IN THE SUPREME COURT OF FLORIDA

CITIZENS OF THE STATE OF FLORIDA,)
)
Appellants,

v. CASE NO. 75,029

FLORIDA PUBLIC SERVICE COMMISSION,)
)
Appellee.)
)

On Appeal from the Florida Public Service Commission

ANSWER BRIEF OF UNITED TELEPHONE COMPANY OF FLORIDA

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STATEMENT OF CASE AND FACTS

In October, **1986,** shortly after enactment of the Tax Reform Act of **1986** (the Act), the Florida Public Service Commission (Commission) opened an investigation as to how this Act would affect utilities subject to the Commission's jurisdiction. This investigation was conducted in Docket No. **861145-PU** and involved many utilities, one of which is United Telephone Company of Florida (United).

On December **18, 1986,** the Office of Public Counsel petitioned the Commission to reduce United's rates to eliminate any tax savings that the Act might produce (the **1986** petition). United, Public Counsel and the Commission Staff had several informal discussions as to how the Commission's investigation and Public Counsel's petition might be resolved. Ultimately, an accord was reached, the result of which is reflected in Order No. **17429,** issued on April **20, 1987.** (A. **1)** United was ordered to reduce rates by **$6,700,000** and to take additional depreciation of **$568,000.** These measures had the effect of eliminating United's **1987** tax savings. (A. **2)** Order No. **17429** was issued in several dockets simultaneously, including Docket No. **861615-TL,** Public Counsel's **1986** petition. The order recites that:

> this [action] will be in lieu of the application of Commission Rule **25-14.003.** (A. **2)** (language in brackets added)
>
> * * * *
>
> Because the access charge reductions and depreciation expense increases will dispose of United's **1987** savings in tax expense resulting from tax reform, we believe OPC's petition in Docket NO. **861615-TL** has become moot; therefore, we will close that docket. (A. 3)

Order No. 17429 became a final order and was not appealed by Public Counsel or United.

The rate reduction ordered by the Commission for United to offset tax savings continued in 1988.[1]

On April 10, 1989, Public Counsel filed a petition with the Commission alleging that United was not in compliance with the Commission's tax rule (the 1989 petition). While noting that United had reported to the Commission that the continued rate reduction has consumed United's 1988 tax savings, Public Counsel asserted for the first time that the Commission's tax rule could not be satisfied through rate reductions, but required a refund. (R. 1)

United controverted this claim by Answer filed on May 2, 1989. (R. 5) United cited Order No. 17429 for the proposition that tax savings had properly been disposed of through rate reductions, that Public Counsel had petitioned for and actively participated in the proceeding which had implemented the rate reductions, and that such action was, by concurrence of all parties, "in lieu of" application of the refund provisions of the tax rule.

On October 16, 1989, the Commission denied a portion of the 1989 petition, holding that the tax rule had not been violated by disposing of tax savings through rate reductions. The Commission

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[1] The depreciation expense increase was a one-time adjustment which was necessitated by the fact that the Commission wanted a uniform rate reduction among all telephone companies even though the effective date of the reduction varied among companies.

recited the background of its **1987** actions to eliminate tax savings and in Order No. 22060 concluded:

> When we approved the reduction in United's access charges, we viewed this action as an acceptable disposition of tax savings. At the time of this action, we expected the access charge reduction to have an ongoing impact on United's tax savings. Accordingly, our action in reducing United's access charge savings in **1987** must be considered in determining whether the Company's **1988** tax savings have been properly disposed of. (A. 6)

This appeal followed.

SUMMARY OF ARGUMENT

Public Counsel has not shown that the Commission violated Rule **25-14.003** F.A.C. That Rule exists to ensure that a utility's customers pay rates which accurately reflect the level of tax expenses the utility is required to pay. When, as in this case, the Commission adjusted customer rates coincident with the tax rate change, the purpose for which the tax rule exists has been satisfied. It is only when the tax rate changes and no customer rate changes are made to reflect the new tax rate that the refund provisions of the tax rule must be considered.

The Commission acted responsibly and in the ratepayers' best interests by ordering that all tax savings be flowed through as they were realized through access charge reductions. Handling tax savings through refunds delays the benefit for more than **a** year and introduces the possibility that less than all tax savings will be given back.[2]

Public Counsel itself urged the course of action it now condemns. It was among the first to petition the Commission to reduce rates to eliminate tax savings. It participated actively at every stage of the docket in which United was ordered to reduce access charges, without ever suggesting that the tax rule could not be satisfied in this manner. Public Counsel is estopped from taking a position to the contrary in this appeal.

