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General Counsel-Florida

BellSouth Telecommunications, Inc.
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Tallahassee, Florida 32301
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RECORDS AND
REPORTING

January 29, 1999

Mrs. Blanca S. Bayó
Director, Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 980918-TC (Florida BillSouth)

Dear Mrs. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications Inc.'s Direct Testimony of Sandra J. Evans, which we ask that you file in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me.

RECEIVED & FILED

Sincerely,

Nancy B. White
Nancy B. White (BW)

FPSC BUREAU OF RECORDS

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AFA _____

APP _____

CAF _____ NBW/vf

CMU _____ Enclosures

CTR _____

cc: Parties of Record
Marshall M. Criser III
William J. Ellenberg II

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SEC 1 _____

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OTH _____

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FPSC-RECORDS/REPORTING


**CERTIFICATE OF SERVICE
DOCKET NO. 980918-TC**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by

U.S. Mail this 29th day of January, 1999 to the following:

Staff Counsel
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Florida BillSouth Telephone Company
12791 S.W. 8th Terrace
Miami, FL 33184-2242
Tel. No. (305) 207-1687
Fax. No (305) 207-1687



Nancy B. White (m)

BELLSOUTH TELECOMMUNICATIONS, INC.

DIRECT TESTIMONY OF SANDRA J. EVANS

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 980918-TC

JANUARY 29, 1999

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Q. Please state your name, address and position with BellSouth Telecommunications, Inc. or its affiliate. ("BellSouth" or "The Company").

A. My name is Sandy Evans. I am employed by BellSouth Intellectual Property Management Corporation. My business address is 1155 Peachtree Street, N.E., Suite 500, Atlanta, Georgia 30309.

Q. Please give a brief description of your background and experience.

A. I am a graduate of Vanderbilt University with a degree in English and the University of Georgia School of Law with a Juris Doctor degree. I have 21 years of service with BellSouth. My career with BellSouth began in the Legal Department of Southern Bell and has continued on to assignments in BellSouth Services, BellSouth Corporation, BellSouth Intellectual Property Corporation and BellSouth Intellectual Property Management Corporation. For the last 13 years, I have acted as in-house counsel to all BellSouth companies on intellectual property matters, including trademark matters.

1

2 Q. What is the purpose of your testimony?

3

4 A. The purpose of my testimony is to support BellSouth's protest against
5 the use of the name and mark BILLSOUTH by Florida BellSouth
6 Telephone Company, an applicant to provide pay telephone services.

7

8 Q. To what issue will you be addressing?

9

10 A. I will address the issues raised by BellSouth regarding the likelihood of
11 confusion that would be caused by the use of BILLSOUTH and how
12 this would negatively impact Florida citizens.

13

14 Q. What is the basis for BellSouth's position that BELLSOUTH and
15 BILLSOUTH are confusingly similar?

16

17 A. The question of whether the use of the term BILLSOUTH on pay
18 telephones is likely to cause confusion among the consuming public,
19 which is used to seeing BELLSOUTH on pay phones, can be answered
20 by using the traditional test used by the courts in trademark
21 infringement cases. In trademark infringement cases, the following
22 factors are considered to determine whether a likelihood of confusion
23 between two names or marks exists:

24 1. the type of trademark sought to be protected – is it strong and
25 highly protectable or weak?

- 1 2. similarity of the marks in sight, sound, meaning and overall
- 2 commercial impression;
- 3 3. similarity of the products and services on which the marks are
- 4 used;
- 5 4. identity of retail outlets and purchasers;
- 6 5. similarity of advertising media;
- 7 6. defendant's intent ; and
- 8 7. actual confusion.

9

10 In examining the factors necessary for proving likelihood of confusion,
11 a trademark owner need not show that all, or even most, of the factors
12 are present in any particular case to be successful. I believe that you
13 will agree with me after I have run through the factors that the use of
14 BILLSOUTH would confuse Florida customers and should not be
15 allowed.

16

17 Q. Before we go through these factors, why are you not suing Mr. Pelletier
18 and his company in court rather than appealing before this
19 Commission?

20

21 A. BellSouth will take all legal steps available to it, including filing suit, in
22 the event that Mr. Pelletier is authorized to provide service under this
23 name. I am here because this Commission has a concern for the
24 wellbeing of the Florida consumer of telephone services. In that sense,
25 the Commission has the same basic legal mandate as the court in a

1 trademark infringement case – to protect consumers from being
2 confused as to the source of the goods and services they are
3 purchasing.

