

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

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

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

TO THE HONORABLE FEDERAL COMMUNICATIONS COMMISSION:

UTEX Communications Corporation (“UTEX”) hereby respectfully submits these Comments¹ regarding its renewed request, pursuant to Section 252(e) of the Telecommunications Act (the “Act”), 47 U.S.C. § 252(e)(5), and Rule 51.803 of the Commission’s rules, 47 C.F.R. § 51.803, that the Commission preempt the jurisdiction of the Public Utility Commission of Texas (the “PUCT”) and arbitrate the pending interconnection disputes between UTEX and Southwestern Bell Telephone Company d/b/a AT&T Texas f/k/a SBC Texas (“AT&T”).²

I. INTRODUCTION

1. Applicable law absolutely requires that the Commission enter an order preempting the PUCT no later than 90 days after the renewed request, or by October 11, 2010.

2. Only PUCT has so far replied to the renewed petition. While PUCT details all the work done,³ it nonetheless has “failed to act” as defined in the Act and Commission rules.⁴ First, the PUCT unilaterally and without explanation delayed action on the arbitration for over two

¹ See, Public Notice, Pleading Cycle Established for Comments on UTEX Communications Corporation’s Renewed Petition for Preemption of the Jurisdiction of the Public Utility Commission if Texas Pursuant to Section 252(e)(5) of the Communications Act, DA 10-1398, WC Docket No. 09-134 (rel. July 28, 2010) (“*Comment Cycle Public Notice*”).

² UTEX will refer to the ILEC involved in this matter using its current d/b/a: “AT&T Texas” although for most of the time the proceeding below was active the ILEC went by “SWB” or “SBC Texas.”

³ PUCT Response, p. 6.

⁴ See, e.g., PUCT Response, p. 6 [“It has been only a bit more than nine months since the Commission issued its order ...”].

months after the October 9, 2009 *Order Denying Preemption*. PUCT's Response implies that it immediately swung into action to begin processing Docket 26381 ever since the October 9, 2009 *Order Denying Preemption*. PUCT's Response observes on page 3 that during "the PUCT's next open meeting after the Commission issued its October 2009 order, the PUCT discussed that order." What the PUCT fails to explain is that this open meeting occurred almost two whole precious weeks later. As a result of its discussion, PUCT voted to *not* unabate Docket 26381. Instead, the PUCT decided to keep the case on hold in lieu of a rulemaking on VoIP, initiating a wholly separate proceeding (Docket 37614). PUCT staff waited until November 10, 2009 – two whole months after the *Order Denying Preemption* – before it issued a request for comments, with initial comments due December 2, 2009 and reply comments due December 16, 2009. The PUCT's own staff described the decision made at the "next open meeting after the Commission issued its October 2009 order":

At the PUCT Open Meeting of October 22, 2009, the Commissioners discussed the UTEX Preemption Order, and concluded that a rulemaking proceeding preceding the unabatement of the pending arbitration would allow for broad industry participation in the determination of the regulatory treatment of VoIP services and would permit the most efficient completion of the arbitration, and directed Staff to go forward with a rulemaking. The Commissioners also expressed concern about the short time available to conclude both the rulemaking and the arbitration under the terms of the FCC's order.⁵

As is clear from this discussion, PUCT delayed processing Docket 26381 in favor of doing a rulemaking, and did not intend to reboot the arbitration until it completed a rulemaking.⁶ The rulemaking entered with a bang – and a host of commenters⁷ went far afield from the matters

⁵ PUCT Project No. 37614, Request For Comment, Rulemaking Related to the Regulatory Treatment of Voice Over Internet Protocol Services, pp. 2-3 (Nov. 10, 2009).

⁶ UTEX will not burden the record with a dissertation regarding the serious legal problems with this approach under § 252, but does not waive the right to do so later if an when it is necessary.

