

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

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In the Matter of)
)
 Petition of Autotel Pursuant to Section 252(e)(5))
 of the Communications Act of 1934, as Amended,)
 for Preemption of the Jurisdiction of the)
 Arizona Corporation Commission Regarding)
 Arbitration of an Interconnection Agreement with)
 Qwest Corporation)
)
 Petition of Autotel Pursuant to Section 252(e)(5))
 of the Communications Act of 1934, as Amended,)
 for Preemption of the Jurisdiction of the)
 Colorado Public Utilities Commission Regarding)
 Arbitration of an Interconnection Agreement with)
 Qwest Corporation)
)
 Petition of Autotel Pursuant to Section 252(e)(5))
 of the Communications Act of 1934, as Amended,)
 for Preemption of the Jurisdiction of the)
 New Mexico Public Regulation Commission)
 Regarding Arbitration of an Interconnection)
 Agreement with Qwest Corporation)
)
 Petition of Western Radio Pursuant to Section)
 252(e)(5) of the Communications Act of 1934, as)
 Amended, for Preemption of the Jurisdiction of the)
 Oregon Public Utility Commission Regarding)
 Arbitration of an Interconnection Agreement with)
 Qwest Corporation)
)
 Petition of Autotel Pursuant to Section 252(e)(5))
 of the Communications Act of 1934, as Amended,)
 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

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MEMORANDUM OPINION AND ORDER

Adopted: October 6, 2006

Released: October 6, 2006

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order (Order) addresses the petitions of Autotel and its affiliate Western Radio Services Co. (Autotel) for preemption of the jurisdiction of five state utility

commissions pursuant to section 252(e)(5) of the Communications Act, as amended (the Act), with respect to arbitration proceedings involving Autotel and Qwest Corporation.¹ Specifically, Autotel seeks preemption of the jurisdiction of the Arizona Corporation Commission (Arizona Commission),² the Colorado Public Utilities Commission (Colorado Commission),³ the New Mexico Public Regulation Commission (New Mexico Commission),⁴ the Oregon Public Utility Commission (Oregon Commission),⁵ and the Utah Public Service Commission (Utah Commission).⁶ We find that all five state commissions have met the requirements of section 252 because they responded to the petitions for arbitration and rendered final determinations by dismissing the petitions. Accordingly, we deny the petitions of Autotel and do not preempt the jurisdiction of the state commissions.

II. BACKGROUND

A. Statutory Provisions and the Commission's Rules

2. Section 252(e)(5) of the Act requires the Commission to preempt the jurisdiction of a state commission in any proceeding in which the state commission "fails to act to carry out its responsibility" under section 252.⁷ Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements for interconnection, services, or unbundled network elements pursuant to section 251.⁸ Under section 252, when carriers cannot arrive at an interconnection agreement through voluntary negotiation, they may mediate and arbitrate their unresolved issues before the state commission. In arbitrating disputes, the state commission must "resolve each issue set forth in the petition and the response" and must "conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request [for interconnection]."⁹ In addition, the state commission may require the parties "to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived."¹⁰ Finally, section 252(e)(6)

¹ 47 U.S.C. § 252(e)(5). Section 252 was added to the Communications Act of 1934 by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), codified at 47 U.S.C. §§ 151 et seq.

² Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended, for Preemption of the Jurisdiction of the Arizona Corporation Commission Regarding Arbitration of an Interconnection Agreement with Qwest Corporation, WC Docket No. 06-134 (filed July 10, 2006) (Autotel Arizona Petition).

³ Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended, for Preemption of the Jurisdiction of the Colorado Public Utilities Commission Regarding Arbitration of an Interconnection Agreement with Qwest Corporation, WC Docket No. 06-134 (filed July 10, 2006) (Autotel Colorado Petition).

⁴ Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended, for Preemption of the Jurisdiction of the New Mexico Public Regulation Commission Regarding Arbitration of an Interconnection Agreement with Qwest Corporation, WC Docket No. 06-134 (filed July 10, 2006) (Autotel New Mexico Petition).

⁵ Petition of Western Radio Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended, for Preemption of the Jurisdiction of the Oregon Public Utility Commission Regarding Arbitration of an Interconnection Agreement with Qwest Corporation, WC Docket No. 06-134 (filed July 10, 2006) (Autotel Oregon Petition).

