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AZ CORP COMMISSION  
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IN THE MATTER OF THE PETITION OF  
BY AUTOTEL FOR ARBITRATION OF  
AN INTERCONNECTION AGREEMENT  
WITH QWEST PURSUANT TO SECTION  
252(B) OF THE TELECOMMUNICATIONS  
ACT

DOCKET NO: T-01051B-05-0858

**OPENING BRIEF OF QWEST  
CORPORATION**

Qwest Corporation ("Qwest"), pursuant to Procedural Order issued December 16, 2005, hereby submits its opening brief addressing the legal issue of whether Autotel is precluded from filing the arbitration application in this docket.

**INTRODUCTION**

On December 13, 2005, Qwest submitted a Response to Petition for Arbitration, Including Motion to Dismiss ("Motion"), wherein Qwest argued that Autotel is precluded from proceeding with the Petition for Arbitration ("Petition") it filed on November 23, 2005. Qwest moved the Commission to dismiss the Petition, in part, because the Petition is unlawful in light of the Commission's Decision No. 67408 ("*Arbitration Decision*"), issued November 2, 2004 in Docket No. T-01051B-04-0152 and the parties subsequent submission of a signed interconnection agreement on March 16, 2005, which was deemed approved by the Commission pursuant to 47 U.S.C. § 252(e)(4) ("Approved

1 Agreement”).<sup>1</sup> Qwest’s Motion addressed legal deficiencies with Autotel’s attempt to  
2 begin a new interconnection agreement arbitration. However, the Motion did not fully  
3 address two issues specifically identified in the Procedural Order—(1) the effect on this  
4 proceeding of the federal appeal regarding the Approved Agreement; and (2) the effect of  
5 the language in the Approved Agreement regarding the commencement of negotiations on  
6 a new agreement within two and one-half years after the Approved Agreement became  
7 effective.

8 Qwest will herein restate the relevant arguments from its Motion, as well as the  
9 Motion’s background section, in order for the Commission to have (with the supplemental  
10 arguments on the two additional issues identified in the Procedural Order) one document  
11 comprehensively setting forth Qwest’s arguments for why Autotel is precluded by law  
12 from proceeding with a new arbitration at this time. This results in substantial  
13 repetitiveness between the Motion and this opening brief.

## 14 BACKGROUND

### 15 **I. Negotiations Between Qwest and Autotel**

16 Qwest has engaged in interconnection negotiations with Autotel’s president and  
17 principal, Richard Oberdorfer, pursuant to sections 251 and 252 of the  
18 Telecommunications Act of 1996 (“Act”),<sup>2</sup> for more than eight years without  
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21 <sup>1</sup> The Motion also argued that the Petition fails to identify any unresolved issues,  
22 the positions of the parties with respect to unresolved issues and resolved issues in  
23 connection with an interconnection agreement between the parties as required by 47  
24 U.S.C. § 252(b)(2)(A) and A.A.C. R14-2-1505.B.2. Qwest will not restate that argument  
25 herein, because it goes toward the specific sufficiency of the Petition rather than the more  
26 fundamental question about which Qwest understands the Commission to be seeking  
27 further briefing—whether Autotel may file any arbitration petition at all. Qwest’s  
28 decision not to restate its argument about the specific sufficiency of the Petition should  
not be read as an abandonment of that argument. Rather, Qwest is merely attempting to  
limit the content of this opening brief to the issues addressed in the Procedural Order.

<sup>2</sup> P.L. 104-104, 110 Stat. 56 (1996). In this opening brief, sections of the Act will  
be referred to by their section numbers as codified in Title 47 of the United States Code.

1 interconnecting or exchanging traffic with his companies under the terms of an  
2 interconnection agreement acceptable to both parties. Initially, negotiations covered the  
3 state of Oregon, where Mr. Oberdorfer conducts a wireless telecommunications and  
4 paging business through an Oregon corporation, Western Radio Services Co. ("Western").  
5 Western exchanged traffic with Qwest and its predecessors in Oregon for many years  
6 under the terms of Qwest's Oregon Radio Common Carrier Tariff. Since October 2005,  
7 Western has exchanged traffic with Qwest in Oregon under the terms of an arbitrated  
8 interconnection agreement approved by the Oregon Commission. This Oregon arbitrated  
9 agreement is essentially the same as the Approved Agreement.

10 In December 2001, Mr. Oberdorfer expanded his interconnection negotiations with  
11 Qwest to include the state of Utah, where Mr. Oberdorfer apparently intends to conduct  
12 business through a Nevada corporation, Autotel. Subsequently, Mr. Oberdorfer requested  
13 negotiations with Qwest on behalf of Western in Oregon and on behalf of Autotel in  
14 Arizona, Colorado and New Mexico. To the best of Qwest's knowledge, Autotel does not  
15 do business in Arizona, Colorado, New Mexico or Utah. Autotel is not a certificated  
16 competitive local exchange carrier ("CLEC") in Arizona and is, therefore, only entitled to  
17 enter into a wireless interconnection agreement with Qwest in Arizona.

