

**COMMONWEALTH OF KENTUCKY**  
**BEFORE THE PUBLIC SERVICE COMMISSION**

Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996	)	Case No. 2001-00105
	)	
	)	
	)	
Petition of BellSouth Telecommunications, Inc. for the Establishment of a New Performance Plan	)	Case No. 2004-00391
	)	

**REPLY IN SUPPORT OF OBJECTION TO  
AT&T-KY'S DECLARATION OF *FORCE MAJEURE* EVENT**

The Competitive Carriers of the South, Inc. (CompSouth), through its undersigned counsel, pursuant to the Commission's order dated April 9, 2009, hereby files this Reply in Support of its 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. Since AT&T admits that it did not provide prompt written notice to the Commission, and since the incident was not a "flood," the Commission should find that AT&T-KY must make all payments required under the SEEM plan.

**AT&T-KY Failed to Give Prompt Notice as the SEEM Plan Requires**

*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. AT&T-KY admits that it did not promptly notify the Commission in writing of the alleged *force majeure* event. Instead, it claims to have left a voicemail message for a Commission staff member three days after the water main ruptured. Significantly, AT&T-KY admits that the voicemail did not include any statement to the effect that AT&T-KY had failed to meet any performance standards for Kentucky or would seek any relief from contractual

obligations. Also, since the data center is not located within the nine state BellSouth region, without further information a recipient of the message might not have realized that an event in Missouri could be relevant for regulatory purposes in Kentucky. But by any measure, the voicemail was not sufficient notice to the Commission. The Commission established this case as an electronic filing docket, and all AT&T-KY filings associated with its SEEM plan are to be filed electronically. AT&T-KY files its monthly updates electronically, and has not explained why it did not file a prompt written notice with the Commission. Electronic filing was available even during the weekend of the incident.<sup>1</sup>

While CompSouth believes AT&T failed to meet its contractual obligations in any of the nine BellSouth states, its actions fell particularly short in Kentucky. AT&T-KY's inaction is easily contrasted to what its North Carolina affiliate had done. While the North Carolina Commission found that AT&T provided prompt notice of the event, that notice was filed at the North Carolina Commission *in writing on December 15, 2008*. Thus, the North Carolina decision is of no help to AT&T KY on the issue of "prompt" notice. AT&T-KY made no comparable filing in Kentucky until *February 11, 2009* -- over two months later -- when AT&T-KY declared a *force majeure* event. That difference alone distinguishes the North Carolina decision and is the reason the Commission should find that AT&T-KY's notice was not prompt.

Moreover, in its response AT&T-KY is candid in admitting that it 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. *See* AT&T Response at 2 and

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<sup>1</sup> While AT&T-KY does not mention it, there is one circumstance when oral notice to the Commission is permitted, but only if the notice is provided *within two hours* of a "utility-related accident" and the utility provides a written follow-up within *seven calendar days* of the accident. *See* 807 KAR 5:006, Section 26 (Reporting of Accidents, Property Damage or Loss of Service). AT&T-KY's notice here was insufficient to satisfy either requirement of that rule. The oral notice was three days late, and the written notice was two months late. Neither notice can be considered prompt, whether under the standard of the SEEM plan or the Commission's rules.

¶ 11. In addition, while AT&T-KY claims that the incident affected wholesale operations in *twenty two states* (AT&T Response at ¶ 6), AT&T-KY's Response implies that AT&T invoked *force majeure* only in *nine states*, after it "computed the remedy impact of the water main break." AT&T Response at ¶11. This apparent admission supports CompSouth's claim that the *force majeure* filing and the tardy notice to the Kentucky Commission were basically afterthoughts in an effort to avoid the performance plan. CompSouth Objection at ¶¶ 12-14.

**The St. Louis Outage Was Not a Flood and Does Not Qualify as a Force Majeure Event**

AT&T-KY admits that the damage to its property was caused by highly pressurized water from a main owned and controlled by the municipal water utility of St. Louis. As can readily be seen, that is not a "flood." A flood involves an overflow of a natural watercourse, perhaps as the result of heavy rain. *Sun Underwriters Ins. Co. of N.Y. v. Bunkley*, 233 S.W.2d 153 (Tex. Civ. App. 1950). Rainfall fits comfortably within the concept of an "act of God." A water main break most certainly does not, because unlike rainfall, some water main breaks are foreseeable and avoidable. For that reason municipal water utilities are bound to use a degree of diligence and care proportioned to the danger reasonably to be anticipated from a break in a water main. *Stein v. Louisville Water Co.*, 249 S.W.2d 750, 754 (Ky. 1952). And while *force majeure* events are characterized as unforeseeable or unavoidable events, an unavoidable accident is "essentially a happening to which human fault does not contribute." *Id.* at 755. Therefore, if human fault may be an issue in an accident, it is not at all clear that a *force majeure* event has occurred, and the Commission should not let AT&T-KY beg the question by alleging the harm was from a "flood."

The 2008 St. Louis incident was not the first one involving the city's municipal water utility. Indeed, the City of St. Louis has been held to have a duty under Missouri law not to let its property cause injury to others, and has been held responsible when a break in the water

company's lines caused damage to surrounding property. *See Lamar v. City of St. Louis*, 746 S.W. 2d 160 (Mo. App. E.D. 1988). Just four years ago the Missouri Supreme Court reaffirmed that the City of St. Louis does not have sovereign immunity from damages resulting from operation of its revenue-generating water utility. *Junior College District of St. Louis v. City of St. Louis*, 149 S.W.2d 442 (2004). There is no immunity because selling water is a proprietary function, not a sovereign function of government. *Id.* The SEEM plan recognizes this difference; it does not excuse AT&T from performance prevented by government acting in a proprietary capacity.<sup>2</sup> If the utility was negligent, AT&T has a cause of action against the city, and its damages and/or insurable interests could include SEEM payments that resulted from the negligence and resulting outage. CompSouth does not know if AT&T is investigating the cause of the accident, but the Commission should not remove the incentive for it to do so by letting AT&T-KY gloss over its contractual obligations to CompSouth's members.

For all of reasons stated in CompSouth's Objection and this Reply, 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;
3. AT&T-KY is required to make the payments under the SEEM plan.

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<sup>2</sup> Section 4.5.2 of the AT&T SEEM plan excuses AT&T when performance is prevented by "acts of the government in its *sovereign* capacity." (emphasis added).

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 10<sup>th</sup> day of April, 2009 to the following:

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