

IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE  
MIDDLE DIVISION

FILED  
IN THE CLAIMS COMMISSION  
SECRETARY'S OFFICE  
2014 NOV -7 A 10: 34

BELLSOUTH )  
TELECOMMUNICATIONS, INC., )  
D/B/A AT&T (TN) ) Claim No. T20120351  
 )  
Claimant, )  
v. )  
 )  
STATE OF TENNESSEE )  
 ) Regular Docket  
Defendant. )

JUDGMENT FOR CLAIMANT

This claim came to be tried before Robert N. Hibbett, Claims Commissioner and Trial Judge of the facts and law, on September 23, 2014 at Legislative Plaza in Nashville, Tennessee. The Claimant, Bellsouth Telecommunications, Inc., D/B/A AT&T (Bellsouth), seeks damages arising from the Tennessee Department of Transportation (TDOT) replacing a culvert and damaging Bellsouth's cables. Mark Reagan, Esq., appeared for the Claimant. Assistant Attorney General Michael L. Delisle represented the State of Tennessee. The Trial Transcript and Exhibits were filed on October 16, 2014.

## JURISDICTIONAL BASIS

The Claims Commission's jurisdiction over this action is set forth in

Tenn. Code Ann. § 9-8-307(a)(1)(M), which states:

The commission or each commissioner sitting individually has exclusive jurisdiction to determine all monetary claims against the state based on the acts or omissions of "state employees," as defined in § 8-42-101(3), falling within one (1) or more of the following categories:

\* \* \*

(M) Negligent operation of machinery or equipment;

Pursuant to statute, the Tribunal shall make findings of fact and conclusions of law:

## FINDINGS OF FACT

### **Testimony of William Bryan Lancaster**

William Lancaster is a facility technician working and doing repairs for Bellsouth. Mr. Lancaster responded on October 30, 2010 to several calls of reported outages, which led him to the corner of Cagle and Bearwallow Road in Ashland City. There was a new asphalt patch located at the corner of the roads. He opened the telephone cable pedestal and saw that one of the cables was pulled down into the base of the closure. When he looked down below

into the new construction on the road, he found a cable exposed with the sheathe torn and pairs of cable sticking out of the fresh asphalt.

He called the local TDOT office and spoke to Les Stewart, Supervisor of the Cheatham County TDOT office. He asked Mr. Stewart if TDOT would like to do the backhoe work to save TDOT from being billed by Bellsouth for the excavation. Mr. Stewart called him back and told him "good luck to you" meaning TDOT was not going to do the excavation for the repair.

Mr. Lancaster had to chip the asphalt off the damaged cable and dig it up with a shovel to do the temporary repair. Once he had dug enough to expose good copper, he did a temporary splice to get the customers back into service. Once the temporary repair was done, he wrapped it in plastic and called his supervisor to discuss what would have to be done to permanently repair the cable.

Subsequently, he had to go back to the site to do another temporary repair because customers were experiencing outages. Someone had attempted to steal copper wire out of the first temporary repair. Another actual theft of copper occurred November 3, 2010. He could not do a permanent repair because the damage was also under the culvert. Part of the culvert and

roadway needed excavating to give access for a permanent repair. He knew to call TDOT about the damaged cable because he had seen TDOT equipment at the site between October 15 and October 30, 2010. The Tribunal believes and accredits the testimony of Mr. Lancaster.

### **Testimony of James Wells**

James Wells locates buried underground utilities for UtiliQuest. He was called to locate Bellsouth's buried utility facilities at the corner of Cagle and Bearwallow Road. His company was called to locate and mark the telephone lines at least twice. He was directed to investigate the damage to Bellsouth's lines on November 18, 2010 and prepared a Damage Investigation Report (Trial Exhibit 4). His mission was to determine whether it was UtiliQuest's fault that the lines were damaged.