⁶ Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act of 1934, as Amended, 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 (filed July 10, 2006) (Autotel Utah Petition).

⁷ 47 U.S.C. § 252(e)(5).

⁸ 47 U.S.C. § 252; 47 U.S.C. § 251.

⁹ 47 U.S.C. § 252(b)(4)(C).

¹⁰ 47 U.S.C. § 252(b)(4)(B).

authorizes a party "aggrieved" by a state commission's determination under section 252 to bring an action in federal district court.¹¹ The United States Court of Appeals for the District of Columbia Circuit has ruled that sections 252(e)(5) and 252(e)(6) are mutually exclusive, and therefore preemption by the Commission applies only where the state commission fails or refuses to make a "determination" that is reviewable under section 252(e)(6).¹²

3. Under the Commission's rules, the party seeking preemption bears the burden of proving that the state commission has failed to act.¹³ In the *Local Competition Order*, the Commission concluded that it would not take an "expansive view" of what constitutes a state commission's "failure to act" for purposes of section 252(e)(5).¹⁴ Rather, the Commission limited the instances in which preemption pursuant to section 252(e)(5) is appropriate to "when a state commission fails to respond, within reasonable time, to a request for mediation or arbitration, or fails to complete an arbitration within the time limits of section 252(b)(4)(C)."¹⁵

B. Procedural History in the States

4. Although the underlying arbitration proceedings before the five state commissions involved here have long procedural histories, we highlight in the following paragraphs only those events that are relevant to our discussion.

5. *Arizona*. On February 27, 2004, Autotel filed before the Arizona Commission a petition for arbitration of an interconnection agreement with Qwest.¹⁶ The Arizona Commission issued a decision on arbitration resolving the issues raised in Autotel's petitions and Qwest's response on November 2, 2004.¹⁷ The signed interconnection agreement was filed with the Arizona Commission on March 16, 2005, and approved by operation of law on April 15, 2005.¹⁸ On May 5, 2005, Autotel filed a complaint before the United States District Court for the District of Arizona seeking damages for violation of due process and equal protection, and alleging that the approved interconnection agreement did not comply with the Act.¹⁹

6. Qwest received a request from Autotel for negotiation of a second interconnection agreement on June 23, 2005.²⁰ Qwest declined to negotiate a new interconnection agreement, citing the existing,

¹¹ 47 U.S.C. § 252(e)(6).

¹² See *Global NAPS, Inc. v. FCC*, 291 F.3d 832, 836-37 (D.C. Cir. 2002) ("Both the plain language and structure of this provision suggest that the remedies it authorizes are distinct and mutually exclusive. If a state commission fails to act, preemption is a viable option; however, if the state agency takes final action disposing of the pending claim, that action can be undone only by a direct review in the appropriate forum.").

¹³ See 47 C.F.R. § 51.803(b); see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Services Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16128, para. 1285 (1996) (*Local Competition Order*) (subsequent history omitted).

¹⁴ *Local Competition Order*, 11 FCC Rcd at 16127, para. 1283.

¹⁵ *Id.* at 16128, para. 1285; see 47 C.F.R. § 51.801(b).

¹⁶ See Autotel Arizona Petition, Attach., *Opinion and Order*, Arizona Corporation Commission Docket No. T-01051B-05-0858, Decision No. 68601 (Mar. 23, 2006) at 2 (*Arizona Commission Order*).

¹⁷ *Id.*; see also Arizona Comments at 2-3.

¹⁸ *Arizona Commission Order* at 2.

¹⁹ *Id.*; Arizona Comments at 3-4.

²⁰ See Autotel Arizona Petition, Attach., Affidavit of Richard L. Oberdorfer (Autotel Oberdorfer Arizona Aff.) at para. 3; see also *Arizona Commission Order* at 2.

approved agreement.²¹ On November 23, 2005, Autotel filed before the Arizona Commission a petition for arbitration of an interconnection agreement with Qwest pursuant to section 252(b) of the Act.²² On December 13, 2005, Qwest filed its response to the petition on arbitration and a motion to dismiss that petition.²³ After the Arizona Commission and parties completed several procedural steps, Autotel set forth for resolution by the Arizona Commission one issue: adoption of an interconnection agreement.²⁴ On March 23, 2006, the Arizona Commission dismissed with prejudice Autotel's petition for arbitration finding, among other things, that Autotel may not file a second petition for arbitration while an approved interconnection agreement remains under judicial review.²⁵

