

# “NEGOTIATE IN GOOD FAITH AS TO WHAT?” AN ANALYSIS OF THE GOOD FAITH NEGOTIATION CLAUSE OF THE TELECOMMUNICATIONS ACT OF 1996

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*Slug it out. Not only that, Senator, but you are going to slug it out on every single negotiation. Negotiate in good faith as to what? You have got hundreds and hundreds of negotiations in every state. It is a lawyer's dream. We have got to build some more law schools here. (Laughter).*

—Anne K. Bingaman<sup>1</sup>

## INTRODUCTION

In February of 1996, Congress passed and President Clinton signed the Telecommunications Act of 1996 (“Telecommunications Act”),<sup>2</sup> thus ushering in a new era in telecommunications law.<sup>3</sup> A primary purpose of the Telecommunications Act is to dismantle the local phone service monopoly system and introduce competition to the local telephone market.<sup>4</sup> In the preamble to the Telecommunications Act, Congress declared its desire to “[p]romote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>5</sup> Although competition has existed in the long-distance market for over a decade, monopolies have dominated the local phone market.<sup>6</sup> As a result, until the passage of the Telecommunications Act, a person or business in

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1. *Hearing on Telecomms. Policy Reform: Hearing of the Comm. on Commerce, Science, and Transp.*, 104th Cong. 69 (1995) (statement of Anne K. Bingaman, Asst. Attorney Gen., Antitrust Div.) (responding to Sen. Hollings) (punctuation altered).

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified in scattered sections of 15, 18, and 47 U.S.C.).

3. The Telecommunications Act was the first major revision of the United States's telecommunications law since the enactment of the Communication Act of 1934. *See id.* at preamble.

4. *See* H.R. REP. NO. 104-204, at 48 (1996) (“Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies.”).

5. Telecommunications Act, preamble.

6. *See* H.R. REP. NO. 104-204, at 50 (1996).

Denver, Colorado, could choose from a number of long-distance providers such as Sprint, AT&T, or MCI, but for local phone service, they had no alternative except to select U S West. Through the enactment of the Telecommunications Act, Congress sought to end this domination and introduce competition to the local phone markets.

In deconstructing the previous regulatory regime, Congress enacted a complex system of incentives and requirements designed to facilitate competition in local phone markets.<sup>7</sup> Interconnection is the keystone to bringing competition; without interconnection between the local phone service monopolies and competitors, competition cannot possibly flourish.<sup>8</sup> In order to complete a phone call to someone who subscribes to a different local phone company, each competing local system must be connected or *interconnected* to the other phone company systems.<sup>9</sup> If a new competing company is not interconnected, a person who signed up with this company could not call a person who subscribed to the original monopoly or any other company.<sup>10</sup> Furthermore, Congress understood that local phone companies have no incentive to offer interconnection to a competitor. Instead, they have a strong incentive to prevent interconnection.<sup>11</sup> Realizing the importance of interconnection, and the lack of incentive for a local monopoly to negotiate such an agreement, Congress mandated that parties "negotiate in good faith . . . the particular terms and conditions of [the interconnec-

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7. See generally 47 U.S.C.A. §§ 251, 271 (West Supp. 1997).

8. See *id.*; see also H.R. CONF. REP. NO. 104-458, at 118 (1996).

9. Interconnection between telecommunications carriers allows for a person subscribing to one provider of a local network to call a subscriber of another network. Thus, if MCI were to offer competitive local phone service in Denver, Colo., for an MCI customer to call a U S West customer, the two networks would have to be interconnected. See generally CHARLES H. KENNEDY, AN INTRODUCTION TO U.S. TELECOMMUNICATIONS LAW 31-47 (1994).

10. For example, until 1949, two local phone companies offered services to Philadelphia, PA., without interconnecting. As a result, people had to subscribe to both companies to ensure access to everyone in the city who had a phone. See H.R. REP. NO. 104-204, at 50 (1996).

11. If U S West refuses to interconnect with a new local phone company, then a Denver subscriber to that new phone company would not be able to complete calls to anyone on the U S West network. Furthermore, if 99% of the population of Denver use U S West for its local service, then the new phone company subscriber would be able to call only the 1% of the people in Denver who subscribed to the same company. Therefore, U S West has no real incentive to interconnect with a new phone company—interconnection only removes a major disincentive for customers who are considering leaving U S West.

tion] agreements. . . ."<sup>12</sup> Bingaman's comments to the Senate Committee Hearing on Commerce, Science, and Transportation, quoted at the outset of this paper, refer to the difficulty the courts, the Federal Communications Commission ("FCC"), and various state commissions will have in implementing the good faith negotiation clause of the Telecommunications Act.<sup>13</sup>

A primary challenge facing these bodies<sup>14</sup> is determining what it means to negotiate a contract in good faith. Good faith has a substantial history in contract law as a duty required in the performance and enforcement of a contract.<sup>15</sup> However, good faith in performance and enforcement requires a contract, while a duty to *negotiate* in good faith, by definition, assumes the absence of a contract. The congressional mandate that Incumbent Local Exchange Carriers ("ILECs")<sup>16</sup> "negotiate in good faith" is a notable departure from the classical theory of freedom of contract.<sup>17</sup> Furthermore, because Congress failed to provide much guidance as to the meaning of good faith, the courts will have to depend upon a variety of sources.

Although the good faith clause will be at first difficult to apply, as it matures it will provide the courts with a powerful method of enforcing Congress's goal of introducing competition into the local phone market. The history of the good faith negotiation doctrine applied in American labor law proves that precontractual good faith can function in our legal and economic system despite our confidence in the freedom of contract.<sup>18</sup> In addition, judicially mandated good faith in precontractual negotiation outside of the labor law field, though rarely imposed,

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12. Telecommunications Act of 1996, 47 U.S.C.A. § 251(c)(1) (West Supp. 1997).

13. See *supra* note 1 and accompanying text.

14. Although all three parties eventually will rule on the meaning of the good faith clause, for the remainder of this paper these parties will be referred to collectively as the "courts."

15. See RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981); U.C.C. § 1-203 (1995).

16. The Telecommunications Act defines a Local Exchange Carrier ("LEC") as "any person that is engaged in the provision of telephone service or exchange access." 47 U.S.C.A. § 153(26) (West Supp. 1997). An Incumbent LEC ("ILEC") is the telephone exchange service provider in the area at the time of enactment of the Telecommunications Act. See *id.* § 251(h)(1). The Telecommunications Act also allows the FCC to treat any LEC as an ILEC if the carrier replaces the ILEC as the dominant carrier for a specified area. See *id.* § 251(h)(2).

17. See E. ALLAN FARNSWORTH, CONTRACTS § 3.26 (2d ed. 1990).

18. See generally *infra* Part III.

is arguably already a valuable part of our legal system.<sup>19</sup> Furthermore, the two tests developed by the FCC to identify bad faith provide the courts with a powerful tool to implement a major goal of the Telecommunications Act—increased competition.<sup>20</sup> The FCC's objective test establishes certain boundaries beyond which an actor may not pass without violating his duty of good faith, while its subjective test allows the judiciary to delve into seemingly more benign behavior that may under certain circumstances violate this duty.<sup>21</sup>

The success of a similar standard created by the National Labor Relations Board ("NLRB") under the National Labor Relations Act ("NLRA") lends support to the viability of the FCC's new standard.<sup>22</sup> By analogy, the long standing precedent of good faith negotiation developed under the NLRA will provide negotiators with a bounty of legal argument.<sup>23</sup> Furthermore, the FCC's standard is consistent with common-law notions of good faith in contract negotiations that have developed in the United States.<sup>24</sup> This case law will be invaluable to the legal world as it develops the meaning of good faith under the Telecommunications Act.<sup>25</sup> The two tests promulgated by the FCC provide the courts with the basic tools necessary to govern the implementation of competition in the local phone markets. The precedent developed under the NLRA and in contract law will help further guide the courts as they develop the meaning of good faith.

This comment explores the development of good faith negotiation standards in American law and discusses where these approaches may be appropriate for application under the Telecommunications Act. Part I examines the text of the Telecommunications Act as well as its legislative history. Part II considers the FCC rulemaking which implemented the Telecommunications Act. Part III explores the development of the good faith negotiation doctrine in American labor law. Part IV investigates the existence of good faith negotiation in American contract law. Finally, Part V integrates the text of the Telecommunications Act, its legislative history, and the FCC rules with the relevant

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19. See generally *infra* Part III.

20. See *infra* Part II.

21. See *id.*

22. See *infra* Part III.

23. See *id.*

24. See *infra* Part IV.

25. See *id.*

policies and doctrines of labor law and contract law and proposes a model for determining good faith.

#### I. AN ANALYSIS OF THE TELECOMMUNICATIONS ACT OF 1996 AND ITS LEGISLATIVE HISTORY

In passing the Telecommunications Act of 1996, Congress intended to promote competition and lower prices in local telecommunications markets.<sup>26</sup> To accomplish this monumental task, the Telecommunications Act combines a mixture of legal mandates and economic encouragements, each designed to break down the current system of regulatory and economic structures supporting the local phone monopolies. The good faith negotiation clause is one such mandate. However, Congress did not provide any substantive guidance as to how the courts should interpret the meaning of good faith. Although little doubt exists that Congress intended the clause to facilitate competition,<sup>27</sup> neither the text of the Telecommunications Act nor much of the legislative history gives any indication how Congress intended the clause to achieve this goal. The Telecommunications Act does not define good faith; nowhere in the legislative history does Congress refer to any legal meaning of good faith, and there is no suggestion as to what might constitute a violation of this duty. After briefly describing the historical development of the system of local phone monopolies and introducing the mechanics of the Telecommunications Act, this section explores the possible conclusions to be drawn from this dearth of guidance provided by Congress.

