BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

May 18, 1999

IN RE:	)	
	)	
PETITION OF NEXTLINK TENNESSEE, L.L.C	)	**DOCKET NO.**
FOR ARBITRATION OF INTERCONNECTION	)	**98-00123**
WITH BELLSOUTH TELECOMMUNICATIONS,	)	
INC.	)	

FIRST ORDER OF ARBITRATION AWARD

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I. INTRODUCTION

This First Order of Arbitration Award ("First Arbitration Award") embodies all decisions made by Chairman Melvin J. Malone, Director H. Lynn Greer, Jr., and Director Sara Kyle, acting as Arbitrators, pursuant to the Federal Telecommunications Act of 1996 ("1996 Act") at a public meeting held on October 6, 1998.[1]

With the passage of the 1996 Act, Congress intended to foster competition in "all telecommunications market[s] in a procompetitive, deregulatory national policy framework ...." S. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996). As part of that framework, the 1996 Act requires that incumbent local exchange carriers ("incumbent LECs") provide new entrants to the local market with access to telephone networks and services on "rates, terms and conditions that are just, reasonable, and non-discriminatory." *See* 47 U.S.C. § 251(c) (1998). Pursuant to §§ 251 and 252 of the 1996 Act, incumbent LECs and competing local exchange carriers ("CLECs") have the duty to negotiate in good faith the terms and conditions of agreements regarding facilities access, interconnection, resale of services, and other arrangements contemplated under these Sections. If the parties are unable to reach an agreement voluntarily, either party may petition the State Commission for arbitration. *See* 47 U.S.C. § 252(b)(1). A final interconnection agreement, whether negotiated or arbitrated, must be reviewed by the State Commission in order to determine whether it complies with the 1996 Act. *See* 47 U.S.C. § 252(e)(1).

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[1] Subsequent to the decision of the Arbitrators on the merits of this proceeding on October 6, 1998, the Supreme Court of the United states has rendered its decision on January 25, 1999, in *AT&T Corp. v. Iowa Utilities Board,* 119 S.Ct. 721, 142 L.Ed 2d 835 (1999). The Arbitrators acknowledge that the decision of the Supreme Court may in fact impact some of the issues herein, however, these decisions reflect the understanding of the Arbitrators at that point in time. Accordingly, this Order has not been altered to take into account any changes that could result from the action of the Court. Rather, this Order reflects the decisions and opinions of the Arbitrators at the time of deliberation.

On February 24, 1998, NEXTLINK Tennessee L.L.C. ("NEXTLINK") filed a petition requesting that the Tennessee Regulatory Authority ("Authority") arbitrate certain issues that NEXTLINK and BellSouth Telecommunications, Inc. ("BellSouth") had been unable to resolve through voluntary negotiation. BellSouth filed its response to NEXTLINK's petition on March 23, 1998. Although Section 252(b)(4)(C) requires a State Commission to resolve an arbitration within nine months after the date on which the incumbent LEC received the request for negotiation, NEXTLINK and BellSouth voluntarily agreed to extend until November 20, 1998, this statutory time limit.[2]

The Directors of the Authority unanimously determined that they would serve as Arbitrators in this matter. After several pre-arbitration conferences, a public hearing was held before the Arbitrators on August 24 and August 25, 1998. The following notices of appearance were entered:

Daniel Waggoner, Esquire, Davis Wright Tremaine, Suite 2600, 1501 Fourth Avenue, Seattle, Washington 98101; **Alaine Miller, Esquire,** 155 - 108th Avenue, NE, #810, Bellevue, Washington 98804; and **Henry Walker, Esquire,** Boult, Cummings, Conner & Berry, P. O. Box 198062, Nashville, Tennessee 37219-8062, appearing on behalf of NEXTLINK.

Guy M. Hicks, Esquire, BellSouth Telecommunications, Inc., Room 2101, 333 Commerce Street, Nashville, Tennessee 37201; and **Bennett L. Ross, Esquire,** BellSouth Telecommunications, Inc., Suite 4300, 675 West Peachtree St., NE, Atlanta, Georgia 30375, appearing on behalf of BellSouth.

Post-hearing briefs were filed by the parties on September 22, 1998. Upon agreement of the parties and without objection from the Arbitrators, all discovery responses were included as part of the evidentiary record in the proceeding.

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[2] *See* Third Agreed Order to Extend Time for Arbitration entered on November 5, 1998.

II. DISCUSSION

Through negotiations both prior and subsequent to the hearing on the merits, the parties resolved several of the issues initially presented for arbitration. The following issues remained open for resolution in this arbitration proceeding: Issues 3(a) and 3(b); Issues 4(a) through (f); Issue 5; Issue 6(b); Issues 7(b) and 7(c); Issues 10(a) through (d); Issue 11; and Issues 12(a) through (d). After due consideration of the evidence, the arguments of the parties, applicable federal and state laws, rules and regulations, and the entire record in this proceeding, the Arbitrators deliberated and reached the following decisions with respect to the issues before them.

ISSUE 3(a): MUST NEXTLINK BE COLLOCATED AT BELLSOUTH'S PREMISES TO OBTAIN ACCESS TO BELLSOUTH'S DIGITAL CROSS-CONNECT SYSTEMS ("DCS")?

