IP West LLC, et al. v. Federal Communications Commission and United States of America*, No. 09-1070 (D.C. Cir, September 9, 2009).

<sup>9</sup> Texas PUC Docket 33323 was a significant topic of discussion in the comments in both the forbearance and preemption comments. Indeed, the dispute between UTEX and AT&T Texas over access charges was a primary driver for the initiation of both Docket 07-256 and Docket 09-134.

<sup>10</sup>The Award is fairly long so it will not be attached. It is publicly available by going to publicly available at <http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/login/pgLogin.asp>. Perform an anonymous login and enter "33323" in the field for "Project." The case docket sheet, with links to all filings, will appear. The Award is Item 342.

<sup>11</sup>The Arbitrator adopted – in the guise of contract interpretation – AT&T Texas' unilaterally-developed *post hoc* "validity" test even though "valid" is not even used in the ICA. According to AT&T Texas and the Arbitrator "Valid CPN is a North American Numbering Plan (NANP) 10-digit number that matches the LERG. Valid or adequate CPN is the actual number of the calling party recognized in the LERG. CPN cannot be validly created by populating the data field with: (1) nothing; (2) all of the same digits, such as ten zeroes; (3) an 8YY number; (4) fewer than ten digits; or (5) a number with an NPA-NXX not recognized by the NANP and not contained in the LERG." Further, the Arbitrator held that "CPN" in the ICA was consistent with and incorporated the FCC's definition of "Calling Party Number" in rule 64.1600(c): "Finally, the ICA's use of CPN, as well as the ordinary meaning of CPN, agrees with the FCC's definition of CPN. 47 C.F.R. § 64.1600(c) states: 'The term Calling Party Number refers to the subscriber line number or the directory number contained in the calling party number parameter of the call set-up message associated with an interstate call on a Signaling System 7 network.'" The significance of the feigned incorporation of the FCC's definition will be addressed further below.

After the Reply Comments were submitted in WC Docket 09-134, several ILEC entities including Embarq filed comments with the Texas PUC. The Texas PUC then took the matter up again on August 26, 2009. Two of the three Commissioners have still signaled the intent to overrule the Award in one regard and hold that UTEX's customers are indeed ESPs. One Commissioner, however, changed his vote on the "access charge" and "CPN" issues, largely in synch with Embarq's suggested result.<sup>12</sup> A majority has decided to impose access charges on VoIP based on several theories. One Texas Commissioner held to her initial decision and interpreted the mutual waiver provision in the contract to mean there was a mutual waiver: *i.e.*, "no compensation" means just that. As of the date of this written *ex parte*, the Texas PUC has not issued a written order that disposes the issues at the administrative level. This may or may not occur at the Texas PUC meeting presently scheduled for September 24, 2009.

Although a majority of the Texas PUC appears to recognize UTEX's customers and their services as ESPs, this determination does not carry through to other intercarrier compensation issues. The Texas PUC acknowledges an ESP when it sees one, but then refuses to apply and implement the consequence of this classification: ESPs are access-exempt and the contract has an express provision saying no compensation is due for traffic to or from ESPs.

**A. Texas PUC must interpret the current ICA consistently with the Act and Commission rules and where provisions are vague they must apply the intent of the framers. That is not what they are doing.**

Petitioner's discussion of the Texas PUC post-ICA dispute deliberations should not be taken as an attempt to "appeal" that case to the Commission. If necessary, UTEX will take a §

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<sup>12</sup>Embarq's filing apparently convinced one Texas Commissioner to change his vote on the CPN issue to hold that UTEX must pass "valid CPN" or pay intrastate access charges, and to do so based on the notion that he is merely interpreting the contract. UTEX will address this fallacy below. The result, however, is the imposition of an anti-competitive ILEC-contrived closed-network "industry standard" on open Internet standards that were designed precisely for the purpose of interworking with the PSTN. The result also destroys an innovative technology company, and ends the natural competitive promise of Uniform Resource Identifier based addressing and signaling for voice, by requiring IP "Voice" to mimic Legacy Voice when the two intersect.

252(e)(6) appeal to the federal courts. Any suggestion that the Texas PUC is merely “interpreting” and “enforcing” the current agreement in isolation from any other intercarrier compensation issue is fallacious.

With the exception of one provision further discussed below, the current ICA is fully arbitrated (*i.e.*, not negotiated under § 252(a)(1)). This means that – as with the § 252(c) and (e) “determinations” state commissions make in an arbitration for an new or replacement agreement – the Texas PUC must ensure that the result is consistent with the Act and this Commission’s rules. The Fifth Circuit – like most of the other circuits – held that when a state commission is conducting a “post ICA dispute” resolution and interpreting or enforcing an interconnection agreement, its post ICA determinations must “meet the requirements” of § 251 and 252 and this Commission’s rules.<sup>13</sup> In a later case, the Fifth Circuit held that ICAs are otherwise interpreted like traditional contracts.<sup>14</sup> If ICA terms are unambiguous, then the interpretation to be supplied by the state commission must be done as a matter of law. Unambiguous provisions must be enforced as written, with the intent of the parties being derived from the agreement itself. To determine whether there is ambiguity, the state commission must consider the contract as a whole and the circumstances present when the parties entered the contract. Similarly, if there is any ambiguity, the focus is the parties’ intent at the time of contract formation. Under no circumstances may a state commission consider decisions, policy statements or even developments that came after contract formation. Only the circumstances and the intent of the parties at the time of formation may be taken into account. The state commission cannot supply new terms and it cannot order a change to the terms, either expressly based on a perceived change in policy or practice that occurred after contract formation or implicitly in the guise of

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<sup>13</sup> *Southwestern Bell Tel. Co. v. Public Util. Comm’n*, 208 F.3d 475, 477, 480-482 (5<sup>th</sup> Cir. 2000).

<sup>14</sup> *Southwestern Bell Tel., L.P., v. Public Utility Commission of Texas*, 467 F.3d 418 (5<sup>th</sup> Cir. 2006).

“interpreting.” In derogation of the precepts, the Texas PUC’s tentative decision supplies and adds new terms based on a misguided attempt to implement “today” policies and stamp a *post-hoc* regulatory seal of approval on ILEC-crafted “standards” that were not conceived until long after this ICA went into effect.

**B. Texas PUC imposing access on § 251(b)(5) “telecommunications exchanged with LECs.”**

The Texas PUC tentative ruling interprets the Act and the current ICA allow AT&T Texas to impose access charges on UTEX for § 251(b)(5)<sup>15</sup> traffic that is not between two telephone numbers associated with the same mandatory or extended local calling area.<sup>16</sup> The Texas PUC adopted AT&T Texas’ position notwithstanding the Commission’s recent holding that § 251(b)(5) is not limited to “local” traffic because “the better reading of the Act as a whole, in particular the broad language of section 251(b)(5) and the grandfather clause in section 251(g), supports our view that the transport and termination of *all telecommunications exchanged with LECs* is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).”<sup>17</sup> There was no pre-Act obligation relating to intercarrier compensation for “*ESP*

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<sup>15</sup>The Arbitrator and AT&T Texas – and as far as UTEX can determine – now the Texas PUC have all agreed that UTEX was fulfilling only an LEC role in its interconnection relationship with AT&T Texas, and that UTEX was not and is not providing any IXC or “telephone toll” functions that would cause it to be an “exchange access” customer of AT&T Texas. Therefore, the only possible conclusion that can be drawn at this time is that the Texas PUC believes an ILEC can assess access charges on a CLEC for LEC-LEC traffic that is subject to § 251(b)(5) and not “carved out” by § 251(g), if the traffic is deemed to not be “local.”

<sup>16</sup>The current ICA was an arbitrated agreement that AT&T Texas appealed all the way to the Fifth Circuit in two different cases and lost. Hence, the Texas PUC must be interpreting the ICA terms to be consistent with the Act and the Commission’s rules. Therefore the Texas PUC is necessarily saying the Act allows one LEC to assess access charges on another LEC for the “transport and termination” of “telecommunications” notwithstanding §§ 251(b)(5) and 252(d)(2).

<sup>17</sup>Order on Remand and Report and Order and Further Notice Of Proposed Rulemaking, *In the Matter of High-Cost Universal Service Support Federal-State Joint Board on Universal Service Lifeline and Link Up, Universal Service Contribution Methodology, Numbering Resource Optimization, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, IP-Enabled Services*, WC Docket Nos. 03-109, 04-36, 05-337, 06-122, CC Docket Nos. 96-45, 96-98, 99-68, 99-200, 01-92, FCC 08-262, ¶¶ 9-16, 24 FCC Rcd 6475, 6480-6483 (rel. Nov. 2008) (*Core Mandamus Order*) (emphasis added).

