BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	)	
	)	
EXAMINATION OF ISSUES	)	
SURROUNDING BELLSOUTH	)	
TELECOMMUNICATIONS, INC.	)	
D/B/A AT&T TENNESSEE'S NOTICE OF	)	**DOCKET NO. 11-00109**
JUNE 28, 2011 CONCERNING BLC	)	
MANAGEMENT, LLC D/B/A ANGLES	)	
COMMUNICATION SOLUTIONS, DPI	)	
TELECONNECT, LLC, GANOCO, INC.,	)	
D/B/A AMERICAN DIAL TONE, IMAGE	)	
ACCESS, INC. D/B/A NEWPHONE, AND	)	
ONETONE TELECOM, INC.	)	

INITIAL BRIEF OF RESELLERS

INTRODUCTION

The issue before the TRA is very narrow. The issue is not whether the Resellers are right or wrong on the "Lifeline subsidy" issue but whether the Resellers have the right, under their interconnection agreements, to raise the Lifeline subsidy issue as a "billing dispute."[1]

AT&T acknowledges that the Resellers are permitted under their interconnection agreement to dispute any charge from AT&T and to withhold payment of that charge[2] pending a resolution of the dispute by the Authority. Several such disputes are currently pending before the

[1] Of the five Resellers listed in the caption, two have either paid or put into escrow the disputed amounts at issue in this case. Both carriers, however, have reserved their rights to argue the merits of the Lifeline subsidy issue. The other three Resellers (Angels, American Dial Tone and dPi) continue to withhold the disputed amounts, as they are allowed to do under their interconnection agreement but by order of the Hearing officer are prohibited from adding new customers in Tennessee, pending a decision by the TRA on August 1.

[2] For example, the dPi interconnection agreement states (Attachment 7, Section 1.4.1), "Payment Due. Payment for services provided by BellSouth, **not** including disputed charges, is due on or before the next bill date." ...

TRA. See TRA Dockets 10-00006, 07, 08 and 09. AT&T argues, however, that the Resellers cannot raise the Lifeline subsidy issue as a billing dispute because the TRA addressed the Lifeline subsidy issue in 2000, a decision that was affirmed by the Tennessee Court of Appeals in 2001. Since the issue was addressed eleven years ago, AT&T argues that the Resellers cannot, in good faith[3], raise the Lifeline issue as a billing dispute.

STATEMENT OF FACTS

There are no facts before the agency in this matter, only allegations.[4] Based on the arguments of counsel, the Authority can reasonably presume, for the purposes of addressing the issue before it, that the Resellers have filed billing disputes on the "Lifeline subsidy" issue and have been doing so for some period of time. Until last year, AT&T did not challenge the Resellers' right to raise this issue as a billing dispute under the parties' interconnection agreements. AT&T has recently informed the Resellers that AT&T no longer recognizes these disputes as valid and that the Resellers must pay all of these disputed charges or face termination.

ARGUMENT

The interconnection agreements between the Resellers and AT&T are governed, where applicable, by Georgia state law.[5] Therefore, in interpreting and enforcing those agreements, the TRA must look to Georgia contract law.

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[3] Each of the Resellers' interconnection agreements contain the following language under "General Terms and Conditions": "Each Party shall act in good faith in its performance under this Agreement and, in each case in which a Party's consent or agreement is required or requested hereunder, such Party shall not unreasonably withhold or delay such consent or agreement."

[4] The Resellers suggested to the Hearing Officer that the parties should be able to stipulate certain facts. AT&T argued that such a stipulation is unnecessary to resolve the current dispute.

[5] Each contract contains the following provision under "General Terms and Conditions": "Where applicable, this Agreement shall be governed by and construed in accordance with federal and state substantive telecommunications law, including rules and regulations of the FCC and appropriate Commission. In all other respects, this Agreement

A. **Good Faith under Georgia Law.**

Under Georgia law, all contracts contain a requirement – either explicit or implicit – that the parties perform "in good faith." That doctrine is well settled and there are many Georgia cases defining "good faith" as that term is used in a Georgia contract. As discussed in more detail below, a decision is made in good faith as long as it is not made for "arbitrary or capricious reasons," based on "improper pecuniary motive," or "predicated on dishonesty or illegality." As another Georgia court explained, "if there is room for construction, no bad faith can be inferred." That is the test the TRA must apply.

