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

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| In the Matter of | ) | |
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| Southwestern Bell Telephone Company, d/b/a AT&T Texas, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | File No. EB-11-MD-008 |
| v. | ) | |
| | ) | |
| UTEX Communications Corporation, d/b/a FeatureGroup IP, | ) | |
| | ) | |
| Defendant. | ) | |

## MEMORANDUM OPINION AND ORDER

**Adopted: February 10, 2012** **Released: February 10, 2012**

By the Commission:

## I. INTRODUCTION

1. In this Memorandum Opinion and Order (Order), we grant in part and otherwise dismiss without prejudice a formal complaint that Southwestern Bell Telephone Company, d/b/a AT&T Texas (AT&T Texas), filed against UTEX Communications Corporation, d/b/a FeatureGroup IP (FeatureGroup IP), under section 208 of the Communications Act of 1934, as amended (the Act).[1] In brief, AT&T Texas alleges that, as applied to AT&T Texas, certain provisions in a FeatureGroup IP federal tariff pertaining

[1] 47 U.S.C. § 208. *See* Formal Complaint of AT&T Texas, File No. EB-11-MD-008 (filed Sept. 9, 2011) (Complaint). *See also* Proposed Findings of Fact, Conclusions of Law, and Legal Analysis of AT&T Texas, File No. EB-11-MD-008 (filed Sept. 9, 2011) (Complaint Legal Analysis). FeatureGroup IP filed an answer, *see* Defendant's Answer, Defenses and Affirmative Defenses to Formal Complaint, File No. EB-11-MD-008 (filed Sept. 29, 2011) (Answer); UTEX Communications Corp. d/b/a FeatureGroup IP's Legal Analysis in Support of Answer, File No. EB-11-MD-008 (filed Sept. 29, 2011) (Answer Legal Analysis), to which AT&T filed a reply, AT&T Texas's Reply to UTEX's Answer and Legal Analysis, File No. EB-11-MD-008 (filed Oct. 11, 2011) (Reply). The parties also filed, *inter alia*, joint statements and briefs, *see* Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, File No. EB-11-MD-008 (Oct. 18, 2011) (Stipulated Facts); Response to Supplemental Request 2 Regarding the Arbitration Review Court Proceeding and the Court Collection Action, File No. EB-11-MD-008 (filed Oct. 18, 2011) (Court Proceedings Summary); Supplemental Joint Statement and Stipulated Facts, File No. EB-11-MD-008 (filed Nov. 3, 2011) (Supplemental Stipulated Facts); Joint Statement, File No. EB-11-MD-008 (filed Dec. 9, 2011) (Joint Statement); AT&T Texas's Supplemental Brief, File No. EB-11-MD-008 (filed Nov. 3, 2011) (AT&T Brief); Brief of UTEX Communications Corp. d/b/a FeatureGroup IP, File No. EB-11-MD-008 (filed Nov. 3, 2011) (FeatureGroup IP Brief); AT&T Texas's Supplemental Reply Brief, File No. EB-11-MD-008 (filed Nov. 10, 2011) (AT&T Reply Brief); Reply Brief of UTEX Communications Corp. d/b/a FeatureGroup IP, File No. EB-11-MD-008 (filed Nov. 10, 2011) (FeatureGroup IP Reply Brief).

to a call control facilitation service violate section 201(b) of the Act,[2] because those tariff provisions (i) conflict with a preexisting interconnection agreement between the parties (Count I), and (ii) breach the benchmarking and functional equivalent requirements of rule 61.26 (Count II).[3] As explained below, we grant Count I and dismiss Count II without prejudice.

