

BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION

NASHVILLE, TENNESSEE

August 14, 2020

IN RE:

**AT&T TENNESSEE COMPLAINT AGAINST
CELLULAR SOUTH, INC. D/B/A C SPIRE**

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**DOCKET NO.
19-00099**

ORDER ON STATUS CONFERENCE

This matter came before the Hearing Officer of the Tennessee Public Utility Commission (“Commission” or “TPUC”) at the Status Conference held via teleconference on May 14, 2020 with Cellular South, Inc. d/b/a C Spire (“C Spire”) and BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee (“AT&T”), the parties in this matter. As noticed on May 11, 2020, the Status Conference was held to hear oral arguments on *AT&T Tennessee’s Motion for Summary Judgment, or in the Alternative, for a Declaration that the ICA Allows AT&T to Recover the Amounts C Spire Has Overbilled It* (“*Summary Judgment Motion*”) and C Spire’s *Motion to Dismiss*.

AT&T’S SUMMARY JUDGMENT MOTION

On April 21, 2020, AT&T filed its *Summary Judgment Motion* asking the Hearing Officer to “enter an Order finding that C Spire owes AT&T Tennessee \$96,044 and that AT&T Tennessee is entitled to keep the \$138,060 it has already withheld from monthly payments it makes to C Spire.”¹ According to AT&T, for nearly four years C Spire overbilled AT&T for two-way interconnection facilities by using a “‘shared facilities factor’ C Spire knew was outdated and

¹ *Summary Judgment Motion*, p. 4 (April 21, 2020).

overstated.”² AT&T states it disputed the overbilling and provided C Spire with the correct factors C Spire should have been using in the same manner and level of detail AT&T had been doing in previous years. AT&T argues that neither the Interconnection Agreement (“ICA”) nor Tennessee law prevent AT&T from recovering the overbilled amounts from C Spire. AT&T maintains that although it was an oversight that AT&T did not update the shared facility factors for four years, the plain language of the ICA allows either party to correct oversights whenever they arise, and the provision prohibiting overbilling does not apply to these facts.³

REPLY TO AT&T’S MOTION FOR SUMMARY JUDGMENT

C Spire filed its *Reply to AT&T’s Motion for Summary Judgment* on April 27, 2020. C Spire points out that AT&T failed to discuss the standard for granting summary judgment in its *Summary Judgment Motion*. C Spire states summary judgment can only be granted when there is no genuine issue of material fact; “[i]f matters are in dispute, the trial court must hear the evidence before making a decision.”⁴ According to C Spire, there are a number of facts in dispute and “...neither party believes the testimony of the other.”⁵ C Spire argues that since AT&T’s *Summary Judgment Motion* should be denied, there is no reason for the Hearing Officer to rule on AT&T’s argument that the ICA authorizes retroactive billing beyond twelve months because that issue “should be more fully addressed in post-hearing briefs.”⁶

C SPIRE’S MOTION TO DISMISS

On April 21, 2020, C Spire filed its *Motion to Dismiss* arguing that “dismissal is the only appropriate remedy to cure the prejudice suffered by C Spire caused by AT&T’s destruction of

² *Id.* at 1.

³ *Id.* at 3.

⁴ *Reply to AT&T’s Motion for Summary Judgment*, p.1 (April 27, 2020).

⁵ *Id.*

⁶ *Id.* at 3.

crucial evidence in this case.”⁷ According to C Spire, it has repeatedly asked AT&T to see the underlying data to support AT&T’s claim that C Spire used the incorrect shared facility factor for billing between January 2016 and August 2017. C Spire states AT&T has failed to provide the data and now claims the data has been deleted from the billing system, “making it impossible for anyone to verify or refute the accuracy of AT&T’s retroactive charges.”⁸ C Spire argues the facts here are similar to the facts in *Gardner v. R & J Express, LCC*, 599 S.W.2d 462 (Tenn.Ct.App. 2018) wherein the trial court found that the:

plaintiff should have known at the time the evidence was destroyed that it was ‘reasonably foreseeable’ that litigation would result and that the evidence would be relevant. Since the defendant had no opportunity to examine the evidence and could not challenge, except through cross-examination, the plaintiff’s testimony about the missing evidence, the court concluded that the defendant had been severely prejudiced by the destruction of the evidence. Under the circumstances the court found that the appropriate remedy was to dismiss the plaintiff’s complaint. The Court of Appeals affirmed the trial court’s decision.⁹

C Spire maintains that since AT&T has destroyed the data that is the only evidence C Spire can use to rebut AT&T’s claims, the only equitable remedy is to dismiss AT&T’s Complaint.¹⁰

AT&T TENNESSEE’S RESPONSE TO C SPIRE’S MOTION TO DISMISS

AT&T filed *AT&T Tennessee’s Response to C Spire’s Motion to Dismiss* (“AT&T Response”) on April 27, 2020. AT&T argues that the facts, including the longstanding previous conduct of C Spire, do not support C Spire’s spoliation argument.¹¹ AT&T maintains C Spire cannot argue that AT&T’s Complaint must be dismissed for a lack of call detail information when C Spire has always had the ability to gather such information independently.¹² Further, AT&T argues that C Spire has not needed the call detail information to verify the accuracy of the shared

⁷ *Motion to Dismiss*, p. 12 (April 21, 2020).

⁸ *Id.* at 1-2.

⁹ *Id.* at 2.

¹⁰ *Id.* at 12.

¹¹ *AT&T Response*, p. 1 (April 27, 2020).

