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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	Docket No. 03-049-19 **QWEST'S PETITION FOR RECONSIDERATION AND CLARIFICATION**

Qwest Corporation ("Qwest"), pursuant to Utah Code Ann. §§ 54-7-15 and 63-46b-13 and Utah Admin. Code R746-100-11.F, respectfully seeks reconsideration of the Order Denying Request for Approval of Proposed Agreement issued in this docket on August 17, 2005 ("Order"). In addition, Qwest seeks clarification of certain aspects of the Order and reconsideration of the Order with respect to them if they are not as understood by Qwest.

Qwest seeks reconsideration of the Order to the extent the Order concludes that the Commission is unable or unwilling to approve an interconnection agreement if the

parties fail to file a signed agreement with the Commission. Qwest seeks clarification, or alternatively, reconsideration of the Order to the extent the Order suggests that the Commission is unable or unwilling to resolve disputes between the parties regarding whether a proposed agreement complies with its arbitration decision.

I. INTRODUCTION

A. PROCEDURAL HISTORY

Autotel commenced this docket by filing a Petition for Arbitration on March 7, 2003, identifying nine issues for arbitration. Qwest responded to the petition on April 1, 2003, identifying six additional issues for arbitration.[1] Following the filing of testimony and supervised settlement discussions, five of the 15 issues were resolved with written exchanges between the parties confirming their resolution and the language in the agreement that was agreed upon. The parties thereafter filed supplemental testimony. Following the filing of the supplemental testimony, it was apparent that the parties had reached agreement on two additional issues. Thereafter, the parties filed briefs and reply briefs and agreed to extend the time under 47 U.S.C. § 252(b)(4)(C) within which the Commission could resolve issues.

On February 18, 2004, the Commission issued its Order ("Arbitration Decision") deciding the eight disputed issues. On each issue, the Arbitration Decision specified which party's proposed language should be included in the agreement and in one case

[1] Qwest filed amended responses on April 2 and 29. Qwest's response included its proposed interconnection agreement, an issues matrix that identified the specific language in the parties' interconnection agreements that was in dispute on each of the 15 issues, and a computer-generated comparison between the interconnection agreement submitted by Autotel and the interconnection agreement submitted by Qwest identifying each and every difference between the two proposed agreements. In addition to the 15 issues identified for arbitration, the computer-generated comparison identified a number of differences between the agreements which Qwest understood to be clerical or non-substantive in nature and which it understood were not in dispute, but would be accepted by Autotel upon review.

ordered adoption of Qwest's language with specific additional language. The Arbitration Decision directed the parties to modify the interconnection agreement consistent with the Commission's decision and submit it within 30 days.

On March 5, Autotel sent Qwest an electronic copy of its proposed agreement. On March 9, Qwest informed Autotel that its proposed agreement contained substantive provisions that were not arbitrated or were arbitrated and rejected by the Commission and that it did not contain provisions arbitrated and approved by the Commission. Qwest also provided Autotel a copy of an interconnection agreement that complied with the Order and a computer-generated comparison of that agreement and the agreement proposed by Autotel. After further exchanges indicated that Autotel would not sign the agreement proposed by Qwest,[2] Qwest filed its "Notice of Inability to File Signed Interconnection Agreement and Request for Approval of Proposed Agreement" on March 18 ("Request"). The Request described the differences in the proposed agreements, provided a copy of Qwest's proposed agreement and a computer-generated comparison with Autotel's agreement and requested that the Commission approve Qwest's proposed agreement. Autotel never formally responded to the Request, but did inform the Commission informally that it intended to appeal the Arbitration Decision.

Autotel filed a complaint the federal district court on November 12, 2004. The Commission and Qwest both filed motions to dismiss the complaint on the ground that the Court lacked jurisdiction because the Commission had not yet completed the arbitration by approving or rejecting an interconnection agreement. Following briefing

[2] These exchanges indicated that Autotel would not sign the agreement because it included non-substantive clerical differences from the agreement filed by Autotel with its petition. These differences had all been identified in Qwest's response. *See* footnote 1.

and oral argument, the Court issued its Memorandum Decision and Order on May 17, 2005, granting the motions to dismiss.[3]

On May 20, 2005, Qwest received a request from Autotel for negotiation of an interconnection agreement. Following correspondence between the parties in which Qwest attempted to determine what Autotel was requesting, Qwest informed Autotel on June 2 that it was not willing to ignore the arbitration and litigation and restart negotiations and that it had fulfilled its obligations under the Act by negotiating and arbitrating an interconnection agreement with Autotel.

