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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

2010 SEP 15 P 2:43

KRISTEN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

AZ CORP COMMISSION
DOCKET CONTROL

In the Matter of the Petition by Autotel for Arbitration of an Interconnection Agreement with Frontier Communications Corporation Operating Companies of Arizona Pursuant to Section 252(a) of the Telecommunications Act) DOCKET NO. T-03214A-10-0051
AUTOTEL'S RESPONSE TO MOTION TO DISMISS AND TO PROCEDURAL ORDER

Petitioner Autotel hereby responds to the Motion to Dismiss filed by Frontier Communications Corporation Operating Companies of Arizona ("Frontier") and to the Procedural Order filed on September 2, 2010.

I. THE ACC HAS JURISDICTION OVER DISPUTES OTHER THAN THE NEGOTIATION AND ARBITRATION OF ICAs

Frontier's Motion to Dismiss, as well as the Staff Report, appear to assume that the ACC's jurisdiction to arbitrate and/or otherwise decide matters is limited to the arbitration of Interconnection Agreements (ICAs). The Ninth Circuit and Supreme Court have made clear that that the state commissions' authority is not so limited.

As the Ninth Circuit recently held, "the federal statutory scheme specifically grants authority to a state agency to interpret and enforce the provisions of [47 U.S.C.] §§ 251 and 252 (as well as the regulations the F.C.C. promulgates to implement them), including the duty to interpret and enforce the obligation to negotiate in good faith. See § 252(b)(1), (e)(1)-(3)."

Western Radio Services Co. v. Qwest Corp, 530 F.3d 1186, 1200-01 (9th Cir. 2008). The court thus held that such disputes must be heard by the state commission before being litigated in the

1 courts:

2 We therefore agree with Qwest that the only sensible conclusion in this case,
3 given the nature of Western's asserted cause of action and the role allotted to state
4 commissions by Congress, is that the ACC must address Western's good faith claim
5 before that claim may be brought in district court. . . . [W]hile we might under other
6 circumstances be hesitant to require that a party bring its claim to a state agency before
7 raising a federal private right of action in district court, §§ 251 and 252 give the ACC a
8 uniquely prominent role.¹

9 The Supreme Court has similarly made clear that Interconnection Agreements are not the
10 only matter under the Telecommunications Act which are actionable. In Verizon Maryland, Inc.
11 v. Public Service Com'n of Maryland, 535 U.S. 635, 122 S. Ct. 1753 (2002), after negotiating an
12 ICA, Verizon informed WorldCom that it would no longer pay reciprocal compensation for
13 telephone calls made by Verizon's customers to the local access numbers of Internet Service
14 Providers (ISPs), claiming that ISP traffic was not "local traffic" subject to the reciprocal
15 compensation agreement because ISPs connect customers to distant Web sites. 122 S. Ct. at
16 1756-57. WorldCom disputed Verizon's claim and filed a complaint, which ended up going to
17 the Supreme Court on procedural grounds. The Supreme Court rejected Verizon's argument that
18 the only matter appropriate for arbitration and litigation between interconnecting carriers is the
19 ICA itself. The Supreme Court held that 28 U.S.C. 1331 (general federal question jurisdiction)
20 provides the court with jurisdiction to review generally disputes that arise under the

21
22 ¹ The relevant Arizona regulations define "Arbitration" generically as "an alternative dispute
23 resolution process in which the Arizona Corporation Commission decides the matter in dispute
24 after the parties have had an opportunity to present their respective positions." R14-2-1502(A).

1 Telecommunications Act.

2 Thus, the Ninth Circuit and the Supreme Court have made clear that ICAs are not the
3 only subjects appropriate for state commission arbitration and decision-making.

4 **II. FRONTIER'S RURAL EXEMPTION IS APPROPRIATELY BEFORE THE ACC**

5 Frontier has "rural telephone company" status. Rural telephone companies are exempt
6 from 47 U.S.C. 251(c) until the ACC terminates the rural exemption. As explained herein, it is
7 appropriate and necessary for the ACC to act on Autotel's termination request at this time.

8 **A. The Rural Telephone Company Exemption**

9 47 U.S.C. 251(f) provides in relevant part as follows:

10 **(1) Exemption for certain rural telephone companies**

11 **(A) Exemption** – Subsection (c) of this section shall not apply to a rural telephone
12 company until

13 (I) such company has received a bona fide request for interconnection, services, or
network elements, and

14 (ii) the State commission determines (under subparagraph (B)) that such request is
15 not unduly economically burdensome, is technically feasible, and is consistent
with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

16 **(B) State termination of exemption and implementation schedule** – The party making
17 a bona fide request of a rural telephone company for interconnection, services, or
network elements shall submit a notice of its request to the State commission. The State
18 commission shall conduct an inquiry for the purpose of determining whether to terminate
the exemption under subparagraph (A). Within 120 days after the State commission
19 receives notice of the request, the State commission shall terminate the exemption if the
request is not unduly economically burdensome, is technically feasible, and is consistent
20 with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon
termination of the exemption, a State commission shall establish an implementation
21 schedule for compliance with the request that is consistent in time and manner with
Commission regulations.

1 **B. Staff Misunderstands the Applicability of the Rural Exemption to Autotel**

2 The Staff Response (at 2) states: "Frontier apparently advised Autotel that is has not
3 formally invoked its rights as a rural carrier under §§ 251 and 252 of the 1996 Act. Therefore, if
4 this is correct, the rural exemption process would not apply and the Request of Autotel in that
5 regard would be moot and unnecessary." Staff misunderstands both the facts and the nature of
6 the problem.

7 First, in the unsigned Citizens-submitted ICA, Citizens/Frontier unabashedly reserves the
8 right carry the rural exemption forward:

9 This Agreement does not waive the status of Citizens or any unaffiliated ILEC as a rural
10 carrier pursuant to the Telecommunications Act. Citizens reserves the right to respond
11 that it is not required to provide a requested service or Unbundled Network Element as a
12 result of a rural exemption pursuant to 47 U.S.C. 252(f)(1) or other laws or regulations or
13 to file a request for suspension or modification of any requirement in 47 U.S.C. 251(b) or
14 (c) pursuant to 47 U.S.C. 251(f)(2) or other laws or regulations. Carrier reserves its
15 rights to challenge such a response.

16 Smith Declaration Exhibit A, Attachment 2 section 1.2 (Bona Fide Request form).

17 Second, the relevance of the rural exemption to Autotel's interests is crucial, and is
18 twofold. First, the duty of rural exception carriers is simply stated as a duty to interconnect
19 "directly or indirectly," whereas the ILEC section requires direct interconnection at "any
20 technically feasible point within the carrier's network." 47 U.S.C. 252(c)(2)(B). Second, the
21 rural exemption allows Frontier to try to argue its way around the good faith negotiation
22 provisions. The good faith provision is not found in the sections of the Act that apply to carriers
23 with a rural exemption; only to ILECs, under 251(c)(1). The provisions which apply to rural

1 exception carriers (251(a) and (b)) do not contain the good faith requirement.

2 Section 251(c), which "rural" carriers are exempt from, includes the following relevant
3 duties:

4 (c) **Additional obligations of incumbent local exchange carriers** – In addition to the
5 duties contained in subsection (b) of this section, each incumbent local exchange carrier
has the following duties:

6 (1) **Duty to negotiate** – The duty to negotiate in good faith in accordance with
7 section 252 of this title the particular terms and conditions of agreements to fulfill
8 the duties described in paragraphs (1) through (5) of subsection (b) of this section
and this subsection. The requesting telecommunications carrier also has the duty
to negotiate in good faith the terms and conditions of such agreements.

9 (2) **Interconnection** The duty to provide, for the facilities and equipment of any
10 requesting telecommunications carrier, interconnection with the local exchange
carrier's network –

11 (A) for the transmission and routing of telephone exchange service and
12 exchange access;

13 (B) at any technically feasible point within the carrier's network;

14 (C) that is at least equal in quality to that provided by the local exchange
15 carrier to itself or to any subsidiary, affiliate, or any other party to which
the carrier provides interconnection; and

16 (D) on rates, terms, and conditions that are just, reasonable, and
17 nondiscriminatory, in accordance with the terms and conditions of the
agreement and the requirements of this section and section 252 of this
title.

18 **C. There Is No Provision in the Telecommunications Act Allowing the Rural**
19 **Telephone Exemption to Be Voluntarily Waived on a Case-by-Case Basis; It**
20 **Must Be Terminated**

21 There is no provision in the Telecommunications Act allowing the rural telephone
22 exemption under 47 U.S.C. 251(f) to be voluntarily waived on a case-by-case basis. Rather, the
23 Act requires the ACC to terminate the exemption if the facts no longer support the exemption –

1 that is, when 1) a rural telephone company has received a bona fide request for interconnection,
2 services, or network elements, and 2) the State commission then determines that such request is
3 not unduly economically burdensome, is technically feasible, and is consistent with section 254
4 of the Act.

5 Allowing a rural telephone company to simply "waive" the exemption on a case by case
6 basis would improperly permit the company to keep the exemption in its back pocket, so to
7 speak – to be used on an ongoing basis in its operations. Either the rural telephone company is
8 exempt or it is not. Once the company has received a bona fide interconnection request, and that
9 request has been presented to the ACC, it is the ACC's duty to undertake the necessary inquiry as
10 to whether the exemption should be terminated. The deadline for ACC to do so has passed, and
11 it is appropriate and necessary at this time for the ACC to act on the request.

12 It is now three months past the date by which the ACC was required to terminate the rural
13 exemptions of Frontier's Arizona operating companies. That is a non-discretionary deadline. As
14 of this date Frontier has not demonstrated that any of its operating companies meet the definition
15 of "rural telephone company," or if so that it is unduly economically burdensome or not
16 technically feasible to interconnect with Autotel's equipment. In fact the affidavit of Jenny
17 Smith makes clear that the Frontier companies have been able to interconnect with the facilities
18 and equipment of four other wireless carriers in Arizona.

19 Frontier has no explanation for why its rural exemption should not be terminated. It is a
20 waste of the Commission's time and resources – and the time and resources of other carriers – to
21 allow Frontier to carry its exemption in its back pocket to be used at its convenience repeatedly.
22 The question should be answered once and for all, rather than the Commission and the court to
23 face this question again and again every time a new carrier seeks interconnection with Frontier.

1 **III. AUTOTEL'S WELL-SUPPORTED POSITION -- AND FRONTIER'S AND ACC'S**
2 **PRIOR POSITION -- IS THAT NO ICA IS IN EFFECT; AT THE VERY LEAST**
3 **THE ACC SHOULD ARBITRATE THAT OPEN ISSUE**

4 In prior litigation between the parties, both the ACC and Citizens (now Frontier) argued
5 in September 2005 that there was no ICA in effect. See Exhibit A (ACC brief) at 2, 3-4; Exhibit
6 B (Citizens Brief) at 6. Specifically, Citizens (now Frontier) stated in September 2005: "As a
7 result of Autotel's inaction, the Arizona Commission has not made a "determination" regarding a
8 final and binding interconnection agreement between Citizens and Autotel." Exhibit B at 6.
9 Frontier now incorrectly asserts:

10 The Interconnection Agreement executed by Frontier was filed with the Commission
11 effective on January 31, 2005. Pursuant to A.A.C Rule R14-2-1508, agreements are
12 automatically approved 30 days from the filing date if the Commission has not formally
13 rejected the filing. The Commission did not reject the Frontier filing; therefore the
14 Frontier Interconnection Agreement with Autotel went into effect on March 3, 2005.

