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. (AT&T FLORIDA TRACK)	DOCKET NO. 000121A-TP ORDER NO. PSC-10-0016-PCO-TP ISSUED: January 5, 2010

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
NANCY ARGENZIANO
NATHAN A. SKOP
DAVID E. KLEMENT

ORDER DEFERRING RULING ON TIER 2 PAYMENTS AND REQUIRING CORPORATE UNDERTAKING

BY THE COMMISSION:

I. Case Background

The Commission adopted a wholesale Performance Assessment Plan (Plan) for the purpose of monitoring performance levels of Operations Support Systems (OSS) provided to Competitive Local Exchange Companies (CLECs) by Order No. PSC-01-1819-FOF-TP, issued September 10, 2001, in Docket No. 000121A-TP. The Order also recognized our vested authority, per Section 364.01(3), Florida Statutes, to provide regulatory oversight necessary to ensure effective competition in the telecommunications industry. This docket has remained open since that time to address issues and concerns arising from OSS performance.

AT&T's wholesale Performance Assessment Plan provides a standard against which CLECs and the Commission can measure performance over time to detect and correct any degradation of service provided to CLECs. The Performance Assessment Plan is comprised of a Service Quality Measurement (SQM) Plan and a Self-Effectuating Enforcement Mechanism (SEEM) remedy plan. The SQM Plan includes a comprehensive and detailed description of AT&T's performance measurements, while the SEEM remedy plan details the methodology for payments to CLECs (Tier 1 payments) and to the State of Florida (Tier 2 payments) when AT&T's performance fails to meet the SQM standards. The SQM Plan currently consists of 50 measurements, of which 35 measures have applicable SEEM payments if AT&T fails to meet the performance standards as agreed by the parties and approved by the Commission.

In May 2009, Commission staff initiated the current periodic review of the Performance Assessment Plan to gauge the effectiveness of AT&T's performance measures and to determine whether the current remedy structure is effective in driving AT&T's performance toward the

required standards. Through a series of workshops and conference calls, interested parties and this Commission are currently working together to propose changes that constitute reasonable solutions. We anticipate completion of the review in the first quarter of 2010.

On October 16, 2009, separate from the current review of the Performance Assessment Plan, AT&T filed a Motion for expedited approval of Lifeline Outreach Funding and modification of SEEM penalty payments. In its Motion, AT&T is requesting that we eliminate Tier 2 payments from the Performance Assessment Plan. As a compromise to the elimination of Tier 2 payments, AT&T proposes to make a one-time contribution of $250,000 to AT&T Florida's Community Service Fund. The Community Service Fund principally funds the outreach efforts of the Lifeline Assistance and Link-Up programs that assist low-income consumers with telephone connection fees and monthly telephone bills.

On October 23, 2009, the Competitive Carriers of the South (CompSouth) filed a response in opposition to AT&T's Motion. In its response, CompSouth argues that AT&T's Motion is a "lopsided bargain" in terms of dollar value traded and the public interest. CompSouth further argues that AT&T is attempting to veer from the Performance Assessment Plan review process established in this docket and is seeking resolution of this issue before all others. In other words, we should not separately examine and resolve AT&T's motion to eliminate Tier 2 payments without simultaneously looking at Tier 2 payments as part of the entire Performance Assessment Plan review process currently being conducted.

On October 23, 2009, Saturn Telecommunication Services, Inc. (STS) filed a Motion to Intervene and also requested that we hold AT&T's Motion to eliminate Tier 2 payments in abeyance. STS takes the position that AT&T's SEEM plan is designed to maintain an open competitive market in Florida and to prevent wholesale performance from "backsliding." STS is asking for abeyance until two pending complaints are resolved.[1]

On October 30, 2009, the Florida Cable Telecommunications Association (FCTA) filed a response in opposition to AT&T's Motion. It its response, FCTA requests that we deny AT&T's Motion and defer any consideration of AT&T's arguments to the current review of AT&T's Performance Assessment Plan.

