

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

In the Matter of	§	
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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	§	
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	§	WC Docket No. 09-134

Public Utility Commission of Texas’ Reply Comments in Opposition to UTEX Communications Corporation’s Renewed Petition for Preemption

The Public Utility Commission of Texas (“PUCT”) files this reply in opposition to the renewed petition for preemption filed by UTEX Communications Corporation (“UTEX”) on July 13, 2010.

I. The PUCT is in the final stages of a very complex arbitration.

From late July to mid-August, PUCT staff has devoted almost 800 hours to the UTEX arbitration. (Exhibit A, Tex. Pub. Util. Comm’n, Docket 26381 (Notice Regarding Proposal for Award) (August 20, 2010).) The PUCT’s earlier response to UTEX’s renewed petition for preemption described the complexity of the arbitration, the myriad issues involved, and the enormous amount of PUCT staff work that has been required to complete it.¹ Because the PUCT has devoted extraordinary resources to the

¹ Public Utility Commission of Texas’ Response to UTEX Communications Corporation’s Renewed Petition for Preemption (filed July 26, 2010) at 6-7.

arbitration, that work is almost done. Decisions on all contested issues, except the definitions section of the General Terms and Conditions, have now been completed. (Exhibit A.) The arbitrators will issue a proposal for award as soon as possible. Once that proposal is issued, the arbitration will enter its final stage, in which the arbitrators will consider any exceptions to the proposal for award and the PUCT Commissioners will consider any requests for reconsideration. This will be done under the brisk timeframe the PUCT arbitration rules provide.²

Although the arbitration is in its final stages—and the PUCT has undertaken Herculean efforts to timely complete it— UTEX inexplicably demands the Commission assume jurisdiction over it. That would be extremely wasteful and inefficient. No doubt it would delay the development of a new UTEX agreement.

II. The renewed petition should be denied because the PUCT has acted “to carry out its responsibility.”

UTEX says time is up, and that the Commission must take jurisdiction over the UTEX arbitration under Section 252(e)(5). This is simply wrong, for multiple reasons.

First, the Commission did not set a firm nine-month deadline for completing the arbitration in its October 2009 order as UTEX claims. That order simply invited refiling of the petition for preemption in light of new facts if the arbitration was not completed

² See Public Utility Commission of Texas’ Response to UTEX Communications Corporation’s Renewed Petition for Preemption at 3- 4.

within nine months of the order.³ The “new facts,” at the time UTEX filed its renewed petition last month, were that a hearing on the merits had been held in April, and the PUCT arbitrators were working through an enormous amount of evidence to complete the award.⁴ Had the PUCT made little progress in the UTEX arbitration by July, the Commission might be justified in assuming jurisdiction over it. But those are not the “new facts.” To the contrary, the arbitration is almost done, thanks to the arbitrators’ extraordinary efforts.⁵

Second, given the state commissions’ important role in arbitrating interconnection agreements, the Commission has made clear that it (quite properly) does not read “fails to act” under Section 252(e)(5) as strictly as UTEX does. In its order denying UTEX’s first petition for preemption, the Commission noted that in light of the important role of the states under Section 252, it “will not take an expansive view of what constitutes a state’s

³ “Should the PUCT fail to resolve this 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.” Memorandum Opinion and Order, DA09-2205 (filed October 9, 2009) at 6.

⁴ Public Utility Commission of Texas’ Response to UTEX Communications Corporation’s Renewed Petition for Preemption at 4, 6-7.

⁵ After the Commission issued its October 2009 order, the PUCT initiated a rulemaking to allow all interested parties to comment on VoIP issues, but that rulemaking did not delay the UTEX arbitration. Despite UTEX’s complaints about the schedule for the arbitration— such as the loss of the two “precious weeks” between the Commission’s order and the PUCT’s next open meeting—the chronology attached as Exhibit A to the PUCT’s Response to UTEX’s Renewed Petition for Preemption shows that the arbitration proceeded on a quick schedule. Neither the rulemaking nor the arbitration schedule were the reason the arbitration was not completed by July 2010.

‘failure to act.’”⁶ The Commission further noted that the PUCT had affirmed its willingness to complete the arbitration if the Commission made clear that the lack of regulatory direction from the Commission regarding VoIP issues did not stand as a legal obstacle to the PUCT’s completion of the arbitration.⁷ The Commission also stated the PUCT is “best-suited” to handle the arbitration.⁸ Since being apprised that it need not wait for the Commission to establish the rules for the regulatory treatment of VoIP, the PUCT has devoted enormous resources to timely completing the UTEX arbitration.

UTEX argues that the Commission must preempt under its Rule 51.801(b) because the PUCT has failed to complete the arbitration within the time limits established under Section 252(b)(4)(c). Given the history of the UTEX arbitration, and particularly that UTEX itself sought extensions pushing the arbitration beyond the nine-month time frame,⁹ when that period would begin to run is unclear. It is clear that the Commission’s October 2009 order urged the PUCT to timely complete the arbitration but did not set an absolute deadline. In any event, under Section 1.3 of the Commission’s rules, the

⁶ Memorandum Opinion and Order at 5, quoting *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 and 96-185, First Report and Order, 11 FCC Rcd 15499, 16128, para. 1285 (1996).

⁷ *Id.* at 5.

⁸ *Id.* at 6.

⁹ See Public Utility Commission of Texas’ Response to Petition of UTEX Communications Corporation for Preemption under 47 U.S.C. § 252(e) (filed July 27, 2009) at 2 & Exh. A.

Commission may waive any of its rules, upon a showing of good cause, when strict compliance is inconsistent with the public interest. Such is the case here.

The PUCT arbitrators are completing the proposal for award, and the arbitration is in its final phases. It would be wasteful and inefficient for the Commission to assume jurisdiction over it now. Given that starting again at the Commission would undoubtedly delay the completion of the arbitration, it is puzzling at the very least why UTEX demands that.¹⁰

III. Conclusion

The PUCT is acting to timely complete the UTEX arbitration. UTEX's renewed petition for preemption should be denied.

Respectfully submitted,

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¹⁰ Much of UTEX's comments filed August 12 (Pages 7-13) does not even address whether preemption is appropriate, but appears to litigate the issues involved in the arbitration. UTEX even complains about the award that has not yet been issued. UTEX Comments at 13 ("UTEX has every reason to believe that PUCT will use this arbitrary, irrational and illegal 'gotcha' as a means not to resolve the open issues by addressing and imposing 'appropriate conditions' based on 'current law.').

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Certificate of Service

I certify that a true and correct copy of the foregoing Public Utility Commission of Texas' Reply in Opposition to UTEX Communications Corporation's Renewed Petition for Preemption has been sent to the parties below by first class mail, or e-mail as indicated, on the 23rd day of August, 2010.

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