*egress*”<sup>18</sup> traffic because “there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic”<sup>19</sup> (ESP ingress traffic). The § 251(g) carve out therefore cannot apply. Nonetheless, the Texas PUC concluded that one LEC can impose access charges – rather than § 252(d)(2) “additional cost” based charges – on another LEC for § 251(b)(5) traffic merely because the calling and called numbers are associated with different traditional local calling areas.

Most of the current arbitrated terms were put in place in 1998, after the *Local Competition Order*<sup>20</sup> but before the *ISP Declaratory Ruling*<sup>21</sup> and the *ISP Remand Order*<sup>22</sup> in 2001. Therefore the Commission had not yet changed the *Local Competition Order* holding that only “local” traffic was subject to § 251(b)(5): that did not occur until the *ISP Remand Order*. As a consequence the reciprocal compensation terms in part did use the “local” paradigm.

But the ICA intercarrier compensation language was created when the nationwide furor over “ISP-bound” traffic gaining steam. The very first part of the arbitration focused on that very topic. The CLEC in that case was Waller Creek Communications. The Waller Creek

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<sup>18</sup> Again, the Texas PUC majority has indicated it believes that UTEX’s customers are ESPs, but they somehow still think the terminating LEC (here AT&T Texas) can still lawfully impose access charges on the LEC that serves the ESP and hands a call off to the terminating LEC.

<sup>19</sup> *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002). *See also op. cit.* ¶ 16, 24 FCC Rcd at 6483.

<sup>20</sup> Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499 (1996), *aff’d in part and vacated in part sub nom Competitive Telecomm. Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997), *further aff’d in part and vacated in part sub nom Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part and rev’d in part sub nom AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>21</sup> Declaratory Ruling, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket 96-98, FCC 99-38, 14 FCC Rcd 3689 (rel. Feb. 1999) (“*ISP Declaratory Ruling*”) *vacated and remanded, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) (Bell Atlantic).

<sup>22</sup> Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, WC Docket 01-92, FCC 01-131, 16 FCC Rcd 9151 (2001) (“*ISP Remand Order*”), *remanded, WorldCom v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002).

principals are now the core group for UTEX<sup>23</sup>; they handled the Waller Creek arbitration so they were there and they know what happened and how it all turned out.<sup>24</sup>

The terms relating to intercarrier compensation are unique to that time period in two important ways. First, they expressly mention traffic “to or from enhanced service providers.” The inclusion of traffic going in both directions and the broad reference to “enhanced service providers” rather than the more narrow “Internet Service Providers” is not found in any other agreement. Second, and as UTEX demonstrated with copious records from the original case, the Waller Creek principals anticipated much of what would follow in the reciprocal compensation wars and saw to it by the wording and placement of the terms that ESP traffic did not have to be “local” in order to be treated as “local.” Waller Creek proposed the relevant language, and the Texas PUC approved it over Southwestern Bell Telephone Company’s objection that the words used *would allow “access avoidance” because it was not limited to “local” ESP traffic.*

The intent of the framers, adopted by the Texas PUC, was to treat ESP traffic *as if* it is local, even if the actual end-points – however measured or determined, whether actual physical end points or telephone number proxies, whether you look at the ESP as an end point, the Internet as an end point or some other notion of end point – do not matter. As a consequence the initial limitation to “local” traffic has no application to ESP traffic. The litigation history demonstrating all of this was presented to the current Texas PUC in Docket 33323. The majority has chosen to wholly ignore it because they want to impose their own fresh view of what the result “should” be. That is not contract interpretation; it is contract amendment.

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<sup>23</sup>After UTEX was formed it adopted the Waller Creek ICA under § 252(i).

<sup>24</sup>Interestingly, the one Texas PUC Commissioner that believes the “no compensation” provision means what it says was a Texas PUC staff member when most of the Waller Creek arbitration terms were devised. She, however, has been out voted by two Commissioners who were not around at the time.

A subsequent voluntary amendment made it even clearer that the parties truly intended to achieve a full “waiver of mutual recovery” for ESP traffic. This amendment, which appears in Attachment 12: Compensation, § 1.4.1, states that “[n]o compensation is due or payable to either Party for traffic that is destined for or received from an Enhanced Service Provider (“ESP”) as defined in section 53.7 of the general terms and conditions of this Agreement.” The Texas PUC decided to supplement this provision with a “local” condition as well, and then use that reading to transmute “**no compensation**” into “*access compensation*.” This cannot realistically be called interpretation; it is a substantive change that turns the language on its head. This is how far AT&T Texas and the Texas PUC are willing to go in the guise of “interpreting” the ICA to reach the desired end result.

The Commission’s interpretation of § 251(b)(5) has evolved through several stages since the 1996 *Local Competition Order*. The prior focus on “local” was eliminated in the *ISP Remand Order* and this was reaffirmed in the *Core Mandamus Order*. The law today at the Federal level is that “all telecommunications exchanged with LECs” is subject to § 251(b)(5) and ESP traffic is subject to § 201 as well. The ILEC is required to offer to transport and terminate all § 251(b)(5) traffic at \$0.0007 per minute of use, but the parties or the state can instead use “bill and keep” (or more precisely a “waiver of mutual recovery” under § 252(d)(2)(B)(1)) as UTEX and AT&T Texas did here. Under the UTEX ICA, the concept and language in the original terms that ESP traffic is “local treated” does not conflict with the amendatory language, which does not mention “local” at all: the ICA can easily be read to be consistent with current law. Applying the Commission’s rules to the UTEX ICA, all ESP-related traffic between UTEX and AT&T Texas is “reciprocal compensation” (§ 251(b)(5)) traffic and is exchanged without charge because there has been a “waiver of mutual recovery” under § 252(d)(2)(B)(i).

Notwithstanding the Commission’s rulings, the Texas PUC – urged on by AT&T Texas and Embarq – has chosen to interpret the UTEX ICA to not mean that all traffic to or from ESPs is subject to the § 252(d)(2)(B)(1) mutual waiver of cost recovery to which they are otherwise entitled under § 251(b)(5). The Texas PUC appears to be holding that notwithstanding what was intended when the words were written the Texas Rule will now be that “local” is an implied term to every sentence in the contract and before a call to or from an ESP can be “local” the calling and called numbers must be associated with the same mandatory or extended local calling area as defined by the ILECs’ tariffs. The AT&T Texas/Texas PUC interpretation squarely conflicts with the *Core Mandamus Order* and current law.

It was never the law and it is not the law today that one LEC or a state commission can lawfully require another LEC to pay access charges prices for transport and termination of traffic that falls into § 251(b)(5) and is not carved out by § 251(g). Any state commission decision imposing access on § 251(b)(5) traffic is flatly inconsistent with the Act and the Commission’s rules. This is particularly so when the traffic is also subject to § 201 because it is associated with an enhanced/information service.

**C. Texas PUC wrongly using telephone numbers to decide if VoIP traffic is “local.”**

Aside from the problem arising from the Texas PUC’s fixation on “local” the tentative plurality decision presents other glaring inconsistencies. The Texas PUC uses telephone numbers as the “determinative factor for billing.”<sup>25</sup> Then, to achieve the desired CLEC-annihilating effect, the Texas PUC limits the waiver of mutual recovery to only calls between two “local” numbers. However, the Award fails to mention that when AT&T Texas did not like using numbers as a rating tool, the same Texas PUC held that telephone numbers are not good

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<sup>25</sup> Award, p. 96.

proxies when AT&T Texas is the originating carrier. In the so-called “FX Docket,”<sup>26</sup> the Texas PUC looked past the numbers and instead focused on the ESP’s location as the end point as a means to impose “bill and keep” for FX-Type (a/k/a “Virtual NXX”) traffic to ISPs. In that case, the Texas PUC denied AT&T Texas’s demand for access charges from the CLECs serving the ESPs. They found that the CLECs were providing a telephone exchange service, not a telephone toll service, so AT&T Texas could not recover access charges from them.<sup>27</sup> The Texas PUC decided that AT&T Texas would not have to pay reciprocal compensation for FX-Type” service despite the fact that the two numbers are “local” to each other.

Not only does the Texas PUC’s tentative decision contradict its own precedent, the decision in Docket 33323 to exclusively rely on telephone numbers to rate calls VoIP calls terminated by AT&T Texas wholly ignores the Commission’s repeated recognition that telephone numbers are unreliable indicators of physical location or jurisdiction when it comes to VoIP services and applications.<sup>28</sup> Indeed, the Commission expressly noted that previously “geographic” numbers often effectively *become nongeographic* when a user ports them to an interconnected VoIP platform.<sup>29</sup> The Texas PUC’s decision functionally overrules this

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<sup>26</sup>See, Texas PUC Docket No. 24015, *Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Inter-Carrier Compensation for “FX-Type” Traffic against Southwestern Bell Telephone Company*, Order on Reconsideration (Nov. 4, 2004). See also, Docket No. 24015, Order on Clarification (Jan. 5, 2005). These Texas PUC orders are publicly available at <http://interchange.puc.state.tx.us/WebApp/Interchange/application/dbapps/login/pgLogin.asp>. Perform an anonymous login and enter the “Docket” number in the field for “Project.” The case docket sheet, with links to all filings, will appear.

