

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

In Re:	)	
Application of Bristol Tennessee Essential Services	)	Docket No. 12-00060
To Expand Its Certificate of Convenience and	)	*filed electronically
Necessity to Provide Competing	)	in docket office on
Telecommunications Services Statewide	)	12/18/2012

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**CENTURYLINK MOTION TO ENFORCE COMPLIANCE WITH  
HEARING OFFICER ORDER REGARDING PRODUCTION OF  
AUDITOR WORKPAPERS**

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On November 15, 2012, the Hearing Officer granted a motion to compel filed by intervenors United Telephone Southeast LLC d/b/a CenturyLink, CenturyTel 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"). The written order memorializing the Hearing Officer's ruling was issued on November 20, 2012. The Order required Bristol Tennessee Essential Services ("BTES") to produce the auditor workpapers for its 2010 cost allocation audit. BTES has refused to comply with the Hearing Officer's November 20 Order.

CenturyLink's motion to compel concerned Discovery Request No. 5, which sought production of audits testing BTES' compliance with its Cost Allocation Manual ("CAM") during 2007-2010, including un-redacted copies of all documents and correspondence between BTES and its auditors, all documents regarding procedures, and all supporting workpapers. After noting that CenturyLink voluntarily agreed to limit its request to auditor workpapers for the years 2010, and 2011 (if available), in exchange for BTES' cooperation with the production request, the Hearing Officer granted CenturyLink's motion to compel and ordered BTES to produce the

auditor workpapers for BTES' CAM audit for 2010, and if available, 2011. The Hearing Officer specifically found these auditor workpapers are relevant to BTES' application for a statewide CCN, specifically, whether BTES has sufficiently demonstrated that it has and will continue to comply with the Authority's rules, policies and orders:

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 [2006] 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.

(Nov. 20 Order, p. 9.) The Hearing Officer ordered BTES to produce the requested auditor workpapers on November 20, 2012.

When CenturyLink reviewed BTES' production, it noted the workpapers were substantially incomplete. For example, the workpapers are numbered A to Z, but BTES did not produce any of the papers for sections G, M, N, O, P, Q, T, U, V, X, or Y, even though other documents BTES produced reference those missing sections. The sections BTES did produce were also obviously incomplete; CenturyLink noted references to at least 200 missing page numbers, including the following:

Pages A-1-2.00 through A-1-2.09  
Pages A-1-3.00 through A-1-3.09  
Pages A-1-4.00 through A-1.4.09  
Page A-1-5.00  
Page B-1.2.00  
Page B-1.3.00  
Page B-1.400  
Page B-1-5.00  
Page C-1-2.00  
Page C-1-3.00  
Pages C-1-4.00 and C-1-4.01  
Pages D-1-1.05A through D-1-1.05L  
Page D-1-2.00  
Page D-1-3.00

Page D-1-4.00  
Page D-1-5.00  
Pages E-1-2.00 through E-1-2.12  
Pages E-1-3.00 through E-1-3.11  
Pages E-1-4.00 through E-1-4.12  
Pages E-1-5.00 through E-1-5.12  
Pages F-1-2.00 through F-1-2.14  
Pages F-1-3.00 through F-1-3.14  
Pages F-1-4.00 through F-1-4.11  
Pages F-1-5.00 through F-1-5.13  
Pages G-1-1.00 through G-1-1.04  
Pages H-1-2.00 through H-1-2.04  
Pages H-1-3.00 through H-1-3.04  
Pages H-1-4.00 through H-1-4.04  
Pages H-1-5.00 through H-1-5.04  
Page I-1-2.00  
Page J-1-1.01  
Pages K-2-1.01 through K-2-1.09  
Page L-1-1.01  
Page S-1-1.15  
Page W-28-1.00  
Page W-29-1.00  
Page W-30-1.00  
Pages W-30-3.01 through W-30-3.09  
Page W-30-4.01  
Page W-30-5.00  
Page W-30-6.00  
Pages Z-5-1.00 through Z-5-4.00

CenturyLink notified BTES of the incomplete and missing information in the attached December 7 e-mail and requested BTES provide a complete copy of the 2010 audit workpapers. BTES responded on December 13 that BTES did not have a complete set of the workpapers in its possession, and claimed it produced all it had in its file. When CenturyLink requested that BTES obtain a complete set of the workpapers from its auditors, BTES refused, claiming its only obligation was to produce whatever papers it had in its file.