15 Frontier's Br. at 3-4. See American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 227 (9th Cir.
16 1988) (factual assertions in briefs may be considered party admissions binding upon the party).

17 As the Supreme Court recently noted: "Where a party assumes a certain position in a legal
18 proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his
19 interest have changed, assume a contrary position." New Hampshire v. Maine, -- U.S. --, 121 S.
20 Ct. 1808, 1814 (2001). See also Estate of Ashman v. Commissioner of Internal Revenue, 231
21 F.3d 541, 543 (9th Cir. 2000) (the "judicial estoppel doctrine" serves to preserve "the orderly
22 administration of justice and regard for the dignity of judicial proceedings, and to preclude
23 parties from playing fast and loose with the Courts").

24 As the Ninth Circuit has also explained, "the judicial estoppel doctrine is not confined to

1 inconsistent positions taken in the same litigation" and "applies to a party's stated position,
2 regardless of whether it is an expression of intention, a statement of fact, or a legal assertion."
3 Helfland v. Gerson, 105 F.3d 530, 535 (9th Cir. 1997). See also Risetto v. Plumbers and
4 Steamfitters Local 343, 94 F.3d 597, 600-601 (9th Cir. 1996) ("estoppel is even more appropriate
5 where the incompatible statements have been made in two different cases, since inconsistent
6 positions in different suits are much harder to justify than inconsistent pleadings").

7 There is no provision in either the Telecommunications Act or in Arizona statutes or
8 regulations that allows an ICA to go into effect that does not comport with the parties' negotiated
9 and arbitrated ICA provisions. The Act does not provide for entry of a non-negotiated and non-
10 arbitrated ICA. The Act states that if the parties do not agree to an ICA through negotiation,
11 either party may submit the matter to the state commission for arbitration of "open issues." 47
12 U.S.C. 252(b). The State commission then "shall resolve each issue . . . by imposing appropriate
13 conditions," within nine months after the date on which the local exchange carrier received the
14 request under this section. Id. The Act then goes on to state that "[a]ny interconnection
15 agreement adopted by negotiation or arbitration **shall be submitted for approval** to the State
16 commission. A State commission to which an agreement is submitted shall approve or reject the
17 agreement, with written findings as to any deficiencies." 47 U.S.C. 252(e)(1) (emph. added).
18 This statute does not state who is to draft such a document; nor who is to submit the document
19 "for approval." However, subsection (4) clearly does. It states that it is "the parties" who are to
20 submit the document:

21 If the State commission does not act to approve or reject the agreement within 90 days
22 after submission by **the parties** of an agreement adopted by negotiation under subsection
23 (a) of this section, or within 30 days after submission by **the parties** of an agreement
24 adopted by arbitration under subsection (b) of this section, the agreement shall be deemed
25 approved.

1 47 U.S.C. 252(e)(4) (emph. added). It is noteworthy that there is no deadline provided for "the
2 parties" to submit the document for approval. Thus, as the ACC and Frontier (then Citizens)
3 correctly stated in the prior lawsuit, no ICA was ever appropriately submitted to the
4 Commission, and the 90-day clock never began to run.

5 At the very least, there is an open issue for the ACC to arbitrate as to whether the ICA is
6 in effect. This is a straightforward issue of law that is appropriate for ACC determination at this
7 time.

8 **IV. IF THERE IS AN ICA IN EFFECT, AUTOTEL APPROPRIATELY SOUGHT**
9 **RENEGOTIATION OF AN ICA IN FEBRUARY 2010**

10 Frontier asserts that the Frontier-submitted ICA contains an annual 90-day
11 termination/renegotiation window. Even if the ICA went into effect, however, that deadline
12 applies only to Frontier's decision to terminate the agreement. Section 9.1 of the Frontier ICA
13 states:

14 This Agreement will be automatically renewed for successive periods of one (1) year
15 after the initial term unless either Party provides the other Party with no less than **ninety**
16 **(90) day's prior, written notification of, in the case of Citizens, its intent to terminate**
17 **this Agreement, or, in the case of either Party, its desire to renegotiate at the end of**
18 **the initial or any successive period.**

19 Smith Exhibit A at 10 (emph. added). Thus, either party can request renegotiation or termination
20 at any time prior to the termination of the ICA.

21 Under the last part of Section 9.1 (assuming the ICA is in effect, which Autotel disputes),
22 Autotel appropriately expressed its desire to renegotiate. On February 4, 2010, Autotel sent to
23 Frontier's Interconnection Manager, Jenny Smith, a request for the negotiation of an
24 interconnection agreement for the equipment and facilities of Autotel in accordance with
25

1 252(a)(1). Declaration of Oberdorfer ¶ 2. Even if the ICA did go into effect, it then by its own
2 terms expired because Autotel requested a new agreement, and renegotiation (if not negotiation)
3 is appropriate and provided for in the ICA document.²

4 Frontier's brief raises an open issue for ACC determination -- what is the window for
5 renegotiating the ICA (assuming there is an existing agreement)? Frontier asserts that the
6 February renegotiation request is not effective because it came within 90 days of March 2, 2010;
7 and thus asserts that Autotel must submit a new request to negotiate by December 3, 2010 (90
8 days before March 2, 2011). Autotel asserts that because its request came prior to March 2,
9 2010, the parties thus appropriately went into renegotiation mode. This is a straightforward issue
10 of interpretation of the Frontier-submitted ICA language, and is adequately briefed and ripe for a
11 decision.

12 **V. AUTOTEL INTENDS TO PROVIDE WIRELESS SERVICE IN ARIZONA BUT**
13 **IS UNABLE TO DO SO UNDER THE FAULTY ICA SUBMITTED BY**
14 **FRONTIER**

14 Autotel intends to provide wireless service in Arizona after receiving the required
15 regulatory approvals. Declaration of Oberdorfer ¶ 4. The ICA as submitted by Frontier,
16 however, does not allow for interconnection of Autotel's equipment. *Id.* ¶ 5.

17 Autotel previously reviewed Frontier's interconnection agreements with other wireless
18 carriers and none of the agreements would provide for the interconnection of Autotel's
19 equipment and facilities. Declaration of Oberdorfer ¶ 6. Therefore Autotel was unable to opt in
20 to an existing agreement under section 252(i).

21
22 ² Because Ms. Smith advised Frontier deemed some of their operating entities to be Rural
23 Telephone Companies, Autotel submitted notice of its Bona Fide Request to the ACC at the
24 same time. Declaration of Oberdorfer ¶ 3.

1 Citizens' legal counsel did not prepare the interconnection agreement in accordance with
2 Decision number 67273 nor did he complete the required interconnection attachments for the
3 points of interconnection requested by Autotel. Declaration of Oberdorfer ¶ 7. When Autotel
4 advised Citizens of the deficiencies, Citizens' counsel agreed to correct the agreement but still
5 refused to complete the interconnection attachments. Declaration of Oberdorfer ¶ 8. Citizens
6 then submitted an uncorrected agreement, without the required interconnection attachments and
7 without Autotel's signature. Declaration of Oberdorfer ¶ 9.

8 In its Petition to the ACC in this matter, Autotel advised that Frontier did not raise any
9 open issues about the language of the draft agreement during the voluntary negotiation period;
10 Frontier rather contends it does not have to negotiate an agreement with Autotel at all (as it
11 argues in its Motion to Dismiss). Frontier does not dispute either assertion in its response.
12 Instead Frontier faults Autotel for failing to articulate open issues -- but it is Frontier that
13 declined to raise any open issues.

14 The purpose of compulsory arbitration under section 252(b) is to force a recalcitrant
15 incumbent to the negotiating table. Autotel's Petition and Frontier's Motion to Dismiss have
16 raised the open issues discussed in this brief, which should be decided now by the ACC.
17 Frontier complains that it feels harassed by Autotel's attempts to obtain an interconnection
18 agreement; but there is nothing to be gained by delaying a decision on the open issues other than
19 Frontier keeping a competitor out of the market until the same interconnection dispute comes
20 back to the ACC again.

21 **VI. IT IS ALSO APPROPRIATE FOR THE ACC TO ADDRESS A CLAIM FOR**
22 **FRONTIER'S BAD FAITH REFUSAL TO NEGOTIATE**

23 In Western Radio Services Co. v. Qwest Corp., 530 F.3d 1186 (9th Cir. 2008), the Ninth
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25
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1 Circuit held for the first time that the duty to negotiate in good faith is enforceable in federal
2 court, but stated that such a claim must first be presented to the state utilities commission. The
3 court stated:

4 We therefore agree with Qwest that the only sensible conclusion in this case, given the
5 nature of Western's asserted cause of action and the role allotted to state commissions by
6 Congress, is that the PUC must address Western's good faith claim before that claim may
7 be brought in district court. . . . [W]hile we might under other circumstances be hesitant
8 to require that a party bring its claim to a state agency before raising a federal private
9 right of action in district court, §§ 251 and 252 give the PUC a uniquely prominent role.

10 As explained in this brief and in the Declaration of Oberdorfer, Frontier has refused to
11 negotiate, based on a frivolous interpretation of its own ICA language (assuming that the ICA is
12 in effect, when Frontier admitted years ago it is not). Autotel appropriately therefore raises a
13 claim for violation of the good faith negotiation duty herein, as now required by the Ninth
14 Circuit. The ACC should address the open issue of whether and how to proceed with that claim
15 in this venue, so that Autotel may exhaust its administrative remedies prior to any court
16 proceedings.

17 CONCLUSION

18 Autotel respectfully requests that the ACC address the following issues which are ripe for
19 determination:

- 20 1) Whether Frontier's rural exemption should be terminated;
- 21 2) Whether the ICA ever went into effect;
- 22 3) If the ICA is in effect, whether the 90-day "window" for termination applies to
23 Autotel or only to Frontier;

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4) How to proceed on the bad faith claim.

5) Approval of the Interconnection Agreement submitted by Autotel.

Respectfully submitted this 14th day of September, 2010,


Richard L. Oberdorfer
Autotel

I certify that on September 14, 2010, I sent "AUTOTEL'S RESPONSE TO FRONTIER'S MOTION TO DISMISS" original and 13 copies by Federal Express next day delivery to the following:

Docket Control
Arizona Corporation Commission
1200 W. Washington
Phoenix, AZ 85007

I further certify that on September 14, 2010, I also served the above-referenced documents upon all parties of record in this proceeding by mailing a copy properly addressed with first class postage prepaid to the following parties:

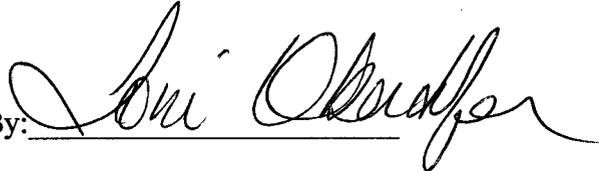
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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 AUTOTEL, a Nevada Corporation,
11
12 Plaintiff,

13 v.

