NEXTLINK

August 31, 1999

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

IN RE: *Petition of NEXTLINK TENNESSEE, Inc. for Arbitration of Interconnection with BellSouth Telecommunications, Inc.*
Docket No. 98-00123

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of NEXTLINK's brief on jurisdictional issues in the above-referenced docket.

Copies have been served on counsel of record.

Sincerely yours,

Dana Shaffer
Vice President
Legal and Regulatory Affairs

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FILE

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

IN RE: PETITION OF NEXTLINK TENNESSEE, INC. FOR ARBITRATION OF INTERCONNECTION WITH BELLSOUTH TELECOMMUNICATIONS, INC.	Dkt. No. 98-00123 NEXTLINK BRIEF ON TRA JURISDICTION

NEXTLINK Tennessee, Inc. ("NEXTLINK") respectfully submits the following brief on the TRA's jurisdiction to address issues NEXTLINK has raised with respect to the impact of the recent Supreme Court decision on the TRA's First Order of Arbitration Award ("First Order") in the above-referenced docket. As explained below, the Telecommunications Act of 1996 ("Act") grants the TRA authority to ensure that an arbitrated agreement is consistent with federal law after the arbitration has been completed, and many other state commissions have conducted additional proceedings after the initial nine month arbitration period to ensure compliance with this requirement. Accordingly, the TRA should reject any arbitrated agreement between NEXTLINK and BellSouth Telecommunications, Inc. ("BellSouth") based on the First Order as inconsistent with applicable law, and require that the Parties present an agreement that conforms with the Act's requirements, with assistance from the TRA as necessary.

I. DISCUSSION

The Supreme Court recently observed that "[i]t would be gross understatement to say that the Telecommunications Act of 1996 is not a model of clarity."[1] The provisions of Section 252 governing state commission obligations with respect to arbitration and approval of interconnection agreements are no exception. Properly interpreted, however, the Act permits – indeed, obligates – the TRA to ensure that all interconnection agreements submitted for approval, including arbitrated agreements, are consistent with the Act's requirements.

[1] *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 738 (1999).

Section 252 of the Act establishes the procedures for negotiation, arbitration, and approval of interconnection agreements. Local exchange carriers ("LECs") that are unable to negotiate an agreement within 135 to 160 days after the incumbent LEC receives the request for negotiations may file a petition for arbitration with the state commission.[2] The commission then must resolve each issue presented within nine months after the date on which the incumbent LEC received the negotiation request.[3] An interconnection agreement adopted by arbitration must then be submitted to the state commission for approval, and the commission may reject that agreement if the commission finds that the agreement does not meet the requirements of the Act.[4] The Act, however, fails to specify any procedure or time limit for incorporating the state commission's resolution of the disputed issues into an arbitrated agreement. Nor does the Act establish any procedure for proceedings after the state commission has rejected an arbitrated agreement.

The Supreme Court has firmly established that "'[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.'"[5] Pursuant to this authority, state commissions have developed their own procedures to fill in the gaps that Congress left in the Act, including the adoption of additional proceedings to resolve disputed issues after the initial arbitration period.

Most commissions require the parties to the arbitration to develop a contract that is consistent with an arbitration decision and to submit that arbitrated agreement to the commission

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[2] 47 U.S.C. § 252(b)(1).

[3] *Id.* § 252(b)(4)(C).

[4] *Id.* § 252(e)(1) & (2).

[5] *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)); *see, e.g., AT&T Corp.*, 119 S.Ct. at 738 ("Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency").

for approval, generally within a specified time period.[6] If the commission rejects the agreement the parties submit, the commission specifies those aspects of the arbitrated agreement that are not consistent with the Act (as required by Section 252(e)(1)) and requires the parties to resubmit an agreement that complies with applicable law.[7] This requirement has included mandating additional proceedings with the original arbitrator to cure deficiencies in the rejected agreement.[8] This latter procedure is employed both when the arbitrator is an administrative law judge or hearing officer and when the state commission itself has functioned as the arbitrator.[9] None of the federal district courts that have reviewed state commission decisions approving arbitrated agreements has questioned the authority of state commissions to establish such procedures, much

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[6] *See, e.g., U S WEST Communications, Inc. v. Minnesota Public Utilities Comm'n,* 1999 WL 437628 at *5-7 (D. Minn. March 30, 1999) (ordering parties to submit a final contract containing all the arbitrated and negotiated terms no later than 30 days from the service date of the MPUC's order); *MCI v. Bell-Atlantic*, 1999 WL 77380 at *2 (D.D.C. Feb. 17, 1999); *Southwestern Bell Tele. Co. v. AT&T Communications,* 1998 WL 657717 (W.D. Tex. Aug. 31, 1998).

