



Public Service Commission

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RECORDS AND REPORTING

DATE: JANUARY 20, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BY *WJW*)

FROM: DIVISION OF COMMUNICATIONS (WILLIAMS *WJW*)
DIVISION OF LEGAL SERVICES (KEATING *WJW* PEÑA *WMP*)

RE: DOCKET NO. 980918-TC - APPLICATION FOR CERTIFICATE TO PROVIDE PAY TELEPHONE SERVICE BY FLORIDA Billsouth TELEPHONE COMPANY

AGENDA: 2/1/00 - REGULAR AGENDA - POST-HEARING DECISION - PARTICIPATION LIMITED TO COMMISSIONERS AND STAFF

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\CMU\WP\980918FR.RCM

CASE BACKGROUND

On July 21, 1998, Florida Billsouth Telephone Company (Billsouth), filed an application to provide pay telephone services (PATS) in Florida. Billsouth received authorization from the Secretary of State to conduct business as a registered corporation in the state on June 29, 1998.

On July 29, 1998, the Commission received a courtesy copy of correspondence from BellSouth Telecommunications, Inc. (BellSouth) to Billsouth. (Attachment A, pp 5,6.) In the correspondence, BellSouth asserted that Billsouth's name is "confusingly similar" to its registered trade name and demanded that Billsouth discontinue using the similar name. BellSouth stated that by copy of the letter to the Commission, BellSouth was requesting that the application be denied. Thereafter, by Order No. PSC-98-1751-PCO-TC, issued on December 22, 1998, BellSouth's Petition to Intervene in this proceeding was granted.

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PSC-RECORDS/REPORTING

At the Commission's December 1, 1998, Agenda Conference, the Commission decided on its own motion to set this item for hearing. Accordingly, an administrative hearing was convened in this matter on March 17, 1999. Due to unforeseen circumstances, however, Billsouth's representative was unable to attend, and, therefore, the hearing was continued. This matter was then set for an administrative hearing on June 28, 1999.

On June 25, 1999, the Commission was notified that Billsouth's representative would be unable to attend the June 28, 1999, hearing due to unavoidable circumstances of an extreme nature. Therefore, the June 28, 1999, hearing was also continued to a later date, by Order No. PSC-99-1260-PCO-TP, issued June 29, 1999. By that Order, however, the prehearing officer emphasized that no further requests for continuance would be granted. On November 29, 1999, the hearing was again convened. Mr. Pelletier, Billsouth's representative did not attend or otherwise participate, and failed to provide any explanation for his absence. Therefore, the testimony of all of the witnesses was entered into the record. Cross-examination of the witnesses was waived by all participants, and after some discussion of the briefing schedule, the hearing was adjourned.

This is staff's recommendation based on the record of this proceeding.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant Florida Billsouth Telephone Company an application for a certificate to provide pay telephone service in Florida?

RECOMMENDATION: No. Granting Mr. Pelletier's application is not in the public interest in accordance with Rule 25-24.511(4), Florida Administrative Code. **(KEATING, PEÑA, WILLIAMS)**

POSITIONS OF THE PARTIES:

Billsouth

Yes. Florida Billsouth Telephone Company believes that the name "Florida Billsouth Telephone Company" is not against the public interest, of BellSouth. The name is not confusingly or similar to "BellSouth."

BellSouth

BellSouth believes that the name "Billsouth" is against the public interest. The name is confusingly similar to BellSouth's trademarked name and likely to mislead the public. This Commission should not grant a certificate to the company using the name "Billsouth".

STAFF ANALYSIS:

Billsouth's witness Pelletier argues that he should be allowed to obtain a certificate in the name of Florida Billsouth Telephone Company because he intends to provide better, cheaper, cleaner services, with 24-hour repair. Witness Pelletier maintains that the Billsouth name is very different from BellSouth's name and that he does not believe that any billing or customer confusion can possibly result if he is certificated in this name. He emphasizes that his company only provides pay telephones; thus, he does not believe any billing confusion could occur. (TR 7-8)

Witness Pelletier further asserts that his company has the resources to operate in Florida and he looks forward to expanding into Tampa and Orlando. (TR 8-9)

BellSouth witness Evans asserts that customer confusion could occur if Billsouth is certificated, because the names Billsouth and BellSouth are confusingly similar. (TR 11) Witness Evans explains that by using the trademark infringement test applied by federal courts, it is clear that the name Billsouth is problematic. (TR 11) The witness provided the following outline of the trademark infringement test:

1. The type of trademark sought to be protected - is it strong and highly protectable or weak?
2. Similarity of the marks in sight, sound, meaning and overall commercial impression.
3. Similarity of the products and services on which the marks are used.
4. Identity of retail outlets and purchasers.
5. Similarity of advertising media.
6. Defendant's intent.

7. Actual confusion.

(TR 11-12) The witness maintains that each of these factors are present in this case with the Billsouth name. Witness Evans further argues that the Billsouth name would clearly confuse Florida customers and should not be allowed.