The local phone market, as it existed until the passage of the Telecommunications Act in 1996, was created in 1974 by the Modification of Final Judgment ("MFJ") settlement.<sup>28</sup> Prior to the MFJ, AT&T either directly owned, or controlled through subsidiary corporations, 80% of the local and long-distance

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26. The Telecommunications Act was drafted "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ." H.R. CONF. REP. NO. 104-458, at 113 (1996).

27. Telecommunications Act of 1996, preamble, Pub. L. No. 104-104, 110 Stat. 56.

28. See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983). The MFJ settled the antitrust suit the Department of Justice brought against AT&T in 1974. See *id.*

market.<sup>29</sup> The MFJ required AT&T to divest itself of its entire interest in the local phone market but allowed it to retain its interexchange or long-distance operations and telephone equipment manufacturing plant.<sup>30</sup> The divested local exchanges became the seven Regional Bell Operating Companies ("RBOCs"), which enjoyed local monopoly power protected by the MFJ.<sup>31</sup> In the Telecommunications Act, Congress chose to group the RBOCs together with other incumbent carriers referring to them collectively as ILECs.<sup>32</sup> The MFJ brought competition to the long-distance market, but left monopolies in control of the local market.<sup>33</sup> The passage of the Telecommunications Act ended this era, and began a new one wherein local phone service is also open to competition.<sup>34</sup>

The mechanics of the de-monopolization of the local phone markets are complex, and Congress understood the Telecommunications Act itself could not account for every contingency. Accordingly, the Telecommunications Act directs the FCC to promulgate rules that will facilitate competition.<sup>35</sup> Congress also envisioned extensive participation by the various state commissions currently regulating local markets.<sup>36</sup>

In drafting the Telecommunications Act, Congress designed a complex mixture of legal constraints and incentives to foster competition with minimal government regulation.<sup>37</sup> For example, section 271 allows the ILECs to sell long-distance services in exchange for cooperating in the de-monopolization of the local

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29. See JOHN BELLAMY, *DIGITAL TELEPHONY* 3 (2d ed. 1991).

30. See H.R. REP. NO. 104-204, at 48-49 (1996).

31. See *id.* There are two other major local phone service companies, GTE and Ameritech, which for the purposes of this paper operate as RBOCs.

32. See generally Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified in scattered sections of 15, 18, and 47 of U.S.C.). This incorporated a number of smaller local phone companies as well as GTE and Ameritech which were never considered RBOCs.

33. See *AT&T*, 552 F. Supp. at 222-24.

34. See H.R. CONF. REP. NO. 104-458, at 113 (1996).

35. See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 96-325, First Report and Order, ¶ 84 (Aug. 8, 1996) [hereinafter *Interconnection Order*].

36. Although a lively debate has arisen surrounding the limits of the FCC's power over issues traditionally governed by State commissions, this paper does not explore these issues. This issue is currently being litigated in *Iowa Utilities Board v. FCC*, 109 F.3d 418 (8th Cir. 1996) (granting stay pending review of the FCC's pricing provisions and "pick and choose rule").

37. See generally Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified in scattered sections of 15, 18, and 47 U.S.C.).

phone market.<sup>38</sup> Accordingly, an ILEC may offer long-distance services to its customers after it completes a "competitive checklist" proving competition exists within its local market.<sup>39</sup>

However, Congress was not content to rely solely on incentives. To compliment these incentives, Congress added section 251 which prevents the ILECs from unfairly protecting their monopolies.<sup>40</sup> While section 271 offers the incentive of long-distance service, section 251 governs the activities of the ILECs with respect to local competitors.<sup>41</sup> Section 251 dictates the manner in which an ILEC must interconnect with competing local exchange carriers ("CLECs").<sup>42</sup> Along with mandating interconnection, section 251 forbids all ILECs and CLECs from installing any feature that does not comply with standard guidelines.<sup>43</sup> Furthermore, it requires all local carriers to resell their telecommunications services without discrimination,<sup>44</sup> to provide number portability and dialing parity,<sup>45</sup> to afford access to its rights-of-way,<sup>46</sup> and to establish reciprocal compensation agreements.<sup>47</sup>

Section 251(c)(1) also separately imposes upon each ILEC:

The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to

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38. Telecommunications Act of 1996, 47 U.S.C.A. § 271 (West Supp. 1997).

39. *See id.*

40. *See id.* § 251.

41. Compare § 251, with § 271.

42. 47 U.S.C.A. § 271 (West Supp. 1997).

43. *See id.* § 251(a)(1)-(2) ("Each telecommunications carrier has the duty—(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to sections 255 or 256. . . .").

44. *See* Telecommunications Act of 1996, 47 U.S.C.A. § 251(b)(1) (West Supp. 1997). In reselling services, an ILEC offers to a competitor a package of services at a discounted rate for the competitor to market as its own product. Therefore, MCI could purchase local telephone service from U S West and resell it to customers in Denver as its own product. *See* H.R. REP. NO. 104-204, at 72 (1996).

45. *See* 47 U.S.C.A. § 251(b)(2)-(3). Number portability allows a customer who changes local service providers to retain his or her phone numbers. Dialing parity means that all persons using a certain local exchange, whether through resale or directly, dial the same number of digits. Thus an MCI customer buying resold U S West products in Denver will not have to dial any access codes or different numbers than would a U S West customer. *See* H.R. REP. NO. 104-204, at 72 (1996).

46. *See* 47 U.S.C.A. § 251(b)(4). All local phone companies currently hold millions of rights-of-way and easements for the existing wire networks. *See* H.R. REP. NO. 104-204, at 72 (1996).

47. *See* 47 U.S.C.A. § 251(b)(5).

fulfill the duties described in paragraphs 1 through 5 of subsection b and this section.<sup>48</sup>

Good faith is required throughout the negotiation of the interconnection agreements. The language of the Telecommunications Act, however, provides no definition of good faith.<sup>49</sup> Furthermore, the Telecommunications Act describes only one instance in which a party might violate the good faith clause—when a party simply refuses to negotiate at all.<sup>50</sup> In order to apply the clause beyond situations in which a party refuses to negotiate, courts will have to rely upon other sources. One such source is the legislative history of the Telecommunications Act.

Unfortunately, the Telecommunication Act's vast legislative history is scant on the definition of good faith. In early drafts of the Telecommunications Act, and throughout the progression of the bill, Congress did not significantly alter the wording or meaning of the good faith negotiation clause. The Senate version first read as follows:

(e) GOOD FAITH NEGOTIATIONS.

(1) INITIATION. A local exchange carrier that receives a request from an entity under subsection (b) shall commence good faith negotiations with respect to a binding agreement for the interconnection requested within 15 days after receiving the request.<sup>51</sup>

The House version resembles the enacted clause:

(8) GOOD FAITH NEGOTIATION. The duty to negotiate, under the supervision of State commissions, the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (7).<sup>52</sup>

48. 47 U.S.C.A. § 251(c)(1). The Telecommunications Act further states that a "requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements." *Id.*

49. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified in scattered sections of 15, 18, and 47 U.S.C.).

50. See 47 U.S.C.A. § 252(b)(5).

51. S. 652, 104th Cong. § 251 (Feb. 11, 1995) (Discussion Draft of the Telecommunications Competition and Deregulation Act of 1995).

52. H.R. 1555, 104th Cong. § 242 (May 3, 1995). Paragraphs (1) through (7) refer to sections similar to those enacted on number portability, dialing parity, rights-of-way, and reciprocal compensation. See *supra* notes 45-47. Later versions

There was surprisingly little discussion about the meaning of these clauses, and much less argument to remove them entirely. In May of 1995, the Senate Subcommittee on Telecommunications and Finance held a series of hearings during which several telecommunications industry officials testified on the merits and procedures of deregulating the local phone industry.<sup>53</sup> During the hearings, Gerald Levin, Chairman and CEO of Time Warner Communications, supported a clause requiring good faith negotiations with oversight by the state commissions.<sup>54</sup> In an earlier hearing, Anne K. Bingaman, Assistant U.S. Attorney General for Antitrust, opposed the language of the bill because she believed the clause to have no substantive legal effect.<sup>55</sup> Her concerns stemmed from the thirty-year history of contentious litigation between the Department of Justice and AT&T.<sup>56</sup> She called the eventual results of this litigation successful, but warned that if Congress did not "get . . . interconnection right, if [Congress] let[s] these guys slug it out in State commissions or in courts, [Congress is] back to 15 years of fighting while [the local phone companies] are over there [offering] long-distance."<sup>57</sup> In Bingaman's mind, the good faith clause apparently did not go far enough to force the local phone companies to open their markets to competition.<sup>58</sup> Despite the comments of private parties like Bingaman and Levin, the record is silent concerning the lawmaker's intended meaning of good faith negotiation.<sup>59</sup>

By including the good faith clause, Congress obviously intended to impose some heightened duty of negotiation upon the

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of the House bill added the provision that both parties would have to negotiate in good faith. See H.R. 1555, 104th Cong., § 242 (July 24, 1995).

53. *Communications Law Reform: Hearings Before the Subcomm. on Telecommunications and Finance of the Comm. of Commerce*, 104th Cong. 1 (1995).

54. See *id.* at 113.

55. See *Hearing on Telecomms. Policy Reform: Hearings of the Comm. on Commerce, Science, and Transp.*, 104th Cong., 67-69 (1995).

56. See *id.*

57. *Id.* at 69.

58. See *id.* at 69-70.

59. Congress did mention good faith negotiation in another section of the Telecommunications Act stating:

[A] refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

47 U.S.C.A. § 252(b)(5) (West Supp. 1997) (disregarding Bingaman's advice). See *supra* note 1 and accompanying text.

ILECs. It is equally obvious that Congress decided not to place in the text of the Telecommunications Act or in the legislative history any indication of what it means to negotiate in good faith, or what actions might constitute a violation of the duty to negotiate in good faith. Therefore, it seems unmistakable that Congress decided to allow the FCC and the courts to flesh out the meaning of good faith negotiation as it applies to the telecommunications market.

