

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Petition of Autotel)
Pursuant to Section 252(e)(5) of the)
Communications Act for Preemption)
of the Jurisdiction of the Arizona)
Corporation Commission Regarding)
Arbitration of an Interconnection)
Agreement with Qwest Corporation)

WC Docket No. 06-134

In the Matter of Petition of Autotel)
Pursuant to Section 252(e)(5) of the)
Communications Act for Preemption)
of the Jurisdiction of the Colorado)
Public Utilities Commission Regarding)
Arbitration of an Interconnection)
Agreement with Qwest Corporation)

In the Matter of Petition of Autotel)
Pursuant to Section 252(e)(5) of the)
Communications Act for Preemption)
of the Jurisdiction of the New Mexico)
Public Regulation Commission Regarding)
Arbitration of an Interconnection)
Agreement with Qwest Corporation)

In the Matter of Petition of Western Radio)
Pursuant to Section 252(e)(5) of the)
Communications Act for Preemption)
of the Jurisdiction of the Oregon)
Public Utility Commission Regarding)
Arbitration of an Interconnection)
Agreement with Qwest Corporation)

In the Matter of Petition of Autotel)
Pursuant to Section 252(e)(5) of the)
Communications Act for Preemption)
of the Jurisdiction of the Utah Public)
Service Commission Regarding)
Arbitration of an Interconnection)
Agreement with Qwest Corporation)

**QWEST'S OPPOSITION TO PREEMPTION PETITIONS
OF AUTOTEL AND WESTERN RADIO**

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August 21, 2006

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**QWEST'S OPPOSITION TO PREEMPTION PETITIONS
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I. INTRODUCTION AND SUMMARY

Autotel and its affiliate Western Radio Services Co. (“Western”) (jointly “Autotel”) filed five petitions seeking preemption of state utilities commission decisions under Section 252(e)(5), which the Federal Communications Commission (“Commission”) put out on public notice.¹ The Federal Communications Commission (“Commission”) should reject each of Autotel’s five Preemption Petitions.² At Autotel’s request state commissions in each of Arizona, Colorado, New Mexico, Oregon and Utah conducted arbitration between Autotel and Qwest Corporation (“Qwest”). Autotel signed the resulting interconnection agreements in Arizona and Colorado. Subsequently, the state commissions approved the interconnection agreements. Autotel then filed a federal court action seeking review of the Arizona arbitration. That federal court action is

¹ See Public Notice, DA 06-1468, rel. July 19, 2006. Previously on May 3, 2006 Autotel served Qwest with five Preemption Petitions. Apparently the Petitions were never filed with the Commission. Not knowing that the Preemption Petitions had not been filed, Qwest filed an opposition with this Commission on May 18, 2006. Later, on July 6, 2006, Autotel filed five slightly revised Preemption Petitions with this Commission. On July 6, 2006, Autotel also mailed a copy of its five revised Preemption Petitions to Qwest without a certificate of service. In its July 6 mailing to Qwest Autotel did not include any affidavit of Richard L. Oberdorfer, as referred to in the Petitions. Qwest therefore assumes that Autotel did not revise the Oberdorfer affidavit served on Qwest on May 3, 2006.

² In the Matter of Petition of Autotel pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Arizona Corporation Commission Regarding Arbitration of an Interconnection Agreement with Qwest Corporation (“Arizona Preemption Petition”); In the Matter of Petition of Autotel pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Colorado Public Utilities Commission Regarding Arbitration of an Interconnection Agreement with Qwest Corporation (“Colorado Preemption Petition”); In the Matter of Petition of Autotel pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the New Mexico Public Regulation Commission Regarding Arbitration of an Interconnection Agreement with Qwest Corporation (“New Mexico Preemption Petition”); In the Matter of Petition of Western Radio pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Oregon Public Utility Commission Regarding Arbitration of an Interconnection Agreement with Qwest Corporation (“Oregon Preemption Petition”); In the Matter of Petition of Autotel pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Utah Public Service Commission Regarding Arbitration of an Interconnection Agreement with Qwest Corporation (“Utah Preemption Petition”).

still pending. Autotel refused to sign interconnection agreements in New Mexico, Oregon and Utah. Despite Autotel's refusal, the Oregon commission approved an interconnection agreement without Autotel's signature. The New Mexico and Utah commissions have not approved the unsigned interconnection agreements. Autotel filed federal court actions in Oregon and Utah seeking review of the arbitrations in those states, both of which were dismissed because Autotel filed them prior to final approval of an interconnection agreement by the state commissions.

Apparently dissatisfied with the results of arbitrations, Autotel requested a second arbitration in each state. Each state commission dismissed Autotel's second arbitration petition on the basis that the second petition represented Autotel's attempt to undermine the previous arbitration. All of the states except Arizona and Oregon also dismissed on the basis that Autotel failed to identify any issues for arbitration. The state commissions' prompt dismissal of the second arbitration requests because of Autotel's unwarranted decision to ignore a prior arbitration and because of Autotel's failure to identify issues for decision does not merit Commission preemption. Accordingly, the Commission should deny Autotel's Preemption Petitions.

