

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

IN RE: Adoption of Emergency )  
 Rule Amendment 25ER89-1 to Rule )  
 25-14.003, F.A.C., Corporate )  
 Income Tax Expense Adjustment. )  
 \_\_\_\_\_ )  
 IN RE: Revision of Rule )  
 25-14.003, Corporate Income Tax )  
 Expense Adjustment Rule: Midpoint )  
 and Additional Changes. )  
 \_\_\_\_\_ )

DOCKET NO. 891296-PU  
  
 DOCKET NO. 891278-PU  
 ORDER NO. 22353  
 ISSUED: 12-29-89

NOTICE OF ADOPTION OF EMERGENCY RULE AMENDMENT

NOTICE IS HEREBY GIVEN THAT the Commission, on its own motion and pursuant to section 120.54(9), Florida Statutes, has adopted emergency rule amendment 25ER89-1 to Rule 25-14.003, F.A.C.

The emergency rule was filed with the Secretary of State on December 21, 1989, and is effective January 1, 1990. Attached is a Notice of Emergency Rule that will appear in the December 29, 1989, edition of the Florida Administrative Weekly.

By Direction of the Florida Public Service Commission,  
 this 29th day of December, 1989.

  
 \_\_\_\_\_  
 Steve Tribble, Director  
 Division of Records and Reporting

( S E A L )

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DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

ORDER NO. 22353  
DOCKET NO. 891296-PU/891278-PU  
PAGE 2

FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 891296-PU

DOCKET NO. 891278-PU

EMERGENCY RULE NO.:

25ER89-1

RULE TITLE:

RULE NO.:

Corporate Income Tax Expense Adjustments

25-14.003

SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC,  
HEALTH, SAFETY OR WELFARE:

One of the changes in the Tax Reform Act of 1986 was a phased-in reduction of the tax rates applicable to taxable income. That change is the subject of Rule 25-14.003, F.A.C. That rule measures the effect of the tax rate changes against an earnings test; it is not a direct pass-through of tax savings or increases. The full effect of the rate change on earnings could not be determined until after the first full year of experience under the new rates. Sixteen regulated companies experienced tax savings in 1987 and 1988. All had earnings at a level that required some earnings be used to benefit the ratepayers either by means of a refund or through an adjustment to depreciation expenses. It has been established that there is a consistent earnings pattern that can be assumed to be attributable to the tax savings resulting from the rate change. Based on 1989 surveillance reviews, it appears that seven companies will experience continuing savings in 1989 and subsequent years that, when current market financial market

ORDER NO. 22353  
DOCKET NO. 891296-PU/891278-PU  
PAGE 3

conditions are recognized, will result in additional refunds or adjustments.

When Rule 25-14.003, F.A.C., was adopted, it was not anticipated that the size of tax rate changes would be as large as it has been nor was it anticipated that tax rates would be stable for the length of time they have been. Also, the current rates of return do not reflect the current cost of capital. These unanticipated effects can now be demonstrated to adversely affect the ratepayers of some companies, unless steps are taken.

Thus, there is now an excellent basis on which to proceed with adjustments to utility rates and charges. At the October 31, 1989, agenda, the Commission formally initiated rulemaking on, among other things, the changes to the definition of midpoint and the method of tax savings disposition and opened two separate dockets to reduce the rates and charges of TECO and Peoples Gas. A hearing has been set for January 29, 1990, if requested, on the rule amendments.

Public Counsel filed a petition with the FPSC for emergency rulemaking based on the concern that the ratepayers will be harmed by the passage of time required to amend the rule. The concern is that monies will be lost to the ratepayers between January 1, 1990, and the effective date of any new equity return that may be established as a result of any rule amendments that may be adopted. A critical point has been reached where the magnitude of the problem can be seen.

ORDER NO. 22353  
DOCKET NO. 891296-PU/891278-PU  
PAGE 4

The existence of these circumstances require emergency rulemaking. Moreover, failure to act affects utility ratepayers, not governmental agencies or employees.

By using emergency rulemaking, the Commission addresses the concern that in some cases: (a) the magnitude of the overearnings problem has now been identified; (b) the overearnings appear material; (c) the return on equity (ROE) established in the last rate case is obsolete; (d) past use of stipulations to a lower ROE for individual calendar years is not a viable long-term solution to permanent tax rate reductions; (e) corporate tax rates at the Federal level did not increase as anticipated these last two years. Further, if the rule is not amended as of January 1, 1990, the Commission's ability to effect a refund or rate reduction for all of 1990 is in doubt due to a concern regarding retroactive ratemaking.

