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October 23, 2009

VIA HAND DELIVERY

Ms. Ann Cole
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: Docket 000121A -- Investigation into the establishment of operations support systems permanent performance measures for incumbent local exchange telecommunications companies. (AT&T FLORIDA TRACK)

Dear Ms. Cole:

Please find enclosed for filing an original and seven (7) copies of The Competitive Carriers of the South, Inc.'s Response in Opposition to AT&T's Motion of October 16, 2009.

Your assistance in this matter is greatly appreciated. Should you have any questions, please do not hesitate to contact me.

COM ____
ECR ____
GCL 2 (+CO)
OPC ____
RCP ____
SSC ____
SGA ____
ADM ____
CLK ____

Sincerely,

Matthew Feil

Enclosures

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies (AT&T Florida Track)	)))))	Docket No. 000121A Filed: October 23, 2009

Response in Opposition to AT&T's October 16, 2009, Motion

Pursuant to Rule 28-106.204(1), Florida Administrate Code, the Competitive Carriers of the South, Inc., ("CompSouth")[1] hereby files its response in opposition ("Response") to the October 16, 2009, Motion for Expedited Approval of Lifeline Outreach Funding and for Modification of SEEM Penalty Payments ("Motion") filed by BellSouth Telecommunications, Inc., d/b/a AT&T Florida ("AT&T"). In support of this Response, CompSouth states as follows:

INTRODUCTION/SUMMARY.

1. CompSouth lauds the notion of this Commission ordering the funding of Lifeline Outreach or, better yet, AT&T and other carriers with Lifeline obligations taking voluntary steps to fund Lifeline Outreach, but AT&T's Motion asks the Commission to accept a tragically lopsided bargain, both in terms of dollar values traded and the public interest, which benefits no one even remotely as much as it benefits AT&T itself. AT&T is attempting to take advantage of an unfortunate situation with an Outreach funding gap[2] to improve AT&T's own bottom line.

[1] CompSouth is made up of the following CLEC members who are supporting this filing: Access Point, Inc.; Birch Communications; Cavalier; Cbeyond; DIECA Communications, Inc., d/b/a Covad Communications Company ("Covad"); DeltaCom; Level 3 Communications; NuVox; tw telecom; and XO Communications.

[2] CompSouth has not attempted to verify in the time permitted for this Response that the Outreach dollars are in fact depleted, but for the nonce, accepts AT&T's allegation at face value.

2. AT&T's argument that Tier II payments are no longer necessary because payments have decreased over time or markets are irreversibly open, even if true, has no basis in logic. AT&T's argument is the equivalent to asserting that crime has gone down so criminal laws can be abolished. Tier II payments are rooted in this Commission's enforcement authority to ensure fair and effective competition under state law and section 271 of the Federal Telecommunications Act (the "Act"). Contrary to AT&T's warped view, AT&T's past wholesale performance and the competitive data in Florida firmly support continuation of Tier II payments.

3. Tier II payments are inextricably intertwined with the service quality measures ("SQMs") to which they relate. The Commission cannot examine part of the overall AT&T performance plan without simultaneously looking at the whole plan and still fulfill its statutory duties to protect the public interest. The issue of how to restructure Tier II payments including whether to eliminate them is already under consideration in the Commission's review of AT&T's performance incentive plan. Asking the Commission to leap ahead of its consideration of the matter in that proceeding would needlessly cause the Commission to have to fashion piecemeal solutions rather than complete the broader review of the issue already before it. AT&T's Motion puts the Commission in the untenable position of administering multiple, and likely duplicative, cases where different parts of the AT&T performance plan my travel different procedural and hearing paths.

AT&T'S PROPOSED BARGAIN IS LOPSIDED IN AT&T'S FAVOR.

4. AT&T asks the Commission to trade a $250,000 one-time payment to fund Lifeline Outreach in exchange for eliminating – forever – Tier II remedy payments. So far in 2009, Tier II payments from AT&T and remitted by the Commission to the State of Florida General Revenue Fund have totaled $421,889. In 2008, AT&T paid $2,092,801 in Tier II payments into the General Revenue Fund, and in 2007, AT&T paid $857,625. (Attached hereto and marked as Exhibit A is a document showing AT&T's Tier II payments in Florida for the past five years.)

