

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 233

In the Matter of)	REPLY BRIEF OF THE CITIZENS' UTILITY BOARD OF OREGON
)	
IDAHO POWER COMPANY)	
)	
Request for General Rate Revision)	
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I. INTRODUCTION

Pursuant to the Prehearing Conference Memorandum of Administrative Law Judge (“ALJ”) Michael Grant, issued on May 21, 2013, the Citizens’ Utility Board of Oregon (“CUB”), submits this Reply Brief to the Oregon Public Utility Commission (“Commission” or “OPUC”). As stated in the Joint Opening Brief submitted by CUB and the Oregon Industrial Customers of Idaho Power (“OICIP”), the Commission should require Idaho Power to amortize into rates the large one-time tax benefits at issue in this case. The arguments contained in the opening briefs of both Staff and Idaho Power are unpersuasive, and should not be adopted by the Commission.

II. ARGUMENT

In their Opening Brief, CUB and OICIP argued that under the precedents addressing the circumstances of amortization after a deferral, the Commission should review Idaho Power’s 2011 earnings and amortize into rates the entire one-time tax benefit received by the Company in 2011. In its Opening Brief, Staff argues that ORS 757.259, in fact, does not require an earnings review when, as is the case here, the statute requires no deferral. Nevertheless, Staff urges the

Commission to adopt a “restrictive” earnings test that would have the Commission examine year-by-year earnings spanning more than twenty years before concluding that amortization is not appropriate for *any* year in this case. Idaho Power argues that an earnings test for the period between 1987 and 2009 is required in this case, but uses an average of Idaho Power’s earnings during that time to support its conclusion that amortization of the one-time tax benefits is not appropriate.

While CUB concedes that the Commission may find persuasive Staff’s argument that no earnings test is required pursuant to ORS 757.259(5), the Commission should not, as Staff argues, choose to impose an earnings test that looks back more twenty years. Rather, if the Commission finds no earnings test is required for amounts subject to ORS 757.259(1)(a)(A), the Commission should order straight amortization of the funds at issue in this case. If, however, the Commission determines that it will nevertheless order an earnings test, even if not required by the deferral statute, the year 2011 is the only appropriate period in which to conduct an earnings review. The Commission should reject Idaho Power’s legally unsupported claim that an average of its earnings during the look-back period warrants denial of CUB and OICIP’s application for amortization.

Allowing the Company to retain the entirety of the \$92.9 million tax windfall received in 2011 would result in the Company retaining earnings almost 900 basis points above its authorized ROE in 2011, even when taking Type 1 adjustments into account. This result is

inconsistent with the current tax policy in Oregon¹ and is fundamentally unfair to ratepayers, who bear the burden of meeting Idaho Power's tax obligations through their rates.

A. Should the Commission Find That an Earnings Test Pursuant to ORS 757.259(5) is Required, the Earnings Test Supports Amortization of the One-Time Tax Benefits.

As argued at length in CUB and OICIP's Joint Opening Brief, the year 2011 is the only period of time that fits the legal requirement of identifying the equivalent of a deferral period for purposes of an earnings review.² Neither the Company nor Staff can point to any precedent that supports instead an earnings review spanning more than 20 years into the past, much less precedent that relies on a utility's average earnings for such a lengthy span of time, to support the denial of an application for amortization.

1. 2011 is the Appropriate Period for an Earnings Review.

All parties agree that in the context of amortization of a deferred amount, the Commission considers earnings for a period that includes the deferral period.³ In applying an earnings test under the circumstances in this case, because no deferral application was filed, the Commission would need to determine the appropriate period for the earnings test by looking to its past precedent. In doing so, the Commission should not be tempted to adopt a hypothetical deferral period beginning in 1987, as requested by Staff and Idaho Power. Rather, the Commission should do as CUB and OICIP argue in their Joint Opening Brief, and adopt as the appropriate period for an earnings test, the year 2011.

The Grid West case is particularly instructive in determining the commencement of a

¹ Senate Bill 967, which is now codified as ORS 757.269, makes clear that although a utility's taxes are not trued-up on a dollar for dollar basis, the policy in the State of Oregon is that customers should not be over-paying for taxes.

² See *Joint Parties' Opening Brief* at 9-13.