Applying the trademark infringement test, witness Evans explains that the BellSouth name and BELL marks have been used since 1879, and have been in widespread use throughout Florida and the rest of the country ever since. (TR 13) The witness emphasizes that BellSouth spends quite a large amount of money on advertising and marketing the BellSouth brand. As a result, the witness maintains, the BellSouth mark and name are well-known, and as such, are considered a strong mark, deserving of protection.

Regarding the similarity between the two names and marks, witness Evans explains that one must examine the overall impression of the names and marks. The witness contends that on pay telephones, the names Billsouth and BellSouth appear "substantially identical" and they sound very much the same. (TR 14) The witness notes that the BellSouth name is the anchor of many BellSouth Corporation subsidiaries, including BellSouth Mobility, BellSouth Telecommunications, and BellSouth Advertising and Publishing. The witness maintains that regardless of what other words may be attached, customers focus on the BellSouth name when using the product. (TR 14) The witness argues that, similarly, customers will focus on the Billsouth name, even if the entire name, Florida Billsouth Telephone Company, is placed on the pay telephones. Thus, the witness believes that it is inevitable that customers will be confused or misled to believe that BellSouth is the pay telephone provider, when it is actually Billsouth. (TR 14)

As for the similarity of products, witness Evans notes that BellSouth also provides pay telephone services, which is what Billsouth seeks certification to provide. Likewise, witness Evans believes that the purchasers and outlets will be identical. (TR 14-15)

As for similarity of advertising, the witness concedes that she is unaware how Billsouth proposes to advertise, but she emphasizes that BellSouth advertises in all media. Therefore, the witness believes that overlap is inevitable. (TR 15)

Regarding intent, the witness refers to her exhibits in this case, Composite Hearing Exhibit 1, which includes a newspaper article and a videotape of a television interview of Mr. Pelletier.

(TR 16) Witness Evans explains that in the article, Mr. Pelletier explains that he intends to use the BellSouth Bell logo, but will make it larger. The witness also emphasizes that Mr. Pelletier indicates in the article that he will paint his trucks with blue and yellow stripes to look like BellSouth's trucks. (TR 16) Witness Evans adds that in the television interview, Mr. Pelletier even offered to sell the Billsouth mark to BellSouth. The witness contends that this evidence clearly indicates that Mr. Pelletier intends to create customer confusion in an effort to garner more business for his pay telephone services. (TR 16)

As for the final factor, witness Evans explains that BellSouth cannot, and need not, demonstrate that actual confusion has occurred, because Mr. Pelletier has not yet begun using the Billsouth name and mark. (TR 16)

Witness Evans also addresses the issue of whether the question of the Billsouth name is a matter for this Commission to address or the federal court. Witness Evans maintains that if the name is approved by this Commission, BellSouth will take whatever legal steps it may deem necessary at that time. (TR 12) The witness explains, however, that BellSouth believes the Commission has a mandate to protect Florida consumers, and

. . . In that sense, the Commission has the same basic legal mandate as the court in a trademark infringement case - to protect consumers from being confused as to the source of the goods and services they are purchasing.

(TR 13)

The witness adds that BellSouth has successfully prevented others from using confusingly similar names and marks by obtaining orders from the Trademark Trial and Appeal Board and the U.S. District Court for the Northern District of Georgia, as well as consent judgments. The names that were enjoined in these cases were Bel Bel-tronics, MicroBell, All Florida Bell, Baby Bell, and Ma and Pa Bell. (TR 17-18)

Staff's Analysis and Recommendation

Rule 25-24.511(4), Florida Administrative Code, states, in pertinent part:

A certificate will be granted
if the Commission determines
that grant of the application
is in the public interest.

Based on the evidence presented in this case, as well as Mr. Pelletier's conduct in failing to appear for the hearing, failing to provide an explanation for his absence from the hearing, and failing to comply with the Order Establishing Procedure for this case, Order No. PSC-99-0377-PCO-TC, issued February 22, 1999, staff recommends that the Commission deny Mr. Pelletier's application for a pay telephone certificate in the name of Florida Billsouth Telephone Company. Staff does not believe that granting Mr. Pelletier a certificate is in the public interest in accordance with Rule 25-24.511(4), Florida Administrative Code, because Mr. Pelletier has demonstrated an inability to comply with Commission orders, rules, and procedures. Staff also believes the use of the name Billsouth is confusingly similar to the name BellSouth, and that to grant a certificate in the Billsouth name would actually promote confusion for Florida pay telephone customers, as well as acquiesce to a marketing practice that staff believes is contrary to Section 364.01(4)(g), Florida Statutes. Section 364.01(4)(g), Florida Statutes, states

The Commission shall exercise its exclusive jurisdiction in order to:

(g) Ensure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior and eliminating unnecessary regulatory restraint.