<sup>27</sup>This notable restraint seems to have been lost. In Docket 33323 there is no claim and no finding that UTEX is providing a telephone toll service, and AT&T Texas admitted that UTEX is acting as an LEC, providing telephone exchange and/or exchange access service to its customers. Yet the tentative plurality decision here is that access is due from UTEX to AT&T Texas merely because the traffic is going the other direction from that in issue in the prior *FX Docket*.

<sup>28</sup>See, e.g., Memorandum Opinion and Order, *In the Matter of Vonage Holdings Corporation for Declaratory Ruling on Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267, ¶¶ 23-32, 19 FCC Rcd 22404, 24418-22425 (rel. Nov. 2004) (“*Vonage*”).

<sup>29</sup> n114 We note that because interconnected VoIP providers offer telephone numbers not necessarily based on the geographic location of their customers -- many times at their customers’ requests --

Commission precedent and forces VoIP services and applications to once again fit within the legacy geographic regime.

Under the tentative decision in Docket No. 33323, AT&T Texas need not pay *any* compensation to CLECs when AT&T Texas originates a call to the Internet via a CLEC-served ESP and the call is deemed “not local”; but *when the Internet makes the call to an ILEC user*, the CLEC must pay AT&T Texas *access charges*. This violent contortion of the rules means that telephone numbers *do not matter* when AT&T Texas is the potential payor but numbers *absolutely control* when the CLEC is the potential payor. This result is neither mutual nor reciprocal.

**D. Texas PUC decisions on CPN presentation wrongly override the mutual waiver and in any event impose impossible conditions to ensure every call incurs intrastate access charges.**

The mutual waiver of cost recovery means that no compensation is due for ESP traffic, so there is no need to try to jurisdictionalize calls so as to rate them in any fashion other than “no compensation.” Yet the Texas Commission majority has tentatively decided to apply intrastate access charges to ESP traffic that has “invalid CPN.” The majority has also tentatively decided to

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there may be limits to number porting between providers. The Act only provides for service provider portability and does not address service or location portability. See First Number Portability Order, 11 FCC Rcd at 8447, para. 181. Thus, for example, if an interconnected VoIP service customer selects a number outside his current rate center, or if the interconnected VoIP service customer selects a number within his geographic rate center and moves out of that rate center, and then requests porting to a wireline carrier in his new rate center, the customer would not be able to port the number. See 47 C.F.R. § 52.26(a). We expect interconnected VoIP providers to fully inform their customers about these limitations, particularly limitations that result from the portable nature of, and use of *non-geographic numbers* by, certain interconnected VoIP services.

Report and Order, Declaratory Ruling, Order on Remand, and NPRM, *In the Matter of Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Numbering Resource Optimization*, WC Docket No. 07-243, WC Docket No. 07-244, WC Docket No. 04-36, CC Docket No. 95-116, CC Docket No. 99-200, FCC 07-188 ¶ 134, note 114, 22 FCC Rcd 19531, 19550 (rel. Nov. 2007) (“*VoIP Porting Order*”) (emphasis added).

adopt AT&T Texas' *post-hoc* "validity standard": if UTEX does not signal a 10-digit, LERG-active geographic NPA/NXX in the SS7 ISUP IAM CPN parameter when it tries to set up a call with AT&T Texas, then AT&T Texas can deem it invalid and treat the call as not only non-local, but also *intrastate* with the result that AT&T Texas will bill UTEX the highest possible rate – intrastate access charges. In other words, the Texas Commission is – while supposedly interpreting terms in an agreement that were formed almost 12 years ago – on the verge of adopting the functional equivalent of NECA's January 22, 2008 Petition for Interim Order in CC Docket 01-92 that this Commission has yet to resolve. And its construction of words from 1997 is that at the time they were formed they were intended to have a precise meaning which coincidentally happens to match a result that AT&T Texas itself did not devise until **after April of 2006** – 8 years after the contract became effective – when AT&T Texas finally made up its mind about what it would advocate to regulators concerning how the CPN field should be data-filled and began to articulate the notion of "valid CPN."

**E. The AT&T Texas/Texas PUC result eliminates any possibility of innovative methods to signal that a call is VoIP or to interoperate IP-based networks and the PSTN.**

The Texas PUC's tentative decision holds that the waiver of mutual recovery is vitiated and does not apply for calls where the CLEC does not signal information in a way that AT&T Texas deems "valid." The Texas PUC holdings will stop development of open, interworking between the PSTN and the Internet, and prevent development of innovative ways to signal information between the two modalities.

The Commission has recognized the need to interoperate IP-based addresses with legacy telephone numbers.<sup>30</sup> To this end, the Commission created a centralized database largely

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<sup>30</sup>Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements*

because multiple Internet TRS providers and LECs would not or could not voluntarily interoperate so that each could recognize or route the various kinds of addresses that were in use.

UTEX and its affiliate companies devised a technically feasible way to signal to the PSTN that a call is VoIP, to interoperate IP-based addresses with traditional numbers and to allow call-back. This “Universal Tele-traffic EXchange (“UTEX”) specification provides a simple way to provide information about the identity of the party initiating a call session involving the PSTN at one or more endpoints. It does so by representing IP-based addresses within the Legacy SS7 protocol.<sup>31</sup>

Despite the obvious value to Internet applications such as Skype and Google phone, the Texas PUC decision effectively eliminates any alternative signaling methods to facilitate interoperation between the Internet and the PSTN, no matter how feasible they may be. Any alternative method will, under the tentative decision, automatically incur intrastate access charges for the call session regardless of jurisdiction. Absent intervention, this “telcomorphic” vision will insure the demise of many Internet based voice communications.

**F. Texas PUC imposing intrastate access on interstate communications.**

All of UTEX’s customers are ESPs. As a matter of law, therefore, the traffic is jurisdictionally interstate and subject to the Commission’s exclusive authority.<sup>32</sup> Moreover, even though this is § 251(b)(5) traffic, it is also subject to § 201<sup>33</sup> and the current rules treat this traffic

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*for IP-Enabled Service Providers*, CG Docket No. 03-123; WC Docket No. 05-196, FCC 08-151, ¶¶ 46-70, 23 FCC Rcd 11591, 11610-11620 (rel. June 2008).

<sup>31</sup>See, March 28, 2007 Letter from W. Scott McCollough, General Counsel, to Commission Secretary, CC Docket No. 01-92, *In the Matter of the Missoula Intercarrier Compensation Reform Plan; Missoula Plan Phantom Interim Process and Call Detail Records Proposal*; Written Ex Parte presenting method to uniquely identify, represent and allow callback to an IP endpoint from the Legacy Public Switched Telephone Network.

<sup>32</sup>*Core Mandamus Order* ¶ 17-22, 24 FCC Rcd at 6483-6486.

<sup>33</sup>The D.C. Circuit has observed that the jurisdictional nature of traffic is not dispositive of whether reciprocal compensation is owed under § 251(b)(5). See *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000). See also *op. cit.* ¶ 22.

as “access-exempt” just as with ISP-bound traffic.<sup>34</sup> Even if it is not access-exempt, the only lawful access rate would be a Commission-approved just and reasonable interstate rate, not intrastate access charges. This Commission cannot stand idly by and allow state commissions to impose intrastate access charges on interstate communications.

The CPN issue is made worse by the fact that a significant portion of UTEX’s ESP customers support services, features and functions that are not “interconnected VoIP” and do not have or use a legacy telephone number. Skype Out is but one example. Skype and many other VoIP applications use a URI addressing scheme<sup>35</sup> so there is not a telephone number to

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<sup>34</sup>The traffic in issue is merely ISP-bound traffic in reverse, in that instead of being addressed from a PSTN end-point to an Internet access provider for processing across the ISP’s network and the Internet it comes from an information/enhanced service provider and is addressed to a location on the PSTN. The traffic melds a packet switched IP-based Internet communication to a traditional circuit-switched telephone call over the PSTN. *Compare Core Mandamus Order* ¶ 21, note 69, 24 FCC Rcd 6484-6485 (and cases cited therein). There can be no rational argument that the Commission has exclusive jurisdiction over ESP traffic only if the call originates on the PSTN and goes to an ESP. ESP’s have used basic service (rather than access) to send calls to the PSTN ever since the ESP Exemption was crafted. PC to FAX calling is but one example. All enhanced/information services have consistently been declared to be interstate and subject to the Commission’s exclusive jurisdiction, regardless of directionality.