COMMENTS AND DISCUSSION:

According to NEXTLINK, access to DCS is a dispute over the definition of the unbundled transport element. NEXTLINK maintains that the unbundled transport network element includes DCS. NEXTLINK wants BellSouth to offer DCS with transport, contending that the Federal Communications Commission ("FCC") ordered all incumbent LECs to provide CLECs with access to DCS functionality with transport.

NEXTLINK disagrees with BellSouth that the request for access to DCS functionality with transport results in a combination of unbundled network elements. In its prefiled testimony, NEXTLINK states that BellSouth agreed in prior interconnection agreements and its Statement of Generally Available Terms and Conditions ("SGAT")[3] to provide such access to DCS when a

[3] BellSouth filed its revised SGAT on January 16, 1998, in Docket No. 97-00309.

CLEC is not collocated.[4] Yet, under cross-examination during the hearing, NEXTLINK witness Mr. Russell Land admitted that DCS access was not in BellSouth's current SGAT.[5] Mr. Land also admitted during cross-examination that NEXTLINK considers transport and DCS as one element when provisioned where NEXTLINK is not collocated, but as two separate elements when NEXTLINK is collocated.

BellSouth argues that NEXTLINK can obtain access to the routing capabilities provided by DCS without collocating by purchasing BellSouth's FlexServ offering. This retail service allows NEXTLINK to establish a link from a remote location to the control center in order to manage its own facilities through DCS without collocating. BellSouth believes that if NEXTLINK wants DCS for the purpose of channelization or multiplexing, it must be collocated in central offices where DCS has been deployed. Otherwise, BellSouth contends that it will be providing NEXTLINK with a combination of DCS and transport which it is not required to do under *Iowa Utilities Board v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *cert. granted* 118 S. Ct. 879 (1998) (hereinafter referred to as the "Eighth Circuit decision or opinion").

According to BellSouth, physical and virtual collocation are currently the only viable methods by which CLECs may have access to unbundled network elements, and these are the only methods of access identified by the 1996 Act. While BellSouth may believe that collocation is the only method for providing access to unbundled network elements, the 1996 Act does not expressly limit access to these elements via collocation. Under the Eighth Circuit's decision, states cannot require that BellSouth provide combinations of network elements, nevertheless, State Commissions have the flexibility to require that CLECs such as NEXTLINK be provided

[4] *See* Pre-filed Direct Testimony of Russell Land at 13 and Pre-filed Rebuttal Testimony at 8.

[5] *See* Hearing Transcript Vol. IIA at 356.

other viable means of interconnection. Because the availability of a means for efficiently combining network elements is extremely important to the development of competition in all segments of the market and due to the many complexities associated with collocation, the Arbitrators find that alternative methods to efficiently combine unbundled network elements must be available to CLECs at this time in order to facilitate the development of competition.

In concurring with the conclusion of the United States Department of Justice, the Arbitrators find that BellSouth's policy of requiring CLECs to collocate connecting equipment as the sole manner for accessing network elements may substantially delay entry. *See* Evaluation of the United States Department of Justice, *In re: Second Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA services in Louisiana*, CC Docket No. 98-121, at 12 (Aug. 19, 1998). The complexities associated with collocation, both actual and potential, may have the effect of placing entrants at a distinct competitive disadvantage. In the Arbitrators' view, acceptance of collocation as the sole method of interconnection would frustrate congressional intent by effectively delaying competition in local exchange markets.

Both the 1996 Act and the Eighth Circuit's decision contemplate that incumbent LECs would provide unbundled network elements in a manner that permits requesting carriers to combine such elements in order to provide a telecommunications service. 47 USC § 251(c)(3) requires the following of an incumbent LEC:

> **The duty to provide, to any requesting telecommunications carrier** for the provision of a telecommunications service, **nondiscriminatory access to network elements on an unbundled basis at any technically feasible [6] point** on

[6] The Federal Communications Commission ("FCC") defines "Technically Feasible" in 47 C.F.R. § 51.5 as follows:

> **Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network**

> rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement of this section and section 252. **An incumbent local exchange provider shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.** (Emphasis supplied).

Section 251 requires nondiscriminatory access to unbundled network elements so that a requesting carrier may bundle these elements in a manner that will permit it to provide telecommunications services. Further, the FCC's rules implementing Section 251 of the Act provide that "[t]echnically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited to: (1) Physical collocation and virtual collocation at the premises of an incumbent LEC; and (2) Meet point interconnection arrangements." *See* 47 C.F.R. § 51.321(b). Thus, despite the express provision in 47 USC § 251(c)(6) that provides for both physical and virtual collocation for access to unbundled network elements, the FCC has recognized that the Act does not prescribe collocation as the sole method to obtain access.

In addition, the Eighth Circuit specifically stated that "[t]he fact that incumbent LECs object to [the FCC rule requiring incumbent LECs to provide combinations of network elements] indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them." 120 F.3d at 813. Hence, to the extent practicable,

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> **shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods.** A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts. (Emphasis supplied).

and as acknowledged by BellSouth during the hearing, alternate methods to collocation should be made available to CLECs for combining unbundled network elements.

