

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 29, 2000

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

**ORDER DENYING BELLSOUTH'S MOTION TO REJECT CERTAIN
PROVISIONS OF INTERCONNECTION AGREEMENT AND APPROVING
INTERCONNECTION AGREEMENT, AS AMENDED**

This matter came before the Tennessee Regulatory Authority (the "Authority" or the "TRA") at the regularly scheduled Authority Conference held on March 28, 2000 for consideration of the Motion (the "Motion") of BellSouth Telecommunications, Inc. ("BellSouth"), to reject two provisions of the arbitrated interconnection agreement (the "Agreement") between BellSouth and NEXTLINK Tennessee, Inc.¹ ("NEXTLINK"). The Agreement was submitted to the Authority for approval in this docket on November 5, 1999. In its Motion, filed on December 6, 1999, BellSouth asserts that these provisions do not comply with the standards for approval of arbitrated interconnection agreements contained in the Telecommunications Act of 1996 (the "Act"), specifically set forth at 47 U.S.C. § 252(e)(2).

¹ Since the opening of this docket, NEXTLINK has changed its name from NEXTLINK Tennessee, L.L.C. to NEXTLINK Tennessee, Inc.

BACKGROUND

As explained in the Authority's Final Order of Arbitration Award, entered on June 25, 1999, the Act requires that incumbent local exchange carriers ("incumbent LECs") provide new entrants to the local telecommunications market with access to telephone networks and services on "rates, terms and conditions that are just, reasonable, and non-discriminatory." 47 U.S.C. § 251(c). Pursuant to §§ 251 and 252 of the 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, including reciprocal compensation, contemplated under 47 U.S.C. §251(b) and (c). If the parties are unable to reach an agreement voluntarily, either party may petition the State commission for arbitration. 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 Act. 47 U.S.C. § 252(e)(1).

On February 24, 1998, NEXTLINK filed a petition requesting that the Authority arbitrate certain issues that NEXTLINK and BellSouth had been unable to resolve through voluntary negotiation of an interconnection agreement. BellSouth filed its response to NEXTLINK's petition on March 23, 1998. Although 47 U.S.C. § 252(b)(4)(C) requires a State commission to resolve an arbitration within nine months of 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.

The TRA Directors 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. Post-hearing briefs were filed by the parties on September 22, 1998. Public Arbitration Conferences were held on October 6 and November 17, 1998, during which the Arbitrators deliberated the issues for consideration in this matter.

The Authority's First Order of Arbitration Award (the "First Order") was entered on May 18, 1999, reflecting the Arbitrators' decisions at the Arbitration Conference held on October 6, 1998.² On May 28, 1999, NEXTLINK filed a Petition for Reconsideration of the Authority's First Order. NEXTLINK requested reconsideration on the grounds that the United States Supreme Court's opinion in *AT&T Corp. v. Iowa Utils. Board*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999), altered the law prevailing on October 6, 1998, the date of the Arbitrators' first decision in this matter. NEXTLINK also asserted that the First Order failed to meet the requirements of Tenn. Code Ann. § 4-4-314(c), which requires that an initial or final order be in writing, include findings of fact and conclusions of law as well as the policy reasons therefor, and the remedy prescribed if appropriate.

BellSouth filed a Response to NEXTLINK's Petition for Reconsideration on June 16, 1999. In its Response, BellSouth defended the First Order on the basis that the Supreme Court's remand to the Eighth Circuit Court of Appeals in *Iowa Utils. Board* meant that the Supreme Court's opinion was not final relative to the issues it had

² The Authority's Final Order of Arbitration Award was entered on June 25, 1999, reflecting the Arbitrators' decisions at the Arbitration Conference held on November 17, 1998 and approving the First Order.

addressed. BellSouth also argued that the Arbitrators concluded the arbitration in this matter based on the law that existed at the time the arbitration was heard. BellSouth noted that the Arbitrators could consider any changes in the law resulting from the *Iowa Utils. Board* opinion when reviewing the resulting interconnection agreement and that NEXTLINK is provided additional relief in the form of judicial review of the First Order. NEXTLINK filed a Reply to BellSouth's Response on June 29, 1999, in which NEXTLINK argued that it should be permitted to explore the issues regarding the Supreme Court's decision and that the Arbitrators should review their original rulings in light of the Supreme Court's opinion.

At the regularly scheduled Authority Conference held on September 9, 1999, the Authority denied NEXTLINK's Petition for Reconsideration. As part of its findings and conclusions, set forth in its Order entered on March 22, 2000, the Authority agreed with BellSouth that the Arbitrators had applied the law that was prevailing at the time the arbitration decisions were rendered in this matter. In addition to denying NEXTLINK's Petition for Reconsideration, the Authority also ordered the parties to file an interconnection agreement that is compliant with the Supreme Court's decision in *Iowa Utils. Board* within thirty (30) days from September 14, 1999, unless the parties requested additional time.