<sup>35</sup>The Commission is familiar with how URIs operate:

At its simplest, a URI specifies both how (the protocol) and where (the address) to access a resource on the Internet. Thus a URI that contains an IP address might take the form “H323:128.000.000.001,” in which “H323” specifies the protocol to be used and “128.000.000.001” specifies the resource’s address. URIs that contain domain names and user names might similarly take the forms “H323:2025551212@siprelay.com” or “IM:IMUser@aol.com.”

Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123; WC Docket No. 05-196, FCC 08-151, ¶ 50, n. 13, 23 FCC Rcd 11591, 11612 (rel. June 2008).

The Commission therefore knows that a Uniform Resource Identifier (URI) is not a “telephone number” although it is possible to have 10 digits which represent a telephone number as part of a URI. For example, the “tel” URI specification is described in RFC 3966. (Network Working Group, Request for Comments: 3396: THE TEL URI FOR TELEPHONE NUMBERS, © The Internet Society (2004), available at <http://tools.ietf.org/html/rfc3966>). Its syntax is somewhat different than many URIs in that there is no domain name; it is expressed as “tel: telephone-subscriber.” If UTEX were to signal a tel URI to AT&T Texas it would be “invalid” because of the inclusion of “tel:.” Note also that while a traditional number is used in the tel URI, it can be any worldwide E.164 address. The E.164 specification, in turn, provides for up to 15 digits. This is because many different numbering schemes are currently operable in the communications space and E.164 and SS7 therefore provide for any that contain up to 16 digits and use SS7 or interoperate with it. The ANSI ISUP protocol specification (T1.113-1995) for SS7 signaling defines a common format for addresses contained in several parameters, including but not limited to CPN. The T1.113-1995 address field specification is variable length, not fixed length and up to 16 digits can be used.

represent. AT&T Texas's "valid" CPN construct requires that the CPN field be populated with a local, legacy telephone number to avoid the imposition of intrastate access charges. This Texas Rule penalizes IP-based users that intercommunicate with the PSTN merely because they do not have or need a traditional telephone number. The Texas Rules assess intrastate access charges on Skype Out and any other new technology traffic regardless of the actual jurisdiction of the call to the PSTN.

**G. Texas PUC decision changes the contract terms related to CPN.**

One of the Texas Commissioners properly recognize that the entire discussion of whether the CPN is "invalid" and AT&T Texas can impose intrastate access charges because if this signaling "defect" is useless because the ICA already sets the rating for ESP traffic: no compensation. But, if one nonetheless chooses to engage in that discussion then the Texas Rules simply get it wrong.

The ICA does not have a distinct definition of "CPN." Attachment 12: Compensation does reference "Calling Party Number" and/or "CPN" in several sections. Section 2.3 in particular provides great insight into what was intended:

2.2 Each Party will include in the information transmitted to the other for each call being terminated on the other's network (where available), the originating Calling Party Number (CPN).

2.3 The type of originating calling number transmitted depends on the protocol of the trunk signaling used for interconnection. Traditional toll protocol will be used with Multi-Frequency (MF) signaling, and Automatic Number Identification (ANI) will be sent either from the originating Parties end office switch to the terminating Parties tandem or end office switch. ISDN used for

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The Award, in contrast, says only 10-digit NANPA numbers listed in the LERG are "valid." The Texas PUC's notion of validity is far too circumscribed, and the notion expressed in the Award that the "industry standard" is and always was "geographic 10-digit LERG-active" is flatly wrong as a simple review of ANSI T1.113-1995 clearly shows. The "industry standard" in 1998 was ANSI T1.113-1995, not the plot hatched up by AT&T Texas and its ILEC cartel brethren in 2006 and then proposed to the Commission in the NECA Interim Signaling Request.

interconnection will be as defined in Attachment 25 Appendix ISDN Interconnection.

2.4 Where one Party is passing CPN but the other Party is not properly receiving information, the Parties will cooperatively work to correctly rate the traffic.

7.5 Through July 31, 1998, if the percentage of calls passed with CPN is greater than ninety percent (90%), all calls exchanged without CPN information will be billed as either Local Traffic or IntraLATA Toll Traffic in direct proportion to the minutes of use (MOU) of calls exchanged with CPN information. Effective August 1, 1998, if the percentage of calls passed with CPN is less than 90%, all calls passed without CPN will be billed as IntraLATA Toll Traffic. Effective August 1, 1998, if the percentage of calls passed with CPN is less than 90%, all calls passed without CPN will be billed as IntraLATA Toll Traffic.<sup>36</sup>

Section 2.3 expressly recognizes that the “originating calling number” can be represented in various ways and in particular that it can be ANI when MF signaling is used or in the ISDN D-channel Q.931 CPN Information Element when ISDN interconnection is used. The ICA clearly requires the parties to signal originating calling number in accordance with the technical requirements or “*protocol*” associated with each type of interconnection.

Despite this clarity, the Award and now the Texas PUC majority decided that the only “valid” CPN that will count toward the 90% threshold in § 7.5 is originating calling number communicated using only one specific protocol: “SS7.” This is the decision even though “SS7 CPN” is not even mentioned in § 2.3.

The Award and now the Texas PUC have also superimposed additional “validity” requirements for “SS7.” The Award parrots AT&T Texas’ argument that the only “valid” CPN

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<sup>36</sup>UTEX explained to the Texas PUC that this provision has no application to ESP traffic since it was all local-treated and there was therefore no chance any lack of CPN could cause AT&T Texas to misrate a call. But the 2000 “no compensation” amendment most certainly trumps § 7.5 to the extent it might somehow apply to ESP traffic. The Texas PUC refused to apply the Texas contract law that an amendment to a contract definitively takes precedence over any previous clauses that may conflict with the subsequent amendatory terms. *See, e.g., Boudreaux Civic Ass’n v. Cox*, 882 S.W.2d 543, 547-48 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1994, no writ). *Accord, EEOC v. R.J. Gallagher Co.*, 181 F.3d 645, 651 (5<sup>th</sup> Cir. 1999).

is a 10-digit, geographic number that is active in the LERG. The Award found that was some sort of “industry” standard. The *real* industry standard – the one that describes the “protocol” for SS7 – is the ANSI ISUP protocol specification (T1.113-1995) for SS7 signaling.<sup>37</sup> This specification defines a common format for addresses contained in several parameters, including but not limited to CPN. The T1.113-1995 address field specification is variable length, not fixed length and up to 16 digits can be used. Another *real* industry standard is “E.164: THE INTERNATIONAL PUBLIC TELECOMMUNICATION NUMBERING PLAN.” The ITU started the most recent series in 1988 with “E.164: NUMBERING PLAN FOR THE ISDN ERA.”<sup>38</sup> It has been updated a few times, with the most recent revision in 2005,<sup>39</sup> but the base syntax and semantics have not materially changed, except that the current version actively discourages “Administrators” from adding additional digits to the approved 15.

Within E.164, the NPI and NoA fields are centered on recognizing and providing for not only E.164 but also other addressing schemes in general and for mobile services in particular. For example, E.212<sup>40</sup> is used for mobile services in North America and E.214 is used for mobile services in other parts of the world. Notably, the standard allows for private schemes and even allows for extension if new schemes and associated standards arise. These numbering schemes are not limited to 10 digits. Even within the E.164 space, more than 10 digits are expressly

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<sup>37</sup>ANSI T1.113-1995, American National Standard for Telecommunications - Signaling System Number 7 (SS7) - Integrated Services Digital Network (ISDN) User Part.

<sup>38</sup>CCITT Recommendation E.164, NUMBERING PLAN FOR THE ISDN ERA, © ITU 1988, 2007, available at [http://www.itu.int/rec/dologin\\_pub.asp?lang=e&id=T-REC-E.164-198811-S!!PDF-E&type=items](http://www.itu.int/rec/dologin_pub.asp?lang=e&id=T-REC-E.164-198811-S!!PDF-E&type=items).

<sup>39</sup>ITU-T Recommendation E.164, NUMBERING PLAN FOR THE ISDN ERA, © ITU 2005, available, available at [http://www.itu.int/rec/dologin\\_pub.asp?lang=e&id=T-REC-E.164-200502-I!!PDF-E&type=items](http://www.itu.int/rec/dologin_pub.asp?lang=e&id=T-REC-E.164-200502-I!!PDF-E&type=items).

<sup>40</sup>E.212, like E.164 allows up to 15 digits. There are three parts: a Mobile Country Code (MCC) composed of 3 digits, a Mobile Network Code (MNC) which has a variable field of 2-3 digits and a Mobile Subscriber Identification Number (MSIN) with a variable field that can contain a maximum of 10-digits. See, ITU-T Recommendation E.212: THE INTERNATIONAL IDENTIFICATION PLAN FOR MOBILE TERMINALS AND MOBILE USERS, © ITU 1999, available at <http://www.itu.int/ITU-T/worksem/ip-telecoms/e164/e212.doc>.

contemplated in order to recognize other national numbering plans besides the NANP, and to allow presentation of international codes and country codes.

