

**BEFORE THE TENNESSEE PUBLIC UTILITY COMMISSION
NASHVILLE, TENNESSEE**

RE:

Docket No. 19-00099

**AT&T Tennessee Complaint Against
Cellular South, Inc. d/b/a C Spire**

**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**

C Spire does not (and cannot) dispute that for nearly four years, it overbilled AT&T Tennessee for two-way interconnection facilities by using a “shared facilities factor” C Spire knew was outdated and overstated. C Spire does not (and cannot) dispute that upon realizing what was happening, AT&T Tennessee disputed the overbilling and provided C Spire the correct factors that it should have been using, and it did so in the same manner and level of detail as it had provided C Spire the factor that C Spire had been using to overbill AT&T Tennessee for nearly four years. Nothing in either the parties’ Interconnection Agreement (“ICA”) or controlling Tennessee law prevents AT&T Tennessee from recovering these overbillings from C Spire. AT&T Tennessee, therefore, urges the Hearing Officer to enter an Order finding that, based on the record before the Commission, a live hearing is unnecessary and pursuant to the ICA and Tennessee law, C Spire owes AT&T Tennessee the \$96,044 it is seeking in this proceeding.¹

¹ As explained in the Direct Testimony of AT&T Tennessee witness Scott McPhee, this is the \$234,104 C Spire overbilled AT&T Tennessee, less the \$138,060 AT&T Tennessee withheld from its payments to C Spire before initiating this proceeding. *See, e.g.,* McPhee Direct Testimony at 10.

I. IT IS UNDISPUTED THAT C SPIRE OVERBILLED AT&T TENNESSEE

In November 2012, AT&T Tennessee provided C Spire a shared facilities factor of 40.21% to be used for Fourth Quarter 2012 billing.² C Spire accepted and applied this factor without requesting supporting documentation because none was necessary -- the general methodology used to calculate the factor from the data provided by AT&T's systems had been, and remains, the same over the years, and C Spire had the ability to independently assess the factor.³ In February 2013, AT&T Tennessee: advised C Spire that an updated factor was not yet available; suggested that C Spire use that same 40.21% factor for the next quarter's billing (First Quarter 2013); and explained that this would benefit C Spire financially because "the factors are declining since landline is drying up and wireless is gaining steam."⁴ Despite knowing that the shared facilities factor would decline over time, C Spire never asked about an updated factor and continued using the outdated and overstated 40.21% factor to overbill AT&T Tennessee *every quarter for four years* until AT&T Tennessee realized what was happening and disputed the overbilling in September 2017.⁵ C Spire witness Lee Puckett does not, and cannot, dispute these facts.

II. NEITHER THE ICA NOR TENNESSEE LAW PREVENTS AT&T TENNESSEE FROM RECOVERING THESE OVERBILLINGS FROM C SPIRE.

C Spire breached the ICA by billing AT&T Tennessee more than it was entitled to bill, and nothing in the ICA (which is the first attachment to the Direct Testimony of AT&T Tennessee witness Scott McPhee), prevents AT&T Tennessee from recovering the amounts it overpaid as a

² See Rebuttal Testimony of C.W. Hodges at 3-4, Exhibit GWH-1.

³ See *Id.*; Rebuttal Testimony of Scott McPhee at 6-8.

⁴ Hodges Rebuttal at 3-4, Exhibit GWH-2.

⁵ McPhee Direct Testimony at 3-9; Chart 1. AT&T Tennessee has provided C Spire the correct factors that it should have used during the period relevant to this proceeding in the same level of detail as AT&T Tennessee provided C Spire the 40.12% factor it has been using to overbill AT&T Tennessee for nearly four years. See McPhee Direct Testimony at 10-11; Chart 2.

result of that breach. To the contrary, Section XX provides that if company representatives are unable to resolve disputes under the ICA, “either Party may petition the Commission for a resolution of the Dispute,” and the ICA’s “non waiver” provision makes clear that either party may *at any time* “insist upon the specific performance of any and all of the provisions of this Agreement.”⁶ It was an oversight for AT&T not to update the shared facility factors for four years, but the plain language of the ICA says *either Party* can correct such oversights whenever they arise. Finally, because the telecommunications services at issue were provided in Tennessee, Tennessee law applies to this dispute,⁷ and AT&T Tennessee’s claim for a refund going back to 2016 is well within Tennessee’s applicable six-year statute of limitations.⁸ Further, any suggestion by C Spire that the ICA’s one-year billing provision limits AT&T Tennessee’s claims in this proceeding is simply wrong. ICA Section VI.B.5 prohibits either party from billing the other charges that were incurred more than a year earlier, but that is not what is happening here. AT&T Tennessee is not billing C Spire any charges – instead, C Spire indisputably has overcharged AT&T Tennessee, and nothing in Section VI.B.5 (or in any other section of the ICA) allows C Spire to retain that windfall.

⁶ Section XXI of the ICA provides “[a]ny failure or delay by either Party to insist upon the strict performance by the other Party of any of the provisions of this Agreement shall not be deemed a waiver of any of the provisions of this Agreement, and each Party, notwithstanding such failure, shall have the right thereafter to insist upon the specific performance of any and all of the provisions of this Agreement.”

⁷ ICA Section XXVI provides that “[t]his Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state in which telecommunications services are provided, without regard to its conflict of laws principles, and the Act as amended by the Telecom Act.” *See also* McPhee Rebuttal Testimony at 13 (discussing, among other things, the Hearing Officer’s March 27, 2020, *Order Denying [C Spire’s] Motion to Dismiss*, which appropriately finds that this matter is to be decided under Tennessee law).

⁸ *See* Tenn. Code Ann. §28-3-109. As AT&T Tennessee witness Scott McPhee explains, AT&T is not seeking refunds all the way back to 2013 because it does not have records for the actual shared facility factors for 2013 through 2015. McPhee Direct Testimony at 11-13.

CONCLUSION

It is undisputed that C Spire overbilled AT&T Tennessee for nearly four years and that nothing in the ICA or Tennessee law prevents AT&T Tennessee from recovering these overbillings from C Spire. AT&T Tennessee, therefore, urges 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.

Respectfully submitted, this 21st day of April, 2020.

By: /s/ Jeremey R. Goolsby
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CERTIFICATE OF SERVICE

I, Jeremy R. Goolsby, attorney of record for BellSouth Telecommunications, LLC d/b/a AT&T Tennessee, hereby certify that I have this day caused to be delivered by U.S. Mail and electronic mail, a copy of the above and foregoing document to:

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This 21st day of April, 2020.

/s/ Jeremy R. Goolsby
Jeremy R. Goolsby