

REQUEST FOR CHANGE TO AGENDA CONFERENCE  
HAND DELIVER

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Date of Request: 2/8/2007 Date of Agenda Conference: 2/13/2007 Item No. 6  
Docket No.: 060684-TP Brief Title: Complaint by Litestream  
Requested by:  Staff  Other Litestream (Petitioner)  
(Name)

Please attach a copy of the written documentation filed (IF OTHER)

STAFF's Recommendation to Executive Suite (IF OTHER)  Approve Request  Deny Request

**ACTION REQUESTED [see APM 2.11]**

- Defer Item to Agenda Scheduled Date: 4/10/2007
- Change Order of Item or Take Up at Time Certain
- Withdraw Item (not expected to return to Agenda)
- Late Filed Recommendation (must be filed no later than 3:00 p.m. on the date approved for late filing) **A copy of the front page of the recommendation must be provided to CCA by 12 noon on the regular filing date for use as a place-holder during agenda preparation.**
- Add Item to Published Agenda [see Section 120.525(2), F.S.] – Issue an ADDENDUM and give Legal NOTICE
- Add Emergency Item to Published Agenda [see Section 120.525 (3), F.S.] – Issue an ADDENDUM and Give Fair NOTICE

OMP \_\_\_\_\_  
 COM \_\_\_\_\_  
 CTR \_\_\_\_\_  
 ECR \_\_\_\_\_  
 OPR \_\_\_\_\_  
 OPC \_\_\_\_\_  
 RCA \_\_\_\_\_  
 SCR \_\_\_\_\_  
 SGA \_\_\_\_\_  
 SEC \_\_\_\_\_  
 OTH \_\_\_\_\_

Concise explanation, justification or comments (attach additional sheet if necessary):

On February 8, 2007, Litestream filed a Motion for Leave to File its Second Amended Complaint and Request for Deferral. Litestream states that deferral would be the most efficient use of the parties' and the Commission's time. Litestream represents that BellSouth does not object to deferral.

Signature (Technical Staff): Joe Burns

Initials (Division Director or Designee): [Signature]

Signature (Legal Staff): [Signature]

Initials (General Counsel or Designee): MSC

**EXECUTIVE DIRECTOR:**

Recommendation to the Chairman's Office

Initials: MAB

Comments:

Approve Request  Deny Request

Date: 2/8/07

**CHAIRMAN'S OFFICE:**

Initials: LPE / [Signature]

Approve Request  Deny Request

Date: 2/9/07

Executive Suite will send the original to the Division of Commission Clerk & Administrative Services and return copy to the requesting staff after the Chairman's Office takes action on this request. Requesting staff should distribute copies to the Division Directors (OPR & OCR) and Attorney assigned to the docket.

DOCUMENT NUMBER - DATE

01369 FEB-9 8

**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 8, 2007

**LITESTREAM HOLDINGS, LLC'S  
MOTION FOR LEAVE TO FILE SECOND  
AMENDED COMPLAINT AND TO DEFER HEARING**

Litestream Holdings, LLC ("Litestream") files this Motion For Leave to File its Second Amended Complaint against BellSouth Telecommunications, Inc.'s ("BellSouth") and prays and states as follows:

1. On October 17, 2006, Litestream filed a Complaint and Petition for Declaratory Relief ("Complaint") against BellSouth.
2. On, December 7, 2006, Litestream filed an Amended Complaint to clarify certain factual issues and to expand the relief requested.
3. Litestream now needs to further amend the Complaint for several reasons. First, there have been changes in relevant facts. At the time of filing of the Complaint and Amended Complaint, Litestream had not entered into an agreement with the developer of a particular community referenced in the Complaint, Glen St. Johns. In February 2007, Litestream entered into an agreement with the developer to provide Cable Service to this development on a bulk basis. Significantly, because of BellSouth's actions, the developer remains unwilling to agree to allow Litestream to provide its Broadband Service on a bulk or exclusive basis. However, Litestream will have a

permanent presence in the development, and thus, Litestream will be requesting and utilizing BellSouth's Telephone Service in the development and will be a customer of BellSouth.

4. In addition, Litestream desires to add new facts that have come to its attention. Since the filing of the Amended Complaint, Litestream learned that BellSouth forced another developer that has been in negotiations with Litestream for Cable and Broadband Services to certify that it had not entered into an agreement with another provide for voice or broadband service, thus depriving Litestream of the ability to enter into an agreement for Broadband Services.