On October 30, 2009, AT&T filed a response in opposition to STS' Motion to intervene and request of the Commission to hold AT&T's October 16, 2009 Motion in abeyance. In its response, AT&T does not object to STS' desire to intervene in this proceeding, but does object to STS' request to hold AT&T's Motion in abeyance. AT&T contends that the bulk of STS' Motion is dedicated to two complaints filed by STS that are pending in separate proceedings that are not relevant to this proceeding. As a result, AT&T requests that we deny STS' request.

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[1] STS filed a complaint against AT&T with the FCC on July 20, 2009 regarding discriminatory access to network elements in accordance with the requirements of sections 251 (c)(3) and 252 (d)(l) of the Telecommunications Act. The complaint is still pending before the FCC. In FPSC Docket No. 090430, STS also filed a complaint against AT&T seeking to restrict or prohibit AT&T from implementing a November 2009 OSS release. The Commission approved a November 10, 2009 staff recommendation to implement and run a new AT&T CLEC OSS interface in parallel with an existing OSS interface until completion of a staff audit and any further Commission decision based on staff's audit findings. See Order No. PSC-09-0799-PAA-TP issued December 2, 2009.

This Order addresses AT&T's Motion to eliminate Tier 2 payments.

Jurisdiction

We are vested with jurisdiction over this matter pursuant to Section 364.01(3) and (4)(g), Florida Statutes. Pursuant to Section 364.01(3), Florida Statutes, the Florida Legislature has found that regulatory oversight is necessary for the development of fair and effective competition in the telecommunications industry. To that end, Section 364.01(4)(g), Florida Statutes, provides, in part, that the Commission shall exercise its exclusive jurisdiction in order to ensure that all providers of telecommunications service are treated fairly by preventing anticompetitive behavior. Furthermore, the FCC has encouraged the states to implement performance metrics and oversight for purposes of evaluating the status of competition under the Telecommunications Act of 1996.

II. **Analysis**

To ensure nondiscriminatory treatment at the wholesale level, AT&T pays penalties for failure to meet key performance measures as defined in the AT&T Performance Assessment Plan. This Plan has been agreed to by the parties and approved by this Commission. Tier 1 payments are paid directly to each CLEC when AT&T delivers noncompliant performance. Tier 2 payments are paid to the state of Florida and are triggered only when AT&T fails to meet performance standards at the aggregate level for three consecutive months. Since inception of the SEEM Plan in 2001, AT&T has paid $11.6 million in Tier 2 payments. In 2009 to date, AT&T has paid over $400,000 in Tier 2 payments for failing to meet wholesale performance standards approved by this Commission.

AT&T is required to participate in review cycles to evaluate AT&T's Performance Assessment Plan, pursuant to Order No. PSC-01-1819-FOF-TP. We are currently holding our fourth review since the Plan was first implemented in September 2001. The current review was initiated in May 2009, when proposed changes were solicited from parties. In August 2009, AT&T, of its own volition, initiated collaborative conference calls between AT&T Florida and CLECs to review the proposed changes submitted to this Commission.[2] The initial AT&T conference call commenced on August 17, 2009, with subsequent weekly calls through the month of September.

On October 1, 2009, our staff conducted a conference call with AT&T and the CLECs to determine the progress made through the collaborative effort. On the call, the parties requested that our staff initiate informal Commission workshops to discuss in detail the areas of agreement and disagreement. Workshops and collaboration is the process that has been followed in each of the three previous reviews with successful results. The first workshop for the current review was conducted on November 9 and 10, 2009, with a subsequent workshop scheduled for December 16 and 17, 2009. Approximately 15 CLECs are participating in the review.

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[2] Notification was provided via AT&T Accessible Letter number CLECSE09-134, dated August 5, 2009, re: (BUSINESS PROCESSES) (Call) Collaborative to Discuss Proposed Changes to Service Quality Measures (SQMs) and Self Effectuating Enforcement Mechanisms (SEEM).