The fact that BTES has failed to maintain a complete copy of its most recent CAM audit raises serious questions about BTES' past and future compliance with the Authority's 2006 CCN

Order, which required BTES to conduct yearly CAM audits and provide copies to the Authority. BTES' refusal to produce the auditor workpapers, despite the Hearing Officer's express Order, also raises troubling questions concerning the seriousness with which BTES views the Authority's orders, especially in light of BTES' prior statements in this docket that it does not intend to conduct any future annual CAM audits, regardless of the TRA's prior 2006 CCN order. Those issues aside, BTES' position that it need only produce whatever workpapers, however incomplete, it actually has in its own possession is completely contrary to law and reason.

As the Hearing Officer noted in the November 20 Order, discovery in this case is guided by the Tennessee Rules of Civil Procedure (November 20 Order, p. 6), which are modeled after and interpreted similarly to the Federal Rules of Civil Procedure. *See Redwing v. Catholic Bishop for Diocese of Memphis*, 363 S.W.3d 436, 445 n.4 (Tenn. 2012) (Tennessee Rules of Civil Procedure are modeled on the Federal Rules, and Tennessee courts often look to federal decisions for guidance). It is well-settled that Rule 34 discovery requests mandate production of all relevant responsive documents not merely in the responding party's possession, but also within the party's custody or control. *See Wright & Miller, Federal Practice & Procedure* § 2210 (collecting cases).

Documents are under a party's control when the party has the right, authority, or practical ability to obtain them from a nonparty. *Id.*; *see also Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984) (“Control [under Rule 34] is defined not only as possession, but as the legal right to obtain the documents requested upon demand.”); *Alexander v. Federal Bureau of Investigation*, 194 F.R.D. 299, 301 (D.D.C., 2000) (“It is well-established that ‘control’, which is defined not as possession, but as the legal right to obtain documents on demand, is the test as to whether production [under Rule 34] is required.”); *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633,

636 (D. Minn. 2000) ("Under Rule 34, 'control' does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party's control when that party has the right, authority, or practical ability, to obtain the documents from a non-party to the action.").

BTES does not dispute that it obviously has the ability to request a complete copy of the workpapers from its auditor, thus BTES clearly has control over the audit workpapers. BTES' claim of lack of possession does not justify BTES' refusal to comply with the Hearing Officer Order.

BTES' claim that the Hearing Officer Order expressly limited its production obligation to only those documents actually in BTES' possession is disingenuous, and reveals a startling lack of candor. The Order specifically notes that at the November 15 status conference, "[i]n response to inquiry by the Hearing Officer, BTES admitted that the auditor workpapers at issue were in its possession, custody and control." (Nov. 20 Order, p. 6.) At no time during the November 15 status conference did BTES qualify this admission by stating that it had possession of only a portion of the workpapers, and would refuse to request a complete copy from its auditor. There is no reasonable, good faith basis for BTES' refusal to comply with the Hearing Officer Order.

Tennessee law recognizes that "[t]he discovery rules would be ineffectual if courts did not have the authority to impose sanctions for their abuse." *Mansfield v. Mansfield*, 1995 WL 643329 at \*5 (Tenn. Ct. App. Nov. 3, 1995). Tenn. R. Civ. P. 37.02 governs the appropriate sanctions when a party fails to comply with an order compelling discovery. *Junkans v. Alamo Rentals, Inc.*, 2011 WL 5145763 at \*4 (Tenn. Ct. App. Oct. 28, 2011). Appropriate sanctions include dismissal of the action, an order precluding the disobeying party from introducing

evidence on certain topics, or implementation of an adverse inference. *Id.* In addition, Rule 37.02 *requires* the issuance of an caused by the failure to comply, unless the court finds the failure was substantially justified. Tenn. R. Civ. P. 37.02.