II. FACTS

This is not the first instance in which Autotel has filed a defective and baseless petition for preemption. In 2004 Autotel filed a petition for preemption when the Public Utilities Commission of Nevada dismissed Autotel's state arbitration petition. The Nevada Commission dismissed based upon Autotel's failure to comply with discovery requests and flouting of state commission procedural orders.³ Two years ago, the Commission denied Autotel's Nevada

³ *In the Matter of Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Public Utilities Commission of Nevada Regarding Arbitration of an Interconnection Agreement with SBC Nevada*, Memorandum Opinion and Order, 19 FCC Rcd 20920 (2004).

petition for preemption. Now, the Commission should do the same to each of Autotel's five pending Petitions for Preemption.

A. Arizona

1. The Arizona interconnection agreement and pending court review

The Arizona Corporation Commission ("ACC") arbitrated an interconnection agreement between Qwest and Autotel, resulting in an arbitration decision, which issued on November 2, 2004 ("Arizona Arbitration Decision"). On April 15, 2005, the interconnection agreement between Qwest and Autotel was approved by operation of law ("Arizona Approved ICA"). On May 5, 2005, Autotel filed a federal complaint alleging, among other things, that the Arizona Arbitration Decision and the Arizona Approved ICA do not comply with the Telecommunications Act of 1996. That complaint remains pending in the United States District Court for the District of Arizona.⁴ Autotel has not requested any services from, or interconnection with, Qwest pursuant to the Arizona Approved ICA.

2. The underlying arbitration request

Despite having just filed the federal complaint in May 2005, in June 2005 Autotel requested that Qwest negotiate a second interconnection agreement in Arizona. Qwest declined to ignore the existence of the Arizona Approved ICA, and thus refused to negotiate a second interconnection agreement. On November 23, 2005, Autotel requested that the ACC arbitrate a second interconnection agreement between Qwest and Autotel. Autotel set forth one issue for resolution by the commission "adoption of an interconnection agreement."⁵ In support, Autotel

⁴ In the United States District Court, District of Arizona, *Autotel v. Qwest*, No. CIV 05-327 TUC-JCG.

⁵ Autotel withdrew its other issues in its opening brief.

attached its own proposed agreement, and what it represented as “Qwest’s current interconnection agreement offering.” That document was not the Arizona Approved ICA.

Qwest moved to dismiss based upon (1) the existence of the Arizona Approved ICA, and (2) Autotel’s failure to identify any resolved or unresolved issues for decision. The ACC agreed with Qwest, dismissing Autotel’s second arbitration petition with prejudice.⁶ The ACC found it significant that Autotel had initiated a second arbitration proceeding while review of the Arizona Arbitration Decision and the Arizona Approved ICA were pending in federal court, all without ever operating under the Arizona Approved ICA.⁷ Arizona decided that allowing Autotel to go forward with a second petition for arbitration would be a waste of resources, and would render the arbitration process futile. The ACC further admonished Autotel for its waste of administrative and judicial resources.⁸

B. Colorado

1. The Colorado interconnection agreement

The Colorado Public Utilities Commission (“Colorado PUC”) also arbitrated an interconnection agreement between Qwest and Autotel. That arbitration resulted in an arbitration decision, adopted February 25, 2005 (“Colorado Arbitration Decision”), and an approval decision, adopted May 11, 2005 (“Colorado Approval Decision”), and the interconnection agreement approved in those decisions (“Colorado Approved Agreement”). As

⁶ Before the Arizona Corporation Commission, *In the Matter of the Petition by Autotel for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b) of the Telecommunications Act*, Opinion and Order, Docket No. T-01051B-05-0858, Decision No. 68601, Mar. 23, 2006.

⁷ *Id.* ¶ 24.

⁸ *Id.* ¶ 26.

in Arizona, Autotel has not requested any services from, or interconnection with, Qwest under the terms of the Colorado Approved Agreement.

2. The underlying arbitration request

Even so, on June 23, 2005, slightly more than a month after the Colorado PUC issued its Colorado Approval Decision, Qwest received a request from Autotel for negotiation of yet another interconnection agreement in Colorado. Qwest informed Autotel that Qwest was not willing to ignore the prior arbitration and restart negotiations and that Qwest believed it had fulfilled its obligation under the Telecommunications Act by negotiating and arbitrating the Colorado Approved Agreement. Accordingly, no negotiations took place. Autotel filed the underlying Colorado arbitration petition on November 23, 2005. It identified three issues for arbitration: (1) adoption of an interconnection agreement, (2) state commission jurisdiction regarding Qwest's good faith negotiation duties under Section 251(c)(1) and (3) review of state commission actions. As in Arizona, in support of its petition, Autotel attached its own proposed agreement, and what it represented as "Qwest's current interconnection agreement offering." That document was not the Colorado Approved Agreement.