## II. BACKGROUND

### A. Factual Background

2. AT&T Texas is an incumbent local exchange carrier (incumbent LEC) in Texas.[4] FeatureGroup IP is a competitive local exchange carrier (competitive LEC) in Texas.[5] At all relevant times, the parties exchanged calls in Texas under an interconnection agreement (Interconnection Agreement or Agreement or ICA) that became effective in 2000 pursuant to sections 251 and 252 of the Act.[6]

3. For purposes relevant here, the Interconnection Agreement required that the parties' networks interconnect utilizing a call control system known as Signaling System 7 (SS7).[7] The calls at issue traversed FeatureGroup IP's network in an Internet Protocol (IP) format employing a call control system known as Session Initiation Protocol (SIP).[8] By contrast, the calls at issue traversed AT&T Texas's network in a non-IP format employing SS7.[9]

4. Because of the differing call control systems employed by FeatureGroup IP and AT&T Texas, the exchange of calls between them could occur only if the call control system associated with the calls was altered – from SIP to SS7 and vice-versa – when the calls traveled from one party's network to the other's.[10] Toward that end, FeatureGroup IP utilized a service called Signaling Layer Translation Service (SLTS) that facilitated the alteration of the call control system associated with the calls from SIP to SS7 and from SS7 to SIP.[11]

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[2] 47 U.S.C. § 201(b) (requiring that charges, practices, classifications, and regulations in connection with a common carrier's provision of interstate communications service be "just and reasonable").

[3] 47 C.F.R. § 61.26.

[4] *See, e.g.*, Stipulated Facts at 2, para. 3; Complaint at 3, para. 7; Complaint Legal Analysis at 1, para. 1; Answer at 6-7, para. 7.

[5] *See, e.g.*, Stipulated Facts at 6, para. 17; Complaint at 3, para. 8; Complaint Exhibit G, Interconnection Agreement-Texas between Southwestern Bell Telephone Company and UTEX Communications Corp. at 17; Answer at 7, para. 8; Answer Legal Analysis at 14.

[6] 47 U.S.C. §§ 251, 252. *See, e.g.*, Stipulated Facts at 6, para. 17; Complaint at Ex. G.

[7] *See, e.g.*, Complaint Exhibit G, Interconnection Agreement-Texas between Southwestern Bell Telephone Company and UTEX Communications Corp. at 378, § 2.1.1.

[8] *See, e.g.*, Supplemental Stipulated Facts at 6-7; Stipulated Facts at 2-4.

[9] *See, e.g.*, Supplemental Stipulated Facts at 7-8; Stipulated Facts at 2-4. The parties identify a caveat to the facts stated in paragraph 3 above, but that caveat is not relevant here. Supplemental Stipulated Facts at 4-7.

[10] *See, e.g.*, Supplemental Stipulated Facts at 7-8; Stipulated Facts at 2-6.

[11] *See, e.g.*, Supplemental Stipulated Facts at 8; Stipulated Facts at 2-6.

5. Beginning in 2005 – almost five years after the parties' Interconnection Agreement became effective – and at all relevant times thereafter, FeatureGroup IP has had on file at the Commission a tariff (the SLTS Tariff) concerning SLTS (among many other things).[12] The SLTS Tariff purports to charge a non-recurring SLTS fee of $10,000 per LATA in which traffic exchanges involving SLTS occur, plus a recurring SLTS fee of $0.05 per session (i.e., per call).[13]

6. As stated above, in order for traffic to traverse to and from the FeatureGroup IP and AT&T Texas networks, the call control system must be altered by FeatureGroup IP. FeatureGroup IP used its SLTS call control alteration function to accomplish this, and invoiced AT&T Texas for substantial amounts allegedly due for SLTS under FeatureGroup IP's SLTS Tariff (SLTS Charges).[14]

### B. Procedural Background

7. FeatureGroup IP filed a claim in federal district court seeking to recover the charges it invoiced AT&T Texas for SLTS.[15] In response, AT&T Texas alleged, *inter alia*, that FeatureGroup IP's SLTS Tariff is unlawful, for a number of reasons.[16] AT&T Texas then filed an unopposed motion to refer to the Commission, on primary jurisdiction grounds, issues regarding the lawfulness of FeatureGroup IP's SLTS Tariff,[17] which motion the federal district court granted.[18]