NEXTLINK proposes two such alternative methods -- the recent change method and direct access to BellSouth's network. The testimony presented in the case, however, is not sufficient to determine whether the recent change method is a viable alternative at this time. The remaining alternative to collocation is to permit NEXTLINK to obtain direct access to BellSouth's network facilities in order to combine unbundled network elements itself. Although direct access as proposed by NEXTLINK may be a viable method, NEXTLINK's proposal raises legitimate security concerns with respect to BellSouth's network. Specifically, BellSouth argues that direct access to its facilities could lead to an unacceptable risk of disruption of service as a result of technicians from numerous telecommunications carriers having access to the facilities used in providing service from BellSouth's central offices.

Neither party addressed how to reasonably mitigate security concerns other than BellSouth's position that direct access should not be allowed. As a reasonable solution to provide CLECs or NEXTLINK with an alternative method for combining unbundled network elements, while at the same time recognizing the security concerns presented by BellSouth, the Arbitrators find that NEXTLINK should be provided access to BellSouth's facilities through an independent third-party vendor who will actually perform the combining of unbundled network elements on NEXTLINK's behalf.

The Arbitrators also find that it is not necessary for NEXTLINK to be collocated in order to obtain access to DCS. If NEXTLINK wants DCS for routing and managing capabilities, then NEXTLINK may purchase FlexServ out of BellSouth's access tariff. If NEXTLINK wants DCS for channelization or multiplexing functionality in order to combine with transport, BellSouth

must provide NEXTLINK with access to its DCS facilities through an independent third-party vendor who would perform the actual combining of elements on NEXTLINK's behalf. The cost of having an independent third-party combine unbundled network elements must appropriately be borne by NEXTLINK. The qualifications of the independent third-party vendor performing the combinations and the procedures for selecting the vendor will be resolved through Final Best Offers.

NEXTLINK may also be provided channelization or multiplexing capabilities of DCS if BellSouth voluntarily decides to provide NEXTLINK with a combination of DCS and transport. If BellSouth were willing to provide this combination, NEXTLINK would not be precluded from combining unbundled network elements through an independent third-party vendor via direct access to DCS.

ORDERED:

1. That NEXTLINK is not required to be collocated in order to obtain access to DCS;

2. That, if NEXTLINK wants DCS for routing and managing capabilities, NEXTLINK may purchase FlexServ out of BellSouth's access tariff;

3. That, if NEXTLINK wants DCS for channelization or multiplexing functionality in order to combine with transport, BellSouth must provide NEXTLINK with access to its DCS facilities through an independent third-party vendor who will perform the actual combining of elements for NEXTLINK at NEXTLINK's expense; and

4. That the parties are directed to submit Final Best Offers concerning the qualifications of the independent third-party vendor performing the combinations for NEXTLINK and the procedures for selecting that vendor. The Final Best Offers must be

adequate to address BellSouth's security concerns without being so onerous so as to effectively discourage NEXTLINK's use of an independent third-party vendor to combine unbundled network elements on its behalf.

ISSUE 3(b): MUST NEXTLINK PAY A RECOMBINATION CHARGE ("GLUE CHARGE") AND EXECUTE A SEPARATE AGREEMENT TO OBTAIN ACCESS TO BELLSOUTH'S DCS?

COMMENTS AND DISCUSSION:

NEXTLINK argues that DCS functionality should be provided as part of transport and no glue charge should apply. BellSouth maintains that NEXTLINK's purchase of DCS through BellSouth's FlexServ offering or accessing DCS when it is collocated would not require that NEXTLINK pay a glue charge. However, because the Eighth Circuit ruled that incumbent LECs are not required to provide CLECs with combinations of network elements, any charges assessed by BellSouth for combining transport and DCS for NEXTLINK should be negotiated between the parties outside the parameters of this proceeding.

ORDERED:

1. That, to the extent BellSouth is willing to combine transport and DCS for NEXTLINK, the parties should negotiate the charge that would apply to such combinations, with the combinations and charges not being subject to the requirements of the 1996 Act.

ISSUE 4(a): WHAT OSS AND ENGINEERING STANDARDS MUST BELLSOUTH PROVIDE TO NEXTLINK TO PERMIT NEXTLINK TO RECOMBINE UNBUNDLED NETWORK ELEMENTS?

COMMENTS AND DISCUSSION:

NEXTLINK requests that BellSouth provide any necessary assistance or Operation Support Systems ("OSS") functions if NEXTLINK combines unbundled network elements. BellSouth witness Mr. Al Varner testified in his direct testimony that BellSouth does not have written specifications for OSS functions and engineering standards that provide instructions for its technicians to combine unbundled network elements.[7]

The Arbitrators have determined that NEXTLINK should be required to make a specific request to BellSouth identifying the elements to be combined. Upon the receipt of this request, BellSouth must provide to NEXTLINK, at no charge, any existing OSS and engineering specifications, design records and features and capabilities of each network element used by BellSouth when it provides services to its end-users. The parties are directed to submit Final Best Offers regarding the time frame between the request by NEXTLINK and the response by BellSouth.

ORDERED:

1. That NEXTLINK shall make a specific request identifying the unbundled network elements NEXTLINK seeks to combine;

2. That, upon receipt of such a request, BellSouth shall provide to NEXTLINK, at no charge, any existing OSS and engineering specifications, design records and features and

[7] *See* Hearing Transcript Vol. IIB, at 424.

capabilities of each network element used by BellSouth when it provides services to its end-users; and

3. That the parties are directed to submit Final Best Offers relative to the time frame within which BellSouth must respond to such a request by NEXTLINK.

