BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

JUNE 25, 1999

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

FINAL ORDER OF ARBITRATION AWARD

This Final Order of 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 47 U.S.C. §§ 251 and 252, at a public meeting held on November 17, 1998.

With the passage of the Federal Telecommunications Act of 1996 ("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

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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).

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 this statutory time limit until November 20, 1998.[1]

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 appearances 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.

On October 6, 1998, the Arbitrators deliberated on the merits of this matter and during the course of those deliberations, they determined that some issues or aspects of those issues

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

should be resolved through the use of Final Best Offers. (This approach is consistent with CC Docket 96-98, FCC 96-325, 51.807(d)(1), entered August 8, 1996). The parties filed their Final Best Offers on October 21, 1998. BellSouth filed a reply to NEXTLINK's Final Best Offers on October 30, 1998. Prior to the Arbitrators' consideration of the Final and Best Offers, the parties resolved Issue 4(a) - What OCC and engineering standards must BellSouth provide to NEXTLINK to permit NEXTLINK to recombine Unbundled Network Elements. On November 17, 1998, the Arbitrators considered these filings and rendered the decisions on the remaining seven (7) issues as set forth herein.

First, the Arbitrators considered all of the issues pertaining to the necessary qualifications of the third-party vendors that will perform network combinations for NEXTLINK as well as the procedures for selecting those vendors. In considering the requirements for third-party vendors, the Arbitrators considered Issues 3(a), 4(b) and (c), and 12.

Issues 3(a), 4(b&c) and 12: What should the necessary qualifications be for the third-party vendor technicians performing network combinations and the procedures for selecting such vendors.

BellSouth stated that it would provide NEXTLINK with a list of certified third-party vendors from which NEXTLINK can designate a vendor who will be given access to BellSouth's network in order to combine unbundled elements for NEXTLINK. BellSouth defined a certified independent third-party vendor as one that has been certified by BellSouth and that is not owned or controlled by or affiliated with either BellSouth or NEXTLINK. NEXTLINK stated that its final best offer recognizes that existing procedures and criteria are in place which permit third-party vendors access to BellSouth's network and facilities. NEXTLINK, however, disagreed with prohibiting BellSouth and NEXTLINK or their affiliates from qualifying as third-party

vendors. The Arbitrators are clear in designating that an independent third-party vendor actually perform the combinations. If NEXTLINK was allowed direct access to BellSouth facilities to combine unbundled network elements for itself, that would undermine the security concerns raised in this proceeding. Therefore, the Arbitrators find that BellSouth's proposed language better addresses the objective set forth by the Arbitrators on October 6, 1998.

Although both parties agree that BellSouth's existing qualifications for certifying vendors should be used, BellSouth proposed that it be permitted to amend such procedures as may be reasonably necessary in the future. BellSouth also stated that it "shall not unreasonably withhold certification of any qualified vendor, although nothing prevents BellSouth from placing reasonable limitations on the number of vendors that are certified at any given time." Limiting the number of vendors was a specific concern of BellSouth and recognized as a valid concern by the Arbitrators. BellSouth asserted that an unacceptable risk of disruption of service could result if technicians from numerous companies were permitted direct access to the various facilities of all companies who provide service from a BellSouth central office. In this regard, the security concerns raised in this proceeding are much better addressed by BellSouth's language.

BellSouth proposed an indemnification provision stating that NEXTLINK would hold harmless BellSouth for claims and losses resulting from work performed by the certified independent third-party vendor. BellSouth also proposed language requiring NEXTLINK to furnish certificates or adequate proof of insurance coverage before the third-party would be permitted access to BellSouth's network. NEXTLINK's proposed language contains no such provisions. The Arbitrators have determined that the indemnification provision and insurance requirements are legitimate steps in addressing security concerns relative to BellSouth's network.

Finally, NEXTLINK proposed language in section 1.4.5 that states "If BellSouth offers additional method(s) of access to combine network elements in another interconnection agreement, tariff or as a condition of obtaining state or federal approval under section 271 of the federal Telecommunications Act, BellSouth shall make those method(s) available to NEXTLINK". It is the opinion of the Arbitrators that NEXTLINK's proposed language rises to the level of permitting the establishment of pick and choose practice, which has been specifically overturned by the Eighth Circuit Court in Iowa Utilities Bd. v. F.C.C., 120 F.3d 753, 800-801 (8th Cir. 1997).[2] Therefore, for the reasons set forth above, the Arbitrators adopt BellSouth's proposed language regarding the qualifications of the third-party vendor technicians.

Issue 10(a): What timeframe should be established in which BellSouth must make available to NEXTLINK all documentation maintained by BellSouth relative to establishing points of demarcation.

The Arbitrators ruled on October 6, 1998 that the demarcation point should be established consistent with FCC Docket 88-57. Additionally, it was ruled that BellSouth must provide on a timely basis any existing written documentation on how the demarcation point was established; if written documentation does not exist, BellSouth should provide NEXTLINK with a contact name and telephone number. The Arbitrators also ruled that BellSouth should be required to maintain written information on a going-forward basis describing how demarcation points are established, and that this documentation should be signed by an authorized representative of the property owner.

[2] After the November 17, 1998, decision of the Arbitrators on the Final Best Offers of the parties in this proceeding, 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 on November 17, 1998. 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.

Because "timely" varies by parties, there is a potential for confusion among the parties on a specific time frame for the information to be provided. In order to prevent this confusion, the Arbitrators requested that the parties file final best offers on "what is a timely basis."