UTEX recognizes that the North American Numbering Plan does use 10 digits with 3 fixed fields. But the NANP is only part of the global numbering plan and is therefore designed to interwork within it: calls using other numbering schemes do occur, and some of them do – contrary to what AT&T Texas and the Texas PUC may want to believe – terminate in Texas and the other parts of this country. The signaling content somehow manages to make its way through. But the number is not always 10 digits and is not in the LERG. AT&T Texas and apparently a Texas PUC majority want to force carriers to signal only 10 digits and use 3 fixed fields (fixed 3-digit NPA, fixed 3-digit NXX and fixed 4 digit line number) for CPN even when the originating calling number is a different but still “valid” global address. The real global numbering standards and the American signaling counterpart provide that the fields in issue are variable length.<sup>41</sup> The *American* signaling protocol for SS7 is expressed in ANSI T1.113-1995. Yet a Texas PUC plurality has decided that a carrier who signals a “valid” international number under both E.164 and T1.113-1995 to a network in Texas would be forced to pay *intrastate access charges*. Does the Commission want this to become the standard?

The Texas PUC plurality assumes that if a call is PSTN-PSTN and if no CPN is represented then it necessarily means some kind of fraud is involved so an intrastate access penalty must be extracted. The Texas PUC does not expressly employ the ILECs’ pejorative characterization of UTEX’s customers as passing “phantom traffic” but it still concludes that the “highest possible rate” (intrastate access charges) must be imposed to punish the fraudsters. This manufactured fear mongering took a major broadside last week: Twitter and Ja-Jah have

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<sup>41</sup> See 1998 standard. p. 2; 2005 standard pp. 8-10.

developed and deployed an application that allows a Twitter user to enter a URI and set up a free two-minute phone call between two ordinary phones.<sup>42</sup> In this application, no CPN is presented. The telcos and their state commission supporters will probably just increase their agitation to outlaw such a thing,<sup>43</sup> and “free” is simply not in their lexicon. The Texas Rules give the ILECs everything they want. @call cannot continue as a free application if it has to pay a ruinous intrastate access tax and innovation at the fringe will suffer.

**H. Texas PUC “validity” criteria for CPN inconsistent with FCC definition and Texas PUC’s own rules.**

While the Award says it is consistent with this Commission’s definition of “Calling Party Number” the result is far more restrictive than what is contemplated by 47 C.F.R. § 64.1600(c). UTEX will be deemed to have delivered “invalid” CPN if it signals a “subscriber line number or the directory number contained in the calling party number parameter of the call set-up message” that happens to be a “nongeographic” number.<sup>44</sup> But non-geographic numbers like 8YY and 500 fully fall within the Commission’s definition of CPN. 8YY and 500 numbers are “CPN” under the Commission’s definition. The Commission uses the same terminology (“NPA” “NXX” and

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<sup>42</sup>See, Marketwire, JAJAH Brings Telephone Calls to Twitter, Social Media Telephony Solution -- @call, September 17, 2009, © 2009 Marketwire, Incorporated, available at <http://www.marketwire.com/press-release/Jajah-Inc-1046069.html>; Zee, The Next Web.com, Phone Calls Come to Twitter, Copyright 2006-2009 © The Next Web, available at <http://thenextweb.com/2009/09/17/phone-calls-twitter-call-username/>.

<sup>43</sup>Or, they will merely mindlessly and repeatedly insist – like AT&T Texas and the Texas PUC Arbitrator and despite overwhelming contrary technical evidence, including express mention of Ja-Jah – that it is just not technically possible for any thing like @call to exist or work.

<sup>44</sup>The Commission has said that a number selected by an interconnected VoIP provider user that is “outside his rate center” is a “nongeographic number.” *VoIP Porting Order*, *supra* ¶ 134, 22 FCC Rcd at 19550. The Texas PUC’s ruling therefore will treat an ordinary number as “invalid” CPN if it is used for interconnected VoIP because it has become nongeographic. All interconnected VoIP service therefore pays intrastate access for every call that touches Texas, regardless of the actual end points, and even if the calling and calling numbers are local to each other.

“line number”) when describing 8YY and other “nongeographic” numbers<sup>45</sup> that it uses when it refers to the geographic numbers AT&T Texas and the Texas Commission say the ICA requires.

The Texas PUC’s own rules have a definition of “calling party information.”<sup>46</sup> Neither the FCC’s definition nor the Texas PUC’s definition support this newly established notion of what is “valid” CPN and nothing supports the Texas PUC’s conclusion that CPN must be a “geographic” number in order to be “valid.”

In 1998 many of AT&T Texas’ end offices could not even receive or recognize 10-digit CPN, and AT&T Texas told CLECs to send 7 digits instead. In this instance, the Texas PUC interprets the ICA not by trying to discern what the meaning and intent was at the time it was formed in 1998, but instead imposes a *post-hoc* policy result with absolutely no evidence to support it other than AT&T Texas’ bald assertion that this should be the industry standard because AT&T Texas came to this conclusion some time in 2006.

**I. Texas PUC “interpretation” prohibits UTEX from using its federally-assigned numbering resources and means UTEX cannot even provide traditional analog local exchange service.**

The Texas Commission plurality upholds the Award’s conclusion on page 88 that:

If UTEX’s customer does not provide a calling number that can be used to populate the CPN parameter in the ISUP IAM for traffic handed to AT&T Texas or does not provide a “valid CPN,” then UTEX is responsible for the payment to AT&T Texas for this traffic if it exceeds 10%. UTEX is obligated under the ICA

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<sup>45</sup> See, Notice of Proposed Rulemaking, *In the Matter of Toll Free Service Access Codes*, CC Docket No. 95-155, FCC 95-419, 10 FCC Rcd 13692, 13693, n. 5 (rel. Oct. 1995) [“A toll free number such as 800-NXX-XXXX consists of three parts: (1) a three digit numbering plan area (“NPA”) or area code (“800”); (2) a three digit central office code (“NXX”); and (3) a four digit line number (“XXXX”). See *Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois*, 10 FCC Rcd 4596 (1995) (“Ameritech Order”).

<sup>46</sup>[Texas PUC Subst. R. 26.5](29) **Calling party information** —

- (A) the telephone listing number and/or name of the customer from whose telephone instrument a telephone number is dialed; or
- (B) other information that may be used to identify the specific originating number or originating location of a wire or electronic communication transmitted by a telephone instrument.

to pass the numbers it receives in the CPN field and is prohibited from altering those numbers in any way. The Arbitrator notes that UTEX is responsible for ensuring that its customers pass the required CPN.

The holding that UTEX must pass on what it gets and cannot alter what it gets means that UTEX cannot use the very numbering resources UTEX has obtained from NANPA. UTEX cannot associate these numbers with its customers and then signal those numbers to AT&T Texas even though that is exactly what every other LEC in the country does and how the rest of the industry operates. The Texas PUC dictates UTEX that it cannot use the numbering resources it has been assigned under the Commission's rules in obvious and flagrant violation of UTEX's federal rights and the Act and applicable rules.

More importantly, the Texas PUC's plurality ignores how LECs have operated for many years for analog service: the LEC associates a telephone number to a customer and the LEC's switch is the one that generates the CPN that is populated in the CPN parameter. LECs never received "SS7 CPN" from their telephone exchange customers' equipment because customer equipment does not communicate with the LEC equipment via SS7. The Texas PUC's conclusion on what the contract means is simply nonsensical and is wholly inconsistent with how a telephone network operates. *The Plurality opinion means that UTEX it cannot provide traditional analog telephone service, contrary to the law and the ICA.*

**J. Texas PUC decision means UTEX cannot be a "numbering partner" for interconnected VoIP providers or Internet TRS providers, and results in contract provisions that would inhibit interconnected VoIP providers and Internet TRS providers from porting numbers to UTEX.**

UTEX connects to its customers using non-SS7 methods and protocols and obtains information from them that UTEX converts into SS7 to then populate in the CPN parameter. Similarly, a LEC would interpret ANI from a PBX trunk or the CPN Information Element on an ISDN D channel and then populate the SS7 CPN parameter. The only difference is that the

protocol conversion is different because UTEX is mapping IP-based URIs to traditional legacy signaling. The Award dictates that UTEX cannot engage in the protocol conversion from ANI or ISDN because that would be an “alteration.” Either by design or ignorance, the Texas PUC decrees that UTEX will be deemed to never signal “valid” CPN to AT&T Texas. The Award ignores the fact that, just like every other LEC in the country, *UTEX does not get “SS7 CPN” from its customers*, so what it receives is “invalid.” Under the Award, UTEX is required to pass on this “invalid” CPN – and then pay access to AT&T Texas as a result.

