

**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)
Necessity to Provide Competiting)
Telecommunications Services Statewide)

**CENTURYLINK'S MOTION TO COMPEL AND RESPONSE TO DISCOVERY
OBJECTION OF BRISTOL TENNESSEE ESSENTIAL SERVICES**

Pursuant to the Second Revised Procedural Schedule, 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") submit the following response to a discovery objection filed by Bristol Tennessee Essential Services (hereinafter BTES") and motion to compel responses to a discovery request propounded upon BTES by CenturyLink.

I. INTRODUCTION

On September 7, 2012, CenturyLink propounded 34 discovery questions upon BTES. On October 5, 2012, BTES filed objections and responses to CenturyLink's discovery. Through CenturyLink's willingness to modify and limit the discovery questions in dispute, and as a result of BTES's supplemental responses of October 23, 2012,¹ CenturyLink limits this response to the objection filed by BTES to Question No. 5, which is further modified as set forth below. CenturyLink Question No. 5 requested that BTES provide the following information:

¹ On October 22, 2012, BTES submitted to CenturyLink draft supplemental responses.

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 CAM² 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 responded to CenturyLink's discovery requests. On October 23, 2012, BTES filed supplemental responses, but did not include a response to Question No. 5. As to Question No. 5, BTES objected as follows:

BTES objects to this request based upon the General Objections. 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 files this response to the objection of BTES to Question No. 5. Consistent with efforts to resolve this matter prior to the filing of this response, CenturyLink limits Question No. 5 to a request for auditor workpapers only and also limits the question to a request for auditor workpapers associated with BTES's Financial Report for year 2010, unless auditor workpapers for year 2011 are available.³

II. RESPONSE TO GENERAL OBJECTIONS

As set forth in BTES's Introduction and General Objections, BTES's main argument appears to be that a certain "regulatory and jurisdictional backdrop" supports BTES's ability to not provide responses to relevant discovery questions. BTES is a municipal electric that has

² Cost Allocation Manual

³ If auditor workpapers for year 2011 are available, then CenturyLink requests that BTES provide the auditor workpapers for BTES's financial reports for years 2010 and 2011.

elected market regulation. Tenn. Code Ann. §§ 65-5-109(m)(n).⁴ BTES now argues that its market regulation status precludes any rigorous review of BTES's application for a statewide certificate of public convenience ("CCN"). Specifically, BTES's argument claims that the Tennessee market regulation statute only preserves jurisdiction of the Tennessee Regulatory Authority ("TRA" or "Authority") relative to Tenn. Code Ann. § 65-4-201, "but the requirements under Title 7, Chapter 52, Part 4 are not included in the jurisdiction reserved to the Authority for a market-regulated carrier like BTES."⁵

CenturyLink disagrees based upon the facts in this case and given BTES's sparse application seeking a statewide CCN authority to provide telecommunications services. BTES's statewide CCN request heightens – rather than dilutes – the Authority's analysis and review required by Tenn. Code Ann. § 65-4-201.

The Hearing Officer need not reach BTES's claim that the Tennessee market regulation act precludes review of issues addressed in the municipal electric law at Title 7, Chapter 52, Part 4. BTES itself admits in its objections that the requirements of Tenn. Code Ann. § 65-4-201 remain applicable and relevant to the scope of this case.⁶ The requested discovery is relevant to the factors within this statute.

The discovery responses received by CenturyLink from BTES do not enable CenturyLink to submit testimony regarding: (1) whether BTES possesses sufficient managerial, financial and technical abilities to provide telecommunications services on a statewide basis, as required by

⁴ Amended T.C.A. Section 65-5-109(n)(12) enacted May 21, 2009 in pertinent part provides that a certificated provider electing market regulation shall be subject to the jurisdiction of the authority only when: "The authority is exercising jurisdiction respecting the requirement of certificates pursuant to § 65-4-201."

⁵ BTES Objections at pp. 2 and 3.

⁶ *Id.*

T.C.A. § 65-4-201(b); and (2) whether BTES's statewide expansion to provide any such telecommunications services raises or implicates anti-competitive concerns, in contravention of T.C.A. § 65-4-123 and T.C.A. § 7-52-401. Furthermore, the application filed by BTES is very sparse as to how BTES will finance, manage, and technically implement statewide authority if granted by the TRA and as to whether BTES has in place today (or has a plan in place for) the appropriate processes, management, and resources that foster – and not inhibit – the development of an efficient, technologically advanced, statewide system of telecommunications services, as is the telecommunications policy of Tennessee, in compliance with T.C.A. § 65-4-123 and T.C.A. § 7-52-401.

Tenn. Code Ann. § 65-4-201

Under Tenn. Code Ann. § 65-4-201(c)(2), BTES must demonstrate that it possesses sufficient managerial, financial and technical abilities to provide the applied for services. In its application to the TRA and its discovery responses, BTES relies upon financial reports for prior years.⁷ Thus, while BTES's application is relatively sparse in terms of proof, BTES has injected the issue of its prior financial reports and, moreover, now claims that these financial reports effectively resulted in "limited recommended and favorable conclusions" regarding these audits. However, when CenturyLink at Question No. 5 requested a copy of the auditor workpapers to, at a minimum, review and test the veracity of BTES's claims regarding its prior financials, BTES objected.