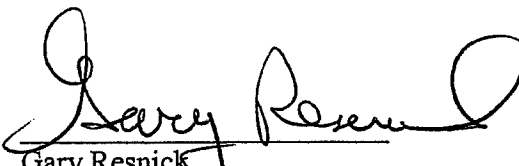
5. Attached please find the Second Amended Complaint Litestream seeks to file. Counsel has contacted counsel for BellSouth and informs the Commission that BellSouth has no objection to allowing Litestream to file the Second Amended Complaint. Moreover, no party would be negatively impacted by the Commission granting Litestream's request for leave to amend the Complaint.

6. There is currently a hearing scheduled on the proposed Staff Recommendation on Litestream's Amended Complaint, which includes a recommendation to maintain the docket open and allow Litestream to file an amended petition that sufficiently addresses standing. Allowing Litestream to file the Second Amended Complaint and deferring the hearing would be the most efficient use of the parties' and the Commission's valuable time and resources. Accordingly, Litestream respectfully requests that the Commission defer the hearing on this matter as well until it is appropriate to have a hearing on the Second Amended Complaint. Counsel for

Litestream has contacted counsel for BellSouth and informs the Commission that BellSouth has no objection to a deferral of the hearing.

**WHEREFORE,** Litestream respectfully requests that this Honorable Commission grants leave to file the Second Amended Complaint.

Respectfully submitted this February 8, 2007.

By: 

Gary Resnick  
(Florida Bar No. 54119)  
Frank A. Rullan  
(Florida Bar No. 150592)  
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Attorneys for Litestream Holdings, LLC

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Amend Complaint of Litestream Holdings, LLC been furnished by electronic mail and Federal Express this 8<sup>th</sup> day of February, 2007, to the following:

Patrick Wiggins, Supervising Attorney  
Dale Buys  
Jason Fudge  
Florida Public Service Commission  
Division of Legal Services  
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s/   
Frank A. Rullan



requesting such service, pursuant to Section 364.025(1), Florida Statutes. BellSouth is blatantly ignoring its carrier of last resort obligations when it threatens to deny landline Telephone Service to the development's homes if the developer selects Litestream, or another broadband and/or cable services provider.

Furthermore, BellSouth's practice of threatening to refuse to provide its Telephone Service if the developer enters into such an agreement is anticompetitive because it forecloses choice and directly hampers the ability of broadband and video providers to compete. Through action on this Complaint, the Commission should ensure that BellSouth's threats and illegal requirements conveyed to developers do not prevent Litestream from being able to compete fairly as a potential broadband and cable services provider in various developments in its service areas. Under Florida law, BellSouth may not refuse to provide landline Telephone Service to a development simply because the developer prefers a provider other than BellSouth for broadband service and/or video service. Litestream, therefore, respectfully requests that the Commission require BellSouth to cease and desist immediately from threatening not to install its telecommunications infrastructure and not to offer landline Telephone Service to a development if the developer decides to enter into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement, for broadband services and/or cable services with Litestream.

#### **PARTIES**

1. The party filing this Complaint is Litestream, which is a limited liability company organized and formed under the laws of Florida. Litestream's main office is located at 500 Australian Avenue South, Suite 120, West Palm Beach, FL 33401.

Litestream is a provider of cable television, cable modem broadband service, and other communications services including, but not limited to alarm monitoring services. Litestream possess cable franchises from St. Johns County and St. Lucie County, Florida.

2. This Complaint is filed against BellSouth, a corporation organized and formed under the laws of the State of Georgia. BellSouth's main office is located at 675 West Peachtree, Atlanta, Georgia 30375. BellSouth is an incumbent local exchange carrier ("ILEC") in Florida and provides the majority of its services to customers located in its traditional service territory. A copy of this Complaint was sent via certified mail to BellSouth's representative at the following address:

James Meza, III  
Sharon R. Liebman  
Nancy H. Sims  
BellSouth Telecommunications, Inc.  
150 So. Monroe Street  
Suite 400  
Tallahassee, FL 32301

3. All pleadings, notices and other documents directed to Litestream related to this proceeding should be provided to:

Gary Resnick, Esq.  
Frank A. Rullan, Esq.  
GrayRobinson, P.A.  
401 East Las Olas Blvd.  
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Ft. Lauderdale, FL 33301  
Tel. (954) 761-8111  
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gresnick@gray-robinson.com  
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## **JURISDICTION**

4. The Commission has jurisdiction over this Complaint pursuant to Chapters 120 and 364, Florida Statutes; and Chapters 25-22 and 28-106, Florida Administrative Code. Specifically, the Commission has jurisdiction over the claims asserted in the Complaint consistent with its authority over carrier of last resort obligations pursuant to Sections 364.03, 364.025(1), and 364.01(4)(a), Florida Statutes, which provides for the Commission to “[p]rotect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices;” Section 364.01, Florida Statutes, which gives the Commission authority to regulate telecommunications providers; Section 364.10(1), Florida Statutes, which prohibits a telecommunications company from subjecting any person or locality to any undue or unreasonable prejudice or disadvantage; and Sections 364.01(4)(g) and 364.3381(3), Florida Statutes, which gives the Commission jurisdiction over anticompetitive behavior.

