

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the
establishment of operations
support systems permanent
Performance measures for
incumbent local exchange
telecommunications companies.
(BellSouth Track)

Docket No. 000121A-TP

Filed: February 19, 2009

**OBJECTION OF THE COMPETITIVE CARRIERS OF THE SOUTH, INC. TO
AT&T'S DECLARATION OF FORCE MAJEURE EVENT**

The Competitive Carriers of the South, Inc. (CompSouth), through its undersigned counsel, pursuant to section 4.5.2.2 of the Self-Effectuating Enforcement Mechanism (SEEM) plan approved by the Commission, hereby file this Objection to BellSouth Telecommunications, Inc. d/b/a AT&T Florida d/b/a AT&T Southeast's (AT&T) declaration of a Force Majeure Event related to an incident in its St. Louis data center occurring on December 6, 2008. For the reasons set out below, the Commission should find that AT&T did not provide proper notice of this event, that this event was not a Force Majeure Event, and that AT&T should be required to make all payments required under the SEEM plan. As grounds therefor, CompSouth states:

Background

1. In 2000, the Commission opened Docket No. 000121-TP to develop permanent performance metrics for the evaluation of the OSS of the incumbent local exchange carriers.¹ The Commission issued Order No. PSC-01-1819-FOF-TP (*OSS Order*) on September 10, 2001 delineating performance requirements and approving the SEEM plan. The OSS Order described the three phases of the docket, with the third phase designated a performance monitoring and evaluation program.² This docket has remained open since that time to address issues and

¹ This docket was later broken into three sub-dockets, one for each ILEC. Order No. PSC-02-0503-PCO-TP.

² *OSS Order* at 8.

concerns arising from OSS performance.

2. CompSouth³ is a not-for-profit corporation whose members provide competitive telecommunications services in the state utilizing AT&T's operations support systems (OSS).

3. On February 10, 2008, AT&T filed a letter with the Commission notifying it that it declared a Force Majeure Event pursuant to an incident in its St. Louis data center occurring on December 6, 2008 and that it did not intend to make SEEM payments for certain SQM measures which it was unable to meet from December 8 – 12, 2008.

4. CompSouth contends that this event was not properly noticed as required by the SEEM plan and that it does not meet the SEEM plan requirements for a Force Majeure Event.

AT&T Failed to Give Prompt Notice as the SEEM Plan Requires

5. Force majeure events are addressed in section 4.5 of the SEEM plan. Specifically, section 4.5.2 requires AT&T to give the Commission and CLECs "prompt" notice of a force majeure event. This section provides:

BellSouth, upon giving *prompt notice* to the Commission and CLECs as provided below, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference. . . .⁴

6. Section 4.5.2.1 of the SEEM plan states:

To invoke the application of Section 4.5.2 (Force Majeure Event), BellSouth will provide written notice to the Commission and post notification of such filing on BellSouth's website wherein BellSouth will identify the Force Majeure Event, the affected measures, and the impacted wire centers, including affected NPAs and NXXs.

7. In this instance, AT&T failed to comply with sections 4.5.2 and 4.5.2.1 of the SEEM plan because it did not give prompt notice of the alleged force majeure event.

³ Simultaneously with the filing of this Objection, CompSouth has filed a Petition to Intervene in this docket.

⁴ Emphasis supplied.

8. The event in question occurred in AT&T's St. Louis data center on *December 6, 2008*. On December 10, 2008, AT&T provided an Accessible Letter "apprising" CLECs of the event. On December 11, 2008, AT&T sent the Commission a letter "as information" regarding the St. Louis power outage.⁵ Nothing further was heard from AT&T on this matter until *February 10, 2009* - over two months later -- when AT&T declared a force majeure event.

9. Merriam-Webster's Dictionary defines "prompt"⁶ as "being ready and quick to act as occasion demands" or "performed readily or immediately." A two-month delay in providing notice of a force majeure event cannot, under any set of imaginable circumstances or any reasonable definition, be equated with the "prompt" notice the SEEM plan requires for a force majeure declaration.

10. AT&T has provided absolutely no reason for such an extraordinary delay in declaring a force majeure event.

11. Interestingly, it appears that AT&T did not declare this incident to be a force majeure event until *after* it calculated the SEEM payments that would be due as a result of its failure to comply with the applicable SQMs. This can be seen by reviewing the timeframe for SEEM payments related to this event.

12. Section 4.4.1 of the SEEM plan provides that AT&T must remit SEEM payments on the day on which the final validated SEEM reports are posted in accordance with section 2.4 of the SEEM plan.

⁵ Neither of these communications complies with or comprises the notice required by sections 4.5.2 and 4.5.2.1. Section 4.5.2.1 requires AT&T to "identify the Force Majeure Event, the affected measures, and the impacted wire centers, including affected NPAs and NXXs." This required information was not provided until AT&T's February 10th letter.

⁶ The word "prompt" must be given its plain and ordinary meaning. *See, i.e., Wheeler v. Wheeler, Erwin & Fountain, P.A.*, 964 So.2d 745, 751 (Fl. 1st DCA 2007). One should look to the dictionary to find the plain and ordinary meaning of words. *See, i.e., City of Miami Beach v. Royal Castle System, Inc.*, 126 So.2d 595, 598 (Fl. 3rd DCA 1961).

13. Section 2.4 provides that final validated SEEM reports will be posted on the 15th of the month following the posting of the final validated SQM reports for that data month. Section 2.3 provides that final SQM reports will be posted no later than the last day of the month following the date month in which the activity occurred.

