

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 80554**

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)
)

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)

WC Docket No. 06-134

RESPONSE OF THE ARIZONA CORPORATION COMMISSION

I. Introduction

The Arizona Corporation Commission (“Arizona Commission”) hereby files its Response to the Petitions for Preemption dated July 6, 2006 filed by Autotel with the Federal Communications Commission (“FCC” or “Commission”).

On July 11, 2006, the Arizona Commission received a copy of a Petition for Preemption of the Arizona Commission’s jurisdiction filed by Autotel with the FCC.¹ In its Petition, Autotel seeks preemption of the Arizona Commission’s jurisdiction over arbitration proceedings involving Autotel and Qwest Corporation (“Qwest”) pursuant to Section 252(e)(5) of the Telecommunications Act of 1996 (“1996 Act”).

On July 19, 2006, the FCC published notice of Autotel’s Petition and set a deadline for responses of August 21, 2006.

For the reasons discussed below, the FCC should deny Autotel’s Petition for Preemption of the Arizona Commission’s jurisdiction. The Arizona Commission has not “failed to act” on Autotel’s Petitions for Arbitration.

II. Background

Autotel has filed two petitions for arbitration under Section 252 of the 1996 Act with the Arizona Commission since 2004. Autotel filed its first Petition on February 27, 2004. Autotel’s first Petition identified the following four issues for resolution: 1) Is Qwest required to transport and terminate telephone exchange traffic and exchange access traffic delivered to a tandem by Autotel to another tandem; 2) What is local traffic for LEC/CMRS interconnection; 3) When using Type 1 interconnection, is Qwest required to provide any technically feasible type of signaling requested by Autotel; and 4)

¹ Apparently Autotel filed its Petitions for Preemption initially on May 4, 2006. On July 6, 2006 it sent a letter to the FCC indicating it was resending its Petitions for Preemption because “...either the U.S. Postal Service or the FCC lost the package.” Autotel also stated in its letter that “[t]he state commissions as well as Qwest all did receive copies of the initial petitions, and Qwest and the State of Colorado have responded.” Autotel’s statement, at least with respect to the Arizona Commission, is incorrect. The Arizona Commission has no record of ever receiving Autotel’s May 4, 2006 Petition. The Arizona Commission certainly would have responded had it been aware of Autotel’s Petition at the time.

Is Qwest required to provide the loop unbundled network element so that Autotel may use the element to provide a telecommunication service. Qwest moved to dismiss, and in the alternative, raised nine additional issues.

An Arizona Commission Administrative Law Judge (“ALJ”) entertained pre-hearing motions and issued procedural orders setting deadlines for filing testimony. The parties “agreed to submit written testimony on the disputed issues, waive their right of cross-examination, and have the issues resolved based on briefs.” *Id* at 2.

The ALJ issued her Recommended Opinion and Order on October 8, 2004. Neither Qwest nor Autotel filed Exceptions to the ALJ’s Order. On November 2, 2004, the Arizona Commission issued Decision No. 67408 which resolved twelve substantive issues and one “clerical” issue and made findings of fact and conclusions of law. The Arizona Commission then ordered the parties to incorporate the Commission’s resolutions of the issues into a final, executed interconnection agreement and to submit that agreement to the Commission. Neither Qwest nor Autotel filed a Petition for Reconsideration or Rehearing of the Arizona Commission’s Decision. On March 15, 2005, Qwest filed the Interconnection Agreement with the Commission as required under 47 U.S.C. Section 252(e)(1). The Agreement was subsequently approved by operation of law.

On May 5, 2005, Autotel filed a “Complaint for Violation of Telecommunications Act of 1996 and Violation of 42 U.S.C. Section 1983” in the United District Court for the District of Arizona, Case No. CIV 05-327 TUC. Autotel’s Complaint requested a jury trial and contained the following four Counts: 1) The ACC violated its delegated authority under 47 U.S.C. Sections 251 and 252; 2) Qwest failed to negotiate the interconnection agreement in good faith; 3) The ACC and Commissioners violated Autotel’s due process rights under 42 U.S.C. Section 1983; and 4) The ACC and Commissioners violated Autotel’s equal protection rights under 42 U.S.C. Section 1983.

By Order dated April 20, 2006, the Arizona Federal District Court granted the Motions to Dismiss filed by the Arizona Commission and Qwest and dismissed Counts 2, 3 and 4 of Autotel's Complaint. Only Count I of Autotel's Complaint remains. The Court subsequently established a procedural schedule to govern further proceedings in the case.