⁷ UTEX did not participate or submit comments, although an affiliate that provides CMRS service, including broadband, did.

before PUCT in Docket 26381, including a plea that PUCT begin to regulate “interconnected VoIP” providers like Vonage notwithstanding this Commission’s preemption order regarding that company and the state of Minnesota. Ultimately, however, Docket 37614 functionally closed on April 9, 2010 with a whimper and no substantive action or rule. Meanwhile, as noted by PUCT in its Response, UTEX tired of the continued delay and filed a Motion to Unabate on November 17, 2009. In that Motion, UTEX made plain its position that PUCT could not lawfully “arbitrate through rulemaking” and insisted that PUCT had to unabate and then “arbitrate through arbitration” *in Docket 26381*. PUCT waited an entire month, and then finally, on December 17, 2009, entered its Order Unabating Docket 26381.

3. The PUCT did nothing between October 9, 2009 and December 17, 2009 – for two months and six days, almost one-fourth of the nine months prescribed by the Commission – before it began to process Docket 26381. This inexcusable delay is a prime reason the PUCT failed to “complete the arbitration” by the nine-month deadline.

4. On July 23, 2010, the PUCT issued a Notice by the state level arbitrators stating that they “expect to complete the proposal for award by August 13, 2010, and will file another status report by August 6, 2010 if the award has not been issued by that date.”⁸ The bottom of the first page in the *Comment Cycle Public Notice* references this representation. The state level arbitrators did file another status report on August 6, 2010, and it is attached as **Exhibit “A”** hereto. The PUCT’s proposal for award expected issue date has slipped by a week, and the state-level arbitrators now “expect to issue it during the week of August 16, 2010.”

5. A careful review of the rest of PUCT’s Response reveals that the proposal for award – regardless of how much longer it may be before (and even if) it is ever issued – will still

⁸ PUCT Response, p. 5. *See also*, Exhibit B to PUCT Response.

not complete the arbitration. *Id.* p. 6. The proposal for award is merely a proposal. After that come exceptions and replies, and then a final award, to which the parties can then object by appealing to the full PUCT in the form of a motion for reconsideration. After all of that is done, there is the process of devising a conforming contract which must then go back to the arbitrators and ultimately the full PUCT for review and approval under § 252(e), with up to another 30 days for them to approve or reject. In the past, the PUCT has reversed itself on a substantive ruling, rejected the conforming terms under § 252(e)(2)(B), and remanded to the arbitrators during this phase for functional rehearing, with the result being that the whole matter is delayed by months. Any state-level action must be measured in practical terms by when approval of a replacement interconnection agreement is likely, and that event is very far down the road, even according to PUCT.

6. But ultimately, there is no discretion here; PUCT's clock has already expired and the game is over. Any subsequent developments are mere nullities as a matter of law.

II. ARGUMENT AND AUTHORITIES

A. No Discretion Not to Preempt

7. PUCT, despite having abated the proceeding for eight years after its inception, now requests that the Commission exercise some form of perceived discretion to not abide by the plain words of the Act and applicable rules, and choose to not preempt because "the PUCT arbitrators are endeavoring to issue a proposal for award ... as soon as possible."

8. However, the Act and the rule do not confer any discretion to not preempt if one of the triggers apply. There is absolutely no dispute that PUCT missed the nine month deadline. There is no dispute that UTEX did not explicitly or implicitly waive its rights under the Act to insist that the PUCT act by that deadline. PUCT blithely argues that it should nonetheless be allowed to proceed despite the fact that it is out of time as a matter of law.

9. There is no choice or discretion. The Act and rule say that the Commission ***SHALL*** preempt under these circumstances; it does not say that it “may” or “can.”

10. Section 252(e)(5) provides

Commission to act if state will not act.--If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified⁹ (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission. (emphasis added)

11. The Commission's rules are to the same effect, if not clearer. Section 51.801 of the rules says:

51.801. Commission action upon a state commission's failure to act to carry out its responsibility under section 252 of the Act.

(a) If a state commission fails to act to carry out its responsibility under section 252 of the Act in any proceeding or other matter under section 252 of the Act, the Commission shall issue an order preempting the state commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the state commission under section 252 of the Act with respect to the proceeding or matter and shall act for the state commission.