## II. THE FCC'S INTERPRETATION OF THE GOOD FAITH CLAUSE

In contrast to the dearth of guidance provided by the Telecommunications Act and its legislative history, the FCC rules provide a solid base from which the courts can adjudicate whether a company violated its duty to negotiate in good faith. In addition, industry participants are likely to use the FCC rules to shape their negotiations to avoid liability.

The FCC designed two tests to determine whether a negotiator's actions violated the duty to negotiate in good faith. An objective test for liability is evidenced by a set of *per se* violations of the duty to negotiate in good faith. A separate form of liability arises from a subjective test for good faith negotiation. These two tests establish a base from which the courts will be able to govern the actions of negotiators. The *per se* or objective test allows the FCC to prohibit certain specific behavior as well as signal the industry of this prohibition. The subjective test, on the other hand, grants the adjudicating body a large measure of discretion with which it can sanction a wide range of behavior. Although the FCC tests further define the meaning of good faith under the Telecommunications Act, the FCC admits that a great deal of litigation will be required to develop a meaningful doctrine of good faith negotiation.<sup>60</sup>

On August 8, 1996, nearly six months after the passage of the Telecommunications Act, the FCC published its regulations designed to implement the local competition sections.<sup>61</sup> The FCC claims the Telecommunications Act grants it authority to promulgate national rules implementing various provisions.<sup>62</sup> Though the FCC's authority to promulgate these rules is in

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60. See Interconnection Order, *supra* note 35, ¶ 150.

61. See Interconnection Order, *supra* note 35, at app. B.

62. See *id.*

dispute,<sup>63</sup> the FCC rules will have, at minimum, strong persuasive effect upon any future court proceeding. The FCC describes its rules as "minimum requirements of good faith negotiations" intended to guide parties when negotiating interconnection agreements, as well as state commissions reviewing these agreements.<sup>64</sup> Like Congress, the FCC recognized that the ILECs enjoy an inherent advantage that necessitates rebalancing.<sup>65</sup>

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63. See *Iowa Util. Bd. v. FCC*, 109 F.3d 418 (8th Cir. 1996).

64. Interconnection Order, *supra* note 35, ¶ 141. The FCC codified its minimum requirements under 47 C.F.R. § 51.301 Duty to negotiate:

- (a) An incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251(b) and (c) of the Act.
- (b) A requesting telecommunications carrier shall negotiate in good faith the terms and conditions of agreements described in paragraph (a) of this section.
- (c) If proven to the Commission, an appropriate state commission, or a court of competent jurisdiction, the following actions or practices, among others, violate the duty to negotiate in good faith:
  - (1) Demanding that another party sign a nondisclosure agreement that precludes such party from providing information requested by the Commission, or a state commission, or in support of a request for arbitrations under section 252(b)(2)(B) of the Act;
  - (2) Demanding that a requesting telecommunications carrier attest that an agreement complies with all provisions of the Act, federal regulations, or state law;
  - (3) Refusing to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules;
  - (4) Conditioning negotiation on a requesting telecommunications carrier first obtaining state certifications;
  - (5) Intentionally misleading or coercing another party into reaching an agreement that it would not otherwise have made;
  - (6) Intentionally obstructing or delaying negotiations or resolutions of disputes;
  - (7) Refusing throughout the negotiation process to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of issues; and
  - (8) Refusing to provide information necessary to reach agreement. Such refusal includes, but is not limited to:
    - (i) Refusal by an incumbent LEC to furnish information about its network that a requesting telecommunications carrier reasonably requires to identify the network elements that its needs in order to serve a particular customer; and
    - (ii) Refusal by a requesting telecommunications carrier to furnish cost data that would be relevant to setting rates if the parties were in arbitration.

Interconnection Order, *supra* note 35, at app. B; Amendments to the Code of Federal Regulations (Aug. 8, 1996).

65. "As distinct from bilateral commercial negotiation, the new entrant comes to the table with little or nothing the incumbent LEC needs or wants." Interconnection Order, *supra* note 35, ¶ 15.

The first four prohibited actions or practices listed by the FCC under section 51.301(c) evidence *per se* liability based on objective criteria. A party's state of mind is not considered when a court examines whether a party has "demand[ed] that another party sign a nondisclosure agreement."<sup>66</sup> Nor does the adjudicating body need to investigate the state of mind of a party that "refus[es] to include . . . a provision that permits the agreement to be amended."<sup>67</sup> Either the party refuses, or it does not refuse to include the provision. Similarly, either a party demands, or it does not demand a nondisclosure agreement. These are questions of fact that must be determined, but in no sense is the party's state of mind or intention considered. In sections 51.301(c)(2) and (4), the FCC creates *per se* liability by prohibiting a party from requesting another party to waive its legal remedies,<sup>68</sup> or conditioning a negotiation on state certification.<sup>69</sup> As with the previous sections, these sections impose liability based upon objective criteria and not the actor's state of mind. In addition to the published rules, the FCC declares that extreme forms of delay, such as would constitute outright refusal, will be considered *per se* violations.<sup>70</sup>

In addition to the objective criteria listed in the rules, the FCC found it necessary to test a company's actions based on a more subjective set of criteria—requiring the court to examine the state of mind of the defendant corporation.<sup>71</sup> A court must consider the state of mind of a defendant when considering whether they *intentionally* misled or coerced a party into reaching an agreement.<sup>72</sup> Similarly, when examining whether a party *intentionally* obstructed or delayed negotiations, a court must consider the state of the defendant's mind.<sup>73</sup> These rules establish a separate subjective test for good faith negotiation.

In its comments to these rules, the FCC strongly indicates its endorsement of a subjective-based evaluation in addition to the

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66. 47 C.F.R. § 51.301(c)(1) (1996).

67. *Id.* § 51.301(c)(3). The FCC describes a violation of this duty as a *per se* failure to negotiate in good faith. See Interconnection Order, *supra* note 35, ¶ 152.

68. See 47 C.F.R. § 51.301(c)(2), (4); Interconnection Order, *supra* note 35, ¶ 152. A party may voluntarily waive its legal remedies. See *id.*

69. See 47 C.F.R. § 51.301(c)(4); Interconnection Order, *supra* note 35, ¶ 154.

70. See Interconnection Order, *supra* note 35, ¶ 154.

71. See 47 C.F.R. § 51.301(c)(5)-(6) (1996).

72. See *id.* § 51.301(c)(5).

73. See *id.* § 51.301(c)(6).

enumerated objective violations. The FCC initially states that determining whether parties negotiated in good faith will require an examination of the specific facts of each negotiation.<sup>74</sup> This case-by-case procedure was used by the NLRB in its development of the good faith negotiation clause in labor law.<sup>75</sup> In addition to proscribing a procedure for the test, the FCC attempted to clarify the meaning of good faith by citing the Uniform Commercial Code's definition of good faith: "honesty in fact in the conduct of the transaction concerned."<sup>76</sup> The FCC further posed the question as "a narrow one focused on subjective intent with which the person in question has acted."<sup>77</sup>

More concretely, the FCC suggests some instances where the subjective test should be applied. For example, the FCC recommends that a nondisclosure agreement which does not violate the objective constraints delineated by section 51.301(c)(1) should still be carefully evaluated to determine if it violates any subjective criteria.<sup>78</sup> The FCC also hints that a subjective violation might occur if a company makes a *quid pro quo* demand of a corporation on two unconnected negotiations.<sup>79</sup> Any actions intended to delay negotiations, such as refusing to designate a representative with the appropriate binding authority, will also be suspect.<sup>80</sup> However, in any of these instances, final determination would necessarily depend upon the facts.<sup>81</sup>

In the last section, the FCC imposes a duty to provide information in which it includes a reasonableness test.<sup>82</sup> The FCC elaborates on the reasonableness requirement by suggesting that it would be reasonable to seek and obtain cost data relevant to the negotiation, as well as necessary technical information about the network.<sup>83</sup> Conversely, the FCC remarks that it would not be reasonable for a carrier to demand proprietary information

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74. Interconnection Order, *supra* note 35, ¶¶ 142, 150.

75. *See infra* Part III.

76. Interconnection Order, *supra* note 35, ¶ 148 (quoting U.C.C. § 1-201(19) (1981)).

77. *Id.* (quoting U.C.C. § 1-201(84) (1981)).

78. *See id.* ¶ 151.

79. *See id.* ¶ 153.

80. *See id.* ¶ 154.

81. *See id.* ¶ 153.

82. *See* 47 C.F.R. § 51.301(8) (1996).

83. *See* Interconnection Order, *supra* note 35, ¶ 155. The FCC does not think it is unreasonable for a new entrant to deny cost information to an incumbent. *See id.*

unnecessary for interconnection.<sup>84</sup> A similar duty to disclose information developed in labor law under the NLRA.<sup>85</sup>

In contrast to the dearth of information provided by the Telecommunications Act and its legislative history, the FCC's rules provide two workable methods for judging the actions of a negotiator. The *per se* test prohibits specific behavior, while the subjective test allows the adjudicator to sanction a wide variety of behavior. However, the subjective test remains largely undefined; the FCC rules only define the procedural rules for the subjective test.<sup>86</sup> A subjective violation must be examined on case-by-case analysis of each negotiation.<sup>87</sup> With no agreements litigated under the good faith clause and no agreements currently under litigation, one must look to other areas of law to understand how courts might implement a subjective good faith test. The next two sections discuss the concept of good faith in labor and contract law, for these are the two areas of law on which courts and the FCC will most likely focus when interpreting and applying a subjective test under the good faith negotiation clause in the Telecommunications Act.

### III. AN ANALYSIS OF THE GOOD FAITH NEGOTIATION CLAUSE IN THE NATIONAL LABOR RELATIONS ACT

For over fifty years, federal law has required employers and employees to negotiate their labor agreements in good faith.<sup>88</sup> The mandate to use good faith in labor law is a useful analogy to the good faith negotiation clause of the Telecommunications Act. In both cases, Congress found it necessary to intervene in the traditionally unregulated arena of contract law. In labor law, Congress understood that the relationship between employers and employees provided a fruitful ground for abuse.<sup>89</sup> An employer could use its economic power to prevent the formation of a union and to subvert a union's attempt to negotiate a

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84. *See id.*

85. *See infra* notes 93-110 and accompanying text.

