

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

February 13, 2013

IN RE:

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

)
)
) **DOCKET NO.**
) **12-00060**
)
)
)

**ORDER REQUIRING PRODUCTION OF 2010 AUDIT WORKPAPERS
INCLUDING AUDITOR'S INDEXED COMPILATION OF BTES DOCUMENTS &
REQUIRING BTES OBTAIN 2011 CAM COMPLIANCE AUDIT**

This matter came before the Hearing Officer of the Tennessee Regulatory Authority ("TRA" or the "Authority") during a status conference held on January 29, 2013, which was scheduled upon a *CenturyLink Request for Status Conference with Hearing Officer ("Request")*, filed on January 8, 2013, to address a continuing dispute between the parties concerning production of the audit workpapers associated with BTES' 2010 compliance audit of its cost allocation procedures.¹

PLEADINGS OF THE PARTIES

In its *Request*, CenturyLink² asserts that despite the Hearing Officer's *Order Granting CenturyLink's Motion to Compel ("Order Compelling Production")*, issued November 20, 2012, and subsequent *Order Granting Motion to Enforce Compliance with Order Requiring Production of Auditor Workpapers ("Enforcement Order")*, issued December 19, 2012, both of

¹ In performing an audit, auditors are required to prepare and maintain audit documentation, which is generally referred to as workpapers or working papers.

² 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").

which directed Bristol Tennessee Essential Services (“BTES”) to produce the workpapers associated with its 2010 cost allocation manual compliance audit report (“2010 CAM Audit Report”), BTES has failed to produce a complete copy of the workpapers.³ Due to the absence of numerous sections of the workpapers, including various schedules and more than 200 missing pages, CenturyLink maintains that it is unable to conduct a meaningful review of the audit.⁴ Included with its *Request*, CenturyLink attached a series of emails exchanged between the counsels for BTES and CenturyLink, which documents the parties’ efforts to amicably resolve their disagreement.⁵ Having reached an impasse, CenturyLink requested that the Hearing Officer convene a status conference with the parties’ counsel and corporate representatives to address the ongoing conflict between the parties on this issue.

In its *Response of Bristol Tennessee Essential Services to Request of United Telephone Southeast LLC for a Status Conference* (“*Response*”), filed on January 11, 2013, BTES asserts that it has complied with the requirements of the *Enforcement Order* and, in good faith, extended multiple reasonable offers to provide alternate documentation that CenturyLink could use to evaluate the 2010 CAM Audit Report.⁶ Referencing the *Affidavit of William H. Novak, CPA*, filed with its *Third Supplemental Responses of Bristol Tennessee Essential Services to Discovery Requests of United Southeast LLC*, BTES contends that it has already produced the complete set of Mr. Novak’s workpapers related to the 2010 CAM Audit Report, and that the documents referenced in those workpapers, but not produced, were not actually audit workpapers. Instead, those (referenced) documents were actually a compilation of documents and calculations that

³ *Request*, p. 1-3 (January 8, 2013).

⁴ *Id.* at 4.

⁵ Attached to the *Request* documents a string of emails exchanged by Mark Smith, counsel for BTES, and Sue Benedek, counsel for CenturyLink, spanning from December 28, 2012 to January 8, 2013.

⁶ *Response*, p. 1 (January 11, 2013).

Novak received from BTES.⁷ Further, BTES states that Novak did not provide it with the indexed compilation of documents, and, after the audit was completed, Novak did not retain a copy but disposed of the indexed compilation completely.⁸ As a result, the indexed compilation no longer exists and cannot be produced.⁹ BTES asserts that it has satisfied its discovery obligations and conformed to the requirements of the *Enforcement Order* because it produced the workpapers actually created by Novak and the companion index of utility documents no longer exists.

In addition, BTES asserts that it has exceeded the requirements of the *Enforcement Order* when, in a good faith effort to resolve the matter, it voluntarily offered CenturyLink four separate options under which BTES agreed to provide alternatively formatted BTES documentation that would permit CenturyLink to complete its review of the 2010 CAM Audit Report.¹⁰ BTES asserts that the offers it made to CenturyLink are reasonable and sufficient accommodations, and asks that CenturyLink's requests for further relief be denied.

