

UTILICORE CORPORATION

1549 State Street
Sarasota, FL 34236
941-363-9300
FAX 941-955-6586

November 16, 1998

Ms. Amanda Fazio
Florida Public Service Commission
Division of Records and Reporting
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Re: Docket 981016

Dear Ms. Fazio,

This letter will serve as our formal protest to PAA Order PSC-98-1464-FOF-TX granting ALEC certificate 5733 to American Phone Corporation.

American Phone Corporation, and its principals Messrs. David Bednarsh and Thomas Beard, have used proprietary and confidential information from Utilicore Corporation, a company that has summarily dismissed both Messrs. Bednarsh and Beard for cause on Thursday, November 12, 1998, in order to personally benefit from the knowledge and experience they gained while at Utilicore Corporation. The attached lawsuit further expresses our reason for our protest.

ACK _____

AFA 1

APP _____

CAF _____

CMR 1

CTI _____

EMR _____

LEG 1

LIR _____

OPR _____

RPT _____

SEC 1

WPS _____

OTR _____

Also, attached please find a letter from GTE Network Services, addressed to Mr. Thomas M. Beard, stating that American Phone Corporation wishes "...to adopt the terms of the Interconnection Agreement between Utilicore Corporation and GTE..." Moreover, Mr. Beard signed that "American Phone Corporation represents and warrants that it is a certified provider of local dialtone service in the State of Florida, and its adoption of the Terms will cover services in the State of Florida only." As a result, we believe that American Phone Corporation has not been officially granted an ALEC certificate by the PSC—since this protest has not be heard—and has 'so misled GTE that it has received its certificate.

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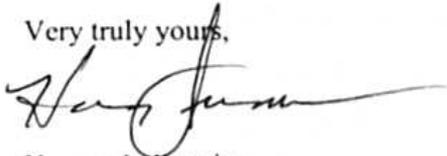
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Page 2
Protest Letter to PSC
Re: American Phone Corporation

I am hopeful that the committee members are given this information without haste, because we believe it will be a detriment to the public if American Phone Corporation is formally granted an ALEC certificate in the state of Florida.

Please feel free to contact me should you have any questions. I look forward to hearing from you soon.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Harvey Judkowitz", with a long horizontal flourish extending to the right.

Harvey Judkowitz
Interim President and CFO

Connie E. Nicholas
Assistant Vice President
Wholesale Markets-Interconnection



GTE Network
Services

HQE03B28
600 Hidden Ridge
P.O. Box 152092
Irving, TX 75038
972/718-4586
FAX 972/719-1523

November 4, 1998

Mr. Thomas M. Beard
Executive Vice President
American Phone Corporation
244 Shopping Avenue Suite 166
Sarasota, Florida 34237

Dear Mr. Beard:

We have received your letter stating that, under Section 252(i) of the Telecommunications Act of 1996, you wish to adopt the terms of the Interconnection Agreement between Utilicore Corporation, Inc. and GTE that was approved by the Florida Public Service Commission as an effective agreement in the State of Florida in Docket Order No. PSC098-0675-FOF-TP ("Terms"). I understand you have a copy of the Terms.

As these Terms are being adopted by you pursuant to your statutory rights under section 252(i), GTE does not provide the Terms to you as either a voluntary or negotiated agreement. The filing and performance by GTE of the Terms does not in any way constitute a waiver by GTE of any claim it may have with respect to the 252(i) process, nor does it constitute a waiver of GTE's right to seek review of any Terms that are interpreted contrary to the law.

GTE contends that certain provisions of the Terms may be void or unenforceable as a result of the July 18, 1997 and October 14, 1997, decisions of the United States Eighth Circuit Court of Appeals. Should American Phone Corporation attempt to apply such conflicting provisions, GTE reserves its rights to seek appropriate legal and/or equitable relief. Should any provision of the Terms be modified, such modification would likewise automatically apply to this 252(i) adoption.

