

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION CONCERNING THE)	
PROPRIETY OF PROVISION OF INTERLATA)	
SERVICES BY BELLSOUTH)	CASE NO.
TELECOMMUNICATIONS, INC., PURSUANT)	2001-00105
TO THE TELECOMMUNICATIONS)	
<u>ACT OF 1996</u>)	
PETITION OF BELLSOUTH)	
TELECOMMUNICATIONS, INC. FOR THE)	CASE NO.
ESTABLISHMENT OF A NEW PERFORMANCE)	2004-00391
<u>PLAN</u>)	

**AT&T KENTUCKY'S RESPONSE TO COMPSOUTH'S OBJECTION
TO DECLARATION OF FORCE MAJEURE EVENT**

BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("AT&T Kentucky"), through its undersigned counsel, responds as follows to the "Objection of the Competitive Carriers of the South, Inc. to AT&T-KY's Declaration of Force Majeure Event," filed February 20, 2009 ("Object."):

INTRODUCTION

On December 6, 2008, a large municipal water main broke under the street outside AT&T's St. Louis data center, flooding the data center and causing a power outage that significantly damaged AT&T's retail and wholesale operations and property. The flood prevented AT&T from meeting for several days certain of its performance standards under state Performance Measure/Remedy Plans, including the Kentucky Service Quality Measurement (SQM) and Self Effectuating Enforcement Mechanisms

(SEEM) Administrative Plan. AT&T worked around the clock, incurring significant expense to promptly restore equipment and applications and to process wholesale requests, and by Tuesday morning, December 9, system operations were largely back to normal.

AT&T sent emergency notice to competitive local exchange carriers (CLECs) by email on December 7. On December 8, AT&T notified CLECs in all regions of the flood and power outage by means of an “accessible letter” and hosted a conference call to discuss the current status of restoration efforts. On December 9, AT&T Kentucky notified the Kentucky Public Service Commission (“Commission”) staff of the flood by voice mail. On December 10, AT&T issued a second accessible letter updating each of the CLECs in its 22-state region—including the nine-state Southeast Region—about the event and alerting each CLEC that AT&T was assessing the impact of the outage on its operations and that AT&T might seek relief under applicable performance measurement and remedy plans at the appropriate time.

After AT&T analyzed the monthly performance data from December and calculated the potential SEEM obligations, AT&T notified the CLECs on February 10, 2009 that it would be filing a letter with the Southeast Region state commissions invoking the force majeure provisions of the SQM/SEEM Plan, as it had anticipated in its December 10, 2008 notice. AT&T Kentucky filed its notification letter with this Commission on February 11. CompSouth filed its Objection to the force majeure declaration in this Docket on February 20, asserting (i) that the St. Louis flood was not a force majeure event, even though the SEEM Plan expressly provides that a flood is a “force majeure” event; and (ii) that AT&T’s notice was not “prompt,” even though AT&T

had immediately notified all Southeast Region CLECs in writing of the flood, its effect on AT&T's operations, and the possibility of AT&T's seeking relief under the applicable performance measurement and remedy plan.

As demonstrated below, AT&T's force majeure declaration was in full compliance with the terms of the Kentucky SEEM Plan. Accordingly, on March 10, 2009, the North Carolina Utilities Commission issued a seven-page order that considers, and rejects, each of CompSouth's arguments and finds that AT&T's February 11, 2009 written notice to the North Carolina Utilities Commission of a Force Majeure Event was proper under the North Carolina SEEM Plan.¹ A copy of the North Carolina Order is attached hereto as **Exhibit A**. For the reasons set out in this Response, the Commission should overrule CompSouth's Objection and find that AT&T Kentucky properly invoked the force majeure provisions of the Kentucky SEEM Plan.