7. *Colorado*. On February 25, 2005, the Colorado Commission issued a decision on arbitration of an interconnection agreement between Qwest and Autotel.²⁶ On May 11, 2005, Autotel and Qwest filed a signed interconnection agreement with the Colorado Commission.²⁷ Subsequently, on June 23, 2005, Autotel requested negotiation of another interconnection agreement with Qwest.²⁸ Qwest declined to negotiate a new interconnection agreement, citing the existing, approved agreement.²⁹ On November 5, 2005, Autotel filed with the Colorado Commission a petition for arbitration of an interconnection agreement with Qwest, requesting resolution of three main issues, as described in the *Colorado Commission Order* as: "1) Qwest's refusal to negotiate in good faith to determine the rates, terms and conditions of the ICA [interconnection agreement]; 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)."³⁰ On December 19, 2005, Qwest filed a response to the petition and a motion to dismiss.³¹ On December 21, 2005, the Colorado Commission granted Qwest's motion to dismiss Autotel's petition for arbitration, finding that Autotel is seeking to undermine the Colorado Commission's previous decision on interconnection issues.³² In addition, the *Colorado Commission Order* notes that Autotel's petition failed to identify open issues concerning the interconnection agreement for the Colorado Commission to resolve.³³

²¹ *Id.*; see also Autotel Oberdorfer Arizona Aff. at para. 4.

²² *Id.* at para. 5; see also *Arizona Commission Order* at 3.

²³ *Id.*; see also Autotel Oberdorfer Arizona Aff. at para. 6.

²⁴ See *Arizona Commission Order* at 3-4.

²⁵ *Arizona Commission Order* at 6-7.

²⁶ See Letter from Mark Valentine for the Attorney General of State of Colorado Department of Law, to Marlene H. Dortch, Secretary, FCC, WC Docket 06-134 (filed May 13, 2006), Attach., *Order Granting Motion to Dismiss*, Colorado Public Utilities Commission Docket No. 05B-501T, Decision No. C06-0005 (Dec. 21, 2005) (*Colorado Commission Order*) at 2.

²⁷ *Id.*

²⁸ See Autotel Colorado Petition, Affidavit of Richard L. Oberdorfer (Autotel Oberdorfer Colorado Aff.) at para. 3; see also *Colorado Commission Order* at 2.

²⁹ See Autotel Oberdorfer Colorado Aff. at para. 4; *Colorado Commission Order* at 2.

³⁰ *Id.* at 1; see also Autotel Oberdorfer Colorado Aff. at para. 5.

³¹ See *Colorado Commission Order* at 2; see also Autotel Oberdorfer Colorado Aff. at para. 6.

³² See *Colorado Commission Order* at 3.

³³ *Id.*

8. *New Mexico*. On June 23, 2005, Qwest received a request from Autotel to negotiate an interconnection agreement.³⁴ Qwest refused the June 23, 2005 negotiation request from Autotel.³⁵ On July 28, 2005, the New Mexico Commission issued an order resolving twelve open issues in the arbitration of an interconnection agreement dispute between Autotel and Qwest, filed prior to Autotel's June 23, 2005 negotiation request with Qwest.³⁶ In that order, the New Mexico Commission ordered Qwest, upon receipt of certain information from Autotel, to prepare and submit to Autotel for signature an interconnection agreement consistent with its order. Upon full execution of the agreement, the order required the parties to file the interconnection agreement with the New Mexico Commission for approval.³⁷ On August 31, 2005, Qwest filed a notice with the New Mexico Commission stating that it had prepared and submitted an interconnection agreement to Autotel for signature on August 12, 2005, but that Autotel refused to sign the agreement.³⁸