## 18 **II. Prior Arbitration in Arizona**

19 Autotel filed a petition for arbitration of an interconnection agreement with Qwest  
20 in Arizona on February 27, 2004, which was assigned Docket No. T-01051B-04-0152.  
21 Autotel's petition identified four issues for arbitration. Qwest responded to the petition,  
22 identifying nine additional issues for arbitration. During the course of the arbitration, one  
23 of the 13 issues was resolved by the parties.

24 On October 8, 2004, following the filing of extensive testimony and briefs and  
25 submission of the matter by the parties, Administrative Law Judge Jane L. Rodda issued  
26 her recommended Opinion and Order. On November 2, 2004, following an open meeting  
27 at which Autotel did not appear, the Commission issued its *Arbitration Decision* adopting  
28 the recommended Opinion and Order. The *Arbitration Decision* directed the parties to

1 modify the interconnection agreement consistent with the Commission's decision and  
2 submit it within 30 days.

3 On December 9, 2004, Autotel filed a Formal Complaint ("Complaint") against  
4 Qwest complaining that the interconnection agreement prepared by Qwest did not comply  
5 with the *Arbitration Decision*. The Complaint was assigned Docket No. T-01051B-04-  
6 0884. In response to the Complaint, Qwest requested a procedural conference and that the  
7 Complaint be consolidated with the proceedings in the arbitration docket. Autotel did not  
8 object to consolidation and, on February 23, 2005, a procedural conference was held to  
9 discuss procedures for resolving the dispute. Following the conference, the parties were  
10 able to resolve their dispute and, on March 16, 2005, submitted the Approved Agreement  
11 to the Commission for approval. The Commission did not act on the agreement within 30  
12 days, so it was deemed approved on April 15, 2005, pursuant to section 252(e)(4). On  
13 March 22, 2005, Autotel withdrew the Complaint. The Commission thereafter dismissed  
14 the Complaint and closed Docket No. T-01051B-04-0884.<sup>3</sup>

15 Autotel has not requested any services or interconnection with Qwest under the  
16 terms of the Approved Agreement. To the best of Qwest's knowledge, Autotel is not  
17 doing business in Arizona.

18 Autotel filed a complaint in the United States District Court for the District of  
19 Arizona on May 5, 2005, claiming that the *Arbitration Decision* and the Approved  
20 Agreement do not comply with the Act. The complaint also seeks damages from Qwest  
21 and the Commission on various grounds.<sup>4</sup> Qwest and the Commission both filed motions  
22 to dismiss the portions of the complaint seeking damages because the Court lacked  
23 jurisdiction or the complaint failed to state a claim upon which relief could be granted.  
24 The motions have been briefed and are pending before the court. Even if the motions are  
25 granted, Autotel's first count challenging the *Arbitration Decision* for compliance with the

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27 <sup>3</sup> Decision No. 67770, *Autotel v. Qwest Corporation*, Docket No. T-01051B-04-  
0884 (ACC Apr. 22, 2005).

28 <sup>4</sup> See *Autotel v. Qwest Corporation, et al.*, CIV 05 327 TUC JCG (D. Ariz.).

1 Act will not be dismissed. Thus, the terms of the Approved Agreement will be reviewed  
2 by the federal court for compliance with the Act.

3 **III. New Request for Negotiations and Arbitration in Arizona**

4 On June 23, 2005, Qwest received a request from Autotel for negotiation of an  
5 interconnection agreement in Arizona. Qwest informed Autotel that it was not willing to  
6 ignore the prior arbitration and restart negotiations and that it had fulfilled its obligations  
7 under the Act by negotiating and arbitrating the Approved Agreement which was in effect.  
8 No negotiations took place, and Autotel filed the Petition on November 23, 2005. The  
9 Petition raises three issues for arbitration, none of which addresses specific terms of a  
10 proposed interconnection agreement between Autotel and Qwest. Attached to the Petition  
11 as Exhibit 1 is a "Type 1 Wireless Interconnection Agreement Between Qwest  
12 Corporation And [COMPANY] For The State Of [STATE]," which Autotel characterizes  
13 as "Qwest's current interconnection agreement offering."<sup>5</sup> The agreement attached to the  
14 Petition as Exhibit 1 is not the Approved Agreement. Attached to the Petition as Exhibit 2  
15 is a "Commercial Mobile Radio Services (CMRS) Interconnection Agreement Arizona,"  
16 which Autotel states is its "proposed interconnection agreement."<sup>6</sup> Neither attachment  
17 identifies differences between the agreements attached as Exhibits 1 and 2, or between  
18 either of these agreements and the Approved Agreement now in effect.

