

ORIGINAL
OPEN MEETING ITEM



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



Executive Director

22

ARIZONA CORPORATION COMMISSION

DATE: FEBRUARY 27, 2006

DOCKET NO: T-01051B-05-0858

TO ALL PARTIES:

Enclosed please find the recommendation of Chief Administrative Law Amy Bjelland. The recommendation has been filed in the form of an Opinion and Order on:

AUTOTEL/QWEST CORPORATION
(ARBITRATION)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and ten (10) copies of the exceptions with the Commission's Docket Control at the address listed below by 4:00 p.m. on or before:

MARCH 8, 2006

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Working Session and Open Meeting to be held on:

MARCH 15, 2006 and MARCH 16, 2006

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602)542-4250. For information about the Open Meeting, contact the Executive Secretary's Office at (602) 542-3931.

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BRIAN C. McNEIL
EXECUTIVE DIRECTOR

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 COMMISSIONERS

3 JEFF HATCH-MILLER, Chairman
4 WILLIAM A. MUNDELL
5 MARC SPITZER
6 MIKE GLEASON
7 KRISTIN K. MAYES

8 IN THE MATTER OF THE PETITION BY
9 AUTOTEL FOR ARBITRATION OF AN
10 INTERCONNECTION AGREEMENT WITH
11 QWEST CORPORATION PURSUANT TO
12 SECTION 252(B) OF THE
13 TELECOMMUNICATIONS ACT.

DOCKET NO. T-01051B-05-0858

DECISION NO. _____

OPINION AND ORDER

14 DATE OF HEARING: December 15, 2005 (procedural conference), February 6,
15 2006 (date scheduled for oral argument)

16 PLACE OF HEARING: Phoenix, Arizona

17 ADMINISTRATIVE LAW JUDGE: Amy Bjelland

18 APPEARANCES: Richard Oberdorfer, President of Autotel;
19 Gregory Monson, STOEL RIVES, LLP, on behalf of
20 Qwest Corporation; and
21 Maureen Scott, Staff Attorney, Legal Division, on
22 behalf of the Utilities Division of the Arizona
23 Corporation Commission.

24 **BY THE COMMISSION:**

25 On November 23, 2005, Autotel filed with the Arizona Corporation Commission
26 ("Commission") a Petition for Arbitration of an interconnection agreement with Qwest Corporation
27 ("Qwest") pursuant to A.A.C. R14-2-1505 and Section 252(b) of the Communications Act of 1934,
28 as amended by the Telecommunications Act of 1996 ("the Act").

On December 13, 2005, Qwest filed its Response to Petition for Arbitration, Including Motion
to Dismiss.

On December 15, 2005, pursuant to Procedural Order, a procedural conference was held.

On December 16, 2005, pursuant to Procedural Order, the timeclock in this matter was
suspended pending resolution of the legal objections to the Petition filed in this docket raised by
Qwest and Staff.

1 On February 6, 2006, pursuant to Procedural Order, a procedural conference was held for the
2 purpose of oral argument. All parties stated that they were satisfied with the existing record and
3 would not object to going forward solely on the pleadings filed in the docket.

4 On February 6, 2006, by Procedural Order, the parties were notified that unless an objection
5 was filed by February 15, 2006, requesting oral argument, the matter would be taken under
6 advisement based upon the existing pleadings. No objection was filed.

7 * * * * *

8 Having considered the entire record herein and being fully advised in the premises, the
9 Commission finds, concludes, and orders that:

10 **FINDINGS OF FACT**

11 1. Autotel is a Commercial Mobile Radio Service ("CMRS") provider. This filing
12 constitutes Autotel's second petition for arbitration of an interconnection agreement ("ICA") with
13 Qwest. Autotel previously filed for arbitration of an ICA with Qwest on February 27, 2004, naming
14 four issues for arbitration. The issues raised in the petition were determined by Decision No. 67408
15 (November 2, 2004) ("Approved Arbitration").

16 2. On December 9, 2004, Autotel filed with the Commission a Formal Complaint against
17 Qwest, alleging that the Qwest ICA did not comply with the Approved Arbitration. The Formal
18 Complaint docket was consolidated with the Approved Arbitration docket on February 11, 2005, and
19 after a procedural conference on February 23, 2005, the parties were able to resolve the dispute that
20 led Autotel to file the Formal Complaint. The ICA was filed with the Commission on March 16,
21 2005, and approved by operation of law on April 15, 2005 ("Approved ICA").

