
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUTOTEL, a Nevada corporation,)	Appeal from the United
)	States District Court for
Plaintiff-Appellant,)	the District of Nevada
)	
v.)	No. 2:07-CV-1423-ECR-GWF
)	
NEVADA BELL TELEPHONE)	
COMPANY d/b/a AT&T OF)	
NEVADA (f/k/a SBC))	Hon. Edward C. Reed, Jr.,
)	<i>Judge, Presiding</i>
Defendant-Appellee.)	

BRIEF OF DEFENDANT-APPELLEE AT&T NEVADA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the undersigned certifies that Nevada Bell Telephone Company d/b/a AT&T Nevada is a wholly-owned subsidiary of its parent corporation, AT&T Inc., which is publicly held.

s/ Dennis G. Friedman
Dennis G. Friedman

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STATEMENT OF JURISDICTION

Defendant-appellee Nevada Bell Telephone Company d/b/a AT&T Nevada (“AT&T Nevada”) agrees with Autotel’s statements concerning the district court’s subject matter jurisdiction, jurisdiction of the court of appeals, and timeliness of this appeal. See Autotel Br. 1.

ISSUES PRESENTED

1. Whether the district court correctly dismissed Autotel’s first claim (alleged breach of the duty to negotiate in good faith) because good faith claims must be decided by the state public utility commission before being asserted in federal court, see *Western Radio Services v. Qwest Corp.*, 530 F.3d 1186 (9th Cir. 2008), and that requirement was not satisfied when Autotel declined to correct filing deficiencies that caused the Public Utilities Commission of Nevada (“PUCN”) to dismiss Autotel’s good faith claim without prejudice and without addressing the merits of that claim.

2. Whether the district court correctly granted summary judgment on Autotel’s second claim (alleged failure to provide “interim interconnection” to Autotel while the parties negotiated an interconnection agreement) because (a) AT&T Nevada was not required to provide interim interconnection since Autotel already had an existing interconnection arrangement with AT&T Nevada, and (b) the claim is barred by the statute of limitations.

STATEMENT OF THE CASE

A. Nature of the Case and the Course of Proceedings.

AT&T Nevada provides local telephone exchange service in the area of Pahrump, Nevada; Autotel seeks to offer competing wireless telephone service in that area. ER31-32 ¶¶ 2-4, 11.¹ Under the Telecommunications Act of 1996, AT&T Nevada, as the incumbent local exchange carrier, is required to negotiate an interconnection agreement at the request of competing carriers, such as Autotel. 47 U.S.C. § 251(c)(1). An interconnection agreement enables telephone traffic to flow between the two carriers' networks. AT&T Nevada and Autotel have had an interconnection arrangement, although not a signed interconnection agreement, since 1994. ER34 ¶¶ 12-14.

In October 2007, Autotel filed this litigation, asserting two claims that are still in the case. First, Autotel alleges that AT&T Nevada failed to negotiate an interconnection agreement in good faith, as required by 47 U.S.C. §§ 251, 252. ER37 ¶¶ 29-33. Second, Autotel contends that AT&T Nevada failed to provide "interim interconnection," as supposedly mandated by 47 C.F.R. §§ 51.715 and 20.11(e), while the parties were negotiating an interconnection agreement. ER37-38 ¶¶ 34-39. A third claim by Autotel and a counterclaim by AT&T Nevada were settled and dismissed with prejudice. Dkt. Nos. 78-79.

¹ Autotel's Excerpts of Record are cited as "ER__"; AT&T Nevada's Supplemental Excerpts of Record are identified as "SER__."

B. Disposition Below.

1. In *Western Radio Services v. Qwest Corp.*, 530 F.3d 1186 (9th Cir. 2008), this Court held that a claim for failure to negotiate in good faith under the Telecommunications Act “cannot” be asserted in district court “before it has been addressed by the PUC” (Public Utilities Commission) for the state in question. *Id.* at 1193. As a “prudential limitation on adjudication,” this Court held, “the PUC must address [a] good faith claim before that claim may be brought in district court.” *Id.* at 1200. A party seeking an interconnection agreement is “require[d]” to “obtain a decision” from the PUC “on the questions underlying its good faith claim before it brings its good faith claim in district court.” *Id.* at 1202.

Applying *Western Radio*, the district court dismissed the first cause of action for failure to state a claim, because “Autotel has not properly presented its case before the PUCN. The PUCN has made no determination of Autotel’s good faith claim either on the merits or in any substantive fashion.” ER7. The court explained that in August 2006, Autotel submitted two *pro se* complaints to the PUCN alleging its good faith claim, but each time “failed to comply with the regulations set forth in the Nevada Administrative Code.” ER7. The PUCN dismissed the complaints “without prejudice” for “failure to comply” with the PUCN’s rules and regulations; “‘strongly recommended’ that Autotel consult or retain legal counsel” because “its submission indicated ‘a lack of required expertise

and familiarity with the Commission’s rules and regulations’”; “told Autotel to resubmit the complaints”; and “even offered to apply Autotel’s paid filing fee toward any new filing.” ER3-4, 7-8. Autotel did not resubmit a proper complaint to the PUCN, and the district court held that Autotel’s “half-hearted attempt at following the detailed procedures” required by the PUCN was “not sufficient.” ER8. If it were, it would be “easy” for parties to “avoid the state regulatory process” required by *Western Radio*: they could simply “present a noncompliant application with the PUCN, wait for the claim to be dismissed, and then file suit in federal court.” *Id.* This type of “administrative bypass would undermine the statutory and regulatory framework underlying the Telecommunications Act by making the provisions optional.” *Id.*

2. Ten months later, the court granted summary judgment to AT&T Nevada on Autotel’s second claim, for two reasons. First, the court held that under 47 C.F.R. § 51.715 (and 47 C.F.R. § 20.11(e), which refers back to § 51.715) the obligation to provide “interim” interconnection “applies only in the absence of an existing interconnection arrangement”—and it was “undisputed” that Autotel “had an existing interconnection arrangement with AT&T at all relevant times.” ER21-22. The rule itself provides that the interim interconnection requirement “shall not apply when the requesting carrier has an existing interconnection arrangement that provides for the transport and termination of telecommunications traffic by the

incumbent LEC [local exchange carrier].’” *Id.* (quoting § 51.715(a)(1)). Nor does it matter that the existing arrangement “did not provide for reciprocal compensation,” as Autotel argued. ER22. Sections 51.715 and 20.11(e) do not require a particular type of compensation under an existing interconnection arrangement. ER22-23.

Second, the court held that the claim for failure to provide interim interconnection was barred by the two-year limitations period in 47 U.S.C. § 415(b). ER23-24. AT&T Nevada had no “duty to provide interim interconnection after October 25, 2005”—two years before suit was filed—because the statute requires interim interconnection only when there is no existing interconnection arrangement, and “Autotel already had an existing interconnection arrangement with AT&T.” ER24.

STATEMENT OF FACTS

Many of the “facts” recited at great length in Autotel’s brief (at 2-25) are irrelevant to the issues presented on appeal. Our factual statement is limited to the facts that are pertinent to the questions presented.

A. Background: The Telecommunications Act of 1996.

Before Congress enacted the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151 *et seq.*) (“1996 Act”), local telephone service was provided primarily by a single company within each

local area. The 1996 Act introduced a competitive regime for local telecommunications services. See *Western Radio*, 530 F.3d at 1190. To that end, the 1996 Act requires incumbent local exchange carriers (“incumbent LECs” or “ILECs”), such as AT&T Nevada, to enter into “interconnection agreements” with competitive local exchange carriers (“CLECs”) and with wireless providers. These agreements establish terms and conditions on which ILECs provide their competitors with, among other things, interconnection with the incumbent’s network, so that traffic can flow between the carriers’ networks (47 U.S.C. § 251(c)(2)); the use of individual elements of the incumbent’s network on an “unbundled” basis, so that competitors can serve their customers without having to build their own networks from scratch (*id.* § 251(c)(3)); and telecommunications services at wholesale rates, for competitors to resell at retail (*id.* § 251(c)(4)).

