

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

November 20, 2012

IN RE:

**APPLICATION OF BRISTOL TENNESSEE ESSENTIAL
SERVICES FOR EXPANDED CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY TO PROVIDE
COMPETING TELECOMMUNICATIONS SERVICES
STATEWIDE**

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)
) **DOCKET NO.**
) **12-00060**
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ORDER GRANTING CENTURYLINK'S MOTION TO COMPEL

This matter came before the Hearing Officer of the Tennessee Regulatory Authority ("TRA" or the "Authority") during a Status Conference held on November 15, 2012, to consider *CenturyLink's Motion to Compel and Response to Discovery Objection of Bristol Tennessee Essential Services ("Motion to Compel")* filed on October 26, 2012.

RELEVANT BACKGROUND

On September 7, 2012, the intervening parties, United Telephone-Southeast LLC d/b/a CenturyLink, CenturyLink of Adamsville, Inc. d/b/a CenturyLink Adamsville, CenturyTel of Claiborne, Inc. d/b/a CenturyLink Claiborne, and CenturyTel of Ooltewah-Collegedale, Inc. d/b/a CenturyLink Ooltewah-Collegedale (collectively, "CenturyLink") and the Tennessee Cable Telecommunications Association ("TCTA") propounded discovery requests upon the applicant, Bristol Tennessee Essential Services ("BTES"). On October 5, 2012, BTES filed its discovery responses to the requests of CenturyLink¹ and TCTA. On October 9, 2012, BTES made a supplemental filing to CenturyLink's Request No. 3.a.

¹ *Responses of Bristol Tennessee Essential Services to Discovery Requests of United Telephone Southeast LLC* (October 5, 2012) ("*Discovery Responses*").

After the parties had engaged in discussions aimed at attempting to resolve their discovery disputes, BTES filed supplemental responses to TCTA on October 22, 2012, and to CenturyLink on October 23, 2012. On October 26, 2012, CenturyLink filed its *Motion to Compel* seeking a ruling concerning its Request No. 5, the last disputed discovery request remaining between it and BTES. On October 30, 2012, the Hearing Officer issued a *Notice of Status Conference* setting a conference with parties on November 8, 2012 to hear and address the *Motion to Compel*. At the request of the parties, the Status Conference was rescheduled to November 15, 2012, for which public notice issued on November 6, 2012.

NOVEMBER 15, 2012 STATUS CONFERENCE

The Status Conference began as noticed in the Hearing Room on the Ground Floor of the Tennessee Regulatory Authority at 460 James Robertson Parkway, Nashville, Tennessee. The parties in attendance were as follows:

For BTES:

Mark W. Smith, Esq., Miller & Martin PLLC, 832 Georgia Avenue, Suite 1000 Volunteer Building, Chattanooga, Tennessee 37402;

For CenturyLink:

Misty Smith Kelley, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, 1800 Republic Centre, 633 Chestnut Street, Chattanooga Tennessee 37450, and via telephone, **Sue Benedek, Esq.**, CenturyLink, 240 North Third Street, Suite 300, Harrisburg, PA 17101; and,

For TCTA:

Charles B. Welch, Jr., Esq., Farris Mathews Bobango, PLC, 300 Historic Caster-Knott Building, Nashville, Tennessee 37219.

BTES' OBJECTION & CENTURYLINK'S MOTION TO COMPEL

Dispute Concerning Discovery Request No. 5

Discovery Request No. 5, propounded by CenturyLink on September 7, 2012, requests the results and various forms of supporting documentation related to audits of BTES' compliance with its Cost Allocation Manual ("CAM"), as follows:

5. Reference BTES's Financial Reports for years 2007, 2008, 2009 and 2010 as filed at TRA Docket No. 05-00251. Provide the results of any audit performed on the allocations that tested BTES's compliance with its CAM for these years. Include any and all documents and correspondence between BTES and the auditor(s), documents regarding procedures, and all supporting workpapers.

On October 5, 2012, BTES filed its responses to discovery, which included production of the results of its CAM compliance audits for the years requested, but BTES objected to producing any supporting documentation related to those audit results, as follows:

BTES objects to this request based upon the General Objections.² Subject to and without waiver of the General Objections, BTES has attached the results of its 2007 – 2010 CAM compliance audits. Expanding upon the General Objections, in light of the limited recommendations and favorable conclusions of the audit reports, the requests for all documents and correspondence relating to these compliance audits is overly broad, unduly burdensome and not calculated to lead to the discovery of admissible evidence.