On June 14, 2005, the Commission issued its Procedural Notice, noting that with dismissal of Autotel's complaint, the case was in the status it was in prior to the appeal and that the last filing was Qwest's Request. The Notice gave the parties 30 days to respond to Qwest's Request or to provide information on additional developments that would hinder the parties from submitting a signed interconnection agreement consistent with the terms of the Arbitration Decision. The Commission's Notice also indicated that the Commission would consider suggestions on how the matter might be concluded.

On June 21, Autotel replied to the Notice stating that no further action by the Commission was necessary because Autotel had requested new negotiations with Qwest. On July 14, Qwest replied to the Notice, requesting that the Commission order Autotel to show cause why the Commission should not approve Qwest's proposed agreement and that the Commission should then, after considering any response by Qwest and any additional process deemed appropriate, approve Qwest's proposed agreement or direct specific language modifications consistent with the Arbitration Decision. Qwest argued

[3] *See* Memorandum Decision and Order, Case No. 2:04cv01052DAK (D. Utah, May 17, 2005).

that Autotel was not entitled to ignore the Arbitration Decision simply because it did not agree with it. On August 1, Qwest filed Supplemental Information in Support of Qwest's Response to Procedural Notice and Reply of Autotel, consisting of correspondence between the parties demonstrating that Autotel believes the Commission's Arbitration Decision does not comply with 47 U.S.C. §§ 251 and 252 or with the regulations adopted by the Federal Communications Commission ("FCC") pursuant to the Telecommunications Act of 1996 ("Act"). Thus, it became clear that Autotel was not refusing to sign the agreement because it believed it did not comply with the Arbitration Decision, but rather was refusing to sign it because it believed the Arbitration Decision was in error.

B. ARBITRATIONS AND LITIGATION IN OTHER STATES

Subsequent to commencing this arbitration in Utah, Autotel and its sister company Western Radio Services Co. commenced arbitrations with Qwest in four other states, Oregon, Arizona, Colorado and New Mexico. The issues arbitrated in Utah, including the non-substantive, clerical differences between the interconnection agreements, have generally been arbitrated in each of those states and Qwest has essentially prevailed on every issue in every other state.[4] Although Western Radio

[4] *See* Order No. 04-600, In the Matter of Western Radio Services Co. Petition for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b) of the Telecommunications Act of 1996, ARB 537 (Ore. P.U.C., Oct. 18, 2004) ("Oregon Order"); Decision No. 67408, 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, Docket No. T-01051B-04-0152 (Ariz. Corp. Comm'n Nov. 2, 2004) ("Arizona Order"); Decision No. C05-0242, In the Matter of Petition of Autotel for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b), Docket No. 04B-361T (Colo. P.U.C. Feb. 28, 2005) ("Colorado Order"); Decision No. C05-0580, In the Matter of the Petition of Autotel for Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47 U.S.C. § 252(b), Docket No. 04B-361T (Colo. P.U.C. May 17, 2005) ("Colorado Approval Order"); Final Order Approving Recommended Decision, In the Matter of the Filing of the Petition of Autotel for Arbitration of an Interconnection Agreement with Qwest

refused to sign an interconnection agreement in Oregon,[5] Autotel has signed interconnection agreements in Arizona and Colorado, accepting Qwest's language on the clerical issues, which have been approved by the state commissions in those states.[6] Autotel has recently informed Qwest that it will not sign the agreement in New Mexico, stating "Since the agreement does not provide interconnection for Autotel's equipment, I can not see any reason to sign. I have also considered the possibility that by not signing the agreement, Autotel may able to obtain an agreement that provides for interconnection sooner." In other words, Autotel is affirming its position that its refusal to sign an interconnection agreement arrived at through arbitration, simply because it does not like the decision, allows it to demand new negotiations for an interconnection agreement without regard to the arbitration decision.