On November 5, 1999, NEXTLINK and BellSouth submitted to the Authority their Agreement.³ As the accompanying letter, signed by counsel for both parties, stated, this Agreement "contains the provisions that were successfully negotiated between the parties,

³ On December 6, 1999, at the Authority's request, NEXTLINK and BellSouth submitted a revised Section 15.1, entitled Modification of Agreement, to replace Section 15.1 as originally contained in the Agreement.

in addition to certain provisions that reflect the decisions of the TRA acting as arbitrators pursuant to Section 252 of the Act.”⁴

On December 6, 1999, one day before the Agreement was scheduled to be considered by the Directors and just one month after submitting the Agreement to the Authority, BellSouth filed its Motion to Reject Certain Portions of the Agreement. NEXTLINK filed a response to BellSouth’s Motion on December 6, 1999, in which NEXTLINK stated that the Motion should be denied. NEXTLINK also stated that because of the short time it had to respond, all of the arguments in support of its position could not be stated at that time.

This matter came before the Directors at the regularly scheduled Authority Conference held on December 7, 1999 for consideration of the Agreement and resolution of BellSouth’s Motion. During the Conference, the parties agreed to waive the thirty (30) day requirement for approval of an arbitrated interconnection agreement. See 47 U.S.C. § 252(e)(4). The Authority decided not to take action on the Agreement at that time and to allow NEXTLINK time to respond to BellSouth’s Motion. NEXTLINK filed a brief in response to BellSouth’s Motion (“NEXTLINK’s Response”) on January 18, 2000, and BellSouth filed a reply memorandum in support of its Motion on March 27, 2000.

BELLSOUTH’S MOTION

Reciprocal Compensation

The first provision to which BellSouth objects is an arbitrated provision which mandates that Internet Service Provider (“ISP”)-bound traffic will be treated as local traffic for purposes of reciprocal compensation. The second provision, which was not an

⁴ Letter to K. David Waddell, TRA Executive Secretary, from Dana Shaffer, counsel for NEXTLINK, and Guy Hicks, counsel for BellSouth, November 5, 1999.

arbitrated issue, deals with terms and conditions associated with providing multiple tandem access ("MTA") interconnection. Neither of these issues was mentioned by either party when they submitted Agreement to the Authority on November 5, 1999 for approval.

BellSouth maintains that the Agreement and the findings of the Arbitrators contain a definition of local traffic that is not consistent with the requirements of Section 251 of the Act. The Agreement defines "Local Traffic" as:

Any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area Service ("EAS") exchange. The terms Exchange and EAS exchanges are defined and specified in Section A3 of BellSouth's General Subscriber Services Tariff. Consistent with the Tennessee Regulatory Authority's decision in Docket 98-00118, traffic that originated from or terminates to an enhanced service provider or information service provider shall be treated as Local Traffic for purposes of reciprocal compensation.⁵

BellSouth maintains that this definition was inserted to comply with the decision of the Arbitrators that reciprocal compensation should be paid for traffic to and from ISPs.⁶ According to BellSouth, this definition is contrary to the Federal Communications Commission's ("FCC") position as stated in the FCC's Declaratory Ruling in CC Docket No. 96-98 (the "Declaratory Ruling") and Notice of Proposed Rulemaking in CC Docket No. 99-68, issued February 26, 1999.

BellSouth argues that the Authority should direct the parties to negotiate a definition of Local Traffic that is consistent with the 1996 Act and devise an inter-carrier compensation mechanism for ISP-bound traffic that takes into account the compensation mechanism the FCC and the Authority may ultimately adopt. BellSouth states that the definition of Local Traffic contained in the Agreement is contrary to the requirements of

⁵ Interconnection Agreement between BellSouth Telecommunications, Inc. and NEXTLINK Tennessee, Inc., November 5, 1999, General Terms and Conditions – Part B.

⁶ See First Order of Arbitration Award, Authority Docket No. 98-00123, May 18, 1999, at 15.