[7] *See, e.g., U S WEST Communications, Inc. v. Minnesota Public Utilities Comm'n,* 1999 WL 437628 at *5-7 (D. Minn. March 30, 1999); *In re Petition of AT&T for Arbitration with U S WEST Communications, Inc.*, Wash. Utils. & Transp. Comm'n Docket No. UT-960309 (rejecting agreements initially filed for approval and requiring parties to resubmit agreement); *In re AT&T Communications for Arbitration with BellSouth Telecommunications Inc.,* North Carolina Utils. Comm'n, Dkt. No. P-140, Sub 50 (same).

[8] *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 (rejecting agreements initially filed for approval and requiring additional proceedings with the arbitrator); *In re AT&T Communications for Arbitration with BellSouth Telecommunications Inc.,* North Carolina Utils. Comm'n, Dkt. No. P-140, Sub 50 (same).

[9] *See, e.g., In re Interconnection Contract Negotiations Between AT&T Communications of the Mountain States, Inc., and U S WEST Communications, Inc.*, Docket No. 96-087-03, Arbitration Order (Utah Public Serv. Comm'n April 28, 1998) ("clarify[ing] decisions made in prior Arbitration Orders issued December 26, 1996, and March 27, 1997" and "decid[ing] remaining issues presented for resolution" in arbitrations originally conducted in October 1996); *U S WEST Communications, Inc. v. Minnesota Public Utilities Comm'n,* 1999 WL 437628 at *5-7 (D. Minn. March 30, 1999) (arbitrator); *Southwestern Bell Tele. Co. v. AT&T Communications,* 1998 WL 657717 (W.D. Tex. Aug. 31, 1998) (commission); *GTE South Inc. v. Morrison*, 6 F. Supp. 2d 517 (E.D. Va. 1998) (commission).

less concluded that the commission lost jurisdiction because it failed to resolve all disputed issues within nine months of the initial request for negotiations.[10]

The TRA, therefore, has the authority under the Act to establish the procedures necessary to ensure that an agreement between NEXTLINK and BellSouth – particularly an arbitrated agreement – complies with the Act, including conducting additional proceedings following the initial arbitration to the extent necessary. The issue in this proceeding, therefore, is not whether the TRA must take additional steps to ensure compliance with applicable law, but what additional proceedings the TRA must undertake to ensure that the arbitrated agreement between NEXTLINK and BellSouth incorporates the Supreme Court's decision rendered after the initial arbitration concluded. The TRA has two alternatives: (1) Review an arbitrated agreement based on the First Order, reject that agreement, and remand either to the parties or to itself as the Arbitrator to develop an agreement that complies with federal law; or (2) Reconsider the First Order in the TRA's role as the Arbitrator in light of subsequent controlling authority.

The TRA recognized that the First Order did not incorporate the Supreme Court's decision in *AT&T Corp.* Assuming, as the parties have been asked to do (and as NEXTLINK argues), that any agreement submitted by the parties as a result of the First Order does not comply with the Act as interpreted by the Supreme Court, the TRA is bound to reject the agreement and require that the parties correct specific deficiencies as a condition of future approval – *i.e.,* remand with instructions to ensure that the agreement complies with the Act. The TRA, however, cannot expect that the parties – with their amply demonstrated inability to

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[10] *See, e.g., U S WEST Communications, Inc. v. Minnesota Public Utilities Comm'n,* 1999 WL 437628 at *5-7 (D. Minn. March 30, 1999); *MCI Telecommunications Corp. v. BellSouth Telecommunications Inc.*, 1999 WL 166183 (E.D. Ky. March 11, 1999); *MCI v. Bell-Atlantic*, 1999 WL 77380 (D.D.C. Feb. 17, 1999); MCI *Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F.Supp. 2d 1157 (D. Or. 1999); *Southwestern Bell Tele. Co. v. AT&T Communications,* 1998 WL 657717 (W.D. Tex. Aug. 31, 1998); *U S WEST v. AT&T Communications*, Case No. C97-1320R, Order Granting in Part and Denying Part Cross-Motions for Summary Judgment (W.D. Wash. July 21, 1998); *AT&T Communications v. BellSouth Telecommunications, Inc.*, 7 F.Supp. 2d 661 (E.D.N.C. 1998); *GTE South Inc. v. Morrison*, 6 F.Supp. 2d 517 (E.D. Va. 1998).

resolve these disputed issues among themselves – could submit a revised agreement that complies with the Act without additional guidance from the TRA as Arbitrator.