86. *See* Interconnection Order, *supra* note 35, ¶¶ 148-56.

87. *See* Interconnection Order, *supra* note 35, ¶ 150.

88. *See* Russel A. Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065, 1067 (1941); *see also* Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1403 (1958).

89. *See* Wagner Act, ch. 372, §1, 49 Stat. 449 (1935).

contract.<sup>90</sup> To counteract this imbalance of power, Congress mandated that employers negotiate in good faith with their employees.<sup>91</sup> Similarly, Congress has recognized the inherent power possessed by the ILECs, and in response, required that the ILECs negotiate in good faith.<sup>92</sup> Therefore, an examination of the current meaning of good faith negotiation in labor law will offer a working model that will provide the courts with a valuable body of well-tested law from which they can begin to develop a meaning of good faith negotiation under the Telecommunications Act.

A. *The History of Good Faith Negotiation in American Labor Law*

During World War I, the National War Board first imposed a duty to negotiate in good faith in labor law by repeatedly holding that company representatives should meet with union representatives "in an earnest endeavor to reach an agreement."<sup>93</sup> A few years later, Congress codified the duty to bargain in the Transportation Act of 1920, declaring that all carriers have a duty "to exert every reasonable effort to adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute."<sup>94</sup> Although the findings of both the National War Board and the language of the Transportation Act of 1920 implied a duty to bargain in good faith, neither mentioned specifically what was required under this duty, nor did any significant case law develop.<sup>95</sup>

The National Labor Board, established by the National Industrial Recovery Act ("NIRA"), first articulated the duty to bargain as a duty to negotiate in good faith in *Houde Engineering Corp.*<sup>96</sup> Subsequently, the National Labor Board, in a flurry of

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90. *See id.*

91. *See* National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1994).

92. *See supra* Part I.

93. *In re Amalgamated Meat Cutters v. Western Cold Storage Co.*, Nat'l Labor Bd. Docket No. 80 (1919), *quoted in* Smith, *supra* note 88, at 1069.

94. Transportation Act of 1920, 40 U.S.C. § 316 (1994).

95. *See generally* Cox, *supra* note 88.

96. *See* *Houde Eng'g Corp.*, 1 N.L.R.B. (old series) 35 (1934). It is an "incontestably sound principle that the employer is obligated by the statute to negotiate in good faith with his employees' representatives; to match their proposals, if unacceptable, with counter-proposals; and to make every reasonable effort to reach an agreement." *Id.*

decisions, began to develop case law defining the duty to negotiate in good faith as requiring both parties to approach the negotiations with an open mind and a willingness to make a reasonable effort to reach a common ground of agreement.<sup>97</sup> Although the United States Supreme Court struck down part of the NIRA as unconstitutional,<sup>98</sup> in 1935, Congress enacted the Wagner Act, otherwise known as the National Labor Relations Act, which preserved the labor sections of the NIRA.<sup>99</sup>

The legislative history of the Wagner Act is ambiguous with regard to the duty to negotiate in good faith.<sup>100</sup> When introducing the bill, Senator Wagner approvingly referred to the good faith language of *Houde Engineering*,<sup>101</sup> and the Senate Committee considering the bill declared its belief that a company should "negotiate with a bona fide effort to arrive at a collective bargaining agreement."<sup>102</sup> However, on the Senate floor, Senator Wagner indicated that his bill did not require any more of a company than to sit in the room with union representatives.<sup>103</sup> The Supreme Court affirmed this sentiment in *NLRB v. Jones & Laughlin Steel Corp.*, where it interpreted a company's duty under the Wagner Act.<sup>104</sup> In 1943, the Ninth Circuit, interpreting the Supreme Court's holding in *Jones & Laughlin Steel*,<sup>105</sup> explained the duty to bargain in good faith as an "obligation . . . to participate actively in the deliberations so as to indicate a present intention

97. See *Connecticut Coke Co.*, 2 N.L.B. 88, 89 (1934); see also *National Lock Co.* 1 N.L.R.B. (old series) 15 (1934); *Hall Baking Co.* 1 N.L.R.B. (old series) 83 (1934); *Dresner & Son*, 1 N.L.R.B. (old series) 26 (1934); *Budd Mfg. Co.*, 1 N.L.R.B. (old series) 58 (1934). Congress replaced the National Labor Board ("NLB") with the National Labor Relations Board ("NLRB") in July of 1934. See H.R.J. RES. 44, 73rd Cong.; 48 Stat. 1183 (1934).

98. See *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935) (holding that Congress's delegation of legislative power to the executive branch in the NIRA was unconstitutionally broad.).

99. See Wagner Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at National Labor Relations Act §§ 1-19, 29 U.S.C. §§ 151-69 (1994)).

100. See Smith, *supra* note 88, at 1084-89.

101. See 79 CONG. REC. 7565, 7571 (1935).

102. S. REP. NO. 74-573, at 12 (1935).

103. See Smith, *supra* note 88, at 1086-88.

104. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). "The Act does not compel agreements between employers and employees . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." *Id.* at 45.

105. See *id.*

to find a basis for agreement."<sup>106</sup> In 1947, Congress, overriding President Truman's veto, enacted the Labor Management Relations Act ("Taft-Hartley Act")<sup>107</sup> which substantially modified the Wagner Act.<sup>108</sup> Section 8(d) of the Taft-Hartley Act detailed the duties of both employers and employees:

To bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in *good faith* with respect to wages, hours, and other terms and conditions of employment, . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .<sup>109</sup>

This language, although often debated, has not been amended since its enactment.<sup>110</sup>

### B. *The Current Meaning of Good Faith Negotiation in American Labor Law*

Currently, the NLRB and the courts apply two independent tests to determine whether a party acted in good faith during a negotiation. In one test, the NLRB applies an objective set of criteria; in the other, it applies a subjective set. In applying the objective test, the NLRB scrutinizes a party's behavior to determine whether the party has violated one or more enumerated *per se* violations of the duty to negotiate in good faith.<sup>111</sup> When implementing the subjective test, the NLRB examines the "totality of the circumstances" evidencing a party's behavior during negotiations to determine whether the duty to negotiate in good faith has been violated.<sup>112</sup> The objective test

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106. NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943).

107. Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-91 (1994).

108. *See id.*

109. National Labor Relations (Wagner) Act § 8(d), 29 U.S.C. § 158(d) (1994) (emphasis added).

110. *See id.*

111. *See, e.g.*, NLRB v. Katz, 369 U.S. 736 (1962).

112. *See, e.g.*, General Electric Co., 150 N.L.R.B. 192 (1964), *enforced*, 418 F.2d 736 (2d Cir. 1969), *cert denied*, 397 U.S. 965 (1970) (holding evidence of a strategy designed to bypass union representatives and effectively negotiate directly with employees violates duty of good faith negotiation); *see also* Virginia Holding Corp., 293 N.L.R.B. 182 (1989); American Commercial Lines, Inc., 291 N.L.R.B. 1066

allows the NLRB to single out specific reoccurring or particularly damaging behavior. On the other hand, the subjective test allows the NLRB to punish behavior that would not by itself constitute a *per se* violation, but when examined along with other suspect behavior constitutes a violation of the duty to negotiate in good faith.

The FCC appears to have adopted a similar approach in its regulations under the Telecommunications Act. In 47 C.F.R. section 51.301(c), the FCC outlines a specific list of prohibited acts that unto themselves constitute violations of the duty to negotiate in good faith.<sup>113</sup> Meanwhile, the FCC also indicates that the courts should examine the totality of the circumstances to determine if bad faith exists beyond the enumerated *per se* violations.<sup>114</sup> The similarity between the FCC and NLRB approaches suggests that an examination of the current NLRB meaning of good faith in labor law will provide an effective road map for the judiciary to follow when interpreting the meaning of good faith in the Telecommunications Act.

Originally, the House version of the Taft-Hartley Act incorporated an extensive list of criteria for an objective good faith test.<sup>115</sup> Though the Senate rejected an objective test and the final bill did not include the list, in order to enforce the Taft-Hartley Act, the NLRB found it necessary to develop a series of *per se* violations of the duty to bargain.<sup>116</sup> The resulting body of law detailing *per se* violations of the duty to bargain operates much the same as the House intended its objective test to operate.<sup>117</sup> For example, the courts have held that a refusal to execute a written contract is a *per se* violation of the duty to

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(1988).

113. See *supra* notes 66-70 and accompanying text.

114. See *supra* notes 71-81 and accompanying text.

115. See H.R. 3020, 80th Cong. § 2(11) (1947). For example, the bill stated that in the absence of an agreement the parties must hold "continued discussion[s] of the matters in dispute at no less than four separate additional conferences. . . ." *Id.* §2(11)(iii). Though the language failed to pass, see H.R. CONF. REP. NO. 80-510, at 34 (1947), and the Senate replaced it with § 8(d) in the current version of the bill, see National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1994), the House Conference Report stated that it believed § 8(d) "had to a very substantial extent the same effect as the House bill. . . ." H.R. CONF. REP. NO. 80-510, at 34 (1947).

116. See *generally* THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 596-607 (Patrick Hardin et. al. eds., 3d ed. 1992) [hereinafter THE DEVELOPING LABOR LAW].

117. See Robert P. Duvin, *The Duty to Bargain: Law in Search of Policy* 64 Colum. L. Rev. 248 (1964); cf. THE DEVELOPING LABOR LAW, *supra* note 116.

bargain in good faith.<sup>118</sup> A refusal to meet at a reasonable time has also been found to be a *per se* violation.<sup>119</sup> Similarly, insisting on a written proposal or a demand to bargain by mail violates the duty to bargain.<sup>120</sup>

Although the *per se* tests outlawed specific behavior, the NLRB sought to develop a broader, more flexible test to include behavior not specifically prohibited in the language of the statute. Hence, the NLRB created a subjective test for good faith negotiation under which it could examine a wide range of behavior.

