

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: February 1, 2007

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Fudge)
Division of Competitive Markets & Enforcement (Buys, Kennedy)

RE: Docket No. 060684-TP – Complaint and petition for declaratory relief against BellSouth Telecommunications, Inc. for refusal to provide telephone service to a new development, by Litestream Holdings, LLC.

AGENDA: 2/13/07 – Regular Agenda – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\060684.RCM.DOC

Case Background

On October 17, 2006, Litestream Holdings, LLC (Litestream) filed a complaint for declaratory relief against BellSouth Telecommunications, Inc. (BellSouth). In the complaint Litestream alleges that BellSouth has threatened to “refuse to provide its telephone service to a new development if the developer enters into an agreement with Litestream to market Litestream’s cable modem broadband services on an exclusive basis to residents or an agreement giving Litestream the exclusive right to provide cable television and broadband services to the development.”

On October 27, 2006, BellSouth filed an unopposed motion for an extension of time until November 17, 2006, in which to file its response. By Order No. PSC-06-0936-PCO-TL, issued

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November 7, 2006, BellSouth was given until November 17, 2006, in which to file its response. On November 17, BellSouth filed its response.

On December 7, 2006, Litestream filed a Motion to Amend Complaint and Opposition to Request to Dismiss. The Motion to Amend Complaint was granted by Order No. PSC-06-1033-PCO-TP, on December 14, 2006. On January 4, 2007, BellSouth filed its Response to Litestream's Amended Complaint. On January 12, 2007, Litestream responded to BellSouth's assertions of affirmative defenses.

During its 1995 session, the Legislature created Section 364.025, Florida Statutes, Universal Services. At the time, Section 364.025(1), Florida Statutes, provided in part:

It is the intent of the Legislature that universal service objectives be maintained after the local exchange market is opened to competitively provided services. It is also the intent of the Legislature that during this transition period the ubiquitous nature of the local exchange telecommunications companies be used to satisfy these objectives. For a period of 4 years after the effective date of this section, 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.

Section 364.025, Florida Statutes, has been amended several times since its 1995 adoption by the Legislature. Each time the carrier of last resort obligation has neared expiration, the Legislature has amended the statute, extending the date on which the carrier of last resort obligation would sunset.

In 2006, the Legislature amended Section 364.025, Florida Statutes, to define the conditions under which an incumbent local exchange company would not be required to serve as carrier of last resort for certain multitenant business or residential properties. Importantly, the carrier of last resort obligation was, in all other respects, retained by the Legislature.

Discussion of Issues

Issue 1: Should the petition for declaratory relief be granted?

Recommendation: No, the Petition should be dismissed without prejudice to sufficiently plead standing. **(FUDGE)**

Staff Analysis:

Litestream's Petition

BellSouth is the carrier of last resort (COLR) in St. Johns County for the development known as Glen St. Johns (Development) being developed by D.R. Horton, Inc.-Jacksonville (Developer). Litestream alleges that BellSouth has refused to install telecommunications facilities and will not provide Telephone Service to the Development if the Developer enters into an exclusive marketing agreement,¹ an exclusive service agreement,² or a bulk services agreement,³ for Broadband Services and/or Cable Services with any provider other than BellSouth (collectively referred to as "Agreements"). Litestream alleges that BellSouth's actions have interfered with the Developer's right to contract with the Broadband Services and /or Cable Services provider of its choice.

In Count 1, Litestream contends that the carrier of last resort obligation requires Bellsouth to provide basic local telecommunications service to all persons within its service area. See Order No. PSC-95-1592-FO-TP, issued, in Docket No. 950696-TP; Sections 364.025(1), 364.03, and 364.01(4)(a), Florida Statutes (these statutes discuss the Commission's duty to ensure that basic local telecommunications services are available to all consumers). In addition, Count 2 argues that BellSouth's refusal to provide telephone services to the Development if the Developer enters into an Agreement with Litestream is unjust, unreasonably discriminatory, and anticompetitive in violation of Chapter 364, Florida Statutes.

BellSouth's Response

BellSouth claims that the complaint is moot. BellSouth states that it has never threatened to deny service but rather, has in fact advised Litestream and Developer of its intent to provide service to the Development. BellSouth also disputes that Litestream has standing under the COLR statute to bring a claim for relief. Next, BellSouth denies that the Commission has jurisdiction over the claims asserted in Litestream's complaint. Finally, BellSouth addresses each paragraph of the Complaint and disputes several assertions made therein.

