

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

<b>UTEX Communications</b>	)	
<b>Corporation, Petition for</b>	)	<b>WC Docket No. 09-134</b>
<b>Preemption</b>	)	

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

TO THE HONORABLE FEDERAL COMMUNICATIONS COMMISSION:

UTEX COMMUNICATIONS CORPORATION (“UTEX”) hereby respectfully submits these Reply Comments<sup>1</sup> 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”).<sup>2</sup>

**I. REPLY COMMENTS**

**A. There is no discretion and no way to plausibly or lawfully find “good cause” to waive the statutory provisions requiring the Commission to preempt.**

1. UTEX demonstrated in its Renewed Petition and Initial Comments that 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. The statute and rules compel this result. AT&T’s suggestion that the Commission should issue a “good cause waiver” pursuant to § 1.3 of the rules is meritless. First, that rule does not allow the Commission to waive a statutory provision such as § 252(b)(4)(C). The Commission strictly interpreted that statutory provision in the *Local Competition Order*<sup>3</sup> to mean that if a state commission fails to complete an arbitration

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<sup>1</sup> 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*”).

<sup>2</sup> 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.”

<sup>3</sup> First 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, FCC

within the nine-month period it has failed to act. Rule 51.801(b) cannot be waived for good cause, since it already strictly interprets the statute as to what it takes for a state to meet its obligations under the Act. In order to “waive” the rule the Commission would have to hold in this case that its prior strict interpretation was “too loose” and wrong. All of this is plain from ¶ 1285 of the *Local Competition Order*:

1285. Regarding what constitutes a state’s “failure to act to carry out its responsibility under” section 252, the Commission was presented with numerous options. The Commission will not take an expansive view of what constitutes a state’s “failure to act.” Instead, the Commission interprets “failure to act” to mean a state’s failure to complete its duties in a timely manner. This would limit Commission action to instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C). The Commission will place the burden of proof on parties alleging that the state commission has failed to respond to a request for mediation or arbitration within a reasonable time frame. We note the work done by states to date in putting in place procedures and regulations governing arbitration and believe that states will meet their responsibilities and obligations under the 1996 Act.

2. AT&T and TPUC focus on the amount of time and resources that have been dedicated to the matter. They seem to believe that this work – and the entirety of the existing TPUC record – cannot be made available to the Commission as a means to reduce what remains to be done. AT&T suggests that “all of this work would be wasted” and thus there is some kind of “good cause” justifying allowing TPUC to proceed. There is no reason to jettison “all of this work.” UTEX suggests that an actual evidentiary hearing may not be required at the Commission at all. The parties’ various proposals (including each of their “refresh” contract proposals that the TPUC state arbitrators erroneously refused to allow), along with the testimony, cross-examination, exhibits, prior arguments and the briefing below can form the basis of the evidentiary and documentary record before the Commission. All the Commission would need to do is review the record, seek further briefing and argument if necessary and then render the determinations the TPUC no longer has jurisdiction to issue. While the TPUC has lost jurisdiction already, and any “order” would be a nullity, UTEX would not oppose admitting and considering any state-level arbitrator proposals (if they ever actually come out) as additional recommendations for the Commission to consider, so long as UTEX and AT&T could file

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96-325, ¶ 1285, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499 (1996) (emphasis added, notes and subsequent history omitted).

comments or further briefs addressing what they recommend. This would largely take the case as it stands today; the only functional difference is that the Commission, rather than the now "jurisdictionless" TPUC, would consider the "proposals" and oversee the final determinations and, ultimately, the contract terms that would be filed for approval under § 252(e), but before the Commission rather than the TPUC. *See* Rule 51.805.

3. AT&T and TPUC's suggestion that TPUC should be allowed to "complete" the arbitration because they have committed resources to it and will be done "soon" is simply not allowed by the statute and Commission's rules. Further, the most recent "report" from the state level arbitrators no longer even provides a completion date for the "Proposal for Award." There is simply no telling when, or if, there will ever be a state level resolution, even if one wrongly assumes that any further TPUC activity is not a total nullity given the expiration of the statutory deadline.

