

ORIGINAL



0000038156

BEFORE THE ARIZONA CORPORATION COMMISSION

305R

RECEIVED

COMMISSIONERS

2006 JAN -6 1 P 4: 33

JEFF HATCH-MILLER, Chairman
WILLIAM A. MUNDELL
MARC SPITZER
MIKE GLEASON
KRISTIN K. MAYES

AZ CORP COMMISSION
DOCUMENT CONTROL

IN THE MATTER OF THE REQUEST OF
AUTOTEL FOR INTERCONNECTION,
SERVICES AND NETWORK ELEMENTS
WITH CITIZENS UTILITIES RURAL
COMPANY, INC. AND FOR AN INQUIRY BY
THE ARIZONA CORPORATION
COMMISSION AND TERMINATION OF THE
EXEMPTION OF CITIZENS RURAL
COMPANY, INC. PURSUANT TO SECTION
251(f)(1)(B) OF THE
TELECOMMUNICATIONS ACT OF 1996

DOCKET NO. T-01954B-05-0852

**STAFF'S BRIEF IN RESPONSE TO
AUTOTEL'S NOTICE OF BONA FIDE
REQUEST AND REQUEST FOR
TERMINATION OF EXEMPTION**

I. Introduction.

On November 21, 2005, Autotel filed a Bona Fide Request and Request for Termination of Exemption with the Commission with respect to Citizens Utilities Rural Company, Inc. ("Citizens"). Autotel is a Commercial Mobile Radio Service ("CMRS") provider in Arizona. A Procedural Conference was held on December 12, 2005. By Procedural Order dated December 12, 2005, Staff and the parties were ordered to file simultaneous opening briefs on or before January 6, 2006. Following is Staff's brief on the legal issues raised by Autotel's Request. Autotel's request should be denied by the Commission for the reasons discussed below.

First and foremost, Autotel seeks only to interconnect with Citizen's network to provide wireless services. Citizens, however, is not invoking the rural exemption. It is willing to provide interconnection services to Autotel to allow it to provide wireless service in Arizona. In addition, Autotel has refused to sign the Interconnection Agreement with Citizens resulting from the Commission's last arbitration. At least one Court has found such conduct to be evidence of bad faith. Further, having availed itself of the remedy set out in § 252(e)(6) of the Act, Autotel should not be

1 permitted to have its issues addressed in two forums simultaneously. The previous arbitration
2 decision is binding on the Companies unless and until a Court finds that it violates §§ 251 and 252 of
3 the TCA.

4 **II. Background.**

5 Prior to the instant filing, Autotel on March 27, 2003, filed a petition for arbitration of
6 interconnection rates, terms and conditions with the Commission pursuant to 47 U.S.C. § 252(b) of
7 the Telecommunications Act of 1996 (“ 1996 TCA”). The Commission resolved the issues raised by
8 Autotel in Decision No. 67273 on October 5, 2004. Autotel has refused to sign an Interconnection
9 Agreement with Citizens which incorporates the results of the Commission’s arbitration.

10 On May 5, 2005, Autotel filed a Complaint in the United States District Court for the District
11 of Arizona alleging that the Commission’s Decision and the Interconnection Agreement violate the
12 1996 TCA; that Citizens failed to negotiate in good faith, and that it was denied equal protection and
13 due process under 42 U.S.C. §1983. Both Citizens and the Commission have filed motions to
14 dismiss. The Complaint and Motions are pending.

15 On November 21, 2005, Autotel filed a Notice for Bona Fide Request and Request for
16 Termination of the Exemption. Following is Staff’s response.

17 **III. Discussion.**

18 **A. The Exemption Has Not Been Invoked By Citizens.**

19 Autotel seeks a termination of the exemption provided to Citizens under § 251(f)(1)(B) which
20 provides as follows:

21 (f) EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS-

22 (1) EXEMPTION FOR CERTAIN RURAL TELEPHONE COMPANIES-

- 23 (A) EXEMPTION – Subsection (c) of this section¹ shall not apply to a
24 rural telephone company until (i) such company has received a bona
25 fide request for interconnection, services, or network elements, and
26 (ii) the State commission determines (under subparagraph (B)) that
such request is not unduly economically burdensome, is technically
feasible, and is consistent with section 254 (other than subsections
(b)(7) and (c)(1)(D) thereof).