## **BACKGROUND REGARDING BELLSOUTH’S ACTIONS THAT CONSTITUTE THE VIOLATIONS**

5. D. R. Horton, Inc.-Jacksonville (“Developer”) is a foreign corporation registered in Florida that owns and is in the process of developing certain real property commonly known as “Glen St. Johns” located in St. Johns County, Florida, consisting of approximately 495 single family residential homes (“Development”). The Developer desires to ensure that cable television services (“Cable Services”) and high speed Internet access services (hereinafter “Broadband Services”) are available to the residents purchasing the homes. The Developer and Lifestream have been negotiating an

agreement that would give Litestream the exclusive right to provide Cable Services and Broadband Services for a certain period of time to the Development's homes on a "bulk" basis, whereby the residents would pay for such services through their homeowners' dues. As an alternative, the Developer and Litestream have been considering an agreement that would provide Litestream with the right to provide Cable Services on a "bulk" basis, and a preferred right to market its Broadband Services to the residents whereby the residents could decide to subscribe to Litestream's Broadband Services and would pay Litestream directly. Either such agreement would allow the residents purchasing homes in the Development to obtain Cable Services at less than standard retail rates and would ensure access to Broadband Services. Litestream possesses a franchise from St. Johns County to construct and operate a cable system and to provide Cable Services in the Development. Litestream would not offer communications services, as defined in Section 364.025(6)(a)(3), Florida Statutes ("Communications Services"), to the Development. Rather, the Developer would need to obtain such services from BellSouth or another provider of such services. However, BellSouth is the only ILEC available to provide Communications Services and moreover, the Developer has determined that it wants BellSouth's Telephone Service for this Development.

6. BellSouth is the ILEC serving St. Johns County and specifically, is the carrier of last resort for the area of the Development. BellSouth also offers Direct Subscriber Line ("DSL") service to residents in the area. BellSouth's DSL Service often

competes with cable modem Broadband Service, including the Broadband Service Litestream would offer in the Development.<sup>1</sup>

7. BellSouth's representatives have threatened the Developer that BellSouth will not install its telecommunications facilities and will not provide Telephone Service to the Development's residents if the Developer exercises its right to enter into an exclusive marketing agreement, an exclusive service agreement, or a bulk service agreement (collectively "Agreement"), for Broadband Services and/or Cable Services with Litestream, or any provider for that matter other than BellSouth. An "exclusive marketing agreement" refers to an agreement whereby the Developer agrees not to allow other providers to market their services using the Developer's materials or facilities, including, for example, its sales center, and prohibits the Developer from marketing services of other providers. An "exclusive service agreement" refers to an agreement whereby the provider has the exclusive right to provide the service (to the extent authorized by applicable law<sup>2</sup>). A "bulk service agreement" refers to an agreement whereby the provider bills the Developer or homeowners' association for certain services provided to residents, and residents pay for such services through their homeowners' assessments. Upon information and belief, BellSouth's senior representatives confirmed in meetings with the Developer that it *may* refuse to provide Telephone Service if the Developer entered into any such Agreement.<sup>3</sup> More recently, BellSouth confirmed its

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<sup>1</sup> BellSouth may also be a competitor for video service. While BellSouth does not offer franchised Cable Services in the area, it apparently sells video services through a relationship with DirecTV, a direct broadcast satellite provider. Thus, BellSouth may seek to sell video services to this Development.

<sup>2</sup> For example, under federal law, an exclusive cable services agreement cannot prohibit a resident from obtaining video service from direct broadcast satellite providers.

<sup>3</sup> The facts in this Complaint should not be confused with the facts *In re: Complaint of the Florida Competitive Carriers Association Against BellSouth Telecommunications, Inc. and Request for Expedited*

position generally of requiring that developers commit, or actually certify in writing, that they have not entered and will not enter into any of the Agreements with another provider for Cable and/or Broadband Service before it will agree to install its telecommunications facilities and to provide Telephone Service.<sup>4</sup> In addition, on November 27, 2006, in a conference call with the Commission staff, BellSouth's counsel admitted that while BellSouth presently intended to install its facilities and to provide Telephone Service to this Development, BellSouth would not commit to install facilities and to provide Telephone Service if the Developer entered into an Agreement with Lifestream. It appears that before BellSouth will undertake work to prepare this Development for installation of its telecommunications facilities, BellSouth will require the Developer to agree that the Developer has not entered into, and does not plan to enter into, an exclusive marketing agreement, an exclusive services agreement, or a "bulk" service agreement with Lifestream or any other provider for voice, Broadband, and/or video services. It should be recognized that BellSouth does not object to such contracts in general. Upon information and belief, BellSouth has proposed that the Developer enter into an agreement that would give BellSouth a preferred or exclusive right to market its DSL Services to the Development's residents and potentially the exclusive right to provide