³ See *In Re Utility Reform Project and Ken Lewis: Application for Deferred Accounting*, OPUC Docket No. UM 1224, Order No. 09-316 (2009).

deferral period under the circumstances in the present case. In Grid West, the deferral period did not commence when the utilities first made loans to Grid West and thereby incurred the remote possibility of a future expense arising from a potential default of the loans.⁴ A deferral period in that case simply could not have begun until the loans became expenses on the utilities' books and only after the loans became unrecoverable.⁵ Applying principles gleaned from Grid West to the facts in this case dictates that the deferral period equivalent in this case commenced when Idaho Power received legal right to the one-time tax benefits—2011—not when Idaho Power first paid taxes in 1987 and thereby incurred the remote possibility of a future accrual of a retroactive tax benefit over twenty years later. The Grid West case cannot be squared with Idaho Power's position that Commission's precedent for determining the appropriate earnings review period for deferrals under ORS 757.259(2) supports the use of any year between 1987 and 2009.⁶ Instead, the deferral period is the year 2011, which is the year that the Joint Committee on Taxation approved Idaho Power's 2009 tax return, and the year that Idaho Power reversed its uncertain tax position to its 2011 earnings.⁷

While Idaho Power perhaps *could have* filed a deferral application as soon as it became aware that the one-time tax benefit might occur, perhaps as early as September 2010 when it filed its 2009 tax return containing both tax method changes, the fact is that Idaho Power *did not* file a deferral application in September 2010 or at any other time. Idaho Power should not now be entitled to benefit from an earnings test for years prior to the time that it could have filed for a deferral of the one-time tax benefits. It received the legal right to the benefit in 2011, and that is

⁴ *Re PacifiCorp, Portland General Elec. Co., and Idaho Power Co.*, OPUC Docket Nos.UM 1256, 1257, 1259, Order No. 06-483, at 2-3 (2006).

⁵ *Id.* at 2.

⁶ *See Idaho Power's Opening Brief* at 6-7.

⁷ *See* UM 1562-UM 1582 CUB/200, Jenks-Feighner/16.

the latest time it could have filed a deferral application had it chosen to do so. That should, therefore, be the time for any earnings review.

Idaho Power argues the Commission should reconstruct “amounts that the Company would have claimed in each of the specific tax years had Idaho Power been using the new UNICAP method in the first instance.”⁸ Yet, in a footnote, Idaho Power acknowledges that “UNICAP and Repairs are considered flow-through differences [and] resulted in *current tax deductions*,”⁹ which were realized in 2011. If Idaho Power had incurred a retroactive tax *expense* that “was not fully recognized until 2011,”¹⁰ it is difficult to imagine Idaho Power not asking for rate recovery of the retroactive expense legally incurred in 2011.

The Commission should not accept Idaho Power’s focus on 1987 to 2009 because Idaho Power did not actually use the tax method in those past years. Nor did it file a deferral application prior to *any of* those past years. Indeed, it could not have been expected to file a deferral application during any of those past years even if it wished to do so – as the Grid West case clearly demonstrates.¹¹ Idaho Power’s position rests on the fiction that it “constructively” re-filed its taxes retroactively to revive the “prior period.”¹² But the reality is Idaho Power obtained the legal right to a one-time benefit in 2011. The appropriate earnings period is the year 2011—the year that Idaho Power reversed its uncertain tax position on its books, the year that the Joint Committee on Taxation approved Idaho Power’s 2009 tax return and the year that Idaho Power’s shareholders and Idaho customers received the benefits from the one-time tax benefits at issue in this case.

⁸ *Idaho Power’s Opening Brief* at 3.

⁹ *Id.* at 4 n.18.

¹⁰ *Id.* at 5.

¹¹ *Re PacifiCorp, Portland General Elec. Co., and Idaho Power Co.*, Order No. 06-483 at 2-3.

¹² *See* UM 1562-UM 1582 Idaho Power/200, Marchioro/5.

