NEXTLINK™



June 29, 1999

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

RE: Petition of NEXTLINK Tennessee, L.L.C. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc.
Docket No.: 98-00123

Dear Mr. Waddell:

Enclosed are the original and thirteen (13) copies of NEXTLINK's Reply to BellSouth's Response to Petition for Reconsideration.

A copy is being served on counsel of record via U.S. Mail.

Sincerely,

Dana Shaffer, Director
Legal and Regulatory Affairs

DS:jr
Enclosure

cc: Party of Record

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BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

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| IN RE: PETITION OF NEXTLINK TENNESSEE, INC. FOR ARBITRATION OF INTERCONNECTION WITH BELLSOUTH TELECOMMUNICATIONS, INC. | Dkt. No. 98-00123<br><br>NEXTLINK REPLY TO BELLSOUTH RESPONSE TO PETITION FOR RECONSIDERATION |

NEXTLINK Tennessee, Inc. ("NEXTLINK") respectfully submits the following reply to the Response of BellSouth Telecommunications, Inc. ("BellSouth") to NEXTLINK's Petition for Reconsideration of the TRA's First Order of Arbitration Award ("Petition"). BellSouth refuses even to address the merits of the Petition but bases its opposition entirely on procedural arguments that are inapplicable and incorrect. Accordingly, the TRA should grant NEXTLINK's Petition.

## I. DISCUSSION

BellSouth attempts to elevate inaccurate form over substance by claiming that the arbitration concluded in November 1998 and that NEXTLINK's Petition is untimely. The First Order of Arbitration Award, not the Authority's oral ruling, is the TRA's official decision, and the authority on which BellSouth purports to rely is not to the contrary. Neither federal law nor the Authority's prior arbitration decisions preclude the TRA from entertaining NEXTLINK's Petition now, rather than following a convoluted regulatory proceeding or review by the federal district court. The TRA, therefore, should affirm its commitment to bringing the benefits of greater competition to Tennessee telecommunications consumers by granting the Petition and amending its First Order of Arbitration Award accordingly.

BellSouth's primary argument in opposition to NEXTLINK's Petition is that under state and federal law, the TRA resolved the disputed issues in its oral ruling on November 17, 1998, and cannot now amend that decision. BellSouth is mistaken.

There is no legitimate authority for the proposition that oral deliberations of an agency amount to a final order simply because such deliberations are "on the record," as BellSouth claims. The Uniform Procedures Act ("UAPA"), as codified at Tenn. Code Ann. § 4-5-314(c) and (g), respectively, mandates that the final order of an agency "shall include conclusions of law, the policy reasons therefor, and findings of fact for all aspects of the order, including the remedy prescribed..." and "shall be rendered in writing." (Emphasis added.) Under state law, therefore, the oral deliberations of the Authority on November 17, 1999 could not have constituted a final order.[1] NEXTLINK's Motion for Reconsideration, filed May 28, 1999, thus was properly filed within ten days of the Authority's May 18, 1999 final order, and state law does not preclude the Authority's consideration of that motion.

BellSouth nevertheless cites *Consumer Advocate Division v. Tennessee Regulatory Authority* for the proposition that, under state law, the TRA's oral decision amounted to a final order because it was on the record. BellSouth Response at 2, fn.2, citing 1998 Tenn. App. LEXIS 428, *9. BellSouth is quick to point to the court's statement that the "utility could have relied upon 'the TRA's oral decision as the basis for its action of putting the rates into effect' since it had been 'stated in the record' as required by Tenn. Code Ann. § 65-2-112." Id. (emphasis added). The court in *Consumer Advocate*, however, did not uphold the utility's rate increase based on any determination that the Authority's oral decision approving such rates was a final order. Rather, the court upheld the rate increase because the utility had, subsequent to the oral decision, given notice of the rate increase and was entitled, under Tenn. Code Ann. § 65-5-203(b)(1), to place the increased rates in effect six months after giving such notice.

[1] If correct, BellSouth's argument that the oral deliberations of the Authority amount to a final order as long as those deliberations simply are stated on the record would lead to the absurd result that every deliberation on the record would amount to a final order. Consequently, motions for reconsideration of any Authority action would routinely have to be filed within ten days of oral deliberation on the matter – often months prior to the issuance of any written order. Such a result would not only violate procedural due process requirements, but also would render the Authority's written orders meaningless.

BellSouth, in its misplaced reliance on *Consumer Advocate,* also ignores the court's explicit caveat that the statute requires that either a written or oral decision contain "a statement of the findings of fact and conclusions of law upon which the decision of the authority is based," and that the court did "not express an opinion on whether the...oral decision complies with that mandate." 1998 Tenn. App. LEXIS 428, *9-10. BellSouth does not even contend that the Authority's oral decision in this matter on November 17, 1999 meets the requirements for a final decision set forth in Tenn. Code Ann. § 65-2-112. Even if the TRA's oral decision could be construed to comply with that statute, Tenn. Code Ann. § 4-5-10 provides, in cases of conflict between UAPA and any statute, that the UAPA – and its requirement that the final order be in writing – controls. Under state law, therefore, the First Order of Arbitration Award, not the TRA's oral decision, represents the final agency order, and NEXTLINK's petition for reconsideration of that order was timely filed.