On December 19, 2005, Qwest moved to dismiss the Colorado arbitration petition because the request to arbitrate was inappropriate in light of the Colorado Arbitration Decision, the Colorado Approval Decision and the Colorado Approved Agreement. Moreover, the underlying petition did not identify any unresolved issues, the position of the parties with respect to unresolved issues, and resolved issues in connection with an interconnection agreement between the parties as required by Section 252(b)(2)(A) and state regulation. The Colorado PUC adopted an order granting Qwest's motion to dismiss on December 21, 2005.⁹

⁹ *In the Matter of the Petition of Autotel for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b) of the Telecommunications Act*, Decision No.

C. New Mexico

1. The unsigned New Mexico interconnection agreement

The New Mexico interconnection agreement remains unsigned. Its history is as follows. As in Arizona and Colorado, the New Mexico Public Regulation Commission (“New Mexico PRC”) arbitrated an interconnection agreement between Autotel and Qwest. New Mexico resolved the open issues by an Order dated July 28, 2005 (“New Mexico Arbitration Decision”). The New Mexico Arbitration Decision directed the parties to utilize the agreement proposed by Qwest with one specified clarification. Autotel refused to sign the resulting interconnection agreement.

2. The underlying arbitration request

On June 23, 2005, while the first New Mexico arbitration was still pending, and before the New Mexico PRC issued the New Mexico Arbitration Decision, Autotel requested negotiation of an interconnection agreement with Qwest. After Qwest refused to negotiate a second New Mexico interconnection agreement, in November 2005, Autotel filed the New Mexico petition for arbitration. The petition raised as issues the same three issues raised in Colorado. In response, Qwest moved to dismiss before the New Mexico PRC on December 19, 2005. The New Mexico PRC dismissed because Autotel ignored the New Mexico Arbitration Decision, and sought arbitration of previously settled issues. Moreover, the second petition for arbitration failed to identify open issues.¹⁰ Rather, Autotel attached its own proposed agreement,

C06-0005, Docket No. 05B-501T, adopted Dec. 21, 2005 (attached hereto as Exhibit 1). Autotel filed a reply to Qwest’s Motion to Dismiss, on January 6, 2006, after the mailing date of the Colorado PUC’s Order.

¹⁰ Before the New Mexico Public Regulation Commission, *In the Matter of the Petition of Autotel for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b) of the Telecommunications Act*, Order Granting Motion to Dismiss and Dismissing Petition, Case No. 05-00462-UT, issued Jan. 10, 2006 ¶ 5 (“New Mexico Decision”).

and a document that it characterized as “Qwest’s current interconnection agreement offering,” which did not reflect the New Mexico Arbitration Decision. Thus, Autotel left the New Mexico PRC to comb through the competing documents to identify any issues.

D. Oregon

1. Dealings between Qwest and Autotel in Oregon

Autotel’s Oregon affiliate, Western Radio Services Co. (“Western”) has exchanged traffic and purchased services from Qwest and its predecessors in Oregon for many years under the terms of Qwest’s Radio Common Carrier Tariff.

2. The unsigned, but approved, Oregon interconnection agreement

Western filed for arbitration of an interconnection with Qwest on March 11, 2004. Even though the Oregon Public Utility Commission (“Oregon PUC”) adopted the arbitrator’s decision in October 2004, the resulting interconnection agreement remained unsigned for about a year. The Oregon PUC approved the Oregon interconnection agreement only after Western filed a complaint in federal court seeking review, and after the federal court denied review for lack of jurisdiction since the Oregon PUC had not yet approved the unsigned interconnection agreement. Western has appealed that decision to the Ninth Circuit Court of Appeals, and that appeal is currently pending. After the federal district court decision, the Oregon PUC approved the interconnection agreement (“Oregon Approved Agreement”) by an order entered on October 10, 2005. In that order the Oregon PUC noted that Western could not “simply refuse to execute and honor the agreement because of disappointment with the outcome of the arbitration proceeding.”¹¹

¹¹ Before the Public Utility Commission of Oregon, *In the Matter of Western Radio Services Co. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Order No. 06-001, entered Jan. 3, 2006 at 3 (attached hereto as Exhibit 2) (“Oregon Decision”), citing to the Oregon PUC’s Order No. 05-1075.

3. The underlying arbitration request

In May 2005, after this Commission issued its *T-Mobile* decision,¹² Qwest sent a form letter to wireless carriers explaining actions it would take in light of that decision, until Qwest and the wireless carriers could amend their interconnection agreements. Autotel asserted that this form letter was Qwest's request to negotiate a new interconnection agreement. On October, 14, 2005, Western filed a petition seeking arbitration of a second interconnection agreement, raising the same three issues raised in other states. Again the agreement attached to the petition as "Qwest's current interconnection agreement offering" was not the Oregon Approved Agreement. Qwest moved to dismiss on November 8, 2005. The Oregon PUC granted Qwest's motion, finding that Qwest's May 10, 2005 form letter was not a request for negotiation. The Oregon PUC further found that negotiation of new interconnection terms and conditions was premature under the terms of the Oregon Approved Agreement.¹³

E. Utah

1. The unsigned Utah interconnection agreement

In Utah, just as in the other states, Autotel filed an initial petition to arbitrate, and then, apparently dissatisfied with the results, filed a second petition for arbitration. The Utah Public Service Commission ("Utah PSC") resolved the initial arbitration by order dated February 18, 2004 ("Utah Arbitration Order"). Despite its failure to sign an interconnection agreement reflecting the terms of the Utah Arbitration Order, Autotel appealed the Utah Arbitration Order to federal district court. That appeal was unsuccessful. Thereafter, the Utah PSC advised

¹² *In the Matter of Developing a Unified Inter-carrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005), *appeals pending sub nom. Ronan Telephone Co. v. FCC*, Nos. 05-71995, *et al.* (9th Cir., appeals stayed until September 21, 2006 pursuant to Order of May 26, 2006).