27 ¹ Subsection C is entitled “Additional Obligations of Incumbent Local Exchange Carriers” and includes the duty to (1)
28 negotiate, (2) interconnect, (3) provide unbundled access, (4) offer facilities for resale, (5) provide notice of changes to
the ILEC’s facilities and network and (6) collocation.

1 (B) STATE TERMINATION OF EXEMPTION AND
2 IMPLEMENTATION SCHEDULE-The party making a bona fide
3 request of a rural telephone company for interconnection, services, or
4 network elements shall submit a notice of its request to the State
5 commission. The State commission shall conduct an inquiry for the
6 purpose of determining whether to terminate the exemption under
7 subparagraph (A). Within 120 days after the State commission
8 receives notice of the request, the State commission shall terminate
9 the exemption if the request is not unduly economically burdensome,
10 is technically feasible, and is consistent with section 254 (other than
11 subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the
12 exemption, a State commission shall establish an implementation
13 schedule for compliance with the request that is consistent in time and
14 manner with Commission regulations.

15 Autotel's filing with the Commission only states that it is making a bona fide request, in
16 accordance with § 251(f)(1)(B) for interconnection, services and network elements with Citizens
17 Utilities Rural Company, Inc. It then requests that the Commission conduct an inquiry and terminate
18 the exemption within 120 days of its request.

19 At the Procedural Conference on December 10, 2005, Autotel stated that it was not seeking
20 unbundled network elements under the TCA and that it merely desired to interconnect with Citizens'
21 network to provide wireless service. However, Citizens stated at the Procedural Conference and also
22 in the attached letter, that it is not raising a rural telephone company exemption claim pursuant to 47
23 U.S.C. § 251(f)(1) with respect to entering into an interconnection agreement with Autotel. Citizens
24 further states in its letter: "Accordingly, if Autotel is only interested in interconnecting and
25 exchanging traffic with Citizens, there does not appear to be a need or basis to proceed with any
26 determination regarding Citizens' rural exemption in the above-referenced docket."

27 It is Staff's understanding in discussing this matter with Autotel, that it desires to simply
28 interconnect with and exchange traffic with Citizens so that it can provide wireless service. In that
Citizens is not raising the exemption in that instance, and already has gone through one arbitration
proceeding with Autotel at the Commission, there is simply no need to go through a 120 day
proceeding to terminate the exemption.

...

...

1 **B. Autotel has not yet signed the first Interconnection Agreement which resulted**
2 **from the Commission's first arbitration and thus Citizens is not obligated to**
3 **begin negotiations on a new agreement, to essentially allow Autotel to void the**
4 **first agreement.**

5 The law is very clear that the Commission's first arbitration order is binding upon Citizens
6 and Autotel. *See, Global NAPs, Inc. v. Verizon New England Inc.*, 2004 WL 1059792 (May 2004)
7 *affirmed*, 396 F.3d 16 (1st Cir., 2005). Autotel is not free to just ignore the Commission's Order and
8 attempt to void it by insisting that Citizens negotiate a new agreement with it. Public policy dictates
9 that the arbitrated agreement be upheld to provide incentive for the CLECs to negotiate in good faith
10 and to conserve administrative resources. *Id.*

11 The *Global NAPs* Court cited the following passage from the FCC's *Local Competition*
12 *Order*:

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

23 The District Court then went on to conclude:

24 The FCC clearly states that the arbitration order is binding on both
25 parties. Furthermore, under Section 252(b)(5), Global's refusal to
26 cooperate with the arbitrator's order constitutes a failure to negotiate in
27 good faith. *See* 47 U.S.C. Section 252(b)(5) ("The refusal of any other
28 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.

 Finally, DTE correctly ruled that permitting Global to ignore its
 arbitration decision would waste DTE's limited resources and impose
 an unnecessary burden on Verizon.

Id. at * 3.