14 CITIZENS UTILITIES RURAL COMPANY,
15 INC.; CITIZENS TELECOMMUNICATIONS
16 COMPANY OF THE WHITE MOUNTAINS, a
17 Delaware Corporation; NAVAJO
18 COMMUNICATIONS CO., INC., an Arizona
19 Corporation; ARIZONA CORPORATION
20 COMMISSION; MARC SPITZER; WILLIAM
21 A. MUNDELL; JEFF HATCH-MILLER; MIKE
22 GLEASON; and KRISTIN K. MAYES, in their
23 official capacities as Commissioners of the
24 Arizona Corporation Commission and in their
25 individual capacities,

26 Defendants.

NO. CIV 05-328 TUC-JMR(HCE)

**DEFENDANTS ARIZONA
CORPORATION
COMMISSION, MARC
SPITZER, WILLIAM A.
MUNDELL, JEFF HATCH-
MILLER, MIKE GLEASON
AND KRISTIN K. MAYES'
MOTION TO DISMISS**

27 Defendants Arizona Corporation Commission (the "Commission"), Marc Spitzer,
28 William A. Mundell, Jeff Hatch-Miller, Mike Gleason, and Kristin K. Mayes as members
29 of the Commission (the "Commissioners") (collectively referred to as the "Defendants")
30 by counsel and under Fed.R.Civ.P. 12(b)(1) and 12(b)(6), move this Court to dismiss
31 Plaintiff Autotel's (the "Plaintiff" or "Autotel") Complaint for lack of subject matter
32 jurisdiction and for failure to state claims for which relief may be granted.

33 ...

34 ...

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 This Court lacks subject matter jurisdiction over Autotel's Complaint. With
4 respect to Count I of its Complaint, the Commission has not approved a final
5 interconnection agreement between Plaintiff Autotel and Citizens Communications
6 Company ("Citizens") and thus, the Court lacks subject matter jurisdiction over the
7 Complaint under Section 252(e)(6). If the Court should find that it has subject matter
8 jurisdiction under Section 252(e)(6) which the Arizona Commission believes that it does
9 not, the Court still lacks subject matter jurisdiction under the remaining counts for the
10 following reasons. With respect to Count II of its Complaint, Autotel failed to make its
11 claims before the Commission and under established case law, it cannot bring its claims
12 to the Court for the first time. Accordingly, the Court lacks subject matter jurisdiction
13 over Count II. With regard to Counts III and IV of its Complaint, wherein Autotel seeks
14 separate remedies under 42 U.S.C. § 1983 and § 1988, subject matter jurisdiction is also
15 lacking. The remedy provided in 47 U.S.C. § 252 of the Telecommunications Act of
16 1996 (the "1996 Act") is an exclusive remedy and forecloses separate remedies under
17 U.S.C. §§ 1983 and 1988. Alternatively, the Commission and individual Commissioners
18 are entitled to absolute immunity from 42 U.S.C. § 1983 suits. Further, Autotel's
19 U.S.C. § 1983 causes of action fail to state claims upon which relief may be granted
20 because Autotel has not suffered a deprivation of a federally protected right.

21 **BACKGROUND**

22 This matter arises under the Telecommunications Act of 1996, an Act of Congress
23 that is designed to promote competition in the local telecommunications market. To that
24 end, the 1996 Act imposes interconnection obligations upon three classes of carriers,
25 including all telecommunications companies, local exchange carriers ("LECs") and
26 incumbent local exchange carriers ("ILECs"), with the most extensive obligations

1 imposed upon ILECs such as Citizens. If the companies are unable to voluntarily
2 negotiate an agreement, either party may request arbitration by the state commission of
3 any disputed or open issues. *See* 47 U.S.C. § (b)(1). 47 U.S.C. § 252(c) establishes
4 standards which govern state commission arbitration proceedings.

5 47 U.S.C. § 252(e) provides that any interconnection agreement adopted by
6 negotiation or arbitration is to be submitted to the state commission for approval. The
7 1996 Act provides different standards and timeframes for review depending upon
8 whether the interconnection agreement was voluntarily negotiated or arbitrated. 47
9 U.S.C. § 252 (e)(1).

10 A party aggrieved by the state commission's determination may seek review in
11 Federal District court. The court's review is limited to determining whether the
12 interconnection agreement approved by the state commission complies with §§ 251 and
13 252 of the 1996 Act. *See* 47 U.S.C. § 252(e)(6).

14 PROCEDURAL HISTORY

15 On March 27, 2003, Autotel filed a Petition for Arbitration with the Commission.
16 The Petition identified four issues requiring arbitration.

17 A Commission Administrative Law Judge ("ALJ") entertained pre-hearing
18 motions¹, issued procedural orders setting deadlines for filing testimony and presided

19
20 ¹On June 27, 2003, Citizens filed with the Commission a Motion to Compel and
21 Memorandum of Points and Authorities in Support of Motion to Compel Disclosure and
22 impose Sanctions. In its Memorandum, Citizens asked the Commission to order Autotel
23 to provide Citizens with a specific and detailed technical explanation as to how Autotel, a
24 wireless carrier, intended to interconnect its wireless network using Citizens' wireline
25 UNEs. Following a procedural conference, the parties were ordered to brief the issue of
26 whether the Act required Citizens to provide access to UNEs to wireless carriers such as
Autotel. On October 24, 2003, the Commission issued Decision No. 66457, finding that
Citizens did not have a duty to provide access to unbundled Dedicated Transport or
Loops to connect Autotel's MSC Switch and Cell Sites based upon the FCC's recent
Triennial Review Order. The parties were then ordered to resume negotiations.
Negotiations were ultimately unsuccessful and Autotel filed a statement of open issues
the Commission on February 6, 2004.

1 over an evidentiary hearing on June 7, 2004. Following the hearing, the parties reached
2 agreement on two of the issues. On October 5, 2004, the Commission issued Decision
3 No. 67273, which resolved the remaining two issues. The Commission ordered the
4 parties to incorporate the Commission's resolutions of the issues into a final, executed
5 interconnection agreement and to submit that agreement to the Commission for approval.
6 However, a final, executed interconnection agreement has not been submitted to the
7 Commission for approval.

8 ARGUMENT

9 I. STANDARD OF REVIEW FOR RULE 12(b)(1) AND 12(b)(6) MOTIONS.

10 When subject matter is challenged under Federal Rule of Civil Procedure 12(b)(1),
11 the plaintiff has the burden of establishing that this Court has jurisdiction in order to
12 survive the motion.² With respect to a motion to dismiss under Rule 12(b)(6), for failure
13 to state a claim upon which relief can be granted, the Court must accept all of Autotel's
14 allegations as true, and deny the motion "unless it appears beyond doubt that the plaintiff
15 can prove no set of facts in support of his claim which would entitle him to relief."³

16 II. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED FOR LACK OF 17 SUBJECT MATTER JURISDICTION BECAUSE THE COMMISSION'S 18 ARBITRATION ORDER IS NOT A FINAL APPROVAL OR REJECTION 19 OF AN INTERCONNECTION AGREEMENT.

20 Autotel's Complaint arises under § 252(e)(6). Under the provisions of § 252, and
21 judicial decisions interpreting these provisions, this Court cannot exercise jurisdiction
22 until the Commission has approved or rejected an executed interconnection agreement
23 between the parties. Decision No. 67273, the order that Autotel challenges in this case,
24 requires Citizens and Autotel to incorporate the Commission's resolutions of the disputed

25 ² See, *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 499 (9th Cir.
26 2001).

³ See *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002).

1 issues into a final, executed interconnection agreement and to submit that agreement to
2 the Commission for approval. Autotel's Complaint does not allege that the parties have
3 submitted that agreement to the Commission. Because the parties have not submitted
4 such an agreement, there has been no final approval or rejection of an interconnection
5 agreement, and the Commission order challenged by Autotel is merely an interlocutory
6 order. Until the Parties submit such an agreement and the Commission approves or
7 rejects it, this Court lacks subject matter jurisdiction over the issues raised in Autotel's
8 Complaint.

9 Arbitration is an intermediate step in the process of final approval or rejection of
10 an agreement. A state commission must limit its consideration of any petition for
11 arbitration "to the issues set forth in the petition and in the response." 47 U.S.C.
12 § 252(b)(4)(A). Petitions for arbitration only present the disputed issues on which the
13 parties have not reached agreement; a state commission's arbitration proceeding does not
14 address the issues that the parties have resolved. Therefore, arbitrated issues are only a
15 subset of the issues that will ultimately be presented to the Commission for its review in
16 the final, executed agreement.

17 Courts have consistently recognized that a state commission must either approve
18 or reject a final, executed interconnection agreement before an aggrieved party may
19 appeal pursuant to § 252. In *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000), the
20 Sixth Circuit Court of Appeals recognized "federal district courts have 'no jurisdiction to
21 review [commission] decisions arising *during the §252 process* until after [an]
22 interconnection agreement ha[s] become final by way of commission approval or
23 rejection.'" *Id.* at 917 (citations omitted; emphasis in the original). The Sixth Circuit
24 distinguished "interlocutory orders issued by state commissions during the course of
25 § 252 arbitrations" from other orders. *Id.*

26 ...

1 In *GTE South Inc. v. Morrison*, the Eastern District of Virginia explained:

2 the language in [§ 252] clearly indicates that the Court will
3 review the decisions of the [commission] based on whether
4 the *agreement* entered into by the parties pursuant to the
5 arbitration decisions is in compliance with the Act. Since the
6 parties do not dispute, and the Complaint explains, that there
7 was no agreement between AT & T and GTE when the
8 Complaint was filed, the Court does not have subject matter
9 jurisdiction under the Act.

7 *GTE South, Inc.*, 957 F. Supp. 800, 804 (E.D. Va. 1997)(emphasis in the original).

8 The structure of § 252 supports the conclusion that aggrieved parties have a right
9 of appeal only after approval or rejection of an agreement. Section 252(e) requires “[a]ny
10 interconnection agreement *adopted by negotiation or arbitration* [to] be submitted for
11 approval to the State commission.” 47 U.S.C. § 252(e)(1) (emphasis added). The right
12 of appeal created by that same section is not a stand-alone provision, but is instead
13 intertwined with the process for approval of interconnection agreements. 47 U.S.C.
14 § 252(e)(6). Further, Congress limited the scope of the appeal to whether “the *agreement*
15 or statement meets the requirements of section 251 of this title and this section.”
16 47 U.S.C. § 252(e)(6) (emphasis added). If Congress had intended the right of appeal to
17 apply to intermediate actions by state commissions, it would have used a stand-alone
18 provision and more encompassing language.