19 **IV. Arbitrations and Litigation in Other States**

20 Prior to commencing Docket No. T-01051B-04-0152 in Arizona, Autotel filed an  
21 arbitration petition against Qwest in Utah and its sister company Western filed an  
22 arbitration petition against Qwest in Oregon. After commencing Docket No. T-01051B-  
23 04-0152 in Arizona, Autotel commenced arbitrations with Qwest in two other states,  
24 Colorado and New Mexico. The issues arbitrated in Arizona have generally been  
25 arbitrated in each of those states, and Qwest has essentially prevailed on every issue in  
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27 <sup>5</sup> See Petition at 2.

28 <sup>6</sup> *Id.*

1 every state.<sup>7</sup> Following conclusion of these arbitrations, Western refused to sign an  
2 interconnection agreement in Oregon and Autotel refused to sign interconnection  
3 agreements in New Mexico and Utah. However, Autotel signed an interconnection  
4 agreement in Colorado that was approved by the Colorado Commission.<sup>8</sup> In addition, as  
5 discussed below, the Oregon Commission recently issued an order approving the  
6 interconnection agreement filed by Qwest in that state.<sup>9</sup>

7 **A. Further Proceedings in Utah**

8 In Utah, as in Arizona, Autotel filed a complaint against Qwest and the Utah  
9 Commission in federal district court. Qwest and the Utah Commission filed motions to  
10 dismiss the complaint on the ground that the federal court lacked jurisdiction because the  
11 Commission had not yet approved an interconnection agreement between the parties. The  
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13 <sup>7</sup> See Report and Order, *In the Matter of the Petition of Autotel for Arbitration of an*  
14 *Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b) of the*  
15 *Telecommunications Act*, Docket No. 03-049-19 (Utah PSC Feb. 18, 2004) (“*Utah 2004*  
16 *Order*”), <http://www.psc.state.ut.us/telecom/04orders/Feb/0304919ro.htm>; Order No. 04-  
17 600, *In the Matter of Western Radio Services Co. Petition for Arbitration of an*  
18 *Interconnection Agreement with Qwest Corporation Pursuant to Section 252(b) of the*  
19 *Telecommunications Act of 1996*, ARB 537 (Or. PUC Oct. 18, 2004) (“*Oregon Order*”),  
20 <http://apps.puc.state.or.us/orders/2004ords/04-600.pdf>; Decision No. C05-0242, *In the*  
21 *Matter of Petition of Autotel for Arbitration of an Interconnection Agreement with Qwest*  
22 *Corporation Pursuant to 47 U.S.C. § 252(b)*, Docket No. 04B-361T (Colo. PUC. Feb. 28,  
23 2005) (“*Colorado Order*”), [http://www.dora.state.co.us/puc/decisions/2005/C05-  
24 0242\\_04B-361T.doc](http://www.dora.state.co.us/puc/decisions/2005/C05-0242_04B-361T.doc); Decision No. C05-0580, *In the Matter of the Petition of Autotel for*  
25 *Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to 47*  
26 *U.S.C. § 252(b)*, Docket No. 04B-361T (Colo. PUC May 17, 2005) (“*Colorado Approval*  
27 *Order*”), [http://www.dora.state.co.us/puc/decisions/2005/C05-0580\\_04B-361T.doc](http://www.dora.state.co.us/puc/decisions/2005/C05-0580_04B-361T.doc); Final  
28 Order Approving Recommended Decision, *In the Matter of the Filing of the Petition of*  
*Autotel for Arbitration of an Interconnection Agreement with Qwest Corporation*  
*Pursuant to Section 252(b) of the Telecommunications Act*, Case No. 04-00226-UT  
(NMPRC Jul. 28, 2005) (“*New Mexico Order*”).

<sup>8</sup> See *Colorado Approval Order*.

<sup>9</sup> Order No. 05-1075, *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 (Or. PUC Oct. 10, 2005),  
<http://apps.puc.state.or.us/orders/2005ords/05-1075.pdf>.

1 federal district court agreed and dismissed the complaint.<sup>10</sup>

2 Following dismissal of the federal district court complaint in Utah, the Utah  
3 Commission requested that the parties provide information that would allow conclusion of  
4 the arbitration. Autotel refused, stating that negotiation of a new interconnection  
5 agreement was pending between the parties. The Commission determined, in light of the  
6 failure of the parties to file an agreement signed by both parties that complied with the  
7 *Utah 2004 Order*, to take no further action in the docket. However, it also determined  
8 that it would not undertake an arbitration proceeding based on Autotel's new request for  
9 arbitration until the parties submitted an interconnection agreement that complied with the  
10 *Utah 2004 Order*.<sup>11</sup> Qwest sought rehearing or clarification of the decision. In response,  
11 the Utah Commission denied reconsideration, but clarified that the conclusions in the  
12 *Utah 2004 Order* would be binding on the parties in any future proceeding, including a  
13 proceeding before the Federal Communications Commission ("FCC").<sup>12</sup>

14 Despite the decisions of the Utah Commission, Autotel filed a new petition for  
15 arbitration in Utah on October 26, 2005, which has been assigned Docket No. 05-049-95.  
16 The petition is substantially identical to the Petition filed in this docket. Qwest responded  
17 to the Utah petition, moving to dismiss it on the same grounds asserted in Qwest's Motion  
18 in this docket. On December 7, 2005, the Utah Commission granted Qwest's motion to  
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21 <sup>10</sup> See Memorandum Decision and Order, *Autotel v. Qwest Corporation, et al.*, Case  
22 No. 2:04cv01052DAK (D. Utah, May 17, 2005) ("*Utah Court Decision*").