**B. "Voluntary negotiations" is ILEC euphemism for being "kind enough" to allow CLECs to choose the specific method (but not the timing) of their demise. It is past time for a regulator to actually regulate and apply the rule of law.**

4. Verizon's assertion on page 2 of its comments that "that any decision resolving the interconnection dispute between AT&T and UTEX is written narrowly enough to avoid chilling voluntary negotiations between carriers with respect to intercarrier compensation for VoIP" is ludicrous in the extreme. It should be plain by now that UTEX and AT&T cannot agree on this topic, because they take diametrically opposed positions. "Voluntary negotiations" is merely Verizon's euphemism for "make UTEX wait even longer than the 10 years that have already passed, and at some point it will capitulate to AT&T and the other ILECs' adhesion terms or simply die."

5. The bottom line is that there will not be any further negotiations unless and until some regulator, for once, requires AT&T and the rest of the ILEC industry to pay at least a modicum of attention to the existing law as expressed in the statute and current rules. They have absolutely no incentive to negotiate or make any concessions whatsoever, just as the Commission repeatedly emphasized in the *Local Competition Order*. To date few regulators have had the fortitude to apply the rule of law; instead they simply stand by and let the ILECs do what ever they want as a means "keeping [their] regional dominance," so as to "thwart CLECs' attempt to compete" and "keep them out" through "flagrant resistance to the network sharing

requirements of the 1996 Act.”<sup>4</sup> It is far past time for this Commission to apply the rule of law, particularly where, as here, it is plain the state commission is more interested in the role of politics with the result that the politically powerful AT&T is the functional regulator of all things telecom in Texas. AT&T cares nothing about the Act or the rules, for no one is making them adhere to any of it in Texas. Verizon, of course, has no problem with that result, for it is dominant in other parts of the country and benefits just as much from this state of affairs.

6. AT&T's total refusal to negotiate anything regarding intercarrier compensation is best illustrated by a communication from AT&T's counsel to UTEX's counsel responding to a 2010 request by UTEX that the parties meet and negotiate in good faith as required by the Act and rules. UTEX's request is Exhibit A to these Reply Comments, and the AT&T communication flatly refusing to negotiate over intercarrier compensation is attached as Exhibit B hereto. While Verizon implies that ILECs are willing to actually negotiate in good faith over compensation, AT&T's position is obviously different. AT&T's counsel directly stated that “[y]our suggestion that the parties need to negotiate compensation issues is misconceived. *AT&T Texas' position on appropriate compensation for traffic must be applied to all CLECs, and AT&T Texas will not negotiate a special compensation system for UTEX.*” (emphasis added). The FCC know knows “how that negotiation thing is going for ya” in AT&T territory.

7. Verizon's suggestion that any determinations should be expressly held to be applicable only to AT&T and UTEX (and somehow not precedent) is misplaced. Much of their concern is already embedded in the fact that this is a bilateral arbitration that will bind only AT&T and UTEX to the resulting terms. Further, any Commission determinations will be based on existing law, including the Commission's current rules. If and when new rules relating to intercarrier compensation are promulgated that will – perhaps – constitute a change of law. On the other hand, since the parties have not actually agreed to any terms “without regard to the standards set forth in subsections (b) and (c) of section 251” pursuant to § 252(a)(1) all such determinations must actually implement existing law as expressed in the Act and Commission rules.

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<sup>4</sup> *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 167 L. Ed. 2d 929, 2007 U.S. LEXIS 5901 \*\*30-\*\*44 (2007).