The 1996 Act establishes the procedure by which requesting carriers may forge interconnection agreements with ILECs. ILECs must negotiate these agreements upon request. *Id.* § 252(a). When it receives such a request, an ILEC has a duty to negotiate in good faith, as does the requesting carrier. *Id.* § 251(c)(1). If negotiations do not yield a complete interconnection agreement, the 1996 Act provides for arbitration of open issues by the state utility commission (*id.* § 252(b)), or, if the state commission declines to perform that role, by the Federal Communications Commission (*id.* § 252(e)(5)). The arbitrator, whether the state

commission or the FCC, resolves the open issues, ensuring that federal statutory requirements are met. *Id.* §§ 252(c)(1) and (2). A party may request arbitration within a window of between 135 and 160 days after a request to negotiate an interconnection agreement. *Id.* § 252(b)(1).

After an interconnection agreement is established by negotiation and/or arbitration, the parties submit it to the state commission for approval or rejection under standards set forth in the 1996 Act. *Id.* §§ 252(e)(1) and (2). Once an interconnection agreement is established and approved, it becomes a binding contract. *Pacific Bell v. Pac-West Telecomm.*, 325 F.3d 1114, 1119-20 (9th Cir. 2003).

B. The Parties' Attempts To Negotiate An Interconnection Agreement, And Proceedings Before The PUCN.

Autotel is a Commercial Mobile Radio Service provider that seeks to offer wireless telephone services in the area of Pahrump, Nevada, a community of some 40,000 people located about 65 miles west of Las Vegas, near the California border; AT&T Nevada is the incumbent local exchange carrier in that area. ER31-32, 34 ¶¶ 2-4, 11. Autotel's sole owner is Richard L. Oberdorfer, who is also (and has been since Autotel's inception) the company's president, the only member of the company's board of directors, and the company's only employee. SER8, 11-12.

Autotel admits that it "has interconnected with AT&T and its predecessors

since May 1994,” when it obtained five phone lines from AT&T Nevada. ER34 ¶ 12; see SER95. These lines connected Autotel’s switch in Pahrump with AT&T Nevada’s switch (also in Pahrump), and thus enabled telecommunications traffic to flow between Autotel’s network and customers and AT&T Nevada’s network and customers. SER15-16.

In August 1996, Autotel requested negotiation of an interconnection agreement with AT&T Nevada pursuant to the 1996 Act. ER34 ¶ 13. At that time, Autotel acknowledges, the 1994 interconnection arrangement was already in place, providing for the transport and termination of telecommunications traffic by AT&T Nevada. SER30-31, 54, 95. Autotel continues to be interconnected with AT&T Nevada today pursuant to the 1994 interconnection arrangement.

Starting in 1996, Autotel and AT&T Nevada attempted to negotiate an interconnection agreement. ER34 ¶¶ 13-14. According to Autotel, AT&T Nevada allegedly refused to provide Autotel the same digital interconnection that AT&T Nevada uses in its own network unless Autotel accepted AT&T Nevada’s interconnection agreement offering, including AT&T Nevada’s standard terms and conditions. ER34-35 ¶¶ 13-14, 20. The parties were unable to resolve the matter. ER34 ¶ 14.

In August 2002, Autotel filed a petition with the Public Utilities Commission of Nevada seeking arbitration of an interconnection agreement with

AT&T Nevada. SER144 ¶ 1. Nearly two years later, on July 19, 2004, the PUCN dismissed the petition because of “Autotel’s blatant failure to comply with the Commission’s [discovery] procedures” and “Autotel’s refusal to comply with the Presiding Officer’s Orders,” which the Commission found “violates Autotel’s duty to negotiate in good faith” and “shows bad faith in the arbitration process and provides additional justification for the dismissal of its Petition.” SER153 ¶¶ 39-40; see SER18-19. In particular, the PUCN found, “Autotel...repeatedly failed to provide information directly related to the one issue it presented for Arbitration” and “refuse[d] to provide basic information necessary to resolve the issues raised by [AT&T Nevada]. Autotel’s position ignores the Presiding Officer’s Orders, the Commission’s regulations, and Autotel’s requirements under 47 U.S.C. § 252.” SER151 ¶ 35. Autotel then petitioned the FCC to preempt the PUCN and conduct the arbitration pursuant to 47 U.S.C. § 252(e)(5), which requires the FCC to preempt the jurisdiction of a state commission that fails to act to carry out its arbitration responsibility. The FCC, however, denied the petition in October 2004, concluding that the PUCN “acted on a timely basis to arbitrate [the] interconnection dispute” and “met the requirements of section 252.” SER156, 161 ¶¶ 1, 12.

After the PUCN dismissed Autotel’s petition for arbitration, Autotel did not again request interconnection negotiations with AT&T Nevada. SER164 ¶ 6. As

permitted by 47 C.F.R. § 20.11, AT&T Nevada requested interconnection negotiations with Autotel on November 23, 2005. SER163 ¶ 4; ER106-07. The arbitration window that was opened by that request closed without either party petitioning for arbitration. SER164 ¶ 7. At no time between AT&T Nevada's request for negotiation and the close of the arbitration window did either party request an interim interconnection arrangement. SER164-65 ¶ 8.

On August 8, 2006, Oberdorfer, on behalf of Autotel, filed a complaint with the PUCN alleging that AT&T Nevada refused to negotiate an interconnection agreement in good faith. ER49-52. Three days later, the PUCN returned the complaint to Oberdorfer "due to deficiencies in compliance with the Commission's rules and regulations for filings of this nature." ER53. The PUCN explained:

Based on the incomplete nature of the submission, it is strongly recommended that you retain or at least consult with competent legal counsel if you believe additional filings to the Commission are necessary. Your submittal demonstrates a lack of required expertise and familiarity with the Commission's rules and regulations.

Id. The PUCN rejected the complaint "without prejudice" and stated that any filing fee that had been paid "will be re-applied to any new submission." *Id.*

Autotel revised the complaint slightly and filed a new version with the PUCN on August 21, 2006. ER42-45. The next day, the PUCN again rejected Autotel's complaint "without prejudice" because it "does not comply with the Commission's rules and regulations." ER47. The PUCN stated: "Notably, in

relation to your first submission that was rejected, you have changed the title of the document without addressing any of the substantive deficiencies or inconsistencies.” *Id.* As it had done before, the PUCN noted that the complaint was “incomplete” and “demonstrates a lack of required expertise and familiarity with the Commission’s rules and regulations,” “strongly recommended that you retain or at least consult with competent legal counsel,” and reiterated that any filing fee that had been paid “will be re-applied to any new submission.”² *Id.*

In sum, as the district court noted, “[t]he PUCN has made no determination of Autotel’s good faith claim either on the merits or in any substantive fashion.” ER7.

Autotel never resubmitted its good faith complaint to the PUCN after August 22, 2006. Instead, after waiting more than 14 months, Autotel filed this litigation in October 2007. Dkt. No. 1.

