

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

**IN RE: PETITION OF NEXTLINK TENNESSEE, L.L.C. TO SANCTION
 BELLSOUTH ADVERTISING AND PUBLISHING
 CORPORATION AND ENFORCE THE TRA ORDER
 REGARDING TELEPHONE DIRECTORIES**

Docket No. 98-00654

**DISSENTING OPINION OF CHAIRMAN MELVIN MALONE
AND REQUEST FOR RECONSIDERATION**

While I respect the opinion of the majority, I am compelled to write separately because I have concluded that the route taken to achieve the result is clearly inconsistent with well-established state law. Therefore, for the reasons set forth below, I respectfully dissent and request the majority to reconsider its decision.

For the limited purposes of this separate opinion, it is not necessary to recite the extensive history of this case. As set forth in the Order adopted by the Authority, BellSouth Advertising and Publishing Corporation ("BAPCO") and NEXTLINK Tennessee, L.L.C. ("NEXTLINK") reached an agreement regarding the appearance of NEXTLINK's name and logo on the cover of the local directory published on behalf of BellSouth Telecommunications, Inc. ("BellSouth") pursuant to TRA Rule 1220-4-2-.15. Nonetheless, at the November 3, 1998, Authority Conference, NEXTLINK requested that the Authority order that the local directory published on

behalf of BellSouth contain the phrase “published by” on the cover near the name of BAPCO.¹ BAPCO argued against the request on the ground that such a requirement would “clutter the cover.” *See November 3, 1998, TRA Conference Transcript at 52.* BAPCO did not contend that the Authority is without jurisdiction to address NEXTLINK’s request.

Sua sponte, a majority of the Directors determined that the Authority is without jurisdiction to entertain NEXTLINK’s request that the Authority require the words “published by” to appear on the cover of the BellSouth local directory near the BAPCO name. *See November 3, 1998, TRA Conference Transcript at 56-7, 59-60, 65, and 71.* No argument, written or oral, was offered by any party challenging the jurisdiction of the Authority on this point.

In countless orders and decisions this agency has relied upon its plenary authority. *See, e.g., Order Denying BAPCO's Petition for Stay of Authority's November 2, 1998, Order Enforcing Rule 1220-4-2-.15, November 25, 1998, Docket No. 98-00654* (“State law grants the Authority broad, statutory authority over all public utilities, including their property and services. *See Tenn. Code Ann. § 65-4-104* (‘property and property rights’), *Tenn. Code Ann. § 65-4-117(3)* (‘practices and services’), and *Tenn. Code Ann. § 65-4-124(a)* (‘features, functions, services’). Such authority ‘shall be given a liberal construction’ in favor of the Authority’s jurisdiction. *See Tenn. Code Ann. § 65-4-106.* In view of the agency’s statutory jurisdiction over utility property and services, the Authority has ample jurisdiction to regulate telephone

¹ It should be noted that previous local directories published on behalf of BellSouth contained the phrase “published by” on the cover near the name BellSouth Advertising and Publishing Corporation.

*directories, including the cover of those directories[.]”); Declaratory Order, March 19, 1998, Docket No. 96-01692 at 7, paragraph 2 (“Pursuant to Tenn. Code Ann. § 65-4-104, the Authority has general supervisory and regulatory powers, and has jurisdiction and control over the public utilities that were parties to this proceeding, and over their property, property rights and facilities for the purpose of carrying out the provisions of Chapter 4 of Title 65.”). From my vantage point, it seems clear that the Tennessee Regulatory Authority has the jurisdiction to consider NEXTLINK’s request. *See Comments of Mr. Henry Walker, counsel for NEXTLINK, November 3, 1998, TRA Conference Transcript at 57 (“For 30 years you have had rules requiring what goes on the cover of the phone book, name of the company, the date of issuance, and the service area covered You have always exercised jurisdiction over the phone book[.]”)*.*

Whether I would have voted to grant NEXTLINK’s request is an altogether distinguishable question from a determination on jurisdiction.² As for the latter question, I write separately because I have concluded that the TRA is not without jurisdiction with respect to NEXTLINK’s request. Unlike the majority, I am slow to relinquish what the General Assembly has so carefully entrusted to this agency. Generally, if the TRA’s jurisdiction is lessened, it should, in my opinion, only occur by an act of the General Assembly, a court ruling, or, when appropriate, after careful consideration and study by the Directors themselves.

² It is one thing to deny a request. It is quite another to say that we are without jurisdiction to grant or deny the request. Hence, it goes without saying that the majority could have reached the same result by simply denying NEXTLINK’s request as a matter of discretion, as opposed to abdicating jurisdiction.

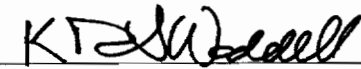
Given the importance of jurisdictional questions and the impact of the same, and since no party presented any legal arguments at the November 3, 1998, Authority Conference, written or oral, challenging the agency's jurisdiction with respect to NEXTLINK's request, it is my opinion that the agency would be better served by carefully considering this matter before declaring that it is without jurisdiction.

Respectfully submitted,



CHAIRMAN MELVIN J. MALONE

ATTEST:



Executive Secretary