

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
)
Petition of Autotel Pursuant to Section 252(e)(5) ) WC Docket No. 04-311
of the Communications Act for Preemption of the )
Jurisdiction of the Public Utilities Commission of )
Nevada Regarding Arbitration of an )
Interconnection Agreement with SBC Nevada )

MEMORANDUM OPINION AND ORDER

Adopted: October 22, 2004

Released: October 22, 2004

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. This Memorandum Opinion and Order (Order) addresses the petition of Autotel for preemption of the jurisdiction of the Public Utilities Commission of Nevada (Nevada Commission), pursuant to section 252(e)(5) of the Communications Act, as amended (the Act), with respect to an arbitration proceeding involving Autotel and Nevada Bell Telephone Company, d/b/a SBC Nevada (SBC). We find that the Nevada Commission has met the requirements of section 252 because it responded to Autotel's request for arbitration and rendered a final determination by dismissing Autotel's petition for arbitration on procedural grounds. Accordingly, we deny the Autotel Petition and do not preempt the jurisdiction of the Nevada Commission.

II. BACKGROUND

2. Statutory Provisions and the Commission's Rules. Section 252(e)(5) of Act requires the Commission to preempt the jurisdiction of a state commission in any proceeding in which the state commission "fails to act to carry out its responsibility" under section 252. Section 252 sets forth the procedures by which telecommunications carriers may request and obtain interconnection, services, or unbundled network elements from an incumbent local exchange carrier. Under section 252, when these carriers cannot arrive at an interconnection agreement through voluntary negotiation, they may mediate and arbitrate their unresolved issues before the state commission. In arbitrating disputes, the state

147 U.S.C. § 252(e)(5).

2Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Public Utilities Commission of Nevada Regarding Arbitration of an Interconnection Agreement with SBC Nevada, WC Docket No. 04-311 (filed July 30, 2004) (Autotel Petition); see Pleading Cycle Established for Petition of Autotel for Preemption Pursuant to Section 252(e)(5), WC Docket No. 04-311, Public Notice, DA 04-2484 (rel. Aug. 9, 2004). Comments on the Autotel Petition were due by August 24, 2004. The Nevada Commission and SBC filed comments. Reply comments were due by September 3, 2004. Autotel did not file reply comments in this proceeding.

347 U.S.C. § 252(e)(5).

commission must “resolve each issue set forth in the petition and the response” and must “conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request [for interconnection].”<sup>4</sup> In addition, the state commission may require the parties “to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.”<sup>5</sup> Finally, section 252(e)(6) authorizes a party “aggrieved” by a state commission’s determination under section 252 to bring an action in federal district court.<sup>6</sup> The United States Court of Appeals for the District of Columbia Circuit has ruled that sections 252(e)(5) and 252(e)(6) are mutually exclusive, and therefore preemption by the Commission applies only where the state commission fails or refuses to make a “determination” that is reviewable under section 252(e)(6).<sup>7</sup>

3. Under the Commission’s rules, the party seeking preemption bears the burden of proving that the state commission has failed to act.<sup>8</sup> In the *Local Competition Order*, the Commission concluded that it would not take an “expansive view” of what constitutes a state commission’s “failure to act” for purposes of section 252(e)(5).<sup>9</sup> Rather, the Commission limited the instances in which preemption pursuant to section 252(e)(5) is appropriate to “when a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete an arbitration within the time limits of section 252(b)(4)(C).”<sup>10</sup>

4. **Procedural History.** Although the underlying arbitration proceeding before the Nevada Commission has a long procedural history, we highlight here only those events that are relevant to our discussion. Autotel requested interconnection negotiations with SBC in Nevada on March 11, 2002.<sup>11</sup> Autotel initiated the underlying arbitration proceeding before the Nevada Commission on August 14, 2002 by filing an arbitration petition under section 252(b) of the Act.<sup>12</sup> On September 13, 2002, SBC filed a Motion to Compel Autotel’s Responses to Data Requests, claiming that Autotel had refused to

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<sup>4</sup>47 U.S.C. § 252(b)(4)(C).