While the legal issue of whether improper retroactive ratemaking would result should the Commission simply proceed under regular rulemaking, the amount of money involved dictates that the FPSC not take the risk. The materiality now is known. The total tax savings subject to refund and relating to the Tax Reform Act of 1986 for Florida utilities was approximately \$336 million in 1988.

The impact of the emergency tax rule is difficult to quantify, because the appropriate return on equity for 1990 has not yet been established, and the actual earnings and tax savings for 1990 cannot be known conclusively until after 1990.

ORDER NO. 22353  
DOCKET NO. 891296-PU/891278-PU  
PAGE 5

However, based on data from 1988, there is a potential harm to ratepayers of approximately \$180 million if this emergency rule is not adopted.

This emergency rule will give the FPSC the flexibility to proceed in the best way to protect the ratepayers. The addition of the language "or other adjustments" enables the FPSC to require rate reductions/increases as well as refunds or additional collections.

REASONS FOR CONCLUDING THAT THE PROCEDURE USED IS FAIR UNDER THE CIRCUMSTANCES: This emergency rule was considered at a December 5, 1989, public meeting of the FPSC, at which interested persons were allowed to address the merits of the rule. Ample notice was provided to the utilities regarding this emergency rulemaking. On November 6, the Public Counsel filed the Petition for Initiation of Emergency Rulemaking on the rule. That Petition was served upon counsel for Florida Power and Light Company, Tampa Electric Company, Southern Bell, and some counsel representing water and sewer utilities. In addition, newspaper articles around the state appeared regarding the petition.

Also, permanent rulemaking proceedings, with a January 29, 1990, hearing date, are underway to remedy the long-term problems of the tax savings.

Notice of this rule will be published in the next available issue of the Florida Administrative Weekly.

ORDER NO. 22353  
DOCKET NO. 891296-PU/891278-PU  
PAGE 6

SUMMARY OF THE RULE: This rule allows the Commission to apply the most recent Commission approved Return on Equity to calculate the corporate income tax expense adjustment. In addition, it permits the FPSC to apply rate reductions or increases in addition to mandating refunds for additional collections.

The rule revisions to Rule 25-14.003 in Docket No. 861190-PU, which have been filed with the Department of State, will become effective on January 1, 1990. Therefore, this emergency rule will not apply to the water and sewer companies.

THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULE IS: Steve Tribble, Director of Records and Reporting

THE FULL TEXT OF THE EMERGENCY RULE IS:

25-14.003 Corporate Income Tax Expense Adjustments.

(1) Definitions. For the purposes of this rule, the following definitions shall apply:

(a) "Tax Savings." The difference between the tax expenses for a utility or regulated company calculated under the previously effective corporate income tax rates and those calculated under newly effective, reduced corporate income tax rates.

(b) "Tax Deficiency." The difference between the tax expenses for a utility or regulated company calculated under newly effective, higher corporate income tax rates and those calculated under the previously effective corporate income tax rates.

(c) "Associated Revenues." Those revenues resulting from the application of a utility's or regulated company's revenue expansion

ORDER NO. 22353  
DOCKET NO. 891296-PU/891278-PU  
PAGE 7

factor to a tax savings or tax deficiency. The tax rate to be used in calculating the revenue expansion factor shall reflect the tax rate at which the utility or regulated company recognizes the effect of the refund, collection or other adjustment on its tax return.

(d) "Previously Effective." Refers to the corporate income tax rate used in a utility's or regulated company's last rate case or earnings review show-cause proceeding, or used in the last tax expense adjustment by the Commission, whichever occurred most recently.

(e) "Tax Rate." The statutory tax rates, both federal and state, applicable to utility or regulated company income, including any surcharges, minimum taxes, and other adjustments to the basic percentage tax rates.

(f) "Midpoint." The midpoint of the range of rate of return calculated as the weighted average cost of capital for the period of time covered by the tax adjustment report required in subsection (4). The weighted average cost of capital shall be calculated using the current embedded cost of fixed rate capital, the actual cost of short term debt, zero cost for all investment tax credits, the cost of common equity that is the most recent Commission approved return on equity, and the actual cost of other sources of capital. The capital structure used shall be the company's actual capital structure adjusted to reflect all regulatory adjustments. ~~of-return-approved-by-the-Commission-in-~~

ORDER NO. 22353  
DOCKET NO. 891296-PU/891278-PU  
PAGE 8

~~the utility's last rate case, adjusted for the cost of any debt issued subsequent to the rate case and prior to the commencement of a tax savings refund or tax deficiency collection.~~

(2) Tax Savings Refunds or Other Adjustments Approved by the Commission. In accordance with subsection (5) of this rule and using a calendar year as the basis of the calculation:

(a) When, during the reporting period described in paragraph (5)(a) below, a utility or regulated company is earning a rate of return which is at or above the midpoint of its authorized range computed in accordance with subsection (1)(f) and without consideration of a tax rate reduction, the utility or regulated company shall make an adjustment approved by the Commission or refund all associated revenues as described in paragraph 5(c).