Autotel then filed a second Petition for Arbitration of an Interconnection Agreement with Qwest with the Arizona Commission. That Request for Arbitration was subsequently dismissed by the Arizona Commission because: 1) there was a lack of identifiable issues presented to the Arizona Commission for resolution; 2) the Arizona Commission had just completed an arbitration proceeding at the request of Autotel; 3) Autotel filed a Complaint in the United States District Court for the District of Arizona alleging that the Commission's order was in violation of Section 251 and 252 of the Act, and these issues were not yet resolved; 4) Autotel has never provided service in Arizona and never operated under the first arbitration agreement approved by the Arizona Commission which is still effective and pending judicial review; and 5) there appeared to the Arizona Commission to be a pattern of conduct on Autotel's part of acting in bad faith.

On May 4, 2006, Autotel apparently filed a Petition for Preemption with the FCC which no one at the ACC has knowledge of receiving. Autotel subsequently refiled its Petition for Preemption with the FCC on July 6, 2006.

III. Discussion

A. The Arizona Commission did not "fail to act" under Section 252(e)(5) of the 1996 Act with respect to Autotel's Petition

Section 252(e)(5) of the 1996 Act provides:

“(5)COMMISSION TO ACT IF STATE WILL NOT ACT
– If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume

the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.”

The FCC has entered innumerable orders under Section 252(e)(5). In its review of these orders, the Arizona Commission did not find one that supports Autotel’s position. In its *Local Competition Order*, the FCC established interim procedures to exercise its preemption authority under Section 252(e)(5). The FCC concluded in that order that it would not take an “expansive view” of what constitutes a state commission’s ‘failure to act’ within the meaning of section 252(e)(5).² Rather, the FCC interpreted ‘failure to act’ to mean a state’s failure to complete its duties in a timely manner, thereby limiting preemption under section 252(e)(5) “to instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C).³ The party seeking preemption bears the burden of proving that the State commission failed to act. See 47 C.F.R. Section 51.803(b).

Autotel’s allegation that the Arizona Commission “failed to act” under this provision of the 1996 Act appears to be based upon the fact that the Arizona Commission dismissed its second petition for arbitration because there was an outstanding Federal District Court appeal, and the Arizona Commission believed it to be procedurally defective in a number of ways. The Arizona Commission also had a concern that Autotel was not acting in good faith. However, dismissal of Autotel’s second petition by the Arizona Commission, cannot be interpreted as a “failure to act” under prior FCC determinations. In particular, the facts in this case are similar to the facts presented in a recent case involving Autotel before the FCC requesting preemption of the Nevada Public Utilities Commission (“Nevada Commission”) under Section 252(e)(5) of the

² *In the Matter of the Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 97-166, Memorandum Opinion and Order, 12 FCC Rcd. 15,594 (Released September 26, 1997).

³ *Id.* at p. 15598-15599.

1996 Act.⁴ In that case the Nevada Commission dismissed Autotel’s petition because of its failure to timely respond to data requests and to the Presiding Officer’s orders.⁵ Autotel filed a petition with the FCC to preempt the Nevada Commission’s jurisdiction for failure to act under Section 252(E)(5). In denying Autotel’s petition, the FCC stated:

“We find the Nevada Commission’s procedural dismissal satisfies its obligation to act under Section 252(e)(5). As this Commission has recognized, “a state commission carrie[s] out ‘its responsibility [under section 252]’ when it resolves the merits of a section 252 proceeding or dismisses such a proceeding on jurisdictional or procedural grounds.” The record demonstrates that in response to the arbitration petition filed by Autotel, the Nevada Commission docketed the matter, issued a public notice, held pre-hearing conferences, issued a procedural schedule, and ruled on pre-hearing issues, including SBC’s motions to compel. When ‘the state agency actually ‘makes a determination’ under Section 252 – there is no statutory basis for FCC preemption.’ Moreover section 252(e)(5)’ does not empower [the Commission] to look behind a state agency’s dismissal of a carrier’s claim to evaluate the substantive validity of that dismissal.’ Thus, the Nevada Commission Order dismissing Autotel’s arbitration petition on procedural grounds, without addressing the merits of the arbitration issues, was a final determination and cannot be deemed a “failure to act” under section 252 of the Act.”

In this case, the Arizona Commission issued a final decision on Autotel’s first petition for arbitration and approved the parties’ interconnection agreement incorporating the Arizona Commission’s decision. Autotel appealed the Arizona Commission’s decision to the United States District Court for the District of Arizona. With this appeal still pending and unresolved, and without ever operating under the first agreement, Autotel filed a second petition for arbitration with the Arizona Commission.