From a practical perspective, in order to present an arbitrated agreement for review based on the First Order, the parties would have to develop contract language that will not be approved, and the TRA would be required to review that agreement and issue written findings detailing the deficiencies within 30 days of submission of the contract or it would be deemed approved.[11] Rather than undertake such a needless exercise, and to allow the Authority the time needed to consider the effect of the Supreme Court's decision on the issues presented in the arbitration, the TRA should reconsider its First Order in light of *AT&T Corp.*, then require that the parties submit an arbitrated agreement that conforms to the TRA's order on reconsideration.[12]

BellSouth, however, apparently would have the TRA believe that it lacks jurisdiction to reconsider its resolution of some of the disputed issues in the First Order. The Act is not susceptible to such an interpretation. To the contrary, the Act expressly provides that the TRA may reject an arbitrated agreement during the approval process for failure to comply with the Act, even though the TRA as the arbitrator initially resolved the disputed issues in a manner that (it believed at the time) was consistent with the Act. An approval process for arbitrated interconnection agreements would be superfluous if Congress in Section 252 had not contemplated that circumstances may exist or arise – including subsequent events such as the Supreme Court's decision in *AT&T Corp.* or further proceedings at the FCC – that could require that the TRA later modify its initial resolution of disputed issues. Such a modification thus is not a "resolution of unresolved issues" that must be completed within nine months. It is an essential

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[11] 47 U.S.C. § 252(e)(1) & (4).

[12] If the TRA were to elect the second option, it should reject the arbitrated agreement for failure to consider the Supreme Court's decision and should order each party to submit proposed contract language and supportive briefing to the TRA in its capacity as the arbitrator that each party contends would render the agreement consistent with that decision. The TRA should then determine the changes that are necessary to comply with existing federal law and should order the parties to resubmit a revised arbitrated agreement to the TRA for its approval.

part of the TRA's responsibility to ensure that any arbitrated agreement complies with federal law as of the date the TRA finally approves that agreement.

Even if reconsideration in light of a subsequent change in the law could be construed to be a resolution of disputed issues after the nine month deadline, the TRA is not without authority to reconsider its First Order. "'Although the statutory term "shall" suggests that limits are mandatory, failure of an agency to act within a statutory time frame does not bar subsequent agency action absent *a specific indication that Congress intended the time frame to serve as a bar.*'"[13] The Act specifies the nine month time period but includes no specific indication that that Congress intended that deadline as a bar to further action. Rather, the Act establishes only that the FCC will preempt a state commission if it fails to act to carry out its statutory obligations:

> 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 [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, 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.[14]

The TRA has acted to carry out its responsibility under Section 252 by conducting the arbitration and initially resolving disputed issues presented by the parties. The Supreme Court's subsequent decision, at a minimum, casts substantial doubt on the validity of the TRA's initial resolution of some of those issues, and the TRA's primary responsibility is to ensure that any

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[13] *William G. Tadlock Construction v. United States Dept. of Defense*, 91 F.3d 1335, 1341 (9th Cir. 1996) (quoting *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1400 (9th Cir. 1995)) (emphasis added by quoting court); *accord, e.g., Brock v. Pierce County*, 476 U.S. 253, 258-62 (1986); *see Friends of Crystal River v. United States Environmental Protection Agency*, 35 F.3d 1073, 1080 (6th Cir. 1994) ("courts are not to assume that an agency has lost jurisdiction merely because it has not acted within a statutorily specified time limit" unless "a statute both requires the agency to act within a certain time period and specifies a consequence if that requirement is not met").

[14] 47 U.S.C. § 252(e)(5).

arbitrated agreement between NEXTLINK and BellSouth complies with federal law. The TRA thus would not fail to act to carry out its responsibility under Section 252 if it were to resolve disputed issues outside the nine month time frame established for the arbitration. To the contrary, the TRA would fail in its statutory obligations if it were to refuse to consider a subsequent change in federal law prior to final approval of an arbitrated agreement. Whether consideration of a change in the law occurs prior to submission of the arbitrated agreement for approval or afterward is irrelevant for jurisdictional purposes. The Act requires that the TRA ensure that an arbitrated agreement is consistent with existing federal law, even if the TRA must modify its resolution of disputed issues after the initial arbitration period.

II. CONCLUSION

The TRA has the authority – indeed, the responsibility – under the Act to resolve disputed issues consistent with the Act's requirements, even if that resolution requires additional proceedings after the initial arbitration has been completed. Accordingly, the TRA should reconsider the First Order in light of the Supreme Court's decision and modify that order to conform to existing federal law.

RESPECTFULLY SUBMITTED this 31st day of August, 1999.

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