Mr. Thomas M. Beard
November 4, 1998
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Please indicate by your countersignature on this letter your understanding of and commitment to the following three points:

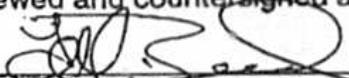
- (A) American Phone Corporation adopts the Terms of the Utilicore Corporation, Inc. agreement for interconnection with GTE and in applying the Terms, agrees that American Phone Corporation be substituted in place of "Utilicore Corporation, Inc." in the Terms wherever appropriate.
- (B) American Phone Corporation requests that notice to American Phone Corporation as may be required under the Terms shall be provided as follows:

To : American Phone Corporation
Attention: Mr. Thomas M. Beard
Executive Vice President
244 Shopping Ave Suite 166
Sarasota, Florida 34237
Telephone number: 941 726-1337
Facsimile number: 941 955-6586
- (C) American Phone Corporation represents and warrants that it is a certified provider of local dialtone service in the State of Florida, and that its adoption of the Terms will cover services in the State of Florida only.

Sincerely,

GTE Florida Incorporated
Connie E. Nicholas
Assistant Vice President-
Wholesale Markets- Interconnections

Reviewed and countersigned as to points A, B, and C:



American Phone Corporation

c: A.Lowery- NC999142
M.Marczyk- FLTC0009
B.Menard - FLTC0616
R.Ragsdale-HQE03B75
R. Vogelzang - HQE03J41

Ann Lowery
Manager-Interconnection/Negotiations
Wholesale Markets



GTE Network
Services

NC999142
4100 N. Roxboro Road
P.O. Box 1412
Durham, NC 27702
919/317-5453
FAX: 919/317-7204

November 4, 1998

VIA AIRBORNE

Thomas M. Beard
American Phone Corporation
244 Shopping Ave Suite 166
Sarasota, Florida 34237

Dear Mr. Beard:

Enclosed are two copies of a letter of agreement adopting the terms of the Interconnection Agreement between Utilicore and GTE in Florida pursuant to Section 252(i) of the Telecommunications Act of 1996.

Please have both copies of the attached letter executed and return them to:

✓ Ms. Renée Ragsdale
GTE Network Services
600 Hidden Ridge, HQE03B75
Irving, TX 75038

A copy will be returned to you upon final execution by GTE. Please advise me if you have any questions or if I can provide anything further.

Sincerely,

Ann Lowery
Manager-Interconnection/Negotiations
Wholesale Markets

oal
Enclosure

c: R. Ragsdale
M. Marczyk
J. Wong
B. Menard
B. Santos

EXP. 11-6-98

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

UTILICORE CORPORATION,
a Delaware Corporation,

Plaintiff,

General Jurisdiction Division

Case No.: 98-26152

CA 13

Florida Bar No.: 111480

vs.

DAVID BEDNARSH, an individual,
THOMAS M. BEARD, an individual,
AMERICAN PHONE CORPORATION,
a foreign corporation,

Defendants.

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF

Plaintiff Utilicore Corporation ("Utilicore") hereby sues the Defendants David Bednarsh ("Bednarsh"), Thomas M. Beard ("Beard"), and American Phone Corporation ("APC") for monetary damages and injunctive relief, and alleges that:

ALLEGATIONS AS TO ALL COUNTS

1. This is an action for damages which exceeds \$15,000, and for injunctive relief.
2. This Court has venue over this dispute because the causes of action accrued in Miami-Dade County, Florida.
3. Defendant David Bednarsh is a resident of the State of Florida. Until November 12, 1998, Defendant David Bednarsh served as Plaintiff's President and as a member of its Board of Directors. Defendant Bednarsh is in all respects *sui juris*.

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Case No.:

4. Defendant Thomas M. Beard is a resident of the State of Florida. At all material times, Defendant Beard served as Plaintiff's Executive Vice President in charge of regulatory affairs. Defendant Beard is in all respects *sui juris*.

5. Defendant APC is a foreign corporation that is licensed to do business in the State of Florida and who conducts business throughout the State of Florida.

6. Plaintiff Utilicore has complied with all conditions precedent to bringing forth this action, or if such conditions have not been performed, the conditions have been waived or excused.

7. Utilicore is a Delaware corporation whose principal place of business is located in the state of Florida. Utilicore is in the business of developing private telecommunications systems for residential multiple dwelling unit properties and marketing those systems.

8. Telephone and related communication services may be provided at wholesale prices by large telephone service providers to local telephone companies. Companies, as the Plaintiff, who wish to provide such local service must demonstrate their qualifications to the Public Service Commission of the State of Florida for local service and to the Federal Communications Commission for long distance service. If qualified, such companies are then certified and licensed to provide service. Once licensed, such companies must then negotiate to purchase service from a bulk carrier, *i.e.*, BellSouth, GTE, etc. When such a contract is executed, the companies are then able to perform as the "consumers'" local telephone company earning the difference between the wholesale rate paid to the bulk carrier and the rate charged to the retail customer. The process of establishing such a business and then attracting customers is extremely costly, time consuming and requires a high degree of expertise and specialized knowledge.