Early Georgia law on an action for contract breach defined the term "bad faith" as requiring "bad purpose, bad intent, bad state of knowledge or desire." *Smith v. Maples*, 151 S.E.2d 815, 815-816 (Ga. Ct. App. 1966). These general notions have been fleshed out in recent years. The Georgia Court of Appeals made the following observations when considering a breach of contract claim in which the sole issue was whether one party's action was made in good faith:

> The concept of good faith encompasses basic notions of 'fairness and commercial reasonableness.' (Citations, punctuation and footnotes omitted.) '[A] decision was not made in good faith if it was made for arbitrary or capricious reasons, was based on an improper pecuniary motive, or was predicated on dishonesty or illegality.' (Citations omitted.) Furthermore, 'a decision can be so grossly erroneous, as where there is a total absence of any factual evidence to support it, that it creates an inference of bad faith and dishonest judgment.' *Id.* *See also*, *Sacks v. Bell Telephone Laboratories*, 149 Ga. App. 799, 803(3), 256 S.E.2d 87 (1979) (noting that 'bad faith may ... be inferred from an adverse decision which has no basis in fact'). The requirement that a party exercise good faith and honest judgment, even where the contractual language grants the party discretion, arises from the implied duty

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shall be governed by and construed and enforced in accordance with the laws of the State of Georgia without regard to its conflict of laws principles."

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> of good faith and fair dealing imposed upon virtually every contract under Georgia law. (Citations omitted.)
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> Significantly, we have held in several cases that whether a party exercised good faith and honest judgment in the performance of a contract is a factual question for the jury to resolve.

Capital Health Management Group, Inc. v. Hartley, 689 S.E.2d 107, 111-112 (Ga. Ct. App. 2009).

As noted in *Capital Health*, the Georgia courts have consistently held that whether a party exercised good faith in performing a contract is a fact question for the jury. *See, e.g., Camp v. Peetluk*, 585 S.E.2d 704, 708 (Ga. Ct. App. 2003); *Rogers v. Farmers & Merchants Bank*, 545 S.E.2d 51, 53 (Ga. Ct. App. 2001); *Ginn v. C & S Nat. Bank*, 243 S.E.2d 528, 530 (Ga. Ct. App. 1978); *MacDougald Constr. Co. v. State Highway Dept.*, 188 S.E.2d 405, 407 (Ga. Ct. App. 1972); *see also Hunting Aircraft, Inc. v. Peachtree City Airport Authority*, 636 S.E.2d 139, 141 (Ga. Ct. App. 2006) ("What constitutes good faith is a question for the finder of fact."). In another contract termination case for bad faith, the Court of Appeals held that:

> ...[A] decision was not made in good faith if it was made for arbitrary or capricious reasons, was based on an improper pecuniary motive, or was predicated on dishonesty or illegality. (Citations omitted.) Additionally, a decision can be so grossly erroneous, as where there is a total absence of any factual evidence to support it that it creates an inference of bad faith and dishonest judgment. (Citations omitted). Similarly, '[a] contract may be so patently clear and explicit on a given point that any construction different from its obvious and exclusive meaning would constitute a gross mistake or error,' *but 'if there is room for construction, 'no bad faith can be inferred.*

Planning Technologies, Inc. v. Korman, 600 S.E.2d 39, 43-44 (Ga. Ct. App. 2008) (emphasis added). Similarly, "'[g]ood faith' and 'reasonableness' do not comprehend arbitrary or capricious reasons, or considerations based on pecuniary gain, or merely personal preferences; rather, they refer to 'considerations of fairness and commercial reasonableness.'" *Hunting Aircraft, Inc., v. Peachtree City Airport Authority*, 636 S.E.2d 139, 141 (Ga. Ct. App. 2006).

By way of analogy, Georgia courts have found that a title insurer cannot be held liable for bad faith where the insurer had a reasonable basis to withhold payment of a claim:

> 'Penalties for bad faith are not authorized ... where the insurance company has any reasonable ground to contest the claim and where there is a disputed question of fact.' (Footnote and citation omitted.) 'Bad faith is shown by evidence that under *the terms of the policy* under which the demand is made and under the facts surrounding the response to that demand, the insurer had no 'good cause' for resisting and delaying payment.' (Citation and punctuation omitted; emphasis in original.)