BACKGROUND

Municipal Water Main Breaks over the Weekend of December 6 and Floods the St. Louis Data Center

1. On Saturday afternoon, December 6, 2008, a massive rupture in a city-owned and a city-maintained 10-inch water main flooded the basement of the AT&T St. Louis Data Center, located at Ninth and Chestnut in St. Louis, Missouri (the "St. Louis Data Center" or "Data Center"), causing the total loss of commercial, and then generator, electrical power for the entire building. See Affidavit of Ross Bawcum ("Bawcum Affid.") ¶ 3, attached hereto as **Exhibit B**.

¹ CompSouth filed substantially identical objections in each of the state commissions for the nine-state Southeast Region. The North Carolina SEEM Plan is in all material respects the same as the Kentucky SEEM Plan.

2. The St. Louis Data Center, like many buildings in downtown metropolitan areas, receives its electrical power through huge underground cables. The cables deliver power to the building's primary switch gear, which because of its size is typically housed in the basement or sub-basement of large urban commercial buildings, often (as in this case) in more than one room. Four steel-tube electrical conduits carry the electric cables into the Data Center. Those cables run adjacent to, and above, the electrical switch gear, a common configuration for large urban buildings. Bawcum Affid. ¶ 4.

3. Water from the broken municipal main quickly filled an immediately adjacent underground electric utility vault, creating a pool of water under the street that was pressurized at approximately 60 psi (the pressure level for water mains in downtown St. Louis). The utility vault is constructed from brick, and the pressurized water quickly filled the vault and the conduits themselves by penetrating the voids in the mortar between the bricks. The pressurized water flowed directly into the building through the conduits and flooded the rooms in which the switch gear is housed with 14 inches of water. Bawcum Affid. ¶ 5.

4. The water main that broke—and caused the flooding and resulting power outage—is owned and maintained by the City of St. Louis. The water main break and resulting flooding of the switch gear were unforeseeable to AT&T and beyond AT&T's control. Bawcum Affid. ¶ 6.

5. The St. Louis Data Center has substantial redundancy and diversity for both commercial and generator power equipment, and is designed to protect against power outages from flooding caused by heavy rains, where water falls onto street and

building surfaces and gravity causes it to flow through well-designed drainage systems.² For example, the Data Center has backup generators on the penthouse level and on the roof that were not touched by the flood water. But the equipment used to transfer the Data Center from commercial power to the standby generators was disabled because critical elements of it had been flooded. (The generator wiring runs to the point in the basement where commercial power is delivered to the building.) As a result, although the backup generators were available on December 6, they were unable to deliver necessary power to the building until the basement had been drained and dried—not only to ensure that the switching equipment would work properly, but to protect the lives of the many individuals who were working in the basement. Bawcum Affid. ¶ 7.

6. The power outage caused by the water main break significantly disrupted AT&T's own operations in St. Louis and throughout AT&T's incumbent local exchange territory. It also affected both AT&T's retail and wholesale operations throughout its 22-state region, interfering with AT&T's ability to process retail and wholesale transactions that are handled in the St. Louis Data Center. The disruption caused by the flood prevented AT&T from meeting performance standards associated with two ordering metrics under the SQM Plan: Reject Interval and Firm Order Confirmation Timeliness. Bawcum Affid. ¶ 8.

² Street flooding in downtown St. Louis is very rare due to these drainage systems, and while some incidental water seepage into electric utility vaults is not uncommon, it does not typically fill the vault and would not in any case cause the vault to become pressurized and threaten the seals to the conduits. Indeed, the Data Center was unaffected by the historic 1993 flooding, when the Mississippi River overflowed its banks. Not even a heavy rainstorm could be expected to cause the kind of water pressure that could break the conduit seals and send a torrent of water into the Data Center through its electrical conduits.

AT&T Responded Immediately and Applications Were Restored within Days

7. AT&T became aware of the water entry into the St. Louis Data Center almost immediately and urgently began intensive—and costly—efforts to restore all applications. More than 500 employees and contractors worked around the clock to resolve the effects of the flood and restore full service. AT&T had a plane on standby at the St. Louis airport to transport data to other centers if it determined that use of alternative sites could provide a quicker restoration of service. Bawcum Affid. ¶ 9.