STANDARD OF REVIEW

Rulings dismissing claims under Rule 12(b)(6) and granting summary judgment are reviewed *de novo*. *Legal Aid Services of Oregon v. Legal Services*

² Autotel did not dispute below, nor does it dispute on appeal, that the district court, in ruling on the motion to dismiss Autotel’s first claim, properly took judicial notice of the publicly filed PUCN documents quoted in the text. See, e.g., *Western Radio*, 530 F.3d at 1192 n.4 (taking judicial notice of an Oregon PUC order); *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) (“Courts may take judicial notice of some public records, including the ‘records and reports of administrative bodies’”).

Corp., 608 F.3d 1084, 1093 (9th Cir. 2009).

SUMMARY OF ARGUMENT

I. The district court correctly concluded that this Court’s decision in *Western Radio* requires the dismissal of Autotel’s claim that AT&T Nevada has not negotiated in good faith. *Western Radio* could not be clearer: in light of the “role allotted to state commissions by Congress, ...the PUC *must address* [a] good faith claim before that claim may be brought in district court.” 530 F.3d at 1200 (emphasis added). A plaintiff is “require[d]” to “*obtain a decision* on the questions underlying its good faith claim” from the state commission “before it brings its good faith claim in district court.” *Id.* at 1202 (emphasis added).

Autotel did not satisfy this prudential exhaustion requirement by merely filing facially deficient complaints that the PUCN rejected on procedural grounds without addressing the merits of Autotel’s good faith claim. The PUCN stated explicitly that its action was “without prejudice,” it “strongly” advised Autotel to consult counsel and refile a complaint that complied with PUCN rules and regulations, and it promised to apply Autotel’s filing fees to a future filing. ER47, 53. Autotel’s failure to follow the PUCN’s advice and file a cognizable complaint deprived the commission of the ability to render the “decision on the questions underlying [the] good faith claim” that *Western Radio* “require[s]” as a prerequisite to district court litigation. 530 F.3d at 1202. Autotel effectively abandoned the

PUCN proceeding before it began—and courts hold regularly that parties that abandon a required administrative process cannot pursue litigation in federal court.

This is at least the fourth case in this Court in recent years in which Autotel or its sister company, Western Radio, has attempted to bypass a state commission and assert a good faith claim in federal court. See *infra* at 16-17. As in the previous three cases, the Court should again reaffirm that administrative exhaustion is required, not optional.

II. The district court also properly granted summary judgment on Autotel’s claim that AT&T Nevada did not provide “interim interconnection” while the parties were negotiating an interconnection agreement. Most fundamentally, that claim fails because of the undisputed fact that the parties already had an *existing* interconnection arrangement (since 1994) at the time when Autotel asked to negotiate an interconnection agreement (1996). That dooms Autotel’s claim: the governing rule unambiguously provides that the interim interconnection provisions “shall not apply when the requesting carrier has an existing interconnection arrangement.” 47 C.F.R. § 51.715(a)(1). Autotel argues that the existing interconnection arrangement did not include certain compensation provisions, but the FCC’s rules do not require any particular compensation terms for *existing* interconnection arrangements—only for *interim* interconnection arrangements.

Autotel's interim interconnection claim also fails because it is barred by the two-year limitations period. Autotel believed in 1996 that AT&T Nevada was in violation of its duty to provide interim interconnection, but Autotel did not bring suit until October 2007. Moreover, if AT&T Nevada had any duty to provide interim interconnection—and it did not—that obligation expired when the PUCN, in July 2004, dismissed Autotel's arbitration seeking an interconnection agreement, because of Autotel's discovery violations and bad faith. After that, Autotel never requested interim interconnection before filing suit.

ARGUMENT

I. Under This Court's Decision In *Western Radio*, The District Court Properly Dismissed Autotel's Claim For Alleged Violation Of The Duty To Negotiate In Good Faith.

A. *Western Radio* Requires That Good Faith Claims Must Be Addressed First By The State Public Utilities Commission Before Being Brought In District Court.

In *Western Radio*, this Court considered whether the district court could adjudicate a claim alleging violation of the 1996 Act's requirement (47 U.S.C. § 251(c)(1)) to negotiate an interconnection agreement in good faith against a defendant ILEC—exactly the same issue presented here. *Western Radio*—the plaintiff there and Autotel's sister company—sought to negotiate an interconnection agreement with Qwest, an incumbent local exchange carrier in Oregon. 530 F.3d at 1191. When negotiations failed, *Western* filed a petition for arbitration with the Oregon Public Utilities Commission. *Id.* The PUC adopted

Qwest's proposed language as to all but one issue and ordered that an interconnection agreement consistent with the decision be submitted to the PUC. *Id.* Qwest prepared an interconnection agreement, signed it, and submitted it to Western for its signature and to the PUC for its records. *Id.* Western refused to sign, but it did not raise with the PUC any concerns about Qwest's proposed interconnection agreement. *Id.* at 1189, 1191. Instead, Western filed suit in the district court alleging, among other things, that Qwest failed to negotiate the interconnection agreement in good faith. *Id.* at 1191. The PUC later approved the interconnection agreement over Western's objection. *Id.* at 1192.

This Court held that while the district court had subject matter jurisdiction to consider Western's good faith claim (*id.* at 1193-96), the suit was premature: as a "prudential matter" a party "cannot" assert a "good faith claim in district court before it has been addressed by the PUC." *Id.* at 1193; see also *id.* at 1196-1205. "[I]nitial state commission adjudication is necessary for good faith claims." *Id.* at 1198 n.10. In requiring plaintiffs to first obtain a ruling from the state commission, the Court noted that the statutory scheme in the 1996 Act established mechanisms for state PUCs to consider and remedy allegations of failure to negotiate in good faith. *Id.* at 1197-98 (describing the processes for adjudicating good faith claims in Sections 251 and 252 as requiring PUC determinations in the first instance). Thus, the 1996 Act gives the PUC a "uniquely prominent role" in considering good faith

claims; requiring a telecommunications carrier to “await a decision on the [good faith] issue from the PUC” is consistent with the statutory scheme. *Id.* at 1200-01. Moreover, “failure to require [the plaintiff] to await an agency decision...would permit an extremely inefficient ‘bypass of an administrative remedy,’” which would “waste[] the agency’s resources and make[] it more difficult for the district court to reach a correct decision on the good faith claim.” *Id.* at 1201. In short, this Court held, the “only sensible conclusion” is that “the PUC must address [the plaintiff’s] good faith claim before that claim may be brought in district court.” *Id.* at 1200.³

In addition to applying these principles against Autotel’s sister company (Western Radio), this Court has already applied them to Autotel itself. In *Autotel v. Central Telephone. Co.*, 320 F. App’x 492, 494 (9th Cir. 2008), the Court, citing *Western Radio*, held that Autotel must first bring its good faith claim against the defendant to the PUCN, because the PUCN did not address the issue of good faith when it initially dismissed Autotel’s complaint as “unripe.” And in *Autotel v. Qwest*, 336 F. App’x 666, 667 (9th Cir. 2009), the Court affirmed the dismissal of

³ Rather than holding that Western Radio’s claim must be dismissed, this Court remanded the claim to the district court for a determination whether the PUC had, in effect, decided the good faith claim when it subsequently approved the interconnection agreement submitted by Qwest. *Id.* at 1203. As discussed below, such a question does not arise here; the PUCN indisputably has not addressed, or had occasion to address, Autotel’s good faith claim.

Autotel’s complaint because its bad-faith negotiation claim was “not exhausted” before the Arizona commission; two “passing references” to that claim in Autotel’s briefs before the commission “did not give the ACC an opportunity to resolve any claim of bad faith, as required for exhaustion purposes” under *Western Radio*.⁴

As we discuss next, in this case, too, the PUCN did not address the good faith claim asserted by Autotel when it dismissed Autotel’s complaints because of filing deficiencies.