The Arizona Commission scheduled proceedings on Autotel’s second petition. The Arizona Commission subsequently dismissed Autotel’s second petition upon motion of Qwest and the Commission Staff. The Commission found that it was not feasible to

⁴ *In the Matter of the 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*, WC Docket No. 04-311, Memorandum Opinion and Order, 19 FCC Rcd. 20,920 (Released October 22, 2004)(“*FCC Nevada Ruling*”).

⁵ *FCC Nevada Ruling* at 20923.

go ahead with Autotel's second petition while the Commission's Decision in response to Autotel's first petition was still pending before the Arizona Federal District Court. The Commission also found that Autotel appeared to be acting in bad faith given its conduct throughout the Qwest region of initiating a multitude of proceedings in its attempt to find a sympathetic forum. When reviewed under the standards discussed by the FCC in its *Nevada Ruling*, the Arizona Commission in dismissing Autotel's second petition, cannot be said to have "failed to act" on Autotel's petition.

The FCC has also found that where the issues are not clearly presented to a State Commission, the State Commission will not be deemed to have "failed to act" by not ruling on them. The 4 issues listed in Autotel's second petition for arbitration filed with the Arizona Commission were confusing and difficult to comprehend. It appeared as if Autotel was requesting that the Arizona Commission address Autotel's contention that Qwest had not negotiated in good faith, an issue that Autotel had raised before the Arizona District Court for the first time on appeal of the Arizona Commission's first arbitration decision.

In addition, Autotel had attached two interconnection agreements to the petition, adding further confusion since that could be interpreted as Autotel's desire to have all issues litigated again. The FCC found in its *MCI/Missouri Ruling* that "...a state commission may not be found to have 'failed to act' within the meaning of section 252(e)(5) if the issue or issues that are the subject of the preemption petition were never clearly and specifically presented to the state commission in accordance with any procedures set forth by the state commission." *Id.* at 15611. The FCC further stated: "In our view, it would be inconsistent with the Act's grant of authority to the state commissions to arbitrate disputes if we interpreted the statute to authorize us to preempt the state commissions for 'failing' to arbitrate disputes that were not clearly and specifically presented to the state commission in the first instance for arbitration." *Id.* at 15611. In the proceeding before the Arizona Commission, when the time came for oral

argument, a representative of Autotel with sufficient knowledge of the proceeding failed to appear, so the Staff and Commission were unable to seek any additional clarification of the issues raised by the Company. When Autotel was given another opportunity to supplement the record by filing an objection, it did not respond. There, the ALJ had no alternative but to proceed on the basis of the existing record.

Moreover, the FCC has ruled in still other cases under 47 U.S.C. 252(e)(5) that where a final state commission “determination” under section 252 is subject to review in federal district court, . . . there is no basis for the Commission to assume jurisdiction under section 252(e)(5).”⁶ *ACS/Alaska Ruling* at p. 21119. Autotel’s appeal of the Commission’s first arbitration order is still pending with the Arizona District Court. In fact, it is only in the briefing stage. Indeed, this was one of the reasons the second petition was dismissed by the Arizona Commission. To the extent Autotel was requesting a second arbitration addressing many of the same issues addressed by the first arbitration conducted by the Arizona Commission, a ruling by the Arizona Commission would have been difficult if not impossible given the outstanding appeal in the Federal District Court challenging many of the Arizona Commission’s rulings. The Arizona Commission’s dismissal of the second Autotel petition was a “determination” under Section 252(e)(6). As recognized in the *Global NAPs* decision discussed below, the language of the statute (Sections 252(e)(5) and 252(e)(6)) allowing an aggrieved party to file a District Court appeal or seek preemption by the FCC for a state commission’s failure to act are mutually exclusive.

Finally, the cases relied upon by Autotel in its Petition, do not support its position. Autotel relies upon the *MCI/Missouri Ruling* discussed earlier. In that case, as here, part of the problem was that the issues were not clearly presented to the agency, and thus the FCC stated that under those circumstances, preemption would not be appropriate.

⁶ See *In the Matter of ACS of Anchorage, Inc. and ACS of Fairbanks, Inc.*, WC Docket No. 01-201, Memorandum Opinion and Order, 17 FCC Rcd. 21,114 (Released Oct. 22, 2002)(“*ACS/Alaska Ruling*”).

Autotel also relies upon language in a 2002 decision of the D.C. Circuit Court⁷ which stated in part that if state commission refuses to resolve a particular matter raised in a request, it is subject to preemption under Section 252(e)(5). However, Autotel’s reliance upon this language is misplaced. When read in context of the entire decision by the D.C. Circuit Court, a state commission dismissal of an action is not a “refusal or failure to act”.