8. As a result of AT&T's efforts, power was restored through the backup generators the day after the flood (Sunday evening, December 7), and commercial power was restored less than a day after that (Monday morning, December 8). Both retail and wholesale systems were performing business as usual on Tuesday morning, December 9, 2008. Final restoration of services delivered from the St. Louis Data Center was completed on Wednesday evening, December 10. By December 12, AT&T was again in full compliance with the performance requirements of the SQM Plan. Bawcum Affid. ¶ 10.

AT&T Promptly Notified the CLECs and the Commission

9. On Sunday, December 7, 2008, AT&T sent an emergency email to CLECs by means of two established forums for wholesale operations issues—AT&T's Change Management ("CMP") Point of Contact List and CLEC User Forum Executive Steering Committee List—alerting the CLECs to the flood and resulting power outage. A copy of one of the December 7 emails is attached hereto as **Exhibit C**. On December 8, 2008, AT&T notified each of the CLECs in the nine-state Southeast Region (the "Southeast Region CLECs") of the flood and outage by means of an

“accessible letter” (attached hereto as **Exhibit D**) and follow-up conference call. The letter also informed the CLECs that, because the system outage broadcast notification system had been affected, AT&T had already provided notice via the CMP Point of Contact List and CLEC User Forum Executive Steering Committee List “in order to notify CLECs as soon as possible.” See Affidavit of Steve Huston (“Huston Affid.”) ¶¶ 3, 4, attached hereto as **Exhibit E**.

10. On December 10, 2008, AT&T issued a second accessible letter, attached hereto as **Exhibit F**, to each of the Southeast Region CLECs.³ The December 10 letter again notified the CLECs that, as a result of “a water main break outside the St. Louis data center” on December 6, “water flooded the building switch gear forcing a shut down of commercial and generator power to the entire building.” In addition, specifically invoking the “Performance Measures provisions of [each SEEM] agreement,” AT&T notified the Southeast Region CLECs that the event “has impacted AT&T’s ability to perform its contractual obligations[,]” and made clear 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.” Huston Affid. ¶ 5. AT&T notified the Commission staff of the water main break on December 9 by voicemail. See Affidavit of Jim Tipton, ¶ 2, attached hereto as **Exhibit G**. Thereafter, AT&T timely responded to various inquiries from Southeast Region CLECs regarding the situation. Huston Affid. ¶ 5.

11. On February 10, 2009, shortly after AT&T had compiled performance measurement results for the month of December and computed the remedy impact of

³ The December 8 and December 10 accessible letters were issued to CLECs in all 22 AT&T states, not just the Southeast Region CLECs. Huston Affid. ¶ 6.

the water main break, AT&T issued a third “accessible letter” (attached hereto as **Exhibit H**) to each of the Southeast Region CLECs. AT&T advised the CLECs that “AT&T 9-state will be filing a letter notifying the state commissions that it is invoking the force majeure provisions of the SQM/SEEM Plan (Section 4.5.2) in connection with the St. Louis data center outage, which was addressed in the accessible letter issued on December 10, 2008.” On February 11, 2009 AT&T notified this Commission in writing that it was invoking the force majeure provisions of the SEEM Plan and identified the two specific performance measures for which AT&T had invoked force majeure. A copy of the February 11 notice is attached hereto as **Exhibit I**.

ARGUMENT

The Water Main Break, Flood, and Resulting Power Outage Constitute a “Force Majeure” Event under the SEEM Plan

12. Section 4.5.2 of the Kentucky SEEM Plan provides in relevant part that AT&T “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 [such] that performance under this SQM/SEEM Plan is *either directly or indirectly prevented, restricted, or interfered with.*” (Emphasis added.)