Mr. Wells testified that TDOT was digging on an out of date ticket that was generated when TDOT called before digging pursuant to the Underground Utility Damage Prevention Act. A ticket that permits digging is valid for fifteen days.<sup>1</sup> He also found faded markings that were marked

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<sup>1</sup> According to the Damage Investigation Report, the ticket expired on October 20, 2010 and the damage occurred on October 26, 2010.

correctly indicating telephone lines. The Tribunal believes and accredits the testimony of Mr. Wells.

### **Testimony of Les Stewart**

Mr. Stewart is the TDOT maintenance supervisor of Cheatham County. He testified that that TDOT was replacing a fifteen-inch galvanized drain pipe at the corner of Cagle and Bearwallow Roads because the pipe had become obstructed from years of use. On the day of construction, he noticed that there were some orange cable markers on the scene leading down from the pedestal and into the ditch line. The backhoe operator excavated across Cagle Road. The operator told Mr. Stewart that he had found a chunk of cable in removing the original galvanized pipe. Mr. Stewart looked at it and it seemed to be a smooth cut, but not something that a backhoe would cut. When he looked at the cable, he called his supervisor. He did not remember looking to see if there were any orange marks but he did see the marks before they started work. He and his crew did not dig down to see if they could find any cable before they began the excavation.

It appeared to the Tribunal that Mr. Stewart could not remember the date that he replaced the culvert and he was provided with the Daily Work

Reports (Trial Exhibit 5) to facilitate his testimony. Report No. 1566442 indicated that the pipe was installed on Bearwallow Road (State Route 249) on September 13, 2010. Report No. 1579062 showed that TDOT patched Bearwallow Road on October 5, 2010. Report No. 1579040 indicated that TDOT reshaped a ditch on Bearwallow Road also on October 5, 2010. There were no reports showing backhoe work being done on October 26, 2010. The Tribunal accredits the testimony of Mr. Stewart to the extent of his recollection, though vague, of the replacing of the culvert. The Tribunal does not accredit the Daily Work Reports concerning the date the culvert was replaced.

#### **Testimony of Michael Steltmann**

Mr. Steltmann is a claims manager and investigator for AT&T (Bellsouth). He investigated the damage that occurred at the corner of Cagle and Bearwallow Road, which is the subject of this claim. He is responsible for the breakdown of the costs incurred to repair the damages. He testified using Trial Exhibit 2.

Four different technicians worked on the temporary and permanent repairs. The permanent repair did not take place until August of 2011 because

of other priorities and the temporary repair was working. Bellsouth is billing the State for the temporary repair after the theft in November due to it being an attractive target for someone to steal the exposed copper. The Claimant is requesting \$116.50 an hour for the work done by its technicians for a total of \$5,329.96 for labor costs. This is not based on the technician's actual pay per hour. The amount is based on their insurance, benefits, 401(k) match, costs of the vehicle, tools and other factors. This is called fully distributed costing. The total cost distribution for labor is shown in Trial Exhibit 7 (sealed).

The material costs started with two trouble tickets charged when customers call Bellsouth to report their telephone is out of service. Mr. Steltmann testified that his was a very conservative charge for one customer calling Bellsouth. The Claimant had to replace a 400 pair and 200 pair cable under Cagle Road to repair the outage. In addition, the pedestal had to be moved due to the reshaping of the ditches. Actually, more 400 pair cable was used than what is reflected in Exhibit 2 but the Claimant is not requesting more money for cable. The XAGA 1650-B2 closures are used to encapsulate the new cable. The connectors and other materials are used on either end of

the cable and are crimped together to make a connection. The total amount requested for materials totals \$628.12.

Bellsouth had to hire a contractor to drill down and do a directional bore across the road so the technicians could run the new cable. Star Construction was the contractor that performed this operation for the Claimant. The total amount paid to the contractor and requested in damages totals \$2,593.61.

The Claimant is also requesting loss of use of the 200 pair cable. The 400 pair cable was not damaged so it is not requesting loss of use of that cable. The loss of use rate is based on the monthly charge for basic telephone service divided by thirty days, which comes to \$1.67. This amount is multiplied by 200 (the 200 pair cable) for loss of use for one day. The total amount requested for loss of use is \$334.00. The total amount of damages requested by Bellsouth is \$8,885.69.