CenturyLink's Position

In its *Motion to Compel*, CenturyLink narrows its request and seeks to compel BTES to produce the auditor workpapers associated with BTES' CAM compliance audit for the years 2010 and 2011, if available. CenturyLink asserts that BTES relies upon its prior financial reports to demonstrate that it possesses sufficient managerial, financial and technical ability to provide statewide services, as required in Tenn. Code Ann 65-4-201. Thus, in order to review and test the veracity of BTES' claims regarding its prior financials, CenturyLink contends that the auditor workpapers are relevant to these proceedings.

In addition, CenturyLink asserts that the workpapers are relevant to demonstrating whether BTES has and will continue to adhere to all applicable authority policies, rules, and orders, which is also required under the statute. Further, CenturyLink states that BTES admits that the statutory requirements of Tenn. Code Ann. § 65-4-201 remain applicable and relevant to

² *Responses of Bristol Tennessee Essential Services to Discovery Requests of United Telephone Southeast, LLC*, pp. 1-5 (October 5, 2012).

the scope of this case. Finally, CenturyLink contends that, insofar as the discovery dispute at issue, the Hearing Officer need not reach BTES' claim that the Tennessee Market Regulation Act, under Tenn. Code Ann. § 65-5-109(m) and (n), precludes review of matters addressed in the Municipal Electric Act at Tenn. Code Ann. § 7-52-401, *et. seq.*,.

During the Status Conference, counsel for CenturyLink reiterated the reasons, as set forth in its *Motion to Compel*, why the Hearing Officer should require BTES to produce the auditor workpapers, and further stated that auditor workpapers are routinely produced in TRA proceedings and are relevant to the statutory standards of Tenn. Code Ann. § 65-4-201. Further, BTES, as a municipal electric utility that has elected market regulation of its telecommunications services, will not be subject to the TRA's general regulation following conclusion of this proceeding. CenturyLink asserts that this fact only serves to heighten, not lessen, the appropriate level of scrutiny to be applied in this case. Finally, CenturyLink contends that Tenn. Code Ann. § 7-52-401, *et. seq.*, includes a presumption that a municipal electric utility is uniquely suited to provide services within its electric footprint, but for statewide services or service outside its footprint, no such presumption is applicable.

BTES' Position

In addition to its specific objections to Request No. 5, BTES supplements and clarifies its reasons for objecting to discovery in the Introduction and General Objections sections of its responses to discovery. Therein, BTES asserts that upon its election of market-based regulation, the TRA has no regulatory interest or jurisdiction concerning whether BTES has complied with the requirements of the law related to its provision of telecommunications services under Tenn. Code Ann. § 7-52-401, *et. seq.* BTES asserts that because it is expressly retained in Tenn. Code Ann. § 65-5-109(n)(12), the TRA retains regulatory authority over a certificated provider that has elected market regulation when exercising its authority pursuant to the certification

requirements of Tenn. Code Ann. § 65-4-201. Conversely, BTES contends that the TRA has no regulatory authority concerning the municipality's obligations under Tenn. Code Ann. § 7-52-401, *et. seq.*, because that statute is not expressly referenced in Tenn. Code Ann. § 65-5-109(n). Therefore, according to BTES, the Authority's consideration of matters relevant to BTES' request for expanded certification is limited as follows:

[T]he appropriate standard under Tenn. Code Ann. § 65-4-201 in the context of this proceeding – and the one appropriate for determining the relevance of the intervenor's discovery request – is that BTES must demonstrate that (1) it possesses sufficient managerial, financial and technical abilities to provide telecommunications service outside of its electric system footprint, and (2) that it will adhere to the policies, rules, and orders of the Authority that are "applicable" after its election to operate pursuant to market based regulation – meaning those found in the areas reserved for the Authority under Tenn. Code Ann. § 65-5-109(n).³

To be clear, BTES further states, "Matters involving the BTES telephone business unit that do not relate to the statutory standard set forth in T.C.A. § 65-4-201 may be raised in other proceedings and other venues. Matters involving divisions and business units of BTES other than the telephone business unit are beyond the jurisdiction of the Authority and the scope of this proceeding."⁴ Finally, in its specific response to Request No. 5, BTES asserts that in light of the favorable conclusions and limited recommendations set forth in its compliance audit reports, CenturyLink's request for supporting documentation is overly broad, unduly burdensome, and not calculated to lead to the discovery of admissible evidence.⁵

During the Status Conference, counsel for BTES reiterated its objections and reasoning provided in its responses to discovery, summarized above, and further stated that BTES has produced a significant amount of information in both its *Application* and responses to discovery. BTES asserted that, in fact, it had already produced more than ample evidence in the docket

³ *Responses of Bristol Tennessee Essential Services to Discovery Requests of United Telephone Southeast, LLC*, pp. 2-3 (October 5, 2012).