8. Meanwhile, starting before the Court Collection Action began and continuing after issuance of the primary jurisdiction referral order arising from that Action, the parties engaged in exhaustive litigation before the Public Utility Commission of Texas (Texas PUC) regarding the meaning of the parties' Interconnection Agreement.[19] Among the scores of disputed issues were issues about whether and how the Interconnection Agreement directs the parties to address, both operationally and financially, interconnection of their disparate call control systems (i.e., SIP for FeatureGroup IP, and SS7 for AT&T Texas).[20] The Texas PUC issued a final Arbitration Award,[21] whereupon FeatureGroup IP

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[12] *See, e.g.*, Complaint, Exhibits B and C. We recognize that the tariff at issue concerns services other than SLTS. Nonetheless, for convenience and purposes of this case only, we refer to it as the "SLTS Tariff." *See generally* Answer Legal Analysis at 3 (referring to the tariff at issue as "the SLTS Tariff").

[13] *See, e.g.*, Stipulated Facts at 4-6.

[14] *See, e.g.*, Stipulated Facts at 5-6. FeatureGroup IP has now billed AT&T Texas at least $22,255,725 in SLTS charges and late payment penalties. *Id*.

[15] FeatureGroup IP's claim was actually a counterclaim filed in response to a prior claim filed by AT&T Texas for recovery of certain local number portability charges and access charges. *See, e.g.*, Complaint at 11, para. 31; Answer at 13, para. 31; Response to Supplemental Request 2 at 1-3.

[16] *See, e.g.*, Complaint at 12, para. 33; Answer at 13, para. 33.

[17] *See* Court Proceedings Summary, Exhibit 10.

[18] *See, e.g.*, Complaint at 12, para. 34; Answer at 13-14, para. 34; Court Proceedings Summary, Exhibit 11, Response to Supplemental Request 2. For convenience, we refer to the federal district court proceeding from which the primary jurisdiction referral order arose as the "Court Collection Action."

[19] *See, e.g.*, Stipulated Facts at 6-8.

[20] *See, e.g.*, Stipulated Facts at 6-8.

[21] An arbitrator appointed by the Texas PUC issued a decision on June 1, 2009. *See* Complaint Exhibit H, *Petition of UTEX Communications Corporation for Post-Interconnection Dispute Resolution With AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution with UTEX Communications Corporation*, Arbitration Award, Docket No. 33323 (PUCT June 1, 2009) (Arbitration Award). The Texas PUC entered its (continued…)

sought federal district court review of the Arbitration Award under section 252(e)(6) of the Act.[22]

9. Almost a year after FeatureGroup IP filed the Court Arbitration Review Action, AT&T Texas initiated the instant formal complaint proceeding to effectuate the primary jurisdiction referral order in the Court Collection Action.[23] AT&T Texas alleges that, as applied to AT&T Texas, the charges in FeatureGroup IP's SLTS Tariff violate section 201(b) of the Act, because they (i) conflict with the parties' Interconnection Agreement, as conclusively construed by the Texas PUC in the Arbitration Award ("Count I"),[24] and (ii) breach the benchmarking and functional equivalent requirements of rule 61.26 ("Count II").[25] For the following reasons, we grant Count I. Because we need not reach the merits of Count II to afford AT&T Texas the relief to which it would be entitled under that Count, we dismiss Count II without prejudice.[26]

(Continued from previous page)

Order on Arbitration Award on October 2, 2009, which in pertinent part affirmed the Arbitration Award. *See* Complaint Exhibit I, *Petition of UTEX Communications Corporation for Post-Interconnection Dispute Resolution With AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution with UTEX Communications Corporation*, Order on Arbitration Award, Docket No. 33323 (PUCT Oct. 2, 2009). The Texas PUC entered its Order on Reconsideration of Arbitration Award on February 12, 2010, which left the pertinent part of the Arbitration Award intact. *See* Complaint Exhibit J, *Petition of UTEX Communications Corporation for Post-Interconnection Dispute Resolution With AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution with UTEX Communications Corporation*, Order on Reconsideration of Arbitration Award, Docket No. 33323 (PUCT Feb. 12, 2010). Consequently, unless otherwise stated, all references herein to the Texas PUC's action will be to the June 1, 2009 Arbitration Award.