<sup>5</sup>47 U.S.C. § 252(b)(4)(B).

<sup>6</sup>47 U.S.C. § 252(e)(6).

<sup>7</sup>See *Global NAPs, Inc. v. FCC*, 291 F.3d 832, 836-37 (D.C. Cir. 2002) (“Both the plain language and structure of this provision suggest that the remedies it authorizes are distinct and mutually exclusive. If a state commission fails to act, preemption is a viable option; however, if the state agency takes final action disposing of the pending claim, that action can be undone only by direct judicial review in the appropriate forum.”).

<sup>8</sup>See 47 C.F.R. § 51.803(b); see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16128, para. 1285 (1996) (*Local Competition Order*) (subsequent history omitted).

<sup>9</sup>*Local Competition Order*, 11 FCC Rcd at 16127, para. 1283.

<sup>10</sup>*Id.* at 16128, para 1285; see 47 C.F.R. § 51.801(b).

<sup>11</sup>See Autotel Petition, Attach., Affidavit of Richard L. Oberdorfer (Autotel Oberdorfer Aff.) at para. 4.

<sup>12</sup>See *id.* at para. 5; see also Autotel Petition, Exh. C, *Order Granting Motion to Dismiss*, Public Utilities Commission of Nevada Docket No. 02-8016 (July 7, 2004) at para. 1 (*Nevada Commission Order*); Nevada Commission Comments at 1. We note that the Nevada Commission states that it does not oppose the Autotel Petition. See Nevada Commission Comments at 1.

provide responses to some data requests and provided incomplete or unresponsive responses to others.<sup>13</sup> On October 30, 2002, before the Nevada Commission ruled on SBC's motion, SBC and Autotel requested that the Nevada Commission hold the arbitration petition in abeyance to facilitate further negotiations.<sup>14</sup>

5. On February 6, 2004, Autotel filed with the Nevada Commission a letter requesting assistance in resolving the sole remaining open issue.<sup>15</sup> On April 20, 2004, at a pre-hearing conference, the Presiding Officer granted SBC's September 13, 2002 Motion to Compel and ordered Autotel to respond to SBC's data request.<sup>16</sup> On May 10, 2004, SBC renewed its Motion to Compel, and on May 17, 2004, SBC filed an additional Motion to Compel.<sup>17</sup> The Regulatory Operations Staff of the Nevada Commission filed a response stating that "it supported [SBC's] Motion to Compel and that after two years of proceedings Staff lacked the fundamental facts underlying the issues on which Autotel had requested arbitration."<sup>18</sup> On June 1, 2004, the Nevada Commission granted SBC's second Motion to Compel.<sup>19</sup>

6. On June 7, 2004, SBC filed a Motion to Dismiss the arbitration petition and, in the alternative, another Motion to Compel.<sup>20</sup> On June 14, 2004, the Nevada Commission staff filed its response in support of the SBC motion.<sup>21</sup> On June 15, 2004, Autotel filed its response to the SBC Motion to Dismiss, arguing only that the Nevada Commission could not grant SBC's motion to dismiss and that the "remedy for a State Commission's failure to act is preemption of the matter by the FCC."<sup>22</sup>

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<sup>13</sup>See Nevada Commission Comments at 1; *see also Nevada Commission Order* at para. 5.

<sup>14</sup>See Autotel Oberdorfer Aff. at para. 6; *see also Nevada Commission Order* at para. 10; Nevada Commission Comments at 1.

<sup>15</sup>See Autotel Oberdorfer Aff. at para. 6; *see also Nevada Commission Order* at para. 14; Nevada Commission Comments at 1; SBC Comments at 2-3. On April 13, 2004, SBC filed a Statement of Issues and Positions indicating that additional issues, beyond the single issue presented by Autotel, had yet to be resolved by the parties. *See Nevada Commission Order* at para. 17.

<sup>16</sup>See Nevada Commission Comments at 1; *see also Nevada Commission Order* at para. 18.