ISSUE 4(b): MUST NEXTLINK BE COLLOCATED WITH BELLSOUTH IN ORDER TO RECOMBINE UNBUNDLED NETWORK ELEMENTS?

ISSUE 4(c): ARE THERE ANY TECHNICALLY FEASIBLE METHODS THAT BELLSOUTH MUST OFFER TO PERMIT NEXTLINK TO RECOMBINE UNBUNDLED NETWORK ELEMENTS WHERE IT IS NOT COLLOCATED?

COMMENTS AND DISCUSSION:

NEXTLINK has requested either direct access to BellSouth's network or use of the recent change process as alternatives to collocation. BellSouth witness Varner testified that, in BellSouth's view, physical and virtual collocation are currently the only viable methods of providing CLECs with access to unbundled network elements. According to Mr. Varner, neither direct access nor the recent change method are viable alternatives to collocation.[8]

The Arbitrators' reasoning in resolving Issue 3(a) applies equally to Issues 4(b) and (c). For the reasons previously stated, it is not necessary for NEXTLINK to be collocated in order to combine unbundled network elements. As an alternative to collocation, BellSouth must provide NEXTLINK with access to its network facilities through an independent third-party vendor who would perform the actual combining of elements on NEXTLINK's behalf. The cost of having an independent third-party vendor combine unbundled network elements must appropriately be

[8] *See* Hearing Transcript Vol. IIB, at 371-372.

borne by NEXTLINK. The qualifications of the independent third-party vendor performing the combinations and the procedures for selecting the vendor will be resolved in Final Best Offers.

ORDERED:

1. That NEXTLINK is not required to be collocated in order to combine unbundled network elements;

2. That, if NEXTLINK seeks to combine unbundled network elements, BellSouth must provide NEXTLINK with access to its network facilities through an independent third-party vendor who will perform the actual combining of elements for NEXTLINK at NEXTLINK's expense; and

3. That the parties are directed to submit Final Best Offers concerning the qualifications of the independent third-party vendor performing the combinations for NEXTLINK and the procedures for selecting that vendor, which must be adequate to address BellSouth's security concerns without being so onerous so as to effectively discourage NEXTLINK's use of an independent third-party vendor to combine elements on its behalf.

ISSUE 4(d): WHAT TERMS AND CONDITIONS SHOULD GOVERN THE RECOMBINATION PROCESS IF BELLSOUTH CHOOSES TO RECOMBINE UNBUNDLED NETWORK ELEMENTS ITSELF?

ISSUE 4(e): FOR WHAT FUNCTIONS, IF ANY, MAY BELLSOUTH IMPOSE A "GLUE CHARGE?"

ISSUE 4(f): MUST BELLSOUTH PROVIDE TRANSPORT AND A LOOP TOGETHER? IF SO, UNDER WHAT TERMS AND CONDITIONS?

COMMENTS AND DISCUSSION:

NEXTLINK argues that if BellSouth is required to provide combinations of network elements, the terms and conditions must be such that allow NEXTLINK a meaningful opportunity to compete. NEXTLINK contends that rates for combinations should be no more

than the sum of the Total Element Long Run Incremental Cost ("TELRIC") for each individual element involved. Also, NEXTLINK contends that BellSouth should be required to provide network combinations without the application of any glue charges.

Specifically, NEXTLINK desires access to unbundled loops at central offices where it is not collocated through the provisioning of a loop with transport without the imposition of a glue charge. NEXTLINK witness Land testified that NEXTLINK needs such access to serve those customers it cannot reach completely through its own facilities and that it is impossible for NEXTLINK to immediately collocate in every BellSouth central office. According to Mr. Land, all that is necessary for BellSouth to provide transport and a loop together is for a BellSouth technician to perform a cross-connect between the loop and transport provided to NEXTLINK.[9] NEXTLINK does not believe this request constitutes a combination of network elements.

BellSouth offers that, if NEXTLINK will identify the network combinations it wants, BellSouth is willing to negotiate outside of this proceeding, the terms, conditions, and prices under which BellSouth would provide such combinations. BellSouth witness Varner was of the opinion that combining transport and a loop together as NEXTLINK requested will resemble BellSouth's private line or special access services, both of which, are available for resale as a general tariff offering. In Mr. Varner's opinion, the Eighth Circuit decision does not require BellSouth to provide such network combinations and that requiring BellSouth to provide combinations of network elements to CLECs would discourage the development of facilities-based competition.[10]

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[9] *See* Pre filed Direct Testimony of Russell Land at 24.

[10] *See* Pre-filed Direct Testimony of Al Varner at 24 and Pre-filed Rebuttal Testimony at 23.

The Arbitrators recognize that under the Eighth Circuit decision, incumbent LECs are not required to combine unbundled network elements for CLECs, although the Eighth Circuit did not preclude incumbent LECs from voluntarily agreeing to provide such combinations. Since BellSouth is not required to provide combinations (such as combining a loop and transport), any charges assessed by BellSouth if it voluntarily agrees to do so should be negotiated between the parties outside the parameters of this proceeding.

ORDERED:

1. That, to the extent BellSouth is willing to combine network elements for NEXTLINK, the parties should negotiate the charge that would apply to such combinations, with the combinations and charges not being subject to the requirements of the 1996 Act.