NEXTLINK proposed that BellSouth provide existing written documentation within forty-eight (48) hours. They also proposed forty-eight (48) hours turnaround for this information on a going-forward basis. BellSouth proposed to provide NEXTLINK written documentation within five (5) business days from the receipt of NEXTLINK's request.

Additionally, NEXTLINK proposed that its requests for information and/or documentation regarding the location of demarcation points for specific locations shall be protected from disclosure. More specifically, NEXTLINK proposed that BellSouth not disclose such information to its retail sales and marketing personnel. BellSouth proposed no such provision, nor offered an alternative solution.

Based on the preceding, the Arbitrators have determined that it is reasonable for BellSouth to provide any information written or otherwise regarding the establishment of the demarcation point within forty-eight (48) hours. The Arbitrators also determined that the proposed disclosure protection by NEXTLINK is reasonable and may prevent anti-competitive practices.

Issue 10(d): What Proxy rates should be established for riser cable and terminating wire portion of the loop.

NEXTLINK proposed that the parties continue negotiations and agree to amend the interconnection agreement with regard to provision and/or pricing of riser cable and terminating wire. NEXTLINK further proposed that if the parties were unable to reach an agreement within ninety (90) days, either party may petition the Tennessee Regulatory Authority ("Authority") to establish interim prices.

BellSouth proposed a list of specific interim, or proxy, non-recurring and recurring prices for these elements. The rates proposed by BellSouth appear to be consistent with the proxy rates for loop elements previously adopted by the Authority.

The Arbitrators requested that the parties submit final best offers to establish a proxy rate for the riser cable and terminating wire portion of the loop. The Arbitrators did not suggest that the parties continue to negotiate as NEXTLINK suggests. The parties have had an appropriate amount of time in which to negotiate these prices, but have failed to do so. Thus, the Arbitrators determined that they would adopt the prices proposed by BellSouth for riser cable and terminating wire on an interim basis until permanent prices can be addressed for these elements. These rates can be found in **Appendix A**. In rendering this decision, the Arbitrators take note that the riser cable and terminating wire portion of the loop are not separate elements being considered in Authority Docket No. 97-01262. Therefore, a separate proceeding must be established to address cost based pricing of these elements.

Issue 11: What is the appropriate timeframe for ordering, provisioning, installation, and repair of poles, ducts, and conduits and right-of-ways.

In Section 7.1.3 of the proposed interconnection agreement, the parties seem to agree to the proposed language with the exception of one phrase. NEXTLINK proposed the following language:

> Within 15 calendar days of receipt of a License Application, BellSouth will acknowledge such receipt and: (1) if the License Application is complete and accurate, provide NEXTLINK with an estimate of the cost of conducting the pre-license survey and whether it can accommodate NEXTLINK's Application, provided however, that accommodating NEXTLINK's License Application does not mean BellSouth **will grant** License Application within 15 days of receipt of the License Application. (2) If the License Application is incomplete or

inaccurate, will identify for NEXTLINK the deficiencies in the License Application.

BellSouth proposes the words "shall issue" in place of "will grant" which is highlighted above.

The Arbitrators have determined that it is appropriate to adopt NEXTLINK's proposed language in Section 7.1.3.

NEXTLINK proposed the following language in 7.1.4:

> Within 30 calendar days of receipt of BellSouth's acknowledgment and the pre-license survey cost estimate, NEXTLINK shall indicate its intent to proceed with the License Application by submitting to BellSouth the associated fees for the pre-license survey. Upon receipt of the appropriate fees, BellSouth shall promptly proceed with the Pre-license Survey and the Make-Ready Estimate and return the results of the survey and the Make-Ready Estimate (including the costs involved and the duration of the project) to NEXTLINK within 30 calendar days.

BellSouth agrees with the above language except that they propose thirty-five (35) business days to return the survey and Make-Ready Estimate to NEXTLINK.

In essence, NEXTLINK proposes four (4) weeks while BellSouth proposes seven (7) weeks for returning the results of the survey and the Make-Ready estimate. The Arbitrators have determined that based on the amount of work which appears to be required as evidenced by the material existing in the record, four (4) weeks is a reasonable timeframe for such work.

CONCLUSION

The Arbitrators state that the decisions made on November 17, 1998 are considered rendered on the day upon which they are voted. 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

Melvin J. Malone, Chairman

H. Lynn Greer, Jr., Director

Sara Kyle, Director

Attest:

K. David Waddell, Executive Secretary

Unbundled Riser Cable (USL-R)

- Recurring, per month, per 2-wire pair	$2.06
- Nonrecurring	
First	$390.17
Additional, each	$293.26

Unbundled Network Terminating Wire (UNTW)

- Recurring, UNTW Pair, per pair, per month	$2.00
- Nonrecurring	
Site Visit Survey, per MDU/MTU Complex	$216.84
Site Visit Set-up-Terminal Preparation, per terminal	
-First terminal	$ 95.77
-Additional, each additional terminal	$ 63.06
Access Terminal Provisioning & 1st 25 pair panel,	
-First terminal	$109.22
-Additional, each additional terminal	108.11
Existing Access Terminal Provisioning	
-First terminal	$ 34.31
-Additional	33.19
UNTW Pair Provisioning, per pair	
-First	$ 8.85
-Additional	7.73
Service Visit for Provisioning, per request, Per MDU/MTU Complex	$ 53.73
Manual Service Order, NRC	$ 40.20