<sup>17</sup>See Nevada Commission Comments at 1-2 (explaining that on May 17, 2004 SBC filed a Motion to Compel Autotel to Answer Deposition Questions and Data Requests, Motion to Compel Autotel to Resume the Deposition of Richard L. Oberdorfer, and Supplement Information in Support of SBC Nevada's Renewed Motion to Compel Autotel to Produce Requested Documents); *see also Nevada Commission Order* at paras. 20-21.

<sup>18</sup>Nevada Commission Comments at 2; *see also Nevada Commission Order* at para. 22. In response, Autotel argued that section 252 only allows the state commission to request information related to open issues. *See Nevada Commission Order* at para. 23.

<sup>19</sup>See Nevada Commission Comments at 2; *see also Nevada Commission Order* at para. 24.

<sup>20</sup>See Autotel Oberdorfer Aff. at para. 9; *see also* Autotel Petition, Exh. A, SBC Nevada's Motion to Dismiss at 3 (SBC Motion to Dismiss) (arguing that "[d]ismissal, without prejudice, appears to be the appropriate remedy in this situation" because "Autotel's actions have demonstrated a complete disregard of the Commission's procedural regulations and its orders."); *Nevada Commission Order* at para. 25; Nevada Commission Comments at 2.

<sup>21</sup>See Nevada Commission Comments at 2; *see also Nevada Commission Order* at para. 26.

<sup>22</sup>See Autotel Oberdorfer Aff. at para. 10; Autotel Petition, Exh. B, Autotel's Reply to SBC Nevada's Motion to Dismiss and Motion to Compel Answers to SBC Nevada's Second Data Requests at 1; *Nevada Commission Order* at para. 31; *see also Nevada Commission Order* at para. 27; Nevada Commission Comments at 2. The Nevada Commission states that Autotel's response was filed out of time. *See Nevada Commission Order* at para. 27; Nevada Commission Comments at 2.

7. On July 19, 2004, the Nevada Commission granted SBC's Motion to Dismiss and dismissed the arbitration petition without prejudice.<sup>23</sup> According to the Nevada Commission, the Presiding Officer twice ordered Autotel to respond to data requests, and "[a]s of July 19, 2004, Autotel had yet to comply with the Presiding Officer's orders nor had Autotel provided the [Nevada Commission] with an explanation as to why it had not complied with the Orders."<sup>24</sup> Moreover, the Nevada Commission concluded that "Autotel has repeatedly failed to provide information directly related to the one issue it presented for [a]rbitration. . . . Autotel's position ignores the Presiding Officer's Orders, the [Nevada] Commission's regulations, and Autotel's requirements under 47 U.S.C. § 252."<sup>25</sup> Finally, the Nevada Commission concluded that "Autotel's refusal to comply with the Presiding Officer's Orders violate[d] Autotel's duty to negotiate in good faith" under section 252(b)(5) of the Act.<sup>26</sup> Based on these findings, the Nevada Commission dismissed Autotel's arbitration petition without prejudice, as permitted by its procedural rules, and without addressing the merits of Autotel's arbitration issues.<sup>27</sup>

8. On June 30, 2004, Autotel filed its petition for preemption of the Nevada Commission's jurisdiction with this Commission. In its petition, Autotel argues that the Nevada Commission failed to carry out its responsibility under section 252 by (1) dismissing Autotel's petition for arbitration without resolving open issues; and (2) failing to complete the arbitration within the time limit in section 252(b)(4)(C).<sup>28</sup>

### III. DISCUSSION

9. *The State Commission's Procedural Dismissal is Not Tantamount to Failure to Act.* We find that the Nevada Commission's procedural dismissal satisfies its obligation to act under section 252(e)(5).<sup>29</sup> As this Commission has recognized, "a state commission carrie[s] out 'its responsibility [under section 252]' when it resolves the merits of a section 252 proceeding or dismisses such a proceeding on jurisdictional or procedural grounds."<sup>30</sup> The record demonstrates that in response to the

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<sup>23</sup>See Autotel Oberdorfer Aff. at para. 11; see also *Nevada Commission Order* at para. 41; Nevada Commission Comments at 2.