In this case, BTES has consistently refused to reveal information about its compliance with the previous 2006 Authority CCN Order and the anti-subsidy provisions of Tenn. Code Ann. § 7-52-401 *et seq.* BTES has claimed such matters are outside the Authority's jurisdiction, and has played hide-the-ball during discovery, going to great lengths to avoid producing the details of its past CAM compliance audits. Such conduct would justify dismissal of BTES' petition outright under Rule 37.02. At the very least, this conduct raises an inference that the details of these past compliance audits could very well reveal information adverse to BTES. Therefore, as sanction for its disobedience of the Hearing Officer's Order, the Authority should require BTES to produce complete, un-redacted copies of all workpapers, correspondence, and other documents referring or relating to any CAM or cost allocation audit conducted from 2007 to the present. It will also be necessary to amend the current procedural schedule to allow time for thorough review of this information prior to the filing of testimony. CenturyLink also requests that BTES be ordered to reimburse CenturyLink for the attorneys' fees it has incurred in bringing both this motion and its previous motion to compel.

Respectfully submitted this 18th day of December , 2012.



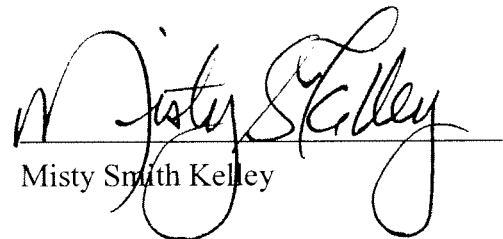
Misty Smith Kelley, TN BPR 019450  
Baker, Donelson, Bearman, Caldwell & Berkowitz, PC  
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633 Chestnut Street  
Chattanooga, Tennessee 37450  
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct electronic copy of this response has been forwarded via electronic mail to the following on this the 18th day of December, 2012.

Mark W. Smith  
MILLER & MARTIN PLLC  
832 Georgia Avenue, Suite 1000  
Chattanooga, TN 37402  
[msmith@millermartin.com](mailto:msmith@millermartin.com)

Charles B. Welch, Jr.  
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618 Church Street  
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Misty Smith Kelley

## Kelley, Misty Smith

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**From:** Mark Smith <msmith@millermartin.com>  
**Sent:** Monday, December 17, 2012 3:11 PM  
**To:** Benedek, Sue E  
**Cc:** Kelley, Misty Smith; 'Tom Davenport (tom@ctdlegal.com)'  
**Subject:** RE: Docket No. 12-00060 [M&M-Content.15518.0001]

Sue – BTES has considered this further. Ordering clause 2 of the Hearing Officer's order requires BTES to "supplement its discovery responses and produce the 2010 CAM compliance auditor's workpapers, which are currently in its [BTES'] possession." BTES has produced what it has, so as I see it, BTES has complied with the order.

I am happy to discuss this further if you would like. Regards-- Mark

### Mark W. Smith Miller & Martin PLLC

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832 Georgia Avenue  
Chattanooga, TN 37402  
Phone (423) 785-8357  
Fax (423) 321-1527



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**From:** Benedek, Sue E [mailto:Sue.Benedek@centurylink.com]  
**Sent:** Friday, December 14, 2012 11:38 AM  
**To:** Mark Smith  
**Cc:** 'Kelley, Misty Smith'; 'Charles Welch (CWelch@farrismathews.com)'; 'Tom Davenport (tom@ctdlegal.com)'; Benedek, Sue E  
**Subject:** RE: Docket No. 12-00060 [M&M-Content.15518.0001]

Mark: Unfortunately, the answer is not acceptable to my client. The auditor used by BTES has the workpapers. BTES clearly has access to the auditor and the workpapers. The workpapers provided clearly are missing sections. CTL immediately requests a complete copy of the auditor workpapers.

Confirm by COB Monday whether BTES is going to request a complete copy of the workpapers from its auditor. Depending upon your response, we may have to seek recourse with the Hearing Officer and alter the schedule.