5. It is quite obvious why AT&T wants to make this bargain, which is good only for AT&T. Not only will it reduce to nothing what AT&T automatically pays the State of Florida next year and forevermore in Tier II remedies in exchange for a one-time payment that is less than a quarter of what it paid in 2008, but it will eliminate a whole category of financial incentives that cause AT&T to offer competitors a higher quality of service than it would otherwise provide. This would be roughly akin to permitting a taxpayer to make a payment to a worthy cause – one time – in an amount less than half what they expect to owe next year in taxes in exchange for possibly never having to pay taxes again.

6. Looked at another way, one might say AT&T asks the Commission to trade a $250,000 one-time payment to fund Lifeline Outreach in exchange for the present value of future revenues derived from Tier II payments. If the Commission annually remits to the General Revenue Fund $1,241,055 in Tier II payments (based on a five-year average) and Tier II payments continue for at least another five years into the future, the present value of such

payments to the State of Florida General Revenue Fund is approximately $6,023,377, assuming a 1% discount rate.[3] Therefore, AT&T effectively asks the Commission to trade $250,000 for $6,023,377.

7. On the dollar value terms alone, the Commission may not be well positioned to explain this bargain to Legislative oversight authorities, especially now, when the Legislature is thoroughly engrossed in a budget crises and exploring all revenue sources and collection options. As discussed further below, granting AT&T's Motion would be no stronger on policy grounds. The Legislature tasked this Commission with furthering local exchange competition. By weakening AT&T's incentives to provide quality service to competitors based on nothing but a few self-serving statements in a short pleading, the Commission would be moving in quite the opposite direction.

8. AT&T would have the Commission believe that there is no other way to obtain a one-time infusion for Lifeline Outreach than to accept AT&T's proposal to relieve AT&T of Tier II obligation. This is a Hobson's choice, and one this Commission should not and need not make. The Commission sanctioned the outreach function of the Community Service Fund ("CSF") as a largely circumstantial opportunity to promote Lifeline when AT&T and Embarq were show caused for, and settled, service quality violations with the Office of Public Counsel ("OPC"). This outreach effort entailed no life beyond a few periodic infusions stemming from

[3] The average annual amount is a simple average of the annual Tier II payments made to the Commission for the five years, 2005 – yet unfinished 2009. No attempt was made to normalize or back out amounts to account for force majeure events (tending to decrease payments) or the April 2008 OSS release (tending to increase payments). The discount rate is very conservative. In no event would any reasonable adjustments to normalize yearly totals or change the discount rate alter the fact that $250,000 AT&T seeks to trade is paltry in comparison to the present value of anticipated future payments. The above calculations are made for the sake of this pleading only. CompSouth may offer a different method of calculation or discount rate in the future should a dispute in this matter continue.

AT&T and Embarq violations and settlements. If the Commission wishes to fund Outreach programs going forward (a decision it has not yet made), the Commission should consider the issues on a horizon beyond AT&T's buy-now-or-gone-tomorrow salesmanship. For Outreach, the Commission should seek comment, forge policy, design a program, make recommendations and implement a plan. The Commission has a public interest duty to explore all choices for the long-term betterment of Lifeline recipients. The Commission may, for example, evaluate its broad authority under sections 364.01(4) and 364.0252, Florida Statutes, and various eligible telecommunications carrier ("ETC") requirements to promote outreach efforts, or ETC carriers could voluntarily undertake outreach efforts. And it goes without saying that AT&T's financial position is such that it could fund $250,000 for Lifeline Outreach from existing cash flows without even a fraction of a basis point impact on its ROE. Instead, AT&T elected to test the Commission's judgment and resolve by floating this utterly lopsided deal.

