

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of the Citizens of Florida to Compel Compliance with Commission Rule 25-14.003 by UNITED TELEPHONE COMPANY OF FLORIDA)	DOCKET NO. 890486-TL
)	ORDER NO. 22412
)	ISSUED: 1-11-90

ORDER COMPELLING PRODUCTION OF
DOCUMENTS FOR INSPECTION

On April 10, 1989, the Office of Public Counsel (OPC) served its First Set of Requests for Production of Documents (Request I) on United Telephone Company of Florida (United). Request I lists the following fifteen specific items:

- I.1. Allocations to United from affiliates,
- I.2. United's adjusted trial balance,
- I.3. Expense vs. capitalize allocations analyses,
- I.4. Allocation procedures,
- I.5. Cost-benefit analyses,
- I.6. Expense vs. capitalize analyses,
- I.7. Actual vs. budget variances,
- I.8. Actual vs. budget variance explanations,
- I.9. Capital structure,
- I.10. Capital structure changes since 1984,
- I.11. Capital structure projections (United & affiliates),
- I.12. Earnings impact of FASB 87,
- I.13. Bond rating agency contacts,
- I.14. Outside auditor adjustments, and
- I.15. Surveillance report adjustments.

OPC served its Second Set of Requests for Production of Documents (Request II) on United and United Telecommunications, Inc. (the Parent Company) on April 18, 1989. Request II asks for the following five specific items:

- II.1. 1988 systemwide organizational charts,
- II.2. Current Charts of Account of United and affiliates,
- II.3. Cost allocations to and from affiliates,
- II.4. 1988 consolidated financial statements, and
- II.5. 1988 United and consolidated income tax returns or calculations.

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OPC filed on June 9, 1989, a Motion to Compel, seeking an order directing United to produce the documents sought by Request I. OPC argues that, by failing to respond to this request within the time limit imposed by Rule 1.350 of the Florida Rules of Civil Procedure, United has waived any right to object to this discovery. Also on June 9, 1989, OPC filed a separate Motion to Compel, requesting an order directing United and the Parent Company to produce the documents sought by Request II. Similarly, OPC contends that United waived its right to object to this discovery through failing to respond timely.

United submitted a Response to both Motions to Compel on June 19, 1989. United asserts that the effect of OPC's filing a Motion for Judgment on the Pleadings on May 8, 1989, was to exclude any matters from Commission consideration other than the pleadings then on file. As a result, United believes that the Motions to Compel should be denied because discovery is inappropriate until the Motion for Judgment on the Pleadings has been resolved.

OPC served on United a Third Request for Production of Documents (Request III) on September 1, 1989. Request III seeks the following three specific items:

- III.1. 1988 income tax savings calculations,
- III.2. 1987 income tax savings calculations,
- III.3. Income tax savings documents provided to the Staff.

On September 29, 1989, United moved for a protective order and objected to Request III. United points out that the Commission voted on August 29, 1989, to dismiss OPC's petition (the Petition) which led to the opening of this docket. United argues that it should have an opportunity to consider the relevancy of Request III in light of the Commission's intent to dismiss the Petition. Moreover, United complains that Items III.2 & III.3 relate to 1987 tax savings which are not relevant because they are not addressed in the Petition.

On October 9, 1989, OPC moved to compel United to produce the documents sought by Request III. OPC states that it intends to protest the Commission's action on the Petition and maintains that the company's 1988 tax savings are still at issue. With respect to United's 1987 tax savings, OPC alleges

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that Items III.2 & III.3 are reasonably calculated to lead to the discovery of admissible evidence because these documents are useful as comparisons in evaluating the accuracy of the company's 1988 tax savings calculations. Therefore, OPC seeks an order compelling United's production of the documents covered by Request III and renews its motion to compel production of the Request I and Request II documents.