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*Relief*, Docket No. 020507-TL, which was ultimately dismissed by the Commission, Order No. PSC-06-0308 (April 20, 2006) (hereinafter "*FCCA Action*"). In *FCCA Action*, the factual situation was the opposite. BellSouth refused to provide DSL service to consumers who selected an alternative voice service provider. In this case, BellSouth is refusing to provide its Telephone Service to consumers who select an alternative Broadband Services provider.

<sup>4</sup> See Comments of BellSouth Telecommunications, Inc. Regarding Proposed Rule 25-4.804, *In re: Carrier-of-Last Resort; Multitenant Business and Residential Property*, Docket No. 060554-TL (October 5, 2006). See also Joint Filing By Verizon Florida Inc., Embarq Florida, Inc and BellSouth Telecommunications, Inc. of Proposed rule 25-4.084 and Intermodal Competition Report, *In re: Carrier-of-Last-Resort; Multitenant Business and Residential Property*, Docket No. 060554-TL (October 5, 2006)(proposing that factors the Commission should consider in a petition for relief from the carrier-of-last-resort obligation include "[w]hether the owner or developer has entered into an agreement with another provider of data services, video service or other substitute or similar service...." Proposed Rule 25-4.084(5)(b)).

video services, most likely through DirecTV's service. Thus, BellSouth is using its unique position as the carrier of last resort for Telephone Service to create an unfair advantage for itself over Lifestream for Broadband Services and video service.

8. The Developer was prepared to enter into an agreement with Lifestream pertaining to Lifestream's provision of Broadband Services and Cable Services in this Development. The agreement with Lifestream would not in any way prohibit BellSouth from installing its telecommunications facilities or from providing its Telephone Service in the Development. However, as a result of BellSouth's threat to refuse to install its telecommunications facilities and to refuse to provide Telephone Service, the Developer was hesitant to enter into an agreement with Lifestream for Broadband Service. The Developer and Lifestream concluded their negotiations and in February 2007, entered into an agreement whereby Lifestream will provide Cable Services to the residents on a "bulk" basis. Because of its concern that BellSouth will withhold its Telephone Service to the Development, the Developer would not agree to allow Lifestream to provide its Broadband Service to the residents on either a "bulk" or exclusive basis. While the Developer agreed to market Lifestream's Broadband Service to the residents, because of BellSouth's threat to withhold Telephone Service if it cannot sell its DSL Service to the residents, the Developer insisted that it retain the right to terminate its marketing support for Lifestream's Broadband Service. To provide its Cable and Broadband Services to this Development, Lifestream will be constructing and operating an equipment facility, known as a "headend," which will be a permanent facility in the Development. To operate its "headend," Lifestream will be requesting and purchasing BellSouth's

Telephone Service in the Development and thus, will be a customer of BellSouth's Telephone Service in the Development.

9. Finally, although BellSouth has requested the Commission to adopt a rule that would interpret Section 364.025(6)(d), Florida Statutes, as providing relief to its carrier of last resort obligations if a developer enters into a "bulk" or preferred Broadband Services agreement with a company other than BellSouth, the Commission has not adopted such a rule, nor determined that it would be consistent with the Statute to do so.<sup>5</sup> Moreover, to the best of Litestream's knowledge, BellSouth has not filed a request with the Commission to be relieved of its carrier of last resort obligations for this Development. Rather, BellSouth has merely ignored its carrier of last resort obligations without complying with the procedures mandated by Florida law.

10. The Developer has the authority under state and federal law to enter into an agreement with Litestream for Cable Services and Broadband Services to the Development. Litestream has the authority under its franchise with St. Johns County and applicable federal and state law to offer Cable Services on an exclusive bulk basis to the Development and to have preferred marketing rights for its Broadband Services. There are many reasons why the Developer would prefer Litestream's Broadband Services over BellSouth's DSL Services, not the least of which is that Litestream offers much faster download speeds. Similarly, there are many reasons why the Developer would prefer Litestream's franchised Cable Services over video service offered by BellSouth, which may require placing a satellite receiver on every home. 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.

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<sup>5</sup> *Id.*

The market to provide video and Broadband Services in new developments, such as the Development in the present case, is fairly competitive. However, Litestream will be unable to compete on fair terms if, as a result of BellSouth's threat to withhold Telephone Service, developers are unwilling to enter into a Cable Services and/or Broadband Services agreement with Litestream.