[22] *See, e.g.*, Stipulated Facts at 8 (citing 47 U.S.C. 252(e)(6)). For convenience, we refer to the federal district court proceeding in which FeatureGroup IP seeks review of the Texas PUC's Arbitration Award as the "Court Arbitration Review Action."

[23] *See, e.g.*, Complaint. AT&T Texas simultaneously filed an informal complaint against FeatureGroup IP under section 208 of the Act and rules 1.716-1.719, 47 C.F.R. §§ 1.716-1.719. The informal complaint challenges the lawfulness of the SLTS Tariff on several grounds not alleged in the formal Complaint, including that (i) SLTS is an "enhanced service" not eligible for inclusion in a Title II tariff; (ii) the SLTS Tariff violates 47 C.F.R. § 64.1601(c)(2) by charging connecting carriers for the delivery of calling party number parameters; (iii) the SLTS Tariff violates section 201(b) of the Act by "deeming" AT&T Texas to have ordered SLTS; and (iv) the SLTS Tariff violates section 201(b) of the Act by charging unreasonably high rates for SLTS. Informal Complaint of AT&T Texas, Letter from Aaron M. Panner, Counsel for AT&T Texas, to Marlene H. Dortch, Secretary, FCC (filed Sept. 9, 2011). The informal complaint proceeding has been stayed pending a final order in this formal complaint proceeding. Notice of Formal Complaint, File No. EB-11-MD-008 (rel. Sept. 14, 2010) at 5.

[24] *See, e.g.*, Complaint at 14-17, paras. 41-48.

[25] *See, e.g.*, Complaint at 17-19, paras. 49-56.

[26] We note that, in addressing the merits of Count I, this Order does not evaluate the accuracy or lawfulness of the Arbitration Award's interpretation of the parties' Interconnection Agreement. We are merely applying the Arbitration Award's conclusions to the relevant questions raised by the primary jurisdiction referral and resulting complaint. Thus, this proceeding does not usurp the function assigned by section 252(e)(6) of the Act to federal district courts, nor otherwise allow parties to seek review at this Commission of state commission decisions interpreting interconnection agreements, in contravention of section 252(e)(6). 47 U.S.C. § 252(e)(6). *See, e.g.*, *In the Matter of Starpower Communications, LLC Petition For Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act Of 1996*, Memorandum Opinion and Order,15 FCC Rcd. 11277, 11279-80, para. 6 (2000); *Budget Prepay, Inc. v. AT&T Corp.*, 605 F.3d 273, 276 (5th Cir. 2010); *Southwestern Bell Telephone Co. v. Public Utility Commission of Texas*, 208 F.3d 475, 479-82 (5th Cir. 2000).

## III. DISCUSSION

### A. The SLTS Tariff is Unlawful If It Conflicts with the Interconnection Agreement.

10. Two Supreme Court cases have established a rule – commonly known as the "*Sierra-Mobile*" doctrine – regarding the interplay between tariffs and pre-existing contracts.[27] As the D.C. Circuit has observed, "[t]he rule of *Sierra* [and] *Mobile* … is refreshingly simple: The [pre-existing] contract between the parties governs the legality of the [tariff] filing. Rate filings consistent with [pre-existing] contractual obligations are valid; rate filings inconsistent with [such] contractual obligations are invalid."[28]

11. As a result, on this the parties agree: section 201(b) of the Act and the *Sierra-Mobile* doctrine preclude enforcement of a tariff provision if enforcing the provision would conflict with a pre-existing interconnection agreement.[29] The parties also agree that, if billing AT&T Texas the SLTS charges specified in the SLTS Tariff would conflict with the parties' pre-existing Interconnection Agreement, as interpreted by the Texas PUC's Arbitration Award, then FeatureGroup IP may not lawfully do so.[30] Accordingly, the question presented here is whether the SLTS charges specified in the SLTS Tariff, as applied to AT&T Texas, conflict with the parties' Interconnection Agreement as interpreted in the Arbitration Award. Put more finely, the question presented here is whether the parties' Interconnection Agreement, as interpreted by the Arbitration Award, requires FeatureGroup IP to bear the costs associated with exchanging calls with AT&T Texas via SS7.