**C. Everyone agrees it is way past time to resolve the access charge issues, but then most never agree that “this” is the proceeding to do so.**

8. Every commenting party except TPUC and AT&T agreed that it is time to finally resolve the intercarrier compensation issues surrounding VoIP. But, as usual, several say “this” is not the case for that to happen. And, as usual, every one has their own opinion on how the issue should be resolved. ITTA asks on page 5 that for the Commission to “order that all VoIP traffic terminating to the PSTN is subject to terminating access payment obligations. In addition, all PSTN originated traffic, regardless of whether it will terminate on a TDM or IP platform, should be subject to originating access charges.” In other words, they want to eliminate the ESP Exemption in its entirety. Qwest is a bit more nuanced. They essentially reargued what they said in the GNAPs preemption case, WC Docket 10-60. AT&T has recently complained about the “regulatory vacuum” on this issue in other cases so it is fair to conclude they want resolution too, but “not in this case.”

9. But none of these parties truly understand or acknowledge that the issues go far beyond just “whether” access charges apply under existing law. UTEX, of course, contends they do not. But if they do, just what does that mean? Who is the “access customer”: will it be the IP-Enabled service provider that has a relationship with an LEC, meaning it is for all intents and purposes deemed to be an IXC even though many IP-Enabled services are not “telephone toll service” or even a “telecommunications service” as a matter of law? Will all IP-Enabled service providers – even those like Skype or Google that do not provide “interconnected VoIP service” – be required to obtain a CIC and directly subscribe to some switched access Feature Group Type? If so, what are all the steps that will have to be taken to reconfigure the current interconnection arrangements that use non-access trunking at the present time? The ILECs want to impose access on the LEC that directly connects to the IP-Enabled service provider and arranges for origination or termination on the PSTN, but they never really explain how that can comport with § 251(b)(5) (and its companion § 252(d)(2)) and § 252(g) as recently interpreted by the D.C. Circuit and this Commission or the current access rule (§ 69.5(b)) that imposes access only on “interexchange carriers.” While some CLECs have chosen to perform IXC functions along with their LEC functions, UTEX is solely an LEC and does not at all provide *any* telephone toll service and thus is not and cannot be an IXC. UTEX contends that *if* access applies then all involved LECs are engaged in jointly provided access, and the basic rules on that topic, including use of MECAB

meet-point billing and the default to the multiple bill option absent voluntary agreement by all the LECs must necessary be employed. But still, how will all of this work in practice? It is one thing to say that "access applies"; it is quite another to contractualize and operationalize that result.

10. UTEX presented the numerous issues that must be decided in its renewed petition, in paragraph 6 of its renewed petition:

6. If the Commission chooses again to not preempt the PUCT, the minimum acceptable outcome consistent with the Commission's charge is to at least issue something that tells the nation what the rules are so the PUCT will understand it cannot just – once again – let AT&T rules. These threshold issues are particular to UTEX but they will soon be prevalent disputes 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"?
  - (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)
  - (vii) Application based non-interconnected VOIP (Google Voice, various conference call services, including those launched by IP Mobile devices)
  - (viii) Integrated Business System Services (Hosted IP based Business solutions like 8X8 and shared Broadsoft applications)

- (ix) Stand Alone to large enterprise IP-PBX Products (products made by MiTel, SureTel, 3Com, Cisco and Avaya)
  - (x) Enhanced Service Provider (Any entity that affirmatively claims the historical ESP Exemption)
  - (xi) Disaster Recovery Based services
  - (xii) 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? Can the ILECs reasonably and lawfully obtain at the state level the interim final solution they asked the Commission to adopt several years ago in Docket 01-92, without any success (in part because FeatureGroup IP showed just how wrong it all was?)
- (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 (or even allowed) 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? We all know how unreliable a telephone number is as a proxy for an IP end-point. Add to this that many of the end-points in issue will be not only IP but also wireless.