11. Moreover, in addition to this particular Development, it appears that BellSouth has established a general policy in Florida that it will not commit to construct facilities and to provide its Telephone Services in any new development that enters any of the Agreements with a BellSouth competitor. In addition, it is believed that BellSouth requires developers to certify that they have not entered into such Agreements, or to agree that if they do enter into such an Agreement, they will pay BellSouth certain costs for installing its facilities. BellSouth's actions affect Litestream's operations not only in the Development but in other new developments within Litestream's service areas where it may propose to offer its Broadband and/or Cable Services under such Agreements.

12. For example, on January 10, 2007, BellSouth sent a letter to another developer, Pride Home, requiring written agreement pertaining to services other than its Telephone Service before it will proceed to install its facilities and to provide its Telephone Service in such development. Specifically, BellSouth required this developer and any affiliated entity to confirm that they "have not entered into, and do not plan to enter into, an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement ... with another service provider for communications services, including any voice or data service." BellSouth acknowledged, however, that the developer did enter into or plans to enter into a bulk agreement for video service. See

Exhibit 1. Litestream has been negotiating with this developer to provide Cable and Broadband Services, but because of BellSouth's letter, the developer remains hesitant to enter into an agreement with Litestream that includes Broadband Services. BellSouth's anticompetitive conduct of threatening to withhold its Telephone Service has harmed Litestream with respect to this development.

13. Also, even when questioned 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 Cable and/or Broadband 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 service to coerce developers into entering exclusive agreements with BellSouth for video and broadband services.

14. Developers realize that persons purchasing new homes want the option of obtaining BellSouth's Telephone Service, which as the incumbent local exchange carrier, is the most well known Telephone Service provider in its service territory. In many cases, developers may have no alternatives to obtain Communications Services other than the ILEC. Thus, unless BellSouth is directed to cease and desist this inappropriate strong-arm tactic and to provide Telephone Service in accordance with Section 364.025(1), Florida Statutes, developers will remain hesitant to enter Agreements for Cable and/or Broadband Services with Litestream or will be forced to contract solely with BellSouth for a complete package of bundled services (i.e. Telephone, DSL, and video), as well as marketing rights, even though BellSouth's video and DSL products may be less desirable than those offered by Litestream. Either way, residents of new



developments will have fewer options for services. Furthermore, developers will be prevented from negotiating Agreements with a full range of providers to obtain the most cost-effective and appropriate services for their communities. Most importantly to Litestream, BellSouth's tactics make it virtually impossible for it to compete fairly. As Litestream has observed first hand, developers will not enter into agreements for Cable and/or Broadband Services with another company if it means that homeowners will be unable to obtain BellSouth's Telephone Service. Long term, this will reduce competition generally and slow the deployment of broadband with greater bandwidth in Florida, since BellSouth will use its market power in Telephone Service to push its DSL service rather than compete on fair terms and invest in upgrading its products.

#### STANDING

15. Litestream has standing to file this Complaint because it will be a customer of BellSouth's Telephone Service in the Development.

16. Furthermore, Litestream has standing to file this Complaint as a provider of Broadband Services and a competitor of BellSouth. Litestream has been harmed by BellSouth's anticompetitive actions. Preventing BellSouth's anticompetitive behavior and supporting the promotion and deployment of Broadband Services are precisely the interests the Commission is authorized to protect pursuant to Chapter 364. See Sections 364.10(1); 364.3381(3); 364.507(3), Florida Statutes. The 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.

## STATUTES BELLSOUTH IS VIOLATING

### I. **BellSouth's Refusal to Provide Telephone Service to a Development if the Developer Enters into an Exclusive Marketing, Exclusive Service, or Bulk Service Agreement with Lifestream for Broadband Services and/or Cable Services is a Breach of its Obligations as the Carrier of Last Resort, in Violation of Chapter 364, Florida Statutes.**

17. The carrier of last resort obligation in Florida requires BellSouth to provide basic local telecommunications service to all persons within its service area requesting such service. See Final Order Determining Appropriate Interim Universal Service/Carrier of Last Resort Mechanism, Order No. PSC-95-1592-FOF-TP, *In Re: Determination of Funding for Universal Service and Carrier of Last Resort Responsibilities*, Docket No. 95-0696-TP; Section 364.025(1), Florida Statutes ("Until January 1, 2009, each local exchange telecommunications company shall be required to furnish basic local exchange telecommunications service within a reasonable time period to any person requesting such service within the company's service territory."). See also 364.01(4)(a), Florida Statutes ("The commission shall exercise its exclusive jurisdiction in order to: (a) Protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices."). See also Section 364.03(3), Florida Statutes ("Every telecommunications company shall, upon reasonable notice, furnish to all person who may apply therefore and be reasonably entitled thereto suitable and proper telecommunications facilities and connections for telecommunications services and furnish telecommunications service as demanded upon terms to be approved by the commission.").