B. The PUCN Has Not Addressed Autotel’s Good Faith Claim.

The PUCN clearly did not “address [plaintiff’s] good faith claim,” as *Western Radio* requires before a good faith claim may be asserted in the district court. 530 F.3d at 1200. The PUCN did not address the merits of Autotel’s claim at all. Rather, it dismissed Autotel’s complaints—without prejudice—for procedural reasons. Autotel submitted two complaints that the PUCN rejected because they did “not comply with the Commission’s rules and regulations”—the complaints were “deficien[t]” and “incomplete,” and they “demonstrate[d] a lack of required expertise and familiarity with the Commission’s rules and regulations.” ER47, 53. As a result, the PUCN “strongly recommended” that Autotel “retain or

⁴ *Western Radio* cited *Autotel v. Central Telephone* and *Autotel v. Qwest* as two other then-pending cases “in which Western appears to have headed directly to district court with its good faith claim, rather than waiting for the PUC.” 530 F.3d at 1201 n.14.

at least consult with competent legal counsel.” *Id.* And the PUCN stated that any filing fees “will be re-applied to any new submission.” *Id.*

This was plainly not “a decision on the questions underlying [plaintiff’s] good faith claim.” *Western Radio*, 530 F.3d at 1202. Although “initial state commission adjudication is necessary for good faith claims” (*id.* at 1198 n.10), there was no such adjudication here. The PUCN simply returned the complaints to Autotel because of a filing deficiency and invited Autotel to refile after consulting counsel. The PUCN stated expressly that its return of the complaints was “without prejudice” to a future refiling of Autotel’s good faith claim. ER47, 53. In other words, as far as the PUCN was concerned, Autotel did not file a cognizable complaint against AT&T Nevada—Autotel did not in any legally cognizable way assert a claim at the PUCN for failure to negotiate in good faith. It is, for all practical and legal purposes, as if Autotel never made a filing at the PUCN at all. As a result, the PUCN’s door remained open to Autotel to file a proper good faith claim. Because Autotel did not do that and “obtain a decision” from the PUCN on its good faith claim, it could not “bring[] its good faith claim in district court.” *Western Radio*, 530 F.3d at 1202. “[T]he question must be decided by the PUC” first (*id.* at 1198 n.10), and because that did not happen, the district court correctly dismissed Autotel’s good faith claim.

C. Autotel's Attempts To Evade Western Radio Are Groundless.

Autotel's efforts to get around the requirements set forth in *Western Radio* are unavailing.

1. Autotel asserts that it “submitted the good faith claim squarely to the PUCN.” Autotel Br. 28. But *Western Radio* does not permit a plaintiff to obtain admission to federal court merely by touching base with the state commission and *beginning* the administrative process. *Western Radio* compels Autotel to wait until the PUCN proceeding on the merits of the good faith claim is *concluded* and Autotel has received “a decision on the issue”—“abandon[ing]” the PUC proceeding and filing a lawsuit is not permitted. 530 F.3d at 1201. See also *id.* at 1202 (“It is appropriate to require that *Western complete* the arbitration process it has already begun and obtain a decision on the questions underlying its good faith claim before it brings its good faith claim in district court”) (emphasis added).

The principles in *Western Radio* govern here. As in *Western Radio*, Autotel's complaint does not request review of any PUCN determination on good faith—because none has been made—but instead asserts an original claim for damages against AT&T Nevada. See 530 F.3d at 1196 (“Western's action against Qwest is not an action for judicial review of a state commission determination; instead, Western has sued Qwest, a private party, for damages”); *id.* at 1196 n.7 (“The complaint did not seek review of any PUC determination on the good faith

issue, because no such determination had been made”). Under *Western Radio*, such a claim may not be brought in federal court until it has been addressed by the PUCN.

Western Radio is consistent with cases involving the analogous doctrine of administrative exhaustion, as cases cited in Autotel’s own brief illustrate.⁵ For example, in *Lodge 1858 v. Paine*, 436 F.2d 882 (D.C. Cir. 1970) (cited Autotel Br. 32), Judge Robinson noted in his separate opinion (there was no majority opinion) that “[t]he exhaustion doctrine ‘does not require merely the *initiation* of prescribed administrative procedures. It is one of exhausting them, that is, of *pursuing them to their appropriate conclusion* and, correlatively, of *awaiting their final outcome* before seeking judicial intervention.’” *Id.* at 896 (emphasis added; quoting *Aircraft & Diesel Equip. v. Hirsch*, 331 U.S. 752, 767 (1947)). Accord, e.g., *Home Loan Bank Bd. v. Mallonee*, 196 F.2d 336, 381 (9th Cir. 1952). In *Aircraft & Diesel*, the Supreme Court affirmed the dismissal of the complaint because the underlying Tax Court proceedings remained unresolved. The Tax Court’s functions, the Court held, must “not only...be put in motion,” but must be “fully performed, before

⁵ In *Western Radio*, this Court stated that while the 1996 Act’s statutory scheme “is sufficiently unusual that the established contours of the exhaustion and primary jurisdiction doctrines do not quite apply, the basic concerns that underlie both doctrines have equal force here.” 530 F.3d at 1200. More recently, this Court has used the phrase “prudential exhaustion” to describe *Western Radio*’s holding. *Autotel*, 336 F. App’x at 667.

judicial intervention should take place.” 331 U.S. at 771.

Similarly, in *Bankston v. White*, 345 F.3d 768 (9th Cir. 2003) (cited Autotel Br. 26), this Court held that while there is no exhaustion requirement for claims under the Age Discrimination in Employment Act—administrative remedies are voluntary under the ADEA—exhaustion is required for Title VII claims. Thus, the *Bankston* Court noted, *Vinieratos v. United States Dep’t of Air Force*, 939 F.2d 762 (9th Cir. 1991), affirmed dismissal of a Title VII claim where the plaintiff “abandoned” an administrative appeal. 345 F.3d at 771. “[A]n administrative exhaustion rule is meaningless if claimants may impede and abandon the administrative process and yet still be heard in the federal courts.” *Id.* (quoting *Vinieratos*, 939 F.2d at 772, and explaining the importance of “preventing end-runs around Title VII’s exhaustion of remedies requirement”). In *Vinieratos*, this Court cited with approval *Johnson v. Bergland*, 614 F.2d 415 (5th Cir. 1980), where the Fifth Circuit held that the plaintiff failed to exhaust administrative remedies—“his administrative complaint was vacated because he failed to comply” with an “administrative requirement” to provide more specific information supporting his claim. *Vinieratos*, 939 F.2d at 771 (quoting *Johnson*, 614 F.2d at 417). “[I]f the agency does not reach the merits of the complaint because the complainant fails to comply with the administrative procedures the Court should not reach the merits either.” *Johnson*, 614 F.2d at 418.

Other decisions from this Court likewise stress that when a plaintiff abandons a required administrative process, the exhaustion requirement is not satisfied, and the plaintiff's lawsuit must be dismissed:

A plaintiff may not cut short the administrative process prior to its final disposition, for upon abandonment a claimant fails to exhaust administrative relief and may not thereafter seek redress from the courts.