ISSUE 5: SHOULD RECIPROCAL COMPENSATION FOR LOCAL TRAFFIC APPLY TO TRAFFIC TO AND FROM AN INFORMATION SERVICE PROVIDER OR AN ENHANCED SERVICE PROVIDER?

COMMENTS AND DISCUSSION:

NEXTLINK requests that the parties be required to treat traffic that originates from and terminates to an enhanced service provider ("ESP") or information service provider ("ISP") as local traffic and that reciprocal compensation should apply to such traffic. BellSouth believes that calls to ISPs are interstate because the information service itself is interstate. Consistent with the Authority's decision in Docket 98-00118 (*In Re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for the Issuance of a Show Cause Order*), traffic to or from ESPs or ISPs should be considered local traffic for which reciprocal compensation should be paid.

ORDERED:

1. That, consistent with the Authority's decision in Docket 98-00118, the parties are required to treat traffic that originates from and terminates to an enhanced service provider or an ISP as local traffic subject to the payment of reciprocal compensation.

ISSUE 6(b): IS IT APPROPRIATE TO INCLUDE REMEDIES, AND IF SO, WHAT SHOULD THOSE REMEDIES BE? (Performance Measurements, Reports and Remedies)

ISSUE 7(b): IS IT APPROPRIATE TO INCLUDE REMEDIES, AND IF SO, WHAT SHOULD THOSE REMEDIES BE? (Unbundled Loop Provisioning Intervals)

NEXTLINK has proposed a series of self-executing remedies that NEXTLINK asserts should apply in the event BellSouth fails to meet performance measures or loop provisioning intervals to which the parties have agreed. BellSouth contends that such remedies are not necessary or appropriate and that the only remedies which should apply are those to which the parties mutually agree.

Even assuming self-executing remedies such as those proposed by NEXTLINK are appropriate, a finding which the Arbitrators did not reach, the Arbitrators conclude that it is not possible to fashion remedies based on the evidentiary record developed in this arbitration proceeding. Although the issue of remedies could conceivably be resolved on Final Best Offers, the Arbitrators find that doing so would require a factual inquiry, which is ill-suited for resolution by Final Best Offers.

ORDERED:

1. That the establishment of remedies for BellSouth's failure to meet performance measures or loop provisioning intervals to which the parties have agreed will not be done within the confines of this proceeding because the evidentiary record herein will not support such action.

ISSUE 7(c): SHOULD BELLSOUTH PROVIDE ORDER COORDINATION AND TEST POINTS WITH ALL UNBUNDLED LOOPS AT NO ADDITIONAL COST?

COMMENTS AND DISCUSSION:

NEXTLINK proposes that BellSouth provide order coordination and test points with all unbundled loops at no additional cost. BellSouth states that it is proposing two different loop rates in Docket No. 97-01262 -- one that includes order coordination and test points and one that does not. The issue of "permanent" loop rates will be resolved in *In re: Contested Case Proceeding to Establish Final Cost Based Rates for Interconnection and Unbundled Network Elements*, Docket 97-01262. Until such time as "permanent" loop rates are established, the parties should use the existing proxy loop rates as established by the Authority in *In re: Matter of Interconnection Agreement Negotiation Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc., et al.*, Docket No. 96-01152 ("AT&T/MCI Arbitration"), which includes order coordination and test points.

ORDERED:

1. That, until the Authority establishes "permanent" loop rates in Docket 97-01262, the parties should use the existing proxy loop rates established by the Authority in the AT&T/MCI Arbitration, which include order coordination and test points.

ISSUE 10(a): HOW SHOULD THE POINT OF DEMARCATION BE ESTABLISHED FOR BUILDINGS SERVED BY BELLSOUTH, INCLUDING UNDER WHAT CONDITIONS BELLSOUTH MAY ESTABLISH SUCH POINT OF DEMARCATION?

COMMENTS AND DISCUSSION:

NEXTLINK witness Land contends that relative to wire installed after 1990, the demarcation point should be presumed to be at the minimum point of entry ("MPOE"). According to Land, in situations where wiring was installed prior to August 1990, if BellSouth desires to locate the demarcation at some point other than the MPOE, BellSouth must provide evidence to NEXTLINK or the Authority demonstrating that the wire existed in the building before 1990 and that the building owner did not assert control of that wire.[11]

BellSouth, on the other hand, contends that the demarcation point should be established consistent with rules promulgated by the FCC in Docket 88-57, which are currently codified at 47 C.F.R. Section 68.3(b) (1997).[12] These rules state that in multi-unit premises that exist as of

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[11] *See* Pre-filed Direct Testimony of Russell Land at 35.

[12] 47 C.F.R. § 68.3(b)provides in pertinent part as follows:

(b) Multiunit installations.

(1) In multiunit premises existing as of August 13, 1990, the demarcation point shall be determined in accordance with the local carrier's reasonable and non-discriminatory standard operating practices. Provided, however, that where there are multiple demarcation points within the multiunit premises, a demarcation point for a customer shall not be further inside the customer's premises than a point twelve inches from where the wiring enters the customer's premises, or as close thereto as practicable.