The Award also prohibits UTEX from engaging in protocol conversion from URIs to SS7. Like many CLECs, UTEX acts as a numbering partner for some of its ESP customers and it may choose to support Internet TRS providers – if UTEX survives. Under this arrangement, the number that UTEX signals to AT&T Texas is in fact a UTEX-assigned number because the customer chose to use a UTEX number and then represent it to UTEX through a URI. UTEX, in turn, performs a protocol conversion, and then populates the SS7 CPN parameter.

According to the Award, UTEX must take “CPN”<sup>47</sup> it supposedly gets from its customers and pass that through to AT&T Texas unchanged. Based on the results of the arbitrary CPN “validity test,” the Award effectively jurisdictionalizes the traffic or deems it “no CPN.” UTEX’s customers do not communicate with UTEX via SS7, so it does not in fact “get” CPN from its customers as AT&T Texas and the Texas Commission define it. This is so even when the customer has a UTEX number and represents it to UTEX during call set-up: the customer will represent the number using other protocols, and it never comes to UTEX in “SS7.” In order to populate the SS7 CPN parameter, *UTEX has to change the information from the original*

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<sup>47</sup>Recall that the Award says “CPN” is information in the SS7 ISUP IAM CPN parameter. UTEX does not use SS7 to do call control with its customers, and therefore it never gets any “CPN” as defined in the Award. Like all other LECs, UTEX gets or uses information that can be interpreted and populated in the CPN parameter.

*protocol to SS7* and then populate the CPN parameter. That, however, would violate the interpretation expressed in the Award. The Award mandates the impossible because it simply does not match up with technical reality – for either traditional LEC activity or for interworking VoIP with the PSTN.

For example, UTEX communicates with some of its customers using SIP. In order to interoperate the SIP messages with SS7, UTEX translates SIP messages into ISUP messages and maps the SIP headers into ISUP parameters, using RFC 3398,<sup>48</sup> which is the “industry standard.” UTEX extracts the relevant information from the SIP INVITE and maps it to and then populates it in the SS7 CPN parameter. The Award says UTEX must “signal what it gets” but that is simply how RFC 3398 works to interoperate with SS7:

When a SIP INVITE arrives at a PSTN gateway, the gateway SHOULD attempt to make use of encapsulated ISUP (see [3]), if any, within the INVITE to assist in the formulation of outbound PSTN signaling, but SHOULD also heed the security considerations in Section 15. If possible, the gateway SHOULD reuse the values of each of the ISUP parameters of the encapsulated IAM as it formulates an IAM that it will send across its PSTN interface. In some cases, the gateway will be unable to make use of that ISUP - for example, if the gateway cannot understand the ISUP variant and must therefore ignore the encapsulated body. Even when there is comprehensible encapsulated ISUP, the relevant values of SIP header fields MUST ‘overwrite’ through the process of translation the parameter values that would have been set based on encapsulated ISUP.

...

For example, if an INVITE arrives at a gateway with an encapsulated IAM with a CPN field indicating the telephone number +12025332699, but the Request-URI of the INVITE indicates ‘tel:+15105550110’, the gateway MUST use the telephone number in the Request-URI, rather than the one in the encapsulated IAM, when creating the IAM that the gateway will send to the PSTN.

Under RFC 3396 UTEX’s gateway has to make choices about which “originating number” to take, convert, map and then populate in the SS7 IAM CPN parameter. Further, and

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<sup>48</sup>Network Working Group, RFC 3398, INTEGRATED SERVICES DIGITAL NETWORK (ISDN) USER PART (ISUP) TO SESSION INITIATION PROTOCOL (SIP) MAPPING, © The Internet Society (2002), available at <http://www.ietf.org/rfc/rfc3398.txt>.

even more problematic, RFC 3398 requires UTEX to overwrite certain information. But the Award on its face prohibits from doing so. RFC 3398 expressly states that on occasion:

[T]he relevant values of SIP header fields MUST ‘overwrite’ through the process of translation the parameter values that would have been set based on encapsulated ISUP. In other words, the updates to the critical session context parameters that are created in the SIP network take precedence, in ISUP-SIP-ISUP bridging cases, over the encapsulated ISUP. ... For example, if an INVITE arrives at a gateway with an encapsulated IAM with a CPN field indicating the telephone number +12025332699, but the Request-URI of the INVITE indicates ‘tel:+15105550110’, the gateway MUST use the telephone number in the Request-URI, rather than the one in the encapsulated IAM, when creating the IAM that the gateway will send to the PSTN.

The Award expressly prohibits overwriting or replacement of the encapsulated CPN with the number in the Request-URI even though RFC 3398 requires it.<sup>49</sup> The Texas PUC single-handedly abrogates open Internet standards as subservient to ILEC cartel crafted closed network preferences, even through the entire purpose of RFC 3398 is to allow seamless and efficient interoperation between the open Internet and the closed PSTN. A Texas PUC plurality puts a government seal of approval on the incumbent monopolists’ goals of protecting their walled gardens from the efficiencies and interoperability of the Internet.

Under the Texas PUC’s plurality result UTEX cannot be a “numbering partner” for interconnected VoIP providers or Internet TRS providers, because under the Award, UTEX cannot use the numbers it has been assigned by NANPA and associate them with users on the customer’s behalf and then have the UTEX switch populate the CPN parameter. The FCC,

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<sup>49</sup>The information UTEX receives will often contain alphabetical characters that cannot be represented in the SS7 CPN parameter, and this must be removed because the CPN parameter can be populated only with numeric characters. The URI-based calling party identifier may have “tel:” on the left-hand side of a 10-digit number, and this must be removed in order to populate the CPN parameter. Or, the URI-based calling party identifier may have a 10-digit number on the left-hand side, followed by “@ domain.tld” on the right-hand side. There may even be alpha characters and/or symbols on both sides of the numerals that are supposed to be populated in the SS7 CPN. For example, UTEX might receive “sip:+12024180300@fcc.gov;user=phone” and would normally remove all of the characters other than the Commission Secretary’s number before the numerals are populated in the SS7 CPN parameter. The award prohibits UTEX from doing this.

however, has taken great pains to support CLEC service to interconnected VoIP providers as a numbering partner and it has also worked extensively to ensure that users can port numbers between interconnected VoIP services, wireline services and wireless services. Indeed, the Commission held that carriers cannot have contract terms that would operate to inhibit a user's ability to secure a port from one carrier to another.<sup>50</sup>

The Commission, of course knows how porting works. The process is short-hand called "porting in to a carrier's switch" because the carrier's switch "holds" the number. The telephone number is placed in the NPAC database with a notation of the winning carrier, and it is then associated with the winning carrier's LRN for routing purposes. The Award frustrates the whole porting process for UTEX because the entire premise behind the decision is that UTEX's customer's equipment (rather than UTEX's switch) holds the number and acts as the SS7 Service Switching Point ("SSP"). This premise of the Award is just plain wrong. In the real SS7 world, UTEX's switch – not the customer's gear – is the "SSP" and the one that initiates the SS7 signaling that includes the telephone number.

**K. Texas PUC refuses to enforce ICA terms and Commission rules, and will not require AT&T Texas to perform switch translations/code opening so UTEX's numbers are routable from and through AT&T Texas' network.**

The Texas PUC also appears to be on the verge of approving the parts of the Award that allow AT&T Texas to continue to refuse to perform switch translations and code opening for non-geographic "500" numbers UTEX was assigned by this Commission for the very purpose of

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<sup>50</sup>See, e.g., Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities; E911 Requirements for IP-Enabled Service Providers*, CG Docket No. 03-123; WC Docket No. 05-196, FCC 08-151, ¶ 35, 23 FCC Rcd. 11591, 11607 (rel. June 2008) [prohibiting Internet-based TRS providers and their numbering partners from entering into agreements that would prohibit or unreasonably delay an Internet-based TRS user from porting between Internet-based TRS providers]. See also, Memorandum Opinion and Order, *In the Matter of Telephone Number Portability - Carrier Requests for Clarification of Wireless-Wireless Porting Issues*, CC Docket No. 95-116, FCC 03-237, ¶ 11, 18 FCC Rcd. 20971, 20974 (rel. Oct. 2003) [prohibiting carriers from having or asserting contract provisions that would inhibit users' ability to quickly and easily port numbers].

serving its ESP customers. AT&T Texas insists that UTEX must subscribe to AT&T Texas' access services and pay large nonrecurring charges for code-opening. This too is inconsistent with the current agreement, which expressly requires AT&T Texas to perform switch translations and open codes without charges,<sup>51</sup> and the recourse to access tariffs is of course inconsistent with the cost-based requirements for interconnection and traffic exchange in the Act.