OPC served its Fourth Request for Production of Documents (Request IV) on October 27, 1989, seeking the following eleven specific items:

- IV.1. 1988 budget documents,
- IV.2. 1988 budget variations,
- IV.3. Outside auditor's 1988 and more recent workpapers,
- IV.4. Materials prepared for United's outside auditor,
- IV.5. Affiliates' costs allocated to United,
- IV.6. Earnings impact of FASB 87,
- IV.7. Documents dealing with the Staff's audit of United's 1988 earnings
- IV.8. Evaluations of affiliates' expenses charged to United,
- IV.9. Expense vs. capitalize analyses of affiliates' expenses charged to United,
- IV.10. Cost-benefit analyses of expense allocations,
- IV.11. 1988 "ARMIS" report to the FCC.

United filed on November 7, 1989, an Objection to Discovery and Request for Protective Order. In light of OPC's October 20, 1989 protest of the Commission's proposed agency action, Order No. 22060, issued October 16, 1989, the company says it has had an opportunity to determine the relevancy of the documents sought by OPC. United takes the position that the only matter at issue in this docket is whether the reduction in its 1988 revenues associated with the lowering of its access charges exceeds its 1988 tax savings.

As a result of this determination, United concludes that only those documents tending to show the amounts of this revenue reduction and of these tax savings are relevant to this proceeding. United asserts that the relevant documents include those showing how 1988 book income tax expense was calculated and those establishing the company's 1988 intrastate minutes of use for access charge purposes. United believes that the following 6 of the 34 specific items listed above "may be

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relevant" to these issues: I.2, I.15, II.2 (but only with respect to United), III.1, III.3 (but only with regard to 1988 information) and IV.7. The balance, according to the company, would tend to neither prove nor disprove the correctness of its 1988 revenue reduction related to access charges and of its 1988 tax savings. Further, United maintains that only those documents reviewed by Staff in its examination of the company's 1988 tax savings report are relevant to the question of United's tax savings.

If United's arguments with regard to the relevancy of certain documents are not accepted, the company argues, in the alternative, that these documents should be specified as proprietary information pursuant to Rule 25-22.006(5)(c), Florida Administrative Code (the Confidentiality Rule), through the issuance of a temporary protective order directing that their confidentiality be protected. The nine items requested by United to be accorded such alternative treatment are as follows:

1. The financial projections and information regarding non-regulated operations in: I.7, I.8, I.9, I.11 and I.13;
2. Unpublished financial information for the Parent Company and its unregulated subsidiaries in: II.4 and II.5; and
3. The financial projections and information regarding non-regulated operations in: IV.1 and IV.2.

United appended to its November 7th pleading, as Appendix A, an item-by-item discussion of the relevancy of the 34 specific items sought by OPC's four pending requests. A copy of Appendix A is attached to this Order.

OPC filed a Motion to Strike United's "Objection to Discovery and Request for Protective Order" on November 22, 1989. This motion argues that United has violated Rule 1.350(b) and Rule 25-22.034, Florida Administrative Code, by responding to Requests I, II and III beyond the 30-day deadline. OPC alleges that United's argument that a motion for judgment on the pleadings stays any pending discovery is in error. According to OPC, United remains bound by the Rules of

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Civil Procedure and the Commission's rules on discovery, and a motion for judgment on the pleadings, which merely tests the legal sufficiency of a answer, has no effect on these requirements. For these reasons, OPC asks that United's November 7th objection be stricken.

Also on November 22, 1989, OPC filed a Response to United's "Objection to Discovery and Request for Protective Order" and Motion to Compel. OPC maintains that its four pending requests for documents involve United's earnings for 1988 which relate to the Company's tax savings directly because changes in earnings produce changes in tax savings. Additionally, these requests concern the effect on United's 1988 earnings of its access charge reduction which the Commission has determined to be an offset to United's tax savings. After pointing out that OPC has moved to compel United's production of documents pursuant to Requests I, II and III, the response renews these motions and seeks an order compelling United to produce documents in response to Request IV.

Upon review, the Prehearing Officer denies the objections and motions for protective orders and compels the company to produce the documents sought by OPC in the four pending requests. By this point in this proceeding, United's argument regarding OPC's motion for judgment on the pleading has lost any vitality that it may have had. The protest of Order No. 22060 rendered that proposed agency action a nullity. In view of the current hearing status of this proceeding, OPC's motion for judgment on the pleadings has been effectively resolved. The hearing will give the parties here an adequate opportunity to address the issues.

