

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

**UTEX Communications Corporation,**            )  
**Petition for Preemption**                    )  
  )  
  )

**WC Docket No. 09-134**

**UTEX COMMUNICATIONS CORPORATION'S  
RENEWED PETITION FOR PREEMPTION**

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July 13, 2010



*arbitration within nine months of the date of release of this order, we invite the parties to re-file a request for preemption at that time, based on those new facts.* emphasis added)

2. It is now more than “nine months of the date of release of this order”<sup>3</sup> and the PUCT has failed to resolve this arbitration; indeed the PUCT failed even to produce a “proposal for award” and will not do so until at least July 23, 2010.<sup>4</sup> That proposal for award portends a tentative rather than a final set of determinations.<sup>5</sup> The PUCT will not resolve this Arbitration by the Bureau’s nine month deadline, or for some undetermined time thereafter. UTEX therefore accepts the invitation in the Wireline Competition Bureau’s order, and hereby does “re-file a request for preemption ... based on those new facts.”

#### **B. UTEX is Irreparably Harmed by the Delay**

3. The PUCT's inexcusable delay irreparably harms UTEX. First, to forestall the threatened termination by AT&T, UTEX filed for bankruptcy protection on March 3, 2010. Specifically, AT&T threatened to disconnect all interconnection and cease exchanging traffic with UTEX unless UTEX paid AT&T approximately \$3.8 million in access charges related to AT&T's termination of ESP (VoIP) traffic. This charge emanates from a PUCT ruling in favor and at the behest of AT&T that access charges should apply to ISP-originated VoIP calls and were recoverable from UTEX, notwithstanding that UTEX was and still is acting purely as an LEC and does not provide or support any telephone toll service, rendering all of the traffic

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<sup>3</sup> July 9, 2010 marked the completion of the ninth month after the date of the order.

<sup>4</sup> On July 8, 2010 the PUCT Arbitrators issued a "Notice Regarding Proposal for Award" stating that they will "file the Proposal for Award or a status update no later than July 23, 2010." The Arbitrators were fully aware that the nine month deadline expired on July 9, 2010 and that UTEX expressly refused to extend it. See, e.g. PUCT Docket 26381, Order No. 32, pp. 3-4 (March 25, 2010) ("In its Motion to Unabate Docket, UTEX requested that 'the Commission immediately unabate this case and arrange for resumed processing so as to conclude all determinations within 9 months of October 9, 2009, i.e., by July 9, 2010. ... UTEX has not agreed to extend other deadlines for this proceeding.'). See Tomasco Aff. Exh. 1 and 2

<sup>5</sup> See PUCT Proc. R. 21.95(t) (Providing for a "proposal for award" to which the parties submit exceptions to the Arbitrators within 10 working days and that the Arbitrators are to "endeavor to issue the Arbitration Award within ten working days of the receipt of parties' Exceptions to the Proposal for Award.").

between AT&T and UTEX subject exclusively to § 251(b)(5) as a matter of law.<sup>6</sup> UTEX can propose a plan of reorganization that is based on an access recovery model or one that comports with the Telecommunications Act of 1996 – that adheres to the maxim that IP-based communications are exempt from the access regime. Until the PUC decides how UTEX can lawfully operate without the threat of AT&T charging access that UTEX did not collect from its customers, UTEX cannot prepare a feasible plan of reorganization or have any possibility of emerging from bankruptcy.