18. BellSouth, by refusing to provide Telephone Service to the Glen St. Johns Development, or to any new development if the developer selects Litestream or other BellSouth competitor to provide Broadband and/or Cable Services, is flagrantly breaching its statutory obligations as a carrier of last resort, in violation of Chapter 364. Litestream is not only a competitor of BellSouth, but in Glen St. Johns and other developments where it will be providing Cable Service, is a “person requesting such service” from BellSouth, and therefore has standing to complain about BellSouth’s carrier of last resort violations.

**II. BellSouth’s Refusal to Provide Telephone Service to a Development if the Developer Enters into an Exclusive Marketing, Exclusive Service, or Bulk Service Agreement with Litestream for Broadband and/or Cable Services is an Anticompetitive Practice and Inconsistent with Policy of Advancing the Deployment of Broadband in Violation of Chapter 364, Florida Statutes.**

19. Florida law prohibits BellSouth from engaging in an anticompetitive practice with respect to its provision of telecommunications services. See Section 364.01(4)(g). In addition, Section 364.10(1), Florida Statutes provides that a “telecommunications company may not give any undue or unreasonable preference or advantage to any person or locality or subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.” In the *FCCA Action*, BellSouth previously admitted that Section 364.10(1), Florida Statutes “may apply if BellSouth were to offer a voice line only to customers that purchased its FastAccess [DSL] Service.” *FCCA Action* at 2. This is what BellSouth is doing. BellSouth has subjected Litestream and its customers to unreasonable prejudice and disadvantage by refusing – or threatening to refuse – to provide its voice service to residents of developments that select Litestream’s Broadband Service as opposed to

BellSouth's DSL service. As a result, Lifestream has lost opportunities to provide its Broadband Services.

20. Section 364.3381(3), Florida Statutes gives the Commission continuing oversight jurisdiction over "anticompetitive behavior" and provides that the Commission may investigate allegations of such behavior upon complaint.

21. Finally, Section 364.507(3), Florida Statutes, sets forth a policy "to encourage competition among providers of telecommunications services to provider advanced telecommunications services, as such competition will accelerate the deployment" of Broadband Services. BellSouth's anticompetitive actions harm competition and if not checked by the Commission, will actually slow the development and deployment of Broadband Services.

22. In enforcing its statutory authority, it is well settled that the Commission has the authority to take action to effectuate the intent of the law.<sup>6</sup> Accordingly, it is the Commission's role to ensure that BellSouth does not engage in anticompetitive behavior in its provision of Telephone Service.

23. By refusing to sell Telephone Service to the residents of a development if the developer enters into an agreement with Lifestream to provide Cable Services and/or Broadband Service or gives Lifestream a preferred right to markets its Broadband Services, BellSouth is: (1) engaging in unjust and unreasonable practices; (2) discriminating against and prejudicing Lifestream, the developer and ultimately the residents for selecting Lifestream; (3) conferring unjust and unreasonable preferences on

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<sup>6</sup> See *Fogarty Bros. Transfer, Inc. v. Boyd*, 109 So.2d 883, 885 (Fla. 1959) ("In the exercise of the authority conferred upon it by state, the Commission may, within the limitations expressly or impliedly defined by organic or statutory law, exercise reasonable administration discretion and judgment to effectuate the intent of the law as it may legally be applied to varying conditions.")

other consumers and developers who do not enter into such agreements with providers other than BellSouth; and (4) engaging in anticompetitive behavior with respect to Litestream.

24. Accordingly, the Commission should find that BellSouth's refusal to provide Telephone Service to residents of a development if the developer enters into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement, for Broadband Services and/or Cable Services with Litestream is unjust, unreasonably discriminatory, prejudicial, and anticompetitive in violation of Sections 365.01(4)(g), 364.10, and 364.01(4), and inconsistent with Florida's policies under Section 364.507(3), Florida Statutes.

**COUNT ONE**  
**VIOLATION OF CARRIER OF LAST RESORT OBLIGATIONS**

25. Litestream incorporates paragraphs 1-24 of this Complaint as if fully set forth herein.

26. Litestream requests the Commission determine that:

(a) BellSouth must install its facilities in the Glen St. Johns Development and provide Telephone Service to the Development's residents, including Litestream, regardless of whether the Developer executes an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement, for Broadband Services and/or Cable Services with Litestream;

(b) BellSouth acts illegally when it threatens or states to a developer that it will not install communications facilities and will not provide its Telephone Service to the development if the developer executes an exclusive marketing agreement,

exclusive service agreement, or a bulk service agreement, for Broadband Services and/or Cable Services with Litestream;

(c) BellSouth acts illegally when it requires a developer to commit in writing that they have not and will not enter into an exclusive marketing agreement, exclusive service agreement or bulk service agreement with Litestream for Cable Services or Broadband Services before BellSouth will agree to install its facilities and to provide Communications Services to the development;

(d) BellSouth must cease and desist from asserting to developers that it will not provide Telephone Service to the development if the developer executes an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement, for non-Communications Services (Broadband Services and/or Cable Services) with Litestream.