<sup>24</sup>Nevada Commission Comments at 2; see *Nevada Commission Order* at paras. 33-35.

<sup>25</sup>*Nevada Commission Order* at para. 35.

<sup>26</sup>*Id.* at para. 40.

<sup>27</sup>See *id.* at paras. 32, 41.

<sup>28</sup>See Autotel Petition at 1-2.

<sup>29</sup>See 47 C.F.R. § 51.801(b). *But see* Autotel Petition at 2.

<sup>30</sup>*Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd 11277, 11280-81, para. 8 (2000); see also *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission*; *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with BellSouth Before the Georgia Public Service Commission*; *Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with GTE South Before the Public Service Commission of South Carolina*, CC Docket Nos. 97-163, 97-164, 97-165, Memorandum Opinion and Order, 13 FCC Rcd 1755, 1773-74, para. 33 (1997) (*Low Tech Designs Order*) ("[A] state commission does not 'fail to act' when it dismisses or denies an arbitration petition on the ground that it is procedurally defective . . . ."), *recon. denied*, 14 FCC Rcd 7024 (1999); *Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc.*, CC

arbitration petition filed by Autotel, the Nevada Commission docketed the matter, issued a public notice, held pre-hearing conferences, issued a procedural schedule, and ruled on pre-hearing issues, including SBC's motions to compel.<sup>31</sup> When "the state agency actually 'makes a determination' under § 252 – there is no statutory basis for FCC preemption."<sup>32</sup> Moreover, section 252(e)(5) "does not empower [the Commission] to look behind a state agency's dismissal of a carrier's claim to evaluate the substantive validity of that dismissal."<sup>33</sup> Thus, the *Nevada Commission Order* dismissing Autotel's arbitration petition on procedural grounds, without addressing the merits of its arbitration issues, was a final determination and cannot be deemed a "failure to act" under section 252 of the Act.

10. ***The Timing of the State Commission's Final Determination is Not Dispositive for Failure to Act.*** We reject Autotel's argument that we should preempt because the Nevada Commission failed to carry out its responsibility under section 252 by not completing the arbitration within the time limit prescribed in section 252(b)(4)(C).<sup>34</sup> Specifically, Autotel claims that, taking into account the period when the arbitration petition was held in abeyance, the 9-month statutory deadline for action by the Nevada Commission fell on May 28, 2004.<sup>35</sup> The Nevada Commission did not issue its order dismissing the arbitration petition until July 19, 2004. In Autotel's view, the statutory deadline passed with no determination on the open issues by the Nevada Commission.<sup>36</sup>

11. Even if we were to assume that the May 28, 2004 statutory deadline applied to the arbitration as Autotel argues, we find no basis for preempting the jurisdiction of the Nevada Commission because the Nevada Commission has now issued a final determination in the arbitration proceeding and that action "has effectively mooted the need for Commission preemption."<sup>37</sup> While the Commission has "a duty to assume 'responsibility' when a state commission 'fails to act,'" after the Nevada Commission's July 19, 2004 order, "there is no further 'responsibility' left for the Commission to assume."<sup>38</sup> As the Commission has explained in similar proceedings, "a plausible interpretation of [section 252(e)(5)] is that the 90 day period following the filing of a preemption petition was intended, at least in part, to put the state on notice that unless the state commission completes its proceeding, the Commission will preempt the state's

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Docket No. 99-198, Memorandum Opinion and Order, 15 FCC Rcd 23318, 23326, 23327, paras. 16, 19 (CCB 1999).

<sup>31</sup>See *Nevada Commission Order* at paras. 1-28; Nevada Commission Comments at 1-2; SBC Comments at 2-3.

<sup>32</sup>*Global NAPs, Inc. v. FCC*, 291 F.3d at 836.

<sup>33</sup>*Id.* at 837 (upholding the Commission's conclusion that section 252(e)(5) does not authorize preemption to review substantive validity of state commission's dismissal of a party's claim); see also *Low Tech Designs Order*, 13 FCC Rcd at 1774-75, para. 36.

<sup>34</sup>See Autotel Petition at 1.

