

State of Florida



Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: April 9, 2009

TO: Office of Commission Clerk (Cole)

FROM: Division of Regulatory Compliance (Harvey, Hallenstein)
Office of the General Counsel (Teitzman, Brooks)

RE: Docket No. 000121A-TP – Investigation into the establishment of operations support systems permanent performance measures for incumbent local exchange telecommunications companies. (AT&T FLORIDA TRACK)

AGENDA: 04/21/09– Regular Agenda – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Carter

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\RCP\WP\000121A.RCM.DOC

Case Background

By Order No. PSC-01-1819-FOF-TP, issued September 10, 2001, in Docket No. 000121A-TP, the Commission adopted a wholesale Performance Assessment Plan for the purpose of monitoring performance levels of Operations Support Systems (OSS) provided to CLECs. The Order also recognizes the Commission's 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) and to the State of Florida (Tier 2) when AT&T's performance fails to meet the SQM standards. The SQM Plan currently consists of 50 measurements of which 35 measures to which SEEM remedy payments are applied, if AT&T fails to meet the performance standards as agreed by the parties and approved by the Commission.

Pursuant to Section 4.5.2 of the SEEM Administrative Plan, AT&T is not obligated to pay penalties under the Tier 1 or Tier 2 Enforcement Mechanism for non-compliance with a performance measure if such non-compliance is the result of a Force Majeure event. On December 11, 2008, AT&T notified the Commission of a water main break that occurred outside of an AT&T data center in St. Louis, Missouri causing a power outage. On February 10, 2009, AT&T filed a letter claiming the flood as a Force Majeure event, therefore exempting AT&T from paying penalties for selected measures between December 8 and December 12, 2008. In accordance with Section 4.5.2.1 of the SEEM Administrative Plan, AT&T's written notice of the applicability of Section 4.5.2 shall be presumptively valid and deemed approved by the Commission effective thirty (30) calendar days after AT&T provides notice. However, on February 19, 2009, Competitive Carriers of the South Inc. (CompSouth) filed an objection to AT&T's declaration of the Force Majeure event.

This recommendation addresses whether AT&T should be required to pay remedies for the St. Louis Data Center outage that occurred on December 6, 2008.

Jurisdiction

The Commission is vested with jurisdiction over this matter pursuant to Sections 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.

Discussion of Issues

Issue 1: Should AT&T be required to pay SEEM remedies for a St. Louis Data Center outage that occurred on December 6, 2008?

Recommendation: No. The St. Louis Data Center outage was a Force Majeure event in accordance with the definition in Section 4.5.2 of the SEEM Administrative Plan.

Staff Analysis

To ensure nondiscriminatory treatment to CLECs, AT&T pays remedies for failure to meet standards (retail analogs and benchmarks) for key performance measures. Tier 1 penalties are paid directly to each CLEC when AT&T delivers noncompliant performance. Tier 2 penalties are paid to the state of Florida and are triggered by a performance measure failing for three consecutive months.

A provision in the SEEM Plan exempts AT&T from paying Tier 1 or Tier 2 penalties if the noncompliance occurred during a claim of a Force Majeure event, such as a hurricane, flood, or fire.¹ The event in question occurred on Saturday, December 6, 2008 in AT&T's St. Louis data center. According to AT&T, an unforeseeable water main break occurred outside of the data center and resulted in flooding that caused a power outage in the data center. The outage shut down the servers that support key retail and wholesale operations in AT&T's 22-state region.

AT&T Claim of Force Majeure

AT&T issued an Accessible Letter to CLECs on Monday, December 8, 2008 notifying the CLECs of the St. Louis data center flood and outage. AT&T hosted a conference call to discuss the system outage status on the same day. AT&T continued to provide status updates via subsequent Accessible Letters and follow-up conference calls on December 9 and 10, 2008.