JANUARY 29, 2013 STATUS CONFERENCE

The status conference was convened as noticed in the Hearing Room on the Ground Floor of the Tennessee Regulatory Authority at 460 James Robertson Parkway, Nashville, Tennessee.¹¹ 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, **C. Thomas Davenport, Jr., Esq.,**

⁷ *Id.* at 2 (January 11, 2013) (citing the *Affidavit of William H. Novak, CPA*, attached to its *Third Supplemental Responses of Bristol Tennessee Essential Services to Discovery Requests of United Southeast LLC* (December 2, 2012)).

⁸ *Id.*

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 3-4 (BTES offered CenturyLink the following four options: (1) to make available copies of all documents that BTES furnished to Novak in connection with the 2010 CAM Audit Report, (2) to make available compilations of its documents related to specific allocation calculations in Novak's workpapers as requested by CenturyLink, (3) provide a compilation of BTES' allocator calculation information provided to Novak during the 2010 CAM audit and additional supporting documents/financial information as requested by CenturyLink, and (4) request that Novak re-create an indexed compilation of documents at CenturyLink's expense.

¹¹ Public notice of the status conference was issued was on January 15, 2013.

BTES General Counsel, 640 State Street, Bristol, Tennessee 37620, and via telephone, **Lola McVey**, BTES Director of Accounting and Finance, 2470 Volunteer Parkway, Bristol, Tennessee 37620;

For CenturyLink:

Misty Smith Kelley, Esq., Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, 1800 Republic Centre, 633 Chestnut Street, Chattanooga Tennessee 37450, **Pam Wescott**, CenturyLink State Regulatory and Legislative Affairs, P.O. Box 680644, Franklin, Tennessee 37068, and via telephone, **Sue Benedek, Esq.**, CenturyLink Senior Attorney, 240 North Third Street, Suite 300, Harrisburg, Pennsylvania 17101, and **Ann Prockish**, CenturyLink Director of Regulatory Operations, 100 CenturyLink Drive, Monroe, LA 71201; and,

For TCTA:

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

During the status conference, the parties presented their positions concerning BTES' production of the 2010 CAM Audit Report audit workpapers and responded to questions raised by the Hearing Officer. As a preliminary matter, BTES confirmed that, in response to the Hearing Officer's email request of January 28, 2013, it attempted to reach Mr. Novak, the auditor that conducted the 2010 CAM Audit Report, to inquire whether he might be available for questions during the status conference. Unfortunately, contact was not made with Mr. Novak before the start of the status conference and he was not available for questions. BTES offered to postpone the status conference until such time as Mr. Novak was available to participate, but the Hearing Officer determined that a postponement was not necessary and carried on with the proceedings.

CenturyLink

During the status conference, CenturyLink recounted the procedural history surrounding its ongoing efforts to obtain a complete, integrated, set of 2011 CAM Audit Report workpapers that would enable it to analyze and verify the accuracy of Novak's audit process, procedures performed, and results achieved. CenturyLink asserted that, despite its ongoing efforts, it did not

have the information it needed in order to verify BTES' assertion that it has complied with the requirements of its existing Certificate of Public Convenience and Necessity ("CCN").

In addition, CenturyLink contended that the Tennessee rules governing Certified Public Accountants ("CPAs") and the Agreed-Upon Procedures filed in Docket No. 05-00251, which provides the particular standards and requirements under which BTES' CAM compliance audits are to be conducted,¹² both require compliance with the standards designated by the American Institute of CPAs ("AICPA"). To demonstrate that certain professional standards promulgated by AICPA concerning audit documentation are applicable to the 2010 CAM Audit Report, CenturyLink proffered to the Hearing Officer and parties, the AICPA Statement on Auditing Standards (SAS No. 103) AU Section 339, *Audit Documentation*.¹³ CenturyLink identified specific paragraphs of AU Section 339 that detail the objectives, purposes, and importance of preparing, maintaining, and retaining audit documentation, and requirements related to the form, content, and extent of audit workpapers. Further, CenturyLink noted that in defining the types of data that may constitute audit documentation, i.e., workpapers, the AICPA does not distinguish an auditor's own created documents from client documents, and, thus, does not preclude client documents from qualifying as workpapers. Indeed, the AICPA standards provide that client documents and records should be included as part of the workpapers if they are needed to enable an understanding of the work performed and the conclusions reached in the audit.¹⁴

CenturyLink contended that in light of these standards, Novak and BTES had an obligation to retain the indexed compilation of BTES documents as part of the audit workpapers. Although Novak indicated that the index of company documents was destroyed upon completion

¹² *In re Application of Bristol Tennessee Essential Services for a Certificate of Public Convenience and Necessity to Provide Telecommunication Services*, Docket No. 05-00251, *Agreed-Upon Procedures for Bristol Tennessee Essential Service's audit of its Cost Allocation Manual* (also referred to as, *Work Plan*) (May 22, 2006).