22 3. On May 5, 2005, Autotel filed a Complaint in the United States District Court for the
23 District of Arizona ("Federal Complaint") seeking damages for violations of due process and equal
24 protection, and alleging that the Approved Arbitration and Approved ICA do not comply with the
25 Act. The Federal Complaint remains pending. Qwest stated that Autotel has not requested any
26 services or interconnection with Qwest under the terms of the Approved ICA.

27 4. Qwest stated that it received a request from Autotel for negotiation of a second ICA in
28 Arizona on June 23, 2005. Citing the Approved ICA, Qwest declined to begin negotiations anew.

1 5. On November 23, 2005, Autotel filed with the Commission a Petition for Arbitration
2 of an Interconnection Agreement with Qwest pursuant to A.A.C. R14-2-1505 and Section 252(b) of
3 the Communications Act of 1934, as amended by the Act.

4 6. On December 13, 2005, Qwest filed its Response to Petition for Arbitration, Including
5 Motion to Dismiss.

6 7. On December 15, 2005, pursuant to Procedural Order, a procedural conference was
7 held.

8 8. On December 16, 2005, pursuant to Procedural Order, the timeclock in this matter was
9 suspended pending resolution of the legal objections to the Petition filed in this docket raised by
10 Qwest and Staff.

11 9. On December 20, 2005, Qwest filed a Motion and Consent of Timothy Berg for *Pro*
12 *Hac Vice* Admission of Gregory Monson on behalf of Qwest Corporation. This motion was granted
13 by procedural order on January 10, 2006.

14 10. On January 6, 2006, Autotel, Qwest and Staff filed Opening Briefs.

15 11. On January 17, 2006 Qwest filed a Request for the Commission to Take Official
16 Notice of Decisions in Other States.

17 12. On January 27, 2006, Autotel and Qwest filed their Reply Briefs.

18 13. On February 6, 2006, pursuant to Procedural Order, a procedural conference was held
19 for the purpose of oral argument. Richard Oberdorfer, President of Autotel, unexpectedly failed to
20 make an appearance. Monica Davis, office manager for Mr. Oberdorfer, was present via telephone
21 on behalf of Autotel, but stated that she is not an attorney. She stated that Mr. Oberdorfer was out of
22 the country. Counsel for Qwest and counsel for Staff were both present.

23 14. At the time appointed for oral argument, all parties stated that they were satisfied with
24 the existing record and would not object to going forward solely on the pleadings filed in the docket.

25 15. On February 6, 2006, by Procedural Order, the parties were notified that unless an
26 objection was filed by February 15, 2006, requesting oral argument, the matter would be taken under
27 advisement based upon the existing pleadings. No objection was filed.

28 16. On February 16, 2006, Fennemore Craig, attorneys for Qwest, filed a Notice of

1 Withdrawal, stating that Qwest has been advised of and consented to the withdrawal, and that
2 pleadings in the matter previously sent to Fennemore Craig should be directed to Norman Curtright.
3 Substitution of counsel was approved by procedural order on February 23, 2006.

4 17. Autotel set forth three issues for resolution by the Commission: (1) adoption of an
5 interconnection agreement; (2) state commission jurisdiction concerning Qwest's good faith
6 negotiation duties under Section 251(c)(1); and (3) review of state commission actions. Autotel
7 subsequently withdrew issues (2) and (3) in its January 6, 2006 filing. Because Autotel has
8 withdrawn the issues relating to state commission jurisdiction concerning Qwest's good faith
9 negotiation duties under Section 251(c)(1) and review of state commission actions, we do not address
10 those here.

11 18. Prior to reaching the issues enumerated by Autotel in this docket, we must address the
12 legal objections to the Petition for Arbitration raised by Qwest and Staff.

13 19. Both Qwest and Staff contended that to allow Autotel's Petition to go forward in this
14 docket would be inappropriate and, in effect, allow Autotel to ignore the Approved ICA. Qwest
15 further stated that the Petition does not comply with the requirements of 47 U.S.C. § 252(b)(2)(A)
16 and A.A.C. R14-2-1505.B.2, in that it fails to identify any unresolved and resolved issues.

17 20. Autotel's arguments are unpersuasive, and it has cited no legal authority that
18 overcomes, or adequately addresses, the arguments set forth by Qwest and Staff. Autotel argued that
19 it may file this petition pursuant to the Approved ICA, which states in Section XXII.B.1:

20 This Agreement shall be effective as of the effective date of commission
21 approval of this Interconnection Agreement and shall remain in effect for
22 a period of 3 years, and thereafter shall continue in force and effect unless
23 and until a new agreement, addressing all of the terms of this Agreement,
24 becomes effective between the Parties. The Parties agree to commence
25 negotiations on a new agreement no later than 2 ½ years after this
26 Agreement becomes effective. This Agreement shall become effective
27 pursuant to Sections 251 and 252 of the Act.