In AT&T's December 10, 2008 Accessible Letter, which was filed with the Commission on December 11, 2008, AT&T noted:

AT&T is in the process of assessing the impact of the outage and may seek relief under applicable performance measurement and remedy plans at the appropriate time. The inception date for this

¹ Pursuant to Section 4.5.2 of the SEEM Plan, AT&T shall not be obligated to pay Tier-1 or Tier-2 Enforcement Mechanisms (SEEM payments) for non-compliance with a performance measurement, if such non-compliance was the result of any Force Majeure Event that either directly or indirectly prevented, restricted, or interfered with performance as measured by the SQM/SEEM Plan. Such Force Majeure Events include non-compliance caused by reason of fire, flood, earthquake or like acts of God, wars, . . . or any other circumstances beyond the reasonable control and without the fault or negligence of AT&T. AT&T, upon giving prompt notice to the Commission and CLECs, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference; provided, however, that AT&T shall use diligent efforts to avoid or remove such causes of non-performance.

event was December 6, 2008 and it is expected that operations will be impacted until December 12, 2008.

On February 10, 2009, AT&T filed a letter with the Commission providing notice that AT&T declared the outage which occurred December 6 to 12, 2008 as a Force Majeure Event pursuant Section 4.5.2.1 of the SEEM Plan.² In the letter, AT&T declared that the outage prevented AT&T Florida from meeting the performance standards associated with two specific ordering performance measurements: Firm Order Confirmation Timeliness (FOCT) and Reject Interval (RI). Accordingly, AT&T did not make SEEM payments associated with these performance measures for the dates identified below.

- FOCT Fully Mechanized --- December 8 and 9, 2008
- FOCT Partially Mechanized --- December 8, 9, 10, 11, and 12, 2008
- RI Fully Mechanized --- December 8, 2008
- RI Partially Mechanized --- December 8, 9, 10, and 11, 2008

The SEEM payments for these measures would have been paid to the CLECs on February 15, 2009, had a claim of Force Majeure not been filed. AT&T assumed the Force Majeure claim would be approved and therefore withheld payments from the CLECs. In a data request to staff, AT&T stated that had the Force Majeure not been in effect, AT&T would have paid \$66,667.50 for these measures. However, with the claim of Force Majeure, AT&T paid \$4,687.50 for these measures for the remaining days in December 2008 that were not impacted by the Force Majeure event.

CompSouth's Objection to AT&T's Claim of Force Majeure

On February 19, 2009, CompSouth filed an Objection to AT&T's Declaration of the December 6, 2008, Force Majeure event.³ In its filing, CompSouth argues that AT&T did not provide proper notice of the Force Majeure event, that the incident should not be declared a Force Majeure event, and that AT&T should not be exempt from making payments required under the SEEM plan.

CompSouth contends that AT&T failed to comply with sections 4.5.2 and 4.5.2.1 of the SEEM Plan. Section 4.5.2 requires AT&T give the Commission and CLECs "prompt" notice of a Force Majeure event:

AT&T, upon giving prompt notice to the Commission and CLECs, shall be excused from such performance on a day-to-day basis to the extent of such prevention, restriction, or interference; provided,

² Pursuant to section 4.5.2.1 of the SEEM Plan, to invoke the application of Section 4.5.2 (Force Majeure Event), AT&T will provide written notice to the Commission and post notification of such filing on AT&T's website wherein AT&T will identify the Force Majeure Event, the affected measures, and the impacted wire centers, including affected NPAs and NXXs.

³ Pursuant to section 4.5.2.2. of the SEEM Plan, no later than ten (10) business days after AT&T provides written notice in accordance with Section 4.5.2.1 affected CLECs must file written comments with the Commission to the extent such CLECs have objections or concerns regarding the application of Section 4.5.2. CLECs will be required to show that the relief is not reasonable under the circumstances.

however, that AT&T shall use diligent efforts to avoid or remove such causes of non-performance.