19 If an aggrieved party could appeal an arbitration order, federal courts could
20 become involved in piecemeal litigation, constantly entertaining a series of interlocutory
21 decisions. In *GTE South, Inc. v. Breathitt*, 963 F. Supp. 610 (E.D. Ky. 1997), the court
22 explained that granting jurisdiction for an arbitration order “would place the federal
23 district courts in a role of constant oversight of ongoing state commission proceedings.”
24 *Id.* at 612. Such a result would require the court to review agency action that is not final,
25 a result that would offend the ripeness doctrine. See *Abbott Lab. v. Gardner*, 387 U.S.

26 ...

1 136, 148 (1967). A federal district court does not have jurisdiction over the subject
2 matter of a complaint if it is not “ripe” for review.

3 In the case *sub judice*, the Plaintiff has not alleged that it executed an
4 interconnection agreement, or submitted an interconnection agreement to the
5 Commission as required by § 252(e)(1). As a result, the Commission has not had the
6 opportunity to approve or reject the complete agreement. Therefore, the Complaint
7 should be dismissed for lack of subject matter jurisdiction.

8 **III. AUTOTEL’S SECOND CAUSE OF ACTION SHOULD BE DISMISSED**
9 **FOR LACK OF SUBJECT MATTER JURISDICTION.**

10 In its Second Cause of Action, Autotel alleges that Citizens failed to negotiate in
11 good faith as required by §§ 251 and 252. (Complaint at ¶ 32; *see also* 47 U.S.C.
12 § 252(b)(5)). If the Court finds that it has jurisdiction under Section 252 despite the fact
13 that Autotel has not filed a final agreement with the Commission for approval, this Court
14 should still dismiss Count II pursuant to Rule 12(b)(1) for lack of subject matter
15 jurisdiction and under Rule 12(b)(6) for failure to state a claim upon relief may be
16 granted. Autotel failed to raise this issue before the Commission, and it is therefore not
17 entitled to bring the issue to the Court in the first instance.

18 Courts have consistently held that § 252 designates state commissions as the initial
19 reviewers of disputes related to the negotiation process. For example, in *Global Naps,*
20 *Inc. v. Bell-Atlantic – New Jersey*, the court dismissed a claim based on failure to
21 negotiate in good faith because the plaintiff raised the issue for the first time in its
22 complaint. The court held that the “statutory scheme set out in §§ 251 and 252 for
23 addressing the negotiation, approval, and enforcement of interconnection agreements is
24 to....make state commissions the initial decision maker regarding claims involving these
25 matters....” 287 F. Supp. 2d 532, 541 (D.N.J. 2003)(*citing Atlantic Alliance Telecomms.,*

26 ...

1 *Inc. v. Bell Atlantic*, No. 99 CV 4915, 2000 U.S. Dist. LEXIS 19649, at * 16-17
2 (E.D.N.Y. April 19, 2000)).

3 Autotel's Complaint does not contain the allegation that it raised the issue of
4 Citizens's alleged lack of good faith in the proceedings before the Commission.
5 "Disputes of this type are squarely within the scope of matters committed to state
6 regulators." *Global Naps*, 287 F.Supp. 2d at 541. Therefore, this Court should dismiss
7 Plaintiff's Second Cause of Action for lack of subject matter jurisdiction.

8 **IV. THIS COURT ALSO LACKS SUBJECT MATTER JURISDICTION OVER**
9 **THE § 1983 CAUSES OF ACTION; AND PLAINTIFF'S § 1983 CAUSES**
10 **OF ACTION ALSO FAIL TO STATE CLAIMS FOR WHICH RELIEF**
11 **MAY BE GRANTED.**

12 **A. The Judicial Remedy Provided by the 1996 Act Forecloses Remedies**
13 **under 42 U.S.C. §§ 1983 and 1988.**

14 Plaintiff's Third and Fourth Causes of Action assert claims against the
15 Commission and the Commissioners in their individual and official capacities under 42
16 U.S.C. § 1983. The claims are based upon alleged due process and equal protection
17 violations. If the Court finds that it has subject matter jurisdiction over Autotel's
18 Complaint despite the Arizona Commission not having yet approved the final
19 interconnection agreement between Autotel and Citizens as required by § 252(e)(6), this
20 Court lacks subject matter jurisdiction over Counts III and IV of Autotel's Complaint for
21 the following reasons.

22 Section 1983 provides a cause of action for any person whose federal rights,
23 whether constitutional or statutory, have been violated by a state actor under color of
24 state law. *Verizon Maryland, Inc. v. RCN Telecom Services, Inc.*, 232 F. Supp. 2d 539,
25 554 (N.D. Md. 2002), *aff'd in part, dismissed in part*, 377 F. 3d 355 (4th Cir. 2004).
26 Plaintiff may avail itself of the remedy provided under 42 U.S.C. § 1983 only if Congress
has not foreclosed private enforcement of such rights, either expressly in the statute itself,

1 “or impliedly, by creating a comprehensive enforcement scheme that is incompatible with
2 individual enforcement under §1983.” *Blessing v. Freestone*, 520 U.S. 329, 340-41
3 (1997).

4 Autotel’s § 1983 claims should be dismissed because § 252 of the 1996 Act
5 establishes a comprehensive enforcement scheme and private judicial remedy which are
6 intended to address any claims that a state commission’s approval of an interconnection
7 agreement fails to comply with §§ 251 and 252. Even though Congress did not expressly
8 prohibit a § 1983 action in § 252, “[w]hen the remedial devices provided in a particular
9 Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent
10 to preclude the remedy of suits under § 1983.” *Middlesex County Sewerage Auth. v.*
11 *Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 20 (1981). The provision of a private means of
12 redress in a statute itself is ordinarily an indication that Congress did not intend to allow a
13 damages remedy under § 1983. In this case, § 252 creates a comprehensive enforcement
14 scheme for telecommunications companies attempting to interconnect with other carriers
15 under the 1996 Act. The 1996 Act’s provisions indicate that Congress intended to
16 foreclose separate actions under § 1983.

17 At least one District Court has addressed the issue of whether the enforcement
18 scheme contained in § 252 precludes separate enforcement actions under 42 U.S.C.
19 § 1983. The District Court for the Northern District of Maryland held that § 252(e)(6)
20 forecloses separate enforcement actions under § 1983:

21 The 1996 Act, as the Court has found, permits a carrier to
22 enforce its right to a negotiated, binding interconnection
23 agreement, in the first instance, before a state administrative
24 agency. (cite omitted). It then provides for immediate review
25 of that administrative decision before the federal district
26 court. (cite omitted). If its remedial scheme lacks some
procedural detail, it nevertheless confers on carriers a private
right of action. *Id.* The 1996 Act provides ample—and
sufficiently comprehensive—means for vindicating the right
at issue here. Therefore, Congress cannot have intended to
allow enforcement under § 1983 as well.

1 *Verizon Maryland*, 232 F. Supp. 2d at 557.

2 In arriving at its conclusion, the court compared the similarities of the
3 comprehensive nature of the enforcement scheme contained in § 252 with other
4 provisions in federal statutes where the Supreme Court had found that a plaintiff could
5 not also avail itself of a separate § 1983 action.⁴

6 More recently, the United States Supreme Court held that § 1983 could not be
7 used to enforce rights created in a section of the 1996 Act that is similar to § 252. In *City*
8 *of Rancho Palos Verdes v. Abrams*, 125 S.Ct. 1453, 1462 (2005), the Court stated:⁵

9 Enforcement of § 332(c)(7) through § 1983 would *distort the*
10 *scheme of expedited judicial review and limited remedies*
11 *created by § 332(c)(7)(B)(v)*. We therefore hold that the
TCA—by providing a judicial remedy different from § 1983
in § 332(c)(7) itself—precluded resort to § 1983.

12 *Id.* (emphasis added).⁶ The *Abrams* Court noted “in *all* of the cases in which we have
13 held that § 1983 *is* available for violation of a federal statute, we have emphasized that
14 the statute at issue, *did not* provide a private judicial remedy (or, in most of the case, even
15 a private administrative remedy) for the rights violated.” *Id.* at 1459.⁷ Thus, [w]hen a

16 _____
17 ⁴ See *Nat’l Sea Clammers*, 453 U.S. at 20 (The Supreme Court found that the
enforcement provisions of the Federal Water Pollution Control Act and the Marine
18 Protection, Research, and Sanctuaries Act of 1972 were sufficiently comprehensive to
supplant § 1983 actions.); see also, *Smith v. Robinson*, 468 U.S. 992, 1013 (1984)(The
19 Supreme Court held that the Education of the Handicapped Act established an
enforcement scheme so comprehensive as to preclude a § 1983 action.).

20 ⁵ *Verizon Maryland*, 232 F. Supp. 2d at 557.

21 ⁶ 47 U.S.C. § 332(c)(7)(B)(v) provides in relevant part that:
22 Any person adversely affected by any final action or failure to act by a State or local
23 government or any instrumentality thereof that is inconsistent with this subparagraph may,
within 30 days after such action or failure to act, commence an action in any court of
competent jurisdiction. The court shall hear and decide such action on an expedited basis.

24 ⁷ See *Wright v. City of Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 428
25 (1987) (Housing Act and Brooke Amendment provided no private judicial remedy but
only local, administrative grievance procedures.); See also *Blessing*, 520 U.S. at 331.
26 (“Unlike the federal programs at issue in those cases, Title IV-D contains no private
remedy – either judicial or administrative—through which aggrieved persons can seek
redress.”)

1 state official is alleged to have violated a federal statute which provides its own
2 comprehensive enforcement scheme, the requirements of that enforcement procedure
3 may not be bypassed by bringing suit directly under § 1983.” *Id.* (citing *Sea Clammers*,
4 453 U.S. at 20).⁸

5 If Congress intended to foreclose § 1983 remedies for the statute at issue in
6 *Abrams*, it also intended to foreclose such remedies for §§ 251 and 252. Sections 251
7 and 252 of the 1996 Act create a scheme of cooperative federalism⁹ which balances state
8 and federal interests. These provisions rely on state commissions to resolve issues within
9 their unique area of expertise, but also require them to follow minimum federal
10 substantive and procedural standards. This regulatory scheme would be undermined if
11 separate enforcement actions under § 1983 were allowed. Accordingly, this Court should
12 dismiss Counts II and III of Autotel’s Complaint.

13 **B. The Commission and the Commissioners in their Official Capacities**
14 **Are Immune from Suit under 42 U.S.C. § 1983.**

15 If the Court finds that the judicial remedy provided by 47 U.S.C. § 252(e)(6) does
16 not foreclose remedies under 42 U.S.C. § 1983, it should still dismiss the § 1983 causes
17 of action against the Commission and the Commissioners in their official capacities.¹⁰

18
19 ⁸ The Commission is not aware of any case to-date which has found that a plaintiff may
20 avail itself of a separate §1983 action, for a claim brought under § 252(e)(6) of the 1996
21 Act.

22 ⁹ In his concurring opinion in *Abrams*, Justice Breyer explained that § 332 of the 1996
23 Act is based upon a scheme of cooperative federalism which carefully balances federal
24 and local interests. He explained that this scheme of cooperative federalism would be
25 undermined if separate § 1983 actions were allowed.