Regarding the relevancy of the documents sought, the Prehearing Officer finds that the issues being pursued by OPC are appropriate for consideration in this proceeding. These issues include the computation of the Company's actual earnings, the calculation of its tax savings, the disposition of such tax savings through access charge reductions and the determination of whether a refund is due under Rule 25-14.003, Florida Administrative Code (the Tax Rule). In view of the current inapplicability of Order No. 22060, OPC will now have the opportunity to show that the company is not in compliance with the Tax Rule just as United shall be given the chance to demonstrate that it is in compliance with this rule. The

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Prehearing Officer's review of the Tax Rule has caused him to conclude that the company's earnings, its tax savings and the effect of its access charge reduction are important considerations in applying this rule. These issues appear germane to the Commission's consideration of the positions to be advocated by the parties, and the documents being sought by OPC are discoverable because they appear relevant to these issues.

The discussion which follows will address the company's arguments as they appear item-by-item in Appendix A.

Items I.1, I.3 through I.10 & I.12: The company's argument that these documents are relevant only in a rate case is rejected. Having found that United's earnings are relevant considerations in this proceeding, the Prehearing Officer concludes that its revenues and expenses used to calculate such earnings are also relevant. Earnings and their components are as relevant to issues in this proceeding, i.e., the calculation of United's tax savings and their disposition, as they are in a rate case.

Items I.11 & I.13: The company's capital structure has a direct effect on its achieved earnings, and changes in capital structure have an impact on the level of tax savings. Also, the reasonableness of the company's debt-to-equity ratio is an important concern, and the opinion of bond rating agencies furnishes evidence in this regard. As a result, those documents are discoverable evidence which relate to United's capital structure since it is an appropriate issue in this proceeding.

Item I.14: The auditor's information is discoverable evidence because it is relevant to the issue of whether the company has properly accounted for its expenses and revenues in calculating its earnings.

Items II.1 through II.5: The company's argument that these documents related to affiliated corporations and thus have no effect on United's tax savings or their disposition ignores the impact of the allocation of costs and expenses to United from its affiliates. Affiliated corporations' organization charts, charts of accounts, financial statements and workpapers and tax returns can provide discoverable evidence of these allocations,

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including the reasonableness of allocation procedures and the appropriateness of the costs and expenses for being allocated. The conclusion reached above with regard to United's argument that this is not a rate case applies equally here to the documents being sought in Request II.

Items III.2 & III.3: Documents dealing with 1987 tax savings are discoverable evidence because they are relevant to the determination of whether tax savings for 1988 have been calculated in a consistent manner over time or whether changes have been implemented which call into question the correctness of the current computational practices.

Items IV.1 & IV.2: Documents dealing with 1988 budget information, including variances, are discoverable evidence because they can furnish information about the company's consistency in treating revenues and expenses, including cost allocations, between the time that budgets were prepared and the time these items were actually recorded. Such evidence can tend to show whether changes in accounting practices and procedures were implemented for reasons other than proper accounting.

Items IV.3 through IV.6 and IV.8 & IV.9: As concluded above, the auditor's information is discoverable evidence because it concerns whether United has properly accounted for its expenses and revenues. The conclusion reached above with regard to United's argument that this is not a rate case applies equally here to the documents being sought in Request IV.

Item IV.10: As concluded above, these documents relating to affiliated corporations are discoverable evidence because they concern the impact of the allocation of costs and expenses to United from its affiliates. The cost-benefit analyses for affiliated services can provide discoverable evidence of the level of costs allocated, the reasonableness of allocation procedures and the appropriateness of the costs and expenses for being allocated.

Item IV.11: Because total company costs are allocated between the interstate and intrastate jurisdictions based on various formulae, a document dealing exclusively with interstate matters can be relevant in an intrastate

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proceeding, such as this one involving United's tax savings and their disposition, because it may demonstrate whether the allocation to intrastate operations was correct and also may effect the tax savings calculation if prepared in error.