⁴ *Id.* at 3.

⁵ *Id.* at 11.

upon which the Authority may deliberate and make a determination on its *Application*. Finally, BTES asserted that Authority's precedent in the Electric Power Board of Chattanooga matter supported its contention that the certification requirements of Tenn. Code Ann. § 65-4-201 are separate and distinct from issues related to Tenn. Code Ann. § 7-52-401, *et. seq.* In response to inquiry by the Hearing Officer, BTES admitted that the auditor workpapers at issue were in its possession, custody and control. Further, BTES admitted that it had not obtained a CAM compliance audit for 2011, and that it did not intend to do so, based on its earlier assertions that such requirements were no longer within the scope of the Authority's regulatory reach or jurisdiction.

General Discovery Principles

Pursuant to Authority Rule 1220-1-2-.11, when informal discovery is not practicable, discovery shall be effectuated in accordance with the Tennessee Rules of Civil Procedure. The Rules of Civil Procedure permit discovery through oral or written depositions, written interrogatories, production of documents or things, and requests for admission.⁶ Through these instruments, a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party."⁷ The information sought need not be admissible if it is reasonably calculated to lead to admissible evidence.⁸ The Tennessee Court of Appeals has commented on relevancy as follows:

Relevancy is extremely important at the discovery stage. However, it is more loosely construed during discovery than it is at trial. The phrase "relevant to the subject matter involved in the pending action" has been construed "broadly to

⁶ Tenn. R. Civ. P. 26.01.

⁷ *Id.* at 26.02(1).

⁸ *Id.*

encompass any matter that bears on or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.”⁹

Further, parties may learn of information related to books, documents or other tangible items as well as the identity and location of individuals with knowledge of a discoverable matter.¹⁰ However, Tennessee’s rules do provide some limitations. Rule 26.02 permits a court to limit discovery under certain circumstances, such as undue burden, and Rule 26.03 permits a court to issue protective orders as justice requires.¹¹ In *Duncan v. Duncan*, the Tennessee Court of Appeals held that:

A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available. If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case (citations omitted).¹²

Rule 37.01 permits a party to file a motion to compel if a party fails to answer an interrogatory, including providing an evasive or incomplete answer.¹³ “Decisions to grant a motion to compel rest in the trial court’s reasonable discretion.”¹⁴

FINDINGS & CONCLUSIONS

In accordance with the Certificate of Public Convenience and Necessity (“CCN”) granted by the TRA in its Order of March 21, 2006, entered in Docket No. 05-00251, BTES, a municipal electric company, provides telecommunications services subject to certain conditions, within Sullivan County, Tennessee. Those conditions, made pursuant to a settlement agreement between the parties, are consistent with law, incorporated into the Authority’s Order, and

⁹ *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 220 n.25 (Tenn. Ct. App. 2002) (citations omitted) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 2389, 57 L.Ed.2d 253 (1978)).

¹⁰ Tenn. R. Civ. P. 26.02(1).

¹¹ *Id.* at 26.02 & .03.

¹² *Duncan v. Duncan*, 789 S.W.2d 557, 561 (Tenn. Ct. App. 1990).

¹³ *Id.* at 37.01(2).

¹⁴ *Kuehne & Nagel, Inc. v. Preston, Skahan & Smith International, Inc.*, 2002 WL 1389615, *5 n.4 (Tenn. Ct. App. June 27, 2002).

included as part of the basis upon which the Authority granted a CCN to BTES. On May 5, 2011, BTES filed notice of its intent to operate pursuant to market regulation, as set forth in Tenn. Code Ann. § 65-5-109(m) and (n). On June 20, 2012, in accordance with Tenn. Code Ann. 65-4-201 through 204 and the Authority's rules, BTES filed its *Application* seeking expanded authority to provide telecommunications services on a statewide basis.

CenturyLink seeks to compel BTES to produce the auditor's workpapers that are associated with the audits of BTES' compliance with its Cost Allocation Manual for the years 2010, and 2011 (if 2011 is available). CenturyLink asserts that the auditor workpapers are needed in order to test the veracity of BTES' claims concerning the requirements and standards set forth under Tenn. Code Ann. § 65-4-201. Specifically, BTES's ability to provide the statewide service for which it has applied, and whether BTES has and/or will continue to adhere to applicable Authority policies, rules, and orders.