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9. In an effort to gain the expertise necessary to effect certification as well as to locate, procure and execute contracts with Utilicore's ultimate consumers and suppliers, and to develop Plaintiff's business, Utilicore hired Bednarsh as its President and Beard as its Vice President in charge of regulatory affairs. At all material times, Utilicore reposed its trust and confidence upon Bednarsh and Beard, which Bednarsh and Beard accepted. Moreover, Bednarsh had Beard represented that they possessed the unique skill to develop a business with gross earnings of over \$9,000,000 and profits of \$2,000,000 per year within one year.

10. Utilicore raised approximately \$1.5 million in capital to finance the certification process and to commence operations.

11. After being hired by Utilicore, Bednarsh and Beard commenced the certification process, and thereafter commenced negotiations for the procurement of contracts.

12. Utilicore was successfully certified as both an Alternate Local Exchange Company and an Inter-Exchange Carrier, which enabled Utilicore to function as both a local and long distance telephone company serving customers anywhere within the state of Florida. Utilicore, unlike many of its competitors, is not required to serve unprofitable market segments and can therefore concentrate on high profit segments of the telephone business.

13. By November 12, 1998, Plaintiff was servicing over 4,100 customers in Miami-Dade County as well as 2,000 customers elsewhere in the State of Florida and had developed an expectation to increase Plaintiff's customers to 841,650 customers based on its existing relationships.

14. At some time prior to August, 1998, Defendants conspired to implement a plan to usurp the Plaintiff's business for themselves.

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15. In or about August 1998, APC was formed by Bednarsh and Beard for the sole and express purpose of engaging in the exact business as Utilicore. Upon information and belief, Bednarsh is and was at all material times the President of APC, and Beard is and was at all material times the Executive Vice President of APC.

16. Immediately after forming APC, Bednarsh and Beard embarked upon a campaign designed to "piggy-back" and capitalize upon the expenditures made by Utilicore. Specifically, using Utilicore resources, APC became a certified local carrier and then, without Plaintiff's knowledge or consent, "piggybacked" on Plaintiff's contracts with its carriers under §252(i) of the Telecommunications Act of 1996.

17. Thereafter, Bednarsh and Beard sought to usurp the contracts procured for and on behalf of Utilicore for the benefit of APC, all during the time in which Bednarsh and Beard were employed with Utilicore. In November 1998, said Defendants sought to cause Plaintiff's employees to work for the Defendants in their competing venture.

18. At no time did Bednarsh or Beard disclose to the Utilicore Board of Directors their wrongful activities regarding APC. At all times material, Bednarsh and Beard sought to conceal the very existence of APC from the Utilicore Board of Directors.

19. On November 12, 1998, certified auditors retained by Plaintiff's Board of Directors commenced an audit of Utilicore. However, when Bednarsh learned that these auditors were on Utilicore property and had discovered the Defendants' wrongful conduct, Bednarsh, with the support of Beard, called the local police and stated that, on behalf of Utilicore, he had not authorized the audit and demanded the police escort the auditors from the premises. Later, said Defendant stated

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to the police that he had hired said auditors and demanded that they be removed, all of which was designed to conceal the Defendants' misconduct.

20. On November 12, 1998, Plaintiff's Board of Directors held an emergency meeting and terminated Bednarsh and Beard from their employment with Utilicore for cause.

21. After inspecting the Utilicore books and records, the auditors discovered that Bednarsh, Beard, and APC commenced business in competition with Utilicore.

COUNT I
BREACH OF FIDUCIARY DUTY

22. Utilicore incorporates paragraphs 1 through 21 above as if fully set forth herein.

23. Utilicore sues Defendants Bednarsh and Beard, and APC for conspiring with said Defendants, for breach of fiduciary duty.

24. Bednarsh and Beard were at all material times officers and directors of Utilicore. As such, Bednarsh and Beard owed Utilicore a fiduciary obligation to the corporation and its shareholders to act in good faith and in the best interest of the corporation.