Nor does the federal Telecommunications Act of 1996 ("Act") preclude TRA reconsideration of its decisions in the First Order of Arbitration Award. Section 252(b)(4)(C) requires the state commission to resolve unresolved issues within nine months of the request for negotiations, but Section 252(e)(1) requires that an arbitrated agreement be submitted to the state commission for separate approval, which can be denied under Section 252(e)(2)(B) if the arbitrated provisions do not meet the requirements of the Act. Following BellSouth's logic, the Authority could refuse to reconsider its decision as an arbitrator, but could then reject the agreement as the reviewing body for failure to comply with the Act, requiring reconsideration by the TRA as the arbitrator on "remand." The TRA should refuse to engage in such a convoluted, inefficient, and ultimately meaningless process.[2] Rather than require the parties to waste time

[2] Indeed, the only sanction for failure to complete the arbitration within the statutory time frame is that NEXTLINK, as the petitioning party, could seek FCC preemption of TRA jurisdiction to resolve the disputed issues under Section 252(e)(5). NEXTLINK believes that the TRA is the appropriate body to resolve these issues – as evidenced by NEXTLINK's waivers of the statutory time frames in response to the TRA's earlier requests – and NEXTLINK has not sought, and has no intention of seeking, FCC preemption. Other state commissions have taken the time necessary to resolve arbitrations in substantive compliance with the Act, even if that means

and resources to develop and submit an agreement that does not comply with the Act, the Commission should reconsider and conform its decision to federal law now so that the parties can submit an agreement that can be approved.

BellSouth contends that the TRA's prior decision in BellSouth's arbitration with AT&T and MCI somehow precludes such a process, but the Authority's prior decision cannot be interpreted so narrowly. BellSouth acknowledges that the TRA "recogniz[ed] that it could 'act to clarify and to correct mistakes and omissions'" in its arbitration order. BellSouth Response at 2 (quoting March 18, 1997 Tr. at 11-12). NEXTLINK's Petition asks the TRA to do just that. NEXTLINK, for example, asks the TRA to consider the impact of the Supreme Court's recent decision rendered two months after the TRA announced its oral decision. Reconsideration is designed precisely to enable the TRA to correct errors created or enhanced by a subsequent change in governing law. Similarly, the TRA required NEXTLINK to engage a third party to combine BellSouth unbundled network elements without any factual or legal support, and without any opportunity even to address that issue in violation of fundamental fairness and constitutional due process. Again, reconsideration is intended to provide the TRA the opportunity to correct such mistakes before they are presented to a reviewing court.

BellSouth would have the TRA ignore the practical implications of refusing to address the issues in NEXTLINK's Petition. If the TRA refuses to correct the errors of law in its First Order of Arbitration Award, NEXTLINK must file a complaint with the federal district court to correct those errors. At a minimum, the court will require that the TRA consider the impact of the Supreme Court's recent decision on the issues raised in the arbitration and to allow the parties to address – and, if necessary, develop a factual record on – any requirement that the Authority has unilaterally imposed. Thus, rather than correcting the errors in its decision now,

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extending the time for ultimate resolution of all disputed issues. *See, e.g., In re Petition of AT&T for Arbitration with U S WEST Communications, Inc.*, Wash. Utils. & Transp. Comm'n Docket No. UT-960309 (completing proceedings and approving arbitrated agreement in June 1998 to conclude arbitration filed in July 1996). The TRA should do the same.

the TRA will be compelled to correct those errors at some indeterminate time in the future on remand from the federal district court. Such delay is wholly unwarranted and will only further slow the development of effective local exchange competition and its attendant consumer benefits in Tennessee. The protracted procedure BellSouth advocates also will ensure that BellSouth is, and for the foreseeable future will continue to be, in violation of Sections 252 and 271 of the Act, as well as the FCC's implementing rules, and thus ineligible for FCC authorization to offer interLATA services in Tennessee. The Authority should demonstrate its commitment to bringing greater choice of service providers to the consumers of this state by properly applying federal law at its first opportunity, not when compelled to do so by the federal courts.

## II. CONCLUSION

For the foregoing reasons and the reasons stated in NEXLTINK's Petition, the TRA should reconsider its First Order and adopt NEXTLINK's proposals to require BellSouth (1) to provide UNEs in combinations or to allow NEXTLINK direct access to those UNEs to combine them for itself in the context of Issues 3, 4 and 12; (2) to provide unbundled access to DCS as part of the element of unbundled transport in partial resolution of Issue 3, at least until such time as the FCC completes its remand proceedings on the specification of UNEs to be provided; and (3) not to impose a recombination or glue charge that has not been established by the TRA in compliance with the requirements of Section 252(d) of the Act in the context of Issues 3, 4, and 12.

DATED this 30 day of June, 1999.

Attorneys for NEXTLINK Tennessee, Inc.

By _____

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