C. THE ORDER

On August 17, the Commission issued the Order denying Qwest's requested relief because the parties had not filed a signed agreement. The Commission stated that it had "fulfilled [its] duty under the Act," and further stated:

> The Commission recognizes this decision effectively leaves the parties without an interconnection agreement. However, we also recognize this lack of agreement is due, not to a lack of Commission action, but to business decisions made by the parties. If either party believes the Commission has failed to act in

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Corporation Pursuant to Section 252(b) of the Telecommunications Act, Case No. 04-00226-UT (N.M. P.R.C. July 28, 2005) ("New Mexico Order").

[5] The federal district court in Oregon has entered a decision similar to that entered in Utah dismissing Western Radio's complaint challenging the Oregon Commission's decision. *Western Radio Services v. Qwest Corp.*, CV 05-159-AA (D, Ore. July 25, 2005), but Western Radio has now appealed that decision to the United States Court of Appeals for the Ninth Circuit, *Western Radio Serv. v. Qwest*, Docket No. 05-35796 (9th Cir.).

[6] *See Colorado Approval Order*. The agreement was deemed approved in Arizona because the Commission took no action on it within 30 days after its submission. 47 U.S.C. § 252(e)(4).

> accordance with the Act, it may petition the Federal Communications Commission to assume jurisdiction of this matter pursuant to Section 252(e)(5).[7]

While Qwest appreciates (and shares) the Commission's apparent frustration with this matter, it may be that the Commission's Order was motivated by an understanding that the Commission is powerless to approve an agreement that is not signed by the parties. If so, there is contrary precedent in other jurisdictions. If the Commission's decision is motivated by an unwillingness to devote further resources to this matter because of Autotel's recalcitrance, the decision is inconsistent with the Act, which requires parties to cooperate with the Commission in reaching a final agreement. The Commission should recognize that a bad precedent will be set if a party's lack of cooperation is allowed to frustrate the arbitration process. Accordingly, Qwest seeks reconsideration of the Commission's determination not to take further action until the parties submit a signed agreement.

In addition, the Order may be viewed as suggesting that the Commission does not believe that it has authority to resolve a dispute between the parties regarding the application of the Arbitration Decision to the terms of the interconnection agreement. Given that such an interpretation of the Order would be inconsistent with prior Commission practice,[8] Qwest assumes that the Order is not meant to be so construed. Therefore, Qwest seeks clarification of the Order on that issue. Alternatively, if the Commission believes that it is powerless to resolve such a dispute between the parties,

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[7] Order at 3-4.

[8] *See, e.g.*, Arbitration Order, Docket Nos. 96-087-03 and 96-095-01 (Utah P.S.C. Apr. 28, 1998) (clarifying prior arbitration orders issued in the same dockets December 26, 1996 and March 27, 1997); Order on Joint Motion of AT&T, TCG and Qwest, Docket No. 04-049-09 (Utah P.S.C. Nov. 1, 2004) (resolving disputes between the parties regarding application of the arbitration decision issued May 20, 2004).

Qwest seeks reconsideration of the Order because that view is inconsistent with other authorities. Finally, to the extent the Commission is unwilling to resolve a dispute about application of the Arbitration Decision to the interconnection agreement because of Autotel's recalcitrance, Qwest seeks reconsideration of the Order for the same reasons discussed above that such an order is inconsistent with the Act and would set bad precedent.

Given Autotel's track record of pursuing frivolous and premature appeals of state commission actions, there is substantial risk that the current posture of this docket could lead to further wasteful proceedings. Specifically, if the Commission refuses to take further action, there is a significant risk that Autotel will either (1) take-up the Commission's invitation to proceed before the FCC and seek to obtain the very thing the Order attempted to preclude—a fresh slate to start again with the arbitration process, ignoring the Commission's findings in an attempt to obtain more favorable terms, (2) seek again to appeal orders in this docket to federal district court or (3) seek a further arbitration before the Commission, which if denied, would likely lead to an another appeal to the federal district court. Any such action by Autotel would be wasteful and would make a mockery of the section 252 arbitration process. The Commission should foreclose the possibility of Autotel pursuing such courses by issuing a final order in this docket that makes clear the terms upon which Autotel can interconnect with Qwest, if it desires any interconnection at all. A final order would preclude action before the FCC, would specify the terms of the interconnection agreement, and would avoid the potential of a muddled procedural posture in the event of further appeal.