(2) In multiunit premises in which wiring is installed after August 13, 1990, including major additions or rearrangements of wiring existing prior to that date, the telephone company may establish a reasonable and nondiscriminatory practice of placing the demarcation point at the minimum point of entry. If the telephone company does not elect to establish a practice of placing the demarcation point at the minimum point of entry, the multiunit premises owner shall determine the location of the demarcation point or points. The multiunit premises owner shall determine whether there shall be a single demarcation point location for all customers or separate such locations for each customer. Provided, however, that where there are multiple demarcation points within the multiunit premises, a demarcation point for a customer shall not be further inside the

August 13, 1990, the demarcation point shall be determined in accordance with the local carrier's reasonable and nondiscriminatory standard operating practices. As required by the aforementioned FCC rules, a multi-unit premises in which wiring is installed after August 13, 1990, including major additions or rearrangements of wiring existing prior to that date, BellSouth will comply with a building owner's request for a single demarcation point to serve an entire building. If the building owner does not want a single demarcation point, BellSouth will provide demarcation points in each tenant's office or suite. This suggests that BellSouth queries the building owners and that the responses of the building owners guide the appropriate treatment of demarcation points consistent with 47 C.F.R. § 68.3(b).

The Arbitrators referred to 47 C.F.R. § 68.3(b) and noted that the point of demarcation in multi-unit buildings served by BellSouth should be established consistent with these rules. In addition to the requirements set forth under these FCC rules, the Arbitrators have determined that BellSouth should, upon request by NEXTLINK, make available on a timely basis any and all documentation maintained by BellSouth relative to establishing points of demarcation. This includes reducing to writing and certifying any oral representations made to BellSouth by building owners concerning demarcation points. The time within which BellSouth must respond to such a request by NEXTLINK will be resolved in Final Best Offers. If NEXTLINK believes that BellSouth is not in compliance with the FCC rules for establishing the demarcation point in a particular customer location, then NEXTLINK should file a complaint with the Authority.

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customer's premises than a point 30 cm (12 in) from where the wiring enters the customer's premises, or as close thereto as practicable.
(3) In multiunit premises with more than one customer, the premises owner may adopt a policy restricting a customer's access to wiring on the premises to only that wiring located in the customer's individual unit that serves only that particular customer.

ORDERED:

1. That the point of demarcation in multi-unit buildings served by BellSouth should be established consistent with 47 C.F.R. § 68.3(b);

2. That upon request by NEXTLINK, BellSouth shall make available to NEXTLINK on a timely basis any and all documentation maintained by BellSouth relative to establishing points of demarcation. This includes reducing to writing and certifying any oral representations made to BellSouth by building owners concerning demarcation points;

3. That the parties are directed to submit Final Best Offers concerning the time within which BellSouth must respond to a request by NEXTLINK for documentation concerning the location of the demarcation point in a particular multi-unit location; and

4. That, if NEXTLINK believes BellSouth is not in compliance with 47 C.F.R. § 68.3(b) (the FCC rules governing the establishment of the demarcation point in a particular customer location), then NEXTLINK should file a complaint with the Authority.

ISSUE 10(b): HOW MUST BELLSOUTH DEMONSTRATE THAT THE DEMARCATION POINT IN A PARTICULAR BUILDING HAS BEEN ESTABLISHED?

COMMENTS AND DISCUSSION:

NEXTLINK witness Land testified that if BellSouth desires to locate the demarcation point in a particular building at some point other than the MPOE, BellSouth should have to provide evidence to NEXTLINK demonstrating that the demarcation point has been properly established in that building.[13]

BellSouth contends that since no business owner or residential property owner in

[13] *See* Pre-filed Direct Testimony of Russell Land at 35.

Tennessee has elected to place the demarcation point at the MPOE, NEXTLINK can conclude that the demarcation point in every building is located in each tenant's office or suite. BellSouth also contends that NEXTLINK may contact BellSouth's outside plant engineering staff with requests about specific locations. According to the testimony of BellSouth witness Milner, demarcation points in buildings are based on verbal communication between property owners and BellSouth personnel. Additionally, Mr. Milner testified that there is not a written document that building owners are required to sign that explains the options for determining the demarcation point.[14]

The Arbitrators find that for a request regarding the location of the demarcation point in a specific multi-unit building, BellSouth must provide NEXTLINK with any existing written documentation, to the extent such documentation exists, stating how the demarcation point was determined. If written documentation does not exist, BellSouth should provide a contact name and telephone number of the appropriate outside plant staff and building owner. In addition, BellSouth should be required to maintain written documentation on a going-forward basis describing how the demarcation point has been established in a particular building. An authorized representative of the building owner should sign this document. Requiring BellSouth to obtain written documentation regarding the establishment of demarcation points on a going-forward basis should prevent, or at least limit, the number of disagreements that may arise over demarcation points in the future.

ORDERED:

1. That, upon request by NEXTLINK regarding the location of the demarcation point in a specific multi-unit building, BellSouth shall provide NEXTLINK with any existing written

[14] *See* Hearing Transcript Vol. ID, at 299.

documentation stating how the demarcation point was determined, to the extent such documentation exists;

2. That, if written documentation does not exist, BellSouth shall provide a contact name and telephone number of the appropriate BellSouth outside plant staff and building owner; and

3. That BellSouth from the date of the entry of this Order shall maintain written documentation on a going-forward basis describing how the demarcation point has been established in a particular building, which should be signed by an authorized representative of the building owner.