26 ¹⁰ Both § 1983 causes of action refer to the “individual defendants.” *See* Complaint at ¶¶
37 and 48. It is unclear whether that term refers to the Commissioners in their individual
capacities or in both their official and individual capacities. In contrast to paragraphs 37
and 48 of the Complaint, paragraph 8 states “These defendants are sued in their official
capacities as commissioners who issued the order leading to the agreement that is the
subject of this complaint; and are also sued in their individual capacities for purposes of
42 U.S.C. § 1983 claim[s].” (Complaint at ¶ 8) (emphasis added). Because paragraphs

1 The law is clear that state agencies and state officials acting in their official capacities are
2 absolutely immune from suit for damages in § 1983 actions.

3 In *The Destek Group, Inc. v. State of New Hampshire Pub. Util. Comm'n*, 318
4 F.3d 32 (1st Cir. 2003), the First Circuit Court of Appeals summarily dismissed § 1983
5 claims against a state commission and its commissioners in their official capacities. The
6 First Circuit concluded “[i]t is well settled beyond peradventure...that neither a state
7 agency nor a state official acting in his official capacity may be sued for damages in a
8 § 1983 action.” *Id.* at 40, quoting *Johnson v. Rodriguez*, 943 F.2d 104, 108 (1st Cir.
9 1991) (citing *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989)). Other courts
10 have reached the same conclusion.¹¹

11 In *Will*, the seminal case on this issue, the U.S. Supreme Court held “neither a
12 State nor its officials acting in their official capacities are ‘persons’ under § 1983.” With
13 regard to the State itself, the Supreme Court noted that the language of § 1983, and the
14 meaning of the word “person” did not lend themselves to such a contrary construction.
15 491 U.S. at 64-66. The Supreme Court noted that States had the benefit of sovereign
16 immunity at common law and Congress did not intend for § 1983 to override well-
17 established immunities or defenses under common law. *Id.* at 67. Under *Will*, those state
18 agencies and other political subdivisions which carry out the state’s business and have
19 immunity from lawsuits under the Eleventh Amendment constitute “arms of the state”
20 and would not be considered ‘persons’ under § 1983. With respect to State officials, the
21 Court noted that while state officials are literally ‘persons’, a suit against a state official

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23
24 37 and 48 used “individual defendants” rather than the Commissioners in their individual
25 capacities, the legal argument addresses the Commissioners in both their official and
26 individual capacities.

¹¹ In *Hirsh v. Supreme Court of the State of California*, 67 F.3d 708, 715 (9th Cir. 1995),
the Ninth Circuit Court of Appeals also summarily dismissed § 1983 claims against
state agencies and their officials.

1 in his or her official capacity is not a suit against the official but rather is a suit against
2 the official's office. *Id.* at 71.

3 Because the Commission is not a "person" within the meaning of § 1983,
4 Plaintiff's claims against the Commission must be dismissed. The individual
5 Commissioners' actions related to arbitration are official acts. Therefore, the individual
6 Commissioners, while acting in their official capacities, are not "persons" within the
7 meaning of § 1983. Accordingly, the claims against the Commissioners in their official
8 capacities must also be dismissed.

9 **C. Autotel's § 1983 Claims for Damages against the Commission and the**
10 **Individual Commissioners Are Barred by the Eleventh Amendment.**

11 The United States Supreme Court has interpreted the Eleventh Amendment as a
12 grant of sovereign immunity to the states against suit in federal court. *Seminole Tribe of*
13 *Florida v. Florida*, 517 U.S. 44, 54 (1996). This sovereign immunity also applies to state
14 agencies. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). In
15 the absence of state consent, the Eleventh Amendment clearly bars § 1983 claims against
16 state agencies. *See Will*, 491 U.S. at 66. The Complaint does not allege that the
17 Commission consented to suit in federal court in this case; therefore, Autotel's § 1983
18 claims against the Commission should be dismissed.¹²

19 Autotel may argue that its § 1983 claims against the Commissioners are
20 sustainable pursuant to the legal fiction established in *Ex Parte Young*, 209 U.S. 123
21 (1908). Under this doctrine, state officials may be sued in their official capacities for
22 *prospective relief* to redress ongoing violations of federal law. *See Ex Parte Young*, 209
23 U.S. at 159-66; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 294 (1997).
24 Autotel's § 1983 claims, however, purport to proceed against the individual

25 _____
26 ¹²Moreover, the Commission has not consented to suit for cases involving arbitration of
interconnection agreements pursuant to the 1996 Act. See, e.g., A.A.C. R14-2-1500, et.
seq.

1 Commissioners for *damages*. Such a claim for damages is barred by the Eleventh
2 Amendment; accordingly, Autotel's § 1983 claims must be dismissed.

3 **D. The § 1983 Claims against the Commissioners in their Individual**
4 **Capacities Are Barred by the Doctrine of Quasi-Judicial Immunity.**

5 If the Court finds that the judicial remedy provided by 47 U.S.C. § 252(e)(6) does
6 not foreclose remedies under 42 U.S.C. § 1983, it should still dismiss the § 1983 causes
7 of action against the Commissioners in their individual capacities. Because the § 1983
8 claims are based on asserted violations of §§ 251 and 252, the Commissioners are
9 immune under the doctrine of quasi-judicial immunity.

10 State officials are entitled to quasi-judicial immunity when they “perform
11 functions similar to judges and prosecutors in a setting like that of a court.” *Hirsh*, 67
12 F.3d at 715; *see also Destek Group*, 318 F.3d at 41. In *Butz v. Economou*, 438 U.S. 478
13 (1978), the United States Supreme Court provided a nonexclusive list of six factors for
14 courts to consider in granting immunity:

- 15 (a) the need to assure that the individual can perform his
16 functions without harassment or intimidation; (b) the presence
17 of safeguards that reduce the need for private damages actions
18 as a means of controlling unconstitutional conduct; (c) the
[agency's] insulation from political influence; (d) the
importance of precedent; (e) the adversary nature of the
process; and (f) the correctability of error on appeal.

19 *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 923 (9th Cir. 2004), quoting
20 *Cleavinger v. Saxner*, 474 U.S. 193, 202 (1985) (citing *Butz*, 438 U.S. at 512). Absolute
21 immunity is available to agency officials who, irrespective of their title, perform
22 functions essentially similar to those of judges. *Destek Group*, 318 F.3d at 41.

23 Section 252 clearly requires state commissions to perform traditional adjudicatory
24 functions in arbitrating “open issues” or disputes between parties negotiating an
25 interconnection agreement. Section 252(b)(2) requires a party petitioning a commission
26 ...

1 for arbitration to submit documentation creating a factual record for review.¹³ 47 U.S.C.
2 § 252(b)(2). State commissions must then decide disputed issues set forth in a petition
3 and a response, if any, (47 U.S.C. § 252(b)(4)(A)) by applying the requirements of § 251
4 (47 U.S.C. § 252(e)(2)(B)).

5 The decision to approve or reject an interconnection agreement, and in the case of
6 arbitrated agreements the resolution of an issue against a party, “is likely to stimulate a
7 litigious reaction from the disappointed [party], making the need for absolute immunity
8 apparent.” *Bettencourt v. Bd. of Registration in Medicine of the Commw. Of Mass.* , 904
9 F.2d 772, 783 (1st.Cir. 1990). Obviously, Congress recognized the adversarial nature of
10 negotiating interconnection agreements by including provisions for mediation and
11 compulsory arbitration in § 252. Congress also recognized the importance of precedent
12 by requiring state commissions to issue written findings of deficiencies when approving
13 or rejecting agreements (47 U.S.C. § 252(e)(1)), and to make approved agreements
14 available to the public (47 U.S.C. § 252(h)).

15 Finally, the adjudication is subject to a backdrop of safeguards designed to protect
16 a party’s constitutional rights. The safeguards provided in § 252 are alone sufficient to
17 satisfy the *Butz* factors.¹⁴ Beyond that, there are additional safeguards provided under
18 state law to ensure that a party’s due process rights are protected.¹⁵

19 Plaintiff’s § 1983 claims against the Commissioners in their individual capacities
20 should be dismissed. The Commissioners are entitled to absolute immunity because they
21

22 ¹³ Section 252(b)(3) also allows the non-petitioning party to submit documentation for
23 commission review.

24 ¹⁴ *See, e.g.*, 47 U.S.C. §§ 252(c) (substantive and procedural standards for arbitration);
25 252(e)(2) (limited grounds for rejection); 252(e)(4) (schedule for decision); and 252(e)(6)
(ability to correct errors on appeal).

26 ¹⁵ *See, e.g.*, Arizona Revised Statutes, Title 40, Chapter 2, Article 3 (Investigations,
Hearings and Appeals), and Arizona Administrative Code, Title 14, Chapter 2, Article 15
(Arbitration and Mediation).

1 perform quasi-judicial functions arbitrating, approving, or rejecting interconnection
2 agreements pursuant to § 252.

3 **E. Autotel's § 1983 Claims Are Barred because It Has Not Suffered a**
4 **Deprivation of a Federally Protected Right.**

5 If the Court finds that the judicial remedy provided by 47 U.S.C. § 252(e) (6) does
6 not foreclose remedies under 42 U.S.C. § 1983, it should still dismiss the § 1983 claims
7 against the Commission and the Commissioners in their individual capacities because
8 Autotel has not suffered a deprivation of a federally protected right. Equal protection of
9 the laws is "essentially a direction that all persons similarly situated should be treated
10 alike." See *E-spire Communications*, 392 F.3d 1204, 1209, (citing *City of Cleburne v.*
11 *Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). Since Autotel does not allege that it is
12 a member of a suspect class or was denied a fundamental right, the state regulation need
13 only be rationally related to a legitimate government purpose. In this instance, the
14 Commission's arbitration of Autotel's dispute with Qwest was rationally related to the
15 legitimate state interests in ensuring greater competition in the local telephone services
16 market and in setting just and reasonable rates.

17 Nor were Autotel's substantive due process rights violated. The Fourteenth
18 Amendment proscribes a state from depriving a party of property without due process of
19 law. Property as it relates to the Due Process Clause, is a "legitimate claim of
20 entitlement" to some benefit. *E-spire*, 392 F.3d at 1210. Even to the extent that Autotel
21 can establish some protectable property right, the Commission followed the processes
22 outlined in the 1996 Act for proceedings of this nature and the processes contained in
23 state law as well. Autotel had the benefit of defined processes at both the state and
24 federal levels which governed the arbitration before the Commission. The Company had
25 adequate opportunity to have its views heard at every stage of the proceeding, some of

26 ...

1 which it did not avail itself of; so it should not be heard to complain now that it was
2 denied due process of law.

3 **CONCLUSION**

4 Based on the foregoing, Defendants respectfully request that the Court grant their
5 Motion to Dismiss Autotel's Complaint.