AT&T's Motion to Approve Lifeline Funding and Modify SEEM Payments

On October 16, 2009, AT&T filed a Motion with the Commission for expedited approval of Lifeline Outreach funding and for modification of SEEM penalty payments. In its Motion, AT&T requests that Tier 2 penalty payments be eliminated because they are unfairly discriminatory, unreasonably punitive, and are no longer appropriate based on market conditions. AT&T argues that competition is firmly entrenched, and, as a result, Tier 2 payments no longer serve their intended purpose and should be eliminated. As support, AT&T cites the Commission's 2009 Report on the Status of Competition in the Telecommunications Industry where it states: "Wireless and VOIP services have become a significant portion of the voice communications market. In addition, CLECs investing in facilities in Florida are providing a range of service options and do not appear to have insurmountable obstacles relating to interconnection issues."

Furthermore, AT&T argues that it is being discriminated against because other large Florida ILECs, Verizon and CenturyLink, are subject to performance measurement plans, yet AT&T is the only Florida ILEC subjected to SEEM penalties. AT&T acknowledges that it voluntarily agreed to the initial SEEM plan, but now believes the local telecommunications market has minimal or no barriers to entry or exit. AT&T also referred to its Midwest, West, and Southwest regions where Tier 2 payments have been eliminated. AT&T was never subjected to Tier 2 remedies in its East region.

As a compromise to the elimination of Tier 2 payments, AT&T is proposing to contribute a one-time $250,000 deposit to the AT&T Florida Community Service Fund. The purpose of the Community Service Fund is to promote the awareness of the Lifeline Assistance and Link-up programs. According to AT&T, the Community Service Fund is now depleted and is in need of additional funding in order for Lifeline outreach efforts to continue.

CompSouth's and FCTA's response to AT&T's Motion

On October 23, 2009 CompSouth filed a response in opposition to AT&T's Motion. CompSouth maintains that we should not approve AT&T's Motion for the following reasons:

1. AT&T's proposed bargain is lopsided in AT&T's favor.

2. AT&T's proposal defies logic.

3. The Commission should not separate Tier 2 from the rest of the performance plan review.

4. No southeastern commissions have eliminated Tier 2 obligations.

5. AT&T is the only Florida ILEC subject to a SEEM component because AT&T is the only ILEC in the state subject to Section 271 of the Telecommunications Act as a legacy Regional Bell Operating Company (RBOC).

First, CompSouth argues that AT&T is proposing a lopsided bargain in an attempt to take advantage of an unfortunate situation with a Community Service Fund gap. CompSouth maintains that AT&T is asking us to sacrifice competitive services to Florida's consumers and businesses in exchange for a one-time payment to a worthy cause. In other words, the $250,000 contribution is insignificant when compared to what AT&T pays annually in Tier 2 payments, an average of $1.2 million per year based on a five year average. It is CompSouth's position that funding for the Community Service Outreach programs is not an issue in this docket, and funding should be explored and resolved through alternative means.

Second, CompSouth states that AT&T's proposal defies logic. AT&T argues that Tier 2 payments should be eliminated because the current competition in the telecommunication market is providing sufficient incentive for AT&T to provide nondiscriminatory access. CompSouth refutes this argument by pointing out that during every month since AT&T obtained 271 authorization in Florida in 2002, AT&T has been required to make Tier 1 and Tier 2 payments, which indicates discriminatory performance.[3] According to CompSouth, if Tier 2 payments are no longer sufficient incentive for AT&T to perform, no one can logically expect that eliminating Tier 2 obligations will incent AT&T to maintain and improve performance. CompSouth states that AT&T's past wholesale performance and the competitive data in Florida firmly support continuation of Tier 2 obligations.

Additionally, CompSouth states that Tier 2 payments are appropriate because the state itself loses when wholesale performance is poor. Florida residential and business consumers are harmed by diminished competitive alternatives. The harm includes less innovation, fewer choices, and higher prices.

Third, CompSouth contends that we should not separate Tier 2 payments for the rest of AT&T's Performance Assessment Plan review. Tier 2 payments are inextricably intertwined with the service quality measures to which they relate. CompSouth points out that AT&T, by filing this Motion, has set the table for parties to potentially file additional motions addressing other parts of the Plan. Conducting a hearing on AT&T's motion separate from the hearing of all other issues related to the Plan will result in duplication of effort and a waste of limited resources. Furthermore, CompSouth stated that any Commission Order approving or rejecting AT&T's Motion on Tier 2 will be protested and require a hearing. CompSouth argues that AT&T should withdraw the Motion, or we should defer ruling on the Motion until the rest of the issues in the performance review are ripe for disposition.