<sup>35</sup>See *id.*

<sup>36</sup>See *id.*

<sup>37</sup>*Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Regarding Interconnection Dispute with Bell Atlantic-New Jersey, Inc.*, CC Docket No. 99-154, Memorandum Opinion and Order, 14 FCC Rcd 12530, 12538, para. 17 (1999) (*Global NAPs New Jersey Order*); see also *id.* ("Principles of federal-state comity and efficiency lead us to question the merit of assuming jurisdiction over the completed state proceeding under the circumstances presented in this instance.").

<sup>38</sup>*Id.*; see also *Global NAPs, Inc. Petition for Preemption of Jurisdiction of the Massachusetts Department of Telecommunications and Energy Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 99-354, Memorandum Opinion and Order, 15 FCC Rcd 4943, 4946, paras. 7-8 (CCB 2000), *review denied*, 16 FCC Rcd 4976 (2001), *aff'd*, *Global NAPs, Inc. v. FCC*, 291 F.3d 832.

authority.”<sup>39</sup> Thus, “[w]hen state action is fully completed within this notification period, we find it hard to conclude that Congress, nevertheless, intended that we must assume jurisdiction, which would have the effect of delaying resolution of the proceeding rather than expediting it.”<sup>40</sup> Because the Nevada Commission has made its final determination in this arbitration, we believe that further action by this Commission to assume jurisdiction over the already completed arbitration proceeding is unwarranted.<sup>41</sup>

#### IV. CONCLUSION

12. For the reasons discussed above, we deny the Autotel Petition for preemption of the jurisdiction of the Nevada Commission with respect to its arbitration of an interconnection agreement between SBC and Autotel. We conclude that Autotel has not met its burden of demonstrating that the Nevada Commission has “failed to act” within the meaning of the Commission’s rules implementing section 252(e)(5). When, as in this case, a state commission has acted on a timely basis to arbitrate an interconnection dispute, section 252(e)(6) provides the basis for federal court review; section 252(e)(5) provides no alternative forum for appeal.<sup>42</sup>

#### V. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, 47 U.S.C. § 252, as amended, and sections 0.91, 0.291, and 51.801(b) of the Commission’s rules, 47 C.F.R. §§ 0.91, 0.291, 51.801(b), the petition filed by Autotel on July 30, 2004 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Jeffrey Carlisle  
Chief, Wireline Competition Bureau

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<sup>39</sup>*Global NAPs New Jersey Order*, 14 FCC Rcd at 12538-39, para. 18.

<sup>40</sup>*Id.*

<sup>41</sup>We make no finding with regard to the applicability of the May 28, 2004 date as the statutory deadline for action by the Nevada Commission. Autotel does not indicate that it requested or agreed to waive the statutory deadline. The Nevada Commission, however, stated its understanding that “Autotel and SBC . . . have already waived the applicability of the resolution deadline and have continued with this proceeding for nearly two years.” *Nevada Commission Order* at para. 38. We need not resolve this apparent conflict in the record here because, as discussed above, we find no basis for preemption even if the May 28, 2004 date were to apply as Autotel contends. *See also* SBC Comments at 3 (arguing that “the proceedings were prolonged as result of Autotel’s failure to comply with discovery” and that “[i]t would be patently inappropriate for the Commission to reward Autotel by now concluding that the Nevada Commission’s patience in dealing with Autotel’s dilatory tactics constitutes failure of the Nevada Commission to act within the deadlines [prescribed] by the Act.”).

<sup>42</sup>*See Global NAPs, Inc. v. FCC*, 291 F.3d at 836-37; *see also Low Tech Designs Order*, 13 FCC Rcd at 1775, para. 37; *Petition of Supra Telecommunications & Information Systems, Inc.*, (“*Supra*”) Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Florida Public Service Commission, WC Docket No. 02-238, Memorandum Opinion and Order, 17 FCC Rcd 22884, 22891, para. 13 (WCB 2002) (“[A]ny grounds for seeking review of the Florida Commission’s action – whether alleging substantive or procedural flaws – are properly addressed to a federal district court pursuant to section 252(a)(6) of the Act.”).