¹³ *Audit Documentation*, Statement on Auditing Standards (SAS No. 103), AU Section 339 (Am. Inst. of Certified Pub. Accountants, December 15, 2006).

¹⁴ *Id.* at .06.

of the audit, and regardless of BTES' offers to provide relevant documents in various alternative formats, CenturyLink maintained that BTES, at its own expense, should engage Novak to re-create the index. CenturyLink further asserted that in the absence of the indexed compilation of BTES documents, as referenced by the auditor, a clear understanding of the work performed by Novak and the basis of his conclusions cannot be attained. Therefore, CenturyLink contended that it is unable to move forward in its examination and analysis of the issues, and is hindered in its ability to prepare testimony or otherwise participate in this docket.

TCTA

As concerns the issue before the Hearing Officer on discovery of the audit documentation associated with the 2010 CAM Audit Report, TCTA noted its agreement and support of CenturyLink's position for the record. In addition, in light of the Authority panel's ruling, made during its regularly scheduled Authority Conference held on January 7, 2013, TCTA requested that the Hearing Officer order BTES to obtain a 2011 CAM compliance audit in accordance with the conditions of its CCN.¹⁵

BTES

During the status conference, reiterating the arguments set forth in its filed pleadings, BTES emphasized that the indexed compilation of company documents, used by Novak in his performance of the 2010 CAM Audit Report, was not provided to it and was destroyed upon completion of the audit. Thus, it cannot be produced. Nevertheless, in a good faith effort to

¹⁵ During the regularly scheduled Authority Conference held on January 7, 2013, the voting panel considered the threshold legal issue raised and briefed by the parties on the jurisdiction and authority of the TRA to impose and enforce requirements or conditions on Certificates of Public Convenience and Necessity issued under Tenn. Code Ann. § 65-4-201 *et seq.*, including conditions to promote competition and prevent anti-competitive behavior consistent with Tenn. Code Ann. § 7-52-401 *et seq.*, concerning municipal electric utilities, following a utility's election of market regulation under Tenn. Code Ann. § 65-5-109(l) through (p), also known as the Market Regulation Act of 2009 (2009 Pub. Acts 278, eff. May 21, 2009). Although the Authority's Order memorializing its ruling of January 7, 2013 has not yet been approved for release and entry in the docket file, for purposes of context within this order, the Hearing Officer notes that the panel unanimously agreed that, when exercising its authority under Tenn. Code Ann. § 65-4-201 *et seq.*, the TRA may impose conditions on its approval of a CCN for a market-regulated utility, including, but not limited to, conditions to prevent anti-competitive behavior as found in Tenn. Code Ann. § 7-52-401 *et seq.* See Transcript of Authority Conference, pp. 15-19 (January 7, 2013).

resolve this issue, BTES has offered several reasonable alternatives. First, BTES asserts that in addition to the voluminous and detailed documentation of Novak's own calculations, which it has already produced, it has also offered to provide CenturyLink with all of the information and documents that it furnished to Novak during the audit. Second, in the event that production of all documents was burdensome on CenturyLink, BTES offered to allow CenturyLink to identify particular transactions for which BTES would then provide tailored information and calculations. After CenturyLink declined these offers, BTES continued its attempts to reach a compromise that would facilitate a review of the audit. Third, BTES agreed to provide documentation concerning BTES' allocation factors and a compilation of all of BTES' own allocation calculations. BTES contends that its initial offers were sufficient to allow CenturyLink to tie BTES' information to Novak's calculations, and thus, complete a thorough review of the 2010 CAM Audit Report. Nevertheless, as a final accommodation, BTES offered to request that Novak re-create the indexed compilation of BTES documents referenced in the portions of the workpapers that he had authored - at CenturyLink's expense.

BTES stated that Novak, who is known to the Authority and well-regarded, indicated in his *Affidavit* that the company documents were disposed of in accordance with the audit engagement letter and consistent with industry practice. Further, BTES asserts that, in light of Novak's conclusion in the 2010 CAM Audit Report that BTES was in material compliance with its cost allocation process in all respects, ultimately finding less than \$35,000 worth of adjusting entries, and, as the indexed compilation was destroyed in the ordinary course of business and does not exist, its good faith efforts and reasonable offers should be considered to have satisfied its discovery production obligations. Further, as CenturyLink did not raise the CPA standards before the status conference, neither BTES nor Novak had an opportunity to review them or prepare a response.