6 RESPECTFULLY SUBMITTED this 19th day of September, 2005.

7
8 s/Maureen A. Scott

9 _____
10 Maureen A. Scott
11 Janet F. Wagner
12 Keith A. Layton
13 Attorneys, Legal Division
14 Arizona Corporation Commission
15 1200 West Washington Street
16 Phoenix, Arizona 85007-2927
17 (602) 542-3402

18 **CERTIFICATE OF SERVICE**

19 I hereby certify that on September 19, 2005, I electronically transmitted the
20 attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a
21 Notice of Electronic Filing to the following CM/ECF registrants:

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11 Navajo Communications Company, Inc.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

AUTOTEL, a Nevada Corporation,
Plaintiff,

v.

CITIZENS UTILITIES RURAL
COMPANY, INC.; CITIZENS
TELECOMMUNICATIONS
COMPANY OF THE WHITE
MOUNTAINS, a Delaware
Corporations; NAVAJO
COMMUNICATIONS CO. INC., an
Arizona Corporation; ARIZONA
CORPORATION COMMISSION;
MARC SPITZER, WILLIAM A.
MUNDELL, JEFF HATCH-MILLER;
MIKE GLEASON; and KRISTEN K.
MAYES, in their capacities as
Commissioners of the Arizona
Corporation Commission and in their
individual capacities,
Defendants.

No. CIV 05-328-TUC-JMR (HCE)

**MOTION TO DISMISS PLAINTIFF'S
COMPLAINT**

Assigned to: Hon. Hector C. Estrada

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INTRODUCTION

Pursuant to Rules 12(b)(1) and 12(b)(6), Fed.R.Civ.P., Defendants Citizens Utilities Rural Company, Inc., Citizens Telecommunications Company of the White Mountains, and Navajo Communications Company, Inc. (collectively, "Citizens") seek the dismissal of Plaintiff's Complaint. In effect, this lawsuit is an appeal of Plaintiff's unsuccessful and unadjudicated administrative claims against Citizens before the Arizona Corporation Commission ("Commission" or "Arizona Commission"). Because the Plaintiff did not comply with the Telecommunications Act of 1996 ("Act") requirements associated with executing and submitting the arbitrated interconnection agreement to the Commission and did not raise or preserve the claims Plaintiff makes here in the Commission proceedings below, Plaintiff cannot bring this action in the District Court. Under well-developed case law arising from the Act, this Court also lacks jurisdiction to hear Plaintiff's claims. Accordingly, dismissal is appropriate at the pleadings stage.

I. THE LEGAL STANDARDS FOR RULE 12 DISMISSAL MOTIONS.

To survive a dismissal motion under Rule 12(b)(1), Fed.R.Civ.P., Plaintiff has the burden of establishing that the Court has subject matter jurisdiction. *See, e.g., Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495, 499 (9th Cir. 2001). On a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, the Court must accept the well-plead factual allegations of Plaintiff's Complaint as true, and should grant the motion where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See, e.g., Gompper v. VISX, Inc.*, 298 F. 3d 893, 896 (9th Cir. 2002).

This is a unique case due to the volume of undisputed facts and documents generated in the Commission proceedings referenced in Plaintiff's Complaint and upon which the Court can rely in ruling on this motion. "Thus, for example, a court ruling on a

1 motion to dismiss may consider full texts of documents which the complaint quotes only
2 in part.” *Cooper v. Pickett*, 137 F.3d 616, 623 (9th Cir. 1997). Moreover, “even if the
3 plaintiff’s complaint does not explicitly refer to a document, a trial court ruling on a
4 motion to dismiss may consider a document the authenticity of which is not contested, and
5 upon which the plaintiffs’ complaint necessarily relies because this prevents plaintiffs
6 from surviving a Rule 12(b)(6) motion by deliberately omitting references to documents
7 upon which their claims are based.” *McGrath v. Scott*, 250 F. Supp.2d 1218, 1221 (D.
8 Ariz. 2003) (citations omitted).

9 These principles are important here because Citizens submits four key exhibits
10 from the Commission proceedings below in support of this motion – all materials the
11 Court can consider on this motion. “On a motion to dismiss a court may properly look
12 beyond the complaint to matters of public record and doing so does not convert a Rule
13 12(b) motion to one for summary judgment.” *Mack v. South Bay Beer Distributors, Inc.*,
14 798 F.2d 1279, 1282 (9th Cir. 1986); *see also Lee v. Los Angeles*, 250 F.3d 668, 689 (9th
15 Cir. 2001) (same). Moreover, “when plaintiff fails to introduce a pertinent document as
16 part of his pleading, defendant may introduce the exhibit as part of his motion attacking
17 the pleading.” *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994), citing Wright &
18 Miller, *Federal Practice and Procedure* § 1327. The District Court of Arizona has said
19 the same. *See, e.g., Mason v. Arizona*, 260 F. Supp. 2d. 807, 814 (D. Ariz. 2003).

20 As the procedural history of the Arizona Commission proceedings evidenced by
21 these exhibits and federal authorities below make clear, Plaintiff failed to comply with the
22 Commission and Act requirements for executing and submitting the arbitrated
23 interconnection agreement to the Commission and did not raise or preserve the claims
24 Plaintiff makes here in the Commission proceedings below. As a result, Plaintiff’s
25 lawsuit must be dismissed.
26

1 **II. BACKGROUND OF THE TELECOMMUNICATIONS ACT.**

2 This action arises under the provisions of 47 U.S.C. §§ 251 and 252 of the Act.¹ A
3 key requirement of the Act is that telecommunications carriers interconnect their
4 networks, in part by entering into interconnection agreements whereby incumbent local
5 exchange carriers such as Citizens reach agreement with competitive providers who
6 request services, elements or access to facilities under section 251. *See* 47 U.S.C. §§
7 251(a) – (c). Section 252 sets out the procedures for the negotiation, arbitration, and
8 approval of interconnection agreements. This includes four steps: 1) voluntary
9 negotiations, § 252(a); 2) the right to petition the state commission to arbitrate any issues
10 unresolved through voluntary negotiations, § 252(b); 3) state commission (or FCC)
11 review, and approval or rejection of the proposed interconnection agreement, §252(e); and
12 4) federal district court review of the state commission's final actions, § 252(e)(6).

13 **III. PROCEDURAL HISTORY.**

14 On March 27, 2003, Autotel filed a Petition for Arbitration pursuant to 47
15 U.S.C. § 252 of the Act against Citizens (“Petition”) with the Arizona Corporation
16 Commission. *See* Exhibit A, a copy of the Commission order from which Plaintiff
17 appeals to the District Court, at 1. Autotel, a wireless carrier, sought to enter into an
18 interconnection agreement with Citizens. On February 6, 2004, Autotel filed a
19 Statement of Open Issues with the Arizona Corporation Commission, identifying three
20 disputed issues to be resolved at an arbitration hearing before the Commission. *See*
21 Exhibit B. The accompanying letter from Autotel explained: “The purpose of this
22 letter is to request the Commission’s assistance in resolving the remaining open issues
23 in this docket.” *Id.* The arbitration hearing was held before a Commission
24 Administrative Law Judge on June 7, 2004. Citizens and Autotel presented witnesses

25

26 ¹ The Telecommunications Act of 1996 is codified in part at 47 U.S.C. §§ 251-261.

1 who testified and were available for cross-examination during the hearing. Exhibit A
2 at 3.

3 On October 5, 2004 the Arizona Commission issued its Opinion and Order
4 (Decision No. 67273) addressing the interconnection agreement arbitration between
5 Citizens and Autotel. Exhibit A. The Order directed the parties to “prepare and sign an
6 interconnection agreement incorporating the terms of the Commission’s resolutions” and
7 that “the signed interconnection agreement shall be submitted to the Commission for its
8 review within thirty days of the date of this Decision.” *Id.* at p.17.

9 Pursuant to the Commission’s Opinion and Order, Citizens prepared the
10 interconnection agreement incorporating the terms and conditions from the Commission’s
11 Order and forwarded the agreement to Autotel for signature on October 21, 2004.
12 Autotel, however, refused to execute the agreement as modified by the Commission’s
13 Order; accordingly, on January 31, 2005, Citizens advised the Commission that Autotel
14 would not execute the arbitrated interconnection agreement as required by the
15 Commission’s Order. *See* Exhibit C (letter to Commission). Citizens enclosed a copy of
16 the arbitrated interconnection agreement executed by Citizens. *Id.* Citizen’s January 31,
17 2005 notice explained that Autotel had not executed the arbitrated agreement. *Id.*

18 Autotel did not ask the Arizona Commission to take any specific action regarding
19 the October 5, 2004 Order or Citizen’s January 31st letter; accordingly, the Arizona
20 Commission has not taken any further action with respect to the arbitrated interconnection
21 agreement issues. Instead, the Commission’s electronic docket shows the current status of
22 the interconnection arbitration proceeding as “Compliance Due.” *See* Exhibit D.

1 Autotel filed this and a companion lawsuit on May 5, 2005.² In its complaint in
2 this lawsuit, Autotel asserted four causes of action. Only the second cause of action --
3 alleging that Citizens failed to negotiate in good faith -- was directed at Citizens. Citizens
4 seeks dismissal of this claim.³

5 **ARGUMENT**

6 **IV. THE COURT LACKS JURISDICTION OVER AUTOTEL'S CLAIMS**
7 **BECAUSE THE ARIZONA COMMISSION DID NOT MAKE A FINAL**
8 **DETERMINATION REGARDING THE ARBITRATED**
9 **INTERCONNECTION AGREEMENT.**

10 "[W]here Congress has provided statutory review procedures designed to permit
11 agency expertise to be brought to bear on particular problems, those procedures are to be
12 exclusive." *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420
13 (1965). Section 252 of the Act sets clear limits on federal district court jurisdiction to
14 hear interconnection disputes after a detailed administrative process has been followed at
15 the state commission. Pursuant to Section 252(e)(1) of the Act, any interconnection
16 agreement adopted by negotiation or arbitration shall be submitted for approval to the
17 State Commission:

18 **(e) Approval by State commission**

19 **(1) Approval required**

20 Any interconnection agreement adopted by negotiation or arbitration shall
21 be submitted for approval to the State commission. A State commission to
22 which an agreement is submitted shall approve or reject the agreement,
23 with written findings as to any deficiencies.

24 ² On the same date, Autotel also filed a suit in this Court against Qwest Corporation
25 and the Arizona Commission related to its arbitration of an interconnection agreement
26 with Qwest. Case No. CIV 05-327 TUC-JCG. Qwest and the Commission have sought
to dismiss the suit on jurisdictional grounds.

³ The Arizona Corporation Commission Defendants will be filing a separate
dismissal motion, addressing the claims asserted against the Commission. Citizens joins
in the Commission's motion to the extent it bears on any claim against Citizens.

1 47 U.S.C. § 252(e)(1). Until an agreement has been “submitted for approval” to the state
2 commission, the commission cannot make a determination regarding approval or
3 rejection, with written findings regarding any deficiencies, of the agreement as required
4 by Section 252(e)(6) of the Act. Section 252(e)(6) provides:

5
6 In any case in which a State commission makes a determination under this
7 section, any party aggrieved by such determination may bring an action in
8 an appropriate Federal district court to determine whether the agreement or
statement meets the requirements of section 251 of this title and this
section.

