

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for
certificate to provide pay
telephone service by Florida
Billsouth Telephone Company.

DOCKET NO. 980918-TC
ORDER NO. PSC-00-0351-FOF-TC
ISSUED: February 21, 2000

The following Commissioners participated in the disposition of
this matter:

JOE GARCIA, Chairman
J. TERRY DEASON
SUSAN F. CLARK
E. LEON JACOBS, JR.

APPEARANCES:

Michael P. Goggin, Esquire, 150 West Flagler, Suite 1910,
Miami, Florida 33130.

On behalf of BellSouth Telecommunications, Inc.

Beth Keating, Esquire, 2540 Shumard Oak Boulevard,
Tallahassee, Florida 32399-0850.

On behalf of Commission staff.

FINAL ORDER
DENYING APPLICATION FOR CERTIFICATE TO PROVIDE
PAY TELEPHONE SERVICE

BY THE COMMISSION:

I.

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, we received a courtesy copy of correspondence from BellSouth Telecommunications, Inc. (BellSouth) to Billsouth. In the correspondence, BellSouth asserted that

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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 us, 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.

At our December 1, 1998, Agenda Conference, we decided on our 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, we were 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 Order sets forth our decision on Billsouth's application for a pay telephone certificate of public convenience and necessity.

II. BILLSOUTH'S APPLICATION FOR A CERTIFICATE

Billsouth's witness Pelletier argues in his prefiled testimony 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.

Witness Pelletier further asserts that his company has the resources to operate in Florida and he looks forward to expanding into Tampa and Orlando.

BellSouth witness Evans asserts that customer confusion could occur if Billsouth is certificated, because the names Billsouth and BellSouth are confusingly similar. Witness Evans explains that by using the trademark infringement test applied by federal courts, it is clear that the name Billsouth is problematic. 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.

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 by us.

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. 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 that is 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. 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. 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.

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.

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.

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. Witness Evans explains that in the article, Mr. Pelletier reveals 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. 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.

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.

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 we approve the name, BellSouth will take whatever legal steps it may deem necessary at that time. The witness explains, however, that BellSouth believes we have 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.

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.

III.

ANALYSIS AND DECISION

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, we hereby deny Mr. Pelletier's application for a pay telephone certificate in the name of Florida Billsouth Telephone Company. We do 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 our orders, rules, and procedures. We

also believe that 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 appears to be 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 our orders, rules, and procedures, we emphasize 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. These actions demonstrate Mr. Pelletier's inability to comply with our orders, rules, and procedures. In view of this apparent inability, we believe that it would not be in the public interest to grant Mr. Pelletier a certificate.

We are 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. The record clearly demonstrates that certification under the name Billsouth will not be in the public interest.

Furthermore, 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. This action appears to fall within the scope of an anticompetitive act prohibited by Section 364.01(4)(g), Florida Statutes. Therefore, because it would be

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violative of Section 364.01(4)(g), Florida Statutes, we find that 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.

Furthermore, while we acknowledge that we are 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, we do agree with BellSouth's witness Evans that we may use the trademark infringement test as a guideline in reaching our 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, we emphasize that the likelihood that customer confusion will result from the use of the Billsouth name seems obvious. The pay telephone certification process is in place to give us the opportunity to consider the public interest in granting a certificate and to address situations such as this. Because it is within our jurisdiction to protect the public from confusion propounded by a telecommunications company seeking certification in Florida, it is within our jurisdiction to determine that granting a certificate in the name of Billsouth is not in the public interest.

Based on the foregoing, we hereby 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.


It is therefore,

ORDERED by the Florida Public Service Commission that Mr. Javier Pelletier's application for a certificate of public convenience and necessity to provide pay telephone service in the name of Florida Billsouth Telephone Company is denied. It is further

ORDERED that this Docket shall be closed.

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By ORDER of the Florida Public Service Commission this 21st
Day of February, 2000.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.