2. There is no precedent for reviewing earnings twenty-five years old.

Staff and Idaho Power cite to off-point cases addressing “prior period activity” in a purchase gas adjustment (“PGA”) proceeding.¹³ But as Staff itself admits, “[t]he rule governing PGAs that requires exclusion of amounts associated with prior period activity in the PGA earnings test is not applicable here.”¹⁴ This is not a PGA. It is a re-opened general rate case where Idaho Power’s earnings have already been set at a level that all parties agreed was adequate without the one-time tax benefit. In fact, the record demonstrates that Idaho Power’s rates were more than adequate to provide it with above authorized earnings in 2011, even without the inclusion of the one-time tax benefits at issue in this case. If Idaho Power wished to have earnings from some prior period, such 2010, reviewed, it should have filed a deferral application in that year and sought to amortize the tax benefit when it obtained the legal right to it in September 2011. The Commission has explicitly stated that it “intends to tailor earnings tests to fit the type of deferral.”¹⁵ Under the circumstances presented here, the year 2011 is the appropriate year to review earnings.

3. There is No Basis For the Commission to Average Idaho Power’s Actual Earnings for More Than Twenty Years as a Basis for Denying Amortization.

Idaho Power argues that the Company’s earnings between 1987 and 2009 were lower than its authorized ROE “by an *average* margin of 412 basis points,” and the Commission should, therefore, decline to order amortization of the *entire* one-time tax benefits at issue in this case.¹⁶ However, Idaho Power cites to no precedent in which the Commission has averaged a

¹³ See *Staff’s Opening Brief* at 6 (discussing *In re Northwest Natural Gas Co.: 2011 Spring Earnings Review*, OPUC Docket No. UM 903, Order No. 11-365 (2011)); *Idaho Power’s Opening Brief* at 7 (same).

¹⁴ *Id.*

¹⁵ *Re Portland General Electric Company*, OPUC Docket No. UE 82/UM 445, Order No. 93-257, at 9 (1993).

¹⁶ *Idaho Power’s Opening Brief* at 8-9 (emphasis added).

utility's earnings when determining whether an earnings test supports amortization, and the Commission should not be persuaded by Idaho Power's self-serving statistics in this case. The fact remains that in the year 2011, the appropriate period for an earnings test in this case, the Company's earnings were almost 900 basis points in excess of its authorized return on equity for that year. If the Commission determines that the appropriate period for an earnings test is between 1987 and 2009, it should order amortization for each *individual* year that the Company's earnings were within an appropriate zone of reasonableness, and for every year that SB 408 was in effect up to the point that the Company can demonstrate that a refund in those years would lead to confiscatory rates.¹⁷

B. Should the Commission Find that No Earnings Test is Required Pursuant to ORS 757.259(5), the Commission Should Order Straight Amortization of the One-Time Tax Benefits.

The Commission Staff's Opening Brief sets forth an alternative interpretation of the requirements in the deferral statute for the Commission's consideration. Specifically, Staff's brief argues that ORS 757.259 imposes no requirement for an earnings review for amounts subject to immediate amortization without prior deferral. Should the Commission find that this argument has merit and determine that an earnings test is, in fact, not required for amounts subject to ORS 757.259(1)(a)(A), it should order straight amortization of the amounts at issue in this case. If, however, the Commission determines that it will nevertheless apply an earnings test, the year 2011 is the only appropriate period for the earnings review.

Staff asserts that "the language in ORS 757.259(5) specifying that the Commission can only amortize amounts described in the statute upon 'review of the utility's earnings at the time

¹⁷ See *Joint Parties' Opening Brief* at 17-23.

of the application to amortize deferral’ does not apply to ORS 757.269(1)(a)(A) amounts,”¹⁸ because “the statute deems amounts retroactively imposed by other governmental agencies as automatically qualified for amortization” and “it is not necessary to defer the tax refunds before amortizing them in rates.”¹⁹ Under this alternative theory, the statute would be read to apply an earnings test only to amounts that were previously subject to deferral. Therefore, Section 757.259(1)(a)(A) would simply provide an exception to the rule against retroactive ratemaking and allow the Commission to order amortization of the one-time tax benefits without the application of an earnings test.