Lawyers Title Ins. Corp. v. Griffin, 691 S.E.2d 633, 637 (Ga. Ct. App. 2010). Indeed, other cases have defined "good faith" as '"any reasonable ground for contesting the claim,'" such as where there is a "disputed question of fact or doubtful question of law." *Lawyers Title Ins. Corp. v. Griffin,* 691 S.E.2d 633, 637 (Ga. Ct. App. 2010.)

Finally, Georgia courts have held time and gain that "[a] party does not breach its obligation of good faith where it exercises a right which it has under a contract." *Hemmerich v. Southeast Properties Group, L.P.,* 498 S.E.2d 87, 89 (Ga. Ct. App. 1998). Similarly, "there can be no breach of an implied covenant of good faith where a party to a contract has done what the provisions of the contract expressly give him the right to do." *Cox v. Athens Regional Medical Center, Inc.,* 631 S.E.2d 792, 797 (Ga. Ct. App. 2006); *see also Greenwald v. Columbus Bank & Trust Co.,* 492 S.E.2d 248 (Ga. Ct. App. 1997); *Robin v. Bellsouth Advertising & Pub. Co.,* 471 S.E.2d 294 (Ga. Ct. App. 1996); *Medical Ass'n of Georgia v. Blue Cross & Blue Shield of Georgia, Inc.,* 536 S.E.2d 184 (Ga. Ct. App. 2000); *Nobel Lodging, Inc. v. Holiday Hospitality Franchising, Inc.,* 548 S.E.2d 481 (Ga. Ct. App. 2001); *Automatic Sprinkler Corp. of America v. Anderson,* 257 S.E.2d 283 (Ga. 1979). Because the contract at issue in this case expressly gives a Reseller the right to withhold payment if the Reseller disputes a bill, AT&T cannot unilaterally terminate on the basis of nonpayment where the Resellers have withheld payment due to a billing dispute.

B. Lifeline Subsidy Issue.

It is not the purpose of this proceeding to reargue the merits of the Lifeline subsidy issue. That will come later.[6] It is important, however, for the Authority to have a basic understanding of the issue in order to decide whether the Resellers could, in good faith, raise this matter as a billing dispute under the parties' interconnection agreements.

The TRA addressed the Lifeline subsidy issue in 2000. At the time, the Authority said the issue was one of policy, not law, and that the agency's policy was intended only to be an interim one. The Court of Appeals affirmed the agency's decision because, according to the Court, the issue was a question of policy which the FCC had left to the discretion of the state commissions.

That was eleven years ago. The two TRA Directors who made that interim policy are no longer at the agency. The one TRA Director who opposed that policy is still at the TRA. It is clearly not "arbitrary or capricious" for the Resellers to ask the TRA to revisit its interim policy and reach a different result. To the contrary, it borders on bad faith for AT&T to claim otherwise.

[6] The Resellers have previously suggested that this issue be added to the other billing disputes pending before the agency in Dockets 10-00006, 07, 08 and 09. That case could be ready for hearing within three to four months.

1. Background of Lifeline Subsidy Issue[7]

Pursuant to federal law, qualified, low-income customers may purchase Lifeline telephone service at a discounted price. The size of the discount depends on the state where the service is offered. In Tennessee, telephone companies offer Lifeline service at a discount of $10.50 less than the standard residential rate. Of that amount, $7.00 is provided by the federal government and $3.50 is the state's responsibility.

When Lifeline service began in Tennessee, the Tennessee Public Service Commission (predecessor to the TRA) directed all telephone companies to offer Lifeline service to low income customers at a rate of $10.50 less than the carrier's normal retail rate. At the time, the PSC regulated the rates and earnings of all local carriers. The carriers were authorized to recover $7.00 of the Lifeline subsidy from the federal government and directed to cover the remaining $3.50 from their intrastate revenues. To cover the $3.50 loss, the PSC allowed the carriers to increase rates to other customers in order to maintain a "just and reasonable" level of earnings. In other words, the PSC designed rates so that the $3.50 subsidy was "built in" to each carrier's rate structure.