Greenlaw v. Garrett, 59 F.3d 994, 997 (9th Cir. 1995); see also *id.* at 1000 (“abandonment or failure to cooperate in the administrative process prevents exhaustion and precludes judicial review”) (citing, *inter alia*, *Vinieratos* and *Johnson*). Another decision from this Court, *Santos-Reyes v. Mukasey*, 308 F. App'x 100 (9th Cir. 2009), is strikingly similar to this case. The plaintiff there was required to exhaust her administrative remedies before the Merit Systems Protection Board, but after the MSPB “dismissed her claims without prejudice” and told her “she could re-file her claims 35 days after her claim for disability retirement was resolved, she abandoned the MSPB process.” *Id.* at 102. This Court ruled that she had “failed to exhaust her administrative remedies,” which “barred” her from bringing suit in federal court. *Id.*

This administrative exhaustion cases are obviously relevant here: Autotel effectively abandoned the mandated PUCN proceeding at the outset. And as the case just discussed hold, when a party abandons a required administrative process, it cannot bring its claim in court.

For all of these reasons, the requirement that “the PUC must address [the] good faith claim before that claim may be brought in district court” (*Western Radio*, 530 F.3d at 1200) was not satisfied by Autotel’s filing of a facially deficient complaint—particularly when the PUCN promptly notified Autotel of that fact, sent it back without prejudice, and strongly suggested that Autotel retain counsel and refile (without a new filing fee) a complaint that satisfied the PUCN’s rules and regulations. In not following the PUCN’s advice, Autotel has prevented the PUCN from deciding the merits of the good faith claim that the PUCN is required by *Western Radio* to address in the first instance.

If Autotel is permitted to get away with this, *Western Radio*’s prudential exhaustion requirement for good faith claims would be meaningless. A party could avoid PUC adjudication simply by filing a facially deficient complaint and then, after that pleading is dismissed on procedural grounds, run into federal court. If Autotel’s position were accepted, the “bypass of an administrative remedy” that *Western Radio* condemned, 530 F.3d at 1201, could become routine.

2. Autotel argues at some length that the PUCN wrongly determined that Autotel’s complaint was defective. Autotel Br. 28-30. But as in *Western Radio*, this case “is not an action for judicial review of a state commission determination.” 530 F.3d at 1196. As a result, this Court cannot properly review the PUCN’s August 2006 determination that the filings did not comply with PUCN rules.

Autotel never appealed the PUCN's determination, and any such appeal would lie exclusively in state court. See Nev. Rev. Stat. § 233B.130. Thus, for purposes of this case, the propriety of the PUCN's rejection of Autotel's complaints is a given.

3. For the same reason, there is no merit to Autotel's argument that "even if there were procedural defects, they should be overlooked," because Oberdorfer acted *pro se* before the PUCN. Autotel Br. 30. That might have been an argument for Autotel to raise in state court if it had appealed the PUCN's determination—but Autotel did not do that. (Oberdorfer's *pro se* status was also a reason for Autotel to follow the PUCN's advice and retain counsel to draft a proper PUCN complaint, but Autotel did not do that either.) What is more, *Western Radio* did not carve out an exception for *pro se* litigants in public utility commission proceedings. In *all* cases, this Court held, "the PUC must address [plaintiff's] good faith claim before that claim may be brought in district court." 530 F.3d at 1200. See also *McNeil v. United States*, 508 U.S. 106, 113 (1993) (a *pro se* party must comply with administrative exhaustion requirements—"we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel").

4. The unsupported assertion (Autotel Br. 30) that "the Nevada regulations regarding the format of complaints did not apply to Autotel's submission," because it was submitting a good faith claim under federal law, is

equally misguided. Not only is that another issue that Autotel could have raised in a state court appeal, but it is clearly wrong. As the district court explained (ER9), the Nevada regulations themselves provide unequivocally that they “apply to any request or petition submitted to the [PUCN] pursuant to sections 251 and 252 of the Telecommunications Act of 1996.” Nev. Admin. Code § 703.280. See also Nev. Admin. Code § 703.105 (“The provisions of this chapter govern practice before the Commission”).

5. Autotel contends that the PUCN effectively barred Autotel from relief by its “summary rejection of plaintiffs’ two successive filings without explanation” and that Autotel has “done what [it] can to attempt to exhaust [its] administrative remedies.” Autotel Br. 31. That is preposterous.

At least three courses of action were available to Autotel after the PUCN rejected its complaint. Most obviously, Autotel could have obtained appropriate legal advice (as the PUCN strongly suggested), corrected the defects, and re-filed its complaint with the PUCN. There is no reason to believe that counsel versed in PUCN procedures could not have put together a complaint that would have passed procedural muster, especially since counsel could have consulted with PUCN Staff to get guidance on the filing rules if necessary. Alternatively, if Autotel believed that the PUCN’s rejection of its complaints was improper, Autotel could have filed a state court appeal. See Nev. Rev. Stat. § 233B.130. Or Autotel could have asked

the FCC to decide its good faith claim. The 1996 Act expressly provides for the FCC to step in when a state commission fails to carry out its responsibilities with respect to interconnection matters. See 47 U.S.C. § 252(e)(5) (“If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission’s jurisdiction...and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission”).⁶ Autotel did not exercise any of these available options.

6. The cases Autotel cites (at 31) are distinguishable on their face and do not support Autotel’s position. In *Ayers v. Espy*, 873 F. Supp. 455, 462 (D. Colo. 1994), as reflected in the long passage Autotel quotes, the state agency (the Forest Service) had “failed to take any action whatsoever,” and there was “no indication that the Forest Service will ever consider the merits of the...appeal.” Here, in

⁶ The FCC has routinely accepted jurisdiction under the circumstances described in Section 252(e)(5). See, e.g., Opinion and Order, WC Docket No. 08-33, *Petition of Intrado Communications*, 23 FCC Rcd. 8715, 2008 WL 2311009 (June 4, 2008); Opinion and Order, WC Docket No. 03-242, *Petition of Northland Networks*, 19 FCC Rcd. 2396, 2004 WL 853634 (Feb. 11, 2004). To be clear, AT&T Nevada does not mean to suggest that the PUCN in fact failed to act to carry out its responsibility. On the contrary, AT&T Nevada believes that the PUCN discharged its responsibility by dismissing Autotel’s complaints. But if Autotel believed otherwise, a preemption notice pursuant to Section 252(e)(5) would have been an appropriate course—which Autotel did not take.

contrast, the PUCN took immediate action by notifying Autotel that its complaints were defective and made clear that it would consider the merits of Autotel's good faith claim in the future: it rejected the complaints without prejudice, encouraged Autotel to retain counsel and re-file, and offered to reapply the filing fee to a new filing. Moreover, the *Ayers* court noted that the case involved "unique" circumstances, and that plaintiffs' claims rested on issues of statutory interpretation that were "not subject to the exhaustion of remedies doctrine." 873 F. Supp. at 462. Autotel's good faith claim, in contrast, is subject to prudential exhaustion, and under *Western Radio*, Autotel must first proceed before the state commission.

Similarly, *AT&T Communications v. Pacific Bell*, 203 F.3d 1183 (9th Cir. 2000), has no bearing on this dispute. In that case, the state commission *had* issued a decision approving an arbitrated agreement, which was a "determination" within the meaning of 47 U.S.C. § 252(e)(6) (providing for judicial review), because it was "operational or binding on the parties." 203 F.3d at 1185-86. By contrast, the PUCN has made no such decision or determination. It has not made any substantive ruling on Autotel's good faith claim, because it determined that Autotel did not properly ask it to do so.

