

Matilda Sanders

From: Jennys Castillo [jcastillo@gray-robinson.com]
Sent: Friday, January 12, 2007 1:54 PM
To: Filings@psc.state.fl.us
Cc: andrew.shore@bellsouth.com; james.meza@bellsouth.com; kip.edenfield@bellsouth.com; Dale Buys; Jason Fudge; Patrick Wiggins
Subject: Docket No. 060684-TP

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Attachments: Litestream - Respond of Litestream Holdings_ LLC to BellSouth's Assertion of Affirmative Defense.PDF



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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:

Gary Resnick; Esq.
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Thank you,

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January 12, 2007

VIA ELECTRONIC MAIL

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

**Re: Response of Litestream Holdings, LLC to BellSouth's Assertion of
Affirmative Defenses
Docket No. 060684-TP**

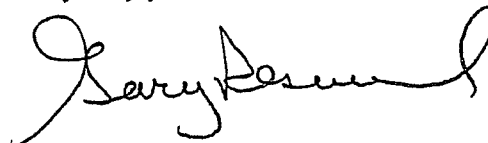
Dear Ms. Bayó:

Enclosed please find the Response of Litestream Holdings, LLC to BellSouth's
Assertion of Affirmative Defenses, which we ask that you please file in the captioned
docket.

Copies have been served to the parties shown on the Certificate of Service.

If you have any questions, please do not hesitate to contact me.

Very truly yours,



Gary Resnick

GIR:jc
Enclosure

cc: All Parties of Record
Litestream Holdings, LLC

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ORIGINAL

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:)
Complaint and Petition for Declaratory)
Relief of Litestream Holdings, LLC.)
Against BellSouth Telecommunications, Inc.)

Docket No. 060684-TP

Filed: January 12, 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.'s ("BellSouth") Response to Litestream's Amended Complaint, and herein states as follows:

1. On January 4, 2007, BellSouth filed its Response to Litestream's Amended Complaint ("Response"), which included a section with Affirmative Defenses. BellSouth asserts 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 know[n] 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 of BellSouth's affirmative defenses, 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 has plans to provide communications services to the particular

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development at issue in the Complaint, Glen St. Johns. However, 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. Therefore, even with BellSouth's Response, neither the Commission, Litestream, nor most importantly, the developer know whether BellSouth will install its facilities and will provide its carrier of last resort communications services to residents of Glen St. Johns if the developer signs an agreement for cable and/or broadband services with Litestream.

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. Developers realize that persons purchasing new homes want the option of obtaining Telephone Service from BellSouth, which as the incumbent local exchange carrier, is the most well known Telephone Service provider in its service territory. Thus, unless BellSouth is directed to cease and desist this inappropriate strong-arm tactic and provide Telephone Service in accordance with Section 364.025(1), Florida Statutes, developers will find themselves in the difficult position of either contracting solely with BellSouth for a complete package of bundled services (i.e. voice, broadband, and video),

as well as marketing rights or, if BellSouth makes good on its threat, foregoing service by BellSouth entirely. Either way, residents of new developments will have fewer options for services. Furthermore, developers will be prevented from negotiating deals with a full range of providers, like Lifestream, to obtain the most cost-effective and appropriate services for their communities. Most importantly to Lifestream, BellSouth's tactics make it virtually impossible for it to compete fairly, since as Lifestream has observed first hand, developers will not enter into agreements for cable and/or broadband services with another company if it means that prospective residents will be unable to obtain BellSouth's Telephone Service. Long term, this will reduce competition generally and the deployment of broadband with greater bandwidth in Florida, since BellSouth will use its market power in Telephone Service to push its other products rather compete and invest in upgrading its products.

6. BellSouth's lack of standing argument is equally without merit. Lifestream 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 (Fla. 2nd DCA 1981)("Agrico").

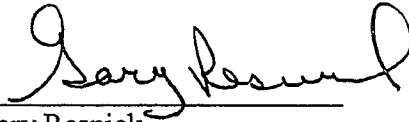
7. As stated in the Amended Complaint, Florida Statutes provide for causes of action and remedies against a telecommunications company's anticompetitive behavior. See Fl. Stat. §364.01(3)(the legislative intent for Commission powers includes "appropriate regulatory oversight to protect consumers and provide effective competition"); Fl. Stat. §364.01(g)("The Commission shall exercise its exclusive jurisdiction in order to: . . . ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior"); and Fl. Stat. §364.3381("the

Commission shall have continuing oversight jurisdiction over ... other similar anticompetitive behavior and may investigate, upon complaint or on its own motion, allegations of such practices”).

8. Moreover, Litestream satisfies the standing test prescribed in Agrico which requires: (1) an injury in fact; and (2) that the substantial injury is of a type or nature which the proceeding is designed to protect. The Amended Complaint clearly states the injuries that Litestream will suffer if the complaint is not addressed by the Commission and also cites to the above Florida Statutes that empower the Commission to protect Litestream from anticompetitive behavior by BellSouth. For example, “BellSouth’s actions have harmed Litestream by affecting Litestream’s substantial interest in being able to provide Broadband Services and/or Cable Services pursuant to an agreement with the Developer.” Amended Complaint, at ¶10. Accordingly, Litestream provided in its Amended Complaint that it has suffered an injury in fact. Further, the harm to Litestream’s competitive interests is of the type or nature which this proceeding before the Commission is designed to protect.

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

Respectfully submitted this January 12, 2007.

By: 

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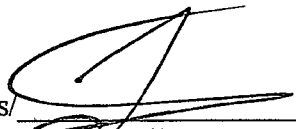
CERTIFICATE OF SERVICE

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 12th day of January, 2007, to the following:

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s/
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