9. On November 23, 2005, Autotel filed a petition with the New Mexico Commission seeking arbitration of an interconnection agreement between Autotel and Qwest pursuant to the June 23, 2005 negotiation request from Autotel which Qwest declined.³⁹ Autotel's arbitration petition sought resolution of three issues, described in the *New Mexico Commission Order* as: "a) adoption of an interconnection agreement; b) state commission jurisdiction concerning Qwest's good faith negotiation duties under 47 U.S.C. § 251(c)(1); and c) review of state commission actions."⁴⁰ On December 19, 2005, Qwest filed a response and a motion to dismiss.⁴¹ On January 10, 2006, the New Mexico Commission granted Qwest's motion to dismiss Autotel's petition for arbitration, finding that Autotel sought to ignore the New Mexico Commission's July 28, 2005 order and sought arbitration of previously settled issues.⁴² In addition, the New Mexico Commission dismissed Autotel's petition because it failed to properly identify open issues for arbitration as required under section 252(b)(2)(A) of the Act.⁴³

10. *Oregon*. On March 11, 2004, Autotel's subsidiary, Western Radio Services Co., filed with the Oregon Commission a petition for arbitration of an interconnection agreement with Qwest.⁴⁴ On October 18, 2004, the Oregon Commission issued an order adopting the arbitrator's decision on the case and directing the parties to submit an interconnection agreement consistent with the terms of the order within 30 days.⁴⁵ Autotel declined to sign the agreement and filed a complaint with the United States

³⁴ See Autotel New Mexico Petition, Attach., Affidavit of Richard L. Oberdorfer (Autotel Oberdorfer New Mexico Aff.) at para. 3; see also Autotel New Mexico Petition, Attach., *Order Granting Motion to Dismiss and Dismissing Petition*, New Mexico Public Regulation Commission Case No. 05-00462-UT (Jan. 10, 2006) at 1 (*New Mexico Commission Order*).

³⁵ See Autotel Oberdorfer New Mexico Aff. at para. 4.

³⁶ See *New Mexico Commission Order* at 1-2.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Autotel Oberdorfer New Mexico Aff. at para. 5; *New Mexico Commission Order* at 1.

⁴⁰ *Id.*

⁴¹ *Id.*; see Autotel Oberdorfer New Mexico Aff. at para. 6.

⁴² *New Mexico Commission Order* at 2.

⁴³ *Id.* at 2-3.

⁴⁴ See Autotel Oregon Petition, Attach., *Petition for Arbitration Dismissed; Docket Closed*, Oregon Public Utility Commission. ARB 706, Order No. 06-001 (Jan. 3, 2006) at 2 (*Oregon Commission Order*).

⁴⁵ *Id.*

District Court for the District of Oregon alleging violations of the Act.⁴⁶ The court dismissed Autotel's complaint finding that the federal district court lacked jurisdiction because the Oregon Commission had not yet approved an interconnection agreement between the parties.⁴⁷

11. On October 10, 2005, the Oregon Commission issued an order approving the interconnection agreement without Autotel's signature, concluding that the agreement was in compliance with the arbitrator's decision and the requirements of the Act.⁴⁸ Four days later, Autotel filed a petition with the Oregon Commission for arbitration of an interconnection agreement with Qwest, asserting that Qwest requested negotiation pursuant to a letter dated May 10, 2005.⁴⁹ Qwest filed a response and motion to dismiss stating, among other things, that its May 10, 2005 letter did not seek negotiation of an interconnection agreement.⁵⁰ On January 3, 2005, the Oregon Commission dismissed Autotel's petition for arbitration, finding that Autotel's petition ignores the fact that an approved interconnection agreement is in effect. The Oregon Commission also found that Qwest's May 10, 2005 letter did not constitute a request for negotiation of a new interconnection agreement and, therefore, Autotel's petition was inappropriate.⁵¹

12. *Utah*. On February 18, 2004, the Utah Commission issued an order resolving eight open issues in the arbitration of an interconnection agreement between Autotel and Qwest.⁵² The order required the parties to file a signed interconnection agreement within 30 days.⁵³ On August 17, 2005, with no signed interconnection agreement filed, the Utah Commission issued an order denying a request made by Qwest to require Autotel to sign the interconnection agreement. The Utah Commission stated that it would neither take further action on the interconnection agreement docket nor entertain further arbitration of the same issues until the parties submitted a signed interconnection agreement in accordance with its order.⁵⁴ The Utah Commission reiterated this position on September 21, 2005, when it issued an order in response to a petition for reconsideration and clarification filed by Qwest.⁵⁵