7. Finally, Autotel argues that exhaustion would be "futile." Autotel Br. 32. In support of this argument, Autotel cites a habeas corpus case, *Sweet v. Cupp*,

640 F.2d 233 (9th Cir. 1981).⁷ But in habeas cases, “futility is no exception to procedural default,” and a prisoner may not rely on the futility doctrine when he or she has failed to comply with state procedural rules. *Prater v. Lampert*, 2006 WL 240534 at *5 (D. Or. Jan. 30, 2006) (citing *Engle v. Isaac*, 456 U.S. 107, 130 (1982)), *vacated as moot*, 250 F. App’x 218 (9th Cir. 2007). Similarly, futility is inapplicable here, where Autotel has failed to comply with the PUCN’s filing rules. Autotel merely asserts, with no support whatsoever, that exhaustion would be futile because the PUCN “unreasonably” dismissed two of Autotel’s complaints. Autotel Br. 32. Besides the fact that this Court cannot appropriately adjudicate the reasonableness of the PUCN’s application of its own filing rules, Autotel’s unsupported assertion does not establish that exhaustion would be “futile.” See *Independent Living Ctr. v. Leavitt*, 2006 WL 4498214, at *4-5 (E.D. Cal. June 29, 2006) (in the context of Medicare proceedings, holding that a plaintiff’s allegations “that further exhaustion would be ‘futile’” were inadequate to excuse the exhaustion of administrative review; dismissing plaintiff’s claim).

There is every indication that the PUCN stood ready to entertain Autotel’s

⁷ This Court ultimately held that the petitioners in *Sweet* failed to exhaust their remedies. *Sweet*, 640 F.2d at 235. In subsequent cases, *Sweet*’s viability, even in the habeas context, has been called into question. See *Noltie v. Peterson*, 9 F.3d 802, 805 (9th Cir. 1993) (noting the Supreme Court’s criticism of the futility doctrine as an excuse in federal habeas cases after *Sweet*, and noting that this Court has rejected at least one futility doctrine case since *Sweet*) (citing *Engle v. Isaac*, 456 U.S. 107 (1982), and *Roberts v. Arave*, 847 F.2d 528, 530 (9th Cir. 1988)).

good faith claim, if only Autotel had given it a complaint that complied with the PUCN's rules. Nothing in the record supports Autotel's assertion that going to the PUCN was "obviously useless." Autotel Br. 32.

* * *

Autotel is attempting the very "bypass of an administrative remedy" that *Western Radio* prohibits. 530 F.3d at 1201. Indeed, Autotel has made this a habit: this is at least the fourth case in recent years in which Autotel or a sister company has attempted to skip the required step of having a public utility commission address in the first instance a claim of failure to negotiate in good faith. See *supra* at 16-17. Enough is enough. *Western Radio* means what it says: "the PUC *must address* [a] good faith claim before that claim may be brought in district court." 530 F.3d at 1200 (emphasis added). Because that manifestly did not happen here, the district court correctly dismissed Autotel's good faith claim.⁸

II. The District Court Correctly Granted Summary Judgment On Autotel's Second Claim.

Autotel's only remaining claim is that while the parties were negotiating an interconnection agreement, AT&T Nevada failed to provide "interim interconnection" to Autotel, which Autotel contends is required by 47 C.F.R.

⁸ Autotel spends several pages (at 33-37) discussing another ground for dismissing the good faith claim that the district court did not address. Because the district court has not considered that issue and we are not offering it as an alternative ground for affirmance, this Court need not and should not decide it.

§§ 51.715 and 20.11(e). ER37-38. The district court granted summary judgment on this claim for two reasons: (a) by the plain terms of the rules, AT&T Nevada has no duty to provide interim interconnection to Autotel, and (b) the claim is time-barred. ER21-24. Both grounds are correct.

A. There Is No Duty To Provide “Interim” Interconnection When, As Here, There Is An Existing Interconnection Arrangement.

The first problem with Autotel’s interim interconnection claim is that AT&T Nevada was not required to provide interim interconnection at all. That is because, as Autotel conceded in its complaint and as Oberdorfer admitted in his depositions, AT&T Nevada and Autotel have had an interconnection arrangement since 1994—two years before Autotel initiated negotiations for an interconnection agreement. ER34 ¶¶ 12-13; SER30-31, 54, 95. That fact is undisputed—and dispositive.

Rule 51.715(a) provides unequivocally that the duty to provide interim interconnection applies *only* when the parties do not already have an existing interconnection arrangement:

Upon request from a telecommunications carrier *without an existing interconnection arrangement* with an incumbent LEC, the incumbent LEC shall provide transport and termination of telecommunications traffic immediately under an interim arrangement....

47 C.F.R. § 51.715(a) (emphasis added). To make it even clearer, the rule further provides:

This requirement *shall not apply when the requesting carrier has an existing interconnection arrangement* that provides for the transport

and termination of telecommunications traffic by the incumbent LEC.

47 C.F.R. § 51.715(a)(1) (emphasis added).

In promulgating Rule 51.715(a), the FCC explained why the rule's provisions do not apply when the requesting carrier already has an existing interconnection arrangement:

We are concerned that some new entrants that do not already have interconnection arrangements with incumbent LECs may face delays in initiating service solely because of the need to negotiate transport and termination arrangements with the incumbent LEC. In particular, a new entrant that has already constructed facilities may have a relatively weak bargaining position because it may be forced to choose either to accept transport and termination rates not in accord with these rules or to delay its commencement of service until the conclusion of the arbitration and state approval process. ... Because the purpose of this interim termination requirement is to permit parties without existing interconnection agreements to enter the market expeditiously, *this requirement shall not apply with respect to requesting carriers that have existing interconnection arrangements that provide for termination of local traffic by the incumbent LEC.*

First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (“Local Competition Order”), 11 FCC Rcd. 15499, 1996 WL 452885, ¶ 1065 (Aug. 8, 1996) (emphasis added).

Autotel had, at all pertinent times, “an existing interconnection arrangement that provide[d] for the transport and termination of telecommunications traffic by [AT&T Nevada].” 47 C.F.R. § 51.715(a)(1). Oberdorfer admitted this. SER30 (“Q: At the time when Autotel initiated those negotiations in August of 1996, was Autotel operating under an arrangement with Nevada Bell that provided for

Autotel to pay Nevada Bell compensation for the transport and termination of local telecommunications traffic? A: Yes”). From this it necessarily follows that Autotel was not entitled to request, and AT&T Nevada was not required to provide, interim interconnection pursuant to Rule 51.715.⁹

Autotel does not dispute that it had an existing interconnection arrangement with AT&T Nevada in 1996, or that the arrangement provided for the transport and termination of telecommunications traffic by AT&T Nevada. Nonetheless, Autotel argues, none of that matters because the existing interconnection arrangement “did not provide for reciprocal compensation for the transport and termination of local telecommunications traffic,” which 47 C.F.R. § 51.715(a) and (b) supposedly require. Autotel Br. 40. But as already explained, Rule 51.715(a) provides explicitly that its requirements “shall *not apply* when the requesting carrier has an existing interconnection arrangement that provides for the transport and termination of telecommunications traffic by the incumbent LEC.” 47 C.F.R. § 51.715(a)(1) (emphasis added). And the compensation provision, Rule 51.715(b), applies only when subsection (a) applies. See 47 C.F.R. § 51.715(b) (“Upon receipt of a request as described in paragraph (a)...an incumbent LEC

⁹ Oberdorfer also conceded that AT&T Nevada’s failure to provide interim interconnection did not delay Autotel’s initiation of service—the reason for the interim interconnection requirement in the first place (see *supra* at 31)—because Autotel was already providing service via its existing interconnection arrangement with AT&T Nevada. SER95, 134.

must...establish an interim arrangement for transport and termination of telecommunications traffic at symmetrical rates”). In short, Rule 51.715 does not say anything about what the compensation terms of the *existing* arrangement must be—or even that there must be compensation terms. This is consistent with the Rule’s purpose, which is merely to insure that “new entrants that do not already have interconnection arrangements” could “enter the market.” *Local Competition Order*, 11 FCC Rcd. 15499, 1996 WL 452885, ¶ 1065.