ISSUE 10(c): SHOULD THERE BE ANY RESTRICTIONS ON A BUILDING OWNER'S ABILITY TO ESTABLISH THE DEMARCATION POINT AND UTILIZE RISER CABLE AND/OR OTHER TERMINATING WIRE WITHIN THAT OWNER'S BUILDING?

COMMENTS AND DISCUSSION:

The FCC rules provide sufficient guidance on this issue, and a building owner's ability to establish the demarcation point and utilize riser cable or network terminating wire within that building should be governed by those rules.

ORDERED:

1. That a building owner's ability to establish the demarcation point and utilize riser cable or network terminating wire within that building should be governed by applicable FCC rules.

ISSUE 10(d): WHERE THE DEMARCATION POINT HAS PROPERLY BEEN ESTABLISHED SUCH THAT BELLSOUTH OWNS THE RISER CABLE AND NETWORK TERMINATING WIRE WITHIN A PARTICULAR BUILDING, UNDER WHAT TERMS AND CONDITIONS SHOULD NEXTLINK BE ALLOWED ACCESS TO THAT NETWORK TERMINATING WIRE AND/OR RISER CABLE?

COMMENTS AND DISCUSSION:

NEXTLINK asserts that it should be allowed to purchase riser cable and network terminating wire from BellSouth. BellSouth contends that riser cable and network terminating wire are sub-loop elements that NEXTLINK can purchase by placing an order and paying for such elements. BellSouth also asks the Authority to order NEXTLINK to cease its practice of unilaterally attaching its facilities to BellSouth's network terminating wire and riser cable.

The Arbitrators find that in instances where BellSouth owns the riser cable and network terminating wire within a multi-unit building, and NEXTLINK has purchased a loop from BellSouth to serve an end-user customer in that building, a separate rate need not be established for riser cable and network terminating wire because they are part of the facilities for which loop rates are established. However, when NEXTLINK installs facilities in a multi-unit building and only needs access to the riser cable and network terminating wire portion of the loop, rates should be established for these separate sub-loop elements. The proxy rates for the riser cable and network terminating wire portions of the local loop should be resolved in Final Best Offers.

ORDERED:

1. That in instances where BellSouth owns the riser cable and network terminating wire within a multi-unit building, and NEXTLINK has purchased a loop from BellSouth to serve an end-user customer in that building, a separate rate need not be established for riser cable and

network terminating wire because they are part of the facilities for which loop rates are established.

2. That, when NEXTLINK installs facilities in a multi-unit building and only needs access to BellSouth's riser cable and network terminating wire in order to serve an end-user customer, rates should be established for these separate sub-loop elements; and

3. That the parties shall submit Final Best Offers on the proxy rates to be paid by NEXTLINK for BellSouth's riser cable and network terminating wire when NEXTLINK seeks to make use of these separate sub-loop elements.

ISSUE 11: WHAT INTERVALS, IF ANY, SHOULD GOVERN BELLSOUTH'S APPLICATION PROCESSING, ORDERING, PROVISIONING, INSTALLATION, AND REPAIR OF POLES, DUCTS, CONDUITS, AND RIGHTS-OF-WAY?

COMMENTS AND DISCUSSION:

NEXTLINK's witness, Mr. Gregory Breetz, testified about proposed intervals that should be established to apply to BellSouth's application processing, performance of pre-license surveys, and make-ready work conducted in connection with NEXTLINK's request for access to BellSouth's poles, ducts, conduits, and rights-of-way. NEXTLINK states that without these intervals, BellSouth has no incentive to process and implement requests for access in an efficient, timely manner. BellSouth's witness Milner responds that appropriate standard intervals do not exist for the ordering and provisioning of access to poles ducts conduits, and rights-of-way because of the uniqueness of each request.

The Arbitrators find that BellSouth should inform NEXTLINK whether it can accommodate NEXTLINK's license request and respond to NEXTLINK's license application within fifteen (15) calendar days after receipt of the application. The remaining intervals for ordering, provisioning, installation, and repair of poles, ducts, conduits, and rights-of-way, however, are issues that will be determined in *In re: BellSouth's Entry Into Long Distance (InterLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996,* Docket No. 97-00309.[15] Interim intervals should be resolved in Final Best Offers.

[15] The Arbitrators note that if BellSouth does not pursue its 271 Application pending in Docket No. 97-00309 to completion, then the provisions of the 1996 Act, independent of 47 U.S.C § 271 that require BellSouth to provide interconnection, unbundled access, resale, collocation and other specified rights, duties and privileges, will be used to resolve the remaining issues under Issue 11 upon the request any party to this proceeding.

ORDERED:

1. That BellSouth shall inform NEXTLINK whether it can accommodate NEXTLINK's license request and respond to NEXTLINK's license application within fifteen (15) calendar days after receipt of the application;

2. That the remaining intervals for the ordering, provisioning, installation, and repair of poles, ducts, conduits, and rights-of-way will be determined in Docket No. 97-00309; and

3. That, in the interim, the parties shall submit Final Best Offers for the remaining intervals for ordering, provisioning, installation, and repair of poles, ducts, conduits, and rights-of-way.