In summary, the FCC has consistently found, that a state commission has not failed to act under its rules implementing section 252(e)(5) “solely because they dismissed or denied...[an] arbitration request on the ground that...[the applicant] is not entitled to invoke arbitration under section 252(b).”⁸ A state commission does not fail to act when it dismisses or denies an arbitration petition on the ground that it is procedurally defective. *Id.* at 1773. Further, the FCC has interpreted section 252(e)(5), and at least one federal court has agreed with it, that “... only if the state commission either does not respond to a request, or refuses to resolve a particular matter raised in a request, does preemption become a viable option.”⁹

Further, the D.C. Circuit also held that the purpose of Section 252(e)(5) is not to hold out the FCC as an alternative forum for the adjudication of certain disputes related to interconnection agreements; the statute does not authorize the Commission to sit as an appellate tribunal to review the correctness of state resolution of such disputes.”¹⁰ The FCC should deny Autotel’s Petition for Preemption of the Arizona Commission’s authority based upon an alleged violation of section 252(e)(5). Autotel did not meet its burden of proof. The Arizona Commission did not fail to act on Autotel’s Petition.

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⁷ *Global NAPS, Inc. v. FCC*, 291 F.3d 832 (D.C.Cir. 2002).

⁸ *In the Matter of Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.’s Petition for Arbitration with Ameritech Illinois before the Illinois Commerce Commission et al.*, CC Docket No. 97-163 et al., Memorandum Opinion and Order, 13 FCC Rcd. 1755 (Released October 8, 1997)(*LTD/Illinois Ruling*).

⁹ *Global NAPS v. FCC*, 291 F.3d 832 (D.C.Cir. 2002).

¹⁰ *Id.* at p. 837.

B. Autotel's Petition appears to be part of a pattern of serial filings designed to obtain a more sympathetic forum.

In dismissing Autotel's second petition, the Arizona Commission was also concerned with what appeared to be a pattern of behavior on Autotel's part of serial arbitration filings, actions in federal district court and now before the FCC, all in what appears to be an attempt to obtain a more sympathetic forum. The circumstances surrounding Autotel's behavior before the Arizona Commission are similar to those addressed by the Massachusetts District Court¹¹ recently:

We reject SBC's suggestion that an arbitrated agreement is not binding on the parties. Absent mutual agreement to different terms, the decision reached through arbitration is binding... We also believe that, although competing providers do not have an affirmative duty to enter into agreements under Section 252, a requesting carrier might face penalties if, by refusing to enter into an arbitrated agreement, that carrier is deemed to have failed to negotiate in good faith. Such penalties should serve as a disincentive for requesting carriers to force an incumbent LEC to expand [sic] resources in arbitration if the requesting carrier does not intend to abide by the arbitrated decision.

The Arizona Commission spent 8 months arbitrating Autotel's first petition with Qwest. It issued a Decision which Autotel took no exception to, and ordered the parties to file an interconnection agreement for approval. While Autotel eventually signed the agreement, it has refused to operate under the Agreement. It has also appealed the Arizona Commission's determination to the Federal District Court. Its filing of a second petition appeared to be an attempt to void the results of the first Decision and to further its Federal District Court litigation. The *Global NAPS* Court found that an entity's refusal to cooperate with the arbitrator's order constitutes a failure to negotiate in good faith.

The FCC clearly states that the arbitration order is binding on both parties. Furthermore, under Section 2529b(5), Global's refusal to cooperate with the arbitrator's order constitutes a failure to

¹¹ *Global NAPS, Inc. v. Verizon New England, Inc.*, 2004 WL 1059792 (C.Mass. 2004), aff'd, 396 F.3d 16 (1st Cir. 2005).

negotiate in good faith. See 47 U.S.C. Section 252(b)(5) (“The refusal of any other party to the negotiation...to cooperate with the State commission in carrying out its function as an arbitrator...shall be considered a failure to negotiate in good faith.”). Therefore, enforcement of the arbitration order is an entirely appropriate penalty and serves as a disincentive for a CLEC to force an ILEC to arbitrate an agreement while reserving the right to withdraw if it does not like the outcome.

Likewise, the First Circuit found on appeal that attempting to void the terms of a valid arbitration order could itself be construed as a violation of the duty to negotiate in good faith.

In attempting to void the terms of a valid arbitration order, it is clear that Global NAPs is refusing to cooperate with the DTE, in violation of its duty to negotiate in good faith.

Global NAPs, 396 F.3d at 25.

IV. CONCLUSION

For the reasons discussed above, the Arizona Corporation Commission respectfully requests that the FCC deny Autotel’s Petition.

RESPECTFULLY submitted this 21st day of August, 2006.

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