25. By secretly forming APC, and by working for and on behalf of APC while at the same time purporting to act for and on behalf of Utilicore, Bednarsh and Beard placed their own interests above that of Utilicore and its shareholders.

26. In addition, by usurping corporate opportunities for and on behalf of APC and in their endeavor to enjoy personal profit and gain to the detriment of Utilicore and its shareholders, Bednarsh and Beard have failed in the performance of their duties for Utilicore to exercise reasonable care, have failed to act in good faith, and have failed to act in the best interests of Utilicore.

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27. Utilicore has suffered material damages in excess of \$10,000,000 as a direct result of Bednarsh's and Beard's breach of fiduciary duty including lost profits.

WHEREFORE, Utilicore prays this Court enter judgment against Bednarsh, Beard and APC for monetary damages, plus costs of this action, plus such further relief as this Court deems just and proper.

COUNT II
USURPATION OF CORPORATE OPPORTUNITY

28. Utilicore incorporates paragraphs 1 through 21 above as if fully set forth herein.

29. Utilicore sues Defendants Bednarsh, Beard, and APC for breach of fiduciary duty.

30. Defendants Bednarsh and Beard, in concert with Defendant APC, have together usurped the business opportunities which fit into the present activities of Utilicore or into an established corporate policy which acquisition of the opportunity would follow.

31. In addition, Bednarsh and Beard have each used property belonging to Utilicore for their personal benefit and/or for the benefit of APC, without the knowledge, permission or consent of Utilicore.

32. At not time did Bednarsh or Beard disclose the existence of APC nor did they disclose their association with APC.

33. Utilicore has suffered material damages in excess of \$10,000,000 as a direct result of Bednarsh's and Beard's usurpation of corporate opportunity duty including lost profits.

WHEREFORE, Utilicore prays this Court enter judgment against Bednarsh and Beard for monetary damages, plus costs of this action, plus such further relief as this Court deems just and proper.

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COUNT III
BREACH OF STANDARD OF CONDUCT FOR A DIRECTOR AND OFFICER

34. Utilicore incorporates paragraphs 1 through 21 above as if fully set forth herein.

35. Utilicore sues Bednarsh and Beard for their breach of the general standard of conduct for a director and/or officer.

36. As discussed above, Bednarsh and Beard have breached the standard of conduct for directors and officers and are each personally liable to Utilicore for monetary damages.

37. Plaintiff has suffered monetary damages in excess of \$10,000,000 including lost profits.

WHEREFORE, Utilicore prays this Court enter judgment against Bednarsh and Beard for monetary damages, plus disgorgement of all salary, profits and common stock issued by Utilicore to Bednarsh and Beard, plus costs of this action, plus such further relief as this Court deems just and proper.

COUNT IV
TORTUOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS

38. Utilicore incorporates paragraphs 1 through 21 above as if fully set forth herein.

39. Utilicore sues Bednarsh, Beard and APC for tortuous interference with Plaintiff's business relationships.

40. Utilicore enjoys business relations with both its suppliers and customers.

41. Defendants each knew of Utilicore's business relations with its suppliers and customers. Indeed, Defendants possessed a unique and special understanding of Utilicore's business

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relations since Defendants Bednarsh and Beard participated in the negotiation and formation of the business relations.

42. Defendants exploited their unique and special knowledge of Utilicore's business relationships and intentionally and unjustifiably interfered with Utilicore's business relations with both Utilicore's suppliers as well as its customers.

43. Utilicore has been damaged in excess of \$10,000,000 as a proximate result of Defendants' tortuous interference with Plaintiff's business relationships.

WHEREFORE, Utilicore prays this Court enter judgment against Bednarsh, Beard and APC for monetary damages, plus costs of this action, plus such further relief as this Court deems just and proper.

COUNT V
THEFT OF TRADE SECRETS

44. Utilicore incorporates paragraphs 1 through 21 above as if fully set forth herein.

45. Utilicore sues Bednarsh, Beard and APC for theft of trade secrets.

46. Throughout their employment and association with Utilicore, Defendants Bednarsh and Beard were given access to Utilicore's trade secrets, as defined in Fla. Stat. §688.002(4).

47. As discussed above, Defendants Bednarsh and Beard, acting individually and for and on behalf of Defendant APC, misappropriated Utilicore's trade secrets, as defined by Fla. Stat. §688.002(2).

