

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

Petition of BellSouth Telecommunications, Inc. for)
the Establishment of a New Performance Plan) Case No. 2004-00391
)
)

**OBJECTION OF THE COMPETITIVE CARRIERS OF THE SOUTH, INC. TO
AT&T-KY'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 files this Objection to BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky's (AT&T-KY) 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-KY did not provide proper notice of this event, that this event was not a Force Majeure Event, and that AT&T-KY should be required to make all payments required under the SEEM plan. As grounds therefor, CompSouth states:

Background

1. On October 19, 2001, in Case No. 2001-00105, the Commission put in place the performance measures, benchmarks and retail analogs, and the penalty plan adopted by the Georgia Public Service Commission. *See Investigation Concerning The Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc.*, Order (April 26, 2002).

Collectively, these elements are the "performance plan" that governed the relationship between BellSouth and CLECs, including all members of CompSouth providing service in Kentucky. In 2004, BellSouth asked to replace the original performance plan. The instant proceeding was

opened at the request of BellSouth, and the Commission ultimately determined to adopt a revised performance plan that had been approved by the Georgia Commission. *Order*, Case No. 2004-00391 (June 20, 2005). This docket has remained open since that time for AT&T-KY to file periodic reports and notifications, and to address issues and concerns arising from OSS performance.

2. CompSouth¹ is a not-for-profit corporation whose members provide competitive telecommunications services in the state utilizing AT&T-KY's operations support systems (OSS). Individual members of CompSouth intervened in this case and CompSouth has participated in this proceeding since December 2004, when it first suggested that the Commission monitor the then-pending Florida performance measures case to alleviate unnecessary duplication of work being conducted in other states.

3. On February 11, 2009, AT&T-KY 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-KY 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-KY to give the Commission and CLECs “prompt” notice of a force majeure event. This section provides:

¹ CompSouth's members include Access Point, Inc., Birch Communications, Cavalier Telephone, Cbeyond Communications, Covad Communications Company, Deltacom, Level 3 Communications, Momentum Telecom, Inc., NuVox Communications, Inc., Sprint-Nextel, tw telecom of ky llc and XO Communications, Inc.

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. . . .²

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 wherein BellSouth will identify the Force Majeure Event, the affected measures, and the impacted areas including affected NPAs and NXXs.

7. In this instance, AT&T-KY 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.

8. The event in question occurred in AT&T-KY's St. Louis data center on *December 6, 2008*. Nothing was filed at the Commission by AT&T-KY on this matter until *February 11, 2009* -- over two months later -- when AT&T-KY declared a force majeure event.

9. Merriam-Webster's Dictionary defines "prompt"³ 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-KY has provided absolutely no reason for such an extraordinary delay in declaring a force majeure event.

² Emphasis supplied.

³ The word "prompt" must be given its plain and ordinary meaning. *Abell v. Meguire*, 402 S.W.2d 91, 92 (Ky. 1966) ("The word 'prompt' is defined in Webster's New International Dictionary, Second Edition, as 'Ready and quick to act as occasion demands; responding instantly; alert; as, prompt in obedience, prompt to go.'"). Kentucky courts customarily look to the dictionary to find the plain and ordinary meaning of words. *Taylor v. Rosenthal*, 213 S.W.2d 435, 437 (Ky. 1948) (contract construction); see also *Roman Catholic Diocese v. Noble*, 92 S.W.3d 724, 734 (Ky. 2002); *Niagara Fire Ins. Co. v. Curtsinger*, 361 S.W.2d 762, 765 (Ky. 1962).

11. Interestingly, it appears that AT&T-KY 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-KY 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.

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-KY 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-KY's February 11th letter, a water main break outside of AT&T-KY's data center in St. Louis resulted in a flood that caused a power outage in the data center. AT&T-KY claims that this water main break was "unforeseeable" and could not have "been anticipated or prevented by AT&T" ⁴ CompSouth strongly disagrees.

⁴ AT&T-KY February 11, 2009 letter to Jeff Derouen at 1.

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

17. AT&T-KY’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-KY from meeting the SQM standards. This outage was caused by AT&T-KY’s failure to properly plan for such a foreseeable event.

18. The likelihood that a basement may flood is certainly a foreseeable event.⁵ 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-KY 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-KY had the proper procedures in place, it could have quickly isolated the equipment in the basement. In that instance, AT&T-KY would not have been required to shut down power to the entire building. AT&T-KY’s failure to properly plan for power outages,

⁵ As the Commission is aware, severe weather in September 2006 resulted in flooding of a Windstream backup power system *located in the basement* of a central office in Elizabethtown, Kentucky. The resulting power outage affected tens of thousands of customers. In the wake of a Commission investigation Windstream agreed that facilities critical to providing service would be moved well above ground level. These facilities included battery backup equipment. *See generally* Intra-Agency Memorandum dated January 17, 2007 in Case No. 2006-00532. Thus, since at least 2006 it has been foreseeable that essential equipment located below ground level is at risk of being incapacitated by water.

which are certainly common, foreseeable events, does not qualify as a force majeure event. AT&T-KY's failure to anticipate and appropriately react to a power outage is not a force majeure event.

21. Finally, AT&T-KY'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-KY is now addressing redundancy requirements in its data centers.

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

22. Section 4.5.2.3 of the SEEM provides that AT&T-KY'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-KY's force majeure declaration is not presumptively valid and should not automatically go into effect.⁶

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

WHEREFORE, the Commission should enter an order finding that:

1. AT&T-KY 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-KY's poor planning and procedures;
3. AT&T-KY is required to make the payments under the SEEM plan.

⁶ AT&T-KY stated in its February 11th letter that it "will not make any SEEM payments associated [with the listed measures] on the dates identified herein." AT&T-KY February 11, 2009 letter to Jeff Derouen at 2.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed via upload to the Commission's Electronic Filing Portal and served via First Class Mail this 20th day of February, 2009 to the following:

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