

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. P-100, SUB 133k

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of)	
Generic Docket to Address Performance)	ORDER GRANTING
Measurements and Enforcement Mechanisms)	AT&T'S NOTICE OF
)	FORCE MAJEURE
)	EVENT AND
)	COMPSOUTH'S
)	PETITION TO
)	INTERVENE

BY THE COMMISSION: Section 4.5.2 of BellSouth Telecommunications, Inc. d/b/a AT&T North Carolina's (AT&T's) Self-Effectuating Enforcement Mechanisms (SEEM) Plan (AT&T's wholesale performance penalty plan) outlines the procedures to be followed by AT&T in instances of force majeure events. AT&T's current North Carolina SEEM Plan was approved by the Commission with the most recent revisions to that Plan becoming effective in 2006.

AT&T's SEEM Plan states in pertinent part:

Section 4.5.2 BellSouth shall not be obligated to pay Tier-1 or Tier-2 Enforcement Mechanisms for non-compliance with a performance measurement if such non-compliance was the result of any event that performance under this SQM [Service Quality Measurements]/SEEM Plan is either directly or indirectly prevented, restricted, or interfered with by reason of fire, flood, earthquake or like acts of God, wars, revolution, civil commotion, explosion, acts of public enemy, embargo, acts of the government in its sovereign capacity, labor difficulties, including without limitation, strikes, slowdowns, picketing, or boycotts, or any other circumstances beyond the reasonable control and without the fault or negligence of BellSouth. BellSouth, 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 BellSouth shall use diligent efforts to avoid or remove such causes of non-performance.

Section 4.5.2.1 To invoke the application of Section 4.5.2 (Force Majeure Event), BellSouth will provide written notice to the Commission wherein BellSouth will identify the Force

Majeure Event, the affected measures, and the impacted areas including affected NPAs and NXXs.

Section 4.5.2.2 No later than ten (10) business days after BellSouth provides written notice in accordance with Section 4.5.2.1 affected parties must file written comments with the Commission to the extent they have objections or concerns regarding the application of Section 4.5.2.

Section 4.5.2.3 BellSouth's written notice of the applicability of Section 4.5.2 would be presumptively valid and deemed approved by the Commission effective thirty (30) calendar days after BellSouth provides notice in accordance with Section 4.5.2.1. The Commission may require BellSouth to provide a true-up of SEEM fees to affected carriers if a Force Majeure declaration is found to be invalid by the Commission after it has taken effect.

Section 4.5.2.4 During the pendency of a Force Majeure Event, BellSouth shall provide the Commission with periodic updates of its restoration/recovery progress and efforts as agreed upon between the Commission Staff and BellSouth.

On December 15, 2008, AT&T filed a letter informing the Commission that a water main break occurred outside of AT&T's data center in St. Louis, Missouri on December 6, 2008. AT&T noted that the water main break resulted in flooding that caused a power outage in the data center. AT&T maintained that this outage impacted AT&T's operations throughout its 22-state region. AT&T stated that carriers had been notified of the outage via the Accessible Letter (AL) process. AT&T provided a copy of the AL for the Commission's review. The AL is dated December 10, 2008 and notes that the flood occurred which required AT&T to shut down its commercial and generator power to the entire building. The AL also noted that AT&T was in the process of assessing the impact of the outage and that AT&T may seek relief under applicable performance measurement and remedy plans at the appropriate time.

On February 11, 2009, AT&T filed a notice pursuant to Section 4.5.2 of its SEEM Plan declaring the December 2008 outage a Force Majeure Event that prevented AT&T from meeting the performance standards associated with the Reject Interval (RI) and Firm Order Confirmation Timeliness (FOCT) measures on the following dates:

- 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

AT&T maintained that Section 4.5.2 of the SEEM Plan specifically identifies a flood as a Force Majeure Event. AT&T filed two documents with its notice which AT&T maintained demonstrate the impact the outage had on the RI and FOCT measures on a regional basis. AT&T stated that, because the Force Majeure Event prevented AT&T from meeting the performance standards associated with these measures on the dates identified, AT&T will not make any SEEM payments associated with such measures on the dates identified in its notice.

On February 20, 2009, in accordance with Section 4.5.2.2 of AT&T's SEEM Plan, the Competitive Carriers of the South, Inc. (CompSouth) filed: (1) a Petition to Intervene in this docket; and (2) Objections to AT&T's Declaration of Force Majeure Event¹. No other party provided any written comments in this regard.