This subjective test for good faith can be traced to cases decided before the Taft-Hartley amendments to the Wagner Act became effective.<sup>121</sup> Although the text of the Taft-Hartley amendments to the Wagner Act expressly outlined the duty to "confer in good faith,"<sup>122</sup> the NLRB and several circuit courts previously interpreted the Wagner Act to require an "employer to bargain in good faith both collectively and exclusively with the chosen representative of a majority of his employees with respect to all matters which affect his employees as a class, including wages, hours of employment, and working conditions."<sup>123</sup> The NLRB required that parties "deal with each other with an open and fair mind and sincerely endeavor to overcome obstacles or difficulties existing between the employer and the employees. . . ."<sup>124</sup> Conversely, "a refusal to do what reasonable and fair minded men are ordinarily willing to do, upon request, may certainly be taken to be an indication of a lack of proper intent and good faith in collective bargaining."<sup>125</sup> Determining whether a party subjectively bargained in good faith was a question of fact

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118. See *NLRB v. International Longshoremen's Ass'n*, 443 F.2d 218 (5th Cir. 1971), enforcing 181 N.L.R.B. 590 (1970) (holding a union's refusal as a violation); see also *H.J. Heinz Co. v. N.L.R.B.*, 311 U.S. 514 (1941) (holding company refusal as a violation).

119. See *Carbonex Coal Co.*, 248 N.L.R.B. 779 (1980), enforced, 679 F.2d 200 (10th Cir. 1982).

120. See *NLRB v. United States Cold Storage Corp.*, 203 F.2d 924 (5th Cir. 1953).

121. See, e.g., *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676 (9th Cir. 1943).

122. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1994).

123. *Wilson & Co. v. NLRB*, 115 F.2d 759, 763 (8th Cir. 1940), cited with approval in *Montgomery Ward*, 133 F.2d at 683.

124. *NLRB v. Boss Mfg. Co.*, 118 F.2d 187, 189 (7th Cir. 1941), cited with approval in *Montgomery Ward*, 133 F.2d at 684.

125. *Wilson & Co.*, 115 F.2d at 763, cited with approval in *Montgomery Ward*, 133 F.2d at 683.

left to the NLRB—provided the facts were supported by evidence in the record.<sup>126</sup>

After Congress passed the Taft-Hartley Act, the Supreme Court decided a line of cases further defining the subjective test of good faith in collective bargaining. Although the mandate to bargain in good faith now rested in statutory form, the operation of the duty did not alter significantly. In developing the subjective test, the Court struggled with the tension between scrutinizing the negotiating process as opposed to the substance of the agreements. Early on, the Court determined that the Taft-Hartley Act was designed to “promote industrial peace” by encouraging unions and employers to negotiate and sign voluntary agreements.<sup>127</sup> Accordingly, parties could not satisfy the duty to negotiate in good faith by simply sitting down in the same room and participating in “a sterile discussion of union-management differences.”<sup>128</sup>

The exact nature of what else parties had to do remains a contentious issue. Even though Congress sought to restrict the NLRB’s influence over the substance of the agreements,<sup>129</sup> the Court carried forward pre-Taft-Hartley Act precedent of *Houde Engineering*.<sup>130</sup> This precedent strongly suggests the courts have power to pass judgement upon the substance of the agreements.

Nonetheless, both Congress<sup>131</sup> and the Supreme Court<sup>132</sup> have clearly stated their desire to refrain from interfering with the substance of the proposals and agreements. Early on, the Court concluded that the Taft-Hartley Act “does not encourage a party to engage in fruitless marathon discussions at the expense of

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126. See *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299-300 (1939).

127. *NLRB v. American Nat’l Ins. Co.*, 343 U.S. 395, 401-02 (1952).

128. *Id.* at 402.

129. See H.R. REP NO. 80-245, at 19 (1947). The Board “has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make.” *Id.*, cited in *American Nat’l Ins. Co.*, 343 U.S. at 404.

130. See *American Nat’l Ins. Co.*, 343 U.S. at 404.

131. The duty to bargain collectively in good faith “does not compel either party to agree to a proposal or require the making of a concession.” National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1994).

132. “The [Wagner] Act does not compel agreements between employers and employees.” *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

frank statement and support of his position."<sup>133</sup> The Court also noted, "it is equally clear that the [NLRB] may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the *substantive* terms of collective bargaining agreements."<sup>134</sup>

The tension between the mandate to refrain from adjudicating the substance of the agreements and the authority to adjudicate the procedure of the bargaining provides the bulk of the case law on the meaning of good faith in collective bargaining. In 1956, the Supreme Court encroached upon the substance barrier by describing good faith as requiring claims made by bargainiers to "be honest claims."<sup>135</sup> In *NLRB v. Truitt Manufacturing Co.*, the Supreme Court enforced the NLRB's order, finding the company failed to bargain in good faith, when, after claiming it could not offer a ten-cent wage increase, the company refused to provide proof of its financial inability.<sup>136</sup> The Court explained that when "an argument is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy."<sup>137</sup> The Court carefully emphasized that it was not creating a *per se* violation of the duty to bargain.<sup>138</sup> Nonetheless, Justice Frankfurter in dissent accused the majority of creating a *per se* violation and misapplying the subjective good faith standard.<sup>139</sup>

Two years later, the Supreme Court again addressed the substantive issue, holding in *NLRB v. Borg-Warner* that the duty to negotiate in good faith is limited to the discussion of "wages, hours, and other terms and conditions of employment."<sup>140</sup> But the duty does not obligate either party to yield to a specific demand or proposal.<sup>141</sup> As to other subjects, a party "is free to bargain or not to bargain, and to agree or not to agree."<sup>142</sup> Notwithstanding the holding of *Borg-Warner*, the circuits recognized that, when

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133. *American Nat'l Ins. Co.*, 343 U.S. at 404.

134. *Id.* (emphasis added).

135. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956).

136. *See id.* at 153-54.

137. *Id.* at 152-53.

138. *See id.* at 153.

139. *See id.* at 154-58 (Frankfurter, J., dissenting).

140. 356 U.S. 342, 348 (1958) (quoting National Labor Relations Act § 8(d), 29 U.S.C. §158(d) (1947) (current version at 29 U.S.C. § 158(d) (1994)).

141. *See id.* at 349.

142. *Id.*

evaluating good faith, "[i]t sometimes may be necessary for the [NLRB] or a court to examine the reasonableness of other parties' positions."<sup>143</sup>

More recently, the Court recounted the intentions of Congress in passing the Taft-Hartley Act, broaching the issue of freedom of contract and the extent to which the courts can examine the substance of the agreements:

The object of [the Taft-Hartley] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. . . . [T]hrough collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.<sup>144</sup>

The Court also recognized the freedom of contract as a "fundamental principle [upon which the Taft-Hartley Act] is grounded."<sup>145</sup> However, the Court quickly pointed out that:

While the parties' freedom of contract is not absolute under the [Taft-Hartley] Act,<sup>146</sup> allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.<sup>147</sup>

Therefore, it appears that the duty to negotiate in good faith mandates that certain subjects be discussed. However, no party must agree to a position within these subjects. Furthermore, the duty to negotiate does not apply to subjects outside of those listed by Congress in the text of the Taft-Hartley Act.

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143. *NLRB v. Advanced Bus. Forms Corp.*, 474 F.2d 457, 467 (2d Cir. 1973) (citing with approval *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953)); see also *NLRB v. General Elec. Co.*, 418 F.2d 736, 766-70 (2d Cir. 1969).

144. *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970); see also *NLRB v. First Nat'l Maintenance Corp.*, 627 F.2d 596 (2d Cir. 1980).

145. *H.K. Porter*, 397 U.S. at 107 (footnote omitted).

146. The Court points out that the Act does not allow the company the freedom to choose a union representative with which to negotiate. See *H.K. Porter*, 397 U.S. at 108 n.6.

147. *Id.* at 108 (footnote omitted).

Beyond the subject matter of the negotiations, the courts focused primarily upon the participant's state of mind. This evaluation necessitated an examination of a broad range of behavior. By definition, the only actions that unto themselves can constitute a violation of the duty to negotiate in good faith are *per se* violations.<sup>148</sup> Even so, evidence which fails to prove a *per se* violation may be considered in determining whether the party violated the subjective test of the duty to negotiate in good faith.<sup>149</sup>

For example, in *NLRB v. General Electric Co.*, the Second Circuit Court of Appeals recognized a plan by the company to "derogate the Union in the eyes of its members and the public at large" as violating the duty to bargain in good faith.<sup>150</sup> In reaching this conclusion, the court cited the proffering of "untenable and unreasonable positions,"<sup>151</sup> the complete absence of a concession by the company, and a publicity campaign designed to communicate directly to its workers instead of through union negotiators.<sup>152</sup> However, the court carefully noted that taken individually, none of these actions constitute convincing evidence of a violation of the duty to negotiate in good faith.<sup>153</sup>

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148. See *NLRB v. General Elec. Co.*, 418 F.2d 736, 756 (2d Cir. 1969). Certain specific practices, such as making unilateral changes in working conditions during bargaining, can be found to constitute *per se* violations of the duty to bargain, since they constitute a 'refusal to negotiate in fact.' When such conduct is present, the Board need make no finding that the totality of the party's conduct manifests bad faith; the *practice itself is conclusive on that issue.*

*Id.* (emphasis added) (citations omitted) (citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962)). This language also appears to refute the contention that *per se* violations are solely violations of the duty to bargain and not the duty to bargain in good faith. *But see* THE DEVELOPING LABOR LAW, *supra* note 116.

