

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

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

**OPPOSITION OF AT&T INC. TO
RENEWED PETITION OF UTEX COMMUNICATIONS
CORPORATION FOR PREEMPTION UNDER 47 U.S.C § 252(E)**

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AT&T Services, Inc. (“AT&T”), on behalf of Southwestern Bell Telephone Company d/b/a AT&T Texas (“AT&T Texas”), and pursuant to 47 C.F.R. § 51.803(a)(3), respectfully submits this Response to the Renewed Petition of UTEX Communications Corporation (“UTEX”) for Preemption Under 47 U.S.C. § 252(e).

1. INTRODUCTION

A year ago, UTEX petitioned the Commission for preemption of the jurisdiction of the Public Utility Commission of Texas (“PUCT”) to hear its dispute with AT&T Texas regarding interconnection of UTEX’s services (including its alleged VoIP service) with AT&T pursuant to 47 U.S.C. § 252(e) on the ground that the PUCT, which had abated proceedings pending a decision by the Commission regarding the appropriate regulatory treatment of VoIP services, had “failed to act to carry out its responsibility” to arbitrate that dispute under section 252(b) of the Telecommunications Act of 1996 (the “1996 Act”). The Commission disagreed that the PUCT had failed to act, noting that the PUCT had filed an *ex parte* with the Commission expressing its willingness to complete the arbitration if the Commission indicated that the PUCT need not wait for the Commission to make nationwide rulings regarding the appropriate regulatory treatment of VoIP.¹ The Commission therefore denied UTEX’s petition, and advised the PUCT that it should not await Commission action addressing the regulatory treatment of VoIP before completing the arbitration of an interconnection agreement for UTEX with AT&T Texas.²

Since then, the PUCT has worked diligently to complete the arbitration. The arbitrators have reviewed more than 5700 pages of material and labored some 1600 hours on this matter.³ Moreover, they have hewed to an aggressive schedule to meet their statutory duty and have given notice that they expect

¹ In the Matter of Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas, WC Docket No. 09-134, Memorandum Opinion and Order, 24 FCC Rcd 12573, ¶ 9 (2009) (“*UTEX Order*”).

² *Id.* at 5-6.

³ Petition Of UTEX Communications Corporation For Arbitration Pursuant To Section 252(b) of the Federal Telecommunications Act And PURA For Rates, Terms, And Conditions Of Interconnection Agreement With Southwestern Bell Telephone Company, Notice Regarding Proposal for Award, Docket No. 26381 (July 23, 2010) at 1-2.

to issue a Proposal for Award, which signals the final stage of the arbitration, during the week of August 16, 2010.⁴ Notwithstanding the enormous time and effort expended by the PUCT to hear its dispute, UTEX asks the Commission to preempt because the PUCT purportedly has “failed to act.”

II. THE COMMISSION SHOULD DENY THE RENEWED PETITION BECAUSE THE PUCT ACTED TO CARRY OUT ITS RESPONSIBILITY.

UTEX seeks preemption of the PUCT’s jurisdiction over the arbitration for two reasons. First, UTEX alleges that the PUCT failed to comply with the FCC’s purported deadline for completing the arbitration within nine months of the effective date of the *UTEX Order*. Second, UTEX alleges it has been irreparably harmed by the PUCT’s delay.⁵ Neither of these claims has any merit and UTEX’s renewed petition thus should be rejected.

UTEX’s first claim fails because the Commission did not, as UTEX maintains, establish a deadline requiring the PUCT to issue a final ruling on UTEX’s arbitration claims within nine months of the Commission’s order denying UTEX’s 2009 petition for preemption.⁶ To the contrary, the Commission simply exhorted the PUCT to arbitrate the matter in a “timely manner.”

Notwithstanding our decision not to preempt, we make clear that the Act requires timely arbitration, even where there is uncertainty in the law because the Commission has not addressed a particular question. The PUCT has affirmatively indicated its desire to retain jurisdiction over the arbitration, and we believe that it is best-suited to resolve such matters. We emphasize that the PUCT should not wait for Commission action to move forward. Rather, the PUCT must proceed to arbitrate this interconnection agreement in a timely manner, relying on existing law. (Footnotes omitted).⁷

⁴ *Id.*, and Notice Regarding Proposal for Award (August 6, 2010) at 1.

⁵ In the Matter of Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas, Renewed Petition of UTEX Communications, Inc. WC Docket 09-134 (filed July 13, 2010) (“*UTEX Renewed Petition*”) at 1-2.

⁶ *UTEX Renewed Petition* at 1-2.

⁷ *UTEX Order* at 5-6.

