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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 RESPONSE TO C SPIRE'S MOTION TO DISMISS

C Spire's Motion to Dismiss – indeed, its entire case – is premised on an argument that because AT&T Tennessee cannot produce call detail records underlying the shared facility factors it provided C Spire for the period January 2016 through September 2017, those shared facility factors should be rejected and, instead, C Spire should be permitted to retain more than $400,000 beyond what it was entitled to collect under the Interconnection Agreement through its intentional use of an outdated, overstated 40.21% shared facility factor from 2013 through September, 2017.[1] That argument fails on both the facts and the law.

I. THE FACTS, INCLUDING C SPIRE'S OWN LONGSTANDING COURSE OF CONDUCT, DO NOT SUPPORT ITS "SPOLIATION OF EVIDENCE" ARGUMENT

Any issues regarding call detail that rolled off AT&T's systems pursuant to legitimate and common document retention policies is of C Spire's own making. AT&T made its claim for

[1] AT&T's claim is for $234,104 C Spire overbilled AT&T Tennessee from January 2016 through September 2017, less $138,060 AT&T Tennessee withheld from its payments to C Spire. McPhee Direct Testimony at 10. AT&T estimates C Spire also overbilled AT&T some $215,000 from 2013 to 2015, but AT&T no longer has actual shared facility factors for that period and so has omitted that amount from its claim. McPhee Direct Testimony at 4-5; McPhee Rebuttal Testimony at 2, 12. AT&T is only claiming what it can prove.

refunds in 2017, yet C Spire waited until 2019 to request call detail records,[2] knowing full well AT&T would have deleted them by then. C Spire itself admitted in discovery it deletes its own call detail after only eighteen months, and other carriers follow similarly appropriate data retention practices. Thus, when C Spire requested call detail records some two years after this dispute arose, it is fair to assume C Spire was not really interested in reviewing those records, but instead was trying to build an argument that AT&T's shared facility factors were "unsupported," hoping to distract the Commission's attention from the fact that the 40.21% factor C Spire had been billing was four years out of date and not based on anything remotely linked to the period at issue.

Second, based on C Spire's course of conduct over the years, AT&T had no reason to believe that C Spire would request these records – to the contrary, C Spire's course of conduct underscores its lack of interest in, and lack of need for, call detail information. For a decade after the Interconnection Agreement became effective in 2003, AT&T provided C Spire with updated shared facility factors, and C Spire never once asked to review underlying call detail. Likewise, since September 2017, AT&T has provided C Spire with updated shared facility factors every quarter – from 4Q17 to 1Q20 the Tennessee factors were 6%, 13%, 16%, 11%, 10%, 12%, 16%, 7%, 3% and 3% -- and again, C Spire has never asked to review call detail for any of these updated factors.[3]

[2] Although C Spire requested "actual traffic figures" on a couple of occasions, AT&T interpreted that to mean C Spire wanted to see the calculations for the shared facilities factors – *i.e.*, the AT&T originating minutes for each quarter divided by the sum of the C Spire minutes and the intermediary minutes – and provided that information to C Spire. C Spire never complained that AT&T had not given it the information it wanted. It was not until April, 2019, that C Spire specifically asked for call detail records for the minutes used to calculate the factors.

[3] C Spire is not alone in that regard. AT&T provides quarterly updated shared facility factors to a number of other carriers, and like C Spire, none of them have ever asked for underlying call detail. McPhee Direct Testimony at 13.

But the biggest flaw in C Spire's argument that it is prejudiced by AT&T's business-as-usual deletion of two-year-old call detail information is C Spire's admission that it always had the ability to capture call detail on its own. As Mr. McPhee explains at pages 7-8 of his Rebuttal Testimony --

> Mr. Puckett, at page 8 of his Direct Testimony, acknowledges that C Spire and its agents have the ability to determine "what traffic AT&T was delivering to C Spire over the Interconnection Facilities." Obviously, C Spire also knows what traffic it is sending to AT&T. Joining those two data sets together gives C Spire a full picture of the traffic flowing over the shared facilities. Thus, C Spire has had, now and in the past, the ability to conduct an independent assessment of the Shared Facility Factor on its own, with no input from AT&T whatsoever. These facts clearly contradict Mr. Puckett's assertion, at page 7 of his Direct Testimony, that "AT&T controls the actual traffic measurements." As Mr. Puckett himself concedes, C Spire clearly can evaluate the shared facility factors.