**L. Texas PUC retroactively approving ILECs' requests the Commission has not yet chosen to grant.**

The Texas PUC decision to impose switched access on VoIP traffic effectively revives and retroactively grants Embarq's withdrawn petition for forbearance in WC Docket 08-8. The holdings on CPN retroactively approve NECA's request for interim relief on signaling in CC Docket 01-92. It is no surprise that the Texas PUC is about to retroactively put a regulatory seal of approval on AT&T Texas' request in WC Docket 08-152. The Texas PUC is about to control virtually all of the outstanding intercarrier compensation issues. The Texas Rules will become the nationwide standard by the ILEC's torting it as precedent in the absence of a preempting Commission decision and the Commission will become a mere passenger on the ship it is chartered to captain.

**M. Texas PUC reinstates illegal Single Company Billing, but only for VoIP.**

One might think that eliminating the ESP Exemption and moving VoIP into the access regime would merely mean that the ESPs now have to buy access from LECs, and they would be treated like IXCs are today. For example, a reasonable person would think that if two LECs

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<sup>51</sup> Attachment 21: Numbering § 1.4 could not be clearer on this point.

1.4 Each Party is responsible to program and update its own switches and network systems to recognize and route traffic to the other Party's assigned NXX codes at all times. Neither Party will impose fees or charges on the other Party for such required programming and updating activities.

The Texas PUC has simply refused to enforce this provision.

were involved in providing this access service then it would be treated like all other jointly provided access services are today. But, alas, that is not the way it works under the Texas Rules.

AT&T Texas' tariffs extensively discuss joint access provision and billing. UTEX's FCC tariff has provisions with similar effect. Both LECs' tariffs expressly provide that the meet point billing is the default. The ICA says the same thing.<sup>52</sup>

The Award, however, has interpreted the ICA to say that even though VoIP is now subject to access meet point billing does not apply when UTEX and AT&T Texas are both involved in handling a VoIP "access" call. The Award says "UTEX presented no evidence indicating that AT&T Texas and UTEX agreed to provide joint access service."<sup>53</sup> It is hard to imagine what more evidence could be required besides the express command to use MPB in the ICA and the express provision in both LECs' tariffs.

The Award means that until AT&T Texas agrees to MPB it has the right to "default bill" UTEX for any access traffic UTEX delivers to AT&T Texas. The Award effectively imposes Single Company Billing – which the Commission ruled more than 20 years ago was unreasonable and illegal under the Communications Act.<sup>54</sup>

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<sup>52</sup>The ICA terms expressly provide in Attachment 12, §§ 6.2 and 6.3 that "[t]he Parties will establish MPB arrangements in order to provide Switched Access Services to Interexchange Carriers via a Party's access tandem switch, in accordance with the MPB guidelines adopted by and contained in the Ordering and Billing Forum's MECOD and MECAB documents. Except as modified herein, MPB will be determined during joint network planning" and "[t]he Parties will maintain provisions in their respective federal and state access tariffs, or provisions within the National Exchange Carrier Association (NECA) Tariff No. 4, or any successor tariff, sufficient to reflect this MPB arrangement, including MPB percentages." Both UTEX and AT&T Texas have such tariff provisions, but the Award says they do not apply, and AT&T Texas can instead default bill UTEX – a joint access provider – rather than the "access customer."

<sup>53</sup>Award p. 116.

<sup>54</sup>*See*, Memorandum Opinion and Order, *In the Matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, CC Docket No. 86-104, FCC 87-252, 2 FCC Rcd 4518 (rel. Jul. 1987). The Commission held that "single company billing" violated the Act and the Commission's rules because it would "result[] in the LECs' charging rates based on the tariff of a LEC other than the one providing service to the customer":

1. The initial access tariffs filed by local exchange carriers (LECs) in 1983 originally contained two optional provisions for the ordering, rating and billing of access services provided

The Arbitrator (and now, the Texas PUC) decided that the Commission was wrong when it required LECs to follow MPB as the default option<sup>55</sup> and ruled that the MECAB variation now known as the “Single Bill Method” or “Single Bill Option” can be used only if *both* LECs voluntarily agree by separate contract to do so. This Commission’s rules and rulings could not be any clearer from the discussion in ¶ 34 and note 25 in the *Joint Access Billing Waiver Order*.<sup>56</sup> When there is no such voluntary agreement one LEC does not buy access from or in any way owe access to the other LEC: they each go to the MPB default and they individually and separately look to the access customer for payment.

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by more than one carrier. The first option essentially required interexchange carriers (ICs) to order service from the LEC in whose territory the end user serving office associated with the IC’s point of presence (POP) was located. That carrier would then determine the charges, arrange to provide the services and perform the billing from its own tariff for the complete service provided, and would settle accounts with the other LEC(s) involved in providing that service. We shall refer to this option as single company billing.

...

3. In our review of the initial access tariffs, this Commission required carriers to delete single company billing because it would have resulted in the LECs’ charging rates based on the tariff of a LEC other than the one providing service to the customer. <sup>[note 1 set out below]</sup> (Emphasis added).

<sup>[note 1]</sup> Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, 97 FCC 2d 1082, 1176 (1984).

<sup>55</sup> See, e.g., Memorandum Opinion and Order, *In the Matter of Waiver of Access Billing Requirements and Investigation of Permanent Modifications*, CC Docket No. 87-579, DA 87-1858 ¶¶ 29-31, 3 FCC Rcd 13 (rel. Dec. 1987) (“*Joint Access Billing Waiver Order*”).

<sup>56</sup> 34. The guidelines further specify that for all single bill options, the tariff should define single billing as it is defined in the MECAB: a single bill consists of all rate elements applicable to access services billed on one statement of charges under one billing account. <sup>[n25 set out below]</sup> For the single bill/multiple tariff option, the tariff should state that interpretation and application of tariffs for non-billing companies must be communicated to the billing company. For the single bill/pass-through option, the tariff should state that each non-billing LEC is responsible for preparing its own bill for its portion of access service, and for forwarding the bill to the billing carrier. The case of the single bill/single tariff option presents questions of cost support and timing that will require further consideration.

<sup>n25</sup> While the single bill/single tariff resembles the single company arrangement rejected by the Commission in its March 28 Order, the significant distinction is that in the former, the relationship between the billing carrier and the other joint LEC provider(s) is a tariff relationship, while in the latter, the relationship is strictly contractual (emphasis added).

The Texas PUC overrules the Commission's decisions, and, in the regulatory vacuum, reverses the order of preference and when where mutual agreement is required, by imposing Single Company Billing as the default unless there is a separate express agreement between the two LECs to use MPB.

**N. AT&T Texas is on the verge of disconnecting UTEX as soon as it gets the Texas PUC's blessing.**

The FeatureGoup IP entities' Motion for Reconsideration observed that they had previously predicted that the ILECs would interpret a denial of forbearance as confirmation of their position that access charges apply to VoIP, and the Motion for Reconsideration presented evidence that this is precisely what occurred within days, despite note 19 to the Order.<sup>57</sup> Specifically, AT&T Texas filed a pleading at the Texas PUC in Docket 33323 citing to the Order denying forbearance and asserting that the Texas PUC should therefore find in AT&T Texas' favor and let AT&T Texas cancel the current interconnection agreement and disconnect all UTEX-AT&T Texas interconnection arrangements.

A mere eight days after the Arbitrator's Award – even before the deadline to seek full Texas PUC review of the decision – AT&T Texas sent a “Notice of Intent to Disconnect” to UTEX demanding that UTEX immediately pay the amount specified in the Award within 14 days. AT&T Texas indicated it would cancel the ICA and disconnect all interconnection if this were not done.

Once it became clear that the full Texas Commission would review the Award, AT&T Texas deferred the payment deadline and threatened disconnection. According to AT&T Texas' latest correspondence, AT&T Texas has “suspended collection efforts at this time.” It is obvious, however, that as soon as the Texas PUC issues a written decision and that decision becomes final

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<sup>57</sup>FeatureGroup IP Corrected Motion for Reconsideration, Reconsideration Point 1, pp. 3-7.

AT&T Texas will immediately renew the demand and will give notice that it is canceling the agreement and will proceed to disconnect all interconnection arrangements as soon as it possibly can.<sup>58</sup>

UTEX handled VoIP call sessions with nearly a billion minutes during the last 18 months in Texas. These are Vonage, Skype, MagicJack, Jah-Jah, digital cable and other IP-based users that needed and wanted to communicate with the PSTN users in Texas. Some of the call sessions are “interconnected VoIP service” related, and others are not. Over the last few years ESPs that offer or support VoIP have found it increasingly difficult to obtain PSTN connections. The ILECs will not provide service to these on any terms other than access, or under an access-like arrangement such as the AT&T ILECs’ TIPToP service. As a consequence, the ESPs rely almost exclusively on CLECs like UTEX, which provides IGI-POP service – a non-access competitive alternative to TIPToP.<sup>59</sup>

ILECs all over the country are pressing state commissions to let them impose access charges on CLECs that serve ESPs, and CLECs are becoming less and less willing to serve ESPs that need termination on the PSTN because of the cost of the litigation and potential liability that is involved. The air supply for PSTN connectivity is getting very limited to ESPs, and the Texas Rules will quite possibly be the last straw. Unless the Commission asserts its authority and acts, the ILECs will win by default. No more “free.” No more \$40 dollar device that allows unlimited

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<sup>58</sup>UTEX reserves all rights in this regard, and does not necessarily agree with AT&T Texas’ interpretation of whether, when or under what circumstances it can take down interconnection. But it is clear that AT&T Texas is absolutely bent on doing so in order to finally obtain its long-held desire to destroy UTEX.