(b) For purposes of this part, a state commission fails to act if the state commission fails to respond, within a reasonable time, to a request for mediation, as provided for in section 252(a)(2) of the Act, or for a request for arbitration, as provided for in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act.¹⁰ (emphasis added)

12. Rule 51.803 recognizes the mandatory nature of the Commission's duty to preempt if one of the triggers is met, as is the case here:

(d) The Commission shall issue an order determining whether it is required to preempt the state commission's jurisdiction of a proceeding or matter

⁹ The Commission was “notified” of PUCT's failure to act on July 13, 2010. Accordingly, the deadline to issue the preemption order is October 11, 2010.

¹⁰For purposes of this proceeding, the “the time limits established in section 252(b)(4)(C) of the Act” expired on July 9, 2010, which marked the end of “nine months of the date of release of” of the Memorandum Opinion and Order, *In the Matter of Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(4) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, DA 09-2205, 24 FCC Rcd 12573 (re. Oct. 9, 2009).

within 90 days after being notified under paragraph (a) of this section or taking notice under paragraph (c) of this section of a state commission's failure to carry out its responsibilities under section 252 of the Act.

13. There is and can be no dispute that PUCT has "fail[ed] to complete an arbitration within the time limits" They admit the state level arbitration was not finished on July 9, 2010, and they go on to further estimate that it will take at least several more months. Because PUCT has failed to timely complete the arbitration, the Commission has no choice in the matter and is "required" to preempt and "assume the responsibility of" PUCT "under section 252 of the Act with respect to the proceeding or matter and shall act for" PUCT.

B. PUCT Cannot Complete an Arbitration Under the Act

14. In order to "complete an arbitration" the state commission must do more than issue some award within nine months and as a result prescribe any terms it wants. Again, there is no wiggle room. The Act requires that the state commission must "resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c)."¹¹ Subsection (c) contains the laundry list of topics and then guides the substantive dictates for each of them:

(c) STANDARDS FOR ARBITRATION.--In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission *shall*--

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

15. In other words, the state commission has to actually resolve the open issues, and it must obey the substantive requirements concerning each of them insofar as they are addressed

¹¹ See § 252(b)(4)(C).

within §§ 251, 252 or any of the Commission's rules. Further, the PUCT must establish a schedule for implementation, and all of this must have been completed by the nine-month deadline. Because the state commission failed to do any of these things, the FCC is required to preempt and assume the state commission's statutory role.

16. PUCT, thus, was required to resolve the open issues by the nine-month deadline.

Those open issues included, *inter alia*:

- a. UTEX's desire and right to business certainty; in particular UTEX has from the beginning continually and consistently presented and prosecuted the key question whether it is a "peer" LEC with AT&T or if instead whether UTEX for some reason has to "pay" AT&T or be a "customer" of AT&T in order to be able to compete with AT&T. Specifically,
 - i. given the operational requirement that the two networks exchange call control/signaling information in order for a call session to work, is UTEX required to "buy" signaling from AT&T – and even potentially at access tariff rates – while AT&T has no corresponding duty? That is not a peer relationship.
 - ii. AT&T has from the beginning insisted that much of UTEX's customer traffic is subject to access charges, but it has also refused to treat UTEX as a joint access provider. Instead, AT&T wants to impose access and send the bill to UTEX. That is not a peer relationship.
 - iii. AT&T refuses to route certain originating traffic on its network addressed to UTEX's numbering resources unless UTEX pays access-based nonrecurring and recurring charges to AT&T. That is not a peer relationship and it turns FCC Rule 51.703(b) on its head.
- b. UTEX's right to provide wholesale services to New Technology customers; and
- c. clear and unambiguous terms regarding the parties' respective obligations when it comes to
 - i. interconnection between the two parties' networks that will allow the exchange of telecommunications – both "bearer" and "signaling,
 - ii. the information that should be signaled,
 - iii. how and where to route specific kinds of calls,
 - iv. how calls will be rated as between the two LECs,
 - v. how calls will be billed, and specific and detailed call flow diagrams that spell out the foregoing in acute technical detail to eliminate all doubt and prevent subsequent disputes.