United has no means by which to recover the **$14.7** million it lost in 1988 as a result of passing through tax savings by means

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[2] See Public Counsel's 1986 Petition, A. 19.

of rate reductions. If refunds are also ordered, United will have returned the tax savings twice.

If the strict construction of Rule 25-14.003, F.A.C., urged by Public Counsel is adopted by the Court, the Court should also hold that the definition of mid-point found in the rule be strictly construed. Strict construction of that definition would obviate the possibility of any refund.

ARGUMENT

POINT I

WHETHER RULE 25-14.003, F.A.C., HAS BEEN VIOLATED

Public Counsel has not established that the Commission violated its tax rule and did not acknowledge in its initial brief that a) Public Counsel was the first to urge that tax savings be disposed of through rate reductions rather than refunds, and b) Public Counsel actively participated in reducing rates at every stage of this proceeding, without ever raising the question it has now brought before the Court.

A. The tax rule has not been violated.

Public Counsel's principal argument in this case is that the Commission's tax rule can be satisfied only through refunds. In other words, United must first collect the excess taxes, and only then can a calculation be made as to whether some amount must be refunded.

The Commission has taken a different view of its responsibilities. The Commission has determined that it is preferable to reduce rates such that the excess taxes are never

collected. (A. 7) The tax rule exists to ensure that any tax savings not disposed of through rate reductions are taken care of through refunds.

Even a casual review of the tax rule reveals that the Commission's pro-active approach will result in greater savings to the ratepayer than Public Counsel's "refund only" approach. The tax rule provides for refunds of tax savings only when a utility is earning above the mid-point of its authorized rate of return range. A utility could have tax savings of millions of dollars, but if it were earning at or below the mid-point of its authorized rate of return, the utility would keep all tax savings under Public Counsel's approach. Conversely, under the Commission's approach, tax savings are eliminated through rate reductions before they are ever collected, thus ensuring not only that the full savings go to the ratepayer, but also that the savings are disposed of up to 15 months sooner than they would be if the "refund only" approach is followed. To ensure that the rate reduction equals or exceeds the estimated tax savings, the Commission retains jurisdiction over this factual question and will apply the refund provisions of the tax rule if all tax savings are not consumed by the rate reduction. [3]

Public Counsel has cited no provision in the tax rule or otherwise that precludes the Commission from disposing of tax savings through rate reductions. The tax rule cannot be violated if there are no tax savings to refund. The Commission is

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[3] See Order No. 22060 (A. 6 - 7)

empowered under Section **364.14,** Florida Statutes, to fix rates for telephone companies such as United. Public Counsel has identified no restriction on the Commission's ability to anticipate savings resulting from known changes to the tax laws and from adjusting rates to dispose of those savings. That is exactly what the Commission has done in this Case.

Public Counsel construes the tax rule as if it were the only means available to the Commission to dispose of tax savings. That is plainly not the tax rule's function. The tax rule is designed to operate only when there have been no rate changes. The intent of the rule is to disgorge tax savings (or allow recovery of tax increases) when tax changes have taken affect and before rates have been adjusted to recognize those changes.

Federal income tax is an expense that is recognized when rates are determined in a rate proceeding. At the time of United's last rate proceeding in **1982,** the federal corporate income tax rate was **46%.** As a result of the Tax Reform Act of **1986,** the tax rate decreased to 34%. If the Commission took no action, United's rates would have continued to collect taxes at the **46%** level because that was the level in effect when the rates were designed. Had the Commission taken no action to adjust rates, the tax rule would have come into play, and if appropriate, **a** refund would have been ordered. For the reasons set forth above, however, the Commission did take action by lowering United's access charges concurrent with the tax reduction. The Commission reduced access charges sufficiently such that United's overall rate levels generated only enough revenues to recover

taxes at the new tax rate.[4]

Since rates now generate only enough revenues to recover taxes at the rate of 34%, the tax rule has no applicability.[5]

Literally taken, Public Counsel's argument would mean that rates can never be designed for a tax rate of other than 46% since, under their interpretation, the refund obligation of the tax rule survives any effort to offset the tax reduction by adjusting customer rates. Such a result is not contemplated by the statutes, rules or case law in Florida. In fact, the matching of revenues to the on-going level of expenses is so fundamentally sound as to be inarguable.