9. Aside from being financially tilted in its favor, AT&T's proposal offers dreadful value from a policy standpoint. AT&T makes significant Tier II payments to the State, over $6,000,000 in the last five years, because AT&T fails to meet performance standards and fails to provide non-discriminatory wholesale service to CLECs. So for a one-time payment of $250,000 and no plan to address Lifeline Outreach long-term, the Commission is being asked to sacrifice competitive services to Florida's consumers and businesses in an environment where AT&T already routinely fails wholesale service standards, impeding the CLECs ability to serve their customers. The long-term value of competitive choice for Florida communications services, and the Commission's duty to protect CLECs from non-discriminatory treatment, cannot and should not be sold off like garage sale furniture. Furthermore, the Commission

should consider the signal accepting AT&T's lopsided bargain would send to jurisdictional entities wanting to permanently evade regulatory requirements: take advantage of an unrelated policy need.

AT&T'S PROPOSAL DEFIES LOGIC

10. AT&T's argument that Tier II payments are no longer necessary is a sophistic one at best. AT&T essentially argues that there is no need to incent AT&T to perform because AT&T promises to perform. This argument presupposes that AT&T would have no incentive to discriminate against carriers with whom it competes – an inherently fallacious premise. Indeed, were AT&T's premise true, there would have been no need to break up the old AT&T, to pass the Act, to implement section 271 or to create and enforce performance plans to begin with. And yet, every single month since AT&T obtained 271 authorization in Florida in 2002, AT&T has been required to make Tier I and Tier II payments (except where excused by force majeure) because AT&T has not provided non-discriminatory treatment to its competitors.

11. AT&T's argument is the equivalent to asserting that crime has gone down this year so criminal laws can be abolished forevermore. The premise is that there is no incentive to commit crimes once laws to punish crime are eliminated, when in reality, the opposite is true. Laws punishing crime are designed to discourage crime, just as the performance plan Tier II payments are designed to discourage discriminatory behavior. AT&T's past wholesale performance and the competitive data in Florida firmly support continuation of Tier II obligations.

12. If Tier I payments alone, whether as structured now or as proposed by AT&T in other filings in this docket, were sufficient to incent AT&T to provide non-discriminatory access, surely by now, more than six years after plan implementation, AT&T would have little or no Tier II exposure. But that is sadly not the case. AT&T has paid over $6M in Tier II payments over the last five years and has paid over $420,000 so far in 2009.[4] The elimination of Tier II can not incent better performance by AT&T and would instead promote worse performance.

13. The metrics that AT&T missed to trigger Tier II liability in 2009 have been largely the same every single month.[5] Still, AT&T persists in arguing it already has sufficient incentive to perform and it seeks to "modernize" regulation. If $6M in Tier II payments over five years **plus** what AT&T pays in Tier I payments is not sufficient incentive for AT&T to perform, no one can logically expect that eliminating AT&T's Tier II obligation will incent AT&T to maintain, let alone improve, its performance. The truth is that it less expensive for AT&T to make SEEM payments than it is to fix the wholesale service problems that continually trigger Tier II liability. Perhaps continuing to ignore service obligations is AT&T's idea of modernized regulation. But this explains why Tier II payments "add nothing," as AT&T has stated in prior filings, to its performance incentives -- not because AT&T already has sufficient incentive. CompSouth suggests that greater SEEM exposure would add something to AT&T's incentive to perform. SEEM payments should be increased until the tipping point is found where AT&T is

[4] CompSouth does not agree one can conclusively say, as AT&T does, that Tier II payments are decreasing. (Motion at page 3, footnote 5.) Even ignoring the peak attributable to the April 2008 OSS release, Exhibit A shows that there is no strong year-to-year trend, and force majeure declarations skew the data by reducing AT&T's liability in certain months and certain years.

[5] They include M&R-3 (Maintenance Average Duration – UNE Loops Non-design) and P-11 (Service Order Accuracy – Resale). Other metrics are frequently if not periodically missed.

motivated to cure underlying service problems instead of simply taking out the checkbook each month.