Following the introduction of competition pursuant to the Federal Telecommunications Act of 1996, the FCC changed the Lifeline program to fit the new, competitive environment so that all carriers, both incumbents and CLECs, could participate. The FCC recognized that many states, like Tennessee, had been funding the state's share of the Lifeline subsidy through the ratemaking process, ordering incumbent LECs to charge Lifeline customers a discounted rate and allowing them to recover the revenue "by charging other subscribers more." FCC's

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[7] Since there is no evidentiary record in this docket, this description of how the Lifeline program works in Tennessee is based on the orders of the TRA in the "Discount Communications" case, Docket 00-00230.

Universal Service Order (FCC 97-157), paragraph 361. [8] Since the Act required incumbent carriers to offer all of their retail services, including Lifeline service, to resellers at reduced, wholesale rates, the FCC recognized that one method of allowing resellers to offer Lifeline services was to require the incumbents to offer Lifeline services for resale at the reduced Lifeline rate. The $3.50 state subsidy portion would therefore be passed through to the resellers and to the resellers' Lifeline customers. As the FCC said, "Resellers therefore could obtain Lifeline services at wholesale rates that include the Lifeline support amounts and can pass these discounts on to qualifying low income customers." Id., at paragraph 370 (quoted in full in the "Discount" order at fn.23).

That, however, was not the only way in which states could fund the Lifeline program. The FCC also said, "Many methods exist, including competitively neutral surcharges on all carriers or the use of general revenues," that states could use to fund the Lifeline program "that would not place the burden on any single group of carriers." Id., at paragraph 361. The FCC cautioned, however, that any method adopted by a state to fund the Lifeline program must be "equitable" and "non discriminatory" and contribute to the "preservation and advancement of universal service" as required by Section 254(f) of the Federal Telecom Act. Id.

In sum, these were the choices presented to the state commissions: requiring resale of Lifeline service at the reduced, Lifeline rate; imposing a non-discriminatory, competitively neutral surcharge on all carriers; or funding Lifeline through state tax revenues. Whatever method the state chose also had to promote the availability of Lifeline services.

The TRA chose none of these options. Instead, the agency adopted an "interim" policy of requiring that "each individual reseller fully fund the state portion of the Lifeline assistance

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[8] This paragraph from the FCC's order is quoted in full at p. 8 of the TRA's final Order in the "Discount" case. Docket 00-00230.

program from the reseller's internal sources." Order in Docket 00-00230 at 11. Any reseller that served a Lifeline customer would, like an incumbent LEC, have to pay the $3.50 "state" portion of the Lifeline subsidy from the reseller's own pocket. Unlike the incumbent LECs, however, the resellers could not readily recover those revenues from other, non-Lifeline customers. Any reseller that primarily served Lifeline customers--as these Resellers do--would be forced to contribute a proportionally large share of its revenues to subsidize the state's Lifeline program. On the other hand, an incumbent LEC that serves a proportionally small number of Lifeline customers would be required to contribute only a proportionally small share of its revenue to the program. The TRA's decision, in effect, penalizes a carrier for serving a Lifeline customer. The larger the percentage of Lifeline customers a carrier serves, the larger the carrier's penalty.[9]

Undoubtedly aware of the discriminatory impact of the agency's decision, the TRA emphasized that this policy was "an interim one" which was intended to remain in place only until the TRA established an "intrastate Universal Service Fund" which would be used to fund "the state subsidy portion of Lifeline service." Order in Docket 00-00230, at 11. The TRA's final Order case recognized that the agency had already decided to create a state universal service fund and that the money in the fund would be used to supply the $3.50 state share "once the fund becomes established and operational." Id., citing to page 43 of the "Interim Order on Phase I of Universal Service," TRA Docket 97-00888.