### **Testimony of Jerry Forbes**

Jerry Forbes is the assistant highway maintenance supervisor in the Cheatham County TDOT office. Les Stewart is his immediate supervisor. He is responsible for the location of utilities before TDOT excavates by calling the one-call number. He recalled that TDOT replaced a culvert at the corner of

Cagle and Bearwallow Road. He notified the Tennessee One-Call system before TDOT began work on the culvert. He testified that once you make the call notifying One-Call of the location of the dig, there are three working days before the ticket becomes valid to start the excavation.

Mr. Forbes testified using Trial Exhibit 8 (the One-Call ticket). Although many calls were made concerning work at the corner of Cagle and Bearwallow Roads, the last call was made on September 30, 2010 and the ticket giving permission to dig was valid from October 5, 2010 until October 20, 2010.

On the day the new pipe was being placed, he remembered there was some commotion and discussion about hitting the line. He could not remember very many of the details concerning the laying of the culvert. He knew that they finished the pipe in one day. He did not remember the date of the work and had to use the One-Call ticket and the Daily Work Report to state the date of the work. He then stated, based on the Daily Work Report that the work was done on September 13, 2010. He then stated some patching was done on October 5, 2010. The Tribunal accredits the testimony of Mr. Forbes except for his testimony concerning the date of the culvert work.

## CONCLUSIONS OF LAW

### LIABILITY

The State argues that the culvert was replaced on September 13, 2010 and therefore, it is impossible that the TDOT cut the cable at the end of October. However, TDOT notified One-Call on September 30, 2010 that digging would take place at the intersection where the culvert was replaced. (Trial Exhibit 8). This made the ticket valid from October 5 until October 20, 2010. According to the Daily Work Report, only patching was done on October 5, 2010 at the site and nothing else during the validity of the ticket. This contention that TDOT could not have cut the cable is simply not logical nor corroborated by TDOT's own records. The Tribunal cannot determine, based on the evidence, the exact date the cable was cut. However, the evidence is clear and convincing that TDOT cut the cable at the intersection in question.

Mr. Lancaster saw pairs of cable sticking up out of *fresh* asphalt. (Emphasis Added). Mr. Stewart remembered the backhoe operator found a "chunk" of cable. Mr. Forbes remembered a commotion and discussion about hitting the line. No other explanation has been offered or has been shown

other than TDOT's culpability in hitting the cable. Therefore, both circumstantial and direct evidence show that TDOT cut the cable.

Furthermore, just because TDOT utilized the One-Call service and was permitted to excavate, does not mean it is excused from damage it has caused to utility lines. It had the obligation to use reasonable care to avoid damage to utilities. The statute is clear on this point:

(c) An excavator shall exercise reasonable care to avoid damage caused by an excavation or demolition within the safety zone around the marked location of the underground utilities. For the purpose of this section, "safety zone" means a strip of land at least four feet (4') wide, but not wider than the width of the utility plus two feet (2') on either side of the utility.

(d) If, upon arrival at the site of a proposed excavation, the excavator observes clear evidence of the presence of an unmarked utility in the area of the proposed excavation, the excavator shall not begin excavating until an additional notice is made to the one-call. The excavator may then proceed, exercising reasonable care to avoid damage to the utility which may be caused by such excavation or demolition.

(e) If no facilities exist in the tract or parcel of land, the operators shall make a reasonable effort to so advise the individual who initiated the request, provided the request is received in accordance with § 65-31-106.

(f) The approximate location of underground utilities does not include a designation of location as to depth below the surface of the ground. Excavators must use reasonable care to ascertain for themselves the exact depth of the underground utilities below the surface of the ground. If, after so ascertaining, the excavator learns that its excavation or demolition is likely to interfere with the operation of the underground utility facilities, it must again

notify the affected operator of such underground utility facilities and reasonably cooperate with the operator of the underground utility facilities to conduct its excavation or demolition in such a way that the operations of the underground utility facilities are not disturbed or the affected underground utility facilities are placed out of the way of the proposed excavation or demolition.