Sue Benedek  
CenturyLink  
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Work: (717) 245-6346  
Mobile: (717) 386-0068



[sue.benedek@centurylink.com](mailto:sue.benedek@centurylink.com)

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**From:** Mark Smith [<mailto:msmith@millermartin.com>]  
**Sent:** Thursday, December 13, 2012 2:52 PM  
**To:** Benedek, Sue E  
**Cc:** 'Kelley, Misty Smith'; 'Charles Welch ([CWelch@farrismathews.com](mailto:CWelch@farrismathews.com))'; 'Tom Davenport ([tom@ctdlegal.com](mailto:tom@ctdlegal.com))'  
**Subject:** RE: Docket No. 12-00060 [M&M-Content.15518.0001]

Sue – I've confirmed that we produced the 2010 CAM audit report workpapers that BTES has in its possession. These workpapers were not provided to BTES in a single ordered set but were rather grouped in five different attachments to the email that I included as the first page of the workpaper production.

I hope this helps. Thanks-- Mark

**Mark W. Smith**  
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**From:** Benedek, Sue E [<mailto:Sue.Benedek@centurylink.com>]  
**Sent:** Friday, December 07, 2012 11:47 AM  
**To:** Mark Smith  
**Cc:** 'Kelley, Misty Smith'; 'Charles Welch ([CWelch@farrismathews.com](mailto:CWelch@farrismathews.com))'; 'Tom Davenport ([tom@ctdlegal.com](mailto:tom@ctdlegal.com))'  
**Subject:** RE: Docket No. 12-00060 [M&M-Content.15518.0001]

Mark: Thanks for checking on the issue regarding BTES's redaction of employee names. Your confirmation that "The only thing redacted is the BTES employee names shown on PDF pages 154-165 and 167-170" is acceptable to my client.

We have preliminarily reviewed the PDF document provided to CenturyLink and those on this distribution. It seems there may be other issues with the 2010 audit workpapers. Specifically:

1. The workpapers are numbered starting with letters A through Z. However, none of the workpapers starting with G, M, N, O, P, Q, T, U, V, X, or Y were provided in the 11/20/2012 email. Further, no explanation was provided by BTES. The document sent to us references several of these sections, so we are assuming these sections exist but were omitted by BTES in the 11/20/2012 filing. At bottom, we are unable to

determine/verify if these missing sections impact the CAM allocations without seeing the sections. Please provide all missing sections.

2. Once we organized the workpapers, which were not in order in the provided electronic copy, we discovered that a number of the pages were missing. When we reviewed the footnotes, we found references to the missing pages. We've attempted to list those below. There could be other missing pages of which we are unaware. Please provide all missing pages. For example, in portions of the workpapers provided by BTES, there is a section W, but it starts with the number 30 (i.e. W-30-x.xx). We are assuming that there are more workpapers starting with W-1-x.xx through W-29-x.xx. Indeed, there are footnotes in the portions actually provided by BTES that reference workpapers W-28-1.00 and W-29-1.00. Please provide all missing pages.

**I am still confirming with my client if there is anything else missing/awry regarding the workpapers as provided by BTES on 11/20/2012. Please provide ASAP a complete, ordered copy of the BTES 2010 CAM audit. Thanks.**

A-1-2.00 through A-1-2.09  
A-1-3.00 through A-1-3.09  
A-1-4.00 through A-1-4.09  
A-1-5.00  
B-1.2.00  
B-1.3.00  
B-1.4.00  
B-1-5.00  
C-1-2.00  
C-1-3.00  
C-1-4.00 and C-1-4.01  
D-1-1.05A through D-1-1.05L  
D-1-2.00  
D-1-3.00  
D-1-4.00  
D-1-5.00  
E-1-2.00 through E-1-2.12  
E-1-3.00 through E-1-3.11  
E-1-4.00 through E-1-4.12  
E-1-5.00 through E-1-5.12  
F-1-2.00 through F-1-2.14  
F-1-3.00 through F-1-3.14  
F-1-4.00 through F-1-4.11  
F-1-5.00 through F-1-5.13  
G-1-1.00 through G-1-1.04  
H-1-2.00 through H-1-2.04

H-1-3.00 through H-1-3.04  
H-1-4.00 through H-1-4.04  
H-1-5.00 through H-1.5.04  
I-1-2.00  
J-1-1.01  
K-2-1.01 through K-2-1.09  
L-1-1.01  
S-1-1.15  
W-28-1.00  
W-29-1.00  
W-30-1.00  
W-30-3.01 through W-30-3.09  
W-30-4.01  
W-30-5.00  
W-30-6.00  
Z-5-1.00 through Z-5-4.00

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**From:** Mark Smith [<mailto:msmith@millermartin.com>]  
**Sent:** Wednesday, November 21, 2012 12:12 PM  
**To:** Benedek, Sue E  
**Subject:** Re: Docket No. 12-00060 [M&M-Content.15518.0001]

Sue - thanks for checking. I just thought that the individual names were beyond what you were looking for and it made my production easier to use these documents. I'm not suggesting you are bound by the prior discussions - I'd just appreciate it if this is workable from your client's perspective.