¹³ Oregon Decision at 4.

Autotel that if it were dissatisfied with the Utah Arbitration Order Autotel should file an appeal with the appropriate federal district court after the Utah PSC approved a signed interconnection agreement. Autotel never signed the resulting interconnection agreement, and the Utah PSC denied Qwest's request that it require Autotel to sign an interconnection agreement filed by Qwest.

2. The underlying arbitration request

Instead of following the Utah PSC's advice to sign an interconnection agreement, and seek review in federal court, Autotel filed a petition to arbitrate on October 26, 2005. Qwest moved to dismiss. The Utah PSC granted Qwest's request in an Order issued December 7, 2005.¹⁴ The state commission found that Autotel failed to identify any open issues.¹⁵ Instead, Autotel merely attached two apparently competing agreements to its petition, but did not specifically identify any issues requiring commission resolution or the parties' respective positions regarding those issues.¹⁶ The Utah PSC also dismissed based upon Autotel's continuing failure to sign an interconnection agreement complying with the Utah Arbitration Order.¹⁷ The Utah PSC refused to allow Autotel to seek arbitration of previously settled issues.¹⁸

¹⁴ Before the Public Service Commission of Utah, *In the Matter of the Petition of Autotel for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b) of the Telecommunications Act*, Order Granting Motion to Dismiss, Docket No. 05-049-95, issued Dec. 7, 2005 ("Utah Decision").

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 3-4.

¹⁷ *Id.* at 4.

¹⁸ *Id.*

III. ARGUMENT

A. Each Of Autotel's Preemption Petitions Is Formally Deficient

Each of Autotel's petitions falls short of the Commission's rule requiring that the party filing a petition pursuant to Section 252(b)(4)(C), state with specificity the basis for the petition. The Commission stated its belief "that parties should be required to file a detailed written petition, backed by affidavit, that will, at the outset, give the Commission a better understanding of the issues involved and the action, or lack of action, taken by the state commission . . . A detailed written petition will facilitate a decision about whether the Commission should assume jurisdiction based on section 252(e)(5)."¹⁹ Autotel's petition fails to give the Commission important facts. In the Arizona, Colorado and Oregon Preemption Petitions Autotel fails to disclose the existence of an approved interconnection agreement, and Qwest's complete compliance with that agreement. In the Arizona and Oregon Preemption Petitions, Autotel also fails to disclose the pending federal court review. In the New Mexico and Utah Preemption Petitions, Autotel does not disclose that it has refused to sign an interconnection agreement reflecting the terms of the state commissions' arbitration decision. These missing facts are all material to this Commission's decision.

Just as Autotel's petitions are formally deficient, they also reveal a profound misunderstanding of the procedures of interconnection negotiation. First, Autotel incorrectly assumes that each state commission's dismissal is tantamount to a failure to act. Second, Autotel does not understand what it means to raise an issue for arbitration, and thus incorrectly asserts that each state commission failed to resolve the issues that Autotel raised. Third, Autotel seems

¹⁹ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 16128-29 ¶ 1287 (1996) ("*Local Competition Order*") (subsequent history omitted).

to assume that it is not bound by the Autotel-Qwest-arbitrations already conducted by each state commission.

B. The State Commissions Did Not Fail To Act, Accordingly Preemption Is Not Appropriate

The first faulty assumption underlying Autotel’s preemption petition is that each state commission’s dismissal is tantamount to failure to act.²⁰ Autotel as the party seeking preemption bears the burden of proving that each state commission has failed to act.²¹ This is a heavy burden because this Commission has decided not to take an “expansive view” of what constitutes a state commission’s failure to act for purposes of Section 252(e)(5).²² Autotel catalogs actions that it believes each state commission should have taken: resolving the “unresolved issues between the parties”-- scheduling proceedings, ordering hearings, requesting briefings, requesting information from the parties, determining whether the contract language meets the requirements of Section 251 and the regulations, and imposing rates that it established into an interconnection agreement.²³ Autotel points to nothing in the statute, this Commission’s decisions or the court decisions interpreting the statute that requires the state commission to go through all of those steps just to dismiss Autotel’s second petition for arbitration, especially where the arbitration petition fails to identify any open issues or the parties’ positions on such issues.

