

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

In the Matter of)	
)	
UTEX Communications Corporation)	WC Docket No. 09-134
Petition for Preemption)	

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 2010

Released: October 6, 2010

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this order, we deny the Renewed Petition of UTEX Communications Corporation (UTEX)¹ for preemption of the jurisdiction of the Public Utilities Commission of Texas (PUCT) pursuant to section 252(e)(5) of the Communications Act of 1934, as amended (Act).² In its Renewed Petition, UTEX asks the Commission to preempt the jurisdiction of the PUCT and arbitrate pending interconnection disputes between itself and AT&T Texas because the “PUCT has failed to resolve the arbitration by the deadline established by the Commission” and such delay is causing the company irreparable harm.³ For the reasons set forth below, we deny UTEX’s Renewed Petition.

II. BACKGROUND

2. On July 13, 2009, UTEX filed its first preemption petition with the Commission alleging that the PUCT failed to act to carry out its responsibilities under section 252 of the Act because it refused to complete the arbitration of pending interconnection disputes between UTEX and AT&T Texas.⁴ The Wireline Competition Bureau (Bureau) denied the First UTEX Petition finding that UTEX did not “meet its burden of showing that the PUCT ‘failed to act’ within the meaning of section 252(e)(5) on disputes regarding the new interconnection agreement between itself and AT&T Texas.”⁵ In particular, the Bureau

¹ See UTEX Communications Corporation, Renewed Petition for Preemption, WC Docket No. 09-134 (filed July 13, 2010) (Renewed Petition).

² See 47 U.S.C. § 252(e)(5); 47 C.F.R. § 51.803 (providing procedures for Commission notification of a state commission’s failure to act).

³ Renewed Petition at 1-2.

⁴ See 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 (filed July 13, 2009) (First UTEX Petition).

⁵ *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, 12576 (2009) (*Order Denying UTEX Petition for Preemption*). The chronology of this dispute is well-described in the Background section of the *Order Denying UTEX Petition for Preemption* and will not be repeated here. See *id.* at 12573-75.

found that the PUCT had conducted the arbitration in a timely fashion, but was unable to render a final decision solely because of the uncertainty surrounding the regulatory classification of VoIP services, an issue implicated in the arbitration proceeding. Further, the Bureau found that the PUCT was best-suited to resolve the dispute and encouraged it to continue the arbitration in reliance on existing law.⁶ The Bureau stated that “[s]hould 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.”⁷ UTEX filed the present petition on July 13, 2010, asserting that more than nine months later the PUCT has “failed to resolve this arbitration.”⁸ Public comment on the Renewed Petition was sought on July 28, 2010.⁹ For the reasons set forth below, we deny UTEX’s Renewed Petition.

III. DISCUSSION

3. We find that UTEX has not met its burden of showing that the PUCT “fail[ed] to act” on the interconnection dispute between UTEX and AT&T Texas.¹⁰ First, we note that the nine-month period referenced in the *Order Denying UTEX Petition for Preemption* was not a firm deadline by which the PUCT was required to complete the arbitration proceeding.¹¹ Rather, the nine-month time period established a reasonable time after which the petitioners were invited to refile a petition for preemption with the Commission providing any new facts relevant to the petitioners’ arguments.¹²

4. We find no new facts in the record to justify preemption at this time.¹³ The record indicates that the PUCT staff has acted to complete the arbitration, and continues to devote extensive time and resources, and that this arbitration is “in its final stages.”¹⁴ In fact, the PUCT arbitrators issued a

⁶ See *id.* at 12577-78.

⁷ See *id.* at 12578.

⁸ Renewed Petition at 2.

⁹ See *Pleading Cycle Established for Comments on UTEX Communications Corporation’s Renewed Petition for Preemption of the Jurisdiction of the Public Utility Commission of Texas Pursuant to Section 252(e)(5) of the Communications Act*, WC Docket No. 09-134, Public Notice, DA 10-1398 (rel. July 28, 2010). Comments were filed by AT&T, Independent Telephone & Telecommunications Alliance (ITTA), PUCT, Qwest, UTEX and Verizon. Reply Comments were filed by the PUCT and UTEX.

¹⁰ See 47 U.S.C. § 252(e)(5).

¹¹ See *Order Denying UTEX Petition for Preemption*, 24 FCC Rcd at 12578; see also Renewed Petition at 1-2.