Thanks - Mark

On Nov 21, 2012, at 11:40 AM, "Benedek, Sue E" <[Sue.Benedek@centurylink.com](mailto:Sue.Benedek@centurylink.com)> wrote:

Mark: I need to check with my client. The prior discussion occurred in the context of an informal resolution of a discovery dispute. It also was made in the context of an alternative in order to get quick access to the information requested – i.e., several years of audit workpapers. Since we had to file a motion to compel and limited the request to 1 year of audit papers, any prior discussions to settle a dispute seem inapplicable. However, I will check with my client.

Sue Benedek  
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**From:** Mark Smith [<mailto:msmith@millermartin.com>]  
**Sent:** Wednesday, November 21, 2012 10:57 AM  
**To:** Benedek, Sue E  
**Cc:** 'mkelley@bakerdonelson.com'  
**Subject:** RE: Docket No. 12-00060 [M&M-Content.15518.0001]

Sue - I apologize for any confusion. The only thing redacted is the BTES employee names shown on PDF pages 154-165 and 167-170. You'll see framed boxes on these pages where the names would appear. We haven't redacted any financial information, and these employees' position titles are shown.

I thought that this was OK based on our prior discussions, but I probably should have been clearer in my explanation in the filing.

If this addresses it, could you let me know, and I'll similarly respond to the broader group?

Thanks-- Mark

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**From:** Benedek, Sue E [<mailto:Sue.Benedek@centurylink.com>]  
**Sent:** Wednesday, November 21, 2012 10:40 AM  
**To:** Carol Bain; Mark Smith  
**Cc:** 'Kelley, Misty Smith ([mkelley@bakerdonelson.com](mailto:mkelley@bakerdonelson.com))'; 'Charles Welch ([CWelch@farrismathews.com](mailto:CWelch@farrismathews.com))';  
Prockish, Ann C; Wescott, Pam A; Mohr, Mike L  
**Subject:** RE: Docket No. 12-00060 [M&M-Content.15518.0001]

Mr. Smith: Apparently, the audit papers have been redacted. We are unable to ascertain what portions are redacted versus non-redacted. This makes it impossible to review the document. Given that the case has a protective order and agreement, we continue to request a unredacted copy of the audit workpapers. That copy need not be filed, of course. Please provide to CenturyLink ASAP. Thank you.

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**From:** Carol Bain [<mailto:cbain@millermartin.com>]  
**Sent:** Tuesday, November 20, 2012 3:26 PM  
**To:** [sharla.dillon@tn.gov](mailto:sharla.dillon@tn.gov)  
**Cc:** Benedek, Sue E; Kelley, Misty Smith ([mkelley@bakerdonelson.com](mailto:mkelley@bakerdonelson.com)); Charles Welch ([CWelch@farrismathews.com](mailto:CWelch@farrismathews.com)); Tom Davenport ([tom@ctdlegal.com](mailto:tom@ctdlegal.com)); Mark Smith  
**Subject:** Docket No. 12-00060 [M&M-Content.15518.0001]

Ms. Dillon - We have attached for filing in Docket No. 12-00060 the Second Supplemental Responses of Bristol Tennessee Essential Services to Discovery Requests of United Telephone Southeast LLC (CenturyLink). The original plus one copy will be forwarded to your attention via U.S. Mail.

We have also attached for filing in Docket No. 12-00060 the Brief of Bristol Tennessee Essential Services Regarding Jurisdiction of the Tennessee Regulatory Authority over a Market Regulated Carrier. The original plus four copies will be forwarded to your attention via U.S. Mail.

We are proposing providing service copies to counsel via email, but if anyone would prefer a paper copy, please let me know.

Thank you.

**Carol Bain**  
Assistant to Carlos Smith and Mark Smith  
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