¹² *Id.* at 3.

facility factors in the decade preceding this dispute or for subsequent periods. According to AT&T, C Spire was “content to keep billing using the 40.21% factor because, at the risk of stating the obvious, it served C Spire’s financial interests.”¹³ AT&T maintains, that even if there were a finding of spoliation of evidence, dismissal would only be warranted “where any less remedy would not be sufficient to redress the prejudice caused to the non-spoliating party by the loss of evidence.”¹⁴ AT&T states that C Spire did not request the call detail records until after they had been destroyed in the normal course of business. In addition, C Spire had not requested such records since the ICA had become effective in 2003, so AT&T maintains it had no reason to anticipate such a request.¹⁵ In *AT&T’s Response*, it argues the plain language of the ICA allows either party to raise a dispute at any time and therefore, C Spire’s argument that AT&T’s billing dispute can’t be addressed because it is more than one year old is without merit.¹⁶ AT&T urges the Hearing Officer to enter an Order that a live hearing would be an unnecessary use of Commission resources, and that, “pursuant to the ICA and Tennessee law, (a) C Spire owes AT&T Tennessee the remaining \$96,044 it is seeking in this proceeding; and (b) AT&T can retain the \$138,060 it has withheld from C Spire.”¹⁷

MAY 14, 2020 STATUS CONFERENCE

The Hearing Officer convened a Status Conference with the parties on May 14, 2020 to hear oral arguments on the *Summary Judgment Motion* and C Spire’s *Motion to Dismiss*. AT&T argued its *Summary Judgment Motion* first, followed by a response from C Spire. Then, C Spire argued its *Motion to Dismiss* and AT&T responded. During the argument on its *Summary Judgment Motion*, AT&T emphasized many points in its brief. In addition, AT&T acknowledged that because there

¹³ *Id.*

¹⁴ *Id.* at 8 (citing *Tatham v. Bridgestone Americas Holding, Inc.*, 473 S.W.3d 734 (Tenn. 2015)).

¹⁵ *Id.* at 8.

¹⁶ *Id.* at 9.

¹⁷ *Id.* at 10.

are so many facts in dispute, the Hearing Officer cannot grant AT&T's *Summary Judgment Motion*.¹⁸ In the alternative, AT&T asked the Hearing Officer to enter a preliminary ruling interpreting the ICA.¹⁹ AT&T requested that the Hearing Officer "issue a ruling that the language of the interconnection agreement is broad enough and it allows AT&T to pursue the refund for the period going back from 2016 through September of 2017."²⁰ According to AT&T, such a determination by the Hearing Officer, would probably allow the parties to resolve the dispute.²¹

During oral argument on C Spire's *Motion to Dismiss*, C Spire stated "I don't think, in light of the disputed testimony, that our motion to dismiss can be resolved without having an evidentiary hearing and evaluation of the credibility of the testimony."²² C Spire reiterated the spoliation arguments laid out in its brief and argued that a spoliation claim is appropriate under these circumstances where AT&T seeks to back-bill C Spire when C Spire requested call detail while data still existed and AT&T subsequently destroyed the data.²³ C Spire emphasized that there are many factual disputes to be resolved.

FINDINGS AND CONCLUSIONS

During the Status Conference held on May 14, 2020, both AT&T and C Spire admitted that the Hearing Officer could not grant the *Motion for Summary Judgment* and C Spire's *Motion to Dismiss* because there were multiple factual disputes that would necessitate that the docket proceed to an evidentiary hearing. The Hearing Officer agrees.

"A trial court should grant summary judgment only when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

¹⁸ Transcript of Status Conference, Docket No. 19-00099, pp. 10-11 (May 14, 2020).

¹⁹ *Id.* at 11.

²⁰ *Id.* at 14.

²¹ *Id.* at 11-12.

²² *Id.* at 26.


²³ *Id.* at 33.

judgment as a matter of law.’’²⁴ As the parties admit, there are many facts in dispute in this docket. A few of the facts that are at issue are: whether the terms of the ICA allow AT&T to bring billing disputes that are over a year old; disputes regarding the validity of witness testimony; disputes regarding the calculations; and a dispute regarding whether C Spire requested the call detail before the data was destroyed, etc. In addition to seeking summary judgment, AT&T asks the Hearing Officer for a preliminary ruling on the terms of the ICA. The Hearing Officer declines to make such a ruling. The Hearing Officer finds that such a ruling goes to the heart of the law and facts to be determined in this proceeding and should be decided along with other material facts by the Hearing Panel. Based on the foregoing, the Hearing Officer concludes that there are material facts in dispute and; therefore, the *Motion for Summary Judgment* must be denied.

C Spire’s Motion to Dismiss is based on a spoliation of evidence claim. C Spire claims AT&T destroyed evidence necessary for C Spire to defend itself against AT&T’s Complaint, therefore, AT&T’s Complaint should be dismissed. C Spire admits that an evidentiary hearing is necessary to prove its spoliation claim. The Hearing Officer agrees. Therefore, the Hearing Officer concludes that *C Spire’s Motion to Dismiss* must be denied.

IT IS THEREFORE ORDERED THAT:

1. *AT&T Tennessee’s Motion for Summary Judgment, or in the Alternative, for a Declaration that the ICA Allows AT&T to Recover the Amounts C Spire Has Overbilled It* is **DENIED**.
2. The *Motion to Dismiss* filed by Cellular South, Inc. d/b/a C Spire is **DENIED**.


Monica Smith-Ashford, Hearing Officer

²⁴ *Tatham v. Bridgestone Americas Holding, Inc.*, 473 S.W.3d 734 (Tenn. 2015) (quoting Tenn.R.Civ. Pro. 56.04).