14. Tier II SEEM payments are also appropriate because the state itself loses when AT&T's wholesale performance is poor. Harm to competition and greater barriers to entry result from poor wholesale performance. Both are a detriment to Florida consumers –residential and business – because diminished competitive alternatives translate to less innovation, fewer choices and higher prices. Tier II SEEM payments incent AT&T to perform so as to minimize the harmful effects that directly impact the State of Florida.

15. Granting AT&T's request to eliminate Tier II defies logic in one other particular respect. AT&T's April 2008 22-state release caused over 71,000 CLEC orders to be lost, cancelled or significantly delayed. Corrective action and normal processing took AT&T over 12 months. Substantial CLEC resources had to be devoted to curing the fall-out of AT&T's blunder. In its audit of the April 2008 release and the aftermath, the Commission staff found that the release was a "critical failure." AT&T, significantly, did not dispute that conclusion. When the Commission considered what action to take against AT&T for this "critical failure," the Commission elected to "postpone . . . a show cause proceeding until after implementation of the next 22-state OSS release." [6] Yet the parties are being asked now, before the next 22-state release, to discuss AT&T's proposal **to diminish** AT&T's incentive to provide nondiscriminatory access. Simply put, AT&T wants to change the rules in the middle of the game. If AT&T breaks the rules again, and its next 22-state releases are critical failures, the consequences to AT&T by granting its Motion on Tier II would be less than before. This is not

[6] Order No. PSC-09-0165-PAA-TP, issued March 23, 2009, at page 4.

true to the Commission's show cause decision. This does not incent AT&T to perform. CompSouth maintains that it is inappropriate to even consider implementing any SQM/SEEM changes, let alone a change to Tier II, before April 2010, when AT&T completes its OSS modifications to support the 22-state OSS architecture.

16. *AT&T's Motion does not address the whole market picture in Florida.* According to the Commission's 2009 Competition Report, residential access lines and CLEC market share for residential customers have shrunk significantly over the last several years as regulatory changes came about and as cable, VoIP and wireless captured market share. Overall CLEC market share has declined as a result. Those declines notwithstanding, in the business market, CLECs, as a group of small competitors, hold a solid 25% market share as of December 2008, down from a peak of 34% in June 2005. Total business access lines have declined from a peak of 4.3 million in June 2006 to 3.6 million, but the number of business access lines has been about the same from 2001 to 2008, unlike residential access lines. Cable and wireless do not yet compete in the business market the way they do in the residential market. Although cable has recently entered some Florida business market with success, cable's market penetration thus far does not approach CLEC levels.

17. Competition, particularly in the business market, depends on non-discriminatory access to wholesale services. CLECs, and, by extension the business market itself, rely on this Commission to police meaningful SQM and SEEMs plans to ensure that AT&T is providing non-discriminatory access to underlying wholesale facilities. If AT&T is permitted to continue discriminating in its wholesale performance, Florida businesses will suffer from diminished choice, pricing options, innovation, and services. Further, as a matter of principle, regulation of

wholesale services is even more critical where, as with the business market in particular, one provider owns nearly all available wholesale facilities to the medium and small business market. Significantly, nothing in the retail deregulatory measures from the 2009 Legislative session in Florida impacted this Commission's authority and responsibility over wholesale issues. The Florida Commission's duties to ensure nondiscriminatory access to wholesale facilities and encourage competition remain the same under both federal and state law.

THE COMMISSION SHOULD NOT SEPARATE TIER II FROM THE REST OF THE PERFORMANCE PLAN REVIEW.

18. SQM Tier II payments are inextricably intertwined with the service quality measures ("SQMs") to which they relate. Indeed, the Commission staff and the parties have been looking at the SQM and SEEM issues sequentially in a singular, over-arching review process. The same practice has been followed in prior year reviews. However, with the need for Outreach funding as pretext, AT&T veers far from the course set for the docket and seeks one issue to be addressed before all others.[7] That one issue – the elimination of Tier II payments -- is not an issue of the Commission's jurisdictional authority or some predicate upon which the resolution of all other issues in the case depends. Rather, it is an issue interlinked with all other issues in the case, as explained below.