¹ An "exclusive marketing agreement" is an agreement whereby the Developer agrees not to allow other providers to market their services using the Developer's materials or facilities, and prohibits the Developer from marketing services of other providers.

² An "exclusive service agreement" is an agreement whereby the provider has the exclusive right to provide the service to the extent authorized by law.

³ A "bulk services agreement" is an agreement whereby the provider bills the Developer or homeowner's association for certain services provided to residents, and residents pay for such services through their homeowners' assessments.

Opposition to Request to Dismiss

Litestream responds that, during a conference call between staff, Litestream, and BellSouth, BellSouth stated that it did not know if it would provide telephone service if the developer enters into an agreement with Litestream. Therefore, Litestream contends that it is uncertain whether BellSouth will fulfill its carrier of last resort obligation to residents of Glen St. Johns if the developer signs an agreement for cable and/or broadband services with Litestream.

Amended Complaint

In the Amended Complaint, Litestream alleges that BellSouth has a general policy of withholding its commitment to construct facilities or to provide telephone services to developments that enter into Agreements with competitors. Litestream argues that this policy affects its operations not only in the Development, but also in any development where it seeks to offer its cable or broadband and cable service. Litestream asserts that this policy makes developers hesitant to enter into agreements for cable or broadband and cable service; or requires developers to contract solely with BellSouth for bundled services (i.e. telephone, DSL, and video). Litestream contends that this will reduce competition generally and slow the deployment of broadband with greater bandwidth in Florida.

Litestream seeks a declaration that BellSouth is required, pursuant to section 364.025, Florida Statutes, "to provide telephone service to the development, or to a similarly situated development, 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, a BellSouth competitor that will not provide Communications Services to such development." Litestream also seeks a declaration that BellSouth's practice of threatening to refuse, or refusing, to provide telephone service if a developer enters into an Agreement for cable or broadband and cable services is unjust, unreasonably discriminatory, prejudicial and anticompetitive in violation of Chapter 364, Florida Statutes.

Finally, Litestream requests that this Commission order 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.

BellSouth's Response to Amended Complaint

BellSouth states that it intends to provide telecommunications services to the residents of the Development, so there is no issue in dispute and the Amended Complaint should be dismissed. BellSouth also asserts that Litestream lacks standing because there is "no allegation that BellSouth has refused to provide service to Litestream (or, for that matter, to any customer requesting service)." BellSouth proceeds to either admit or deny each paragraph in the Amended Complaint based on its understanding of the facts and the law. BellSouth concludes by denying that there are no material facts in dispute.

Litestream Response to BellSouth's Assertion of Affirmative Defenses

On January 12, 2007, Litestream filed a response to BellSouth's Assertion of Affirmative Defenses claiming they are without merit. Litestream again asserts that during a conference call BellSouth did not know if it would provide telephone service if the developer enters into an agreement with Litestream. Therefore, Litestream contends that it is uncertain whether BellSouth will fulfill its carrier of last resort obligation to residents of Glen St. Johns if the developer signs an agreement for cable and/or broadband services with Litestream. Litestream states that Chapter 364, Florida Statutes, provides for causes of action and remedies against a telecommunications company's anticompetitive behavior. See §§ 364.01, and 364.3381, Florida Statutes. Next, Litestream asserts that it meets the standing requirements under *Agrico Chemical Co. v. Dept. of Environmental Reg.*, 406 So. 2d 478 (Fla. 2d DCA 1981), in that it has suffered an injury in fact and that the injury is of a type or nature which the proceeding is designed to protect. Litestream states that "BellSouth's actions have harmed Litestream by affecting Litestream's substantial interest in being able to provide Broadband and/or Cable Services pursuant to an agreement with the Developer." In addition, "the harm to Litestream's competitive interests is of the type or nature which this proceeding before the Commission is designed to protect."