 In addition, the United States Court of Appeals for the First Circuit pointed out that the
 obligations contained in Section 251(b) are not asymmetrical, but apply to both parties alike.

1 Section 252(b)(1) allows either party to the negotiation to petition for
2 arbitration. Section 252(b)(4) allows the state commission to impose
3 conditions on both parties in order to carry out the arbitration. And §
4 2529b)(5) creates a duty for both parties to cooperate with the
5 arbitration at the risk of breaching the duty both parties have, under
6 Section 252(a), to negotiate in good faith. There is no basis for Global

7
8 NAPs' reading Section 252(8) as somehow turning the parallel
9 obligations that run throughout Section 252(b) into merely one-way
10 obligations.

11 *Global Naps, Inc. v. Verizon New England*, 396 F.3d 16, 25 (1st. Cir. 2005).

12 The First Circuit, in agreement with the District Court, further found that attempting to void
13 the terms of a valid arbitration order could in itself be construed as a violation of the duty to negotiate
14 in good faith.

15 Further, Global NAPs' reading is in conflict with the statutory duties of
16 good faith and cooperation with the commission as arbitrator. The
17 TCA, at Section 252(b)(5), states: The refusal of any other party to the
18 negotiation to participate further in the negotiations, to cooperate with
19 the State commission in carrying out its function as an arbitrator, or to
20 continue to negotiate in good faith in the presence, or with the
21 assistance, of the State commission shall be considered a failure to
22 negotiate in good faith. In attempting to void the terms of a valid
23 arbitration order, it is clear that Global NAPs is refusing to cooperate
24 with the DTE, in violation of its duty to negotiate in good faith.

25 *Id.*

26 The facts of *Global NAPs* are reminiscent of this case. Here, Autotel has refused to sign the
27 interconnection agreement resulting from the Commission's first arbitration decision. Now, besides
28 bringing a lawsuit against the Commission and Citizens in District Court, it is back before the
Commission trying to obtain the Commission's assistance in getting a new interconnection agreement
with Citizens, that would essentially void the first agreement before the District Court has even had
an opportunity to decide the issues. This is not indicative of good faith on Autotel's part.

Staff is concerned with what appears to be a pattern of conduct by Autotel across the Qwest
region. Autotel has sought interconnection agreements with ILECs in a number of jurisdictions,
including Qwest and Citizens in Arizona. A pattern of conduct has emerged that raises serious
questions about whether Autotel is negotiating in good faith.

...

1 Following lengthy negotiations in some instances, Autotel has sought arbitrations with state
2 commissions. Rather than accepting the results of the arbitration, Autotel has in some instances
3 prematurely appealed the arbitration decisions without completing the process set out in the 1996
4 TCA. In other instances, it has refused to sign the resulting interconnection agreement and sought to
5 void the state commission's decision by attempting to obtain a new interconnection agreement. In
6 still other instances it has sought to commence a new arbitration with the state commission which
7 would have the effect of voiding the existing agreement or it has gone to the FCC to have the state
8 commission's decision preempted.²

9 In addition to filing appeals in federal court on the merits of the issues raised in the
10 arbitration, Autotel has sought damage awards against state commissions and commissioners under
11 42 U.S.C. § 1983 on the grounds that it was not accorded due process of law and that it was treated in
12 a discriminatory manner. It makes these allegations despite the fact that in Arizona at least, it failed
13 to follow the process set out by the Commission at critical junctures in the proceeding.

14 As in the instant case, Autotel has initiated follow up arbitrations in other jurisdictions while
15 its appeals were pending in federal court. Significantly, in some states including Arizona, Autotel
16 has initiated such follow up arbitrations without ever operating under interconnection agreements
17 previously approved.

18 Furthermore, Autotel also appears to be engaging in forum shopping. Following
19 unsatisfactory results in one forum, it searches for another forum. At times it has engaged multiple
20 forums i.e., the courts, state commissions and FCC.

21 ...

22 ...

23 ...