(b) When, during the reporting period described in paragraph 5(a) below, a utility or regulated company is earning a rate of return which is below the midpoint of its authorized range computed in accordance with subsection (1)(f) and without consideration of a tax rate reduction, the utility or regulated company shall make an adjustment approved by the Commission or refund only those associated revenues which cause the utility or regulated company to earn in excess of that midpoint, as described in paragraph 5(c).

(3) Tax Deficiency Collections or Other Adjustments Approved by the Commission. In accordance with subsection (5) of this rule and using a calendar year as the basis of the calculation:



ORDER NO. 22353  
DOCKET NO. 891296-PU/891278-PU  
PAGE 9

(a) When, during the reporting period described in 5(a) below, a utility or regulated company is earning a rate of return which is at or below the midpoint of its authorized range computed in accordance with subsection (1)(f) and without consideration of a tax rate increase, the utility or regulated company shall make other adjustments approved by the Commission of or collect all associated revenues, as described in paragraph 5(c).

(b) When, during the reporting period described in 5(a) below, a utility or regulated company is earning a rate of return which is above the midpoint of its authorized range computed in accordance with the provision of subsection (1)(f) and without consideration of a tax rate increase, the utility or regulated company shall make other adjustments approved by the Commission or collect only those associated revenues which cause the utility or regulated company to earn below that midpoint, as described in paragraph 5(c).

(4) Reporting Requirements. Following a tax rate change, each utility or regulated company shall furnish a report, on the form prescribed by the Commission, Form PSC/AFA 1 ( ), which is incorporated into this rule by reference. Form PSC/AFA 1 ( ), entitled "Rule 25-14.003 Corporate Income Tax Expese Adjustments", was effective ( ) and may be obtained from the Commission's Division of Auditing and Financial Analysis. A utility or regulated company is not precluded from providing tax adjustment information of its choice in addition to that prescribed by Form

ORDER NO. 22353  
DOCKET NO. 891296-PU/891278-PU  
PAGE 10

PSC/AFA 1 ( ). The report shall be required each year until the utility's or regulated company's rates and charges are adjusted to reflect the newly effective tax rate. On or before March 1st of every year following a tax rate change, each utility or regulated company shall furnish a final report, in the form prescribed by the Commission. The report shall cover only the prior calendar year and shall be due on or before fifteen days after the due date, including authorized extensions, of the Annual Report required by Rules 25-4.018, 25-6.014, 25-7.014, and 25-30.110. during which the tax rate change was effective.

(5) Procedures.

(a) Refunds, ~~or~~ collections or other adjustments approved by the Commission shall be calculated from the effective date of any tax rate change through the end of the calendar year. If the tax rate change is in effect for only part of a tax year, the refund, ~~or~~ collection or other Commission adjustment shall be calculated in accordance with the utility's or regulated company's customary accounting treatment as authorized by the federal or state taxing authority for tax rate changes which occur during a tax year. For years subsequent to the year in which the tax change became effective, tax savings or tax deficiencies shall be calculated for the entire calendar year or for the portion of the calendar year prior to the effective date of the next tax change.

(b) A further change in the tax rate shall end one period of compliance and initiate a new period but shall not affect any

ORDER NO. 22353  
DOCKET NO. 891296-PU/891278-PU  
PAGE 11

refund, or collection or other adjustment approved by the Commission already in progress pursuant to this rule.

(c) Together with the ~~final~~ report described in subsection (4) of this rule, each utility or regulated company shall file a petition containing a calculation of and the method for refunding, or collecting or otherwise disposing of any tax savings or deficiency for the tax year of the report. The Commission will review and evaluate the petition and supporting data, and either approve it, approve it with modification, or deny it; an opportunity for a hearing on the Commission's decision will then be provided, if requested. ~~Thereafter, the~~ The utility or regulated company shall either make the refund to or collect the deficiency from its existing customers in accordance with paragraphs (e) and (f) of this subsection or make another adjustment as directed by this Commission.

(d) Upon its own or other motion, the Commission may determine that a refund, or collection or other adjustment for a particular year is impractical because its amount will not warrant the expense of making the refund, or collecting the deficiency or making another adjustment. In such an event, no refund, or collection or other adjustment will be made for that year.