Staff Analysis

BellSouth raises the affirmative defense of mootness by asserting that it intends to provide service to the Development. However, an affirmative defense may only serve as a basis for a motion to dismiss if the defense appears within the four corners of the complaint. *Value rent-A-Car, Inc. v. Grace*, 794 So. 2d 619, 620 (Fla. 2d DCA 2001), citing *Randles v. Moore*, 780 So. 2d 158 (Fla. 2d DCA 2001); see also *Hayward & Assocs. v. Hoffman*, 826 So. 2d 332 (Fla. 2d DCA 2002)(finding error for trial court to go beyond the four corners of the complaint to consider the affirmative defense of res judicata.). Based on the Petition filed in this case, whether BellSouth has agreed to provide service to the Development remains a disputed issue of material fact to be decided by this Commission. However, before this matter should be set for a hearing under 120.57, Florida Statutes, the Commission must determine the sufficiency of Litestream's petition.

TEST FOR SUFFICIENCY OF PETITION

To meet the standard for a valid petition under Rule 28-106.201(2), Florida Administrative Code, a petitioner must explain how the petitioner's substantial interest will be affected by the agency determination. "Before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him 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." *Agrico*, 406 So. 2d at 482.

The first cause of action raised by Litestream is BellSouth's alleged violation of its COLR obligation. Staff agrees that BellSouth's actions, if true, would result in substantial injury

to both the Developer and residents of the subdivision, which Section 364.025, Florida Statutes, is designed to protect. However, staff can find no support for the proposition that a competitive broadband/video provider can allege injury on behalf of a potential voice customer. Moreover, Litestream has not alleged that it represents the interests of the Developer or residents of the subdivision. Consequently, staff believes that Litestream lacks standing to seek compliance of BellSouth's COLR obligation.

The next cause of action is based on BellSouth's alleged unjust, unreasonably discriminatory and anticompetitive practices in violation of Chapter 364, Florida Statutes. Specifically, BellSouth's refusal to provide telephone service to residents of the 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. Litestream contends that this practice creates an unfair advantage for BellSouth and makes developers reluctant to sign such agreements. While staff has concerns about the allegations raised by Litestream, Litestream has failed to explain how its substantial interests as a broadband/video provider are within the zone of interest to be protected by Chapter 364, Florida Statutes. *See* 364.01(3), Florida Statutes, encouraging the competitive provision of *telecommunications services*; 364.01(4)(b), Florida Statutes, encouraging competition through flexible regulatory treatment among *providers of telecommunications service*; 364.01(4)(g), ensuring that all *providers of telecommunications services* are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint". Nor is the injury alleged within the same type of anticompetitive behavior enumerated in the statute cited by Litestream. *See* 364.3381(3), Florida Statutes, which provides that the "Commission shall have continuing oversight jurisdiction over cross-subsidization, predatory pricing, or other similar anticompetitive behavior . . . and may investigate allegations of such practices." *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1089 (Fla. 2005)(the principal of *ejusdem generis* provides that "where general words follow an enumeration of specific words, the general words are construed as applying to the same kind or class as those that are specifically mentioned").

As to Count 1, Litestream has failed to sufficiently allege standing to enforce BellSouth's COLR obligation. As to Count 2, Litestream has failed to sufficiently allege that its interests as a broadband/video provider are designed to be protected by Chapter 364.⁴ Therefore, staff recommends that the Petition be dismissed without prejudice. *See* Rule 28-106.201, Florida Administrative Code, which provides that "dismissal of a petition, shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured."

⁴ While Litestream's Complaint was styled as a Petition for Declaratory Relief, it was not filed as a Request for a Declaratory Statement under Rule 28-105.001, Florida Administrative Code. Nevertheless, had Litestream requested a Declaratory Statement based on the facts alleged in its Petition, such a request would be improper. *See* Rule 28-105.001, Florida Administrative Code, stating that "[a] declaratory statement is not the appropriate means for determining the conduct of another person or for obtaining a policy statement of general applicability from an agency." *Regal Kitchens, Inc. v. Fla. Dept. of Rev.* 641 So. 2d 158, 162 (Fla. 1st DCA 1994)(stating that "an administrative agency may not use a declaratory statement as a vehicle for the adoption of broad agency policy or to provide statutory or rule interpretations that apply to an entire class of persons").

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Issue 2: Should this docket be closed?

Recommendation: No, this docket should remain open pending the filing of a petition that sufficiently alleges standing as discussed in Issue 1. If Litestream fails to file an amended petition within 30 days of the date of the Order, this docket should be closed administratively. **(FUDGE)**

Staff Analysis: This docket should remain open to allow Litestream to address the deficiencies in its pleading as discussed in Issue 1. If Litestream fails to file an amended petition within 30 days of the date of the Order, this docket should be closed administratively.