> A ratemaking body such as Florida's Public Service Commission cannot ignore an existing fact that admittedly will affect the future rates, such as the corporate tax here.
>
> Gulf Power Co. v. Bevis, 289 So.2d 401, 404 (Fla,. 1974)

Far from violating the tax rule, then, the Commission clearly acted to reduce rates so that customers would have the benefit of reduced taxes reflected in their rates from the very outset,

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[4] In 1987, because the rate reduction did not take place on the same date for all telephone companies, a portion of the tax savings was taken in the form of additional depreciation, which (like the access charge reduction) ensured that no tax savings accrued to United's investors.

[5] It is a factual question as to whether the rate reduction fully disposed of tax savings. If the reduction did not consume all tax savings, the tax rule would apply as to that portion which was collected in spite of the reduction. The Commission is currently investigating whether United's rate reduction disposed of all tax savings in 1988.

rather than have to wait for up to **15** months to see whether any refund might be forthcoming.

B. Tax savings were disposed of in 1988 just as they were in 1987: through access charge reductions.

In **1987,** United, pursuant to Commission Order No. **17429,** disposed of its tax savings through a combination of access charge reductions and additional depreciation. (See footnotes **1** and **3,** supra). Public Counsel has never challenged Order No. **17429,** and specifically has never alleged to the Commission or this Court that the access charge reduction ordered therein did not lawfully and properly dispose of United's **1987** tax savings. That same reduction in access charges did not cease on January **1, 1988,** but rather remained in effect throughout **1988** to dispose of **1988** tax savings. Public Counsel's initial brief nowhere acknowledges its concurrence with disposing of tax savings in **1987** through rate reductions, and nowhere explains why the same course of action is unlawful in **1988.** The tax code did not change; the Commission's tax rule did not change; the access charge reduction did not change; only Public Counsel's position changed. Public Counsel does not even acknowledge this change, let alone justify it and has failed to show the Commission did anything to violate its rules when the Commission pursued the course of action urged by Public Counsel.

C. Public Counsel participated in and acquiesced to the action it now complains of.

Shortly after passage of the Tax Reform Act of **1986,** the Commission opened Docket No. 861145-PU to determine the Act's

potential impact on regulated utilities.

As to United, the Commission found that the Company's **1987** tax savings would be **$7,150,000**, To offset these tax savings, the Commission ordered United to reduce its access charges by **$6,700,000**, effective May **1**, **1987**, and to record a one-time depreciation charge of **$568,000** (which equated to **$450,000** in terms of reducing revenues).

All of the foregoing was provided for in Order No. **17429**, issued on April **20**, **1987**. (A. **1**). Order No. **17429** applied to several dockets, two of which were Dockets No. **861145-PU**, the tax investigation and **861615-TL**, Public Counsel's **1986** petition. The Order stated:

> As more fully discussed below, we find that the public interest would be served through our ordering United to reduce access charges and increase depreciation expense by the amount of its anticipated **1987** tax savings.
>
> Our action here is intended to deal with a number of outstanding issues. In recognition of the tax law change, we will order the disposition of **$7,150,000** associated with United's tax expense reduction for **1987**. This will be in lieu of the application of Commission Rule **25-14.003**.
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> (A. **2**, emphasis added)

Thus, clearly in **1987** the Commission established the principle that disposition of tax savings through means other than refunds would be pursued "in lieu of application of Rule **25-14.003**."

This is not unknown to Public Counsel. In fact, Order No. **17429** specifically states:

> United, OPC, and our staff then began discussions toward settlement of Dockets No. 861363-TL and 861615-TL [Public Counsel's 1986 petition] and of United's involvement in Dockets No. 861145-PU [the tax docket], 860984-TP and 820537-TP.
>
> (A. 2, emphasis and brackets added)[6]

Thus, not only is Public Counsel charged with knowledge of the Commission's disposition of tax savings through access charge reductions and depreciation, Public Counsel actually participated in the docket.

Having knowledge of the Order, having participated in the discussions and having acquiesced to the Commission's disposition of tax savings, Public Counsel is estopped from now asserting that the Commission must order refunds. If the Public Counsel believed that only refunds could properly dispose of tax savings, it should not have participated in reducing rates and then waited silently until after rates had been reduced and revenues foregone to then raise the issue. Public Counsel's acquiescence and silence upon this issue and United's detrimental reliance upon the finality of the Commission's Order to reduce the CCL and take additional depreciation require that this Appeal be denied.