Lastly, CompSouth notes that no Tier 2 obligations have been eliminated in any of AT&T's Southeast performance measurement plans. CompSouth maintains that performance measurement plans in other AT&T regions have not been as robust as in the Southeast. Additionally, CompSouth asserts that we should not consider AT&T's argument of being discriminated against because they are the only Florida ILEC subject to SEEM payments. CompSouth denotes that AT&T (formerly BellSouth) was the only ILEC in the state subject to 271 obligations as a legacy Regional Bell Operating Company.

[3] Except where excused by force majeure.

On October 30, 2009, FCTA filed a response in opposition to AT&T's Motion. FCTA states that Outreach funding and Tier 2 payments serve different and unrelated functions. Tier 2 provides incentives for AT&T not to unfairly disadvantage competitors in situations where market participants are forced to interact. In contrast, the Outreach fund is an AT&T "corporate undertaking" designed to educate customers about and promote AT&T's Lifeline and Link-up service. That funding should have no bearing on the continuation of Tier 2 payments. According to FCTA, AT&T is proposing to pay $250,000 for the right not to have to pay $6 million in future years for violating SEEM competitive safeguard provisions. The proposal by AT&T is so one-sided in AT&T's favor that, according to FCTA, it would meet the definition of an unconscionable contract under Florida law.

As a procedural matter FCTA states that AT&T's request for expedited treatment seems calculated to make an end-run around the carefully crafted schedule of workshops designed by our staff to gather input from parties, in favor of a hastily convened proceeding where parties have an extremely limited time to build a record and provide full input. FCTA proposes that AT&T's Motion be rejected, or at a minimum, deferred to discussing during the workshops being conducted in the current review of the Performance Assessment Plan.

STS' Request to Hold AT&T's Motion in Abeyance

On October 23, 2009, STS filed a Motion to Intervene and requested that we hold AT&T's Motion in abeyance or deny the request. According to STS, AT&T's argument is disingenuous, because if AT&T were properly maintaining its systems and properly and timely meeting the CLECs' orders and other requests, it would have no payments to make. AT&T has the ability to eliminate all payments both to the state and to CLECs by providing equivalent service levels between retail and wholesale. STS maintains that eliminating Tier 2 penalties would only serve to encourage backsliding. STS asserts that we would be in a far better position to evaluate the position of AT&T to eliminate Tier 2 payments, once final determination is made on two complaints STS has pending before the FCC and the Commission (see footnote 1). In both complaints, STS contends that AT&T has not maintained an open market and has not complied with the market opening requirements of Section 271 of the Telecommunications Act.

AT&T's Response to STS' Request

On October 30, 2009, AT&T filed a response specifically addressing STS' request that we hold AT&T's Motion in abeyance or deny the request. In its Response, AT&T states that it filed its Motion in the context of and in conjunction with the ongoing review of the Performance Assessment Plan. This review examines the payment provisions in the Plan of which Tier 2 payments are a part. AT&T asserts that neither of STS' complaints are relevant to this proceeding, which is intended to be an ongoing review of AT&T's Plan. AT&T states that neither complaint involves or will address AT&T's performance measures or penalty payments, particularly Tier 2 payments which are not made to CLECs. Further, AT&T argues that outcomes of neither complaint will have any impact on the ongoing review of the Plan.

Our Position

We find that AT&T's current Motion is premature and sets an undesired precedent. We are currently conducting a collaborative review of the Performance Assessment Plan. Section 3.1 of the Plan states that a collaborative work group, which includes AT&T, interested CLECs, and the Commission, will review the Performance Assessment Plan for additions, deletions, or other modifications in annual review cycles. The collaborative process, which has worked successfully for the past eight years, will be allowed to continue with all elements of the Performance Assessment Plan on the table.