II. ARGUMENT

A. THE COMMISSION CAN EITHER REQUIRE AUTOTEL TO SIGN AN AGREEMENT OR APPROVE AN AGREEMENT WITHOUT AUTOTEL'S SIGNATURE. THE COMMISSION SHOULD TAKE SUCH ACTION IN THIS CASE.

Autotel's June 21, 2005 letter in response to the Commission's Notice and its correspondence with Qwest filed with Qwest's Supplemental Information on August 1, 2005 made it abundantly clear that Autotel had no intention of signing an interconnection agreement that complied with the Arbitration Decision, but rather that Autotel planned to wipe away two years of arbitration and start again in hopes of more favorable terms. The Commission appropriately rejected this attempt to pretend that two years of arbitration never happened, by noting that the Commission would not undertake any future action regarding an interconnection agreement between Qwest and Autotel "unless and until a signed agreement consistent with [its] Arbitration Order has been submitted by the parties."[9] However, by not issuing a final order in this docket and by leaving open the possibility that Autotel could pursue an action before the FCC under section 252(e)(5), the Commission has failed to complete the arbitration due to the recalcitrance of one party. This is inconsistent with the Act and is likely to set a bad precedent for the future.

The Order has not foreclosed the possibility of Autotel inappropriately obtaining the fresh start it seeks. If for some reason the FCC were to decline to treat the Commission's Arbitration Decision as the law of the case,[10] there could be senseless and expensive re-arbitration of the appropriate terms of interconnection. Alternatively, if

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[9] *See* Order at 3.

[10] *See, e.g., Alliance for Cannabis Therapeutics v. DEA*, 15 F.3d 1131, 1134 (D.C. Cir. 1994) (describing law of the case doctrine as "the practice of courts generally to refuse to reopen what has been decided") (quoting *Messenger v. Anderson*, 225 U.S. 436 444, 446 (1912)).

Autotel should determine again to pursue an appeal to federal district court either now or after unsuccessfully seeking a further arbitration based on its new request for negotiations—in a posture where the Commission has stated that it will undertake no further process in this matter—there could be expensive and unnecessary briefing about the procedural posture of the case and the appealability of the Commission's determinations to date.

Qwest respectfully urges the Commission to avoid these uncertainties and inefficiencies by reconsidering the Order and concluding this docket with a final order approving the terms of an interconnection agreement that will govern any interconnection Autotel seeks to pursue with Qwest. Autotel's recalcitrance should not be a bar to such final action.

In the Order, the Commission noted the novelty of the present situation, where "despite timely arbitration resolving the open issues submitted by the parties, those parties thereafter fail to submit a signed interconnection agreement for Commission approval."[11] Despite the novelty of the situation in Utah, however, other states have dealt with similar issues and have provided useful templates for dealing with a recalcitrant party that seeks to avoid the effect of an arbitration decision.

A recent case from Massachusetts involving Global NAPs ("GNAPs") and Verizon is instructive. There, after the Department of Telecommunications and Energy ("DTE") issued an arbitration order and directed the parties to enter an interconnection agreement consistent with that order, GNAPs instead attempted to opt into a previous Verizon interconnection agreement pursuant to 47 U.S.C. § 252(i). Verizon objected to

[11] *See* Order at 3.

such action after having gone through the time and expense of an arbitration proceeding, and submitted contract language that it alleged complied with the arbitration decision, requesting that the DTE approve Verizon's language and compel GNAPs to sign Verizon's agreement. The DTE rejected GNAPs' attempt to circumvent the arbitration decision and granted Verizon's motion, approving Verizon's unilaterally-submitted agreement and ordering GNAPs to sign that agreement. GNAPs thereafter attempted to amend the agreement by reserving certain rights, but the DTE again rebuffed GNAPs. In finally resolving the issue the DTE stated:

> GNAPs has not complied with our directive in the February 2003 Order to sign the Department-approved final arbitrated agreement. In response to the Department's Order, GNAPs did not confine its actions merely to execute the Department-approved final arbitrated agreement, but instead unilaterally amended the agreement with words that could arguably be interpreted as an acceptance by Verizon upon its execution of the contract document as a change to the terms of the contract. Even if, as GNAPs insists, its amendment is merely a reservation of rights, the Department in the February 2003 Order contemplated no additional modifications or amendments to the final arbitrated agreement—and certainly no unilateral changes—when the Department approved the agreement. The Department finds no basis whatsoever to consider modifications or amendments to an agreement it has already approved. In fact, to consider modifications at this late stage would undermine the finality of Department's approval of the arbitrated agreement and would only further delay finalization of the agreement.
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> To enforce our directives in the February 2003 Order, the Department hereby directs GNAPs to affix its signature to the Department-approved final arbitrated agreement without the nonconforming amendment at issue, and without any other modifications or amendments to the agreement, and to forward the same to Verizon by close of business on March 17, 2003. **Should GNAPs fail to comply with our directives herein, the Department concludes that it shall deem the Department-approved arbitrated agreement fully executed and effective, as of February 26, 2003, with Verizon's sole signature.** The Department further directs Verizon to forward a copy of the signed agreement, with or without GNAPs' signature, to the Department

> by close of business on March 18, 2003. **Under either result (that is, whether the unmodified agreement is signed by both GNAPs and Verizon or by Verizon alone), an agreement fully conformable to the February 2003 Order shall, upon execution and filing, replace the agreement between Verizon and GNAPs currently in place.**[12]

GNAPs appealed the DTE's authority to force GNAPs to accept the arbitration order rather than opt-in to a previously-approved interconnection agreement. The DTE was upheld by both the federal district court and the First Circuit—both courts making it perfectly clear that state commissions have the authority to bind all parties to section 252 arbitration decisions.[13]

Florida and Wyoming have also addressed the ability of state commissions to bind unwilling parties to arbitration decisions. In Florida, the commission routinely warns parties that if they fail to submit a signed interconnection agreement within the allotted time after an arbitration determination, the commission may issue an order to show cause

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[12] *See In re Global NAPs, Inc.*, D.T.E. 02-45, 2003 WL 21263358 (Mass. D.T.E. Mar. 14, 2003) (emphasis added).

[13] *See Global Naps, Inc. v. Verizon New England, Inc*., No. Civ.A.03-10437-RWZ, 02-12489-RWZ, 2004 WL 1059792, *3 (D. Mass. May 12, 2004) ("[U]nder Section 252(b)(5), Global's refusal to cooperate with the arbitrator's order constitutes 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.") (citation omitted), *aff'd* 396 F.3d 16, 18 (1st Cir. 2005) ("The challenged February 19 order allowed a remedial motion by Verizon to force Global NAPs to sign an interconnection agreement consistent with the terms of the DTE's earlier December 12 arbitration order. Verizon brought this motion because Global NAPs had balked at the December 12 arbitration order, said it was not bound by the result of the arbitration, and that it was instead exercising what it thought was its unconditional right under § 252(i) of the Act to adopt the terms of an interconnection agreement Verizon had with Sprint, which preexisted Global NAPs' arbitration request. . . . By allowing the commission acting as arbitrator to place conditions on both parties for the implementation of interconnection agreements, it is clear that § 252(b)(4)(C) intends for arbitration orders to be binding on both parties. . . . 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."), *cert. den*. 544 U.S. __, 125 S.Ct. 2522 (2005).

why the party or parties should not face a penalty.[14] In an arbitration between Sprint and BellSouth where there was difficulty getting the parties to sign an agreement, the Florida commission noted that to allow a recalcitrant party to stop the process would be inconsistent with the Act's requirements for cooperation and good faith and should not affect the commission's ability to conclude the docket with a final agreement, stating:

> We believe that to preserve the credibility and viability of the arbitration process, it is crucial that an agreement that sets the basis for the parties to conduct business be produced from this arbitrated proceeding. To allow a party or parties to withdraw a petition for arbitration, or allow a party to simply refuse to sign an agreement, once the Commission has issued its Order, is unacceptable. It simply is inappropriate and unfair for a party to impose on another party the time, effort, and expense of an arbitration proceeding, only to back out in the end because it did not get what it wanted from the proceeding. To allow this action would set a precedent that would encourage parties to future arbitrations to do the same. We believe parties that act in this manner are in violation of Section 252(b)(5) of the Act, for their refusal to negotiate in good faith.[15]

The section the Florida commission referred to provides:

> The refusal of nay other party to the negotiation to participate further in the negotiations, to cooperate with the State