CenturyLink has limited its discovery questions propounded upon BTES and has further limited Question No. 5 to request only the auditor workpapers for years 2010 and year 2011 (if

⁷ See, e.g., BTES Application at Exhibit B (2011 financial report).

available). Under Tenn. Code Ann. § 65-4-201(c)(2), those auditor workpapers are relevant to BTES's financial, managerial, and technical abilities. The best indication of BTES's future abilities – particularly given BTES's request for a statewide CCN – is its past abilities and thus the auditor workpapers may lead to evidence of BTES's financial, managerial, and technical abilities in the future.

Moreover, BTES must show that it “has demonstrated that it will adhere to all applicable authority polices, rules and orders” (T.C.A. §65-4-201(c)(1)). Thus, BTES is required to demonstrate that it has complied, as a matter of fact rather than mere assertion, with prior orders and obligations. In this case, however, BTES wants to provide only cost allocation manual results and general statements regarding audited financials and performance. In other words, BTES asks that the TRA take BTES at its word regarding the alleged credibility of those prior year financials.

A Protective Order has been approved for the docket and remains in place to the extent the auditor workpapers are deemed by BTES to contain confidential information. Likewise, BTES's general objections claiming that the request is beyond the *Tennessee Rules of Civil Procedure* or that the request is overly burdensome lack merit.⁸ BTES hired an auditor, presumably an independent auditor, and the auditor in review of BTES's financials prepared workpapers regarding BTES's financials. Those workpapers are placed directly at issue by BTES's filing for a statewide CCN and its assertion of financial, managerial, and technical abilities to provide telecommunications services *across the entire state of Tennessee*. Auditor

⁸ BTES Objections at pp. 3 and 4. It is CenturyLink's understanding that the 2010 workpapers are approximately 125 pages in length. Thus, BTES's General Objection assertion that the request is burdensome has no merit.

workpapers are necessary as these documents may identify BTES's process for how it responds to auditor findings and recommendations, particularly as it relates to any findings and recommendations impacting BTES's financial books. The auditor workpapers are relevant, are within the scope of work for which BTES engaged its auditor, and may lead to admissible evidence regarding the statutory criteria at Tenn. Code Ann. § 65-4-201(c)(1) and (2). The Hearing Officer should dismiss BTES's objections and enter an order compelling BTES to produce 2010 and 2011 (if available) auditor workpapers.

Tenn. Code Ann. § 65-4-123 and Tenn. Code Ann. § 7-52-401

In the event that the Hearing Officer determines to address BTES's position regarding the interplay between the municipal electric law at Title 7, Chapter 52, Part 4 and the Tennessee market regulation act, then the Authority's obligations at Tenn. Code Ann. § 65-4-123 and T.C.A. § 7-52-401⁹ render relevant the financial auditor workpapers requested in Question No. 5.

Specifically, BTES is a municipally owned electric utility. BTES provides electric service, along with telephone and Internet services. BTES does not have separate affiliates providing its electric, telephone, and Internet services.¹⁰ These facts make BTES's application for a statewide CCN for telecommunications services in need of greater regulatory scrutiny, not

⁹For example, T.C.A. §7-52-401 in part provides as follows:

Notwithstanding § 65-4-101(6)(B) or any other provision of this code or of any private act, to the extent that any municipality provides any of the services authorized by this section, such municipality shall be subject to regulation by the Tennessee regulatory authority in the same manner and to the same extent as other certificated providers of telecommunications services, including, but not limited to, rules or orders governing anti-competitive practices,... (Emphasis added.)

Similarly, T.C.A. §7-52-402 in part provides that "a municipality providing any of the services authorized by § 7-52-401 shall not provide subsidies for such services."

¹⁰ See, e.g., BTES response to CTL Discovery Question Nos. 14 and 11.

less. Moreover, the absence of a specific reference in the market regulation act (§ 65-5-109) to the Title 7 anti-subsidy provisions is immaterial, as the TRA's jurisdiction over such issues is explicitly preserved within Title 7 itself. Specifically, § 7-52-401 provides for continued TRA scrutiny of alleged anti-competitive practices by municipal electrics such as BTES, notwithstanding any other provision of the code:

Notwithstanding § 65-4-101(6)(B) or any other provision of this code or of any private act, to the extent that any municipality provides any of the services authorized by this section, such municipality shall be subject to regulation by the Tennessee regulatory authority in the same manner and to the same extent as other certificated providers of telecommunications services, including, but not limited to, rules or orders governing anti-competitive practices

Tenn. Code Ann. § 7-52-401 (emphasis added). Failure to comply with the anti-subsidy provisions of Title 7 is certainly anti-competitive behavior, as it destroys the level playing field of competition between telecommunication providers. Contrary to BTES' argument, both its current and future compliance with the statutory obligations under Title 7 is a relevant, even critical, area of inquiry appropriate to this docket.