The issue surrounding the elimination of Tier 2 payments is not a singular element that can be addressed without taking into consideration all the issues raised in the review of the Performance Assessment Plan. The Performance Assessment Plan includes a comprehensive set of performance measurements that cover an array of AT&T activities that CLECs must rely on to deliver service offerings to their end-use customers. As part of the review process, these measures are examined as a whole in the determination of which measures should be added, eliminated, or subjected to penalties. The issue of how to restructure Tier 2 payments including whether to eliminate them is already under consideration in the review of AT&T's Performance Assessment Plan.

We agree with FCTA's position that AT&T's request for expedited treatment seems calculated to make an end-run around the collaborative Performance Assessment Plan review in favor of a proceeding where parties have an extremely limited time to build a record and provide full input. The periodic reviews defined in the Plan are designed to allow open participation by all parties with consideration given to all parts of the Plan in total. It would be inappropriate to make a decision on one part of the Plan without thoughtful consideration to how other parts are affected.

Additionally, AT&T has set the precedent for all parties to file motions addressing different parts of the performance plan requiring different procedural and hearing paths. Conducting a hearing on one issue separate from the hearing of all of the other issues will result in duplication of effort, a waste of limited resources, and may result in an ineffective plan.

We also agree with CompSouth that AT&T has paid Tier 1 and Tier 2 payments every month since receiving 271 authorization in Florida in 2002. These payments indicate that discriminatory performance does exist. Competition, particularly in the business market, depends on CLEC nondiscriminatory access to wholesales services. If Tier 2 were eliminated AT&T's incentive to maintain and improve wholesale performance may be compromised. AT&T's past wholesale performance data in Florida may tend to support continuation of Tier 2 obligations.

However, we do not agree that this matter should be held in abeyance, as requested by STS. Rather, as discussed above, it is more appropriate to defer AT&T's Motion and address it as part of the review. We note though, that by deferring a decision on AT&T's Motion, STS' concerns will have been addressed. STS has asserted that the FCC complaint will be resolved by the end of 2009 or the early part of 2010, and we believe that our staff will have the OSS audit

ordered by this Commission complete or close to completion by the end of the current review. Consequently, an abatement is not necessary.

Furthermore, the reason for the Motion to be expedited is unclear. To the best of our knowledge, AT&T has made no mention of the need for this Motion during any of the August and September collaborative calls. The only indication in the Motion of the need to expedite is the depletion of Community Service Funds. Outreach funding and Tier 2 payments serve two totally different and unrelated functions. We agree with CompSouth's position that funding for the Community Service Outreach programs is not an issue in this docket, and it should be explored and resolved through alternative means. The Community Service Fund was originally set up through a stipulation between the Office of Public Counsel and AT&T. As such, we are under no obligation to determine the source of funds for Community Service Outreach programs. The depletion of the Community Service Fund should not be the cause for eliminating Tier 2 payments.

III. **Conclusion**

We defer any ruling on AT&T's Motion until the review of AT&T's wholesale Performance Assessment Plan is completed, and all proposed changes to the Plan can be brought back, as a whole, to us for decision.

Finally, AT&T has requested that any Tier 2 payments that may become due and payable between the date of the issuance of this Order and the date we rule on its Motion be held as a corporate undertaking. Interest on these payments shall be assessed at the applicable average rate for 30-day commercial paper. This does not relieve AT&T of the continuing obligation to provide the Commission with statements regarding Tier 2 payments as required by the current SEEM Plan.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that any ruling on AT&T's Motion shall be deferred until the review of AT&T's wholesale Performance Assessment Plan is completed, and all proposed changes to the Plan can be brought back, as a whole, to us for decision. It is further

ORDERED that AT&T shall hold any Tier 2 payments that may become due and payable under the current SEEM Plan between the date of the issuance of this Order and the date we rule on its Motion as a corporate undertaking. Interest on these payments shall be assessed at the applicable average rate for 30-day commercial paper. AT&T shall file with the Office of Commission Clerk a notice of this corporate undertaking. AT&T shall continue to provide the Commission with statements regarding Tier 2 payments as required by the current SEEM Plan. It is further

ORDERED that this docket shall remain open pending the implementation of our decision and for purposes of future performance measure monitoring.

By ORDER of the Florida Public Service Commission this 5th day of January, 2010.

ANN COLE
Commission Clerk

(SEAL)

JLM

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.