13. Section 4.5.2 specifically lists a “flood” (together with fire, earthquake and “like acts of God”) as a force majeure event that excuses non-compliance with the Plan’s performance metrics to the extent it “directly or indirectly” interferes with AT&T’s performance.

14. There can be no serious question that the December 6 flood “directly or indirectly . . . interfered with” AT&T’s performance and that AT&T is thus not obligated to make the contested SEEM payment under the express terms of the Plan.

15. CompSouth mistakenly analogizes a water main rupture under a major city street to heavy rains that can flood a basement, and contends that the December 6 flood, and the resulting outage, were foreseeable to AT&T and should not be considered a force majeure event under the terms of the Plan. Object. ¶¶ 18-20. But there is no comparison between an ordinary basement flood due to heavy rain and a water main break in a major city’s downtown commercial center that is outside AT&T’s control and causes thousands of gallons of pressurized water to suddenly flood a utility vault—clearly a “circumstance[] beyond the reasonable control and without the fault or negligence” of AT&T, and thus squarely within the SEEM Plan’s definition of Force Majeure. (Section 4.5.2.).

16. The Data Center was constructed with appropriate safeguards and redundancy to handle reasonably foreseeable power outages, including those caused by basement flooding. It has backup generators on high floors, in the event commercial power is lost.⁴ But the flooding from the municipal water main break was of an entirely different scope and magnitude than water seeping in from heavy rainfall: it was sudden, unanticipated by AT&T, and entered the building in a torrent through the electrical conduits above the switch gear (one of which was empty and thus gave the pressurized water an unimpeded path). The inundation of the Data Center’s switch gear *from above*, resulting from the failure of the municipal water main, could not reasonably have been foreseen or prevented by AT&T, and it certainly is not a risk AT&T agreed to assume under the terms of the SEEM Plan.

⁴ CompSouth’s reference to the September 2006 flooding of a Windstream backup power system due to severe weather (Object. ¶ 18 n.5) only proves that AT&T’s backup system was properly redundant. The Windstream backup equipment was located in a basement in Elizabethtown, KY. In contrast, AT&T had backup generators on high floors of the St. Louis Data Center, and those generators were not touched by the flood waters.

AT&T Complied with the Notice Provisions of the SEEM Plan

17. Section 4.5.2 of the SEEM Plan requires that AT&T give prompt notice to the Commission and the CLECs of non-compliance caused by a force majeure event. As demonstrated in paragraphs 9 through 11 above, AT&T gave prompt notice to the CLECs and the Commission both in December and in February.

18. In light of the three notices AT&T sent in early December, CompSouth's suggestion that AT&T's "declaring a force majeure event" on February 11 constituted "extraordinary delay" (Object. ¶ 10) is incredible. Relying on the dictionary definition of "prompt" (Object. ¶ 9) only demonstrates how weak CompSouth's position is: by any definition, AT&T's various notices to the Southeast Region CLECs—both in December and again in February—were prompt. CompSouth does not, and cannot, claim that the CLECs were not immediately told about the force majeure event - and that AT&T might invoke its rights under the SEEM Plan - so it simply ignores the December notices and makes the preposterous argument that the February 11 filing with the Commission was not "prompt" enough.⁵

19. That argument has no basis in fact. The "event in question" was the December 6 flood and the resulting power outage. Object. ¶ 8. As **Exhibit D** hereto

⁵ CompSouth suggests (Object. ¶¶ 6, 7) that the December notices failed to provide prompt notice of the information required by Section 4.5.2.1 of the SEEM Plan. That is simply not correct. The December notices *did* "identify" the force majeure event, and there were *no* impacted wire centers to tell the CLECs about at that time. As for identifying the affected measures, although AT&T knew that ordering measures were likely to be affected, it did not know in December how big an impact the flood would have on them and which specific measures (out of the numerous ordering metrics) would be affected. Having notified the CLECs of the flood and outage, and that relief under the Plan was being considered, it was entirely reasonable (and in fact necessary) for AT&T to wait until remedies were calculated before making a formal declaration that it would seek relief from remedies and identifying specific measures for which relief would be sought. As CompSouth acknowledges (Object. ¶ 13), Section 2.4 of the Plan gives AT&T time after each data month to assess and quantify performance remedies. AT&T promptly notified the CLECs and the Commission of the affected measures on February 11, after it had analyzed the data from the early December outage (which the CLECs already knew about). In any event, since the effect of the flood on AT&T's performance was short-lived, there was no prejudice to the CLECs in not knowing the specific affected measures until early February.