Greater regulatory scrutiny against cross-subsidization and other restrictions contained in T.C.A. §7-52-401 et seq. arises given these facts and given BTES's status as municipal electric. In addition, the TRA has the duty to ensure a level competitive playing field – i.e., monitor for anticompetitive practices – so as “to foster the development of an efficient, technologically advanced, statewide system of telecommunications services, as set forth in Tenn. Code Ann. § 65-4-123.

Thus, given these facts and the limited information available in BTES's application, BTES's election of market regulation does not prevent the TRA from exercising authority under T.C.A. §7-52-401 et seq. and Tenn. Code Ann. § 65-4-123 to require production of auditor workpapers as requested herein. Whether BTES's financial and managerial practices are consistent with a level telecommunications playing field thereby is directly at issue in this proceeding in which BTES seeks statewide CCN authority. Similarly, this case involves the issue of whether additional conditions or requirements of BTES are necessary before the TRA can grant BTES a statewide CCN, particularly if BTES's past actions (or lack thereof) regarding auditor findings and recommendations, as may be set forth in auditor workpapers, support the need for such additional conditions or requirements.

III. RESPONSE TO SPECIFIC OBJECTIONS

As to Question No. 5, BTES responded and objected as follows:

BTES objects to this request based upon the General Objections. 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 incorporates by reference its response above to BTES's general objections.

As to the remaining specific objections of BTES, CenturyLink submits that the objections are without merit and should be dismissed.

BTES objects and claims that it has attached the “results” of its 2007 through 2010 CAM (i.e., its cost allocation manual). BTES’s proposal to rely upon admitted “results” of its cost allocation manual are insufficient and inadequate.

BTES’s CAM does not provide any detail or information regarding how BTES determined costs that comprise and tier up to each allocator calculation. BTES’s CAM provides a narrative of how each cost allocator is determined and the fiscal year 2006 allocators used by BTES. BTES’s CAM does not provide the actual calculations of the cost allocations. The auditor workpapers should provide the results of the company calculations for cost allocations *along with the results of the auditor's calculations*. These calculations are needed to help ensure that the allocations are being done correctly by both the company and the auditors.

Similarly, the question of BTES under allocating costs to its telephone and cable/Internet business units is essential to determining: (1) whether BTES’s has undertaken the necessary processes and practices (both managerial and financial) to prevent anticompetitive results; and (2) whether the business unit financials contained in BTES’s annual reports are accurate for purposes of Tenn. Code Ann. § 65-4-201(c)(1) and (2). Cross subsidization would be an indicator of anti-competitive behavior. Thus, the auditor workpapers are directly related to the financial, managerial and technical abilities under Tenn. Code Ann. § 65-4-201(c)(2).

Moreover, BTES’s allegations of “limited recommendations and favorable conclusions” are not completely accurate. There are findings that seem to indicate on-going problems with the cost allocations employed by BTES. The workpapers may provide additional information on the nature of any such concerns and problems. Thus, the auditor workpapers are necessary for determining financial, managerial and technical abilities under Tenn. Code Ann. § 65-4-

201(c)(2). The workpapers may also shed light upon BTES's alleged compliance with prior obligations and orders and its future plans regarding how it allocates costs among its business units.¹¹ Tenn. Code Ann. § 65-4-201(c)(1).

Furthermore, in Fiscal Year 2010, BTES apparently implemented a Plant Allocation Factor and adjusted the General Allocator. CenturyLink submits that the auditor workpapers for year 2010 (and 2011 if available) should provide information regarding how the Plant Allocation Factor was determined along with how the General Allocator was adjusted. This information is needed to provide assurance that the allocations are being done correctly. Tenn. Code Ann. § 65-4-201(c)(1) and (2).

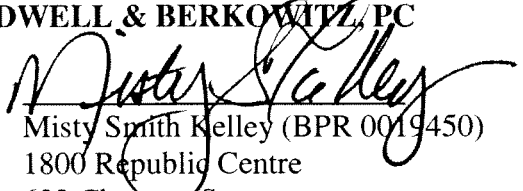
Finally, BTES's CAM does not answer the question of how BTES, if granted a statewide CCN for telecommunications services, will ensure that revenues and expenses earned in conjunction with the non-telephone operations do not subsidize BTES's telephone unit. The auditor workpapers may provide information that will lead to admissible evidence regarding the plans – or lack thereof – of BTES to have managerial processes in place to help ensure against cross subsidization and anticompetitive practices among BTES's various business units.

WHEREFORE, CenturyLink respectfully requests that the Hearing Examiner dismiss BTES's Objection to Question No. 5 and require BTES to provide auditor workpapers for BTES's 2010 financial report and BTES's 2011 financial report (if available).

¹¹For example, in response to CTL Question No. 9, BTES states that "it[] does not anticipate modifying the provisions of the Cost Allocation Manual upon receipt of statewide certification." Providing statewide service outside of BTES's electric footprint will result in additional costs which may, or may not, be contemplated by the CAM. Auditor workpapers, however, may provide additional admissible information on this issue as well.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served via email upon the following on the 26th day of October, 2012:

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