23 <sup>11</sup> Order Denying Request for Approval of Proposed Agreement, *In the Matter of*  
24 *the Petition of Autotel for Arbitration of an Interconnection Agreement with Qwest*  
25 *Corporation Pursuant to Section 252(b) of the Telecommunications Act*, Docket No. 03-  
26 049-19 (Utah PSC Aug. 17, 2005) ("*Utah August 2005 Order*"),  
27 <http://www.psc.state.ut.us/telecom/05orders/Aug/0304919odr.htm>.

28 <sup>12</sup> Order on Petition for Reconsideration and Clarification, *In the Matter of the*  
29 *Petition of Autotel for Arbitration of an Interconnection Agreement with Qwest*  
30 *Corporation Pursuant to Section 252(b) of the Telecommunications Act*, Docket No. 03-  
31 049-19 (Utah PSC Sep. 21, 2005) ("*Utah September 2005 Order*"),  
32 <http://www.psc.state.ut.us/telecom/05orders/Sep/0304919oopfrc.pdf>.

1 dismiss.<sup>13</sup>

2 **B. Further Proceedings in Oregon**

3 In Oregon, Western filed a complaint against Qwest and the Oregon Commission  
4 in federal district court. Qwest and the Oregon Commission filed motions to dismiss the  
5 complaint on the same grounds asserted in Utah. The federal district court in Oregon also  
6 agreed and dismissed the complaint.<sup>14</sup>

7 In July 2005, Qwest requested that the Commission approve the agreement that  
8 Qwest had submitted to it in November 2004.<sup>15</sup> Western responded, requesting that the  
9 Commission take no further action because Western was appealing the federal district  
10 court's dismissal of Western's complaint to the United States Court of Appeals for the  
11 Ninth Circuit and because it was engaged in new interconnection negotiations.<sup>16</sup> On  
12 October 10, 2005, the Oregon Commission issued Order No. 05-1075. In that order, the  
13 Commission noted that if a party could ignore an arbitration decision simply because it  
14 was displeased or disappointed with the outcome, it would render the concept of  
15 compulsory arbitration meaningless.<sup>17</sup> The Oregon Commission reviewed the agreement  
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18 <sup>13</sup> Order Granting Motion to Dismiss, *In the Matter of the Petition of Autotel for*  
19 *Arbitration of an Interconnection Agreement with Qwest Corporation Pursuant to Section*  
20 *252(b) of the Telecommunications Act*, Docket No. 05-049-95 (Utah PSC Dec. 7, 2005)  
21 (“*Utah Dismissal Order*”),  
22 <http://www.psc.utah.gov/telecom/05orders/Dec/0504995ogmd.pdf>.

23 <sup>14</sup> See *Opinion and Order, Western Radio Services Co. v. Qwest Corporation, et al.*,  
24 Civil No. 05-155-AA (D. Or. July 26, 2005) (“*Oregon Court Decision*”).

25 <sup>15</sup> As noted above, Western refused, following the Oregon Commission's *Oregon*  
26 *Order*, to sign an interconnection agreement that complied with the decision.  
27 Accordingly, in November 2004, Qwest filed an agreement that complied with the  
28 decision. Qwest took the same action in Utah and New Mexico following issuance of the  
*Utah 2004 Order* and the *New Mexico Order*, respectively.

<sup>16</sup> See *Western Radio Services Co. v. Qwest Corporation, et al.*, No. 05-35796 (9th  
Cir.).

<sup>17</sup> Order No. 05-1075 at 3.

1 submitted by Qwest and found that it complied with the *Oregon Order*. Accordingly, the  
2 Oregon Commission approved it.<sup>18</sup>

3 Just a few days after issuance of Order No. 05-1075 in Oregon, Western filed a  
4 new petition for arbitration in Oregon, which has been assigned ARB 706. Qwest has  
5 responded to the petition, moving to dismiss it on similar grounds to those asserted in  
6 Qwest's Motion filed in this docket.