Section 252(e)(5) of the Act permits the Commission to preempt the jurisdiction of a state commission only where the state commission “fails to act.” Because each state commission

²⁰ Arizona Preemption Petition at 3, Colorado Preemption Petition at 2, New Mexico Preemption Petition at 3, Oregon Preemption Petition at 3, Utah Preemption Petition at 2.

²¹ 47 C.F.R. § 51.803(b).

²² *Local Competition Order*, 11 FCC Rcd at 16128 ¶ 1285.

²³ Arizona Preemption Petition at 2, Colorado Preemption Petition at 2, New Mexico Preemption Petition at 2, Oregon Preemption Petition at 2, Utah Preemption Petition at 2. Autotel does not acknowledge that each state commission expended significant resources doing just these things in order to reach its arbitration decision and approval decision.

acted upon the underlying arbitration petition, preemption is not appropriate in this situation. It is not appropriate to use Section 252(e)(5) as Autotel does here to ask this Commission to review the substantive validity of a state commission's dismissal of a party's claim.²⁴ Autotel should have sought review of each dismissal in the appropriate judicial forum pursuant to Section 252(e)(6), which provides for judicial review if the state commission takes final action disposing of the pending claim. In situations such as this where the state commission made a determination under Section 252, the remedy for the party "aggrieved" by the state commission's determination is to seek review in the appropriate court under Section 252(e)(6).

Improbably, Autotel relies upon the D.C. Circuit's *Global Naps* decision,²⁵ which supports Qwest's view that preemption under section 252(e)(5) is not appropriate when a state commission dismisses a carrier's claim. In that case, *Global Naps* asked the Commission to preempt a state commission's authority over the interpretation of an interconnection agreement. The Commission refused to preempt the state commission, deciding that the state commission's dismissal of *Global Naps*' complaint was not a failure to act, and therefore the state commission was not subject to preemption.²⁶ The D.C. Circuit agreed with the Commission. The same result should hold with respect to Autotel's five Petitions for Preemption.

On a related point, Autotel misunderstands what it means to raise an issue in the context of arbitration. Autotel argues that the state commissions incorrectly found that Autotel failed to identify unresolved or open issues,²⁷ and that the state commissions failed to resolve issues that

²⁴ *Global Naps, Inc. v. FCC*, 291 F.3d 832, 837 (D.C. Cir. 2002).

²⁵ *Id.*

²⁶ *Id.* at 839.

²⁷ Arizona Preemption Petition at 3, New Mexico Preemption Petition at 3, Utah Preemption Petition at 2.

Autotel identified.²⁸ Again, Autotel relies upon a decision that supports Qwest here, the *MCI* preemption decision.²⁹ As Autotel notes, in *MCI* the Commission explained that a state commission can fail to act under Section 252(e)(5) if it does not resolve all issues “clearly and specifically” presented to it.³⁰ However, the Commission went on to decide that attaching competing agreements and forcing the state commission to comb through them in search of disputes between the parties does not clearly and specifically present issues to the state commission.³¹ Attaching a proposed agreement and forcing the state commission to find the issues was exactly Autotel’s course of conduct. Just as in *MCI*, each state commission that reached the issue found that Autotel’s merely attaching competing agreements did not serve to clearly and specifically raise issues.³² Since Autotel did not “clearly and specifically” raise issues by attaching competing agreements, the state commissions did not leave open issues “clearly and specifically” presented to them.

In sum, because the state commissions’ dismissals were not tantamount to a failure to act, preemption is not appropriate. Rather, Autotel’s remedy is judicial review under Section 252(e)(6). Moreover, the state commissions that considered the argument correctly found that Autotel failed to raise any issues for arbitration.

²⁸ Arizona Preemption Petition at 3, Colorado Preemption Petition at 2, New Mexico Preemption Petition at 3, Oregon Preemption Petition at 3, Utah Preemption Petition at 2.

²⁹ *In the Matter of Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 12 FCC Rcd 15594 (1997) (“*MCI*”).

³⁰ *Id.* at 15613 ¶ 31.

³¹ *Id.* at 15615-16 ¶ 37.

³² *See* Colorado Decision at 3, New Mexico Decision at 2-3, Utah Decision at 3-4.

C. Preemption Is Inappropriate Because Autotel Is Bound By Each State Commission's Prior Arbitration Decision

Implicit in Autotel's Preemption Petitions is Autotel's incorrect assumption that the state commissions' arbitration decisions do not bind Autotel. For example, Autotel says that the ACC "incorrectly found that there is in effect an interconnection agreement between the parties."³³ While Autotel never directly states that it is not bound by the signed interconnection agreements and state commission arbitration decisions, Autotel's demand to arbitrate new interconnection agreements speaks volumes.