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[14] *See, e.g., In re BellSouth Telecommunications, Inc*., Docket No. 001305-TP, 2002 WL 1972976 (Fla. P.S.C. Aug. 9, 2002) ("As noted by Supra, we have the authority to show cause a party which fails to sign an arbitrated interconnection agreement in the event there is no good cause for failing to execute the agreement. We now place the parties on notice that if the parties or a party refuses to submit a jointly executed agreement as required by Order No. PSC-02-0637-PCO-TP and Order No. 02-0143-FOF-TP within fourteen (14) days of the issuance of a final order on Supra's Motion for Reconsideration, we may impose a $25,000 per day penalty for each day the agreement has not been submitted thereafter in accordance with Section 364.285, Florida Statutes."). The Florida commission cites statutory authority to issue such orders to show cause and penalties. The Commission also has statutory authority (*see, e.g*., Utah Code Ann. §§ 54-7-25 through 54-7-28) and has issued numerous orders to show cause why a penalty should not be imposed in the past. *See, e.g., In re Shadow Mountain Estates*, Docket No. 01-2370-01, 2001 WL 1032869 (Utah P.S.C. July 27, 2001). The Commission's authority to proceed in such manner has been affirmed by the courts. *See, e.g., Beehive Telephone Co. v. Public Service Comm'n*, 2004 UT 18, 89 P.3d 131.

[15] *See In re Sprint Communications*, Docket No. 961173-TP, 1997 WL 294619, *8 (Fla. P.S.C. May 13, 1997).

> commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.[16]

In Wyoming, where a CLEC refused to participate in either negotiation or arbitration, the commission entered an order approving the interconnection agreement submitted by Qwest—unsigned by the CLEC.[17]

The upshot of this precedent from other state commissions (and from the federal district court and court of appeals) is an affirmation that state utility commissions retain the authority to enforce compliance with their section 252 arbitration determinations, such as the Arbitration Decision, and conclude an arbitration by approving the specific terms of the interconnection agreement that is to govern any interconnection, whether or not both parties are willing to sign. Furthermore, these cases demonstrate that, consistent with the Act, state commissions should enforce their arbitration decisions and conclude their arbitrations.

In this case, the Commission has expressed sentiments similar to those expressed in other states and has told Autotel that if Autotel fails to sign an agreement consistent with the Arbitration Decision the Commission will not take any further action allowing Autotel to obtain an interconnection agreement with Qwest. However, a key difference between the Commission's actions and the actions of the other states (and the reason Qwest seeks reconsideration) is that in this case the Commission has not taken final action that would both foreclose Autotel from seeking arbitration before the FCC and conclude this docket in such a way that there would be no question of the procedural

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[16] 47 U.S.C. § 252(b)(5).

[17] *See* Order Approving Interconnection Agreement, *In re Qwest Corporation,* Docket Nos. 70000-TK-04-967, 70008-TK-04-41 (Wy. P.S.C. June 23, 2004).

posture and ripeness of another possible appeal by Autotel. Qwest respectfully urges the Commission to reconsider the Order and to take such final action, to foreclose any further wasteful pursuit of improper remedies by Autotel.

B. THE COMMISSION SHOULD CLARIFY THAT IT MAY RESOLVE A DISPUTE BETWEEN THE PARTIES REGARDING APPLICATION OF ITS ARBITRATION DECISION.

Although this issue is essentially subsumed in the discussion under point A above, Qwest wishes to more specifically address the Commission's authority to determine whether Qwest's proposed interconnection agreement complies with the Act and with the Arbitration Decision. In the Order, the Commission seemed concerned with approving Qwest's proposed agreement "even though the parties have not agreed to its terms."[18] Qwest seeks to clarify that the Commission does not consider itself unable to resolve disputes between the parties about the compliance of a proposed agreement with the Arbitration Decision or that it is appropriate to do so where one party refuses to cooperate in concluding the arbitration proceeding. In a circumstance such as the present, the Commission can and should determine whether a proposed agreement meets the requirements of the Act and the Arbitration Decision even in the absence of signatures by both parties. If the Commission does not consider itself to have such authority or believes it may not exercise such authority because of the recalcitrance of Autotel, Qwest respectfully requests that the Commission reconsider its position.