(e) The utility or regulated company may make any refund or collection either as a lump sum payment or billing or in monthly installments not to exceed twelve (12) months. Such refunds shall be made in accordance with Rules 25-4.114, 25-6.109, 25-7.091, and

ORDER NO. 22353  
DOCKET NO. 891296-PU/891278-PU  
PAGE 12

25-30.360. ~~of~~ Such collections shall be made to or from current customers of the utility or regulated company at the time that such ~~refunds-of~~ collections are to be effected. ~~In-either event,-the~~ The utility or regulated company shall refund or collect the amount with interest accruing on any outstanding balance from the date of overcollection or underpayment. ~~Interest-shall-be-set-by-the-Commission~~ The date of overcollection or underpayment shall be the later of the date the tax rate change was effective or the first of the year for which the report is being filed. If a tax rate change was phased in over a period of time, then the date of overcollection or underpayment shall be the later of the date when tax rate change was effective or the date the the effect of the tax rate change was recognized as such by use of a blended tax rate. If the utility or regulated company is unable to show when over-collections or underpayments occurred, then the tax savings or tax deficiency shall be assumed to have occurred evenly over the twelve (12) months covered by the tax adjustment report. Interest on refunds, collections, or other Commission approved adjustments shall be calculated in accordance with the interest calculation provisions of Rules 25-4.114, 25-6.109, 25-7.091, and 25-30.076. Interest shall not accrue on franchise fees, utility taxes, sales taxes, or excise taxes.

(f) ForAn an electric utility, other utility, or regulated company, ~~shall-determine~~ each customer's share of refund or

ORDER NO. 22353  
 DOCKET NO. 891296-PU/891278-PU  
 PAGE 13

collection shall be determined on a basis that fairly and equitably reflects the income taxes embodied in rates for the utility's or regulated company's various customer classes, or on any other fair and reasonable basis approved by the Commission on a-kilowatt-hour-basis. A telephone company shall determine each customer's share of refund or collection based on existing general residence and business local rate relationships. Other utilities shall determine each customer's share of refund or collection based on consumption or any other reasonable basis specified in the utility's or regulated company's petition and approved by the Commission.

(6) Effect of Rate Case or Earnings Review proceeding ~~show~~ cause. A tax savings refund, ~~or~~ tax deficiency collection, or other Commission approved adjustment shall be consistent with this rule except that:

(a) When a tax rate change occurs, its effects ~~The-issue-of a-tax-savings-refund-or-tax-deficiency-collection~~ shall be addressed ~~decided~~ in the course of rate cases and earnings review ~~show-cause~~ proceedings that are pending when a the tax rate change becomes law. If a rate case or earnings review proceeding is begun in ~~or-that-commence-prior-to-the-close~~ of the tax year in which a tax rate change becomes effective., the effects of the tax rate change shall be addressed in such proceedings.

ORDER NO. 22353  
 DOCKET NO. 891296-PU/891278-PU  
 PAGE 14

(b) ~~Nothing in this subsection shall be construed as limiting the operation of the tax expense adjustment process under this rule either in completing a~~ A tax savings refund, or tax deficiency collection or other Commission approved adjustment already in progress for any tax years prior to the year in which a rate case or earnings review proceeding show-cause is initiated, shall be completed. This subsection ~~it~~ shall ~~also~~ not prohibit a tax savings refund, or tax deficiency collection or other Commission approved adjustment for any tax year or portion thereof ending prior to the final order in a rate case or earnings review show-cause proceeding.

(7) The provisions of this rule shall not supersede any disposition of excess tax revenues or collections of tax deficiencies approved by the Commission prior to the effective date of this rule.

Specific Authority: 350.127(2), 364.01, 366.05, 367.121, F.S.

Law Implemented: 364.01, 364.035, 364.05, 366.05, 366.06, 366.076, 367.121, 367.081, 367.0822, F.S.

History: New 6/22/82, formerly 25-14.03, Amended

THIS RULE TAKES EFFECT UPON BEING FILED WITH THE DEPARTMENT OF STATE UNLESS A LATER TIME AND DATE IS SPECIFIED IN THE RULE STATED BELOW:

12:01 A.M., January 1, 1990 AND SHALL REMAIN IN EFFECT UNTIL THE EXPIRATION OF 90 DAYS OR UNTIL PERMANENT RULES ARE ADOPTED AND

ORDER NO. 22353  
DOCKET NO. 891296-PU/891278-PU  
PAGE 15

MADE EFFECTIVE BY THE FLORIDA PUBLIC SERVICE COMMISSION REGARDING  
THE SAME SUBJECT MATTER, WHICHEVER OCCURS SOONER.