Regarding Mr. Pelletier's ability to comply with the Commission's orders, rules, and procedures, staff emphasizes that the record of the case clearly reflects Mr. Pelletier's unwillingness to participate in the hearing process and refusal to appear for the hearing. The hearing date for this matter was changed twice to accommodate Mr. Pelletier's circumstances; however, he still failed to appear on the date the hearing was finally set. To date, he has not filed a post-hearing brief in this case. These actions demonstrate Mr. Pelletier's inability to comply with the Commission's orders, rules, and procedures. In view of this apparent inability, staff believes that it would not be in the public interest to grant Mr. Pelletier a certificate.

Staff is also concerned that the "Billsouth" name has the obvious, and the record indicates intended, potential for customer confusion. Witness Evans has shown that the name and mark used by Billsouth will be substantially similar to the BellSouth name and mark. In addition, witness Evans has shown that Mr. Pelletier intends for his company's name and mark to be confusingly similar to BellSouth. Staff believes that the record clearly demonstrates that certification under the name Billsouth will not be in the public interest.

Furthermore, staff believes that the record demonstrates that use of the Billsouth name and mark, as the record demonstrates Mr. Pelletier intends, is an anticompetitive act contrary to Section 364.01(4)(g), Florida Statutes. The record shows the Mr. Pelletier intends to use a name and mark similar to BellSouth's in order to obtain customers for his pay telephone services. Staff believes that this falls within the scope of an anticompetitive act prohibited by Section 364.01(4)(g), Florida Statutes. Therefore, because it would be violative of Section 364.01(4)(g), Florida Statutes, staff also believes it is not in the public interest under Rule 25-24.511(4), Florida Administrative Code, to grant Mr. Pelletier a certificate in this name.

Staff notes that at the hearing, certain Commissioners raised the issue of the Commission's jurisdiction to deny an application based upon an inappropriate name. The case of KTNT Communications, Inc. d/b/a It Doesn't Matter d/b/a I Don't Care (the Company), addressed by the Commission in Docket No. 970109-TI was referenced. Staff emphasizes that in that case, the Commission determined, after hearing, that the name requested by the Company could not "rob customers of their right to choose an operator services provider," because by virtue of using either of the phrase "I don't know" or "I don't care," the customer was demonstrating that he had relinquished his right to choose. There was no evidence that customers had or would be confused. There was also no evidence that the name could be confused with another company. In that proceeding, KTNT also assured the Commission that it would make every effort to ensure that customers would not be confused, by requiring the operator to notify customers that there was actually a company by that name. The Commission accepted these assurances by KTNT, and emphasized that it would revisit its decision should KTNT fail to act accordingly. Order No. PSC-98-1272-FOF-TI, issued September 28, 1998.

This case is, however, different from the KTNT case. Here, there is clear evidence that Mr. Pelletier intends to confuse customers with his company's name and logo. In addition, the name

and logo are constructed to actually obtain customers by banking on the customer recognition associated with another company's name and mark. As for Mr. Pelletier's assertions that customer confusion will not occur, because he will be providing pay telephone services, staff emphasizes that if Billsouth becomes a certified pay telephone provider, BellSouth, as the incumbent LEC, will on some occasions have to bill for Billsouth. Thus, customer confusion is quite possible.

Furthermore, while staff acknowledges that the Commission is not charged with implementing the Florida Deceptive and Unfair Trade Practices Act, Section 501.204, Florida Statutes, or the Federal Trade Commission Act, 15 USC § 45, staff does agree with BellSouth's witness Evans that the Commission may use the trademark infringement test as a guideline in reaching its decision on the propriety of approving a pay telephone certificate in the name of Billsouth. The purpose of using the trademark test is not to attempt to enforce unfair trade practice laws, but, instead, to gauge the likelihood of customer confusion and anticompetitive behavior by one company against the other. Using the trademark infringement test, staff emphasizes that the likelihood that customer confusion will result from the use of the Billsouth name is obvious. The pay telephone certification process is in place to give the Commission the opportunity to consider the public interest in granting a certificate and to address situations such as this. Because it is within the Commission's jurisdiction to protect the public from confusion propounded by a telecommunications company seeking certification in Florida, staff believes that it is within the Commission's jurisdiction to determine that granting a certificate in the name of Billsouth is not in the public interest.

Based on the foregoing, staff recommends that the Commission deny Mr. Javier Pelletier's application for a pay telephone certificate in the name of Florida Billsouth Telephone Company. Granting Mr. Pelletier's application is not in the public interest in accordance with Rule 25-24.511(4), Florida Administrative Code.

DOCKET NO. 980918-TC
DATE: JANUARY 20, 2000

ISSUE 2: Should this docket be closed?

RECOMMENDATION: Yes. If the Commission approves staff's recommendation in Issue 1, no further action remains to be taken. This Docket may, therefore, be closed. **(KEATING)**

STAFF ANALYSIS: If the Commission approves staff's recommendation in Issue 1, no further action remains to be taken. This Docket may, therefore, be closed.