Suffice it to say, C Spire cannot argue AT&T's complaint must be dismissed because of missing call detail information when C Spire has always had the ability to gather that information on its own.

More to the point, C Spire's assertion that it needs call detail information to satisfy itself that AT&T's shared facility factors are accurate is belied by a decade of its own conduct – it never "needed" (or even asked for) these records to satisfy itself that AT&T's shared facilities factors were accurate in the decade that preceded this dispute, and it has not "needed" or asked for these records for subsequent periods. C Spire concedes it entered an agreement with AT&T intended to ensure C Spire received updated factors every quarter. When AT&T mistakenly failed to provide those updates, C Spire easily could have e-mailed or called AT&T and asked for them. But it did not. Instead, 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.

II. THE LAW C SPIRE RELIES ON DOES NOT SUPPORT ITS "SPOLIATION OF EVIDENCE" ARGUMENT

At bottom, C Spire's "spoliation of evidence" argument is grounded in equity. *See* C Spire's Motion to Dismiss at 11 (citing the *Gardner*[4] decision and suggesting that dismissal of AT&T's claim is "the only ***equitable*** remedy.") (emphasis added). But it is axiomatic that one seeking equity must do so with clean hands,[5] and as noted above, C Spire' hands simply are not clean in this context. It claims to "need" information that neither it nor any other provider has ever "needed" – or even asked for – to substantiate shared facilities factors. And upon becoming aware in 2017 of the dispute that gave rise to this purported newfound "need," C Spire waited until 2019 – months after it would have deleted the same type of information from its own systems – before it asked AT&T, for the first time ever, for the information. For this reason alone, the Hearing Officer should flatly reject C Spire's spoliation argument.

Beyond that, when weighed against these facts, the "evidence spoliation" cases C Spire cites have no relevance here. C Spire cites the four factors set out in *Tatham v. Bridgestone Americas Holding, Inc.*, 473 S.W.3d 734 (Tenn. 2015)(*Tatham*) for determining whether sanctions are appropriate: (1) the culpability of the spoliating party; (2) whether the spoliating party knew or should have known that the evidence was relevant to pending or reasonably foreseeable litigation; (3) the degree of prejudice suffered by the non-spoliating party as a result of absence of the

[4] *Gardner v. R & J Express, LCC*, 559 S.W. 3d 462 (Tenn. Ct. App., 2018)

[5] *Cf. Continental Bankers Life Ins. Co. of the South, Inc. v. Simmons*, 561 S.W.2d 460, 465 (Tenn.Ct.App.1977)("The principle is general, and is one of the maxims of the Court, that he who comes into a Court of Equity asking its interposition in his behalf, must come with clean hands; and if it appear from the case made by him ... that he has himself been guilty of unconscientious, inequitable, or immoral conduct, in and about the same matters whereof he complains of his adversary, or if his claim to relief grows out of, or depends upon, or is inseparably connected with his own prior fraud, he will be repelled at the threshold of the court.").

evidence, and (4) the least severe sanction available to remedy any prejudice. AT&T's conduct does not meet any of the four prongs.

AT&T's Alleged Culpability - C Spire itself concedes "there is no evidence in this case that AT&T's practice of deleting billing data after two years was an act of willful misconduct or demonstrates fraudulent intent." (C Spire Motion to Dismiss at p. 10). Beyond that, and as is clear from the record, AT&T did not delete two-year-old call detail records to hide anything from C Spire. Rather, AT&T was following its business-as-usual standard "record retention" practice to delete call detail records after two years, in the same way that C Spire and every other carrier manages its call detail information. Had C Spire not waited so long to ask for the information (that, again, neither it nor any other carrier previously had asked for to support a shared facilities factor), AT&T could have made it available. And as discussed above: C Spire was able to capture that call detail if it thought it had been important; and had C Spire simply picked up the phone or sent an e-mail at any point after early 2013 asking AT&T to provide updated shared facility factors, this entire call detail discussion would be moot.