### 7 **C. Further Proceedings in Colorado and New Mexico**

8 Autotel has not filed appeals of the *Colorado Order* or the *New Mexico Order* in  
9 the federal district courts in those states. However, it filed petitions with the Colorado and  
10 New Mexico Commissions on November 23, 2005, substantially identical to the Petition  
11 filed in Arizona. The Colorado petition has been assigned Docket No. 05B-501T, and the  
12 New Mexico petition has been assigned Case No. 05-00462-UT. Qwest filed motions to  
13 dismiss the petitions in both states substantially identical to its Motion filed in this docket.  
14 On December 21, 2005, the Colorado Commission granted Qwest's motion to dismiss in  
15 its open meeting, but has not yet issued a written order confirming that decision.<sup>19</sup>

### 16 **V. Qwest's Dealings with Other Wireless Providers in Arizona**

17 Qwest is currently successfully providing interconnection services to 31 wireless  
18 providers in Arizona, many of which, like Autotel, are relatively small companies. These  
19 companies have managed not only to negotiate interconnection agreements with Qwest,  
20 but also to operate under them. Prior to initiating arbitration with Qwest over the terms of  
21 an interconnection agreement in Docket No. T-01051B-04-0152, Autotel would have been  
22 free to opt into the terms and conditions of Qwest's interconnection agreement with any of  
23 these other providers.<sup>20</sup> Thus, Autotel's claims that Qwest has failed to negotiate in good  
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25 <sup>18</sup> *Id.* at 3-5.

26 <sup>19</sup> See Commissioners' Weekly Meeting (CWM) Agenda (Colo. PUC Dec. 21,  
27 2005), <http://www.dora.state.co.us/puc/agendas/cwm12-21-05.pdf> at 10.

28 <sup>20</sup> See 47 USC § 252(i).

1 faith with it, or that Qwest has attempted to stifle its competition in Arizona, ring hollow.  
2 Rather, it is apparent that Autotel seeks unique terms and conditions in its interconnection  
3 agreement with Qwest that would discriminate in its favor and against other wireless  
4 providers and refuses to comply with a Commission order, the *Arbitration Decision*,  
5 denying it those terms and conditions.

## 6 ARGUMENT

7 Autotel's attempt to begin a new interconnection arbitration at this time is unlawful  
8 and should be rejected. As argued in Qwest's Motion, the Petition is inappropriate in light  
9 of the *Arbitration Decision* and the Approved Agreement. In addition to the reasons set  
10 forth in the Motion, the Petition is inappropriate because the Commission lacks  
11 jurisdiction to revisit its findings from the *Arbitration Decision* while those findings are  
12 on appeal. The Commission is, therefore, prohibited from entertaining Autotel's attempt  
13 to revisit and reverse the findings from the *Arbitration Decision*. Finally, nothing in the  
14 terms of the Approved Agreement would allow Autotel to proceed with the Petition at this  
15 time.

16 For all of these reasons, as well as the additional reasons set forth in Qwest's  
17 Motion as referenced in note 1 above, the Petition should be dismissed and Autotel should  
18 be precluded from initiating arbitration of an interconnection agreement at this time.

### 19 **I. The Petition Is an Improper Attempt to Nullify the *Arbitration Decision* and** 20 **the Approved Agreement.**

21 In the *Arbitration Decision*, the Commission decided all issues in dispute between  
22 the parties in the prior arbitration and ordered the parties to enter into an interconnection  
23 agreement consistent with the decision. The parties thereafter entered into the Approved  
24 Agreement and submitted it to the Commission for approval. The Approved Agreement  
25 was deemed approved on April 15, 2005 pursuant to section 252(e)(4) of the Act.

26 It is inappropriate to allow Autotel to ignore the results of an arbitration proceeding  
27 by commencing arbitration of a new interconnection agreement within several months  
28 after the Commission-arbitrated Approved Agreement became effective and before the

1 parties have even started to operate under it. The process that the 1996 Act contemplates  
2 is that the parties will enter into an interconnection agreement through negotiation, or if  
3 negotiation is unsuccessful, through arbitration before the Commission. After they have  
4 entered into an agreement and it is approved by the Commission, both parties are expected  
5 to abide by its terms and conditions until it expires or until they voluntarily negotiate a  
6 new agreement.<sup>21</sup> They may not engage in arbitration and then ignore the decision of the  
7 Commission. If tolerated, Autotel's action would render the arbitration process  
8 meaningless.