The First Circuit has considered and rejected the position that a carrier is not bound by its choice to arbitrate an interconnection agreement. In *Global Naps v. Verizon*,³⁴ Global Naps sought arbitration then refused to cooperate with the resulting arbitration order. Instead of cooperating with the arbitration order, Global Naps sought to enter into a preexisting agreement between the ILEC and a third company. The First Circuit stated that "it is clear that § 252(b)(4)(C) intends for arbitration orders to be binding on both parties. . . . In attempting to avoid the terms of a valid arbitration order, it is clear that Global Naps is refusing to cooperate with the [state commission], in violation of its duty to negotiate in good faith."³⁵

Here, Autotel demonstrates its lack of good faith by seeking to use this Commission's preemption power as a tool in its scheme to avoid the terms of the state commissions' arbitration orders. This lack of good faith further manifests itself before this Commission in Autotel's failure to make a forthright disclosure in its Preemption Petitions regarding the state

³³ Arizona Preemption Petition at 3. Autotel does not explain why it believes that the ACC's finding is incorrect.

³⁴ *Global Naps, Inc. v. Verizon New England, Inc.*, 396 F.3d 16 (1st Cir. 2005), *cert. denied*, *Global Naps v. Verizon New England, Inc.*, 125 S. Ct. 2522 (2005).

³⁵ *Id.* at 24-25.

commissions' prior arbitrations. This Commission should make clear to Autotel that each of the state arbitrations is binding upon Autotel. Autotel cannot waste this Commission's resources, along with the resources of the state commissions, federal courts, and Qwest, by demanding arbitration then failing to abide by the results.

IV. CONCLUSION

Since each state commission reached a decision on Autotel's arbitration request, the state commissions are not subject to preemption. While this Commission need not look at the reasonableness of the state commissions' decisions, the state commissions acted properly to enforce the rules regarding raising issues for arbitration and the results of the Qwest-Autotel arbitrations. Accordingly, this Commission should deny each Preemption Petition.

Respectfully submitted,

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EXHIBIT 1

Decision No. C06-0005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 05B-501T

IN THE MATTER OF THE PETITION OF AUTOTEL FOR ARBITRATION OF AN
INTERCONNECTION AGREEMENT WITH QWEST CORPORATION PURSUANT TO
SECTION 252(B) OF THE TELECOMMUNICATIONS ACT.

ORDER GRANTING MOTION TO DISMISS

Mailed Date: January 5, 2006
Adopted Date: December 21, 2005

I. BY THE COMMISSION

A. Factual and Procedural Background

1. This matter comes before the Commission upon the filing of a Petition for Arbitration by Autotel on November 23, 2005. In its Petition, Autotel requests that the Commission arbitrate an interconnection agreement (ICA) between it and Qwest Corporation (Qwest) to resolve certain issues raised by the parties in the negotiation process and the approval of an ICA in accordance with 47 U.S.C. § 252.

2. Autotel states that there are three issues, and several sub-issues, that it wishes the Commission to arbitrate: 1) Qwest's refusal to negotiate in good faith to determine the rates, terms, and conditions of the ICA; 2) relief to avoid future damages by the imposition of rates, terms, and conditions under an ICA; and 3) the timing of the review of state commission actions and Qwest's violation of the duty to negotiate in good faith pursuant to 47 *Code of Federal Regulations* 51.301(c)(6).

3. Autotel asserts that its request for negotiation was received by Qwest on June 23, 2005. The 135th day is November 5, 2005. The 160th day is November 30, 2005. The end of the nine-month period for Commission decision is March 23, 2006.

4. On December 19, 2005, Qwest filed a Response to Autotel's Petition for Arbitration and Motion to Dismiss. In its Response and Motion, Qwest states that Autotel's Petition is entirely inappropriate in light of the Commission's Decision No. C05-0242 (adopted February 25, 2005) in which the Commission issued its decision on issues arbitrated between these two parties in Docket No. 04B-361T. Following this decision, the parties filed a signed ICA that was approved by Decision No. C05-0580 on May 11, 2005. This ICA is to have an effective life of three years.

5. Qwest asserts that when it received Autotel's request for negotiation on June 23, 2005, Qwest responded that it was not willing to ignore the prior arbitration and restart negotiations, and that it had already fulfilled its obligations under the Federal Telecommunications Act by negotiating and arbitrating the approved agreement still in effect.

6. Qwest contends that Autotel may not engage in an arbitration proceeding and then indirectly challenge the decision of the Commission by seeking to arbitrate a new ICA containing terms already rejected by the Commission. Qwest states that if this action is allowed it would render the arbitration process meaningless.

7. Further, Qwest states that Autotel in its Petition has not identified any issues that involve a dispute regarding any provision of an ICA between the parties. None of the three issues enumerated by Autotel is a valid issue for arbitration of the terms and conditions of an ICA.

8. Qwest asks the Commission to Dismiss the Petition based on its stated arguments.

B. Discussion

9. We agree with Qwest's arguments and dismiss the Petition. By filing this Petition for Arbitration, Autotel is seeking to undermine our previous decision, Decision No. C05-0242, ordering the resolutions of interconnection issues. Autotel could have appealed that decision but chose not to, and instead signed and filed the currently effective ICA per the terms of our decision. Our decision and the resulting ICA are binding on the signatory parties. The parties may negotiate amendments to change the terms of that ICA, but only if both parties are agreeable to the negotiation process.

10. Autotel may not ask this Commission or Qwest to expend additional resources to arbitrate a new agreement when the effective agreement is less than a year into its term. Federal and state law requires negotiations to begin six months prior to the expiration of an agreement, not two and a half years prior.