As part of its *Application* and in its discovery responses, BTES provided the results of the compliance audits for the years 2007 through 2010, but has declined to produce the auditor workpapers associated with those audits. BTES admits that it has possession of the 2010 workpapers but objects to producing them because, it contends, such information falls outside the scope of the Authority's examination in this docket and, in its estimation, it has already produced information sufficient to support its *Application*. BTES admits that a 2011 compliance audit has not been conducted, and that it does not intend to obtain such an audit, for the same reasons it has previously stated. That is, according to BTES, the Authority has no regulatory authority or jurisdiction to require such audits or enforce BTES' compliance with the provisions of Tenn. Code Ann. § 7-52-401, *et seq.*

It is well established that a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it

relates to the claim or defense of the party seeking discovery, or any other party.¹⁵ In accordance with the standards required under Tenn. Code Ann. 65-4-201, BTES must demonstrate that it has/will comply with the Authority's rules, policies and orders, and that it possesses sufficient, managerial, financial, and technical ability to provide its services on a statewide basis. As the auditor workpapers are in the possession of BTES, and CenturyLink requests production of only one year, 2010, BTES' objection as to the request being overly broad and unduly burdensome is not persuasive. Finally, as BTES has placed its prior financial reports at issue in this docket and the compliance audits are required to be conducted pursuant to the Authority's Order granting BTES' CCN, the workpapers associated with the compliance audits are relevant to these proceedings and to the Authority's considerations under Tenn. Code Ann. § 65-4-201.

Therefore, after considering the record and hearing the arguments of the parties, the Hearing Officer finds that CenturyLink's request is reasonable and narrowly tailored, and the information sought to be obtained is relevant to these proceedings. Therefore, CenturyLink's motion to compel should be granted. BTES should supplement its discovery responses with the 2010 CAM compliance auditor's workpapers, which are currently in its possession and under its control.

PROCEDURAL SCHEDULE

During the Status Conference, the parties requested a determination as to the application of certain obligations of BTES set forth in Tenn. Code Ann. § 7-52-401, *et. seq.*, including those related to preventing anti-competitive practices. Thus, a determination on this issue may impact the standards to be applied generally to BTES' *Application* in this docket. Therefore, the parties agreed that this question constitutes a threshold legal issue that should necessarily be resolved prior to the filing of intervenor and rebuttal pre-filed testimony. To accommodate the

¹⁵ Tenn. R. Civ. P. 26.02(1).

submission of legal briefs on this issue, the Hearing Officer, with the agreement and cooperation of the parties, set certain deadlines and target dates for a revised procedural schedule to completion of the proceedings. These deadlines are comprised in the Third Revised Procedural Schedule attached to this Order as **Exhibit A**.

IT IS THEREFORE ORDERED THAT:

1. *CenturyLink's Motion to Compel and Response to Discovery Objection of Bristol Tennessee Essential Services*, insofar as it seeks the auditor workpapers associated with the 2010 audit of Bristol Tennessee Essential Services' compliance with its Cost Allocation Manual, is GRANTED.

2. Bristol Tennessee Essential Services shall supplement its discovery responses and produce the 2010 CAM compliance auditor's workpapers, which are currently in its possession, by November 20, 2012.

3. The Third Revised Procedural Schedule attached to this Order as **Exhibit A** is adopted and in full force and effect.


Kelly Cashman-Grams, Hearing Officer

Third Revised Procedural Schedule

(November 15, 2012)

Due Date	Filing
November 15, 2012	Status Conference re: Discovery Disputes
November 20, 2012	BTES's Supplemental Responses to CenturyLink Discovery Question #5
November 20, 2012	BTES's Initial Brief re Threshold Legal Issue
December 3, 2012	Intervenors' Response to BTES Initial Brief re Threshold Legal Issue
December 6, 2012	BTES's Reply Brief re Threshold Legal Issue
TBD	Ruling by Authority Panel on Threshold Legal Issue (Target: January Authority Conference)
January 28, 2012	Pre-filed testimony by Intervenors
February 18, 2012	Pre-filed rebuttal testimony by BTES
Week of February 25, 2012	1:30 p.m. CST Pre-hearing Conference (if needed)
TBD	Hearing on the Merits before the TRA Panel (Target: March Authority Conference)

Exhibit A