Whether AT&T should have known the data might be requested in litigation - Spoliation comes into play only when the party destroying potential evidence knew or should have known that the evidence could be material in litigation. In this case, everything AT&T did was on a routine, business-as-usual basis, and it was consistent with at least a decade of both general industry practice and specific course of dealing with C Spire. AT&T has been providing shared facility factors to C Spire and other carriers for years and has always retained the call detail underlying those factors on a rolling two-year basis, ***and neither C Spire nor any other carrier has requested call detail records to support a shared facilities factor before or since this dispute arose***. It is one thing to suggest that a party seeking substantial damages in a vehicle accident

should not allow the vehicle to be destroyed because the other party would want to inspect it – that happens all the time.[6] But what C Spire is suggesting is exactly the opposite of what happens all the time between C Spire and AT&T. What happened for at least a decade before this issue arose (and what continues to happen now) is that AT&T provides shared facilities factors to C Spire and other carriers, and those carriers accept and apply those factors without ever asking for underlying call detail records. Given this longstanding industry practice and specific course of dealings with C Spire, AT&T had no reason to anticipate C Spire would, for the first time, ask for call detail information to substantiate shared facility factors some two years after this dispute arose. And it would be inequitable to "sanction" AT&T for acting as it has for years without incident.

C Spire argues that litigation was "reasonably foreseeable" when AT&T deleted call detail records in the ordinary course of its business, but that is simply incorrect. When AT&T sent C Spire updated shared facilities factors in 2017, AT&T's expectation was that, in accordance with the Interconnection Agreement, C Spire would adjust its prior billing for the applicable period and credit AT&T for its overpayments. C Spire, however, did not respond for months, and when it did, the argument was about whether the Interconnection Agreement allowed AT&T to seek prior period billing adjustments, not about whether the shared facility factors were accurately calculated. C Spire had never questioned the accuracy of a factor in the past (nor had any other

[6] This, of course, is what happened in the *Gardner* case on which C Spire so heavily relies. C Spire argues that the facts and legal issues in *Gardner* are "strikingly similar" to this case, but that argument misses the mark by a mile. In *Gardner* the court dismissed a claim after plaintiff's insurance company scrapped a truck within days after the accident, making it impossible for defendant to inspect it. An accident, of course, is a one-time event with its own unique circumstances. In this case, unlike in *Gardner*, (a) the two parties had established a course of conduct for more than a decade whereby C Spire never requested call detail information, (b) C Spire waited until it knew AT&T would have deleted call detail information to ask for it, (c) C Spire had its own independent ability to produce call detail if it thought the information important, (d) in contrast to Gardner where the accident was a one-time event, in this case C Spire's overbilling occurred over an extended four year period, and (e) in this case the most relevant evidence – the updated shared facility factors – is readily available to C Spire. Thus, nothing in *Gardner* provides any guidance here.

carrier), and so AT&T had no reason to believe the accuracy of the factors would be an issue. It was not until 2019 that C Spire demanded call detail information C Spire had every reason to know AT&T would no longer have. At that point, it was clear the request was not an effort to verify data accuracy, but rather a maneuver to set up the regulatory argument C Spire is making here.

The degree of prejudice to C Spire -- C Spire's Motion argues that the prejudice it has suffered from AT&T's deletion of two-year-old call detail records in the normal course of business is the "critical factor" weighing in favor of spoliation sanctions against AT&T. (Motion at p. 10). In support of this argument, C Spire contends that it "suspects" the shared facility factors produced by AT&T may not be accurate, but it now lacks the ability to verify that suspicion (a suspicion which, again, C Spire had never raised before). That argument is wholly without merit. First, and as explained above, C Spire always had an independent ability to capture call detail and verify the factors. (McPhee Direct Testimony at p. 8). C Spire's own witness, Lee Puckett, acknowledges C Spire has the ability to independently check the validity of the shared facility factors provided by AT&T irrespective of whether or not AT&T provides any underlying call data to C Spire. (McPhee Direct Testimony at p. 8). C Spire cannot criticize AT&T for failing to produce call detail records when C Spire has always had the ability to gather that information on its own. (McPhee Direct Testimony at p. 8). Thus, any claimed prejudice C Spire may have suffered is self-inflicted and cannot be attributed to AT&T. Simply put, C Spire cannot now pass the blame to AT&T for deleting data C Spire could have captured on its own.