### B. As Interpreted by the Arbitration Award, the Interconnection Agreement Requires FeatureGroup IP to Bear Any Costs Associated with Exchanging Calls With AT&T Texas Via SS7.

12. In the Texas PUC arbitration proceeding, the parties presented scores of questions regarding the meaning of the parties' Interconnection Agreement. One question pertinent here was: "Does the Parties' [Interconnection Agreement] require UTEX[31] to deliver traffic to AT&T Texas's network using SS7 signaling protocol?"[32] FeatureGroup IP's position was that, if prices and terms

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[27] *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Co.*, 350 U.S. 332 (1956).

[28] *Richmond Power and Light of the City of Richmond, Indiana v. Federal Power Commission*, 481 F.2d 490, 493 (D.C. Cir. 1973) (*Richmond Power v. FPC*).

[29] Complaint at 1-2; 15-16; Complaint Legal Analysis at 9-10; Answer at 1-2, 17-18; Answer Legal Analysis at 4-8. *See, e.g.*, *MCI Telecommunications Corp. v. FCC*, 822 F.2d 80, 84, 87 (D.C. Cir. 1987); *MCI Telecommunications Corp. v. FCC*, 665 F.2d 1300, 1302 (D.C. Cir. 1981); *Richmond Power v. FPC*, 481 F.2d at 492-93, 497; *Bell Atlantic-Delaware, Inc. v. Global NAPs, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 20665, 20670-73, paras.12-21 (2000), *aff'd on recon.*, 17 FCC Rcd 7902 (2002), *aff'd on other grounds sub nom.*, *Global NAPs v. FCC*, 80 Fed. Appx. 114 (D.C. Cir. 2003); *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 654, 656-59, paras. 15-28 (1995). *See also Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9947, para. 57, n.130 (2001) (subsequent history omitted).

[30] *See, e.g.*, Complaint Legal Analysis at 9-10; Answer Legal Analysis at 4-8.

[31] For our purposes, "UTEX" in the Arbitration Award is the same party as "FeatureGroup IP" in this Order. *See* Joint Statement at 1.

[32] Arbitration Award at 28.

contained in an AT&T Texas federal tariff can apply to certain services supplied by AT&T Texas to FeatureGroup IP -- notwithstanding the parties' Interconnection Agreement -- then the SLTS prices and terms contained in FeatureGroup IP's Tariff can apply to the service of SIP/SS7 protocol conversion supplied by FeatureGroup IP to AT&T Texas, notwithstanding the parties' Interconnection Agreement.[33] AT&T Texas's contrary position was that, "[b]ecause the Parties' ICA requires UTEX to use SS7 trunks on the traffic that it signals to AT&T Texas, UTEX then has the financial obligation to convert its traffic to SS7. … [B]y billing AT&T Texas for signaling layer translation service (SLTS), UTEX is attempting to charge AT&T Texas for something that UTEX is obligated to provide."[34]

13. The Arbitration Award found in favor of AT&T Texas, stating that "the Parties' ICA does require UTEX to deliver traffic to AT&T Texas's network using SS7 signaling protocol."[35] In so holding, the Arbitration Award relied on a provision of the Interconnection Agreement indicating that "[t]runks will utilize Signaling System 7 (SS7) protocol signaling when such capabilities exist within the [AT&T Texas] network."[36]