Additional Inquiry by the Hearing Officer

In response to the Hearing Officer's questions, BTES clarified the format of the workpapers and the references therein, which form the basis of the parties' dispute. In addition, upon the Hearing Officer's request, BTES promptly produced a copy of the 2010 Service Agreement ("Engagement Letter"), dated March 9, 2010, which it stated was prepared by Novak and executed for the performance of the 2010 CAM Audit Report. Based upon recollection without having recently reviewed the Engagement Letter, Mr. Davenport, on behalf of BTES, indicated that the provision concerning confidentiality is relevant for the Hearing Officer's consideration, and requires that confidential information or documents provided by BTES to the auditor during the course of the audit be returned or destroyed at the conclusion of the audit engagement. The parties were also provided copies of the 2010 Engagement Letter during the status conference.

FINDINGS & CONCLUSIONS

As this Order constitutes the Hearing Officer third ruling on the issue of BTES' production of the 2010 CAM Audit Report audit workpapers, the basis and reasoning set forth in the Hearing Officer's *Order Granting CenturyLink's Motion to Compel* ("Order Compelling Production"), issued November 20, 2012, and subsequent *Order Granting Motion to Enforce Compliance with Order Requiring Production of Auditor Workpapers* ("Enforcement Order"), issued December 19, 2012, should be considered herein as though reproduced in full.

The documents at issue between the parties were collected and used by Novak during the course of the 2010 compliance audit. Collectively, the documents comprised an indexed compilation of BTES-generated documents and calculations, to which the auditor, for ease of reference, assigned workpaper numbering. Upon completion of the audit, Novak provided BTES with the 2010 CAM Audit Report and the portion of the workpapers that he had authored

or created himself during the course of the audit. Despite the deliberate integration and reference of certain BTES documents within the workpapers - documents which formed the basis and foundation of the work Novak performed and the conclusions he reached in the audit - Novak excluded those documents from the whole of the audit documentation. As a result, the indexed compilation of BTES-generated documents, which for purposes of any subsequent audit examination and review, is an essential companion to Novak's own created documents, was not provided to BTES as part of the audit working papers. Instead, relying on the terms of the Engagement Letter and industry practice, Novak destroyed that portion of the audit documentation that consisted of the compiled BTES "source" documents.

Pursuant to a Settlement Agreement executed between the parties in Docket No. 05-00251, which upon the joint motion of BTES and United Telephone-Southeast, Inc. (a.k.a., CenturyLink) amended BTES' Application and incorporated the Settlement Agreement into the Authority's Order of March 21, 2006, BTES, a municipal electric company, was granted a CCN to provide telecommunications services subject to certain conditions.¹⁶ Included among the various conditions, BTES agreed to submit to an annual audit that included an examination to determine whether BTES and its Telephone Business Unit are operating in compliance with the cost allocation manual, Tennessee law, and the Authority's rules and orders.¹⁷ Further, BTES agreed to maintain its records in a manner that permits audit and review by the Authority.¹⁸

¹⁶ *In re Application of Bristol Tennessee Essential Services for a Certificate of Public Convenience and Necessity to Provide Telecommunication Services*, Docket No. 05-00251, *Settlement Agreement*, pp. 2-3 (February 10, 2006); *see also* Docket No. 05-00251, *Joint Motion of Bristol Tennessee Essential Services and United Telephone-Southeast, Inc. to Approve Settlement Agreement* (February 27, 2006).

¹⁷ *In re Application of Bristol Tennessee Essential Services for a Certificate of Public Convenience and Necessity to Provide Telecommunication Services*, Docket No. 05-00251, *Order Approving Application for Certificate of Public Convenience and Necessity*, pp. 4-5 (March 21, 2006); *see also* Docket No. 05-00251, *Settlement Agreement*, pp. 2-3 (February 10, 2006).

¹⁸ *In re Application of Bristol Tennessee Essential Services for a Certificate of Public Convenience and Necessity to Provide Telecommunication Services*, Docket No. 05-00251, *Settlement Agreement*, p. 4 (February 10, 2006).