17. AT&T Texas assiduously avoids actually litigating most of these open issues, and cajoles the PUCT not to resolve them. And, with all due respect to PUCT and its arbitrators, the PUCT is under considerable pressure to not actually rule on the open issues. UTEX predicts that – if and when an award issues – the award will not actually resolve the open issues, and the PUCT will justify the failure with a variety of excuses. AT&T and the state arbitrators adopted from a “contract up” approach rather than an “issues down” approach, notwithstanding the Acts fairly clear dictate that “issues” be resolve and then appropriate conditions (*e.g.* contract terms) be imposed to implement the issue resolution. As part of this scheme, both AT&T and the state level arbitrators have consistently required UTEX to largely justify its 2005 language and have not allowed UTEX to formally propose contract terms that address “current law” as expressed in several post-2005 Commission decisions.

C. PUCT Failed to Acknowledge Change of Law

18. UTEX was required to, and did, provide briefing on all of the post-2005 decisions that justify its attempt to “refresh” its now-dated 2005 language in light of post-2005, but still “current” law. UTEX’s pleading in response gave this list and discussion. Specifically, the following, among several potential other, decisions constituted changes of law justifying UTEX’s right to bring forward terms other than what was presented in the Second Amended Petition, especially when the cumulative effect of all of them is taken into account:

- Declaratory Ruling and R&O, *In the Matter of Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket 01-92, FCC 05-42, 20 FCC Rcd 4855 (Rel. Feb. 24 2005)
- R&O and FNPRM, *In the Matter of Rules and Regulations Implementing Minimum Customer Account Record Exchange Obligations on All Local and Interexchange Carriers*, CG Docket No. 02-386, FCC 05-29, 20 FCC Rcd 4560 (Rel. Feb. 25, 2005)

- 1st R&O and NPRM, *In the Matters of IP-Enabled Services, E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 04-36, WC Docket No. 05-196, FCC 05-116, 20 FCC Rcd 10245 (Rel. Jun. 2005)
- R&O and NPRM, *In the Matters of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided Via Fiber to the Premises, Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises, Consumer Protection in the Broadband Era*, CC Docket No. 02-33, CC Docket No. 01-337, CC Docket Nos. 95-20, 98-10, WC Docket No. 04-242, WC Docket No. 05-271, FCC 05-150, 20 FCC Rcd 14853 (Rel. Sept. 2005)
- Declaratory Ruling and Report and Order, *In the Matter of Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, FCC 06-79, 21 FCC Rcd 7290, (Rel. Jun. 2006)
- MO&O, *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection under Section 251 of the Communications Act of 1934, as amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket 06-55, DA07-709, 22 FCC Rcd 3513 (Rel. Mar., 2007)
- R&O and FNPRM, *In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, IP-Enabled Services*, CC Docket No. 96-115, WC Docket No. 04-36, FCC 07-22, 22 FCC Rcd 6927 (Rel. Apr, 2007)
- R&O, Declaratory Ruling, Order on Remand, 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, 22 FCC Rcd 19531 (Rel. Nov. 2007)

- R&O, 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 (Rel. Nov., 2007)
- R&O and FNPRM, *In the Matters of Local Number Portability Porting Interval and Validation Requirements, Telephone Number Portability*, WC Docket No. 07-244, CC Docket No. 95-116 , FCC 09-41, 24 FCC Rcd 6084 (Rel. May 2009)
- Order on Remand and R&O and Order and FNPRM, *High Cost Universal Service Reform, 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*, CC Docket Nos. 96-45, 99-200, 96-98, 01-92, 99-68, WC Docket Nos. 05-337, 03-109, 06-122, 04-36, FCC 08-262, 24 FCC Rcd 6475 (rel. Nov. 5, 2008) (“Core Mandamus Order”), *aff’d Core Communs., Inc. v. FCC*, No. 08-1365, 2010 U.S. App. LEXIS 693, (D.C. Cir. Jan. 12, 2010)
- R&O & FNPRM, *In the Matters of Local Number Portability Porting Interval and Validation Requirements, Telephone Number Portability*, WC Docket No. 07-244, CC Docket No. 95-116, FCC 09-41, 24 FCC Rcd 6084 (Rel. May 2009).