14. The next question addressed in the Texas PUC's arbitration proceeding was: "If the answer to [the preceding question] is 'Yes,' does the ICA prohibit UTEX from charging AT&T Texas for translating messages to a protocol other than SS7?"[37] FeatureGroup IP's position was, again, that if certain prices contained in an AT&T Texas federal tariff can sometimes apply to FeatureGroup IP -- notwithstanding the parties' Interconnection Agreement -- then the SLTS prices contained in FeatureGroup IP's Tariff can apply to AT&T Texas, notwithstanding the parties' Interconnection Agreement.[38] AT&T Texas's contrary position was that, under standard industry practice, carriers bear their own costs associated with converting call control systems to SS7, where necessary, and that "no carrier has ever attempted to tariff the [call control system] conversion it performs and to bill those rates to non-ordering carriers."[39]

15. The Arbitration Award found in favor of AT&T Texas, stating:

> UTEX argues for equivalent treatment, but the terms of the ICA do not support UTEX's position that it may charge AT&T Texas for converting messages to an SS7 protocol. UTEX has not cited any ICA provision that permits it to charge AT&T for translating messages to a protocol other than SS7. On the other hand, the Parties' ICA … explicitly addresses translation into SS7 protocol. Under the ICA … UTEX (not AT&T Texas) must ensure that its messages are converted and sent to

[33] Arbitration Award at 28.

[34] Arbitration Award at 28.

[35] Arbitration Award at 28.

[36] Arbitration Award at 28.

[37] Arbitration Award at 29.

[38] Arbitration Award at 29.

[39] Arbitration Award at 29.

AT&T Texas in SS7 protocol.[40]

16. We interpret the foregoing findings of the Arbitration Award to mean the following: because the parties' Interconnection Agreement requires FeatureGroup IP to exchange calls with AT&T Texas in SS7 protocol, it is FeatureGroup IP's responsibility both (i) to perform any necessary conversions to and from SS7 protocol, *and* (ii) *to bear any costs of such conversion.*[41] That is, *both* the operational and the financial obligations of SIP/SS7 conversions fall within FeatureGroup IP's contractual duty to "ensure that its messages are converted and sent to AT&T Texas in SS7 protocol."[42] As stated above, under the *Sierra-Mobile* doctrine, tariffed "rate filings inconsistent with [pre-existing] contractual obligations are invalid."[43] Consequently, as applied to AT&T Texas, the charges for SLTS in FeatureGroup IP's SLTS Tariff conflict with the prohibition of such charges under the Interconnection Agreement, and thus FeatureGroup IP's imposition of those charges is unjust and unreasonable under the *Sierra-Mobile* doctrine and section 201(b) of the Act.

17. FeatureGroup IP challenges that interpretation of the Arbitration Award on what appear to be three grounds. First, FeatureGroup IP seems to argue that, according to the portions of the Arbitration Award just discussed (Arbitration Award at 29-30), the Interconnection Agreement is simply silent on the issue of SIP/SS7 protocol conversion, and thus the Agreement neither permits nor prohibits FeatureGroup from charging AT&T Texas for it. Accordingly, in FeatureGroup IP's view, there is nothing in the Interconnection Agreement with which the SLTS Tariff conflicts.[44] FeatureGroup IP's proffered interpretation of those portions of the Arbitration Award is not as credible as AT&T's. Construed within the context of the wording of the questions presented and of the positions asserted by the parties, the Award's decisional language finds that FeatureGroup IP must bear the cost of SIP/SS7 protocol conversion, especially given that the Interconnection Agreement required that the parties interconnect using SS7.

18. FeatureGroup IP also argues that we must construe the Arbitration Award to find no conflict between the SLTS Tariff and the Interconnection Agreement, because the Arbitration Award interprets the Interconnection Agreement to allow AT&T to impose certain SS7-related charges via federal tariff.[45] We disagree. The Arbitration Award expressly rejects the false symmetry that FeatureGroup IP attempts to construct.[46] Moreover, FeatureGroup IP does not specifically identify any

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[40] Arbitration Award at 29-30.

[41] Our decision here is based on the Arbitration Award's interpretation of the Interconnection Agreement between FeatureGroup IP and AT&T Texas, and does not prejudge any issues pending before the Commission in rulemaking proceedings. *See, e.g.*, *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up, Universal Service Reform – Mobility Fund*, 2011 WL 5844975, **358-59, paras. 1361-64 (rel. Nov. 18, 2011) (seeking comment on whether to require that "carriers electing TDM interconnection be responsible for the costs associated with the IP-TDM conversion").