4. What the PUCT has done through delaying the arbitration of a new ICA for more than 8 years (under PUCT Docket No. 26381, originally filed by UTEX in July 2002) yet acceding to AT&T's schedule for assessing access charges under the existing ICA (under PUCT Docket NO. 33323 filed in October 2006, with an Arbitration Award issued in June 2009) is to prevent UTEX from discerning and then deploying a feasible business plan. Rather than implementing the pro-competitive construct of the Telecommunications Act of 1996, the PUCT, with the tacit blessing of the FCC, poses as an insurmountable hurdle to deploying new-

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<sup>6</sup> This Commission's failure to clarify the appropriate intercarrier compensation for VoIP traffic that is not merely "IP-in-the-Middle" — despite multiple opportunities to do so, including UTEX's (FeatureGroup IP) petition for forbearance and in this very proceeding — compounds this case. The uncertainty and regulatory void has allowed the ILECs and ILEC-friendly state commissions to impose their anticompetitive will, to the detriment of the VoIP industry and the CLECs that try to provide telephone exchange service to VoIP providers. Federal courts repeatedly castigate the Commission for its inaction. *See, e.g., PAETEC Communs. v. CommPartners, LLC*, Civil Action No. 08-0397 (JR), Memorandum Order, 2010 U.S. Dist. LEXIS 51926 (D.D.C. Feb. 18, 2010) (request for interlocutory appeal pending before D.C. Circuit; presently under bankruptcy stay with motion to lift stay pending) ["The telecommunications industry has been 'raging for years' with debate about these arguments, Pl. Reply at 7. The FCC, which has had the controversy on its docket for a decade, has been unable to decide it."]; *Manhattan Telecomms. Corp. v. Global Naps, Inc.*, 08 Civ. 3829 (JSR), Findings of Fact and Conclusions of Law, 2010 U.S. Dist. LEXIS 32315 \*9-\*10 (S.D.N.Y., Mar. 31, 2010) ["Nor is the nonjusticiability strand implicated; the Court is not 'undermin[ing] agency rate-making authority' — the FCC, while fully competent to address this issue, has failed to exercise its authority but remains free (and is encouraged) to do so — but is merely filling the gap left by the FCC's pronouncements."].

technology voice functionality through the regulatory vacuum surrounding IP to PSTN and PSTN to IP compensation. UTEX cannot wait any longer.<sup>7</sup>

## II. REQUEST FOR PREEMPTION

5. A key portion of the FCC ruling returning the UTEX Arbitration to the Texas PUC is an acknowledgment that UTEX has an express right to have its issues decided under existing law, and in a timely manner. UTEX, during the unlawful multi-year delay, has attempted to obtain absolute certainty with respect to existing law in its Forbearance Request to the FCC.<sup>8</sup> The Commission refused to grant UTEX's (FeatureGroup IP's) Forbearance Request regarding "voice-embedded Internet communications." The holding that granting for forbearance would "create" a void necessarily means there is not presently a void in the compensation mechanisms that apply when two LECs mutually exchange telecommunications. The FCC's ruling inherently finds, therefore, that there is a present "rule" with regard to IP-Enabled traffic, even though the Commission has not articulated what that rule is. The Commission assiduously avoids advising the industry whether voice-embedded Internet traffic exchanged between LECs is subject to Section 251(b)(5) or Section 251(g) of the Act, stating that FeatureGroup IP was somehow seeking a declaratory ruling through its Forbearance

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<sup>7</sup> Part of why UTEX cannot wait any longer is that the PUCT, UTEX believes in error, essentially ruled in Docket 33323 that UTEX has **waived any right to have the current law apply to VoIP traffic and that UTEX had voluntarily agreed** when executing the original ICA in 2000, to pay AT&T for Interconnection Charges under certain circumstances. Specifically, the PUCT ruled that calls are to be rated using "CPN" and AT&T gets to assess access if there is not "valid" CPN according to an unilaterally developed AT&T *post-hoc* "standard." In this vein, the PUCT ruled that calls without a "geographic" 10 digit LERG-active number in the CPN parameter are inherently illicit if they comprise more than 10% of total traffic, thus making all "500" number services and all 8YY CPN based calls illicit. In other words, AT&T successfully imposed the "Missoula" interim result favored by ILECs but that this Commission did not adopt. After some extremely odd procedural reversals of this ruling, and a steadfast refusal to clarify the ruling in any way, the PUCT allowed AT&T to insist that payment be made. UTEX then sought and is now operating under bankruptcy protection, but cannot emerge with a plan until a new ICA is arbitrated.