Section 251 of the Act because calls to the Internet through ISPs do not "terminate," in BellSouth's view, at the ISP. BellSouth maintains that the FCC made this clear in its Declaratory Ruling when it stated that Internet-bound calls do not terminate at the ISP's local server and do not consist of two separate calls. Additionally, BellSouth asserts that the Authority should recognize that the Arbitrators did not have the benefit of the FCC's views, as laid out in the Declaratory Ruling, when the arbitration hearings took place and did not consider alternative interim inter-carrier compensation mechanisms for ISP-bound traffic. Finally, BellSouth states that the Authority should recognize that the establishment of an inter-carrier compensation mechanism for ISP-bound traffic is pending before the FCC and is also an issue in two other arbitrations pending before the Authority (Docket Nos. 99-00377 and 99-00430).

In its Response, NEXTLINK counters that the reciprocal compensation question has been fully argued by both parties, that a final order has been issued by the Authority, and that BellSouth should not be permitted to re-litigate the issue through this Motion. NEXTLINK also argues that BellSouth's attempt to invoke the FCC's Declaratory Ruling has no bearing on whether the Authority's decision on this issue is correct or not because the FCC has authorized state commissions to regulate ISP-bound traffic and to order payment of reciprocal compensation for ISP-bound traffic until the FCC addresses this issue. NEXTLINK further maintains that since BellSouth joined in petitioning the Authority to approve the Agreement as written, BellSouth cannot now ask the Authority to reject portions of the Agreement.

Multiple Tandem Access (MTA)

In addition to objecting to the definition of local traffic contained in the Agreement, BellSouth maintains that the Agreement contains terms for MTA interconnection that are inconsistent with the public interest. BellSouth claims that it is willing to provide NEXTLINK with MTA interconnection but Section 3.9.3. of the Agreement, which provides for MTA, omits language emphasizing that interexchange access traffic will not be routed through multiple access tandems.⁷ BellSouth also argues that routing interexchange access traffic through multiple access tandems can delay transmission, degrade the quality of service provided to interexchange carriers, is inconsistent with BellSouth's access tariffs, is technically infeasible, and is inconsistent with the public interest.

In response, NEXTLINK argues that because BellSouth failed to raise the issue of MTA in its response to NEXTLINK's arbitration petition, BellSouth is barred by federal law from arbitrating the issue now. Finally, NEXTLINK disputes BellSouth's claim that MTA is technically infeasible and contrary to BellSouth's federal and state tariffs.

FINDINGS

Contrary to the arguments put forth by BellSouth, the Arbitrators made the proper decision concerning payment of reciprocal compensation of ISP-bound traffic, notwithstanding the fact that the Arbitrators did not have the benefit of the FCC's Declaratory Ruling when the arbitration hearings in this matter took place. The fact that the FCC has provided additional guidance in making a determination concerning payment

⁷ Interconnection Agreement between BellSouth Telecommunications, Inc. and NEXTLINK Tennessee, Inc., November 5, 1999, Attachment 3, at 8.

of reciprocal compensation for ISP-bound traffic does not alter the end result. Reciprocal compensation is a proper method for inter-carrier compensation for ISP-bound traffic in the absence of any other method, and the State commissions have the authority to make that decision in arbitrations.

The FCC held in its Declaratory Ruling that ISP-bound traffic is largely interstate in nature.⁸ Nevertheless, the FCC exempted Enhanced Service Providers ("ESPs"), which include ISPs, from the payment of interstate access charges in 1983. In doing so, the FCC allowed ESPs to be treated as end-users for the purposes of assessing access charges and permitted ESPs to purchase their links to the Public Switched Telephone Network through intrastate business tariffs rather than through interstate access tariffs. The FCC further stated in its Declaratory Ruling that it continues to discharge its regulatory obligations by treating ISP-bound traffic as though it were local. Generally speaking, therefore, the approach the FCC has taken with regard to ISP-bound traffic strongly suggests that, while ISP-bound traffic may be largely interstate in nature, it should be treated as local traffic for regulatory purposes.

The Authority agrees with NEXTLINK that, having previously requested the Authority to approve the Agreement as filed, BellSouth cannot ask the Authority to reject portions of the Agreement. The Authority also agrees with NEXTLINK that because BellSouth failed to raise the issue of MTA as part of the arbitration proceeding, BellSouth cannot raise this issue for initial consideration by the Authority at this time. The Authority is not convinced by BellSouth's assertion, as stated in its Motion and supporting

⁸ The Court of Appeals for the D.C. Circuit has vacated the FCC's Declaratory Ruling because it did not satisfactorily explain why ISP-bound traffic is "exchange access" rather than "telephone exchange service." *Bell Atlantic Telephone Companies v. Federal Communications Commission*, 206 F.3d 1, 3 (D.C.Cir. March 24, 2000).

documents, that MTA is not technically feasible or that the language dealing with MTA is inconsistent with the public interest. NEXTLINK properly points out that section 3.9 of Attachment 3 to the Agreement states, "Each of the following trunking options [which includes MTA] shall be available at NEXTLINK'S option, unless BellSouth demonstrates, consistent with objectively verifiable engineering standards, that such arrangement is not technically feasible."⁹ Under this wording in the Agreement, if BellSouth can show conclusively that MTA is not technically feasible, it will not be required to furnish NEXTLINK with this trunking option.