19. AT&T's Motion sets the table for the Commission to administer multiple, and likely duplicative, cases where different parts of the AT&T performance plan may travel different procedural and hearing paths. Any PAA Order approving or rejecting AT&T's Motion

[7] By the same token, the CLECs could file a motion asking SEEM payments be increased or have any other issue carved out from the others in the case.

on Tier II will assuredly be protested and require a hearing. In the meantime, the rest of the SQM and SEEM review process will continue separately through workshop, resolution, and, if needed, Agenda and a hearing. Conducting a hearing on one Tier II issue separate from the review of and any hearing on all of the other issues in the case will inevitably lead to duplication of effort and will waste limited resources of the parties and the Commission. AT&T should therefore withdraw the Motion, or the Commission should defer ruling on the Motion until the rest of the issues in the performance review are ripe for disposition.

20. The Commission cannot examine one part (Tier II) of the overall AT&T performance plan without simultaneously looking at the whole plan. Tier II payments are triggered by the SQMs and must be examined in the context of the overall efficacy of the performance plan. This is consistent with how the plans have been established and reviewed for 271 and state law purposes. Further, CompSouth maintains that even where a state in another region has eliminated or suspended Tier II payments, it did not do so in the piecemeal fashion AT&T proposes here in Florida, but as part of an overall performance plan review.

21. When the Commission recommended, and the FCC approved, BellSouth's 271 authorization, the performance plan was not parsed into segments – it was looked at as a whole. Without assurance of continued nondiscriminatory access as provided through the entire performance plans, AT&T would not have received section 271 authority. In its Florida 271 Order, the FCC stated, "Our conclusions are based on a review of several elements in any performance assurance plan: total liability at risk in the plan; performance measurement and standards definitions, structure of the plan; self-executing nature of remedies in the plan; data

validation and audit procedures in the plan; and accounting requirements."[8] The FCC relied on the plan as a whole, including two tiers of self-effectuating remedies.[9]

22. When the Commission initially approved Tier II payments, the Commission ruled that Tier II payments for SQM violations was entirely consistent with the Commission's state law authority for enforcing statutes, rules and orders via show cause proceedings.[10] Tier II was and is a means for the Commission to assess uniform and consistent penalties for SQM violations. Severing that uniform, consistent penalty framework from the underlying violations will likely lead to inefficiencies when violations occur and penalties are evaluated.

OTHER AT&T ARGUMENTS

23. The Commission can place no reliance whatsoever on AT&T's assertion that states in **other** regions are trending toward Tier II elimination. Not one state commission order in the Southeast has eliminated Tier II obligations. Notably, AT&T does no more than make casual reference to other regions; AT&T does not compare the SQM plans, historic performance, overall SEEM exposure, Tier II exposure and Tier I and Tier II payment history of any state in any other region to Florida's. CompSouth maintains that plans in other AT&T regions have not been as robust as in the Southeast. Further, CompSouth understands that CLECs in those other regions, unlike here in Florida, did not oppose elimination of Tier II obligations largely due to the lack of teeth in those plans and in consideration of the totality of the plans. Moreover, unlike in other regions, only in the Southeast did CLECs have to suffer through a "critical

[8] FCC Memorandum and Opinion Order No. 02-331, *In the Matter of Application by Bellsouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization to Provide In-Region, Inter LATA Services in Florida and Tennessee*, WC Docket No. 02-307. Rel December 19, 2002. ("*Florida and Tennessee 271 Order*"), ¶ 169.
[9] Id.
[10] Order No. PSC-01-1819-FOF-TP, issued September 10, 2001, pp. 122-128.

failure" like AT&T's April 2008 OSS release fiasco, which took a year of clean-up and negatively impacted thousands of orders. AT&T's master plan for OSS uniformity in the Southeast is reason enough to maintain Tier II obligations. Florida, and the Southeast region, stand apart in these respects, and any effort from AT&T to persuade this Commission to blindly follow a decision in another region must be rejected.