<sup>8</sup> See UTEX Disclosure Statement, Tomasco Aff. Exh. 3.

Petition.<sup>9</sup> At its core, and in light of subsequent events, what FeatureGroup IP sought cannot in any way be characterized as a "declaratory ruling." Instead, FeatureGroup IP faces insolvency and a regulatory stonewall because the FCC cannot answer a simple regulatory question posed to it, and the headstones of CLECs and internet based innovators continue to multiply resulting in a duopoly of cable and phone companies with a paucity of the competition that Congress envisioned when it passed the Telecommunications Act of 1996. The Commission must preempt the PUC.

6. If the Commission chooses again to not preempt the PUCT, the minimum acceptable outcome consistent with the Commission's charge is to determine the regulatory issues that will inform the outcome at the PUCT so that these threshold issues are uniform throughout the country and will prevent additional, innovation-numbing litigation that pervades the industry today. The following are fundamental issues in the Arbitration which have now not been decided by the PUCT in a timely manner that must be resolved in this Renewed Petition:

- a. Does UTEX have a right to interconnect and mutually exchange traffic as a LEC under the Act when at least one but possibly more Information Service Providers ("ISP") are involved in a call?
- b. When the ISP purchases LEC service from UTEX for origination and termination of traffic wholly within the LATA, is the service provided by UTEX "Telephone Exchange Service" or is it "Exchange Access Service"?
- c. Are any of the following applications or service providers who engage in "voice-embedded Internet Services" deemed to be an IXC and not an ISP, and thus for interconnection buy exchange access under the Section 251(g) "carve-out"?

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<sup>9</sup> The FCC then opines that there is no statutory deadline for such a declaratory ruling and that it continues to work on an six year old industry wide solution for intercarrier compensation that also reforms Universal Service. Meanwhile, during the delay, AT&T picks up billions of dollars in high cost Universal Service subsidies through its affiliate wireless carriers and has no obligation tied to these dollars to actually make an investment in the areas that it receives a subsidy for. In fact AT&T employees continue to enjoy board seats controlling the current USAC plan administration while applications by new service providers to receive subsidy based upon its actual investment sit dormant for years at the FCC. *See Tomasco Aff. Exh. 4.*

- (i) Cable Digital Voice (Time Warner Cable and Comcast Cable are examples)
  - (ii) Over the Top residential Interconnected VOIP (such as Vonage)
  - (iii) Dial-up and Dial-out ISPs (such as those served by Core)
  - (iv) Peer to peer interconnected VOIP (OOMA)
  - (v) Peer to Peer non-interconnected VOIP (Skype)
  - (vi) Application based non-interconnected VOIP (Google Voice, various conference call services, including those launched by IP Mobile devices)
  - (vii) Integrated Business System Services (Hosted IP based Business solutions like 8X8 and shared Broadsoft applications)
  - (viii) Stand Alone to large enterprise IP-PBX Products (products made by MiTel, SureTel, 3Com, Cisco and Avaya)
  - (ix) Enhanced Service Provider (Any entity that affirmatively claims the historical ESP Exemption)
  - (x) Disaster Recovery Based services
  - (xi) Any traffic which comes from a customer that (1) affirmatively claims the ESP exemption; or (2) affirmatively claims it is not a common carrier and that there is no IXC involved in the call.
- d. For all traffic deemed to be Section 251(b)(5) traffic, is \$0.0007 an appropriate rate in both directions?
- e. For all traffic deemed subject to Section 251(g), can UTEX require that all such traffic be passed as Jointly Provided Access traffic, or alternatively can AT&T require that UTEX – even though it is acting purely as an LEC – be liable for all such traffic to AT&T?
- f. Is “Signaling” part of Interconnection, and if so can UTEX require terms for the mutual exchange of signaling over “B-Links” without having to “buy” signaling from AT&T out of AT&T’s access tariffs?
- g. Can AT&T Texas avoid negotiating and arbitrating interconnection language enabling Session Initiation Protocol (“SIP”) Interconnection merely because it has refused to invest in any technology or equipment capable of passing traffic using SIP?
- (i) If Yes, should AT&T then be allowed to require a call that was originated using SIP call to also contain what AT&T considers “Valid CPN” through