For the reasons stated above, United shall make the documents sought in Requests I, II, III and IV available on a reasonable basis for inspection by OPC within seven days of the issuance date of this Order. United's alternative request that the nine documents identified above be specified as proprietary information under a temporary protective order pursuant to the Confidentiality Rule is denied because the documents have not been filed with the Commission under an appropriate request for such treatment. If the company wishes to have portions of these nine documents so specified in light of the findings in this Order, then they should be filed with the Commission under a proper request and in accordance with the following directions governing confidentiality requests in this docket.

Recent events have led the Prehearing Officer to conclude that utilities must be more specific in both identifying the precise material believed to be proprietary and supporting their arguments with relevant reasons justifying non-disclosure. Addressing the latter deficiency first, United is reminded that the Confidentiality Rule is explicit in requiring that each request for proprietary specification be fully justified by a showing sufficient to meet the burden of proving harm through public disclosure. The Prehearing Officer will grant the requested specification only in individual instances where United has met that burden with a sufficient showing to support its request. The company is expected to limit its requests for confidential treatment to only those discrete portions of documents that would truly be harmful if disclosed.

To address the former deficiency, United shall follow the steps explained below. The Commission's practice is to assign a Document Number (DN) to each document or set of documents accompanying an individual request for a confidentiality ruling. In the case of two or more documents being submitted for consideration under one DN, the identification of the specific portions of each document has been woefully inadequate in some recent cases. Accordingly, if United submits more than one document under a single request pursuant to the

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Confidentiality Rule, then an index of all documents must accompany the request. This index shall assign a letter to each document, and all references to that document in the request shall refer to that document by the letter assigned to it in the index. Thereafter, all pleadings filed by the parties shall refer to that specific document by the DN and the letter assigned to it in the index.

Numbering the pages consecutively in each discrete document and the lines on each page would further assist the Prehearing Officer and the other parties in identifying the subject material. The recent practice adopted by some utilities of merely highlighting numbers and words on a page as a means of indicating the portion considered proprietary by the utility, while helpful, is insufficient and leads to difficulty in describing this material in the order ruling on the request. Therefore, United shall number consecutively each page of each separate document submitted and each line of each such page. References in the request and in related pleadings to the material sought by the company to be specified proprietary shall be by page and line numbers.

It is therefore,

ORDERED by Commissioner Thomas M. Beard, as Prehearing Officer, that the Office of the Public Counsel's two Motions to Compel, filed on June 9, 1989, are hereby granted. It is further

ORDERED that the Office of the Public Counsel's Motion to Compel and Response to United's Motion for a Protective Order, filed on October 9, 1989, is hereby granted. It is further

ORDERED that the Office of the Public Counsel's Response to United Telephone Company of Florida's "Objection to Discovery and Request for Protective Order" and Motion to Compel, filed on November 22, 1989, is hereby granted. It is further

ORDERED that United Telephone Company of Florida's Motion for Protective Order and Objection, filed on September 29, 1989, is hereby denied. It is further

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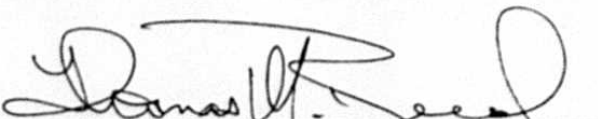
ORDERED that United Telephone Company of Florida's Objection to Discovery and Request for Protective Order, filed on November 7, 1989, is hereby denied. It is further

ORDERED that the Office of the Public Counsel's Motion to Strike United's "Objection to Discovery and Request for Protective Order," filed on November 22, 1989, is hereby dismissed as moot. It is further

ORDERED that United Telephone Company of Florida shall make the documents discussed in the body of this Order available on a reasonable basis for inspection by the Office of the Public Counsel within seven days of the issuance date of this Order. It is further

ORDERED that any document which United Telephone Company of Florida wishes to have specified proprietary pursuant to Rule 25-22.006(5)(c), Florida Administrative Code, shall be filed with the Florida Public Service Commission under a proper request and in accordance with the directions governing confidentiality requests in this docket which are provided in the body of this Order.

By ORDER of Commissioner Thomas M. Beard, and Prehearing Officer, this 11th day of JANUARY, 1990.


THOMAS M. BEARD, Commissioner
and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), 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 this order, which is preliminary, procedural or intermediate in nature, may request: 1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; 2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or 3) 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 or sewer utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.