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Subject: Docket No. 060684-TP
Attachments: Response of Litesream Holdings, LLC to BellSouth_s Assertion of Affirmative Defenses.PDF



Response of
Litesream Holdings..

Good Afternoon:

On behalf of Litestream Holdings, LLC, attached please find the following for electronic filing:

* Response of Litestream Holdings, LLC to BellSouth's Assertion of Affirmative Defenses.

If you have any questions, please do not hesitate to contact Gary Resnick or Frank Rullan. Their contact information is as follows:

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ORIGINAL

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:)
Complaint of Litestream Holdings, LLC)
Against BellSouth Telecommunications, Inc.)
_____)

Docket No. 060684-TP

Filed: February 28, 2007

RESPONSE OF LITESTREAM HOLDINGS, LLC TO
BELLSOUTH'S ASSERTION OF AFFIRMATIVE DEFENSES

In accordance with Rule 1.100(a), Florida Rules of Civil Procedure, Litestream Holdings, LLC ("Litestream") files this response to the Affirmative Defenses set forth in Bell South Telecommunications, Inc.'s¹ ("BellSouth") Response to Litestream's Second Amended Complaint, and herein states as follows:

1. On February 21, 2007, BellSouth filed its Response to Litestream's Second Amended Complaint ("Response"), which included two affirmative defenses: (1) that there is no issue in dispute because BellSouth "intends to provide telecommunications services to residents in the subdivision about which Litestream seemingly complains, which is known as 'Glen St. Johns'"; and (2) that Litestream "lacks standing to bring its claims." See Response, at 1.

2. BellSouth's affirmative defenses lack any merit. Litestream hereby responds to BellSouth's two affirmative defenses.

3. As to the first affirmative defense, it must be incorporated into the record that on a conference call with the Commission's staff and counsel for BellSouth and Litestream on November 27, 2006, counsel for BellSouth stated that BellSouth currently

¹ Although BellSouth is now operating under a new d/b/a, namely AT&T Florida, for purposes of this pleading Litestream will use the BellSouth name.

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has plans to provide communications services to the particular development at issue in the Complaint, Glen St. Johns. As Litestream alleged in the Second Amended Complaint, when questioned by the Commission staff as to whether BellSouth would agree to provide such service if the Glen St. Johns developer entered into an agreement with Litestream for cable or broadband service, counsel for BellSouth stated that BellSouth does not know if it would provide Telephone Services to Glen St. Johns if the developer enters into an agreement with Litestream. Second Amended Complaint, at ¶7. Recently, however, Litestream entered into an agreement with the Glen St. Johns developer for video and broadband services. BellSouth has still not committed to provide telephone service to the development. Therefore, even with BellSouth's Response, neither the Commission, Litestream, nor the developer knows whether BellSouth will install its facilities and will provide its carrier of last resort communications services to customers in Glen St. Johns, including Litestream. Moreover, Litestream has the same issues with other developments in Florida, including the Pride Home development. See Second Amended Complaint, at ¶12. BellSouth did not mention anything about whether it would provide telephone service to the Pride Home development where Litestream will be providing video and other non-communications services.

4. Even when confronted by the Commission staff, BellSouth seems intent on using its market power in Telephone Services to intimidate developers into not entering agreements with other providers for *other services* in violation of its carrier of last resort obligations and Florida's statutes prohibiting anticompetitive conduct. Rather, BellSouth uses its market power in Telephone Services and threatens to withhold such services to coerce developers into entering exclusive agreements with BellSouth.

5. BellSouth's lack of standing argument is equally without merit. Litestream has standing under Florida Statutes as well as under the test prescribed in Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 482 (Fla. 2nd DCA 1981)("Agrico").

6. To have standing under Agrico, the petitioner must show (1) that it will suffer injury in fact which is of sufficient immediacy to entitle it to a Section 120.57 hearing, and (2) that this substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. The "injury in fact" must be both real and immediate and not speculative or conjectural. International Jai-Alai Players Assn. v. Florida Pari-Mutuel Commission, 561 So.2d 1224, 1225-26 (Fla. 3rd DCA 1990).

7. Litestream's Second Amended Complaint alleges an "injury in fact" to meet the first element for standing. Litestream will soon be a customer of BellSouth within the Glen St. Johns and Pride Home developments, as well as in other developments in which Litestream will provide cable and broadband service. When Litestream installs its headend and network equipment within such developments pursuant to agreements, it will request and require basic telephone service from BellSouth, the only ILEC in the area. If BellSouth does not provide telephone service to Litestream within the development, Litestream will suffer a direct injury in fact.

8. Regarding the second prong of the Agrico test, Litestream also fulfils such prong. The second part of the Agrico standing test asks whether the proceeding is designed to protect the injuries alleged by the complainant. The Commission's duties

include enforcing BellSouth's carrier of last resort obligations. This type of proceeding is designed to protect Litestream's rights as a customer of BellSouth.

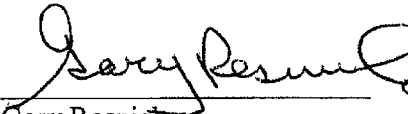
9. Additionally, Litestream also has standing to file its Complaint as a provider of Broadband Services and a competitor of BellSouth. Litestream has been injured in fact by BellSouth's anticompetitive actions. As a result of BellSouth's actions, Litestream has been prevented from obtaining agreements to provide broadband services on a bulk or exclusive basis to various developments, including but not limited, to the Glen St. John and Pride Home developments. Preventing BellSouth's anticompetitive behavior and supporting the promotion and deployment of Broadband Services are important interests the Commission is authorized to protect pursuant to Chapter 364 and for which this type of proceeding is designed to protect. See Sections 364.10(1); 364.3381(3); 364.507(3), Florida Statutes. The anti-competitive type of implied-tying-arrangement that BellSouth is requiring from developers in Florida for its Telephone and DSL Services is similar to other types of anticompetitive economic behavior under Chapter 364 that is considered illegal, such as cross-subsidization and predatory pricing.²

10. Accordingly, Litestream's Second Amended Complaint alleges an actual injury of sufficient immediacy which this proceeding was designed to protect.

² See In re: Complaint of BellSouth Telecommunications, Inc. against Miami-Dade County for alleged operation of a telecommunications company in violation of Florida statutes and Commission rules, 2005 Fla. Lexis 724, Docket No. 050257-TL, Order No. PSC-05-0847-FOF-TL (August 19, 2005) ("First, we find that BellSouth does have standing to bring this action before this Commission. It is not challenged by the County that BellSouth has an economic interest in providing telecommunications services to commercial vendors within MIA. Furthermore, as a certificated telecommunications company competing for business within MIA, BellSouth has an interest in how we interpret and apply Rule 25-24.580, Florida Administrative Code, in this instance. Accordingly, we find that BellSouth's Complaint alleges an actual injury of sufficient immediacy which the proceeding was designed to protect.").

WHEREFORE, Litestream opposes the affirmative defenses asserted by BellSouth in its Response.

Respectfully submitted this February 28, 2007.

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response of Litestream Holdings, LLC to BellSouth's Assertion of Affirmative Defenses has been furnished by electronic mail and Federal Express this 28th day of February, 2007, to the following:

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