In its Petition to Intervene, CompSouth noted that its members are competing local providers (CLPs) for whom the performance requirements and SEEM Plan are intended to protect from anticompetitive behavior and that CompSouth and its members will be substantially affected by action taken in this docket.

The Commission finds it appropriate to grant CompSouth's Petition to Intervene in this proceeding.

In its Objections to AT&T's Declaration of Force Majeure Event, CompSouth recommended that the Commission find: (1) that AT&T did not provide proper notice of the event; (2) that this event was not a Force Majeure Event; and (3) that AT&T should be required to make all payments required under the SEEM Plan.

CompSouth noted that Force Majeure Events are addressed in Section 4.5 of the SEEM Plan. CompSouth stated that Section 4.5.2 requires AT&T to give the Commission and CLPs "prompt" notice of a Force Majeure Event. CompSouth argued that, 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. CompSouth noted that the event in question occurred in AT&T's St. Louis data center on December 6, 2008. CompSouth noted that, on December 10, 2008, AT&T provided an Accessible Letter apprising CLPs of the event. CompSouth further maintained that, on December 11, 2008², AT&T sent the Commission a letter "as information" regarding the St. Louis power outage. CompSouth argued that neither of these communications complies with or comprises the notice required by Sections 4.5.2 and 4.5.2.1. CompSouth asserted that Section 4.5.2.1 requires AT&T to "identify the Force Majeure Event, the affected measures, and the impacted wire centers³, including affected NPAs

¹ It appears that CompSouth filed a copy of objections meant to be filed in another state due to: incorrect verification page, incorrect name of Commission Clerk, and incorrect filing dates of various documents.

² The letter was dated and filed with the Commission on December 15, 2008.

³ SEEM Plan language actually says "areas" and not "wire centers".

and NXXs.” CompSouth argued that this required information was not provided until AT&T’s February 10, 2009 letter⁴. Further, CompSouth maintained that AT&T waited for over two months to file its declaration of a Force Majeure Event.

CompSouth noted that Merriam-Webster’s Dictionary defines “prompt” as, “being ready and quick to act as occasion demands” or “performed readily or immediately.” CompSouth argued that 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 declaration⁵. CompSouth asserted that AT&T has provided absolutely no reason for such an extraordinary delay in declaring a Force Majeure Event.

CompSouth maintained that 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. CompSouth noted that this can be seen by reviewing the timeframe for SEEM payments related to this event.

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

CompSouth asserted that, thus, in this case, the final validated SQM report for the December 6, 2008 event was posted on January 31, 2009 and the SEEM payments related to that event were due on February 15, 2009. CompSouth maintained that 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.

CompSouth further stated that the St. Louis outage does not qualify as a Force Majeure Event. CompSouth asserted that, according to AT&T’s February 10, 2009⁶ 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. CompSouth noted that AT&T claimed that this water main break was “unforeseeable” and could not have “been anticipated or prevented by AT&T. . .” CompSouth maintained that it strongly disagrees.

⁴ AT&T’s written notice was filed on February 11, 2009.

⁵ CompSouth referenced several court cases including: (1) *O & M Industries v. Smith Engineering Company, a/k/a Smith Environmental Corporation, et als*; 360 N.C. 263, 624 S.E.2d 345 (2006); (2) *City of Miami Beach v. Royal Castle System, Inc.*, 126 So.2d 595, 598 (Fl. 3rd DCA 1961); and (3) *Rheinberg-Kellerei GMBH v. Vineyard Wine Company, Inc.*, 53 N.C. App. 560, 281 S.E.2d 425 (1981).

⁶ AT&T’s written notice was filed on February 11, 2009.

CompSouth noted that 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].” CompSouth argued that AT&T’s attempt to label the event a “flood” does not, on its own, make the December 6, 2008 incident a Force Majeure Event. CompSouth asserted that, not only was the “flood” foreseeable, it appears that it was a power outage that prevented AT&T from meeting the SQM standards. CompSouth maintained that this outage was caused by AT&T’s failure to properly plan for such a foreseeable event.

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

CompSouth maintained that it understands that the reason the power to the building failed (the actual cause of the outage) was not because of the water; rather, it was 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.

CompSouth argued that, had AT&T had the proper procedures in place, it could have quickly isolated the equipment in the basement. CompSouth maintained that, in that instance, AT&T would not have been required to shut down power to the entire building. CompSouth argued that AT&T’s failure to properly plan for power outages, which are certainly common, foreseeable events, does not qualify as a Force Majeure Event. CompSouth asserted that AT&T’s failure to anticipate and appropriately react to a power outage is not a Force Majeure Event.