11. If Autotel has a concern that Qwest is not adhering to the terms of the ICA, it can file a complaint with this Commission or pursue a proper dispute resolution process. However, we note, as Qwest states in its Response and Motion, that in this Petition Autotel fails to identify any open issues concerning the ICA for this Commission to resolve.

II. ORDER**A. The Commission Orders That:**

1. The Motion to Dismiss the Petition for Arbitration filed by Qwest Corporation is granted.

2. The 20-day time period provided by § 40-4-114(1), C.R.S., within which to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Mailed Date of this Order.

3. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 21, 2005.**

(SEAL)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

CARL MILLER

Commissioners

EXHIBIT 2

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

ARB 706

In the Matter of)
)
 WESTERN RADIO SERVICES CO.)
)
 Petition for Arbitration Pursuant to)
 Section 252(b) of the Telecommunications)
 Act of 1996.)

ORDER

**DISPOSITION: PETITION FOR ARBITRATION DISMISSED;
DOCKET CLOSED**

On October 14, 2005, Western Radio Services Co. (Western) filed a petition (Petition) with the Public Utility Commission of Oregon (Commission) seeking arbitration of an interconnection agreement with Qwest Corporation (Qwest). Western asserts that Qwest requested negotiation of an interconnection agreement by letter dated May 10, 2005. Western seeks Commission resolution of five issues that it claims were raised by the parties during the negotiation process.

On November 8, 2005, Qwest filed a response to Western’s Petition, including a motion to dismiss. In support of the motion, Qwest asserts that the Petition is inappropriate in light of Commission Order No. 05-1075 entered October 10, 2005, in docket ARB 537 approving an interconnection agreement between Western and Qwest (Approved Agreement). Qwest also asserts that the Petition is inappropriate because Qwest’s May 10, 2005, letter did not constitute a request for negotiation of an interconnection agreement. Finally, Qwest contends that the Petition fails to properly identify the disputed issues in the interconnection agreement and otherwise comply with the requirements of OAR 860-016-0030.

On November 22, 2005, Western filed a reply to Qwest’s motion to dismiss. Western asserts that (a) Qwest’s motion to dismiss is untimely, (b) the Commission is without jurisdiction to award the relief sought by Qwest, and (c) the Petition was filed in accordance with §252 of the Telecommunications Act of 1996 (the Act).

After reviewing the filings, the Commission concludes that Western's Petition should be dismissed for the following reasons:

1. The Petition is improper because it ignores the fact that there is already an approved interconnection agreement in effect. In addition, the Commission finds that the Petition is premised upon the incorrect assumption that Qwest requested negotiation of a new interconnection agreement on May 10, 2005.

On March 11, 2004, Western filed a petition for arbitration with the Commission, which was assigned docket ARB 537. Following extensive proceedings, the Arbitrator issued his decision on September 20, 2004. The Commission adopted the Arbitrator's Decision in Order No. 04-600, entered October 18, 2004. Order No. 04-600 directed the parties to submit an interconnection agreement consistent with the terms of the order within 30 days.

Although Qwest sent Western an interconnection agreement compliant with Order No. 04-600, Western declined to sign the agreement, but instead filed a complaint with the United States District Court for the District of Oregon alleging violation of the Act. The Court dismissed Western's complaint, agreeing with Qwest and the Commission that the federal district court lacked jurisdiction because the Commission had not yet approved an interconnection agreement between the parties.¹

On July 28, 2005, Qwest notified the Commission of the federal district court's decision and requested that the Commission approve the interconnection agreement that Qwest had submitted on November 18, 2004. On August 1, 2005, Western filed a response requesting that the Commission take no further action because Western was appealing the federal district court's dismissal of Western's complaint. Western also asserted that Qwest had requested negotiation of a new interconnection agreement on May 10, 2005. Qwest denied Western's claim that its May 10, 2005, letter was a request for negotiation.²

Just four days before Western filed the current Petition, the Commission entered Order No. 05-1075, approving the interconnection agreement submitted by Qwest on November 18, 2004 (Approved Agreement). We concluded that the Approved Agreement was in full compliance with the Arbitrator's decision and the requirements of the Act. Regarding Western's refusal to sign the Approved Agreement, we held:

¹ See *Western Radio Services Co. v. Qwest Corporation*, Civil No. 05-155-AA (D. Or. July 26, 2005).

² Qwest explained that the May 10, 2005, letter was merely a form letter to all wireless carriers indicating that it was (a) withdrawing a portion of its Oregon tariff as a result of the FCC's *T-Mobile* decision, and (b) implementing an interim tariff in place until Qwest and the wireless carriers could amend their interconnection agreements consistent with the *T-Mobile* decision.