Tenn. Code Ann. § 65-31-108

The Tribunal finds that TDOT made no effort to ascertain the depth of Bellsouth's lines and is liable for the damage pursuant to the Underground Utility Damage Prevention Act.

### DAMAGES

In determining damages, the Tribunal must follow the law as enacted by the General Assembly directing that the State of Tennessee is liable for actual damages only. Tenn. Code Ann. § 9-8-307(d). The State has argued that the Claimant's fully distributed costing methodology is incorrect in costing the labor expended on the repairs. The Claimant proposes including the overhead expenses of the company as part of labor costs as a sound accounting method.

The Tribunal has searched the case law of Tennessee Appellate Courts for guidance on fixed or overhead costs being included as part of the repair bill in a tort claim. The parties have not submitted any Tennessee appellate

opinions on this issue. The Claimant has provided multiple cases from other jurisdictions supporting its theory that labor costs should be fully distributed reflecting the fixed costs of the company. This appears to be the rule in many jurisdictions but Tennessee has not explicitly followed this rule. The following passage from American Jurisprudence, Second Edition is both probative and persuasive in the present matter in stating the majority rule:

An award of damages for property damage should not include fixed overhead costs that would have to be paid whether or not the defendant caused any damage, because such expenses are not a natural consequence of the defendant's negligence.  
22 Am. Jur. 2d Damages § 416

The Tribunal shall use this section and the General Assembly's directive that the State is only liable for actual damages as touchstones in order to award damages in this matter.

Again, the main contention between the parties concerning damages is the costing of the labor expended. Using the fully distributed costing methodology, the Claimant argues that each repair hour should be valued at approximately \$116.50. This figure is based on the average effective wage of \$48.00 in addition to \$68.50 that contains the various fixed and overhead costs of the entire company. (*See* Trial Exhibit 7 sealed) Although the fully

distributed costing methodology is a rational and useful tool to determine labor costs for cost accounting purposes and to fulfill the requirements of the FCC, this does not obligate the Tribunal to accept this methodology to determine the actual costs of labor in repairing the telephone line. Therefore, the Tribunal shall not include the average fixed and overhead costs but use the average effective wage of \$48.00 to determine labor costs multiplied by 45.75 hours. The Claimant is awarded \$2,196.00 in labor costs for its repairs.

The Tribunal finds that the material costs as listed in Trial Exhibit 2 to be reasonable and necessary. The Claimant is awarded \$628.12 in material costs.

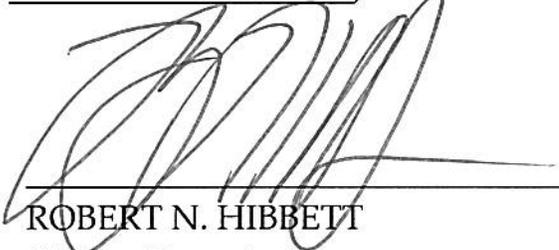
The Claimant has requested \$2,593.61 in contractor costs. The Tribunal finds that said amount is reasonable because it had to pay the contractor to excavate and bore under the road to repair the cable. The Tribunal further finds that the claim for loss of use from the incident and during the repair for \$334.00 to be reasonable. The total amount of damages to be awarded total \$5,751.73.

**IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:**

1. That the Claimant is awarded \$5,751.73 in damages for the cost of repairs and loss of use of its cable lines.

2. That the parties shall bear their own discretionary costs.
3. That the costs of the trial are taxed to the State of Tennessee.
4. Trial Exhibit 7 shall remain under seal.

ENTER this 5 day of November, 2014.



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ROBERT N. HIBBETT  
Claims Commissioner  
Sitting as Trial Judge of Record

**CERTIFICATE OF SERVICE**

This is to certify that a true and exact copy of the foregoing document has been served upon the following parties of record:

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This 7<sup>th</sup> of Nov., 2014.



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PAULA SWANSON  
Administrative Clerk  
Tennessee Claims Commission