D. Public Counsel itself was among the first to urge that tax savings be passed to ratepayers through rate reductions.

Not only did Public Counsel participate in and acquiesce to United's access charge reductions as a means to dispose of tax

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[6] OPC is the Office of Public Counsel.

savings, Public Counsel was the first party to urge that course of action.

In Docket No. 861615-TL, Public Counsel filed a Petition urging the Commission to reduce United's rates to "reflect a reduction in the tax expenses due to the change in the corporate tax rate from 46% to 34%." (A. 15) In other words, Public Counsel petitioned the Commission to take the very action that Public Counsel now asserts is a violation of the Commission tax rule.

In sum, this is what has transpired:

1. 1986 Public Counsel petitions the Commission to reduce rates to eliminate tax savings.

2. 1987 Public Counsel participates and concurs in the Commission's docket that reduces United's rates "in lieu of" application of the tax rule.

3. 1988 The rate reduction continues unchallenged by Public Counsel and United foregoes revenues of $14,738,446. (A. 7)

4. 1989 Public Counsel asserts for the first time that a rate reduction cannot serve to satisfy the tax rule.

There is absolutely no rationale provided by Public Counsel for such a flip-flop. Public Counsel knows that United has no means by which to recover the $14.7 million of rates it lost through the access charge reduction in 1988. The effect of Public Counsel's argument in this case, if it were to prevail, would be to augment the $14.7 million rate reduction by a refund of up to $14.5 million more. United's 1988 tax savings of $14.5 million then would have cost it $29.2 million. Nothing in the tax rule

requires such an inequitable result.

E. Public Counsel is estopped from arguing that tax savings may not be eliminated by rate reduction.

Public Counsel argued forcefully in its petition in Docket No. 861615-TL that the Commission should reduce rates to eliminate tax savings. It participated in the proceeding which culminated in the issuance of Order No. 17429 which ordered United to reduce access charge rates to eliminate tax savings. Having succeeded in persuading the Commission to reduce rates, Public Counsel is now estopped from asserting that tax savings can only be eliminated through the refund process provided for in the Commission's tax rule. The essence of the doctrine of estoppel is that a person should not be permitted to unfairly assert, assume or maintain inconsistent positions. Head v. Lane, 495 So.2d 821, 824 (Fla. 4th DCA, 1986).

One form of estoppel is equitable estoppel which

> . . . is present where a person attempts to change his position after representing a contrary position to another who reasonably relied upon the representation and who would suffer substantial injury if the inconsistent position were permitted to be successfully asserted.
>
> Head v. Lane, supra, at 824.

The Court in Head found that failure to assert a position would also give rise to an estoppel. Where a person has conducted himself in a certain manner, he cannot afterward assume an inconsistent position to the prejudice of one who acted in reliance on that conduct. United Contractors, Inc. v. United Construction Corp., 187 So.2d 695, 701 (Fla. 2nd DCA, 1966). See

also, Doyle v. Tutan, 110 So.2d 42 (Fla. 3rd DCA, 1959) and Gleason v. Leadership Housing, Inc. 327 So.2d 101 (Fla. 4th DCA, 1976). Public Counsel's initial conduct was to urge rate reductions in the Docket which resulted in the Commission's order reducing rates. Public Counsel's inconsistent position is to urge in the instant proceeding that tax savings cannot be passed on by rate reductions, but rather must consist of refunds. United is the party who will be prejudiced by having to make a $14.5 million refund, in addition to the $14.7 million rate reduction it has already made when total tax savings in 1988 were approximately $14.5 million. With respect to estoppel, regardless of whether the Commission acted properly, it acted as Public Counsel had petitioned and in consonance with Public Counsel's active and willful participation. Public Counsel is estopped from asserting that the tax rule has been violated.

POINT II

WHETHER RULE 25-14.003, F.A.C. SHOULD BE STRICTLY INTERPRETED

Public Counsel's argument regarding the Commission's tax rule is founded upon the necessity of a literal interpretation of the rule:

> The rule is plainly worded. It does not state that a utility may make other adjustments in lieu of a refund, nor does it state that the Commission may authorize alternative actions.
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> (Public Counsel's initial brief, at p. 12).