9 In the *Utah September 2005 Order*, the Utah Commission said:

10 We agree with Qwest's argument that state arbitration  
11 decisions are binding on the parties, relative to the issues  
12 arbitrated by a state commission. . . . [O]ur [August O]rder  
13 should not be construed for the proposition that a party  
14 dissatisfied with the results of an arbitration may unilaterally  
15 reject or otherwise attempt to avoid the binding affect of a  
16 state commission's decision on the arbitrated issues. *This*  
17 *would include, as Autotel seemingly has done, attempting to*  
18 *start a new Section 252 negotiation, mediation, arbitration*  
19 *cycle on the issues previously arbitrated.* We believe that the  
20 parties may make an alternative, mutually agreed resolution  
21 on an issue resolved by state arbitration, but only if both  
22 parties are willing. Absent mutual agreement, either party  
23 may rely upon and insist that the state commission's  
24 arbitrated decision applies.<sup>22</sup>

18 In its recent order dismissing Autotel's new petition for arbitration, the Utah  
19 Commission said, "We refuse to permit Autotel, in contravention of federal statute, to  
20 ignore our previous orders and to, apparently, seek arbitration of previously settled  
21

22 <sup>21</sup> Interconnection agreements typically contain terms that require the parties to  
23 enter into amendments if there are changes in the law underlying the terms of the  
24 agreement, *see* Approved Agreement at Section I.B, and that allow the parties to submit  
25 disputes regarding implementation or amendment of the agreement to arbitration or  
26 resolution by and arbitrator or the applicable state commission. *Id.* at Section XXII.Q.  
27 Autotel does not contend that there has been any change in law that justifies arbitration of  
28 amended terms of the Approved Agreement. Rather, it is Autotel's position that the  
Approved Agreement itself does not comply with the Act. *See, e.g.,* Complaint for  
Violation of Telecommunications Act of 1996 and Violation of 42 U.S.C. § 1983, *Autotel*  
*v. Qwest Corporation, et al.*, CIV 05 327 TUC JCG (D. Ariz.).

<sup>22</sup> *Utah September 2005 Order* at 2-3 (emphasis added).

1 issues.”<sup>23</sup>

2 Likewise, in the face of similar conduct by Autotel’s sister company, Western, the  
3 Oregon Commission recently concluded:

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

11 An arbitrated interconnection agreement, with the  
12 disputed terms as decided by the Arbitrator and adopted by  
13 the commission, has the same legal power to bind the parties  
14 as if the agreement had been freely entered into by both  
15 parties prior to submission to the Commission. *One party  
16 cannot simply refuse to execute and honor the agreement  
17 because of disappointment with the outcome of the arbitration  
18 proceeding. . . .*<sup>24</sup>

19 Other state commissions have likewise refused to tolerate the type of conduct  
20 displayed by Autotel. *See, e.g., Global NAPs, Inc. v. Verizon New England, Inc.*, No.  
21 Civ.A.03-10437-RWZ, 02-12489-RWZ, 2004 WL 1059792 (D. Mass. May 12, 2004)  
22 (“[U]nder Section 252(b)(5), Global’s refusal to cooperate with the arbitrator’s order  
23 constitutes a failure to negotiate in good faith. Therefore, enforcement of the arbitration  
24 order is an entirely appropriate penalty and serves as a disincentive for a CLEC to force an  
25 ILEC to arbitrate an agreement while reserving the right to withdraw if it does not like the  
26 outcome.”) (citation omitted), *aff’d* 396 F.3d 16, 18 (1st Cir. 2005) (“By allowing the  
27 commission acting as arbitrator to place conditions on both parties for the implementation  
28 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.* 125 S.Ct. 2522, 161 L.Ed.2d 1110, 73

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27 <sup>23</sup> *Utah Dismissal Order* at 4.

28 <sup>24</sup> Order No. 05-1075 at 3 (emphasis added).

1 USLW 3594, 73 USLW 3692, 73 USLW 3693.<sup>25</sup>

2 Following lengthy arbitration proceedings, the Arizona Commission issued the  
3 *Arbitration Decision* and the parties entered into the Approved Agreement. It is an  
4 unlawful affront to the Commission for Autotel to simply ignore the Commission's  
5 *Arbitration Decision* and seek to re-litigate issues resolved in that decision.<sup>26</sup> Even a  
6 cursory review of the interconnection agreement proposed by Autotel indicates that it is  
7 clearly attempting to do just that. The Commission should reject this attempt and dismiss  
8 the Petition.

9 **II. The Commission Lacks Jurisdiction to Revisit Its Findings from the**  
10 ***Arbitration Decision* While That Decision Is on Appeal.**

11 By seeking to ignore the *Arbitration Decision* and the resulting Approved  
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13 <sup>25</sup> See also, *In re BellSouth Telecommunications, Inc.*, Docket No. 001305-TP,  
14 2002 WL 1972976 (Fla. P.S.C. Aug. 9, 2002) ("As noted by Supra, we have the authority  
15 to show cause a party which fails to sign an arbitrated interconnection agreement in the  
16 event there is no good cause for failing to execute the agreement. We now place the  
17 parties on notice that if the parties or a party refuses to submit a jointly executed  
18 agreement as required by Order No. PSC-02-0637-PCO-TP and Order No. 02-0143-FOF-  
19 TP within fourteen (14) days of the issuance of a final order on Supra's Motion for  
20 Reconsideration, we may impose a \$25,000 per day penalty for each day the agreement  
21 has not been submitted thereafter in accordance with Section 364.285, Florida Statutes.");  
22 *In re Sprint Communications*, Docket No. 961173-TP, 1997 WL 294619, \*8 (Fla. P.S.C.  
23 May 13, 1997) ("We believe that to preserve the credibility and viability of the arbitration  
24 process, it is crucial that an agreement that sets the basis for the parties to conduct  
25 business be produced from this arbitrated proceeding. To allow a party or parties to  
26 withdraw a petition for arbitration, or allow a party to simply refuse to sign an agreement,  
27 once the Commission has issued its Order, is unacceptable. It simply is inappropriate and  
28 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.").