demonstrates, CompSouth had actual notice of the event no later than December 8. Moreover, the December 10 notice (**Exhibit F**) specifically informed CompSouth that AT&T might seek relief from the performance standards of the SEEM plan. These notices protected the CLECs' rights in full. The reason for requiring prompt notice of a force majeure event is to permit the notified party to take action to protect its interests. See, e.g., *Wisconsin Elec. Power Co. v. Union Pacific R.R. Co.*, 2009 WL 499354 at *4 (7th Cir. March 2, 2009) (affirming summary judgment upholding force majeure declaration and noting that plaintiff had “failed to show any detrimental reliance on the failure to receive prompt notice of the higher rate [for shipments of coal]”). Indeed, the SEEM Plan's prompt notice provision contemplates an *ongoing* force majeure—performance is excused “on a day to day basis to the extent” that the force majeure continues to interfere with AT&T's performance. This could be significant if, for instance, the CLEC needed to take action to protect its own customers in the face of an ongoing performance failure. But here the emergency was quickly resolved; there was no “day to day” force majeure, and there was no immediate action any CLEC needed to take to protect its own interests, or its customers. The December 10 notice (**Exhibit F**) provided the Southeast Region CLECs with all of the necessary and up-to-date information available to AT&T: there had been a flood and a power outage, AT&T's ability to perform had been temporarily affected, and AT&T was assessing the impact and “may seek relief under applicable performance measurement and remedy plans[.]” Since service was largely restored by December 10, there was no continuing service disruption and section 4.5.2.4 of the Kentucky SEEM Plan (requiring that AT&T provide the Commission with “periodic updates” of service restoration progress) did not come

into play. And in any case, AT&T did give all CLECs progress reports on the restoration efforts throughout the four-day period during which wholesale applications were affected.

20. Having been informed about the flood and system outage on December 8, and then notified in writing two days later that the event could result in a force majeure declaration, CompSouth cannot reasonably complain that there was *any* delay—much less an “extraordinary delay”—in AT&T’s notice under the Plan, including its February 11 written notification to the Commission. In any event, the Southeast Region CLECs have suffered no prejudice—and CompSouth alleges none—resulting from the February 11 notification.

21. In light of all this, CompSouth’s claim (Object. ¶ 14) that it is “highly suspect that the declaration of the force majeure event did not occur until right before AT&T-KY would have to make the SEEM payment” relating to the December flood cannot be taken seriously. CompSouth must face the facts: the Southeast Region CLECs knew about the flood and resulting service disruption immediately after it occurred (and had in fact been largely resolved) in December; there was nothing those CLECs needed to do, or could have done, to protect their rights; AT&T told the CLECs up front that it would consider whether or not to seek relief under the Plan; it took time (as contemplated by the Plan) for AT&T to evaluate and quantify the effect of the flood on its performance, and thus to determine the precise measures for which AT&T would seek relief; and AT&T promptly notified the CLECs and the Commission about the specific affected measures in its February 11 written notice to the Commission. CompSouth has no basis for suggesting that its members were surprised or prejudiced

by the February declaration of force majeure, much less that there is anything “suspect” about AT&T’s conduct.

CONCLUSION

For the reasons set forth above, CompSouth’s Objection should be overruled, and the Commission should find that AT&T Kentucky’s force majeure declaration is valid under the Kentucky SEEM Plan.

Dated: March 20, 2009

Respectfully submitted,

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