In consideration of the foregoing, and after careful review of the record, BellSouth's Motion and the responses thereto, the Authority finds and concludes that BellSouth's Motion should be denied.

Based upon their review of the Interconnection Agreement and the standards for review set forth in 47 U.S.C. §§ 251-252, the Directors unanimously approve the Agreement based upon finding that:

- 1) The Agreement is in the public interest as it provides consumers with alternative sources of telecommunications services within the BellSouth Telecommunications, Inc. service area;
- 2) The Agreement is not discriminatory to telecommunications service providers that are not parties thereto;
- 3) No person has sought intervention in this docket in connection with the approval of the Agreement;

⁹ Interconnection Agreement between BellSouth Telecommunications, Inc. and NEXTLINK Tennessee, Inc., November 5, 1999, Attachment 3, at 7.

4) The approval of the Agreement is consistent with previous Authority decisions and orders; and

5) The Agreement is reviewable by the Authority pursuant to 47 U.S.C. §§ 251-252 and Tenn. Code Ann. § 65-4-104 *et seq.*

The Authority further directs the parties to delete reference to Docket No. 98-00118 in the definition of "Local Traffic" contained in the Interconnection Agreement and to replace it with a reference to Docket No. 99-00797 and to cause the provisions of the Interconnection Agreement with respect to reciprocal compensation to read consistently with the Arbitrators' decision in Docket No. 99-00797.¹⁰

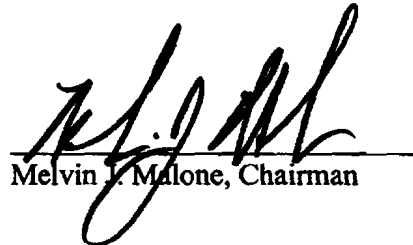
IT IS THEREFORE ORDERED THAT:

1. The Motion of BellSouth Telecommunications, Inc. to Reject Certain Provisions of the Interconnection Agreement is denied;
2. The original decision of the Arbitrators in this matter is upheld;
3. The Interconnection Agreement submitted by the parties on November 5, 1999 and amended on December 6, 1999 is approved upon the condition that parties shall delete reference to Docket No. 98-00118 from the definition of local traffic contained in the Interconnection Agreement and shall replace the reference to Docket No. 98-00118 with a reference to Docket No. 99-00797 and cause the provisions of the Interconnection

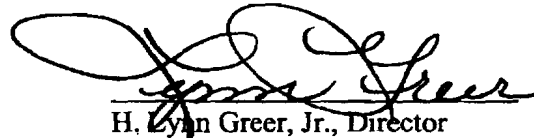
¹⁰ At a Public Arbitration Conference held on March 14, 2000, the Directors, acting as Arbitrators, reached a final arbitration decision in Authority Docket No. 99-00797, Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Time Warner Telecom of the Mid-South, L.P. Pursuant to Section 252(b) of the Telecommunications Act of 1996. As stated in the Final Order of Arbitration Award in that docket, entered on August 4, 2000, the Arbitrators ordered that "reciprocal compensation is the appropriate interim method to be used to recover the costs associated with the delivery of ISP-bound traffic pending completion of the FCC's rulemaking with regard to this traffic." The Final Order further states that "[a]ny amendments to this agreement with regard to reciprocal compensation rates for ISP-bound traffic shall be submitted to the Authority for approval." See Final Order of Arbitration Award, Docket No. 99-00797, August 4, 2000, at 5.

Agreement with respect to reciprocal compensation to read consistently with the Arbitrators' decision in Docket No. 99-00797;¹¹ and

4. The Interconnection Agreement negotiated by and between BellSouth Telecommunications, Inc. and NEXTLINK Tennessee, Inc. is subject to the review of the Authority as provided herein.



Melvin J. Malone, Chairman



H. Lynn Greer, Jr., Director



Sara Kyle, Director

ATTEST:



K. David Waddell, Executive Secretary

¹¹ At the March 28, 2000 Authority Conference, Director Greer stated that if the law regarding reciprocal compensation changes in the future, Section 15.4 of Part A of the Agreement clearly provides that BellSouth will be able to negotiate in good faith with NEXTLINK mutually acceptable terms as may be required by a change in the law. Transcript of Authority Conference, March 28, 2000, at 9.