Its regulatory authority under law notwithstanding, the Authority approved BTES' CCN request upon full consideration of these and other terms and conditions of the Settlement Agreement, with which BTES agreed, willingly consented to comply, and requested be made part of the requirements of its certification.¹⁹ Furthermore, while the Authority, in granting BTES' CCN, declined to adopt a provision of the Settlement Agreement that imposed a requirement that the annual audits automatically be conducted under the Authority's supervision, it expressly affirmed its power to exercise discretion concerning the extent of its participation in these audits.²⁰

During the status conference, CenturyLink contended that the AICPA standards, which are binding on CPAs licensed in Tennessee and established as a criterion of audit performance under the Agreed-Upon Procedures, have not been complied with by Novak and BTES. Particularly, if the AICPA standards had been complied with, then the index compilation would have been included in the audit workpapers and retained for not less than five years. On the other hand, Novak and BTES assert that the index compilation was handled properly in accordance with the Engagement Letter and industry practice for engagements of this type. The Hearing Officer declines to rule on or otherwise render an opinion on these lines of argument, as described in this paragraph only, as they may not yet be fully developed in the record and such a determination is not necessary to the Hearing Officer's decision herein.

Therefore, after due consideration of the record and arguments of the parties, the Hearing Officer finds that, in accordance with its agreement and under the terms of its CCN, BTES is responsible not only to annually procure an independent auditor to perform a compliance audit and to file the results thereof, but also to ensure that the audit records are maintained in a manner

¹⁹ *Id.* at p. 7.

²⁰ *In re Application of Bristol Tennessee Essential Services for a Certificate of Public Convenience and Necessity to Provide Telecommunication Services*, Docket No. 05-00251, *Order Approving Application for Certificate of Public Convenience and Necessity*, pp. 4-5 (March 21, 2006).

that permits the Authority, in its discretion, to audit and review them. As such, in order to facilitate a comprehensive study or assessment of a completed audit, whether it is conducted by the Authority or, as in this case, CenturyLink, the audit documentation should be sufficiently detailed so as to enable a reviewer to understand the scope and results of the work performed, evidence obtained and considered, basis for the conclusions reached, and to reconcile the audit results to the underlying records. Workpapers that fail to provide adequate documentation hinder, and might entirely preclude, a thorough examination of such audit when under review.

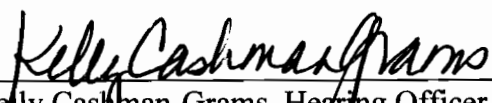
In this case, as would be expected, Novak utilized a variety of underlying company information and documents to conduct the 2010 CAM compliance audit. Insofar as they formed the foundation of his work and conclusions, these BTES-generated documents and calculations were assigned workpaper numbering and assembled into an indexed compilation. As such, the indexed compilation of documents is necessary to an appraisal of the audit and should have been retained and included within the audit workpapers. Although, due to the circumstances of this docket, CenturyLink initiated the request to review the compliance audit, had the Authority decided to undertake an examination of BTES' 2010 CAM Audit Report, as it could have done at any time since approving BTES' CCN, it would have needed this documentation to complete its review.

Therefore, upon the forgoing, the Hearing Officer agrees that BTES should produce the indexed compilation of BTES documents referenced in the audit workpapers, which was utilized by the auditor in performing the audit. As the Hearing Officer understands from BTES that only Mr. Novak is able to accurately reproduce this indexed compilation, then BTES – at its own expense - should engage Novak to re-create the index. In addition, consistent with the Authority panel's ruling during the January 7, 2013, Authority Conference, as described above, BTES should promptly take action to obtain and submit its lapsed 2011 annual compliance audit and

comply appropriately with all other requirements of its CCN. Finally, after determining when the remaining workpapers can be produced, the parties are directed to file a joint proposed procedural schedule to completion for the consideration of the Hearing Officer.²¹

IT IS THEREFORE ORDERED THAT:

1. Bristol Tennessee Essential Services shall produce the indexed compilation of company “source” documents referenced in the 2010 CAM Audit Report workpapers, and, as needed to re-create an accurate replica of the original, which was destroyed, shall at its expense engage Mr. Novak, the auditor of the 2010 CAM Audit Report.
2. Bristol Tennessee Essential Services shall take prompt action to obtain and file its 2011 cost allocation manual compliance audit, and other annual compliance audits and required reports as they become due, in order to conform to the requirements of its Certificate of Public Convenience and Necessity.
3. After conferring together, the parties to this docket shall file for the consideration of the Hearing Officer a joint proposed procedural schedule to completion.



Kelly Cashman-Grams, Hearing Officer

²¹ Following a short recess, the Hearing Officer rendered during the status conference an abbreviated verbal ruling consistent with that set forth above.