149. See *General Electric Co.*, 418 F.2d at 756. Here, the Second Circuit agreed with the NLRB that certain alleged *per se* violations could be considered along with "other specific instances to show that GE had developed a pattern of conduct inconsistent with good faith bargaining." *Id.*; see also *Continental Ins. Co. v. NLRB*, 495 F.2d 44 (2d Cir. 1974). In *Continental Ins.*, the Second Circuit, interpreting *General Electric Co.*, held that "[s]pecific conduct, while it may not, standing alone, amount to a *per se* failure to bargain in good faith, may when considered with all of the other evidence, support an inference of bad faith." *Id.* at 48.

150. *General Electric Co.*, 418 F.2d at 756.

151. *Id.* at 758.

152. *Id.* at 758-62.

153. See *id.* at 762.

The First Circuit, in *NLRB v. Reed & Prince Manufacturing Co.*,<sup>154</sup> first developed a subjective test wherein a court should examine the "totality of the circumstances" surrounding the negotiation. It held that:

[I]f an employer can find nothing whatever to agree to in an ordinary current-day contract submitted to him, or in some of the union's related minor requests, and if the employer makes not a single serious proposal meeting the union at least part way, then certainly the Board must be able to conclude that this is at least some evidence of bad faith.<sup>155</sup>

Here, the court found the company had not participated in good faith bargaining, as evidenced by a wide range of factors including: the company's refusal to supply information on employees' wages, classifications, and ages; its insistence that the union submit its contract in writing; its refusal to include language from section 9(a) of the Taft-Hartley Act into the contract; and its rejection of a union request to use the company bulletin board.<sup>156</sup> Based upon this "circumstantial evidence," the court found the company failed to bargain in good faith.<sup>157</sup>

Similarly, the Ninth Circuit, in *NLRB v. Montgomery Ward & Co.*,<sup>158</sup> viewed good faith as an "obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement," and also required that "a sincere effort must be made to reach a common ground."<sup>159</sup> The court approved the NLRB's evidentiary findings and its conclusion that the management of Montgomery Ward did not participate in good faith.<sup>160</sup> This conclusion was based on a variety of actions and not a single action or *per se* violation of the law.<sup>161</sup> In agreeing with the NLRB, the court highlighted: the management representative's refusal to indicate whether the company would sign a written agreement if and when the parties agreed on the

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154. 205 F.2d 131, 134 (1st Cir. 1953).

155. *Id.*

156. *See id.* at 135-39.

157. *Id.* at 139-40; *see also* *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 485 (1960).

158. 133 F.2d 676 (9th Cir. 1943).

159. *Id.* at 686.

160. *See id.* at 687-88.

161. *See id.* at 686-88.

terms; management's insistence on a six-hour minimum shift without overtime contrary to known company policy; and management's blatant and pointless delaying tactics with regard to meetings between union representatives and higher company officials.<sup>162</sup> The court took special notice of management's refusal to offer a single counterproposal to the several union proposals.<sup>163</sup> The court concluded that "[t]hroughout the conferences there is apparent a studied design of aloofness, of disinterestedness, of unwillingness to go forward, upon the part of Wards, which found its answer in the [NLRB's] conclusion of refusal to bargain."<sup>164</sup>

C. *Applying Good Faith in Labor Law to the Telecommunications Act*

The duty to negotiate in good faith as applied in labor law offers a good model for the application of such a duty in the telecommunications industry. The objective and subjective tests provide excellent guidance to both employers and unions. The objective test outlines a list of specific actions which, if engaged in, constitute *per se* violations of the duty to negotiate in good faith. This test allows the NLRB to focus on a specific tactic employed by a party and to broadcast to the world its disapproval of this tactic. The FCC objective test appears to be designed in a similar manner.<sup>165</sup> Furthermore, the Supreme Court upheld the validity of a *per se* test despite its infringement upon the freedom of contract.<sup>166</sup> Therefore, it appears unlikely that the Court will strike down any of the *per se* violations promulgated by the FCC. Each of the violations relates to the terms and conditions of the interconnection agreements,<sup>167</sup> and thus, appears to satisfy the requirements laid down by the Supreme Court in *H.K. Porter Co. v. NLRB*.<sup>168</sup> Furthermore, none of the rules significantly impinge upon the substance of the negotiations.<sup>169</sup>

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162. *See id.* at 686-87.

163. *See id.* at 687.

164. *Id.*

165. *See supra* notes 66-70 and accompanying text.

166. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970).

167. *See supra* notes 66-70 and accompanying text.

168. *See* 397 U.S. at 103.

169. *See id.* In the regulations promulgated by the FCC, section 51.301(c)(8) comes the closest to regulating the substance of the agreement. *See* 47 C.F.R. § 51.301(c)(8) (1996). However, the Court sanctioned this type of requirement, sometimes referred to as the duty to disclose, in *NLRB v. Truitt Manufacturing Co.*,

The subjective test, on the other hand, allows the NLRB to address the overall behavior of a party. With the subjective test, the NLRB can sanction a party for failing to negotiate in good faith even though it is unable to base its decision on a specific act. Therefore, even if a party is adhering to the letter of the law, thus complying with the *per se* test, the subjective test allows the NLRB to sanction behavior which taken in context violates the duty to negotiate in good faith. The FCC clearly also intends to use a subjective test in a similar fashion.<sup>170</sup> How this test develops will depend on how far the courts are willing to control the actions of the negotiating parties. The courts appear willing to allow agencies to regulate a wide range of behavior so long as the "totality of the circumstances" indicates a true lack of sincerity in the negotiation.<sup>171</sup> Therefore, the FCC may find that a party violates the duty to negotiate in good faith by offering unreasonable positions or refusing to make concessions,<sup>172</sup> by demanding that all proposals be made in writing,<sup>173</sup> or by pointlessly and blatantly delaying the negotiations.<sup>174</sup> Although evidence of only one of these would not constitute a violation under labor law, some combination would likely violate the duty to negotiate in good faith.

The subjective and objective tests for good faith currently used by the NLRB will be an important source of information for the courts as they try to give meaning to the good faith negotiation clause of the Telecommunications Act. However, this will not likely be the only area of law used in this endeavor. The courts will likely look to other areas of the law in developing the duty to negotiate in good faith as it applies to the telecommunications industry. Parties opposing the FCC's interpretation of the good faith negotiation clause will surely argue that labor law does not apply, and further, that courts should not encroach upon the freedom of contract. Therefore, an examination of how good faith negotiation has been treated by courts enforcing common law of contracts must be considered.

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351 U.S. 149, 152 (1956).

170. See *supra* notes 71-81 and accompanying text.

171. See *supra* note 155 and accompanying text.

172. See *NLRB v. General Elec. Co.*, 418 F.2d 736, 758 (2d Cir. 1969).

173. See *NLRB v. Reed & Prince Mfg.*, 205 F.2d 131, 135 (1st Cir. 1953).

174. See *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 686-88 (9th Cir. 1943).

## IV. AN ANALYSIS OF GOOD FAITH IN AMERICAN CONTRACT LAW

Under classic contract rules of offer and acceptance, courts do not assign liability to either party until an offer has been accepted.<sup>175</sup> This characteristic of contract law, often referred to as the freedom of contract, allows a "party to precontractual negotiations [to] break them off without liability at any time and for any reason—a change of heart, a change of circumstances, a better deal—or for no reason at all."<sup>176</sup> Any loss incurred by either party due to a failed negotiation is considered to be a cost of doing business.<sup>177</sup> While both the Uniform Commercial Code ("U.C.C.") and the Restatement (Second) of Contracts ("Restatement (Second)") recognize a duty of good faith in performance and enforcement, neither requires any such duty in the *negotiation* of a contract.<sup>178</sup> Even the drafters of the Constitution felt strongly enough about the freedom to contract to give reference to it.<sup>179</sup>

More recently, some commentators have argued that contract law has developed to include some recovery for loss attributed to failed negotiations.<sup>180</sup> According to this view, courts have compensated for losses incurred in negotiations causing unjust enrichment to the other party.<sup>181</sup> Courts have also recognized that liability may arise from misrepresentations made during negotiations.<sup>182</sup> And finally, a specific promise made during a negotiation may result in precontractual liability.<sup>183</sup> This section briefly outlines the resistance from the legal community to the duty of good faith negotiation in contract law. It then explores

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175. See E. ALLAN FARNSWORTH, *CONTRACTS* § 310, at 125-26 (1982).

176. See E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 221 (1987); see also RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (1981).

177. See Farnsworth, *supra* note 176, at 221..

178. See U.C.C. § 2-103 (1995); RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (1981).

179. See U.S. CONST. art. I, § 10, cl. 1. ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .").

180. See Farnsworth, *supra* note 176; Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968); Friedrich Kessler & Edith Fine, *Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964).

181. See Farnsworth, *supra* note 176, at 222.

182. See *id.*

183. See *id.*

whether modern trends have improved the prospect of liability during precontractual negotiations.

Contract law does not impose an explicit duty of good faith during the negotiations of an arms length contract.<sup>184</sup> Although both the Restatement (Second) and the U.C.C. impose a duty of good faith on contracted parties, both explicitly exclude the contract formation stage from this duty.<sup>185</sup> The most widely agreed upon reason for this omission stems from a "concern that limiting the freedom of negotiation might discourage parties from entering negotiations."<sup>186</sup> Rather than imposing any duties during negotiation, courts have held that each party entering into negotiations for a contract must assume the risk that negotiations will fail. An Illinois court described the assumption of risk:

In a business transaction both sides presumably try to get the best of the deal. That is the essence of bargaining and the free market. . . . So one cannot characterize self-interest as bad faith. No particular demand in negotiations could be termed dishonest, even if it seemed outrageous to the other party. The proper recourse is to walk away from the bargaining table, not to sue for "bad faith" in negotiations.<sup>187</sup>

Professor Farnsworth describes the aversion to applying good faith to negotiations as the "aleatory view of negotiations."<sup>188</sup> This theory states that a party entering negotiations voluntarily bears the risk of loss due to failed negotiations in anticipation of

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184. See, e.g., *Racine & Larmie, Ltd. v. California Dep't of Parks and Recreation*, 14 Cal. Rptr. 2d 335, 339 (Ct. App. 1992) ("[A]n obligation implied in law to negotiate in good faith . . . has never been accepted in Anglo-American jurisprudence."); see also *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 264 (2d Cir. 1984) (holding invalid a preliminary agreement which eliminated any liability from a duty to negotiate in good faith); *Frutico, S.A. de C.V. v. Bankers Trust Co.*, 833 F. Supp. 288, 300 (S.D.N.Y. 1993) (holding that when no agreement to negotiate in good faith exists "either in principle or in fact, there is no duty to negotiate in good faith"); *Magna Bank v. Jameson*, 604 N.E.2d 541, 544 (Ill. App. Ct. 1992) ("[I]n general, no duty to bargain in good faith over the terms of a contract exists even though the parties can, and often do, impose such a duty.").