Autotel also relies (at 40) on 47 C.F.R. § 20.11(e), which provides:

An incumbent local exchange carrier may request interconnection from a commercial mobile radio service provider and invoke the negotiation and arbitration procedures contained in section 252 of the Act. ... Once a request for interconnection is made, the interim transport and termination pricing described in § 51.715 of this chapter shall apply.

That provision does not help Autotel either.

The FCC promulgated that rule when it decided *In re Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling*, 20 FCC Rcd. 4855, 2005 WL 433200 (Feb. 24, 2005) (“T-Mobile Order”).

In that proceeding, certain providers of commercial mobile radio service (“CMRS,” also known as wireless) sought a declaratory ruling that “wireless termination tariffs are not a proper mechanism for establishing reciprocal compensation arrangements for the transport and termination of traffic.” *Id.* ¶ 1.

They argued that by charging CMRS providers pursuant to tariffs for terminating

traffic that originates on the CMRS providers' networks, incumbent LECs were "attempting to preempt the [interconnection agreement] negotiation process contemplated by the [1996] Act and the Commission's rules." *Id.* ¶ 8. The FCC determined that compensation for traffic termination should thereafter be negotiated pursuant to the 1996 Act (*id.* ¶ 14), and accordingly adopted what is now 47 C.F.R. § 20.11(d):

Local exchange carriers may not impose compensation obligations for traffic not subject to access charges upon commercial mobile radio service providers pursuant to tariffs.

But as the FCC recognized, this new rule created a problem for incumbent LECs, because it meant they could impose reciprocal compensation charges on CMRS providers only pursuant to interconnection agreements, and ILECs, as the law then stood, could not compel CMRS providers to negotiate and arbitrate interconnection agreements under the 1996 Act. See *T-Mobile Order* ¶¶ 15-16. To solve the problem, the FCC added what is now 47 C.F.R. § 20.11(e) to permit ILECs to initiate interconnection negotiations with CMRS providers—recall that the rule begins: "An incumbent local exchange carrier may request interconnection from a [CMRS] provider..." And in order to parallel its existing interim interconnection rule (Rule 51.715), which applies when a CMRS provider requests interconnection, the FCC added the last sentence of Rule 20.11(e): "Once a request for interconnection is made, the interim transport and termination pricing described

in § 51.715 of this chapter shall apply.”

Autotel imagines that with that language, the FCC made the interim interconnection requirement self-effectuating in a way that it was not under existing Rule 51.715. The FCC did no such thing. Far from revamping the interim interconnection requirement in the way that Autotel suggests, the last sentence of Rule 20.11(e) merely extends the existing interim interconnection requirement to the new situation—created by the Rule’s first sentence—in which the ILEC asks the CMRS provider to negotiate an interconnection agreement. As the FCC itself explained:

In recognition that the establishment of interconnection arrangements may take more than 160 days, we also establish interim compensation requirements under section 20.11 *consistent with those already provided in section 51.715 of the Commission’s rules.*

T-Mobile Order ¶ 16 (emphasis added; footnote omitted). And of course, as already explained, the interim interconnection provisions of Rule 51.715 apply only to carriers—unlike Autotel—that are “without an existing interconnection arrangement.” 47 C.F.R. § 51.715(a).

Autotel is equally off base in arguing that the *T-Mobile Order* somehow “voided” the 1994 interconnection arrangement because that arrangement “was non-reciprocal and non-negotiated and was tariff-based” (Autotel Br. 40), thus rescuing Autotel’s claim for the period after April 29, 2005 (the effective date of the *T-Mobile Order*, see ¶ 19). That is pure invention. As we just demonstrated,

the FCC's *T-Mobile Order* provided that whether an interconnection agreement is requested by an ILEC or a CMRS provider, the same rules apply with respect to interim interconnection—namely, that when the parties' networks are *already* interconnected, the *interim* interconnection requirements do not come into play. It makes no difference what, if any, compensation arrangements are in place under the existing interconnection arrangement, or what the terms of that arrangement are, or how the arrangement came to be.

Nor is Autotel correct in its conclusory assertion that “Nevada Bell is obligated to interconnect under section 251(a) without any notice from Autotel.” Autotel Br. 41. Autotel's claim is that AT&T Nevada “failed to provide interconnection...on an interim basis applying ‘interim transport and termination pricing described in § 51.715.’” ER37 ¶ 35. An incumbent LEC's duty to provide interconnection on an interim basis applying the specified pricing arises *only* under Rule 51.715—which requires a “request” (47 C.F.R. § 51.715(a))—not under Section 251(a). All that Section 251(a) does is require telecommunications carriers to interconnect with each other, directly or indirectly¹⁰—a requirement that AT&T Nevada fulfilled by virtue of the parties' interconnection arrangement. There is no pricing associated with the general interconnection duty of Section 251(a). See,

¹⁰ See *Pacific Bell*, 325 F.3d at 1118 n.2 (Section 251(a) merely sets forth “the general duties of telecommunications carriers to interconnect with the facilities and equipment of other telecommunications carriers”).

e.g., Further Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685, 4743, 2005 WL 495087, at *37 (Mar. 3, 2005) (“section 251(a)(1) does not address pricing”). In fact, that duty is not even the subject of interconnection agreements under the 1996 Act. See 47 U.S.C. § 251(c)(1), which requires negotiation of interconnection agreements implementing the “duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection [(c)],” but *not* those described in subsection (a). Accordingly, there is no duty to provide interim interconnection unless there is a request for interim interconnection.

For all of these reasons, the district court properly granted summary judgment to AT&T Nevada on Autotel’s interim interconnection claim.¹¹

¹¹ The argument section in Autotel’s brief has two passing references stating without explanation that AT&T Nevada improperly “disconnected [an] existing interconnection.” Autotel Br. 40. This undeveloped snippet is much too short to be considered an argument, and thus Autotel has waived the disconnection issue. *Maldonado v. Morales*, 556 F.3d 1037, 1048 n.4 (9th Cir. 2009) (“Arguments made in passing and inadequately briefed are waived”); *Halicki Films v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1229 (9th Cir. 2008) (plaintiff’s “two passing references to ‘related state claims’ in the argument section of her opening brief are insufficient to preserve those...claims for appellate review”—they are waived).

The point is also meritless. AT&T Nevada disconnected one of Autotel’s five lines for non-payment in 2006 (ER152; SER22-23, 37-38)—a time when it had no duty to interconnect with Autotel on an interim basis. See *infra* at 39-43. Moreover, Autotel admitted that the disconnected line “hasn’t been used for subscriber traffic,” but was used only “for administering the switch and for testing.” SER23. By definition, however, interconnection is for the transmission

(cont’d)

B. The Interim Interconnection Claim Is Time-Barred.

The interim interconnection claim is also untimely. On appeal, Autotel does not contest the district court’s ruling (ER23) that the claim is subject to the limitations period in 47 U.S.C. § 415(b), which provides that claims must be filed “within two years from the time the cause of action accrues, and not after.” See *Pavlak v. Church*, 727 F.2d 1425, 1426 (9th Cir. 1984) (Kennedy, J.) (Section 415(b) applies to claims against telecommunications carriers “filed in district court as well as to complaints filed with the [FCC]”).

Autotel claims that AT&T Nevada’s alleged failure to provide interim interconnection caused Autotel damages (ER38 ¶ 37)—specifically, “lost profits... caused by AT&T’s refusal to provide interim interconnection” (SER55). And Oberdorfer acknowledged in his Rule 30(b)(6) deposition that Autotel believed starting in 1996 that AT&T Nevada had “violate[d] its obligation to provide interconnection on an interim basis,” thus causing harm to Autotel. SER53-55.