13. On May 20, 2005, Autotel requested negotiation of another interconnection agreement with Qwest, which Qwest refused.⁵⁶ On October 26, 2005, Autotel filed a petition with the Utah Commission for arbitration of an interconnection agreement seeking resolution of three issues, described in the *Utah Commission Order* as: "(1) adoption of an interconnection agreement, (2) state commission jurisdiction concerning Qwest's good faith negotiation duties under Section 251(c)(1), and (3) review of state

⁴⁶ *Id.*

⁴⁷ *Western Radio Services Co. v. Qwest Corporation et al.*, Civil No. 05-159-AA (D. Or. July 26, 2005), *appeal pending*, C.A. No. 05-35796 (9th Cir. filed Aug. 11, 2005).

⁴⁸ *Oregon Commission Order* at 2.

⁴⁹ Autotel Oregon Petition, Attach., Affidavit of Richard L. Oberdorfer (Autotel Oberdorfer Oregon Aff.) at paras. 3-5; *see also Oregon Commission Order* at 2.

⁵⁰ *Id.* at 1-2; *see also* Autotel Oberdorfer Oregon Aff. at para. 6.

⁵¹ *Oregon Commission Order* at 2-3.

⁵² *See* Autotel Utah Petition, *Order Granting Motion to Dismiss*, Utah Public Service Commission Docket No. 05-049-95 (Dec. 7, 2005) at 2 (*Utah Commission Order*).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1-2.

⁵⁶ Autotel Utah Petition, Attach., Affidavit of Richard L. Oberdorfer (Autotel Oberdorfer Utah Aff.) at paras. 3-4; *see also Utah Commission Order* at 1.

commission actions.”⁵⁷ Qwest filed a response and motion to dismiss on November 18, 2005.⁵⁸ On December 7, 2005, the Utah Commission issued an order granting Qwest’s motion to dismiss and dismissing Autotel’s petition. The Utah Commission based the dismissal on Autotel’s failure to specifically identify issues requiring resolution as well as its failure to file a signed agreement as required in the February 18, 2004 order.⁵⁹ The Utah Commission also noted that section 252(e) of the Act makes clear that any disagreement with the Utah Commission’s decision on issues arbitrated, upon submission of a signed agreement, may be appealed to the appropriate federal district court.⁶⁰

C. Autotel’s Petitions for Preemption Before the Commission

14. On July 10, 2006, Autotel filed the petitions for preemption at issue in this Order.⁶¹ In its petitions, Autotel argues that the state commissions failed to act on the petitions for arbitration of interconnection agreements that it filed, as required under section 252(e) of the Act.⁶² The Commission issued a *Public Notice* on Autotel’s petitions, establishing a pleading cycle for comments and reply comments, due August 21, 2006, and September 9, 2006, respectively.⁶³

III. DISCUSSION

15. In its petitions, Autotel claims that the state commissions generally failed to resolve unresolved issues between the parties.⁶⁴ Specifically, Autotel claims that the state commissions did not schedule any proceedings in order to complete their duties under section 252(b)(4). Further, Autotel states that the state commissions did not order any hearings, request briefings on issues, request information from either party, make a determination as to whether the contract language proposed by either party met the requirements of section 251, or impose the rates that it established into an interconnection agreement between the parties.⁶⁵ We find that the state commissions’ procedural dismissals of Autotel’s petitions for arbitration of interconnection agreements with Qwest do not

⁵⁷ *Utah Commission Order* at 1; see also *Autotel Oberdorfer Utah Aff.* at para. 5.

⁵⁸ *Utah Commission Order* at 1.

⁵⁹ *Id.* at 3-4.

⁶⁰ *Id.* at 4; 47 U.S.C. § 252(e)(6).

⁶¹ Autotel claims that it originally sent the petitions for preemption to the Commission on May 4, 2006. The Commission did not receive the original filing and, as a result, the petitions were not docketed at that time. See Letter from Marianne Dugan, Counsel for Autotel, to Marlene H. Dortch, Secretary, FCC, WC Docket 06-134 (filed July 10, 2006). Autotel refiled the petitions, which were properly received and docketed by the Commission on July 10, 2006. The Colorado Commission and Qwest were made aware of Autotel’s May 4, 2006 attempt to file with the Commission and filed comments on May 22, 2006, and May 18, 2006, respectively. The comments are part of the record in WC Docket No. 06-134.