24. AT&T bemoans, as it has in the past, that it is the only carrier in Florida that has a SEEM plan. That AT&T alone is subject to a SEEM component is the product of a bargain made when the Act was passed. BellSouth was the only ILEC in the state subject to 271 as a legacy RBOC. Thus, AT&T decries the status of its birth, and wants this Commission to change the Act now that AT&T has tired of it. The Commission should not abide this complaint. RBOC wholesale requirements were part of the bargain struck by RBOCs at the time of the Telecom Act in exchange for long distance relief. Now that AT&T enjoys this relief, it wishes to dispense with the local market opening requirements it offered as consideration. Accordingly, this AT&T complaint should be rejected.

WHEREFORE, in consideration of the foregoing, CompSouth maintains that the Commission should not approve AT&T's Motion.

RESPECTFULLY SUBMITTED this 23rd day of October, 2009.

Matthew J. Feil
Akerman Senterfitt Attorneys at Law
106 East College Avenue, Suite 1200
Tallahassee, FL 32301
(850) 224-9634
Counsel for CompSouth

SCHEDULE OF AT&T TIER II PAYMENTS, 2005 – 2009 (to date)

Date	Florida Tier II Amount (FM* Rita/Katrina)
1-19-2005	$118,500.00
2-18-2005	$ 27,250.00
3-21-2005	$279,700.00
4-22-2005	$182,550.00
5-18-2005	$175,900.00
6-20-2005	$190,300.00
7-20-2005	$125,300.00
8-2005	FM
9-21-2005	$131,900.00
10-20-2005	$155,100.00
11-21-2005	$167,850.00
12-19-2005	$115,619.00
TOTAL Tier II 2005	**$1,669,969.00**

Date	Florida Tier II Amount (FM Wilma)
1-2006	FM
2-17-2006	$ 8,458.00
3-23-2006	$108,418.00
4-19-2006	$ 78,138.67
5-19-2006	$226,736.67
6-19-2006	$163,708.56
7-19-2006	$ 73,557.00
8-18-2006	$ 45,159.33
9-18-2006	$153,800.00
10-20-2006	$117,137.66
11-22-2006	$120,971.33
12-18-2006	$ 66,907.66
TOTAL Tier II 2006	**$1,162,992.85**

Date	Florida Tier II Amount
1-18-2007	$ 76,513.00
2-16-2007	$ 88,790.00
3-19-2007	$100,896.00
4-23-2007	$101,548.01
5-18-2007	$163,015.00
6-21-2007	$ 54,042.00
7-19-2007	$ 53,137.00
8-16-2009	$ 47,155.00
9-25-2007	$ 44,289.66
10-16-2007	$ 43,061.66
11-26-2007	$ 41,715.66
12-18-2007	$ 43, 462.00
TOTAL Tier II 2007	**$857,624.99**

Date	Florida Tier II Payment (FM- Fay)
1-2008	FM
2-2008	FM
3-2008	FM
4-3-2008	$ 31, 398.94
4-23-2008	$ 11,646.57
5-15-2008	$ 19,802.78
6-24-2008	$ 12,061.33
7-16-2008	$398,848.18
7-17-2008	$ 12,315.00
8-14-2008	$501,100.71
9-12-2008	$448,267.00
10-15-2008	$304,398.47
11-17-2008	$283,725.67
12-16-2008	$69,236.67
TOTAL Tier II 2008	**$2,092,801.32**

Date	Florida Tier II Payment (FM Data Center Flood) (FM Excessive Rain)
1-14-2009	$ 63,037.00
2-13-2009	$ 65,573.67
4-16-2009	$ 53,333.00
4-20-2009	$ 56,603.67
5-18-2009	$ 47,909.33
6-16-2009	$ 29,439.67
7-15-2009	$ 17,113.54
8-17-2009	$ 77,311.00
9-14-2009	$ 18,237.00**
9-14-2009 Debit	[$-36,180.00]**
10-15-2009	$ 11,567.67
SUB TOTAL	$421,888.55**
*FM = force majeure **No dollars were calculated for the month of September due to the negative reposting charge.	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail or electronically to the following parties of record this 23rd day of October, 2009:

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