9 47 U.S.C. § 252(e)(6)(emphasis added). “Determination” means the decision or order of a
10 state commission approving or rejecting a final, executed interconnection agreement
11 between the parties. *See Global Naps, Inc. v. Bell Atlantic-New Jersey*, 287 F.Supp.2d
12 532, 540 n.11 (D.N.J. 2003); *GTE North v. Glazer*, 989 F.Supp. 922, 925 (N.D. Ohio
13 1997); *GTE North v. McCarty*, 978 F. Supp. 827, 834 (N.D. Ind. 1997).

14 As explained above, Autotel would not agree to and was unwilling to finalize and
15 execute the interconnection agreement as ordered by the Arizona Commission following
16 the underlying arbitration hearing. Citizens notified the Commission that Autotel refused
17 to agree to and execute the interconnection agreement. Exhibit C. As a result of Autotel’s
18 inaction, the Arizona Commission has not made a “determination” regarding a final and
19 binding interconnection agreement between Citizens and Autotel. Exhibit D.

20 Not only does Autotel lack the final “determination” by the Commission required
21 to appeal to district court, but its failure to obtain that “determination” deprives this Court
22 of jurisdiction. Other federal courts have repeatedly found that they lack subject matter
23 jurisdiction until the state commission makes a determination approving or rejecting an
24 interconnection agreement. *See, e.g., GTE North v. Strand*, 209 F.3.d 909, 917 (6th Cir.
25 2000) (noting “the many . . . cases in which district judges have refused to review
26 interlocutory orders issued by state commissions in the course of 252 arbitration”); *GTE*

1 *Northwest, Inc. v. Hamilton*, 971 F. Supp 1350, 1354 (D. Or. 1997) (“A binding final
2 agreement will not exist until after the Commission reviews and approves the agreement
3 signed and submitted by GTE and AT&T”).

4 These legal principles are well-established generally, and well-known to Autotel in
5 particular. At least two other federal district courts have issued rulings dismissing, on
6 jurisdictional grounds, complaints filed by Plaintiff Autotel or its affiliates because
7 Autotel failed to execute and submit the ordered interconnection agreement to the state
8 commission. On July 25, 2005, the United States District Court for the District of Oregon
9 issued an Opinion and Order finding that the federal district court lacked jurisdiction over
10 a complaint filed by Autotel’s affiliate because it did not sign and submit the underlying
11 agreement to the Oregon Commission. The Court explained:

12 As required by statute, the administrative record which is before this court,
13 clearly shows that Qwest and plaintiff have failed to submit to the
14 Commission a mutually agreeable interconnection agreement that conforms
15 to the Commission’s Order. AR at Tab 33, p. 865. Until the Commission
16 approves or rejects an interconnection agreement submitted by the parties
or otherwise approves an interconnection agreement, any action before this
court is premature. Without the commission’s approval of any agreement,
this court lacks subject matter jurisdiction over plaintiff’s claims.

17 *See Western Radio Services Co. v. Qwest Corporation, The Public Utility Commission of*
18 *Oregon, et al*, Civil No. 05-159-AA Opinion and Order (D. Oregon July 25, 2005),
19 attached as Exhibit E, at p. 10.⁴

20 The United States District Court for the District of Utah reached a similar
21 conclusion in another interconnection agreement case involving Autotel and Qwest. In
22 the Utah proceeding, Qwest and Autotel had completed an interconnection agreement

23 _____
24 ⁴ Citizens is mindful of the Ninth Circuit’s prohibition on citing unpublished
25 authorities. Citizens cites the other District Court cases involving Autotel, however,
26 pursuant to the exceptions provided by 9th Circuit Rule 36-3(b) (e.g., when the
unpublished authority is offered against the same party for collateral estoppel purposes).

1 arbitration hearing. The Public Service Commission of Utah ("PSCU") subsequently
2 issued a Report and Order that addressed eight arbitration issues and directed the parties to
3 modify the arbitrated agreement to reflect the PSCU's determination on each of the eight
4 issues. The Report and Order further directed Autotel and Qwest to submit the modified
5 interconnection agreement to the PSCU. Autotel and Qwest were unable to agree on the
6 interconnection agreement and Autotel refused to sign the interconnection agreement
7 prepared by Qwest. Qwest submitted a notice and its proposed agreement to the PSCU as
8 required by the PSCU Report and Order. Autotel did not file a response to the Qwest
9 filing and instead filed suit in federal district court. The PSCU did not address or issue
10 any Order in response to Qwest notice filing and proposed agreement. The Utah District
11 Court rejected Autotel's lawsuit:

12 Based on the above undisputed facts, the court finds that the parties did not
13 submit an executed interconnection agreement to the PSCU as required by
14 47 U.S.C. § 252(2)(1). Without the submission of an interconnection
 agreement, the PSCU could not "act to approve or reject the agreement.

15 *See Autotel v. Qwest Corporation, The Public Service Commission of Utah, et. al*, Case
16 No. 2:04cv01052DAK Memorandum Decision and Order (D. Utah May 17, 2005),
17 attached as Exhibit F, at 14. Like its sister court in Oregon, the Utah federal court held
18 that it did not have subject matter jurisdiction to review the interconnection agreement
19 that had not been executed by the parties and subject to a final order by the state
20 commission:

21 The explicit language of Section 252(e)(6) therefore compels the
22 conclusion that federal district courts are granted jurisdiction only once a
 final determination approving or rejecting an interconnection agreement is
 made.

23 *See Exhibit F at p. 10.*

24 There is no reason to do differently here. On October 5, 2004 the Arizona
25 Commission issued its Opinion and Order addressing the arbitrated interconnection
26

1 agreement between Citizens and Autotel and directing the parties to prepare, execute and
2 submit an interconnection agreement incorporating the terms of the Commission's order.
3 Autotel did not agree to or execute the interconnection agreement ordered by the Arizona
4 Commission. Consequently, the Commission was not given the opportunity to make and
5 has not made a final determination regarding the proposed interconnection agreement
6 between Citizens and Autotel. A final determination by the Arizona Commission is
7 required by Section 252(e)(6) of the Act. As a result, and as at least two other federal
8 district courts in Utah and Oregon have concluded when Autotel refused to execute the
9 state Commission arbitrated interconnection agreement, the Court does not have
10 jurisdiction over Autotel's claims in this proceeding. The Court should dismiss Autotel's
11 complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1).

12 **V. AUTOTEL'S SECOND CAUSE OF ACTION FAILS TO STATE A CLAIM**
13 **OVER WHICH THIS COURT HAS JURISDICTION.**

14 **A. The Telecommunications Act Does not Recognize Autotel's Claim that**
15 **Citizens Failed to Negotiate in Good Faith.**

16 Autotel's Second Cause of Action alleges that Citizens failed to negotiate in good
17 faith as required by sections 251 and 252 of the Act, and that Autotel suffered damages,
18 which it seeks to recover along with attorneys' fees and costs, pursuant to 47 U.S.C. §
19 206. However, the Telecommunications Act does not authorize or contemplate a cause of
20 action for failure to negotiate in good faith. Alleged concerns with another party's
21 approach to the negotiation of an interconnection agreement should be taken up with the
22 state commission, which can force a recalcitrant party to participate, and can direct the
23 inclusion of appropriate terms in the interconnection agreement. *See In the Matter of*
24 *Implementation of the Local Competition Provisions in the Telecommunications Act of*
25 *1996*, First Report and Order, 11 FCC Rcd. 15,499 at Para. 143 (Aug. 8, 1996)
26 (concluding that state commissions are empowered to resolve disputes concerning the

1 duty to negotiate in good faith). The structure of the Act supports this view, as the duty to
2 negotiate in good faith in section 252(b)(5) is contained in the very section authorizing
3 arbitration by state commissions. As one court has explained in the context of a claim
4 based on the failure to negotiate in good faith:

5 [P]laintiff might have sought arbitration after 135 days, pursuant to §
6 252(b). That subsection includes a provision that reads: "The refusal of any
7 party to the negotiation to participate further in the negotiations, to
8 cooperate with the State commission in carrying out its function as an
9 arbitrator, or to continue to negotiate in good faith in the presence, or with
10 the assistance, of the State commission shall be considered a failure to
11 negotiate in good faith." 47 U.S.C. § 252(b)(5). **The inclusion of language
12 concerning the failure to negotiate in good faith in the subsection
13 addressing arbitration indicates an intention that state commissions
14 would handle such issues during the arbitration process.**

11 *Atlantic Alliance Telecom. Inc. v. Bell Atlantic*, No. 99 CV 4915(ARR), 2000 WL
12 34216867, at *4 (E.D.N.Y. Apr. 19, 2000) (emphasis added). The *Atlantic Alliance* court
13 concluded: "[t]he statute's language, structure, purpose, and legislative history suggest
14 that Congress intended [failure to negotiate in good faith] disputes such as this to be
15 addressed by the state commission in the first instance." *Id.*

16 Regardless of how Autotel attempts to cast its claim for "failure to negotiate in
17 good faith" against Citizens, the gravamen of Autotel's claim is a dispute over the terms of
18 the proposed interconnection agreement between Autotel and Citizens. Disputes of this
19 type are squarely within the scope of matters committed to state regulators, whereas the
20 role of federal courts under the Act in this context is limited under section 252(e)(6) to
21 deciding whether determinations of state commissions and the resulting agreements are
22 consistent with the requirements of the Act. *See, e.g., Indiana Bell Tel. v. McCarty*, 362
23 F.3d 378, 383 (7th Cir. 2004) ("The district court's sole responsibility is to determine
24 whether the interconnection agreement meets the requirements of sections 251 and 252 of
25 the Act."); *GTE North, Inc. v. Glazer*, 989 F.Supp. 922, 924 (N.D. Oh. 1997) ("Congress
26 intended that State commission administrative processes remain unimpeded until an

1 interconnection agreement is completed and approved. In these circumstances, exercising
2 jurisdiction here unquestionably would ‘disrupt[] the review scheme Congress
3 intended.’”) (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 206 (1994)).

4 In *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), the United States
5 Supreme Court explained that a finding that Congress intended to preclude federal district
6 court review “prevents a district court from exercising subject matter jurisdiction.” 510
7 U.S. at 202. Applying the principles articulated in *Thunder Basin*, several courts have
8 concluded that the intent of the statutory scheme set out in Act section 251 and 252 for
9 addressing the negotiation, approval, and enforcement of interconnection agreements is to:
10 1) make state commissions the initial decision maker regarding claims involving Section
11 251 and 252 matters; and 2) dismiss claims brought pursuant to section 206, 207 and
12 252(e) which do not involve the review of state commission “determinations” or final
13 arbitrated, agreements. See, e.g., *Intermedia Communications, Inc. v. Bellsouth*
14 *Telecommunications, Inc.*, 173 F.Supp. 2d 1282, 1287 (M.D. Fla. 2000) (dismissing claim
15 that section 207 provides jurisdiction to hear claim involving section 251 of Act). One
16 Court has explained:

17 This Court agrees with those district courts who have determined that
18 allowing a party to bring claims for violations of the 1996 Act, pursuant to
19 §§ 206 and 207, would jeopardize § 252's system of review and the
20 statutory scheme intended to make state commissions the initial
21 decisionmakers regarding interconnection agreements. As such, this Court
22 also concludes that §§ 206 and 207 do not vest district courts with
23 jurisdiction over violations of the 1996 Act.