CompSouth further asserted that 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 noted that it understands that AT&T is now addressing redundancy requirements in its data centers.

CompSouth also noted that Section 4.5.2.3 of the SEEM Plan 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. CompSouth asserted that 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.

CompSouth recommended that the Commission further investigate this event and not permit AT&T to withhold any SEEM payments.

CompSouth proposed that the Commission find that AT&T failed to give prompt notice regarding its declaration of a Force Majeure Event as required by the SEEM Plan, that the St. Louis outage in question is not a Force Majeure Event as it was foreseeable and the result of AT&T's poor planning and procedures, and that AT&T is required to make the payments under the SEEM Plan.

The Commission notes that the Force Majeure provisions in AT&T's North Carolina SEEM Plan are not the model of clarity. Section 4.5.2 provides a general discussion of Force Majeure events, defines such events, and states that "BellSouth, 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 BellSouth shall use diligent efforts to avoid or remove such causes of non-performance." The Commission believes that the notice AT&T provided on December 15, 2008 to the Commission and on December 10, 2008 to the CLPs via an Accessible Letter constitutes the "prompt notice" required in Section 4.5.2. It is reasonable to expect that AT&T must promptly inform CLPs and state Commissions when its performance is compromised by potential Force Majeure events and the December 15th and December 10th notices were sufficiently prompt. However, those notices did not invoke (and were not intended to invoke) the Force Majeure provision of the SEEM Plan.

Section 4.5.2.1 of the SEEM Plan provides the specific procedure for AT&T to follow to declare a Force Majeure Event. In that Section, the language says "[t]o invoke the application of Section 4.5.2 (Force Majeure Event), BellSouth will provide written notice to the Commission wherein BellSouth will identify the Force Majeure Event, the affected measures, and the impacted areas including affected NPAs and NXXs." In this Section, AT&T is not required to provide any notice to CLPs, only to the state Commission⁷ and the word "prompt" is not included when describing the written notice. Therefore, the Commission believes that it is reasonable to assume that Section 4.5.2.1 requires a separate written notice like the one filed with the Commission by AT&T on February 11, 2009.

After reviewing the filings in this proceeding, the Commission finds that the water main break that occurred outside of AT&T's St. Louis data center on December 6, 2008 should be found to be a Force Majeure Event under AT&T's North Carolina SEEM Plan. The Commission is not persuaded by any of the objections raised by CompSouth in this matter. Although there is not a great deal of detailed information, the Commission does not believe that a water main break which necessitated the shutting down of power to a building could be AT&T's fault or the result of any negligence on AT&T's part. The AL notes that all commercial and generator power to the building needed to be shut down due to the water, which indicates that backup power was available but not usable due to the water in the building. The Commission is satisfied that this event should be classified as a Force Majeure Event.

⁷ AT&T's written filing to the Commission would include copies to all parties of record.

Further, the Commission notes that the procedural steps to be followed when AT&T files written notice of a Force Majeure Event are not without ambiguity either. Section 4.5.2.2 allows affected parties to file written comments no later than 10 business days following AT&T's written notice with the Commission to the extent they have objections or concerns regarding AT&T's written notice of a Force Majeure Event. CompSouth made a timely filing on February 20, 2009 outlining its objections. However, Section 4.5.2.3 notes that AT&T's written notice is presumptively valid and deemed approved by the Commission effective 30 calendar days after AT&T provides its written notice in accordance with Section 4.5.2.1⁸. The SEEM Plan also notes that the Commission may require AT&T to provide a true-up of SEEM fees if a Force Majeure declaration is found to be invalid by the Commission after it has taken effect. The Commission has found it appropriate to issue this Order to address AT&T's written notice of Force Majeure Event due to the objections filed by CompSouth; if no objections were filed, the filing would have been deemed approved unless the Commission determined it to be invalid at some later date not limited by the language in the SEEM Plan.

IT IS, THEREFORE, ORDERED as follows:

1. That CompSouth's Petition to Intervene is hereby granted.
2. That AT&T's February 11, 2009 written notice of a Force Majeure Event is hereby granted.

ISSUED BY ORDER OF THE COMMISSION.

This the 10th day of March, 2009.

NORTH CAROLINA UTILITIES COMMISSION



Patricia Swenson, Deputy Clerk

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⁸ That date would be Friday, March 13, 2009.