⁶² *Autotel Arizona Petition* at 2; *Autotel Colorado Petition* at 2; *Autotel New Mexico Petition* at 2; *Autotel Oregon Petition* at 2; *Autotel Utah Petition* at 2.

⁶³ *Pleading Cycle Established for Petitions of Autotel and Western Radio for Preemption of the Jurisdiction of Arizona Corporation Commission, Colorado Public Utilities Commission, New Mexico Public Regulation Commission, Oregon Public Utility Commission, and Utah Public Service Commission Pursuant to Section 252(e)(5) of the Communications Act*, WC Docket No. 06-134, Public Notice, DA 06-1468 (rel. July 19, 2006) (*Public Notice*).

⁶⁴ *Autotel Arizona Petition* at 2; *Autotel Colorado Petition* at 2; *Autotel New Mexico Petition* at 2; *Autotel Oregon Petition* at 2; *Autotel Utah Petition* at 2.

⁶⁵ *Id.*

constitute failure to act under section 252 of the Act. Rather, we find that the state commissions' procedural dismissals satisfy their obligation to act under section 252(e)(5).⁶⁶

16. As this Commission has recognized, "a state commission carri[e]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."⁶⁷ The record demonstrates that in response to the arbitration petitions filed by Autotel, the state commissions docketed the petitions, followed procedural schedules and issued decisions on the petitions.⁶⁸ When "the state agency actually 'makes a determination' under § 252 – there is no statutory basis for FCC preemption."⁶⁹ 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."⁷⁰ Thus, the state commissions' dismissals of Autotel's arbitration petitions on procedural grounds, without addressing the merits of Autotel's arbitration issues, were final determinations by the state commissions and cannot be deemed a "failure to act" under section 252 of the Act.

17. Autotel also cites in its Arizona, New Mexico and Oregon petitions to *In re Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996* in support of its argument "that a state agency can fail to act under section 252(e)(5) even if it has issued an arbitration order, if that order is a general dismissal that does not resolve all issues 'clearly and specifically' presented to it."⁷¹ We find that the cited order does not support Autotel's argument. In that order, the Commission determined that a state commission may not be found to have "failed to act" within the meaning of section 252(e)(5) in cases involving arbitration proceedings "if the issue or issues that are the subject of the preemption petition were never clearly and specifically presented to the state commission in

⁶⁶See 47 C.F.R. § 51.801(b). *But see* Autotel Arizona Petition at 2; Autotel Colorado Petition at 2; Autotel New Mexico Petition at 2; Autotel Oregon Petition at 2; Autotel Utah Petition at 2.

⁶⁷*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*, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd 11277, 11280-81, para. 8 (2000); *see also* *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission; Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with BellSouth Before the Georgia Public Service Commission; Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with GTE South Before the Public Service Commission of South Carolina*, CC Docket Nos. 97-163, 97-164, 97-165, Memorandum Opinion and Order, 13 FCC Rcd 1755, 1773-74, para. 33 (1997) (*Low Tech Designs Order*) ("[A] state commission does not 'fail to act' when it dismisses or denies an arbitration petition on the ground that it is procedurally defective . . ."), *recon. denied*, 14 FCC Rcd 7024 (1999); *Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc.*, CC Docket No. 99-198, Memorandum Opinion and Order, 15 FCC Rcd 23318, 23326, 23327, paras. 16, 19 (CCB 1999).

⁶⁸See *Arizona Commission Order* at 2; *Colorado Commission Order* at 2; *New Mexico Commission Order* at 1; *Oregon Commission Order* at 1; *Utah Commission Order* at 1-3; *Arizona Commission Comments* at 2-4; *Qwest Comments* at 4-10.

⁶⁹*Global NAPs, Inc. v. FCC*, 291 F.3d at 836.

⁷⁰*Id.* at 837 (upholding the Commission's conclusion that section 252(e)(5) does not authorize preemption to review the substantive validity of a state commission's dismissal of a party's claim); *see also* *Low Tech Designs Order*, 13 FCC Rcd at 1774-75, para. 36.