On appeal, the Tennessee Court of Appeals affirmed the TRA's decision. The Court deferred to the FCC's finding that states could chose among "many" acceptable methods for

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[9] In dissent, Chairman Kyle correctly noted, "First and foremost, BellSouth's retail rates are slightly higher in order to generate the state Lifeline credit." Therefore, as Chairman Kyle pointed out, every reseller in the state was already contributing to the state's Lifeline program by paying BellSouth a "slightly higher" wholesale rate that incorporated the costs of the Lifeline subsidy. The position of Chairman Kyle in that case is the same position urged by the Resellers in their billing dispute with AT&T.

subsidizing the Lifeline program and therefore held that the TRA was "free to continue its policy of placing the burden of the state subsidy on the carriers that sell the services to the Lifeline customers."

2. Lifeline Issue Today

Eleven years have now passed. The "intrastate Universal Service Fund" passed by former TRA Directors Greer and Malone and envisioned by them as the mechanism for funding the state's share of the Lifeline program was never created. As a result, the "interim policy" of forcing some carriers to bear a disproportionate share of the cost of the Lifeline program continues. The interim policy of undermining the availability of Lifeline service is still the policy of the TRA.

The Resellers believe that the interim policy of the TRA does not comply with federal law. The TRA must choose one of the options suggested by the FCC. In the absence of a "neutral surcharge" on all carriers or a program to fund the Lifeline subsidy with tax revenue, the TRA can comply with federal law only by requiring AT&T to offer Lifeline service for resale at the discounted, Lifeline rate. In other words, whenever one of the Resellers purchases Lifeline service from AT&T, the price should be $3.50 less than AT&T has been charging. That is the billing dispute the Resellers have raised. For AT&T to argue that this dispute has been raised in bad faith—simply because the Resellers ask the TRA to correct a bad policy that was adopted only for an "interim" period eleven years ago—is itself a claim that borders on bad faith.

3. Impact of the TRA Decision on the Lifeline Dispute

This case is not about setting a rate. It is a billing dispute which has been brought to the Authority pursuant to the parties interconnection agreements. By statute, the TRA can only set rates prospectively. Billing disputes are different. Under the parties' contracts, a billing dispute, if properly raised and documented, is preserved until it is addressed by the TRA. If a charge is not disputed, the right to challenge it is lost. But if it is disputed, the right to have the charge later removed is preserved.[10]

The Resellers began disputing these Lifeline subsidy charges several years ago. Under the interconnection agreements, each disputed charge must be properly documented. When the dispute is finally brought to the Authority for resolution, the Authority may either uphold the charge and order it paid or find the charge improper and order it removed. It does not matter how long this process takes or whether there is only one disputed charge or one thousand identical, disputed charges. If the dispute is properly preserved, the Authority may decide the issue and its decision will apply to all pending disputes.

AT&T has suggested that even if the TRA agrees with the Resellers on the merits of the Lifeline subsidy issue, the TRA cannot legally apply its decision to all of the pending disputes the Resellers have filed challenging the $3.50 Lifeline charge.

AT&T's argument confuses the TRA's statutory ratemaking process with the TRA's role as the arbiter of billing disputes arising under the parties' interconnection agreements. As explained above, the TRA has the same legal power to resolve a billing dispute whether the dispute was filed five minutes ago or five years ago. The prohibition against retroactive ratemaking has no bearing on the resolution of pending billing disputes. If AT&T were correct that an agency decision on a billing dispute can only be applied prospectively, there would be no point in documenting and preserving billing disputes for eventual presentation to the agency.

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[10] For example, the dPi agreement (Attachment 7, Section 2.2) describes how billing disputes must be filed and documented: "For purposes of this Section 2, a billing dispute means a reported dispute submitted pursuant to Section 2.1 above of a specific amount of money actually billed by BellSouth within twelve (12) months of the submission of such dispute. DPI agrees to not submit billing disputes for amounts billed more than twelve (12) months prior to submission of a billing dispute filed for amounts billed. The billing dispute must be clearly explained by DPI and supported by written documentation, which clearly shows the basis for disputing charges. Disputes that are not clearly explained or those that do not provide complete information may be rejected by BellSouth."

CONCLUSION

For these reasons, the Authority must find that the Resellers have the right under their interconnection agreements to dispute the $3.50 Lifeline charge and to present this dispute to the TRA for resolution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been served upon the following person by electronic transmission and via U.S. Mail, first class, postage prepaid, to:

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This the 20 day of July, 2011.

HENRY WALKER

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