25 Autotel has not partaken of the Approved ICA; we decline to allow Autotel to seek refuge in the very
26 document that it has thus far failed to utilize. Further, the time period referred to in the Approved
27 ICA requires that negotiations commence by October 15, 2007. Even if we were disposed to accept
28

1 Autotel's argument, when we consider the current procedural posture of the Approved ICA, we find
2 it is premature to require Qwest to negotiate with Autotel. The Approved ICA has been in effect
3 since April 15, 2005. Autotel has been able to operate in Arizona pursuant to the Approved ICA
4 since that time, and remains able to operate should it so choose, as the Approved ICA remains in
5 effect.

6 21. In its Response to Autotel's Petition, Qwest gave detailed background regarding its
7 negotiations with Autotel in various western states; an arbitration petition filed against Qwest in
8 Utah; another filed by an Autotel affiliate, Western Radio Services, Inc. ("Western"), in Oregon; two
9 additional petitions filed in Colorado and New Mexico after the petition that began this docket. The
10 issues decided in the Approved Arbitration have likewise been arbitrated in each of these states.
11 Qwest stated that Western and Autotel refused to sign approved ICAs in Oregon, New Mexico and
12 Utah, but did sign the approved ICA with Qwest in Colorado.

13 22. Qwest further alleged in its Response to Autotel's Petition that it has requested that
14 Autotel voluntarily withdraw its petitions in Oregon and Utah; "Autotel and Western, however, have
15 refused to withdraw them unless Qwest will negotiate a new agreement that disregards the arbitration
16 decisions by the commissions in those states." Qwest's Response, fn. 1. We find this pattern of
17 behavior on Autotel's part troubling and essentially an attempt to wrest from Qwest an ICA more
18 favorable to Autotel than that already approved by this Commission via the legitimate arbitration
19 process.

20 23. Staff likewise stated its concern with Autotel's pattern of conduct, wherein Autotel, in
21 various states, has prematurely appealed arbitration decisions, refused to sign resulting ICAs and
22 sought to void state commission decisions by attempting to obtain a new ICA. Staff cited *Global*
23 *NAPS, Inc. v. Verizon New England, Inc.*, stating that "[p]ublic policy dictates that the arbitrated
24 agreement be upheld to provide incentive for the CLECs to negotiate in good faith and to conserve
25 administrative resources" (2004 WL 1059792 (C.Mass. 2004), *aff'd*, 395 F.3d 16 (1st Cir. 2005)).
26 We find Staff's reasoning and arguments very persuasive.

27 24. We find it significant that Autotel has initiated a subsequent arbitration proceeding
28 while the Federal Complaint is pending without ever operating under the Approved ICA. The 1st

1 4. The Commission's resolution of the issues pending herein is just and reasonable,
2 meets the requirements of the Act and regulations prescribed by the FCC pursuant to the Act, is
3 consistent with the best interests of the parties, and is in the public interest.

4 **ORDER**

5 IT IS THEREFORE ORDERED that Autotel's Petition for Arbitration is hereby dismissed
6 with prejudice.

7 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

8 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

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11 CHAIRMAN

COMMISSIONER

12
13 COMMISSIONER

COMMISSIONER

COMMISSIONER

14
15 IN WITNESS WHEREOF, I, BRIAN C. McNEIL, Executive
16 Director of the Arizona Corporation Commission, have
17 hereunto set my hand and caused the official seal of the
18 Commission to be affixed at the Capitol, in the City of Phoenix,
19 this ____ day of _____, 2005.

20
21 BRIAN C. McNEIL
22 EXECUTIVE DIRECTOR

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28
21 DISSENT _____

22 DISSENT _____

1 SERVICE LIST FOR: AUTOTEL/QWEST

2 DOCKET NO.: T-01051B-05-0858

3 Richard L. Oberdorfer
4 114 N.E. Penn Avenue
5 Bend, OR 97701

6 Norman G. Curtright
7 QWEST CORPORATION
8 4041 N. Central Ave., 11th Floor
9 Phoenix, AZ 85012

10 Gregory B. Monson
11 STOEL RIVES, LLP
12 201 S. Main, Ste. 1100
13 Salt Lake City, UT 84111

14 Christopher Kempley, Chief Counsel
15 Legal Division
16 ARIZONA CORPORATION COMMISSION
17 1200 West Washington Street
18 Phoenix, AZ 85007

19 Ernest G. Johnson, Director
20 Utilities Division
21 ARIZONA CORPORATION COMMISSION
22 1200 West Washington
23 Phoenix, AZ 85007

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