[42] Arbitration Award at 30.

[43] *Richmond Power v. FPC*, 481 F.2d at 493. *See* paras. 10-11 above.

[44] *See, e.g.*, Answer Legal Analysis at 4-8.

[45] *See, e.g.*, Answer Legal Analysis at 8-10.

[46] Arbitration Award at 29 (stating that "UTEX argues for equivalent treatment, but the terms of the ICA do not support UTEX's position….").

such charges imposed by AT&T or any provision of the Interconnection Agreement with which those unspecified charges may conflict.

19. FeatureGroup IP further argues that, in later portions of the Arbitration Award *not* discussed above (Arbitration Award at 128-29), the Arbitration Award held that the Interconnection Agreement says nothing about whether FeatureGroup IP must bear the cost of SIP/SS7 protocol conversions; and thus, according to FeatureGroup IP, the Interconnection Agreement does not conflict with FeatureGroup IP's SLTS Tariff in any way that would preclude FeatureGroup IP from imposing SLTS Charges on AT&T Texas pursuant to the SLTS Tariff.[47] For the following reasons, we disagree.

20. The portion of the Arbitration Award on which FeatureGroup IP relies concerned three questions that the Arbitration Award consolidated and that, in combination, essentially asked the Texas PUC to rule on the validity of FeatureGroup IP's federally tariffed SLTS charges.[48] FeatureGroup IP's position was, that "if AT&T Texas prevails on its tariff claims regarding access charges … (based on AT&T Texas's state or federal tariffs) then UTEX must prevail on its tariff claim regarding SLTS."[49] AT&T Texas's contrary position was, in pertinent part, the same as its position here – the SLTS charges violated the Communications Act.[50] The Arbitration Award held that, because the disputed SLTS charges did not arise from the Interconnection Agreement itself, the lawfulness of those SLTS charges was beyond the scope of the Texas PUC's purview:

> The Arbitrator finds that the dispute regarding SLTS charges exceeds the scope of a post-ICA dispute resolution proceeding. The scope of a post-ICA dispute resolution includes: (1) proper interpretation of terms and conditions in the ICA; (2) implementation of activities explicitly provided for, or implicitly contemplated in, the ICAs, including interim rates and terms expiring before the contract expiration date; and (3) enforcement of terms and conditions in an ICA. In the present case, the ICA never explicitly mentions or implicitly contemplates Session Internet Protocol (SIP) to SS7 translation. In contrast, the ICA expressly refers to access charges and SS7 B-Link interconnection. Accordingly, SLTS charges are not appropriate for consideration in this proceeding.[51]

21. Unlike FeatureGroup IP, we do not view the foregoing portion of the Arbitration Award

[47] *See, e.g.*, Answer Legal Analysis at 4-8.

[48] Arbitration Award at 128-29 (consolidating the following three questions: "Should the [Texas] Commission declare that the ICA does not control the issue of whether UTEX may bill AT&T Texas for Signaling Layer Translation Service? Should the [Texas] Commission declare that the ICA does not operate to prevent an award and finding in the appropriate venue that AT&T Texas must pay UTEX's past due bills for Signaling Layer Translation Service? Should the [Texas] Commission declare that AT&T Texas is responsible for payment of future invoices for so long as it receives Signaling Layer Translation Service?")

[49] Arbitration Award at 128.

[50] Arbitration Award at 128-29.

[51] Arbitration Award at 129.

as creating a "void" in the Interconnection Agreement about whether FeatureGroup IP must bear the cost of performing whatever functions are necessary to interconnect with AT&T Texas via SS7. Instead, we construe the Arbitration Award as simply – and correctly – declining to address the legality of a federal tariff, i.e., FeatureGroup IP's federal tariff from which the disputed SLTS charges arise. In other words, by stating that "SLTS charges are not appropriate for consideration in this proceeding," the Arbitration Award is merely reaching the unremarkable, and indisputable, conclusion that assessing the lawfulness of FeatureGroup IP's federal SLTS Tariff is not a task for the Texas PUC to perform.

