

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

IN RE:)
)
BELLSOUTH'S MOTION FOR THE)
ESTABLISHMENT OF A NEW PERFORMANCE)
ASSURANCE PLAN) **DOCKET NO. 04-00150**
)

**OBJECTION OF THE COMPETITIVE CARRIERS OF THE SOUTH, INC. TO
AT&T'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 Authority on August 25, 2005, hereby file this objection to BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee's (AT&T) 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 Authority should find that AT&T did not provide proper notice of this event, that this event was not a Force Majeure Event, and that AT&T should be required to make all payments required under the SEEM plan. As grounds therefor, CompSouth states:

I. Background

1. The Authority initially adopted performance metrics for the evaluation of the Operational Support Systems ("OSS") of BellSouth Telecommunications, Inc. in the context of the incumbent's bid for interLATA operating authority. See TRA Docket 01-00193. Final Order issued October 4, 2002. The current version of the Tennessee plan was approved in this docket as an Order issued August 25, 2005. The docket has remained open since that time.

2. CompSouth is a not-for-profit corporation whose members provide competitive telecommunications services in the state utilizing AT&T's operational support systems.

3. On February 11, 2008, AT&T filed a letter with the Authority notifying the agency that AT&T 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 performance measures which it was unable to meet from December 8 – 12, 2008.

4. CompSouth objects to the relief requested by AT&T, i.e., that it be relieved from making required SEEM payments because AT&T did not provide proper notice of this event and that this event was not a Force Majeure Event.

II. GROUNDS FOR OBJECTION

A. AT&T Failed to Give Prompt Notice as the SEEM Plan Requires

5. Force majeure events are addressed in section 4.5 of the SEEM plan and certain preconditions are mandatory in order for AT&T's payments to be excused. Specifically, section 4.5.2 requires AT&T to give the Authority "prompt" notice of a force majeure event. This section provides:

BellSouth, upon giving *prompt notice* to the Authority 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. . . .¹

6. Section 4.5.2.1 of the SEEM plan describes the mandatory contents of the required "prompt notice" described above:

To invoke the application of Section 4.5.2 (Force Majeure Event), BellSouth will provide written notice to the Authority and post notification of such filing on BellSouth's website wherein BellSouth will identify the Force Majeure Event, the affected measures, and the impacted wire centers, including affected NPAs and NXXs.

7. In this instance, AT&T failed to comply with sections 4.5.2 and 4.5.2.1 of the

¹ Emphasis supplied.

SEEM plan because it did not give “prompt notice” of the alleged force majeure event.

8. The event in question occurred in AT&T’s St. Louis data center on December 6, 2008. AT&T did not tell the TRA of a force majeure event until February 11, 2009 -- over two months later -- when AT&T wrote the Authority and declared that a force majeure event had occurred in December. That did not constitute “prompt notice.”²

9. Words in contracts must be given their “plain, ordinary and popular sense.” BFS Retail and Commercial Operations v. Smith, 232 S.W.3d 756, 758 (Tenn. Ct. App. 2007). The “usual and accepted source for such information is a dictionary.” English Mountain Spring Water v. Chumley, 196 S.W.3d 144, 148 (Tenn. Ct. App. 2006). Merriam-Webster’s Dictionary defines “prompt” 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 reasonable definition, be considered “performed readily or immediately.”

10. AT&T has not provided any reason for this two-month delay in declaring a force majeure event.

11. Furthermore, 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 performance measures. This chronology can be seen by reviewing the timeframe for SEEM payments related to this event:

a.. 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.

² On December 10, 2008, AT&T sent an “Accessible Letter” “apprising” CLECs of the event. In some states, AT&T also sent an “apprising” letter to the state commission. There is no such letter in the TRA’s file in this docket. In any event, Section 4.5.2.1 requires AT&T to “identify the Force Majeure Event, the affected measures, and the impacted wire centers, including affected NPAs and NXXs.” That mandatory information was not provided until AT&T’s February 11, 2009 letter to the TRA.

b. 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.

c. Thus, in this case, the final validated SQM report for the December 6, 2008 event was posted on January 31, 2009, the SEEM payment was calculated thereafter, and the SEEM payment related to the event at issue was due on or about February 15th. The first notice of a force majeure event from AT&T was sent on February 11, 2009, just four days before the SEEM payment was due.

12. AT&T failed to give proper notice when the event occurred and cannot now allege a force majeure event and seek to be excused from the SEEM payments due.

B. The St. Louis Outage Does Not Qualify as a Force Majeure Event

13. According to AT&T's February 11th 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. AT&T claims that this water main break was "unforeseeable" and could not have "been anticipated or prevented by AT&T" ³ CompSouth disagrees.

14. 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]."

15. AT&T's labeling the event a "flood" does not make the December 6th incident a flood nor does the incident – whatever it may be called – constitute a force majeure event. As explained below, not only was the "flood" foreseeable, it appears that, in AT&T's opinion, it was

³ AT&T February 11, 2009 letter to Chairman Roberson at 1.

a power outage that prevented AT&T from meeting the SQM standards. This outage was caused by AT&T's failure to plan properly for such a foreseeable event.

16. The likelihood that a basement may flood is certainly a foreseeable event. 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. Furthermore, if electrical equipment is kept in the basement, it is certainly foreseeable that such equipment might be affected.

17. 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 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.

18. Had AT&T had the proper procedures in place, it could have quickly isolated the equipment in the basement. In that instance, AT&T would not have been required to shut down power to the entire building. Power outages are common, foreseeable events. Neither AT&T's failure to plan properly for power outages nor AT&T's failure to anticipate and appropriately react to a power outage is a force majeure event.

19. Finally, although CompSouth understands that AT&T is now addressing redundancy requirements in its data centers, AT&T's failure to have redundancy in place so as to deal with power outage situations is simply a case of poor planning, not a force majeure event. .

20. Because the power outage implemented by AT&T to deal with a broken pipe is not a force majeure event, AT&T is not entitled to be excused from making SEEM payments.

C. AT&T's Force Majeure Declaration is Not Presumptively Valid

21. 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. As discussed above, AT&T's notice was not provided in accordance with the SEEM plan. Therefore, AT&T's force majeure declaration is not presumptively valid and does not automatically take effect.⁴

22. The Authority should not permit AT&T to withhold any SEEM payments.

WHEREFORE, the Authority should enter an order that:

1. AT&T failed to give prompt notice regarding its declaration of a force majeure event as required by the SEEM plan;

2. The St. Louis outage was not a force majeure event, as it was both foreseeable and the result of AT&T's failure to plan for such events; and

3. AT&T is required to make the required payments under the SEEM plan, with interest as provided by the SEEM plan or by law.

⁴ AT&T stated in its February 11th letter that it "will not make any SEEM payments associated [with the listed measures] on the dates identified herein."

This 20th day of February, 2009.

Respectfully submitted,

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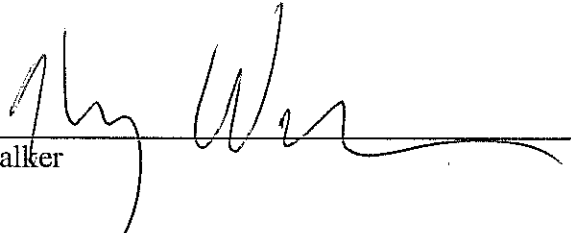
Attorneys for Competitive Carriers of the
South, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded electronically and via U.S. Mail, first class, postage prepaid, to:

Guy Hicks
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on this the 20th day of February, 2009.


Henry Walker