The parties subject to the 252(b) process are plainly required to go through the steps set forth and *are not free to walk away from the arbitrated interconnection agreement if they are displeased with the outcome of the arbitration process* before the state commission. Indeed, if they were free to do so, it would *render the concept of compulsory arbitration meaningless. . . .*

An arbitrated interconnection agreement, with the disputed terms as decided by the Arbitrator and adopted by the commission, has the same legal power to bind the parties as if the agreement had been freely entered into by both parties prior to its submission to the Commission. *One party cannot simply refuse to execute and honor the agreement because of disappointment with the outcome of the arbitration proceeding. . . .* Order No. 05-1075 at 3. (Emphasis added.)

The Approved Agreement went into effect on October 10, 2005, and remains in effect for a period of three years.³ Just as it is inappropriate to allow Western to ignore the results of an arbitration proceeding by refusing to enter into an agreement consistent with the Commission's arbitration decision, it is likewise inappropriate for Western to attempt to commence arbitration of a new interconnection agreement only days after the Commission-arbitrated and approved interconnection agreement became effective. As Qwest points out, entertaining Western's Petition would essentially render the Commission's arbitration decisions meaningless. Both parties are expected to abide by the terms and conditions of the Approved Agreement until it expires or they voluntarily negotiate a new agreement.

2. The Petition is improper because it is premised upon the incorrect assumption that Qwest's May 10, 2005, letter was a request for negotiation.⁴ The Commission already considered and rejected this argument in Order No. 05-1075. There we held:

³ Section XXII.B.1. of the Approved Agreement provides: This Agreement shall be effective as of the *effective date of commission approval* of this Interconnection Agreement and *shall remain in effect* for a period of *3 years*, and thereafter shall continue in force and effect unless and until a new agreement, addressing all of the terms of this Agreement, becomes effective between the Parties. The Parties agree to commence negotiations on a new agreement no later than 2 1/2 years after this Agreement becomes effective. This Agreement shall become effective pursuant to Sections 251 and 252 of the Act. (Emphasis added.)

⁴ Section 252(b)(1) of the Act requires that a petition for arbitration be filed "during the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation." If there is no request for negotiation, no petition can be entertained.

We also find that the Qwest letter of May 10, 2005, notifying radio carriers that it was withdrawing Section 20 of Oregon Tariff²⁹ as a result of the Federal Communications Commission's *T-Mobile* decision [citation omitted] and putting an interim tariff in place . . . in no way constituted a 'request for negotiation.' Order No. 05-1075 at 4.

Because the May 10, 2005, letter did not constitute a request by Qwest for negotiation of a new interconnection agreement, Western's Petition is inappropriate. Moreover, in the absence of Qwest's consent to negotiate a new interconnection agreement, negotiation is not proper at this time under the terms of the Approved Agreement, and, therefore, the 135-160 day period prescribed in Section 252(b)(1) of the Act cannot even begin to run.

3. As a final matter, the Commission is not persuaded by Western's argument that Qwest's motion to dismiss should be rejected because it was filed within the 25-day time period allowed under §252(b)(3) to respond to a petition for arbitration, rather than the 20-day time period specified in OAR 860-013-0050(3)(a) to respond to a motion. Qwest's motion to dismiss is an integral part of its response to Western's Petition. In such circumstances, Commission policy is that the filing deadlines set forth in the Act govern.⁵ Thus, Qwest's motion was not untimely. Moreover, Western did not suffer any prejudice because the motion was filed together with Qwest's response.

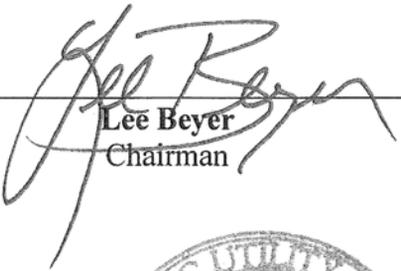
Based on the foregoing, the Commission finds that Qwest's motion to dismiss should be granted. It is unnecessary to discuss the remaining arguments advanced by the parties.

⁵ See e.g., Order No. 05-661, docket ARB 589.

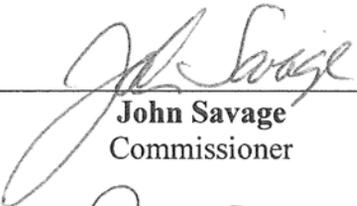
ORDER

IT IS ORDERED that the Petition for Arbitration filed by Western Radio Services Co. on October 14, 2005, is dismissed. This docket is closed.

Made, entered, and effective JAN 03 2006.



Lee Beyer
Chairman



John Savage
Commissioner



Ray Baum
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. The request must be filed with the Commission within 60 days of the date of service of this order and must comply with the requirements in OAR 860-014-0095. A copy of they such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **QWEST'S OPPOSITION TO PREEMPTION PETITIONS OF AUTOTEL AND WESTERN RADIO** to be 1) filed via the FCC's Electronic Comment Filing System with the Office of the Secretary of the FCC in WC Docket No. 06-134; 2) served via email on the staff person of the FCC identified in the attached service list; 3) served via email on the FCC's duplicating contractor Best Copy and Printing, Inc.; and 4) served via First Class United States Mail, postage prepaid, on all other parties as listed on the attached service list.

/s/ Richard Grozier

August 21, 2006

* Served via email

** Served via U.S. Mail

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