Autotel's statements in its June 21 response to the Commission's Notice and its subsequent correspondence with Qwest make it clear that Autotel is not willing to sign the agreement proposed by Qwest because it does not like the results of the arbitration

[18] *See* Order at 3.

and believes the Arbitration Decision does not comply with the Act. Therefore, the only necessary issue for the Commission to consider is whether it may act in the absence of Autotel's cooperation. That issue has been discussed above.

Assuming for the sake of argument that Autotel still asserts that Qwest's proposed agreement does not comply with the Arbitration Decision, the only basis asserted by Autotel to date for such a claim is the fact that at this point in the process there are clerical and other non-substantive issues in Qwest's proposed agreement where the language was neither specifically identified by either party as an issue for arbitration nor agreed-upon in negotiations. In such a case, the Commission may fear that making a determination on this type of language would cause the Commission to exceed its mandate as identified in 47 U.S.C. § 252(b)(4) to only arbitrate issues identified by the parties. The Commission should not harbor any such fear. "Although state commissions are limited to deciding issues set forth by the parties, competing provisions [in the Act] require them to resolve fundamental elements necessary to make an interconnection agreement a working document."[19] In the process of doing so, it is perfectly appropriate to require parties to address and resolve (or bring before the Commission, if they cannot resolve) all of the language necessary to make the interconnection agreement an operative document.

As applied to this case, it would be a clear case of failing to negotiate in good faith if a party were both to (1) reject a proposed agreement because it did not agree to some small clerical-type language issue and (2) refuse to agree to have the Commission resolve the language issue because it had not been specifically identified as an issue in

[19] *See TCG Milwaukee, Inc. v. Public Service Comm'n of Wisconsin*, 980 F.Supp. 992, 1000 (W.D. Wisc. 1997).

the arbitration petition or response. It would be impractical to address every typo or capitalization question as a separate issue in an arbitration petition; and it would be improper to allow a party to prevent the entry of signed agreement by virtue of such issues not being so addressed. Yet this is precisely what may be a stumbling block in this case. Autotel has not agreed to the dotting of every "i" in Qwest's proposed agreement and has previously indicated this was a basis for it to refuses to sign the agreement.[20]

In *In re Sprint Communications*, the Florida commission addressed a case where both parties submitted proposed agreements following the initial arbitration decision and each refused to sign the other's. In that case, the commission staff requested that the CLEC identify all language in the ILEC's proposed agreement with which it did not agree. The commission then found that all language not so identified had been agreed upon, resolved the remaining disputed areas by approving specific language, and approved final language for the agreement.[21]

The Commission should reconsider the Order and follow a similar approach here. The Commission has Qwest's proposed agreement. It should require Autotel to identify the specific provisions with which it does not agree. Any provisions not so identified can be found to have been agreed-upon by the parties (or waived by Autotel), while any disputes Autotel identifies can be resolved by the Commission. Regardless of whether Autotel responds, the Commission can review Qwest's proposed agreement for compliance with the Act and the Arbitration Decision and approve it (with any

[20] If there are more substantive provisions with which Autotel does not agree, presumably they were already the subject of the arbitration and there cannot be any argument about the appropriateness of the Commission determining whose language complies with the Arbitration Decision.

[21] *See In re Sprint Communications*, 1997 WL 294619, *8.

modifications the Commission deems necessary). These are appropriate responses when a party refuses to cooperate and negotiate in good faith, and would result in final approval of an interconnection agreement applicable to any business between the parties in Utah. Such finality is important and Qwest seeks reconsideration in the hope that the Commission will conclude this docket with a final order approving the terms of interconnection between Qwest and Autotel.

III. CONCLUSION

Given the tremendous investment of time and resources by the Commission and the parties in this matter, Qwest requests that the Commission reconsider the Order and conclude the arbitration by giving Autotel the opportunity to provide its position on why the agreement submitted by Qwest does not comply with the Commission's Arbitration Decision and then, with or without response by Autotel, by reviewing the agreement submitted by Qwest to determine if it complies with the Arbitration Decision and with the requirements of the Act. Otherwise, it is entirely possible that litigation will needlessly continue indefinitely between the parties and that parties in future arbitrations will feel empowered to ignore decisions of the Commission with which they do not agree.

RESPECTFULLY SUBMITTED: September 2, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **QWEST'S PETITION FOR RECONSIDERATION AND CLARIFICATION** was served on the following by electronic mail on September 2, 2005:

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