48. Defendants' misappropriation of trade secrets has proximately caused Utilicore to incur substantial damages.

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49. The misappropriation of Utilicore's trade secrets by Defendants has and will cause Utilicore to suffer a material and prejudicial change of position prior to Defendants' acquiring the knowledge derived from the trade secrets such that a monetary recovery alone will be inequitable.

50. The Defendants' above-described misappropriation was willful.

WHEREFORE, Utilicore demands this Court:

- a. Enjoin the Defendants from using or in any way exploiting Utilicore's trade secrets pursuant to Fla. Stat. §688.003;
- b. Enter an award against the Defendants for monetary damages, which include the actual loss caused by the Defendants' misappropriation and the unjust enrichment caused by the misappropriation that is not taken into account in computing actual loss pursuant to Fla. Stat. §688.004 (1);
- c. Enter an award for exemplary damages equal to twice the monetary award entered pursuant to paragraph (b) above pursuant to Fla. Stat. §688.004 (2);
- d. Enter an award for Utilicore's attorneys' fees, pursuant to Fla. Stat. §688.005;
- e. Enter such further relief as this Court deems just and proper.

COUNT VI
UNJUST ENRICHMENT

51. Utilicore incorporates paragraphs 1 through 21 above as if fully set forth herein.
52. Utilicore sues Bednarsh, Beard and APC for unjust enrichment.
53. Bednarsh and Beard formed APC with the resources taken by them from Utilicore.
54. Included amongst these resources was capital raised by Utilicore in the amount exceeding \$1.5 million.

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55. At no time did these Defendants compensate Utilicore for the resources taken by them from Utilicore.

56. These Defendants benefitted from the use of these resources.

WHEREFORE, Utilicore demands judgment against Bednarsh, Beard, and APC for monetary damages, plus court costs, plus such further relief as this Court deems just and proper.

COUNT VII
CONSTRUCTIVE TRUST

57. Utilicore incorporates paragraphs 1 through 21 above as if fully set forth herein.

58. Utilicore sues Bednarsh, Beard and APC for constructive trust.

59. As stated above, APC was formed by Bednarsh and Beard who were at all material times officers and directors of Utilicore with the intention that APC would unlawfully utilize Utilicore's resources in order collectively and individually usurp the benefits obtained by Utilicore.

60. Defendants Bednarsh, Beard and APC have been unjustly enriched at the expense of Utilicore as a direct and proximate result of their above-described actions.

61. In equity and in good conscience, Defendants should not be permitted to retain the benefits resulting from their above-described conduct.

WHEREFORE, Utilicore prays this Court impose a constructive trust, for the benefit of Utilicore, over the entirety of the APC assets and over all funds received by Bednarsh and Beard as a result of their above-described conduct. In addition, Utilicore demands that this Court impose a constructive trust, for the benefit of Utilicore, over all shares of APC common stock. In addition, Utilicore requests this Court award such further relief as this Court deems just and proper.

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COUNT VIII
APPOINTMENT OF A RECEIVER

62. Utilicore incorporates paragraphs 1 through 21 above as if fully set forth herein.

63. Utilicore sues Bednarsh, Beard and APC for the appointment of a receiver.

64. Because of the Defendants' usurpation of Utilicore's corporate opportunity, APC and the profits derived therefrom belong to Utilicore.

65. As described above and because these Defendants' actions have now been discovered, these Defendants are likely to deplete APC of all its assets in an effort to further unjustly enrich themselves as individuals.

66. The appointment of a Receiver is necessary to prevent fraud, to preserve the assets and value of the corporation, and to prevent distribution of profits in the form of cash prior to the disposition of this action against these Defendants.

WHEREFORE, Utilicore demands that this Court appoint a Receiver to run and operate APC during the pendency of this lawsuit in order to prevent fraud and to preserve the APC assets, plus court costs and such further relief as this Court deems just and proper.

DEMAND FOR TRIAL BY JURY

Utilicore hereby demands a trial by jury on all issues so triable.

DATED this 13th day of November, 1998.

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Case No.:

Respectfully submitted,

ANDREW HALL AND ASSOCIATES, P.A.
Attorneys for Plaintiff
1428 Brickell Avenue
Penthouse
Miami, Florida 33131
Telephone: (305) 374-5030
Facsimile: (305) 374-5033

By: 
ANDREW C. HALL
Florida Bar No.: 111480
ALLAN A. JOSEPH
Florida Bar No.: 893137

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