4

5 Q. Please briefly review each of the factors used to determine likelihood of
6 confusion as they apply in this case.

7

8 A. The first factor is to evaluate whether the mark for which protection is
9 being sought is protectable and, if so, to what degree. A strong mark is
10 very distinctive and will be widely protected – a weak mark will have a
11 more limited scope of protection. The factors to consider in
12 determining whether a mark is strong or weak include whether the mark
13 is descriptive or arbitrary, whether the term is used by others on the
14 same type of product or service, and the extent of consumer
15 recognition of the mark based on its use and the amount of advertising
16 and promotion done under the mark.

17 BellSouth Corporation and its subsidiaries have made extensive use of
18 the BELL marks for a significant period of time. The BELL name was
19 first used by Southern Bell, which was formed in 1879. BellSouth
20 adopted BELLSOUTH in 1984. Southern Bell began using the
21 BELLSOUTH brand in 1995. This Commission is well aware of the
22 widespread use of BELLSOUTH in Florida and the amount of money
23 spent on advertising and marketing under the BELLSOUTH brand.
24 The mark is not used by others on the same products or services.

25

1 Therefore, BELLSOUTH is a strong and famous mark deserving of
2 broad protection against the use of similar marks by others.
3
4 Q. Please compare the marks for us under the second factor – similarity of
5 the marks.
6
7 A. In evaluating this factor, one must examine the overall impression
8 created by the marks, including a comparison of the appearance,
9 sound and meaning of the marks.
10 The commercial impression generated by the mark BILLSOUTH on pay
11 telephones is substantially identical to the commercial impression
12 created by the use of BELLSOUTH on pay telephones. These marks
13 sound alike and they look alike. The name and mark BELLSOUTH is
14 the foundation for all of the names and marks used by BellSouth
15 Corporation and its subsidiaries. It is the dominant element used in
16 “BellSouth Telecommunications,” “BellSouth Mobility,” BellSouth
17 Advertising & Publishing,” etc. In determining the question of likelihood
18 of confusion greater weight is given to the dominant parts of a
19 composite mark, because it makes the greatest impression on the
20 ordinary buyer. Thus, even if the full name “FLORIDA BILLSOUTH
21 TELEPHONE COMPANY” is used, the public will focus on the
22 BILLSOUTH portion, as it does on the BELLSOUTH portion of the
23 BellSouth names and marks. BELLSOUTH and BILLSOUTH are
24 identical in sound, and virtually indistinguishable in sight. When the
25

1 dominant portions of two marks look so similar and sound the same,
2 there is likely to be confusion.
3
4 Q. And the third factor?
5
6 A. The parties' respective goods and services are identical. Pay
7 telephones will be branded BILLSOUTH and BELLSOUTH.
8
9 Q. And the fourth factor?
10
11 A. Just as with the goods and services under the third factor, the outlets
12 and purchasers of BILLSOUTH and BELLSOUTH pay phone services
13 are identical.
14
15 Q. How would you evaluate the fifth factor which compares the type of
16 advertising used by each party.
17
18 A. I do not have any information regarding the applicant's proposed
19 method of advertising. BellSouth advertises in virtually every
20 advertising media available – television, on radio, in print, and on
21 outdoor billboards. Since BellSouth advertises in all media, there is
22 inevitable overlap between the party's advertising.
23
24 Q. Do you have any evidence of the applicant's intent to infringe under the
25 sixth factor?

1

2 A. It is very clear that Mr. Pelletier adopted this name with an intent to
3 confuse the public. I am attaching as Exhibit SE-1 a newspaper article
4 in which Mr. Pelletier expresses his intention to create a company logo
5 in the shape of a bell which will be similar to BellSouth's Bell Symbol
6 logo, "but larger." Mr. Pelletier also states that he plans to paint his
7 trucks white with blue and yellow stripes to look like BellSouth's trucks.
8 In the attached television interview, Exhibit SE-2, Mr. Pelletier also
9 offers to sell the BILLSOUTH mark to BellSouth. There can be no
10 doubt that his intent in adopting BILLSOUTH is to confuse the public
11 into using his services.

12

13 Q. With respect to the seventh factor, has there been any actual
14 confusion?

15

16 A. BellSouth would not need to show actual confusion in order to prove its
17 trademark infringement case against BILLSOUTH. In this case, he has
18 not yet used the BILLSOUTH name, so there has not been public
19 confusion.