185. See U.C.C. § 1-203 (1995); RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. c (1981).

186. See Farnsworth, *supra* note 176, at 221.

187. *Feldman v. Allegheny Int'l Inc.*, 850 F.2d 1217, 1223 (7th Cir. 1988), quoted in STEVEN J. BURTON AND ERIC G. ANDERSEN, CONTRACTUAL GOOD FAITH 331 (1995).

188. Farnsworth, *supra* note 176, at 221.

a gain realized if the negotiations succeed.<sup>189</sup> A conservative view of contractual law supports Farnsworth's theory.<sup>190</sup>

A. *Precontractual Good Faith Negotiation in Contract Law*

The four theories under which courts have offered compensation for loss due to failed negotiations apply to very specific situations and do not appear to have gained widespread acceptance. Under the first theory, unjust enrichment, the party seeking redress must prove that the other party unjustly gained from the negotiations. Under this theory, the misappropriation of ideas learned during failed negotiations can lead to liability. This occurred in negotiations between a builder and a contractor in *Hill v. Waxberg*.<sup>191</sup> In *Hill*, the contractor and the builder entered into negotiations regarding a joint venture to build and sell a building.<sup>192</sup> The contractor did not charge the builder for the preliminary design costs in the expectation that he would be compensated by the profits of the venture.<sup>193</sup> The parties were eventually unable to agree on a contract. The contractor sued and the court compensated the contractor for his reasonably anticipated profits based on the theory that the defendant builder unjustly profited on the plaintiff's ideas.<sup>194</sup> Despite the existence of *Hill* and other cases in which courts have granted recovery based on the misappropriation of ideas, such a cause of action has not been widely plead by litigants.<sup>195</sup> This result may be related to the fact that courts may be more willing to find an implied contract in situations that might give rise to precontractual liability.<sup>196</sup> Litigants may also accept Farnsworth's aleatory view and, as a result, not expect to benefit from litigation.<sup>197</sup>

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189. *See id.* at 221-23.

190. *See* GRANT GILMORE, *THE DEATH OF CONTRACT* 95-102 (Robert L. Collings ed. 1995) (expressing concern regarding the "health" of contract law given the development of proffer/acceptance liability that was sparked by section 90 of the Restatement (Second). *Id.*).

191. 237 F.2d. 936 (9th Cir. 1956).

192. *See id.* at 938.

193. *See id.*

194. *See id.* at 938-39. The court also held that the parties were bound by an implied-in-fact contract. *See id.* at 939.

195. *See* Farnsworth, *supra* note 176, at 232-33.

196. *See id.*

197. *Id.* at 233.

The second form of liability involving precontractual negotiations arises from one party's misrepresentation to another. Though misrepresentation is a common basis for recovery for a contract, precontractual negotiations rarely give rise to a claim of misrepresentation. In *Markov v. ABC Transfer & Storage Co.*,<sup>198</sup> the Washington State Supreme Court held a lessor of a warehouse liable for misrepresenting his intentions to renew the lease to the lessee.<sup>199</sup> The court reasoned that fraud could be shown by a promise "made without care or concern [for] whether it will be kept."<sup>200</sup> Farnsworth believes the court implicitly found that a serious intent to reach an agreement was demonstrated by negotiating.<sup>201</sup> He also claims that a party who either continues in negotiations, or fails to notify the other parties that his intent has changed, can be liable under the logic of *Markov*.<sup>202</sup> However, courts have rarely imposed such liability.<sup>203</sup>

The third method for imposing liability can occur when a court actually finds a specific duty to negotiate in good faith. In *Heyer Products v. United States*,<sup>204</sup> the plaintiffs sued the government for failing to grant them a contract for which they were the low bidder.<sup>205</sup> The court found that the government solicited the bids not in "good faith, but as a pretense to conceal the purpose to let the contract to some favored bidder."<sup>206</sup> The court awarded the plaintiffs expenses in preparing the bid.<sup>207</sup> While noting the immense potential of such a specific duty to negotiate in good faith, commentators recognize that the *Heyer* decision has not been widely applied.<sup>208</sup>

The fourth basis for recovery approximating a finding of a good faith duty to negotiate hinges on a specific promise made during negotiations. The famous *Hoffman v. Red Owl Stores*<sup>209</sup> is the leading case of this type. Hoffman sold his store and moved his family in anticipation of completing a franchise agreement

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198. 457 P.2d 535, 539-40 (Wash. 1969).

199. *Id.* at 539-40.

200. *Id.* at 539.

201. *See* Farnsworth, *supra* note 176, at 234.

202. *See id.*

203. *See id.* at 235.

204. 140 F.Supp. 409 (Ct. Cl. 1956).

205. *See id.*

206. *Id.* at 414.

207. *See id.* at 413-14.

208. *See* Summers, *supra* note 180, at 222.

209. 133 N.W.2d 267 (Wis. 1965).

with Red Owl Stores.<sup>210</sup> The franchise negotiations broke down after Hoffman refused to comply with certain requirements that Red Owl Stores suddenly demanded late in the negotiations.<sup>211</sup> Even though the court did not find that an offer had been made or that an implied contract existed, it granted Hoffman recovery based upon his reliance which developed during the ongoing negotiations with Red Owl Stores.<sup>212</sup> Although theoretically promising, this theory of recovery based upon a precontractual promise has also not enjoyed very widespread acceptance in the courts.<sup>213</sup>

Even if courts used the four theories discussed above as authority to litigate the good faith negotiation requirement in the Telecommunications Act, the sheer lack of precedent leaves the meaning of good faith negotiating largely undefined in American contract law. Thus, courts applying the Telecommunications Act will likely look to the more established definition of good faith during the performance and enforcement phases of the contract. Therefore, a brief survey of the meaning of good faith in performance and enforcement may be of some value in the interpretation of the Telecommunications Act's good faith clause.

### *B. Good Faith in the Performance of a Contract*

The definition of good faith under the U.C.C. provides courts with a more concrete meaning which could be applied to the Telecommunications Act. The FCC appears to endorse the use of the U.C.C. definition, although it stops short of incorporating the definition into its rules.<sup>214</sup> The U.C.C. defines good faith as "honesty in fact in the conduct or transaction concerned."<sup>215</sup> The U.C.C. definition illustrates a subjective standard for good faith, focusing on the state of mind of the participants.<sup>216</sup> Good faith in these terms depends upon the motives of the parties. The Restatement (Second) imposes a duty of good faith and fair dealing in the performance and enforcement of a contract,

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210. *See id.* at 274-75.

211. *See id.* at 271.

212. *See id.* at 275.

213. *See* Farnsworth, *supra* note 176, at 237.

214. *See* 47 C.F.R. § 51.301 (1996); Interconnection Order, *supra* note 35, ¶ 148.

215. U.C.C. § 1-102 (1995).

216. *See* U.C.C. § 1-102 cmt. 2 (1995).

incorporating an objective test to compliment the U.C.C.'s subjective test.<sup>217</sup>

In addition to the specific U.C.C. definition of good faith, a broader examination of how good faith operates in the performance of a contract will assist in interpreting the good faith negotiation clause of the Telecommunications Act. In 1968, Professor Robert S. Summers wrote a seminal article on the meaning of good faith in contract law, in which he introduced the concept of good faith as an "excluder."<sup>218</sup> He described good faith as a phrase without a general meaning of its own which serves to exclude "a wide range of heterogeneous forms of bad faith."<sup>219</sup> Good faith takes on a specific meaning only by way of contrast with an identified form of bad faith.<sup>220</sup> In other words, Summers believes good faith is a useless except to the extent that it identifies *bad* faith. Thus he believed the courts should only apply good faith analysis to exclude certain behavior.

In 1982, Summers summarized the essence of his excluder view of good faith:

In my view, some words and phrases do not have a general positive meaning of their own within the contexts or realms of discourse in which they are at home. Instead, these words or phrases function to rule out various things according to context. . . . [G]ood faith in the general requirement of good faith in ordinary moral dealings, and in the general case law of contract up to the late 1960's was most felicitously conceptualized as an "excluder." That is, it was not appropriately formulable in terms of some general positive meaning—through the specification of a set of necessary and sufficient conditions, for example; rather, it functioned as an excluder to rule out a wide range of heterogeneous forms of bad faith.<sup>221</sup>

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217. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." *Id.*

218. See Summers, *supra* note 180.

219. Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 818 (1982); see also Summers, *supra* note 180, at 201.