26 <sup>26</sup> See A.R.S. § 40-252 ("In all collateral actions or proceedings, the orders and  
27 decisions of the commission which have become final shall be conclusive."); *Hibbs v.*  
28 *Calcot*, 801 P.2d 445, 450 (Az. Ct. App. 1990) ("[A] valid and final adjudicative  
determination by an administrative tribunal has the same effects under the rules of res  
judicata, subject to the same exceptions and qualifications, as a judgment of a court.").

1 Agreement, Autotel effectively demands a do-over of Docket No. T-01051B-04-0152.  
2 That is, being dissatisfied with the *Arbitration Decision*, Autotel simply wishes to have  
3 the Commission revisit the issues decided against Autotel in the prior docket. The  
4 Commission lacks jurisdiction to revisit those issues, however, while they are subject to  
5 Autotel's federal district court appeal in *Autotel v. Qwest Corporation, et al.*, CIV 05 327  
6 TUC JCG.

7 As the Supreme Court held in the analogous context of a federal appeal from a  
8 district court decision, "[t]he filing of a notice of appeal is an event of jurisdictional  
9 significance—it confers jurisdiction on the court of appeals and divests the [lower  
10 tribunal] of its control over those aspects of the case involved in the appeal."<sup>27</sup> Thus,  
11 specifically in the administrative context, it is not until "a court remands to the  
12 administrative agency" that "the agency's jurisdiction over the matter is revived, and the  
13 agency may conduct further proceedings" and, if necessary, "render a new decision."<sup>28</sup>

14 A key reason for this requirement that the lower tribunal be divested of jurisdiction  
15 over matters subject to an ongoing appeal is to "avoid the confusion that would ensue  
16 from having the same issues before two [tribunals] simultaneously."<sup>29</sup> That confusion is  
17 precisely what would result from allowing Autotel to proceed with its Petition. In the  
18 *Arbitration Decision*, the Commission determined the terms governing Autotel's proposed  
19 interconnection with Qwest under the Act. The Commission's determination is the  
20 subject of Autotel's appeal. Yet Autotel now seeks to have the Commission start from  
21 scratch and arbitrate interconnection requirements again, when the parties have yet to  
22 operate under the Approved Agreement and when the federal court will be reviewing the

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24 <sup>27</sup> See *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)  
25 (citations omitted); see also *Nat'l Ass'n of Home Bldrs v. Norton*, 325 F.3d 1165, 1167  
26 (9th Cir. 2003) ("As a general rule, '[o]nce a notice of appeal is filed, the district court is  
divested of jurisdiction over the matters being appealed.") (quoting *Natural Res. Defense  
Council v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir.2001)).

27 <sup>28</sup> See 2 Am. Jur. 2d *Administrative Law* § 576 (2004).

28 <sup>29</sup> *Nat'l Ass'n of Home Bldrs*, 325 F.3d at 1167 (quotation omitted).

1 Commission's prior determination of precisely the same question.

2 While it may not be uncommon, and is not improper, for telecommunications  
3 carriers to negotiate and arbitrate a new interconnection agreement while the often-  
4 lengthy appeal process continues regarding a prior agreement, the reason for such is that  
5 the issues in the later proceeding are not the same issues being addressed in the prior  
6 appeal. Regardless of the federal court determination(s) of the requirements of the Act  
7 regarding a prior interconnection agreement, the parties face new questions about their  
8 interconnection relationship going forward once the prior agreement is due to expire and  
9 be replaced. However, such is not the case here. Here, the parties have not yet operated  
10 at all under the Approved Agreement and the Approved Agreement is not set to expire.  
11 Rather, it has *just* been put into place, and Autotel is transparently attempting to avoid  
12 operating under its terms. Autotel is seeking to have the Commission revisit (and decide  
13 differently) the very findings made in the *Arbitration Decision*. As such, Autotel is  
14 attempting to have the Commission address the very issues that are currently on appeal.  
15 The Commission lacks jurisdiction to consider such issues while Autotel's appeal is  
16 pending. Autotel's attempt to conduct a new arbitration, therefore, is unlawful and should  
17 be rejected.