19. Each of these decisions address interconnection and intercarrier compensation between carriers, and they impose regulations on “interconnected VoIP” providers and their LEC or CMRS “numbering partners.” These precepts must be taken into account or at least considered by the PUCT because it impacts what should and should not be in the ICA. When the FCC attempted to “carve” Internet traffic out of § 251(b)(5) by saying it was not “local” (*ISP Declaratory Ruling*) and when it tried again by using § 251(g) (*ISP Remand Order*), AT&T asserted and PUCT agreed that was a change of law, since this Commission had previously treated that traffic as within § 251(b)(5). The FCC brought Internet traffic back in to § 251(b)(5)

in *Core Mandamus* and that is a change in law. ISP-bound traffic is now “§ 251(b)(5)” traffic when it was not before the decision. That is a material change of law.

20. In other cases, the FCC has directly required “interconnected VoIP providers” to support 911, and many of them now obtain that functionality from an entity other than the LEC or CMRS provider that supplies numbers or PSTN connectivity. This has a direct impact on the “911” terms that are necessary and appropriate as between UTEX and AT&T, since many of UTEX’s customers do not have a 911 responsibility or they separately fulfill 911 obligations through arrangements with an entity other than UTEX. The FCC has also changed the rules regarding “numbering” and LNP, and has increasingly recognized that many New Technology applications are employing numbers that have absolutely no relationship or connection to the rate center, or any geographic relevance at all. This has a tremendous impact on the legal and contract issues in this case.

21. A statutory change of law occurred during the considerable time Docket 26381 was abated. The American Recovery and Reinvestment Act (“ARRA”), P.L. 111-5 (2009), constituted a change of law in that it established a new set of Congressionally imposed policies that regulators must honor going forward. Specifically, but without limitation, § 6001(k) provides:

(1) Not later than 1 year after the date of enactment of this section, the Commission shall submit to the Committee on Energy and Commerce of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate, a report containing a national broadband plan.

(2) The national broadband plan required by this section shall seek to ensure that all people of the United States have access to broadband capability and shall establish benchmarks for meeting that goal. The plan shall also include—

- (A) an analysis of the most effective and efficient mechanisms for ensuring broadband access by all people of the United States;
- (B) a detailed strategy for achieving affordability of such service and maximum utilization of broadband infrastructure and service by the public;
- (C) an evaluation of the status of deployment of broadband service, including progress of projects supported by the grants made pursuant to this section; and
- (D) a plan for use of broadband infrastructure and services in advancing consumer welfare, civic participation, public safety and homeland security, community development, health care delivery, energy independence and efficiency, education, worker training, private sector investment, entrepreneurial activity, job creation and economic growth, and other national purposes.

22. In § 6001(k)(2) Congress firmly established significant policies the FCC must implement in its plan. Although the FCC has not completed that plan, it will do so before this arbitration is completed. Regulators cannot lawfully impose interconnection agreement terms and conditions that would directly frustrate or impede the Congressional policies. Subsection (k)(2)(B) includes considerations of affordability and maximum utilization for broadband, which UTEX asserts requires a cost basis for and maximum functionality and interoperability over any interconnection between networks that will directly or indirectly handle communications flowing from or to broadband users, including “voice” traffic that has one leg on the PSTN. This case is entirely about the intersection is between old and New Technology, and much of the New Technology traffic in issue in this case will come from or flow to broadband users. Under (k)(2)(D), broadband services need to advance consumer welfare, entrepreneurial activity and economic growth. The FCC has already taken comments on how to manage the transition from “TDM” to IP-based networks. AT&T’s comments effectively announced that the TDM PSTN is obsolete and must be phased out, but for some reason in this case wants to lock in “TDM” concepts and mandates and avoid dealing with anything IP.

23. Current law – the law in effect today – requires that all these developments and changes be taken into account when the ICA is being developed. ARRA is, therefore, a change in law directly applicable to both interconnection and UNEs. Any carrier to carrier agreement that purposefully stunts these things, either by design or as a result of a refusal to consider them – would not be lawful because it would frustrate Congressional policies and the current law as expressed in the Communications Act and FCC rules.