To be sure, the Commission went on to add that, if the PUCT “fail[ed] to resolve this arbitration within nine months of the date of release of this order,” the parties would be free “to re-file a request for preemption at that time, based on those new facts.”⁸ But, far from establishing a fixed deadline for PUCT action, the Commission’s “invitation” to return after nine months if the PUCT failed to resolve the arbitration was intended to give the parties an opportunity to show “new facts” establishing that the PUCT had abdicated its responsibility to resolve the parties’ dispute. Here, the PUCT has diligently and expeditiously worked to consider and resolve the complex issues raised by UTEX’s request for arbitration, and is less than a week away from issuing a recommended decision on the matter. Against this background, UTEX’s bare allegation that the PUCT did not complete all action in the arbitration within nine months of the date of *UTEX Order* fails to establish that the PUCT has failed to carry out its obligations under section 252, as required to support its renewed request for preemption.

Wholly apart from its failure to make the requisite showing that the PUCT has failed to act, UTEX offers no good reason to uproot the Texas proceeding – which is on the verge of reaching a conclusion – and begin anew at the FCC. Doing so will not only waste all of the effort made in Texas to resolve this matter, it will also compound that waste with the duplicative efforts of the Commission and the parties.

UTEX’s claim that it has been irreparably harmed by the PUCT’s purported delay in completing action in this matter within nine months of the *UTEX Order* fares no better. In UTEX’s view, the PUCT is solely responsible for the delay in resolving this matter.⁹ In the *UTEX Order*, however, the Commission rejected the notion that the PUCT was to blame for delay in this matter, noting that UTEX’s litigation contributed greatly to the delay and that the PUCT had “act[ed] to complete its duties in a timely manner.”¹⁰ More generally, UTEX’s claim that preemption is an appropriate remedy for the purported injury it has suffered from delay is bizarre in the extreme. Preemption in this case will only result in still more

⁸ *Id.* at 6.

⁹ Renewed Petition at 2.

¹⁰ *UTEX Order* at 5.

delay by forcing the parties to start the arbitration anew in Washington at the Commission. This argument makes no sense at all and cannot support a renewed petition for preemption.

III. THE COMMISSION SHOULD NOT PREEMPT THE PUCT'S JURISDICTION UNDER SECTION 801(b) OF THE COMMISSION'S RULES.

47 C.F.R. § 801(b) provides that a State commission fails to act for purposes of 47 U.S.C. § 252(e)(5) if it “fails to respond, within a reasonable time, to . . . a request for arbitration . . . , or fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act.” If the Commission were to apply that rule literally, it could conclude that preemption is warranted here because the PUCT has not literally “complete[d]” the arbitration within the statutory time limit.¹¹ However, pursuant to section 1.3 of the Commission’s rules, the Commission may waive any of its rules upon a showing of “good cause.” Under the good cause standard, the Commission may exercise its discretion to waive a rule where the particular facts before it make strict compliance inconsistent with the public interest.¹² In doing so, the Commission may take into account considerations of hardship, equity, or the more effective implementation of overall policy on an individual basis.¹³ Thus, waiver of a Commission rule is appropriate when special circumstances warrant a deviation from the general rule, and such a decision will serve the public interest.¹⁴

¹¹ Given the history of this case, it is not altogether clear when the statutory period actually began or ended. The *UTEX Order*, for example, does not discuss the statutory period in this regard. Assuming, for the sake of argument, that it did begin on the effective date of the *UTEX Order* (and this is by no means certain), the nine months would have expired in July 2010. If this were to be the case, then the merits of a waiver of the statutory period pursuant to section 1.3 of the Commission’s rules are overwhelming.

¹² See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *Midwest Iowa. LLC Petition for Waiver of Sections 54.313(d) and 54.314(d) of the Commission’s Rules and Regulations*, CC Docket No. 96-45, Order, 19 FCC Rcd 10484, at ¶ 3 (2004).

¹³ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular*, 897 F.2d at 1166.

¹⁴ See *Northeast Cellular*, 897 F.2d at 1166. See also *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, GN Docket No. 00-185, et al., Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, at ¶¶ 45-47 (2002).

If there was ever good cause for not strictly enforcing a Commission rule, there is good cause here. Apart from the fact that the PUCT did not “fail to act” – the operative language of the statute that section 801(b) of the Commission’s rules purports to implement – there is very good cause to allow the PUCT to proceed and complete the arbitration. As discussed above, preempting in this case would waste all of the time and resources that the PUCT and the parties have expended to resolve this highly complex matter, and force the parties to begin anew in Washington with all the attendant delay that a new proceeding will bring.

IV. CONCLUSION

The Commission should deny UTEX’s petition for preemption for the reasons set forth above and permit the PUCT to finish the arbitration.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Toyin Harris, do hereby certify that on this 12th of August, 2010 a copy of the foregoing "*Petition of UTEX Communications Corporation, Pursuant to Section 252 (e) (5) of the Communication Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*" of AT&T Inc." was served via U.S. first class mail, postage paid, to the parties listed below:

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