24
25 ² See In the Matter of the Petition of Autotel for Arbitration of an Interconnection Agreement with Qwest Pursuant to
26 Section 252(b) of the Telecommunications Act, Docket No. T-01051B-05-0858, Qwest's Response and Motion to
27 Dismiss filed on December 13, 2005 at 5-9 (referencing similar arbitrations and follow-up arbitration petitions in Utah,
28 Oregon, Colorado and New Mexico and similar arbitrations and federal court litigation in Utah and Oregon). Autotel also
sought FCC preemption of the Nevada Commission's jurisdiction pursuant to § 252(3)(5) of the TCA with respect to an
arbitration conducted by the Nevada Commission involving Autotel and Nevada Bell Telephone Company.

1 Autotel's pattern of conduct across a number of jurisdictions and in the instant case has
2 resulted in unnecessary litigation costs. It also appears to be motivated by a desire to achieve results
3 Autotel has been unsuccessful in achieving through the process established by the 1996 TCA. In
4 *Global NAPs, Inc.*, the court found similar conduct to be a failure to negotiate in good faith.

5 **IV. Conclusion.**

6 The Commission should dismiss Autotel's request to terminate the rural exemption in the case
7 of Citizens since Citizens has not invoked the exemption and has always been willing to enter into an
8 interconnection agreement with Autotel for interconnection and the exchange of traffic, which
9 according to Autotel is all that it is seeking. Citizens is not required to negotiate a new
10 interconnection agreement with Autotel; given that Autotel has refused to sign the interconnection
11 agreement resulting from the Commission's last arbitration, and is now litigating the matter in federal
12 court.

13 RESPECTFULLY SUBMITTED this 6th day of January, 2006.

14 

15 Maureen A. Scott
16 Keith A. Layton
17 Attorneys, Legal Division
18 Arizona Corporation Commission
19 1200 West Washington Street
20 Phoenix, Arizona 85007
21 (602) 542-3402

22 Original and thirteen (13) copies
23 of the foregoing were filed this
24 6th day of January, 2006 with:

25 Docket Control
26 Arizona Corporation Commission
27 1200 West Washington Street
28 Phoenix, Arizona 85007

Copy of the foregoing mailed this
6th day of January, 2006 to:

Richard L. Oberdorfer
114 N.E. Penn Avenue
Bend, Oregon 97701

1 Kevin Saville
2 Citizens Communications
3 9260 East Stockton Boulevard
4 Elk Grove, California 85624

4

5

6 Karyn Christine, Executive Legal Assistant

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

frontier[®]
COMMUNICATIONS SOLUTIONS

RECEIVED

DEC 29 2005

LEGAL DIV.
ARIZ. CORPORATION COMMISSION

December 28, 2005

VIA OVERNIGHT COURIER
AND E-MAIL

Maureen Scott
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Re: Docket No. T-01954B-05-0852

Dear Ms. Scott:

This letter follows our recent conversations regarding the above-referenced docket and Autotel's November 21, 2005 filing of a Bona Fide Request for Termination of Exemption with the Arizona Corporation Commission. Given Autotel's pending appeal in federal district court and its unwillingness to sign the interconnection agreement resulting from the Commission's arbitration decision in Decision No. 67273, it is not clear that Autotel has a legal basis to commence negotiations of a new interconnection agreement at this time. Citizens reserves the right to seek dismissal of the above-referenced docket on these and other grounds in its January 6, 2006 filing with the Commission in the above-referenced docket.

However, as we have discussed, Citizens Utilities Rural Company, agrees not to raise a rural telephone company exemption claim pursuant 42 U.S.C. § 251(f)(1) as a basis for not entering into an interconnection agreement to interconnect and exchange traffic with Autotel. Citizens, however, retains its right to raise the rural exemption claim if Autotel seeks unbundled access to network elements, resale or collocation pursuant Sections 252(c)(3), (4) or (5) of the Act. Accordingly, if Autotel is only interested in interconnecting and exchanging traffic with Citizens, there does not appear to be a need or basis to proceed with any determination regarding Citizens' rural exemption in the above-referenced docket.

Sincerely,



Kevin Saville
Associate General Counsel
2378 Wilshire Blvd.
Mound, MN 55364
(952) 491-5564 Telephone
(952) 491-5515 Facsimile
ksaville@czn.com

cc: Mr. Richard Oberdorfer - Autotel