<sup>59</sup>IGI-POP is a flat-rated service, unlike switched access and TIPToP which have minutes of use rate elements. Further IGI-POP is much less expensive than other services that track or incorporate access pricing. Indeed, UTEX’s revenues from IGI-POP service on a per minute of use consumption basis are about 25% of what they would be if access rates or prices were built in. More important, IGI-POP offers much more flexibility to new technology users in terms of how they connect to UTEX than is available with switched access or TIPToP. Users can also secure as numbers if the customer desires them, while Feature Group D access service and TIPToP do not. AT&T Texas and the other ILECs are consumed with eliminating UTEX and IGI-POP because it is an astounding value proposition and interferes with the ILEC’s long-held desire to force the access regime on VoIP.

usage for \$20 a year. No more \$24.95 per month for unlimited use. The price for these new services, applications and devices will materially increase and this Commission will be the cause merely because it did not act.

UTEX's IGI-POP service to ESPs is a federally-tariffed service arrangement and given that it is ESP-related, it is jurisdictionally interstate. Similarly, the physical connections between UTEX and AT&T Texas and the traffic interchange that occurs over those connections are also jurisdictionally and exclusively interstate, and therefore the Commission has clear jurisdiction and authority under the Act to control the relationship.<sup>60</sup> The Commission therefore has not only the power, but also the duty to ensure that interstate IGI-POP services and the physical connections between UTEX and AT&T Texas on which UTEX substantially relies are not disconnected, suspended, interrupted or rendered unuseable on account of AT&T Texas' efforts before a state commission or because any state commission order. The Commission must have the last word on whether AT&T Texas can put UTEX in the grave, because these are interstate communications.

**O. Other reasons preemption is required in WC Docket 09-134.**

With regard to the preemption case only (WC Docket 09-134), other aspects of the Award that the full Texas PUC seems intent on affirming militate in favor of allowing UTEX to finally secure a replacement agreement to the current 12 year old and long-expired agreement that has been so mangled through "interpretation" that it is wholly inconsistent with current law and completely unworkable. While most of the attention in the case revolved around whether and when access charges are due under the current ICA for the VoIP services and applications traffic UTEX delivered to AT&T Texas, other significant rulings (and non-rulings) in the Award

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<sup>60</sup> *Core Mandamus Order* ¶ 17-22, 24 FCC Rcd at 6483-6486.

merit attention because they further highlight UTEX’s legitimate need to secure an up-to-date ICA that reflects current (Federal) law.

1. TPUC “interpretation” eliminates UTEX’s § 251(c)(2) right to interconnect its signaling network with AT&T Texas signaling network.

The Arbitrator ruled that the FCC’s *Triennial Review Order*<sup>61</sup> and *Triennial Review Remand Order*<sup>62</sup> removed UTEX’s contractual right to interconnect as a peer with AT&T Texas SS7 network via B-Links for the exchange of traffic. The Award adopted AT&T Texas’ argument that the Commission’s decision to remove signaling from the list of § 251(c)(3) UNEs also eliminated the right to obtain cost-based interconnection with ILECs’ signaling network under § 251(c)(2). The Award rejected UTEX’s observation that the Commission specifically stated that the *TRO* and *TRRO* did not change the law with regard to § 251(c)(2) interconnection and did not change rule 51.305(a)(v) when interconnection – as opposed to UNEs – is involved. The Texas PUC ignores Commission positions about what the FCC did and did not do. *See*, Brief for *Amicus Curiae* FCC in Support of Defendants-Appellants and Reversal of the District Court, *Michigan Bell Telephone Company d/b/a AT&T Michigan v. Covad Communications Company et al.*, Nos. 07-2469 & 07-2473 (6th Cir.) (Filed April 3, 2009)<sup>63</sup>

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<sup>61</sup>Report and Order and Order on Remand and Further Notice of Proposed Rulemaking; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978,(rel. 2003) (“*Triennial Review Order*” or “*TRO*”), vacated in part and remanded, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”).

<sup>62</sup>Order on Remand, *In the Matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, FCC 04-290, 20 FCC Rcd 2533, 2005 FCC LEXIS 912 (2005) (“*Triennial Review Remand Order*” or “*TRRO*”).

<sup>63</sup>*See especially* pp. 14-15 “Section 251(c)(2) and 251(c)(3) are independent statutory obligations that serve different purposes. The cost-based UNEs that incumbent LECs must provide under section 251(c)(3) are designed to enable competitive carriers to assemble their own telecommunications networks by combining elements from various sources (including the incumbent LECs), whereas the interconnection that the incumbent LEC must provide under section 251(c)(2) simply enables a competitive carrier to connect its network with the network of the incumbent LEC to exchange traffic and complete calls. The FCC thus reasonably determined in the TRRO both that competitive LECs are not impaired without access to entrance facilities (thus relieving them of the obligation to provide those facilities to competitive carriers as UNEs under section 251(c)(3)) and that this determination had no

As a result of the Award, and until there is a replacement agreement, when UTEX operates its own STPs used to exchange telephone exchange service and exchange access traffic with AT&T Texas it will be forced to “purchase” signaling from AT&T Texas from AT&T Texas’ interstate access tariff, and pay rates inconsistent with § 252(d)(1). If the Commission does not grant preemption, UTEX may be required to suffer this gross violation of federal law for quite some time, since the Texas PUC has shown no inclination to ever move the arbitration forward.

2. UTEX still does not have *TRO* and *TRRO* compliant UNE terms.

According to AT&T Texas, the current agreement does not allow UTEX to preorder, order and then obtain DSL-capable loops or DS3 loops in eligible wire centers. Both of these loop types remain on the nationwide list to this day.

The Texas PUC of course bent over backwards to put in amended contracts that cut back on the UNEs as soon as possible after *TRRO*. But they would not give UTEX amended language adding sufficient terms for the two UNEs AT&T Texas refuses to provide. The Texas PUC instead told UTEX to take the matter up in the arbitration, which it then abated only a few weeks thereafter. As a result, UTEX still does not have UNE terms that comport with the Commission’s rules.

### **Conclusion**

The Texas Commission will not allow UTEX to arbitrate a replacement agreement but it is more than happy to “interpret” the current agreement in ways that result in duties and obligations that are absolutely contrary to current law, are anticompetitive and render the contract unsustainable – often by holding the agreement does not mean what it plainly says. As a

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effect on the incumbent LECs’ independent obligation to provide interconnection under section 251(c)(2).” (notes omitted)

result the current ICA is wholly one-sided in AT&T Texas' favor and completely unworkable. AT&T Texas has been delegated the function of deciding what the contract says and means and the Texas PUC then retroactively approves AT&T Texas' policy *du jour*. This Commission must allow UTEX to move forward and arbitrate a new agreement, before the Commission, so UTEX can finally – after more than seven years – secure terms that truly reflect and incorporate the provisions of §§ 251 and 252 and the Commission's current rules.

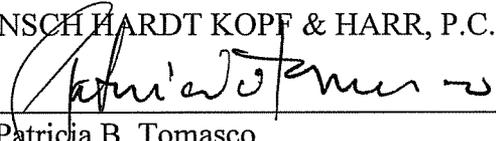
The FCC must preempt in WC Docket 09-134 and let this arbitration move forward. It should also render a decision on rehearing in WC Docket 07-256, and grant the request for forbearance. In the regulatory vacuum at the Federal level, Texas has decided to impose access charges on VoIP services and applications. This Commission, not the state commissions, must be the body that decides the intercarrier compensation result.

**Prayer**

WHEREFORE, PREMISES CONSIDERED, UTEX Communications Corporation requests that the Commission grant its Petition for Preemption and that UTEX have such other and further relief as is just and equitable.

Respectfully submitted,

MUNSCH HARDT KOPF & HARR, P.C.

By: 

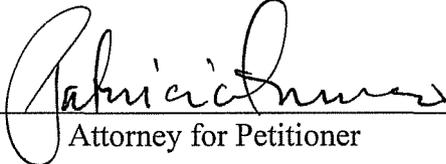
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been sent by first-class, United States mail, postage prepaid, or via electronic mail to all parties on the attached Service List on this the 23<sup>rd</sup> day of September, 2009.

  
\_\_\_\_\_  
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