24. Even still, in very large part, the state level arbitrators – at AT&T's urging – refused to formally consider most of UTEX's 2010 "refresh language" even though UTEX consistently asserted that its 2005 language was not in fact consistent with "current law." UTEX has every reason to believe that PUCT will use this arbitrary, irrational and illegal "gotcha" as a means to not actually resolve the open issues by addressing and imposing "appropriate conditions" based on "current law." This will be yet another "failure to act."

D. ILECs' Request that PUCT Not Actually Interpret and Apply Current Law.

25. After the arbitration record closed in Docket 26381 and UTEX and AT&T completed briefing the issues, Verizon Southwest and Texas Statewide Telephone Cooperative, Inc. filed "*amicus curiae*" letters. While their language is coded,¹² it is plain they are asking PUCT to not decide the open issues based on current law. The plain goal is to thwart competitive LECs from providing wholesale services to new technologies all in an effort to protect access revenue and promote regulatory uncertainty. That Docket 26381 has devolved into yet another VoIP regulatory maelstrom and has yet to be resolved after eight years compels the conclusion that the PUCT has "failed to act."

¹²TSTCI, for example, asserted that TPUC should "explicitly recognize that no industry wide policy decisions are being made in the resolution of this arbitration." The problem, of course, is that "this arbitration" demands a decision that interprets and applies "current law" and would necessarily have some impact on the industry.

III. CONCLUSION

26. PUCT does not contest UTEX's showing that the state commission has failed to complete this arbitration within the time limits established in § 252(b)(4)(C) of the Act, using the original preemption order as the starting point for the nine-month timeline. Therefore, plainly, PUCT has failed to act as a matter of law, despite any efforts that may have been made. This Commission has no choice and no discretion but to follow the statute.

IV. PRAYER

27. UTEX respectfully requests that the Commission preempt the PUCT, and that UTEX have such other and further relief as is just and equitable.

Respectfully submitted,

By: /s/ Patricia B. Tomasco
Patricia Tomasco
Richard C. King, Jr.
Munsch Hardt Kopf & Harr, P.C.
401 Congress Avenue, Suite 3050
Austin, Texas 78701
512.391.6100 (telephone)
512.391.6149 (facsimile)

W. Scott McCollough
General Counsel
UTEX Communications Corp.
1250 S Capital of Texas Hwy,
Bldg 2-235
West Lake Hills, Texas 78746
512.888.1112 (telephone)
512.692.2522 (facsimile)

ATTORNEYS FOR UTEX
COMMUNICATIONS CORPORATION

SERVICE LIST

Julius Genachowski, Chairman
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554
Julius.Genachowski@fcc.gov

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554
Michael.Copps@fcc.gov

Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554
Robert.McDowell@fcc.gov

Lynne Hewitt Engledow
Federal Communications Commission
Wireline Competition Bureau, Pricing
Policy Division
445 12th Street, SW, Room 5-A361
Washington, D.C. 20554
Lynne.Engledow@fcc.gov

Jonathan Banks
David Cohen
Glenn Reynolds
607 14th Street, NW, Suite 400
Washington, D.C. 20005
Attorneys for USTA

Joseph E. Cosgrove, Jr.
Thomas J. Horn
Kathleen S. Hamilton
400 W. 15th Street, Suite 1030
Austin, TX 78701
Attorneys for AT&T Texas

John R. Hulme
PO Box 12548
Austin, TX 78711-2548
Attorney for PUCT

Best Copy and Printing, Inc.
Federal Communications Commission
445 12th Street, SW, Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

Commissioner Meredith Attwell Baker
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, D.C. 20554
Meredith.Baker@fcc.gov

Commissioner Mignon Clyburn
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554
Mignon.Clyburn@fcc.gov

Terri L. Hoskins
Jack S. Zinman
Gary L. Phillips
Paul K. Mancini
AT&T Inc.
1120 20th Street, NW
Washington, D.C. 20036

Theodore A. Livingston
Dennis G. Friedman
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
Attorneys for AT&T Texas

Richard A. Askoff
NECA
80 South Jefferson Rd.
Whippany, NJ 07981