**COUNT TWO  
ANTICOMPETITIVE PRACTICES**

27. Litestream incorporates paragraphs 1-26 of this Complaint as if fully set forth herein.

28. Litestream respectfully requests the Commission determine that:

(a) BellSouth's refusal to provide its Telephone Service to the Glen St. Johns Development, or to similarly situated developments, because the developer enters into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement, for Broadband Services and/or Cable Services with Litestream subjects Litestream to unreasonable prejudice and disadvantage in violation of Chapter 364, Florida Statutes;

(b) BellSouth must cease and desist from asserting to the Developer that it will not provide Telephone Service to the Development if the Developer enters into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement, for non-Communications Services (Broadband Services and/or Cable Services) with Litestream,

29. Litestream further requests that the Commission orders BellSouth to offer its Telephone Service to the Development, upon the Developer's request, even if the Developer enters into any of the Agreements with Litestream.

#### **MATERIAL FACTS IN DISPUTE**

30. Litestream does not believe that there are any material facts in dispute. The only material fact relevant to the Commission's determination is that BellSouth has threatened the Developer that it will not install its telecommunications facilities in the Development and will not offer its Telephone Service to Litestream or other persons in the Development if the Developer enters into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement, for non-Communications Services (Broadband Services and/or Cable Services) with Litestream.

31. The ultimate issue for the Commission to resolve is whether BellSouth's action in threatening not to install its telecommunications facilities and not to provide Telephone Service if the Developer, or a similarly situated developer, enters into any of the Agreements with Litestream constitutes a violation of Florida law.

#### **RELIEF REQUESTED**

32. Litestream respectfully requests that the Commission:

(a) Set this matter for a hearing, pursuant to Section 120.57(2), Florida Statutes, based upon briefs and oral arguments, as it appears that there are no material facts in dispute;

(b) In the alternative, should the Commission believe that material facts are in dispute, require that this matter be set for a Section 120.57(1), Florida Statute, formal proceeding;

(c) Order that, as the ILEC and the carrier of last resort, BellSouth has a duty, pursuant to Chapter 364, Florida Statutes, to provide Telephone Service to persons within the Development, or to persons in similarly situated developments, regardless of whether the developer enters into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement, for Broadband Services and/or Cable Services, with Litestream;

(d) Order that BellSouth's practice of threatening to refuse or refusing to provide Telephone Service to persons within the Development, or a similarly situated developments, if the developer enters into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement, for Broadband Services and/or Cable Services with Litestream, a BellSouth competitor that will not provide Communications Services to such development, subjects Litestream and other persons in the development to unreasonable prejudice and disadvantage and is anticompetitive in violation of Chapter 364, Florida Statutes;

(e) Order BellSouth to cease and desist from imposing any requirement for certifications on developers pertaining to services other than



“Communications Services” before it will proceed to install its facilities and to provide its Telephone Service in such developments in Florida.

(f) Order BellSouth to agree to install its telecommunications facilities and to offer its Telephone Service to persons in the Development, upon request, even if the Developer enters into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement, for Broadband Services and/or Cable Services with Litestream;

(g) Order BellSouth to cease and desist from threatening the Developer, or any other similarly situated developers, that it will not install its telecommunications infrastructure and not offer Telephone Service if the developer enters into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement, for non-Communications Services (Broadband Services and/or Cable Services) with Litestream;

(h) Order BellSouth to communicate with developers to whom it has already sent letters requiring such developers to agree that they have not entered into and do not plan on entering into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement, for non-Communications Services (Broadband Services and/or Cable Services) with Litestream that they should disregard and need not execute such agreement;

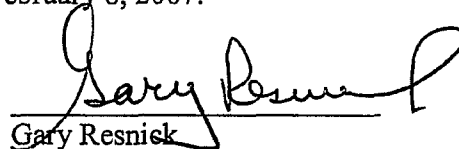
(i) Order BellSouth to communicate with developers that have already executed BellSouth’s letters that required such developers to agree that they have not entered into and do not plan on entering into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement, for non-Communications Services

(Broadband Services and/or Cable Services) with Litestream that BellSouth waives and will not seek to enforce such provisions of the agreement; and

(j) Order such other relief as the Commission may deem appropriate in this matter.