Pursuant to Section 4.5.2.1 of the SEEM plan:

AT&T will provide written notice to the Commission and post notification of such filing on AT&T's website wherein AT&T will identify the Force Majeure Event, the affected measures, and the impacted wire centers, including affected NPAs and NXXs.

CompSouth notes that nothing was heard from AT&T regarding the St. Louis power outage between December 11, 2008 and February 10, 2009 (the date AT&T declared a Force Majeure event). As a result, CompSouth does not consider a two-month delay in providing notice of a Force Majeure event to be a "prompt" notice pursuant to section 4.5.2 of the SEEM Plan. CompSouth further attests that it appears that AT&T did not declare the Force Majeure event until after AT&T calculated the SEEM payments that would be due as a result of its failure to comply with the applicable performance measurements. December 2008 SEEM payments were made on February 15, 2009.

Additionally, CompSouth believes the St. Louis outage should not qualify as a Force Majeure event. According to CompSouth, the outage was foreseeable, whereas a basement flood is likely to occur in any number of scenarios. CompSouth contests that AT&T failed to properly plan for the outage by not realizing that equipment would need to be isolated in an instance such as a flood. As a result, AT&T would not have been required to shut down power to the entire building. Furthermore, CompSouth believes AT&T failed to have a redundant backup system in place to deal with power outage situations.

Staff's Conclusion

Staff contends that the language pursuant to sections 4.5.2 and 4.5.2.1 in the SEEM plan is ambiguous. AT&T provided prompt *notification* to the Commission and the CLECs of the St. Louis outage *event*. Oral and written updates were provided daily the first several days of the event. Via the Accessible Letter process, on December 10, 2008 AT&T alerted both the Commission and the CLECs that "AT&T is in the process of assessing the impact of the outage and may seek relief under applicable performance measurement and remedy plans at the appropriate time."

Despite providing prompt *notification* of the *event*, staff believes that AT&T did not comply with the spirit of section 4.5.2 of the SEEM plan by not promptly filing a *claim* of Force Majeure for the outage. The *claim* is AT&T's specific request to invoke the Force Majeure provision in the SEEM Plan to allow for exemption of SEEM remedy payments. Over the past five years, AT&T filed eight *claims* of Force Majeure. In each case, AT&T filed the *claim* with the Commission within three business days of the event. In the latest case however, AT&T waited over 47 business days before making the actual Force Majeure *claim*.

In sum, staff believes that the Accessible Letters beginning on December 8, 2008 could be construed to constitute "prompt" notification pursuant to section 4.5.2 of the SEEM Plan.

However, in the future, staff suggests AT&T be more expeditious in filing a *claim* of Force Majeure, as it has done in the past.

Despite the lack of promptness, Staff disagrees with the CLECs belief that the St. Louis outage should not qualify as a Force Majeure event. Pursuant to section 4.5.2 of the SEEM Plan, a Force Majeure event is one that is “beyond the reasonable control and without the fault or negligence of AT&T.” From facts made available to staff, there is no indication that the water main break which necessitated the shutting down of power is the result of AT&T’s negligence. However, as mentioned by CompSouth, staff encourages AT&T to pursue contingency plans for a redundant backup system in its data centers.

In conclusion, staff believes the St. Louis Data Center outage was a Force Majeure event in accordance with the definition in Section 4.5.2 of the SEEM Administrative Plan.

Issue 2: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issue 1 the resulting Order will be issued as a Proposed Agency Action. The Order will become final upon issuance of a Consummating Order, if no person whose substantial interests are affected timely files a protest within 21 days of the issuance of the Order. This docket should remain open pending the implementation of the Commission's decision and for purposes of future performance measure monitoring. **(Teitzman)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, the resulting Order will be issued as a Proposed Agency Action. The Order will become final upon issuance of a Consummating Order, if no person whose substantial interests are affected timely files a protest within 21 days of the issuance of the Order. This docket should remain open pending the implementation of the Commission's decision and for purposes of future performance measure monitoring.