- 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 IXCs?
  - (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 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?<sup>5</sup>

11. UTEX is probably the only LEC in the country that has actually thought through all these issues, and is the only one that has presented argument and evidence on the fundamental issues regarding how IP-Enabled services will be *signaled, routed, rated and billed* under the various potential scenarios. UTEX has detailed call flow diagrams that can be used to detail and implement any desired result, for all aspects of signaling, routing rating and then billing. AT&T

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<sup>5</sup> It is noteworthy that none of the commenters (all ILECs, by the way) even mention any of these issues in their submissions. Plainly they are afraid of them. That is precisely why this Commission must directly take them up.

has done everything it could to prevent these proposals from being considered at any level (largely because once one begins in earnest to analyze the practical aspects of operationalizing their preferred result it soon becomes apparent that AT&T's notions are wholly impractical because they do not at all recognize technological advancement or allow any user choice), but they exist, are in the arbitration record, and should be considered by the Commission. UTEX has every reason to believe TPUC will not in fact resolve these matters – despite the fact they are without a doubt open issues that must be resolved – for the same reason AT&T will not touch them. Politics will not allow it because beginning the process inevitably leads to rejection of the ILEC's demands, and TPUC – contrary to its state and federal statutory charges – is controlled by AT&T, not the law. Texas telecommunications regulation is political activity, completely disassociated from what the law requires. They cannot, and UTEX predicts they will not actually address the open issues and resolve them based on existing law. There will not be “determinations”; only findings of waiver, “not preserved,” or “not ripe” – if the issue is even mentioned at all.

12. This is the perfect test case. The Commission really needs to take this case and use it to explain what the existing law is and how it should be operationalized. How can anyone decide what “changes” are appropriate for “new” rules if no one really knows what the current rules really mean, say and do? It may just be that no changes are actually necessary, and all that is required is a fleshing out of the present ones.

**D. UTEX deserves to finally get ICA terms that adhere to the existing law after over 10 years of being held hostage to the role of politics.**

13. UTEX filed its arbitration petition for a replacement agreement in July of 2002. TPUC abated the matter over UTEX's objections in 2006. UTEX's initial petition for preemption was denied because TPUC promised that it would complete the arbitration. The Commission's order denying preemption gave TPUC nine months, which elapsed on July 9, 2010. The state level arbitrators issued their most recent “Notice Regarding Proposals for Award” on August 20, 2010. See Exhibit C to these Reply Comments. The state level arbitrators give updated details on “all the work” they have done, but this time – unlike all the previous post-briefing notices – they completely omit any prediction of the date the proposal for award will issue, and do not even say when they will next report. All they say is that “the Arbitration Team will continue to work diligently on the PFA until it is issued.” Every due date TPUC has set for itself has so far come

and gone (by fairly large margins) without any visible product. There is no way to predict when the proposal will issue, when the final and actual award will be issued and there is clearly no way to tell when – or even if – the state commission might finally get around to actually approving new terms should this Commission wrongly decide to violate the statute and its own rules and purport to let TPUC proceed.

14. UTEX has the right to a **Commission** resolution of the arbitration now that TPUC has, once again, failed to act by the deadline. After all of these years and all of the regulatory dithering at both the state and federal level no other result is fair or reasonable. TPUC has proven that despite its promises it cannot and will not actually resolve all the open issues and complete this arbitration within the applicable deadlines. TPUC has abdicated its responsibility to “arbitrate this interconnection agreement in a timely manner, relying on (and actually applying) existing law.”<sup>6</sup> The Commission has the duty, and no discretion to decline, to now assume this matter and ensure its speedy conclusion so that UTEX can finally have a lawful agreement that will allow it to compete for new-technology customers and provide services that benefit society.

## **II. CONCLUSION**

15. The state commission has failed to complete this arbitration within the time limits established in section 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. No commentator has given any legal justification or persuasive policy reason to do otherwise.

## **III. PRAYER**

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

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<sup>6</sup> 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, ¶ 11, 24 FCC Rcd 12573 (re. Oct. 9, 2009). (parenthetical added)

Respectfully submitted,

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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 August, 2010.

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