(... cont’d)

and routing of “telephone exchange service,” 47 U.S.C. § 251(c)(2)(A)—which is “furnish[ed] to subscribers,” 47 U.S.C. § 153(47)—while “exchange access,” 47 U.S.C. § 251(c)(2)(A), is the offering of telephone services to subscribers, 47 U.S.C. § 153(16). Because Autotel was using that line solely to test and administer the switch, and not for subscriber traffic, the line was not being used for “interconnection” and thus was not subject to any interim interconnection obligation. Finally, Oberdorfer admitted in his Rule 30(b)(6) deposition that Autotel did not suffer any damages from the disconnection of this one line. SER41.

With AT&T Nevada allegedly in breach of its obligations in 1996, any claim for damages had to be filed by 1998. Autotel did not file this case until October 25, 2007, some nine years too late.

Even if the two-year limitations period is considered retrospectively from the complaint's filing date, instead of prospectively from the accrual of the claim in 1996, the claim is still untimely. Viewed retrospectively, Autotel could have a live claim only if AT&T Nevada breached its purported interim interconnection obligations under Rule 51.715(a) within the previous two years, *i.e.*, after October 24, 2005. But even if (contrary to the law set forth in the previous section) Autotel at one time had a right to interim interconnection under Rule 51.715(a), that right would have expired, at the latest, on July 19, 2004, when the PUCN dismissed Autotel's arbitration—which sought an interconnection agreement with AT&T Nevada—because Autotel failed to provide discovery, violated the Presiding Officer's orders, and exercised bad faith in the arbitration process. SER153 ¶¶ 39-40; see *supra* at 9.

“The purpose of [Rule 51.715(a)] is to permit parties to operate in the absence of a formal agreement, *during a time that a formal agreement is being negotiated.*” *WWC License v. Boyle*, 459 F.3d 880, 900 (8th Cir. 2006) (emphasis added). As this language suggests, the duty to provide interim interconnection does not last forever. Rather, the FCC explicitly provided that the obligation to

interconnect on an interim basis “shall cease to be in effect” when an interconnection agreement (whether negotiated or arbitrated) has been approved by the state commission, or when “[t]he period for requesting arbitration has passed with no such request.”¹² 47 C.F.R. § 51.715(c). Understandably, those were the only scenarios the FCC foresaw after a carrier requested negotiation under Section 252(a) of the 1996 Act, because the 1996 Act ensures that a carrier that proceeds properly can obtain an interconnection agreement within a year or less of requesting negotiations. See 47 U.S.C. § 252(b)(4)(C), (e)(4). The FCC did not foresee, and therefore did not expressly account for, a scenario in which an arbitration ends without an interconnection agreement because it is dismissed due to the requesting carrier’s defaults. But that does not mean that Autotel’s right to interim interconnection somehow survived the dismissal of arbitration and lingered into perpetuity. The overall thrust of Rule 51.715 is clear: any duty to provide interim interconnection ends if the parties do not arrive at an interconnection agreement that memorializes a more lasting arrangement.

The PUCN’s dismissal of Autotel’s petition for arbitration terminated any

¹² An arbitration petition can be filed only between 135 and 160 days after an ILEC “receives a request for negotiation.” 47 U.S.C. § 252(b)(1). If that period passes and neither party has petitioned for arbitration, there can be no arbitration unless a new request for negotiation is submitted, thus establishing a new arbitration window. *E.g., Verizon California v. Peevey*, 462 F.3d 1142, 1151 (9th Cir. 2006).

right Autotel might have had to interim interconnection. It brought down the curtain on Autotel's request to negotiate an interconnection agreement with AT&T Nevada, and it left Autotel with no pending request for negotiation, no ongoing negotiations under Section 251(a), and, therefore, no more right (if it had ever had such a right) to an interim interconnection.

Autotel contends that “the duty to provide interim connection (which arose by operation of law when interconnection negotiations began) has never ended” (Autotel Br. 43-44), but that is refuted by the explicit terms of the controlling rule, which states that interim interconnection must be provided only “[u]pon request from a telecommunications carrier without an existing interconnection arrangement.” 47 C.F.R. § 51.715(a) (emphasis added); accord 47 C.F.R. § 51.715(b). Thus, unless Autotel made a request for interim interconnection after October 24, 2005, or if a previous request was still pending on or after that date, there was no duty to provide interim interconnection within the limitations period. Neither condition pertains.

Autotel does not argue—it could not argue—that its arbitration proceeding remained pending on October 24, 2005, but it tries to leave the impression that it requested interim interconnection after that date. See Autotel Br. 42-44. Autotel contends (at 42-43) that in March 2006 it “presented its own ICA [interconnection agreement], and thereby itself requested negotiation, opening a new window,” but

that is irrelevant (and wrong, see *infra* at 42-43). What matters is whether Autotel requested *interim* interconnection under Rule 51.715, not whether it requested negotiations for an interconnection agreement under Section 252(a) of the 1996 Act. Significantly, Autotel does *not* argue that, after its arbitration was dismissed in July 2004, it ever requested interim interconnection pursuant to Rule 51.715(a). Autotel's lengthy recitation of events during the two years before it filed suit (Autotel Br. 13-24) reflects no request for interim interconnection.

Not only is there no evidence that Autotel requested interim interconnection after July 2004, but there is undisputed evidence that Autotel did not. On November 23, 2005, AT&T Nevada made a request to negotiate an interconnection agreement with Autotel. SER163 ¶ 4; ER106-07. Between July 19, 2004 and that request for negotiation, there was no pending request for negotiation (SER164 ¶ 6), and therefore there could be no request for, or entitlement to, an interim arrangement. Nor did Autotel request interim interconnection after AT&T Nevada asked for negotiations on November 23, 2005. SER164-65 ¶ 8. Autotel disputes none of this.

Finally, Autotel's assertion that "Autotel then presented its own ICA, and thereby itself requested negotiation, opening a new window" (Autotel Br. 42) is not only irrelevant, as already explained, but it is also specious. The mere making of what Autotel admits was a "counter-proposal" (Autotel Br. 43) during ongoing

negotiations is not a new request for negotiations under Section 252(a). Autotel's March 23, 2006 letter transmitting its proposed interconnection agreement confirms this: Oberdorfer wrote that he "attached Autotel's counter offer," and made no mention of requesting negotiations or opening a new arbitration window. ER155. Quite the contrary, the letter acknowledged that the arbitration window that had been opened by AT&T Nevada's request for negotiation would close in two weeks and recognized that there would be no new window: "Please ensure that Autotel's proposed interconnection agreement is included in your company's petition for arbitration when filed with the Nevada Commission." *Id.*; see also ER178 (March 31, 2006 email: "Richard [Oberdorfer] does not want to extend the negotiations window so we may need to prepare for Arbitration").

In sum, AT&T Nevada had no duty to provide interim interconnection after October 25, 2005 (two years before Autotel filed its complaint), because there was no live request for interim interconnection after July 19, 2004. Autotel's second cause of action is therefore time-barred.

CONCLUSION

The district court's judgment should be affirmed.

September 13, 2010

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I certify that there are no known related cases pending in this Court.

s/ Dennis G. Friedman
Dennis G. Friedman

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,359 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman typeface.

s/ Dennis G. Friedman
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September 13, 2010

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 13, 2010. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Dennis G. Friedman

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I, Dennis G. Friedman, certify that this brief is identical to the version submitted electronically on September 13, 2010.

September 14, 2010

s/ Dennis G. Friedman
Dennis G. Friedman