24 *Global Naps, Inc. v. Bell Atlantic-New Jersey*, 287 F.Supp.2d 532, 544 (D.N.J. 2003).

25 Because the Arizona Commission is the decision-maker regarding any claim for
26 failure to negotiate in good faith, the Court does not have jurisdiction under section
27 252(e)(6) or sections 206 and 207 of the Act to review the “good faith” of Citizens’
28 negotiations with Autotel. Even if it had jurisdiction, the Court’s review of Citizens’ good

1 faith would still be limited to the context of whether the resulting agreement complies
2 with the requirements of section 251 and 252. Accordingly, Autotel's Second Cause of
3 Action should be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction.
4 For the same reason that the Court lacks jurisdiction, Autotel failed to state a claim upon
5 which relief can be granted. As a result, Autotel's Second Cause of Action should also be
6 dismissed pursuant to Rule 12(b)(6).

7 **B. Autotel Did Not Raise the Issue of Good Faith Negotiations Before the**
8 **ACC, so the ACC Has Not Made a Determination on This Issue.**

9 In cases like these, the reviewing court does not sit as an administrative agency for
10 the purpose of fact-finding in the first instance, and if a petitioner wishes to preserve an
11 issue for appeal, he must first raise it in the proper administrative forum. *See Tejeda-*
12 *Mata v. Immigration and Naturalization Service*, 626 F.2d 721, 726 (9th Cir. 1980). In the
13 context of Section 252 of the Act, it is only where the state commission "makes a
14 determination" that federal court appellate review is appropriate to determine whether the
15 determination "meets the requirements of" sections 251 and 252. Consistent with this
16 principle, a party cannot raise an issue for review before a federal district court if it has
17 not first raised that issue before the state commission in order for the commission to make
18 a determination. *See, e.g., Bell Atlantic-Virginia, Inc. v. WorldCom*, 70 F.Supp.2d 620,
19 625 (E.D.Va. 1999) (dismissing breach of contract claim because Virginia Commission
20 did not review the claim in underlying proceeding); *Contract Communications v. Qwest*
21 *Corporation*, 246 F. Supp.2d 1184, 1190 n. 7 (D.Wy. 2003) (listing several cases where
22 courts refused to review issues not first submitted to state commission).

23 The United States District Court for the District of Utah reached the same
24 conclusion in dismissing Autotel's "failure to negotiate in good faith" claims in Utah:

25 Essentially, the Act grants state commissions authority to oversee the
26

1 negotiation of interconnection terms through mediation and arbitration. It
2 is obvious that in granting this authority, Congress intended state
3 commissions to be the initial decision maker regarding issues arising
out of the negotiation process, including whether a party has failed to
negotiate in good faith. . . .

4 This intention is also reflected in the purpose of the Act. The purpose of
5 the Act is to create a comprehensive statutory scheme designed to promote
6 competition in the telecommunications industry by expediting the
7 formation of interconnection agreements . . . **Granting the court**
8 **jurisdiction to review all alleged concerns with another party's**
9 **approach to negotiation of an interconnection agreement would not**
10 **comport with this scheme.** It would instead result in piecemeal litigation
that would delay the negotiation process. State commissions, on the other
11 hand, have been granted the authority to force a recalcitrant party to
12 participate in the negotiation process and direct the inclusion of appropriate
13 terms in the interconnection agreement. The preference for speedy action
14 supports an interpretation of the Act favoring initial review by the state
15 commission. (Exhibit F at 14).

16 A state commission cannot make a determination on a claim the parties fail to
17 raise. That is precisely the situation with Autotel's allegation that Citizens failed to
18 negotiate an interconnection agreement in good faith. Autotel has not alleged that it
19 raised the claim before the Arizona Commission because it cannot – no such claim was
20 ever raised. In February 2003, after several months of interconnection agreement
21 negotiations with Citizens and immediately prior the arbitration hearing before the
22 Arizona Commission, Autotel filed its Statement of Open Issues with the Commission.
23 Exhibit B. In its list of open, Autotel did not identify Citizens' alleged failure to negotiate
24 in good faith. *Id.* Accordingly, the Arizona Commission did not have an opportunity to
25 consider or make a determination regarding whether Citizens negotiated in good faith.
26 And there is no such finding in the Commissions' October 5, 2004 Opinion and Order.
Because Autotel's claim that Citizens failed to negotiate in good faith – assuming it is
cognizable at all under the Act – was not raised or adjudicated below, the Court does not
have jurisdiction to adjudicate Autotel's Second Cause of Action. This claim should be
dismissed pursuant to Rule 12(b)(1).

1 **C. The Supreme Court’s Ruling in *Verizon Maryland* Does Not Change**
2 **This Result.**

3 Autotel alleges that this Court has jurisdiction pursuant to 28 U.S.C. § 1331.
4 Complaint at ¶ 10. Based on similar arguments raised by Autotel in its other federal
5 district court challenges to state utility commission decisions, Autotel is likely to argue
6 that the United States Supreme Court’s decision in *Verizon Maryland v. Publ. Service*
7 *Commission of Maryland* 535 U.S. 635 (2002) supports jurisdiction. Autotel’s reliance on
8 *Verizon Maryland* is misplaced.

9 In *Verizon Maryland*, the question before the Supreme Court was whether federal
10 courts had jurisdiction to review compensation determinations made by a state
11 commission after the approval of an interconnection agreement. *Verizon Maryland*
12 negotiated an interconnection agreement with MCI WorldCom. After the Maryland
13 Public Service Commission approved the agreement, WorldCom filed a complaint with
14 the commission, which ordered Verizon to make payments for certain past and future
15 calls. Verizon then filed an action in federal district court, seeking an injunction
16 prohibiting enforcement of the payment order, and alleging that the order violated the Act.
17 535 U.S. at 639-40. On these facts, the Supreme Court held that in the absence of
18 legislative intent to divest district courts of their authority under 28 U.S.C. § 1331, the
19 district court had jurisdiction “to review the Commission’s order for compliance with
20 federal law.” *Id.* at 641-642

21 Here, unlike the situation in *Verizon Maryland*, the question the Court must
22 consider is whether it has jurisdiction to review determinations made by a state
23 commission before the Arizona Commission was given an opportunity to make a final
24 determination regarding an arbitrated interconnection agreement. Whether a court may
25 engage in judicial review prior to the completion of a state commission’s administrative
26

1 process involves a completely different analysis than the extent of a court's jurisdiction
2 once the administrative process is complete. In *Thunder Basin Coal Co. v. Reich*, 510
3 U.S. 200 (1994), for example, the Supreme Court made it clear that judicial review prior
4 to final agency action is inappropriate where a statute's "comprehensive enforcement
5 structure, combined with the legislative history's clear concern with channeling and
6 streamlining the enforcement process, establishes a 'fairly discernible' intent to preclude
7 district court review." 510 U.S. at 216. The question before this Court, therefore, is
8 whether the Act intended to preclude its review prior to final determination and action by
9 the Arizona Commission.

10 As noted above, several courts have concluded that the Telecommunications Act's
11 clear language, purpose, and structure precludes district court review until a final
12 determination regarding interconnection agreement or other section 251 and 252 issues
13 has been entered by a state commission. Both the Utah and Oregon federal district courts
14 considering Autotel's similar interconnection arbitration decisions against Qwest, have
15 also reached this conclusion. In the Utah arbitration, the United States District Court in
16 Utah rejected Autotel's claim that the court had jurisdiction pursuant to 28 U.S.C. § 1331:

17 If Autotel's claim fell within 28 U.S.C. § 1331's general grant of
18 jurisdiction, as Autotel argues, the court could review any determination
19 made by the PSCU during the negotiation and approval process. The result
20 of such piecemeal litigation would be the almost indefinite delay of the
21 PSCU's decision to approve or reject an interconnection agreement. Such
22 an interpretation is clearly in derogation of the Act's purpose of rapidly
23 opening telecommunications markets to competitors. Taking the clear
24 language of the statute, its structure, and its purpose, it is fairly discernible
25 that Congress "intended that State commission administrative processes
26 remain unimpeded until an interconnection agreement is completed and
approved." *GTE North Inc. v. Glazer*, 989 F. Supp. 922, 925 (N.D. Ohio
1997). The court therefore rejects Autotel's contention that the court has
general jurisdiction over Autotel's First Cause of Action pursuant to 28
U.S.C. § 1331 and finds that Section 252(e)(6) precludes district court
review until a final order either approving or rejecting an interconnection
agreement has been entered by the PSCU.

See Exhibit F at 11-12.

1 Similarly, the Oregon District Court Autotel's jurisdictional claims based on 28
2 U.S.C. § 1331 and distinguished the Supreme Court's decision in *Verizon Maryland*. In
3 the Oregon arbitration, following an arbitration proceeding before the Oregon
4 Commission, the parties failed to submit to the Oregon Commission a mutually agreeable
5 interconnection agreement. The United States District Court in Oregon distinguished
6 *Verizon Maryland* on the basis that the *Verizon Maryland* case involved a jurisdiction
7 question after the interconnection agreement had been approved by the state commission.
8 The Court concluded that without the Oregon Commission review and approval of the
9 arbitrated interconnection agreement, there was "no basis to circumvent § 252's state level
10 administrative process" and it lacked jurisdiction over Autotel's claims. See Exhibit E at
11 pp. 7-8; see also *Contract Communications v. Qwest Corporation*, 246 F. Supp.2d 1184,
12 1190 (D. Wy. 2003) (rejecting argument that the court had jurisdiction pursuant to 28
13 U.S.C. § 1331 and the Supreme Court's decision in *Verizon Maryland* to adjudicate
14 claims not presented to the state commission).

15 By raising its failure to negotiate in good claims against Citizens for the first time
16 in this action, Autotel is bypassing the Arizona Commission entirely and effectively
17 asking the Court to assume the role of arbitrator. The careful process established by
18 Congress in the Act does not contemplate such a bypass of the state commission, nor does
19 it contemplate a fact-finding role for this Court. In this case, there is no commission
20 determination to review, and the Court should dismiss Autotel's Second Cause of Action
21 against Citizens pursuant to Rule 12(b)(1) and 12(b)(6).
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CONCLUSION

For the reasons set forth above, Defendant Citizens respectfully requests that the Court grant its Motion to Dismiss Autotel's Complaint pursuant to Rules 12(b)(1) and 12(b)(6), Fed.R.Civ.P.

DATED this 19th day of September, 2005.

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Certificate of Service

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I hereby certify that on September 19, 2005, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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Complaint.DOC