Since Public Counsel is arguing for a strict construction of the tax rule, it would be appropriate to consider the plain

meaning of subsection (1)(f) of the rule, which defines "mid-point" as the mid-point approved in the "utility's last rate case." (A. 12) The tax rule provides for a refund of tax savings only if a utility is earning above the mid-point of the return on equity approved in its last rate case. For United, that mid-point would be 15.75%. [7]

If the Court holds that only refunds can satisfy the tax rule, it should be consistent with the "plainly worded" terms of the tax rule, and hold as well that the entire rule be interpreted literally, including the "mid-point" determination. Emerson said that a foolish consistency is the hobgoblin of little minds. Risking the poet's opprobrium, United is compelled to note that the inconsistency of Public Counsel's position regarding 1987 tax savings versus 1988 is apparent also in an inconsistent approach to interpreting the tax rule. That is, Public Counsel insists that the Commission erred by not staying within the four corners of the tax rule. At the same time, Public Counsel itself abandons the mid-point definition that is the cornerstone of the tax rule and argues in favor of a mid-point that was established outside a rate case some six years after United's last rate case.

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[7] Since United has represented that its rate of return in 1988 was 14.25%, United did not exceed the midpoint of its rate case rate of return and no refund is due.

POINT III

WHETHER SUBSEQUENT EMERGENCY CHANGES TO THE TAX RULE ARE RELEVANT

The unnumbered second point of Public Counsel's brief (pp **17-18)** makes the impertinent observation that a recent emergency amendment to the tax rule "shows that the Commission knows how to change its rule" (Public Counsel's Initial Brief, at p. 18) The significance of this observation is not readily apparent in Public Counsel's argument, since no one has questioned the Commission's capabilities in that regard. If it is simply intended to be derisive, no response is warranted. If, on the other hand, Public Counsel is trying to state that such an amendment was necessary prior to the Commission ordering rate reductions, that position has not been supported. It certainly does not explain Public Counsel's **1986** petition to reduce rates to eliminate tax savings. (Pages **11-13,** supra). Or Public Counsel's active, affirmative participation in the rate reduction proceeding. (Pages **9-11,** supra). Or eliminate the estoppel element of Public Counsel's flip-flop. (Pages 13-14).

At best, the emergency amendment, which was initially proposed by Public Counsel indicates only that Public Counsel knows how to petition for emergency rule changes.

POINT IV

WHETHER THE COMMISSION IGNORES RATE INCREASES WHEN DETERMINING TAX SAVINGS REFUNDS

The third unnumbered point of Public Counsel's brief (p. **19-21)** cites a recent proceeding involving GTE Florida, another

telephone company, for the proposition that the Commission interprets its tax rule inconsistently.

The only matter before the Court is whether Commission Order **No. 22060** is lawful. If Public Counsel believes the Commission has acted improperly in the GTE Florida proceeding, it can appeal the final order in that docket. This is not an action for mandamus or prohibition wherein the Commission is to be instructed what actions to take or not take.

The Order referenced by Public Counsel in GTE Florida does not involve United, is not part of the record on appeal, and, according to Public Counsel, is not even a final order.

Order No. **22060** should be reviewed based upon the record before the Court in this proceeding. Presumably there is an entire record before the Commission in the GTE Florida docket. Presumably the Commission's action in that docket is based upon the record therein.

Public Counsel is not citing the GTE Florida order to demonstrate an error in Order No. **22060** since indeed, Public Counsel finds error in the GTE Florida order. Thus, even if the impropriety of considering matters outside of the record is overlooked, the GTE Florida order is neither pertinent or probative.

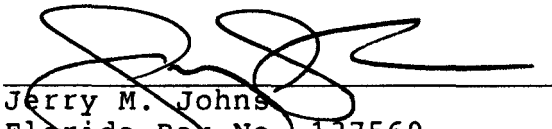
CONCLUSION

Public Counsel has not shown that Order No. 22060 violates Rule 25-14.003, F.A.C. To the contrary, the Commission has acted promptly and reasonably to ensure that rate reductions flowed through to United's customers the benefit of tax savings which resulted from the Tax Reform Act of 1986, rather than wait for a delayed and uncertain refund.

Public Counsel urged the very action of which it now complains. Public Counsel participated at every stage of the proceeding in which rate reductions were ordered in lieu of application of the tax rule.

Public Counsel's appeal should be denied, and Order No. 22060 should be upheld.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of United Telephone Company of Florida in Case No. 75,029 has been served by hand delivery on the following parties this 16th day of February, 1990:

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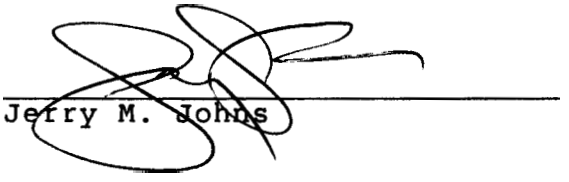

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