ISSUE 12(a): HOW SHOULD BELLSOUTH PROVIDE ACCESS TO LOOPS SERVED BY BELLSOUTH'S REMOTE SWITCHES?

ISSUE 12(b): MUST NEXTLINK BE COLLOCATED AT A BELLSOUTH STRUCTURE CONTAINING A REMOTE SWITCH TO OBTAIN ACCESS TO LOOPS SERVED OFF THAT REMOTE?

ISSUE 12(c): MUST NEXTLINK BE COLLOCATED AT A BELLSOUTH STRUCTURE CONTAINING THE REMOTE SWITCH EVEN WHEN NEXTLINK IS COLLOCATED AT THAT REMOTE SWITCH'S HOST CENTRAL OFFICE?

ISSUE 12(d): IF COLLOCATION IS REQUIRED, HOW MUST BELLSOUTH PROVIDE ACCESS TO LOOPS SERVED BY A REMOTE SWITCH WHEN COLLOCATION IS IMPOSSIBLE DUE TO SPACE OR OTHER LIMITATIONS?

COMMENTS AND DISCUSSION:

NEXTLINK states that it is not economically feasible for it to collocate in all BellSouth central offices in order to gain access to unbundled loops, and that BellSouth's requirement that new entrants be collocated in order to gain access to unbundled loops effectively prevents BellSouth from facing competition in large parts of Tennessee. In lieu of collocation at the remote switch, NEXTLINK argues that it should be allowed to acquire special access transport from the central office in which it is collocated to the remote switching office for access to unbundled loops at the remote switch. More specifically, NEXTLINK asserts that BellSouth should provide unbundled loops, including multiplexing, cross-connects and transport from a remote switch to the host central office where NEXTLINK is collocated. NEXTLINK does not believe that this type of arrangement constitutes a combination of elements by BellSouth because NEXTLINK will only request such loops from BellSouth in order to combine them with NEXTLINK's facilities to provide a completed service to NEXTLINK's customers. According to NEXTLINK, if the Arbitrators find that NEXTLINK must be collocated at a BellSouth remote

switch in order to gain access to unbundled loops, BellSouth should provide alternative access to loops served by that remote switch if collocation is impossible due to space or other limitations.

BellSouth contends that collocation at the central office in which the remote switch is located is currently the only viable method by which a CLEC can obtain access to an unbundled loop served by that remote switch. BellSouth asserts that if unbundled loops terminated in a remote switch are trunked back to the host where NEXTLINK is collocated, as proposed by NEXTLINK, it will result in BellSouth providing a combination of transport and a loop, which BellSouth is not required to provide.[16] BellSouth maintains that even in those instances in which physical collocation is not practical for technical reasons or because of space limitation, virtual collocation is available. BellSouth states that it is not aware of any central office where virtual collocation is not currently possible. Further, because NEXTLINK has not identified any central office where it is impossible to collocate through either physical or virtual collocation, BellSouth contends that the Arbitrators need not resolve this issue. BellSouth does state, however, that in the unlikely event that collocation becomes impossible at a particular central office in the future, BellSouth is willing to negotiate with NEXTLINK a mutually acceptable alternative to collocation.

Consistent with the Arbitrators' decision on Issues 3 and 4, the Arbitrators determine that it is not necessary for NEXTLINK to be collocated at a remote switch in order to obtain access to unbundled loops served from that remote. When NEXTLINK is not collocated at a remote switch, regardless of whether NEXTLINK is collocated at the host central office, BellSouth must provide NEXTLINK with access to its network facilities through an independent third-party

[16] See *Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753 (8th Cir. 1997).

vendor who would perform the actual combining of elements on NEXTLINK's behalf. The cost of having an independent third-party vendor combine unbundled network elements must appropriately be borne by NEXTLINK. The qualifications of the independent third-party vendor performing the combinations and the procedures for selecting the vendor will be resolved in Final Best Offers consistent with the Final and Best Offers for Issues 3(a), 4(b) and 4(c).

ORDERED:

1. That NEXTLINK is not required to be collocated at a remote switch in order to obtain access to unbundled loops served from that remote;

2. That, if NEXTLINK seeks to combine unbundled network elements when it is not collocated at the remote switch, BellSouth must provide NEXTLINK with access to its network facilities through an independent third-party vendor who will perform the actual combining of elements for NEXTLINK at NEXTLINK's expense; and

3. That the parties are directed to submit Final Best Offers concerning the qualifications of the independent third-party vendor performing the combinations for NEXTLINK and the procedures for selecting that vendor, which must be adequate to address BellSouth's security concerns without being so onerous so as to effectively discourage NEXTLINK's use of an independent third-party vendor to combine elements on its behalf.

CONCLUSION

The Arbitrators state that the decisions made on October 6, 1998, are considered rendered when voted upon that day. The Arbitrators conclude that the foregoing First Order of Arbitration Award reflects resolution of the issues presented by the parties for arbitration. The Arbitrators conclude that their resolution of these issues complies with the provisions of the Federal Telecommunications Act of 1996, and is supported by the record in this proceeding.

TENNESSEE REGULATORY AUTHORITY,
BY ITS DIRECTORS ACTING AS ARBITRATORS

CHAIRMAN MELVIN MALONE

DIRECTOR LYNN GREER

DIRECTOR SARA KYLE

ATTEST:

EXECUTIVE SECRETARY