20

21 Q. Please summarize your conclusion from the forgoing.

22

23 A. Weighing all of the foregoing factors, it is clear that a pay telephone
24 company using the name or mark BILLSOUTH or FLORIDA
25 BILLSOUTH TELEPHONE COMPANY is likely to be confused by the

1 public as being related to, sponsored by or endorsed by BellSouth. (1)
2 BELLSOUTH is a strong name and trademark used for various
3 telephone-related goods and services, and is entitled to broad
4 protection; (2) the name and mark BILLSOUTH and FLORIDA
5 BILLSOUTH TELEPHONE COMPANY are similar in appearance and
6 sound, and creates a very similar overall impression to the
7 BELLSOUTH mark and the names of the various BellSouth entities; (3)
8 the products and services are identical; (4) the purchasers and
9 methods used to distribute the products are the same; (5) similar
10 methods of advertising will be used; (6) there is strong evidence of an
11 intent to confuse; and (7) there is no evidence of actual confusion
12 because the BILLSOUTH name and mark is not yet being used.
13 Virtually none of the foregoing factors weigh in favor of BILLSOUTH.

14
15 Q. Has BellSouth been successful in preventing others from using
16 confusingly similar marks and, if so, what marks were being used?

17
18 A. We have obtained two Orders of the Trademark Trial and Appeal Board
19 ("TTAB") in which the TTAB found that there was a likelihood of
20 confusion between the mark BEL BEL-TRONICS and BellSouth's BELL
21 marks and refused registration of the BEL BEL-TRONICS mark, and
22 also from the U.S. District Court for the Northern District of Georgia in
23 which the Defendant was enjoined from using the mark BEL-TRONICS
24 on or in conjunction with telecommunications equipment. In addition to
25 the foregoing, we have been successful in obtaining consent judgments

1 involving the use of the marks MICROBELL, ALL FLORIDA BELL,
2 BABY BELL and MA AND PA BELL in Florida. We have obtained the
3 agreement of numerous other infringers to stop using the names and
4 marks incorporating BELL or BELLSOUTH without having to resort to
5 litigation.

6
7 Q. Would you please summarize your testimony?
8

9 A. Yes. It is the Commission's responsibility to grant applications to
10 provide telecommunication goods or services only if they are in the best
11 interest of the citizens of Florida. It is my testimony that Florida
12 customers would be confused as to the source of goods or services
13 provided to them under the name or mark BILLSOUTH or FLORIDA
14 BILLSOUTH TELEPHONE COMPANY.
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Pay phone entrepreneur sets off bells at BellSouth

The Miami man, who plans to install 100 phones in Miami, wants to name his company Florida Billsouth.

*By John Marzavold
Palm Beach Post Staff Writer*

Javier Pelletier's effort to start a pay phone business has gotten hung up over his company's proposed name.

The Miami construction worker wants state regulators to license his company as Florida Billsouth. If he gets permission, he plans to install about 100 pay phones throughout Miami, and perhaps one day in Palm Beach County.

As one might expect, BellSouth Corp., that other phone company,

isn't too happy about Pelletier's choice of a corporate name.

But Pelletier, 27, said he doesn't understand the fuss.

"Bill is bills. Bell is bells — something that rings," he said from his Miami home.

But bells are going off at BellSouth. The Atlanta-based telecommunications giant has asked the Public Service Commission to deny Pelletier's application. The commissioners will take up the matter on Tuesday in Tallahassee.

So far, Pelletier has won round one in the dispute against the Baby Bell. A week ago PSC staff recommended that the commissioners approve Pel-

Please see BILLSOUTH/6D

Name could cause confusion, state regulators agree

BILLSOUTH

From 1D

letter's request. The staff said the PSC's job is to encourage phone competition.

But PSC staff acknowledged there may be some confusion.

Pay phone owners are entitled to payments when pay callers use calling cards and 1-800 numbers. Therefore, some customers will see Billsouth and BellSouth charges on their BellSouth bill.

Pelletier said he plans to create a company logo in the shape of a bell, which will look similar to

BellSouth's, only larger. He's also planning company trucks painted white with a yellow and blue stripe, similar to BellSouth's, which sport a gold and blue stripe.

Pelletier said he has more than \$100,000 start-up capital, which came "from a lawsuit."