¹² See Public Utility Commission Texas’ Reply Comments in Opposition to UTEX Communications Corporation’s Renewed Petition for Preemption, WC Docket No. 09-134 at 2-3 (filed Aug. 23, 2010) (internal citations omitted) (PUCT Reply Comments) (“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 within nine months of the order.”). See also Opposition of AT&T Inc. to Renewed Petition of UTEX Communications Corporation for Preemption Under 47 U.S.C. § 252(e), WC Docket No. 09-134, at 3 (filed Aug. 12, 2010) (internal citations omitted) (AT&T Comments) (“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. To the contrary, the Commission simply exhorted the PUCT to arbitrate the matter in a ‘timely manner.’”).

¹³ See UTEX Communications Corporation’s Comments Regarding Renewed Petition for Preemption, WC Docket No. 09-134 at 1-2 (filed Aug. 12, 2010) (UTEX Comments).

¹⁴ PUCT Reply Comments at 2.

proposal for award in the arbitration proceeding on September 23, 2010.¹⁵ We find that preemption of the PUCT's jurisdiction at this time would be "extremely wasteful and inefficient."¹⁶ The facts indicate that the PUCT has been acting expeditiously to resolve the large number of complex issues raised in this arbitration. We anticipate that with the release of the arbitrators' proposal for award, the PUCT will be able to conclude this proceeding promptly.

5. We further find that preemption at this point would unnecessarily delay a final resolution of this arbitration. We agree with the PUCT and commenters that preemption by this Commission at this late date would result in further delay contrary to UTEX's contention that "[a]ll the Commission would need to do is review the record, seek further briefing and argument if necessary and then render the determination[]"¹⁷ Moreover, the further delay that would result from granting preemption would exacerbate the harm UTEX claims has already resulted from the protracted arbitration, and would be contrary to the public interest.¹⁸ Notwithstanding our decision not to preempt the PUCT's jurisdiction, again we urge the PUCT to complete the proceeding as soon as practicable. As we previously have stated, the Act requires timely arbitration.¹⁹ We remain of the opinion that the PUCT is best-suited to resolve this matter.²⁰

¹⁵ See Letter from John Hulme, Assistant Attorney General, Attorney for the Public Utility Commission of Texas, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 09-134 (Sept. 27, 2010). The 150 page proposal for award and a 234 page appendix to the proposal detail specific recommendations for resolving the arbitration.

¹⁶ PUCT Reply Comments at 2. A detailed timeline of action taken in the arbitration proceeding since the Bureau released its *Order Denying UTEX Petition for Preemption* was provided in the PUCT's comments in this proceeding. See Public Utility Commission Texas' Response to UTEX Communications Corporation's Renewed Petition for Preemption, WC Docket No. 09-134 at Ex. A (filed July 26, 2010) (PUCT Comments).

¹⁷ UTEX Communications Corporation's Reply Comments Regarding Renewed Petition for Preemption, WC Docket No. 09-134 at 2 (filed Aug. 23, 2010) (UTEX Reply Comments). See PUCT Reply Comments at 2; see also AT&T Comments at 3-4, 6. UTEX also argues in its reply comments that the PUCT has lost jurisdiction of this arbitration proceeding as a result of missing the nine-month "deadline" the Commission established for completion in the *Order Denying UTEX Petition for Preemption*. See UTEX Reply Comments at 1-2. We disagree and have established that the nine-month time period was not a deadline by which the PUCT needed to complete the arbitration proceeding but rather, an opportunity for UTEX to provide this Commission with an update on the progress of the proceeding. See *supra* para. 3.

¹⁸ Also, as the Bureau noted in the *Order Denying UTEX Petition for Preemption*, it again appears that up to this point, at least some of the delay has been caused by the parties to the arbitration. See *Order Denying UTEX Petition for Preemption*, 24 FCC Rcd at 12576-77. For example, UTEX and AT&T Texas were unable to file joint decision point lists until several weeks after the PUCT arbitrators' established deadline. See PUCT Comments at 7 and Ex. A.

¹⁹ See *Order Denying UTEX Petition for Preemption*, 24 FCC Rcd at 12577, n.33.

²⁰ See *supra* para. 2.

IV. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, and section 51.801(b) of the Commission's rules, 47 U.S.C. § 252 and 47 C.F.R. § 51.801(b), and pursuant to the authority delegated in section 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, the petition filed by UTEX Communications Corporation on July 13, 2010 for the preemption of the jurisdiction of the Public Utilities Commission of Texas IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Sharon E. Gillett,
Chief, Wireline Competition Bureau