22. In sum, the Arbitration Award holds that the parties' Interconnection Agreement precludes FeatureGroup IP from charging AT&T Texas for performing whatever functions are necessary to interconnect with AT&T Texas via SS7, because FeatureGroup IP is responsible for any such functions. As a result, FeatureGroup IP's imposition of SLTS charges on AT&T Texas pursuant to the SLTS Tariff is unlawful under the *Sierra-Mobile* doctrine and section 201(b).[52]

### C. FeatureGroup IP's Affirmative Defenses Lack Merit.

23. FeatureGroup IP urges us to deny AT&T Texas's Complaint because AT&T Texas allegedly has "unclean hands." In particular, FeatureGroup IP alleges that AT&T Texas has breached the parties' Interconnection Agreement in several ways and thus should not be heard to complain of any allegedly unlawful conduct by FeatureGroup IP.[53] Those affirmative defenses lack merit. Even assuming, *arguendo*, that an unclean hands defense is available in a section 208 formal complaint proceeding, it would fail here, because AT&T Texas's allegedly wrongful conduct does not pertain to the circumstances at issue in this proceeding, i.e., provision of and payment for call control interconnection services under the parties' Interconnection Agreement and the SLTS Tariff.[54]

### D. Conclusion

24. For the foregoing reasons, we grant Count I of the Complaint and hold that, as applied to AT&T Texas, the provisions of the SLTS Tariff pursuant to which FeatureGroup IP purported to impose charges for SLTS on AT&T Texas are unjust and unreasonable in violation of section 201(b) of the Act. Thus, FeatureGroup IP shall not collect or attempt to collect any such charges from AT&T Texas. Moreover, because our ruling in favor of AT&T Texas on Count I of the Complaint affords AT&T Texas all the relief to which it would be entitled were we to grant Count II of the Complaint, we need not and do not reach the merits of Count II of the Complaint, and we dismiss Count II of the Complaint without prejudice.[55]

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[52] We note that, under well-established precedent, the filed tariff doctrine does not preclude a Commission determination in a section 208 complaint proceeding that a tariffed rate has been and is unlawful and unenforceable. *See, e.g.*, *AT&T Corp. v. Business Telecom, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 12312, 12317-18, para. 9 (2001).

[53] *See, e.g.*, Answer at 4, 19-21; Answer Legal Analysis at 25-29. According to FeatureGroup IP, AT&T Texas has breached the parties' Interconnection Agreement by (i) refusing to route calls addressed to FeatureGroup IP's 500 numbers, and (ii) refusing to route calls addressed to other carrier networks that choose to use FeatureGroup IP as a transit provider. *Id.*

[54] *See, e.g.*, *Sprint Communications Co., L.P. v. Northern Valley Communications, LLC*, Memorandum Opinion and Order, 26 FCC Rcd 10780, 10789-90 (2011) (and cases cited therein).

[55] *See, e.g.*, *AT&T Corp. v. YMax Communications Corp.*, 26 FCC Rcd 5742, 5761, para. 53 (2011) (dismissing certain counts without prejudice because granting certain other counts already afforded AT&T all of the relief to (continued…)

## IV. ORDERING CLAUSE

25. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 201, and 208 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201, and 208, and sections 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.720-1.736, that Count I of the Complaint is GRANTED to the extent described herein, and Count II of the Complaint is DISMISSED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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which it could be entitled). In its Complaint, AT&T Texas purported to seek a "declar[ation] that any claim by [FeatureGroup IP] for compensation under quantum meruit, quasi-contract, constructive contract, or any other theory is preempted by the Communications Act." Complaint at 19. AT&T Texas provided no facts or legal analysis to support that request, however, so we need not and do not consider it. *See, e.g.*, 47 C.F.R. §§ 1.720(a), (c), (d); 1.721(a)(5)-(6), 1.726(c).