18 **III. Nothing in the Approved Agreement Would Permit Autotel to Proceed With a**  
19 **New Arbitration at This Time.**

20 The Procedural Order directs the parties to address the impact of the term in the  
21 Approved Agreement providing that negotiations for a new agreement should be  
22 commenced no later than 2 1/2 years after the agreement became effective. The relevant  
23 language in the Approved Agreement provides that the agreement "shall remain in effect  
24 for a period of 3 years, and thereafter shall continue in force and effect unless and until a  
25 new agreement, addressing all of the terms of this Agreement, becomes effective between  
26 the Parties."<sup>30</sup> It then provides that "[t]he Parties agree to commence negotiations on a  
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<sup>30</sup> See Approved Agreement at Section XXII.B.1.

1 new agreement no later than 2 1/2 years after this Agreement becomes effective.”<sup>31</sup>  
2 These sentences, read in context as a whole, contemplate negotiations beginning  
3 approximately six months prior to the expiration of the Approved Agreement in order to  
4 allow the parties time to negotiate prior to the anticipated termination of the agreement.  
5 In the event such negotiations are not complete by the time the three year term expires, the  
6 Approved Agreement would nonetheless “continue in force and effect unless and until a  
7 new agreement” becomes effective.

8 Nothing in this contractual language contemplates negotiations beginning  
9 substantially earlier than 2 1/2 years after the effective date of the Approved Agreement.  
10 Moreover, even if the agreement were considered to be silent as to how soon new  
11 negotiations can commence (i.e., if the “no later than 2 1/2 years” language were not  
12 interpreted as providing an approximate front-end date for starting new negotiations), the  
13 agreement must still be interpreted “reading the contract as a whole, giving effect to the  
14 main purpose of the instrument and interpreting the contract so as to make it *effective and*  
15 *reasonable*.”<sup>32</sup> What Autotel is attempting by pursuing a new arbitration at this time is  
16 precisely the opposite of making the Approved Agreement “effective.” Indeed, Autotel is  
17 attempting nothing less than to repudiate the terms of the Approved Agreement and is,  
18 therefore, not entitled to (and has not attempted to) assert the terms of the contract in  
19 seeking new negotiations.<sup>33</sup> Nor would it be “reasonable” to interpret any lack of  
20 contractual specificity about the date to begin new negotiations as an invitation for a party  
21 to re-start negotiations the very moment an agreement the party dislikes is approved by  
22 the Commission. Were a party allowed to do such, it could repeatedly force new

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24 <sup>31</sup> *Id.*

25 <sup>32</sup> See *Triangle Construction v. City of Phoenix*, 720 P.2d 87, 90 (Az. Ct. App.  
26 1986) (emphasis added) (citing *Phelps Dodge Corp. v. Brown*, 540 P.2d 651, 653 (Az.  
1975)).

27 <sup>33</sup> See, e.g., *Landin v. Ford*, 727 P.2d 331, 332 (Az. 1986) (“The election of  
28 remedies doctrine . . . prevents a plaintiff from both repudiating a contract and then suing  
on it to gain the benefit of the bargain.”) (quotation and bracketing omitted).

1 negotiations and arbitration immediately upon “losing” any prior arbitration, which  
2 would—as set forth above and as demonstrated by the decisions in other states rejecting  
3 Autotel’s attempts to begin new arbitrations—make a mockery of the Commission’s  
4 arbitration process. Thus, even if it is assumed that Autotel (or Qwest) can unilaterally  
5 begin negotiations on a new agreement somewhat prior to 2 1/2 years after the Approved  
6 Agreement became effective, Autotel certainly cannot begin such negotiations, or  
7 arbitration, at this time.

8 CONCLUSION

9 As noted in its Motion, Qwest respectfully submits that the Commission should  
10 dismiss the Petition. The process that the Act contemplates would be rendered  
11 meaningless if Autotel were allowed to initiate arbitration proceedings for a new  
12 agreement after the Commission has resolved disputed issues between the parties in a  
13 prior arbitration proceeding and approved an interconnection agreement, simply because  
14 Autotel is dissatisfied with the Commission’s decision. Further, the Commission would  
15 be acting beyond the scope of its jurisdiction were it to revisit the issues addressed in the  
16 *Arbitration Decision* while that decision remains on appeal. The language in the term of  
17 the Approved Agreement regarding commencing negotiation of a new interconnection  
18 agreement should be read in a manner that makes the agreement effective and that is  
19 reasonable. The provision cannot be read to sanction Autotel’s attempt to repudiate the  
20 agreement and ignore the *Arbitration Decision*.

21 Based on the Commission’s findings and conclusions in the *Arbitration Decision*  
22 that the language of the Approved Agreement complies with Qwest’s obligations under  
23 the Act, the Commission should reject Autotel’s improper attempt to collaterally attack  
24 the *Arbitration Decision*.

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DATED this 6<sup>th</sup> day of January, 2006.

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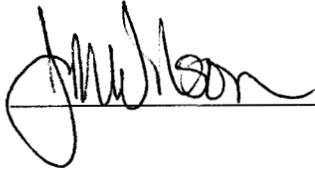
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