14. Thus, in this case, the final validated SQM report for the December 6, 2008 event was posted on January 31, 2009 and the SEEM payment related to that event was due on February 15th. It is highly suspect that the declaration of the force majeure event did not occur until right before AT&T would have to make the SEEM payment for an event occurring over two months ago.

The St. Louis Outage Does Not Qualify as a Force Majeure Event

15. According to AT&T's February 10th letter, a water main break outside of AT&T's data center in St. Louis resulted in a flood that caused a power outage in the data center. AT&T claims that this water main break was "unforeseeable" and could not have "been anticipated or prevented by AT&T" ⁷ CompSouth strongly disagrees.

16. Section 4.5.2 of the SEEM plan defines a force majeure event, in part, as one that prevents AT&T from complying with the SQM/SEEM plan because it is "beyond the reasonable control and without the fault or negligence of (BellSouth) [AT&T]."

17. AT&T's attempt to label the event a "flood" does not on its own make the December 6th incident a force majeure event. As explained below, not only was the "flood" foreseeable, it appears that it was a power outage that prevented AT&T from meeting the SQM standards. This outage was caused by AT&T's failure to properly plan for such a foreseeable event.

⁷ AT&T February 10, 2009 letter to Commission Clerk Ann Cole at 1.

18. The likelihood that a basement may flood is certainly a foreseeable event. Most people would agree that a basement flood is likely to incur in any number of scenarios, including instances of heavy rain or snow as well as when a water main breaks. And if electrical equipment is kept in the basement, it is certainly foreseeable that such equipment might be affected.

19. CompSouth understands that the reason that the power to the building failed (the actual cause of the outage) was not because of the water but because AT&T could not isolate the equipment in the basement affected by the water main break and therefore had to turn off the power to the *entire* building.

20. Had AT&T had the proper procedures in place, it could have quickly isolated the equipment in the basement. In that instance, AT&T would not have been required to shut down power to the entire building. AT&T's failure to properly plan for power outages, which are certainly common, foreseeable events, does not qualify as a force majeure event. AT&T's failure to anticipate and appropriately react to a power outage is not a force majeure event.

21. Finally, AT&T's failure to have redundancy in place so as to deal with power outage situations is also simply a case of poor planning, not a force majeure event. CompSouth understands that AT&T is now addressing redundancy requirements in its data centers.

AT&T's Force Majeure Declaration is Not Presumptively Valid

22. Section 4.5.2.3 of the SEEM provides that AT&T's invocation of the force majeure provision in section 4.5.2 shall be presumptively valid 30 days after notice is provided in accordance with section 4.5.2.1. As discussed above, such notice was not provided in

accordance with the SEEM plan. Therefore, AT&T's force majeure declaration is not presumptively valid and should not automatically go into effect.⁸

23. The Commission should further investigate this event and should not permit AT&T to withhold any SEEM payments.

WHEREFORE, the Commission should enter an order finding that:

1. AT&T failed to give prompt notice regarding its declaration of a force majeure event as required by the SEEM plan;
2. The St. Louis outage is not a force majeure event as it was foreseeable and the result of AT&T's poor planning and procedures;
3. AT&T is required to make the payments under the SEEM plan.

s/ Vicki Gordon Kaufman

Vicki Gordon Kaufman
Keefe Anchors Gordon & Moyle, PA
118 North Gadsden Street
Tallahassee, FL 32301
(850) 681-3828 (Voice)
(850) 681-8788 (Fascimile)
vkaufman@kagmlaw.com

Attorneys for CompSouth

⁸ AT&T stated in its February 10th letter that it "will not make any SEEM payments associated [with the listed measures] on the dates identified herein." AT&T February 10, 2009 letter to Commission Clerk Ann Cole at 2.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via

Electronic Mail and U.S. Mail this 19th day of February, 2009 to the following:

Adam Teitzman
Staff Counsel
Lisa Harvey
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0580
Email: ateitzma@psc.state.fl.us
lsharvey@psc.state.fl.us

Gregory Follensbee
AT&T Florida
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1561
Email: greg.follensbee@att.com

Beth Keating
Akerman Law Firm
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
Email: beth.keating@akerman.com

Katherine K. Mudge
Covad Communications Company
7000 N. MoPac Expressway, Floor 2
Austin, TX 78731
Email: kmudge@covad.com

Robert Culpepper
AT&T Florida
150 South Monroe Street, Suite 400
Tallahassee, FL 32301-1561
Email: rc1191@att.com

Matthew Feil
Akerman Senterfitt
105 East College Ave., Suite 1200
Tallahassee, FL 32301
Email: matt.feil@akerman.com

David A. Konuch
Florida Cable Telecommunications
Association, Inc.
246 E. 6th Avenue, Suite 100
Tallahassee, FL 32303
Email: dkonuch@fcta.com

Howard E. Adams
Pennington Law Firm
215 S. Monroe Street, 2nd Floor
Tallahassee, FL 32301
gene@penningtonlaw.com

Dulaney O'Roark, III
Verizon
Six Concourse Parkway
Suite 3200
Atlanta, GA 30328
Email: de.oroark@verizon.com

Carolyn Ridley, VP Regulatory Affairs
Time Warner Telecom of Florida, L.P.
555 Church Street, Suite 2300
Nashville, TN 37219
Email: Carolyn.ridley@twtelecom.com

Douglas C. Nelson
Sprint Nextel
233 Peachtree Street, N. E.
Suite 2200
Atlanta, GA 30303
Email: douglas.c.nelson@sprint.com

s/ Vicki Gordon Kaufman
Vicki Gordon Kaufman