220. See Summers, *supra* note 180, at 201.

221. Summers, *supra* note 219, at 818. To illuminate the reader as to the character of an excluder, Summers quotes J.L. Austin's discussion of the term "real" as an analogy to the ambiguous nature of good faith:

[A] definite sense attaches to the assertion that something is real, a real such-and-such, only in the light of a specific way in which it might be, or might have been, *not* real. "A real duck" differs from the simple "a duck"

Summers believes terms like good faith are essentially undefinable absent context.<sup>222</sup> The practical effect of this view is to delay any classification until the details of each case have been examined. Summers does not mean to say that no correlation or analogy may be useful. Rather, his point is that a general and broad statement such as "honesty in fact" is utterly useless in practical application.<sup>223</sup> Moreover, honesty may be irrelevant; according to Summers, whether or not a participant acts honestly may or may not determine the quality of his actions.<sup>224</sup>

Summers's method of determining good faith suggests altering the inquiry to analyze whether the parties have acted without bad faith.<sup>225</sup> The courts should ask not what good faith is, but rather examine the instances of bad faith already identified by the courts and reason by analogy whether the particular instance conforms to those circumstances.<sup>226</sup> Some critics claim Summers is really saying, "I can't tell you what bad faith is except that I'll know it when I see it."<sup>227</sup>

Summers's thesis helps to describe the function of the objective or *per se* violations of the duty to negotiate in good faith. In 47 C.F.R. § 51.301, the FCC listed several actions which would constitute *per se* violations of the good faith clause.<sup>228</sup> Summers would simply reclassify these as examples of bad faith. Nowhere in the rules does the FCC attempt to establish good faith as

only in that it is used to exclude various ways of being not a real duck—but a dummy, a toy, a picture, a decoy, &c.; and moreover I don't know *just* how to take the assertion that it's a real duck unless I know *just* what, on the particular occasion, the speaker has it in mind to exclude. This, of course, is why the attempt to find a characteristic common to all things that are or could be called "real" is doomed to failure; the function of "real" is not to contribute positively to the characterization of anything, but to exclude possible ways of being *not* real—and these ways are both numerous for particular kinds of things, and liable to be quite different for things of different kinds. It is this identity of general function combined with immense diversity in specific applications which gives to the word "real" the, at first sight, baffling feature of having neither one single "meaning," nor yet ambiguity, a number of different meanings.

J.L. AUSTIN, *SENSE AND SENSIBILLA* 70-71 (G. Warnock ed. 1962) *quoted in* Summers, *supra* note 219, at 819.

222. *See* Summers, *supra* note 180, at 201.

223. *See id.* at 204.

224. *See id.* at 204-06.

225. *See* Summers, *supra* note 180, at 200-01.

226. *See id.* at 201-06.

227. *See* Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497, 499 (1984).

228. *See supra* note 64 and accompanying text.

honesty in fact. However, the FCC does not reject the application of a subjective form of good faith. Summers's thesis is hostile to the subjective test. By focusing only on the specific violation, Summers ignores the potential for control through a subjective test. Summers in effect limits the applicability of good faith to specifically definable acts or *per se* violations. This would seriously impair the ability of the FCC to regulate the actions of negotiating parties.

One of the more prominent critics of Summers's excluder analysis is Professor Steven J. Burton. Burton agrees with Summers that good faith must act as an excluder; however, he parts with Summers in limiting the analysis to analogy.<sup>229</sup> Burton developed a model for analysis which he believes can be used by courts to identify not only the existence of bad faith, but also the existence of good faith.<sup>230</sup> This analysis essentially complements the Summers theory. Summers could only tell when bad faith existed, and by default when the courts determined good faith.<sup>231</sup> Burton's model, on the other hand, completes the analysis by viewing the case from both angles—thus determining whether *either* good faith or bad faith was exercised.<sup>232</sup>

Burton's primary concern with Summers's view centers around the way in which Summers implements his analysis.<sup>233</sup> Rather than relying—as does Summers—on examples of bad faith and reasoning by analogy when analyzing a claim of bad faith, Burton would have the courts adopt a more standardized methodical approach to good faith analysis.<sup>234</sup> In Burton's model, good faith performance of a contract occurs when a party with discretion in the performance of the contract exercises its discretion for any purpose within the reasonable contemplation of the parties at the time of contract formation. In contrast, bad faith performance occurs when a party uses its discretion to recapture forgone opportunities or costs incurred upon entering the contract.<sup>235</sup>

Burton's model assumes that each party has assigned either by default or explicitly the power to control the performance of

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229. See Burton, *supra* note 227.

230. See *id.* at 499-507.

231. See Summers, *supra* note 180, at 200-01.

232. See Burton, *supra* note 227, at 499-507.

233. See *id.* at 489-99.

234. See *id.* at 499-507.

235. See *id.* at 505.

certain terms of the contract.<sup>236</sup> These terms, left undecided at the time of formation, can range, for example, from price, to time of delivery, to general acceptance of the contract itself.<sup>237</sup> The absence of a term creates discretion.<sup>238</sup> The party empowered to fulfill the term has discretion to fill it in.<sup>239</sup> When a party breaches a contract, it recaptures forgone opportunities such as the opportunity to contract with another party for similar services.<sup>240</sup> According to Burton, when a party uses its discretion endowed by the absent terms to recapture these opportunities, that party has acted in bad faith.<sup>241</sup> Burton concludes his analysis by stating that:

A discretion-exercising promisor who uses its discretion to recapture forgone opportunities necessarily redirects to other opportunities the resources that were committed at formation to performance of the contract. It follows that the resources earmarked at formation for the promised performance will not be received in fact by the promisee.<sup>242</sup>

Therefore, the promisee's injury can be measured by the promisor's recaptured opportunities.

Burton's analysis builds upon the foundation laid by Summers, which Burton molds into a more coherent and workable analysis. By viewing the contract from the discretion perspective, the court can more readily identify behavior that may be straying from the norm. Furthermore, the courts in *Hill*, *Markov*, and *Hoffman* each applied logic similar to Burton's. In *Hill*, the court compensated the contractor for the work he completed in reliance upon the negotiations. Therefore, when the opposing party reneged on the promise to pay the contractor, the courts awarded damages based upon that party's recaptured opportunities—the value of the contractor's time and effort. Similarly, when the lessor in *Markov* misrepresented his intentions and failed to renew the lease, he recaptured opportunities for which the court ordered compensation. Finally in *Hoffman*, the court measured the damages based upon the value Hoffman invested and

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236. *See id.* at 500.

237. *See id.*

238. *See id.*

239. *See id.*

240. *See id.* at 505.

241. *See id.*

242. *Id.*

presumably the value recaptured when Red Owl Stores pulled out of the negotiations.

In the context of negotiating interconnection agreements, the Burton analysis will assist the courts in determining when a party has violated its duty to negotiate in good faith. In this case, a party's discretion develops from his involvement in the telecommunications industry. Congress through section 251 eliminated the opportunity for a local phone service company to operate without interconnecting with its competitors. Therefore, any tactic that results in a company recapturing this opportunity is a bad faith tactic. Furthermore, damages could be measured by costs incurred during negotiation and expected profits.

Burton's thesis provides a more effective rubric for the courts to use in applying the precedents of *Hill*, *Markov*, and *Hoffman*. The Burton thesis provides a necessary formula that a court can use to decide whether a company has violated the subjective test established by the FCC. The courts will have to decide whether an action or group of actions viewed in the totality of the circumstances equates to a violation of the duty to negotiate in good faith. The Burton method gives the courts a methodological approach to judging these actions.

## V. CONCLUSION—NEGOTIATE IN GOOD FAITH AS TO WHAT?

Bingaman's concern that the good faith negotiation clause of the Telecommunications Act would cause a great deal of useless litigation is only partially correct.<sup>243</sup> There will be a great deal of litigation, but it will hardly be useless. Instead, the bulk of this litigation will enhance the definition of good faith in negotiation and will allow the courts the flexibility to sanction a variety of unpredictable bad faith negotiation tactics. Therefore, rather than causing frivolous litigation, the good faith clause will provide courts with a powerful judicial tool for administering the congressional mandate to bring competition to the local phone market.

However, in order to effectively use this tool, courts will have to further develop the meaning of good faith as it applies in the negotiation setting. The *per se* tests developed by the FCC will help the courts to sanction specific behavior and will not require

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243. See *supra* note 1 and accompanying text.

extensive judicial interpretation.<sup>244</sup> On the other hand, the subjective test—potentially a more powerful tool—will require a great deal of further interpretation.<sup>245</sup> This process will require the courts to draw upon legal precedents outside of the Telecommunications Act and its legislative history, such as those found in labor and contract law.

Labor law provides a well-established model of a good faith negotiation.<sup>246</sup> Although labor contracts differ in substance from those in telecommunications law, the good faith negotiation mandate in each serves a similar purpose. In both cases, Congress sought to encourage parties to enter into contracts in order to achieve a specific national goal.<sup>247</sup> Therefore, although a court interpreting the Telecommunications Act will not address the same factual issues as would a court interpreting the Taft-Hartley Act, both courts will look at the totality of the circumstances to determine whether a party has violated its duty to negotiate in good faith.<sup>248</sup> Furthermore, a court applying the good faith negotiation clause in the telecommunications arena will find the large body of precedent in labor law to be a valuable source from which it can draw reasoning.<sup>249</sup>

The contribution of contract law to the meaning of good faith will be more theoretical. Although contract law tends to reject the idea of precontractual liability, the case law that has developed demonstrates a willingness of courts to recognize the potential harms that can develop from bad faith negotiations.<sup>250</sup> Additionally, the four theories of recovery may well be adopted as forms of bad faith in the telecommunications context. Most importantly, however, contract law provides the courts with a methodological approach as to the meaning of good faith. The writings of professors Burton and Summers will likely prove invaluable to the courts and many practitioners as they attempt to develop a meaning for good faith in negotiations.<sup>251</sup>

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244. See *supra* notes 66-70 and accompanying text.

245. See *supra* notes 71-87 and accompanying text.

246. See *supra* Part III.C.

247. See Telecommunications Act of 1996, preamble, Pub. L. No. 104-104, 110 Stat. 56.

248. See *supra* Part III.C.

249. See *supra* Part III.A-B.

250. See *supra* Part IV.A.

251. See *supra* Part IV.B.

In conclusion, if this new era of local telecommunications competition is to succeed, the courts will be forced to define what it means to negotiate in good faith. The FCC rules provide the basic tools for the courts to implement both a subjective and objective test. However, the courts must flesh out these tests and provide the industry with a comprehensive meaning of good faith negotiation. The precedent and theories developed in labor and contract law will likely prove invaluable in effectively completing this task.