Second, and as explained above, the timing of C Spire's request for call detail proves that it is not truly concerned about the accuracy of the factors, but instead has been trying to build a regulatory argument. AT&T made its claim for refunds in 2017, but C Spire waited until 2019 to

demand call detail records, knowing they would have been deleted by then following routine data retention practices followed by AT&T, C Spire and every other carrier.[7] Thus, when C Spire requested call detail records some two years after this dispute arose, it is fair to assume C Spire was not really interested in reviewing those records, but instead was trying to manufacture its regulatory argument.

Finally, and again as discussed above, if C Spire had ever been truly concerned about the accuracy of shared facility factors, it could have asked AT&T for updated factors at any time. Instead, it kept on billing using the 40.21% factor that was generating hundreds of thousands of dollars to which it was not entitled.

Least Severe Sanction to Remedy Prejudice – C Spire argues that the appropriate sanction for the alleged spoliation is dismissal of AT&T's suit. C Spire is substantially overplaying its hand.

Even if there could be a finding that AT&T spoliated evidence — which there should not be as explained above — dismissal of the Complaint would not be an appropriate sanction. Dismissal is the most severe sanction that can be levied for spoliation and is only warranted in circumstances where any less remedy would not be sufficient to redress the prejudice caused to the non-spoliating party by the loss of evidence. *Tatham.* Here, the record shows that two-year-old call detail records deleted by AT&T in the normal course of business were not even requested until after they were gone. The record further shows that C Spire had never requested call detail records since the Interconnection Agreement became effective in 2003, so AT&T had no basis to believe C Spire would be requesting them at all. Finally, the record also shows that C Spire had

[7] C Spire itself admitted in discovery it deletes its own call detail after eighteen months. (*See* Response No. 12 to AT&T's Discovery Requests).

the capacity to generate the records for themselves. Here, there is no basis for sanctions at all, and certainly no basis for dismissal.

III. THE PLAIN LANGUAGE OF THE INTERCONNECTION AGREEMENT REFUTES C SPIRE'S "ONE YEAR" ARGUMENT

C Spire once again argues in its Motion to Dismiss that the Interconnection Agreement ("ICA") precludes the Commission from addressing a billing dispute more than one year old, but that argument has been thoroughly refuted. See, e.g., McPhee Rebuttal at 14. There is no debate that C Spire issued shared facility bills to AT&T and that AT&T paid them. The issue is whether, given that those bills were inaccurate, the ICA allows AT&T to ask that they be corrected. It does.

Section XX of the Interconnection Agreement 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." Section XXI enables either party to raise a dispute ***at any time*** and "insist upon the specific performance of any and all of the provisions of this Agreement."[8] It was an oversight for AT&T not to update the shared facility factors for four years, but the ICA clearly envisions AT&T being able to correct that oversight and demand that C Spire adjust its shared facility billing accordingly. By the same token, C Spire could have requested updated shared facility factors at any time during that four-year period, but did not because it was content to retain its financial windfall.

[8] Section XXI of the ICA provides "Any 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."

CONCLUSION

Nothing in either the parties' ICA or controlling Tennessee law prevents AT&T Tennessee from recovering the amounts C Spire overbilled AT&T from January 2016 through September 2017. Likewise, as explained herein, nothing in C Spire's Motion to Dismiss comes remotely close to providing a basis for dismissing AT&T's complaint. AT&T Tennessee, therefore, urges the Hearing Officer to enter an Order finding that a live hearing would be an unnecessary use of Commission, Staff and party time and 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.

Respectfully submitted, this 27th day of April, 2020.

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CERTIFICATE OF SERVICE

I, Jeremey 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 27th day of April, 2020.

/s/ Jeremey R. Goolsby
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