interconnection even though a traditional phone number is not required in order for SIP to work?

- h. Is there a legal Validity Standard for CPN?
  - (i) Are 8YY phone numbers which are routable and are populated in the CPN field "invalid" uses of CPN?
  - (ii) Are 5YY phone numbers which are part of a UTEX telephone exchange service offering and are routable by UTEX "invalid" numbers for CPN?
  - (iii) Is a LERG based CPN a legally required proxy for the physical location of a caller who is then deemed to be originating a call from the PSTN even when it is in fact IP Originated?
- i. Can a 500 Number service offered by UTEX be designated as a Section 251(b)(5) service for IP Enabled providers who are not also IXC's?
  - (i) If so can AT&T block the use of UTEX's 500 numbers from working by refusing to load and route 500 numbers assigned to UTEX unless and until UTEX subscribes to an AT&T Tariff?
  - (ii) If not, can AT&T block the use of UTEX's 500 numbers from working by refusing to load and route 500 numbers assigned to UTEX unless and until UTEX subscribes to AT&T's Access Tariff, or should the service be a jointly provided Section 251(g) service?
- j. For all Section 251(g) traffic which involves one or potentially more "misroutes" by an IXC, can UTEX propose and require language so that the parties can identify the misrouting party, or, in the alternative, can AT&T merely bill UTEX?
  - (i) If AT&T can bill UTEX, what records must be provided so UTEX can then bill the offending IXC?
- k. Is UTEX prohibited from providing transit service to other carriers, leaving the incumbent as the only anticompetitive alternative?
  - (i) Can UTEX offer a carrier based interconnection utilizing SIP to other carriers as a competitive alternative to AT&T refusing to invest in SIP technology?
- l. Can UTEX require transit Interconnection to be part of an Arbitrated ICA with reciprocal compensation terms?
- m. Are LERG relevant telephone numbers required to be used by IP Enabled services who do not need them when UTEX creates a service for such potential customers?

### **III. CONCLUSION**

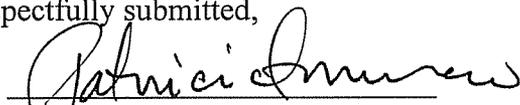
7. Despite the PUCT's promises to the Commission that it could and would adjudicate a new interconnection agreement in Docket No. 26381 after some 8 plus years, it is apparent that the PUCT is neither capable nor willing to do so. The PUCT moved with great alacrity in answering the complaints of AT&T under the existing ICA and imposing millions of dollars in charges against UTEX in Docket No. 33323. Thus, the impediments to the PUCT's ability to rule in Docket No. 26381 are not a lack of capacity or resources. At the end of the day, the Commission must find that the PUCT "failed to act" on UTEX's petition for arbitration of a replacement ICA and that none of the PUCT's protestations to the contrary can withstand serious scrutiny.

### **IV. PRAYER**

UTEX respectfully requests that the Commission grant UTEX's Renewed Petition for Preemption and that UTEX have such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

By:



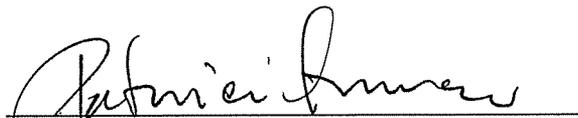
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**CERTIFICATE OF SERVICE**

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 13<sup>th</sup> day of July, 2010.

  
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