Respectfully submitted this February 8, 2007.

By:



Gary Resnick  
(Florida Bar No. 54119)  
Frank A. Rullan  
(Florida Bar No. 150592)  
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Attorneys for Litestream Holdings, LLC

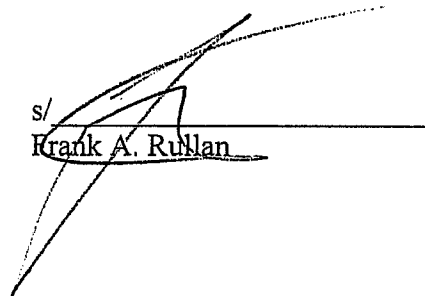
### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Second Amended Complaint Of Litestream Holdings, LLC Against Bellsouth Telecommunications, Inc. has been furnished by electronic mail and Federal Express this 8<sup>th</sup> day of February, 2007, to the following:

Patrick Wiggins, Supervising Attorney  
Dale Buys  
Jason Fudge  
Florida Public Service Commission  
Division of Legal Services  
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Atlanta, Georgia 30375  
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s/  
  
Frank A. Rullan

**EXHIBIT 1**

**BellSouth Telecommunications, Inc.**  
**Planning and Provisioning**  
3300 Okeechobee Rd  
Ft. Pierce, FL 34947

Office: 772-460-4417  
Fax: 772-466-5651

01/10/2007

Pride Home  
Attn: Omar Fonte  
12448 SW 127<sup>th</sup> Ave  
Miami, fl. 33186

**RE: Villa Vizcaya**

Dear Mr. Fonte:

This letter is a follow-up to conversations you have had with Peggy Bowman regarding BellSouth's service provisioning to the referenced project. Included in this letter is important information regarding BellSouth's requirements preparatory to our commencing work on this project. We thank you for considering BellSouth and look forward to working with your team.

Before BellSouth incurs costs to prepare the property for BellSouth service, we require an authorized representative of the developer or affiliated property owner to sign and return this letter. Once we receive the signed letter, BellSouth will commence planning and engineering activities when appropriate to serve the property. By signing this letter, you agree that:

- The developer or its affiliated property owner will grant to BellSouth, at no cost, non-exclusive easements for the placement of its cables and equipment within the property at mutually agreeable locations. To meet the estimated service dates of this project, easements must be granted and recorded by 02-15-2007.
- BellSouth will be provided with site plans and valid addresses for the project as soon as they are available. The plans will include lot lines and measurements.
- To the extent required by applicable laws and rules, or as otherwise agreed upon, the developer or its affiliated property owner will provide support structures necessary for the installation of BellSouth's facilities (for example, landscape and paving avoidance conduits, pullboxes, equipment space, backboards, electrical power, as applicable.)
- BellSouth will not be restricted in any way from providing any service that it desires to offer at the property.

The developer, any affiliated property owner or other affiliated party, and any homeowners or condominium association, have not entered into, and do not plan to enter into, an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement (i.e., charges for services provided to residents are collected through rent, fees, dues, or other similar mechanism), with another service provider for communications services, including any voice or data service. Pride Homes and Villa Vizcaya Homeowner's Association has entered into or plans to enter into a Bulk agreement for video service.

In addition, if Pride Homes or any affiliated party, any builder, or homeowners or condominium association enters into an exclusive marketing agreement, exclusive service agreement, or a bulk service agreement (as defined above) with another service provider for communications services, including any voice or data service, within 18 months of the date of first occupancy, Pride Homes will be responsible to BellSouth for the then un-recovered costs associated with the engineering and installation of the initial facilities.

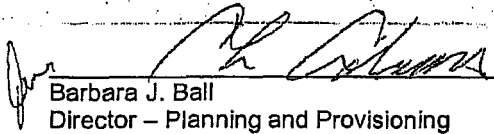
Please sign where indicated below and return the signed letter to Peggy Bowman by 2-15-2007. By signing this letter, you agree that, if BellSouth proceeds with engineering and construction work and ultimately does not provide service to residents due to any of the conditions above not being met, or other conditions that limit BellSouth's ability to provide service, then you will reimburse BellSouth for the costs of such work. This cost recovery would be in addition to any other remedies available to BellSouth. You will promptly inform BellSouth if the conditions are not met or of any limiting conditions.

The person signing below must be a representative who is authorized to sign for your company and by signing below represents that he or she has that authority.

Thank you for choosing BellSouth. If you have any questions, please contact the engineer Peggy Bowman at 772-460-4417.

Sincerely,

BellSouth Telecommunications, Inc.

  
Barbara J. Ball  
Director - Planning and Provisioning

Accepted and Agreed By:

By: Peggy Bowman 1/10/2007  
(Authorized Representative)

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_