⁷¹Autotel Arizona Petition at 2; Autotel New Mexico Petition at 2; Autotel Oregon Petition at 2-3; *see In re 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 15594 (1997).

accordance with any procedures set forth by the state commission.”⁷² Here, the Colorado, New Mexico and Utah state commissions found that Autotel failed to properly identify any open issues for arbitration as required in section 252(b)(2)(A).⁷³ All the state commissions dismissed Autotel’s petitions as improper attempts to invoke arbitration under section 252.⁷⁴ Accordingly, we find no evidence that the state commissions failed to act as required by section 252. As noted earlier, Autotel bears the burden of demonstrating that the state commissions have failed to act, and it has not met that burden.

IV. CONCLUSION

18. For the reasons stated above, we deny the Autotel petitions for preemption of the jurisdiction of the state commissions with respect to the arbitration of interconnection agreements between Qwest and Autotel. We conclude that Autotel has not met its burden of demonstrating that the state commissions “failed to act” within the meaning of the Commission’s rules implementing section 252(e)(5). When, as in these cases, a state commission has acted on a timely basis to resolve an interconnection dispute, section 252(e)(6) provides the basis for federal court review; section 252(e)(5) provides no alternative forum for appeal.⁷⁵

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, 47 U.S.C. § 252, as amended, and sections 0.91, 0.291, and 51.801(b) of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291, 51.801(b), the petition filed by Autotel on July 10, 2006 for the preemption of the jurisdiction of the Arizona Corporation Commission IS DENIED.

20. IT IS FURTHER ORDERED that, pursuant to section 252 of the Communications Act of 1934, 47 U.S.C. § 252, as amended, and sections 0.91, 0.291, and 51.801(b) of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291, 51.801(b), the petition filed by Autotel on July 10, 2006 for the preemption of the jurisdiction of the Colorado Public Utilities Commission IS DENIED.

21. IT IS FURTHER ORDERED that, pursuant to section 252 of the Communications Act of 1934, 47 U.S.C. § 252, as amended, and sections 0.91, 0.291, and 51.801(b) of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291, 51.801(b), the petition filed by Autotel on July 10, 2006 for the preemption of the jurisdiction of the New Mexico Public Regulation Commission IS DENIED.

22. IT IS FURTHER ORDERED that, pursuant to section 252 of the Communications Act of 1934, 47 U.S.C. § 252, as amended, and sections 0.91, 0.291, and 51.801(b) of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291, 51.801(b), the petition filed by Autotel on July 10, 2006 for the preemption of the jurisdiction of the Oregon Public Utility Commission IS DENIED.

⁷² *Id.* at 15611.

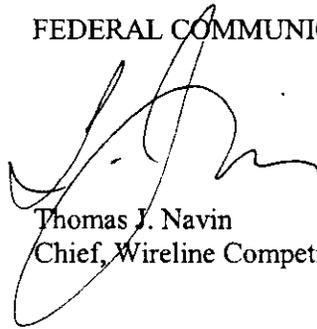
⁷³ *Colorado Commission Order* at 3; *New Mexico Commission Order* at 2-3; *Utah Commission Order* at 3-4.

⁷⁴ *Arizona Commission Order*; *Colorado Commission Order*; *New Mexico Commission Order*; *Oregon Commission Order*; *Utah Commission Order*.

⁷⁵ See *Global NAPs, Inc. v. FCC*, 291 F.3d at 836-37; see also *Low Tech Designs Order*, 13 FCC Rcd at 1775, para. 37; *Petition of Supra Telecommunications & Information Systems, Inc., (Supra) Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Florida Public Service Commission*, WC Docket No. 02-238, Memorandum Opinion and Order, 17 FCC Rcd 22884, 22891, para. 13 (WCB 2002) (“[A]ny grounds for seeking review of the Florida Commission’s action – whether alleging substantive or procedural flaws – are properly addressed to a federal district court pursuant to section 252(a)(6) of the Act.”).

23. IT IS FURTHER ORDERED that, pursuant to section 252 of the Communications Act of 1934, 47 U.S.C. § 252, as amended, and sections 0.91, 0.291, and 51.801(b) of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, 51.801(b), the petition filed by Autotel on July 10, 2006 for the preemption of the jurisdiction of the Utah Public Service Commission IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Thomas J. Navin
Chief, Wireline Competition Bureau