Staff goes on to argue that the Commission should nevertheless conduct an earnings test on earnings in long-past years. Specifically, Staff argues that the Commission should apply a “restrictive” earnings test to ensure that Idaho Power’s shareholders from the period 1987 to 2009 would earn 100 basis points *over* the authorized return on equity on Idaho Power’s historical books, while its current shareholders are actually receiving the benefits.²⁰ While this would certainly send a positive signal to Wall Street, it is unsupported by the Commission’s precedent and unfair to current customers. If the Commission decides to apply an earnings test—whether the particular “restrictive” test advocated for by Staff or any other earnings test—the earnings test could only be applied to the year 2011, as discussed above. Idaho Power does not need to retain the one-time tax benefits to ensure that shareholder returns do not “fall further outside of the zone of reasonableness” between 1987 and 2009. Those years have passed. Idaho Power’s earnings during the appropriate time frame for an earnings test (the year 2011) are

¹⁸ *Staff’s Opening Brief* at 4.

¹⁹ *Re Deferral of Recognized Tax Benefits (UM 1562) and Application for Deferral of Tax Benefits Recognized by Idaho Power Company (UM 1582)*, OPUC Docket Nos. UM 1562, UM 1582, Order No. 13-160 at 8 (2013).

²⁰ *See Staff’s Opening Brief* at 10.

above the authorized rate, and warrant a refund to customers instead of a further boost to the Company's bottom line. Idaho Power's conduct does not warrant treating the tax refund as a "power cost saving" that needs to be refunded down "to an earnings level equal to 100 basis points above [its] authorized ROE" for a period of time beginning when Ronald Reagan was President.²¹

Even if it were appropriate to review such long-past earnings (which it is not), CUB and OICIP demonstrated that the Commission's precedent establishes that 250 basis points is not the upper end of a zone of reasonableness. In fact, the Commission has even required shareholder contribution if actual ROE was more than 400 basis points outside of authorized ROE.²² Despite Idaho Power's claims, the Joint Parties have now identified multiple cases "where the Commission determined that earnings were reasonable when they were 255 basis points below authorized ROE."²³

Additionally, for the tax years 2006 through 2009, when Senate Bill 408's annual filings were in effect, the Commission's precedent supports a complete refund of the benefit allocated to those tax years up to the point that a utility can demonstrate that such a refund would result in confiscatory rates.²⁴ Idaho Power states that the Commission's decision in Order No. 09-316 provides parameters for refund requirements under SB 408.²⁵ However, Order No. 09-316 addresses an application for deferred accounting, pursuant to ORS 757.259, filed by the Utility Reform Project and Ken Lewis for the period of time between the effective date of SB 408 and

²¹ *Id.*; see also *id.* at 6 (arguing that "the Commission should review Idaho Power's earnings at the time it paid the refunded taxes from 1987-2009"); *Idaho Power's Opening Brief* at 6 (same).

²² See *Joint Parties' Opening Brief* at 18-19.

²³ See *Idaho Power's Opening Brief* at 11.

²⁴ See *id.* at 20-23.

²⁵ *Idaho Power's Opening Brief* at 14.

the implementation date of SB 408's automatic adjustment clause.²⁶ The proceeding was not filed under SB 408, and the Commission made clear that the policy articulated in Order 09-316 ended when SB 408's automatic adjustment clause went into effect for the 2006 tax year.²⁷ CUB has only asserted that Idaho Power should be required to amortize into rates, up to the point that it can establish confiscatory takings, amounts attributable to 2006-2009, which is consistent with the Commission's conclusions in Order 09-316.²⁸ Therefore, the Commission's "traditional ORS 757.259(5) earnings review" was not applied to a proceeding under SB 408, as Idaho Power suggests.²⁹

III. CONCLUSION

The facts of this case do not warrant special treatment of an earnings test that spans more than twenty years that will only benefit Idaho Power's current shareholders. As argued above, the year 2011 is the only appropriate year that the Commission can impose an earnings test—restrictive or not—to be consistent with its past precedent. If the Commission determines that an earnings review for years 1987-2009 is required, it should order Idaho Power to share the portions of the one-time tax benefits attributable to each year that the Company's earnings would have been within the appropriate zone of reasonableness, and for every year that SB 408 was in effect up to the point that Idaho Power can demonstrate that such a refund for those years would result in confiscatory rates.

²⁶ *Re Utility Reform Project and Ken Lewis*, OPUC Docket UM 1224, Order No. 09-316 at 1-2 (2009).

²⁷ Order No. 09-316 at 16.

²⁸ *See Joint Parties' Opening Brief* at 20-23.

²⁹ *See Idaho Power's Opening Brief* at 14.

RESPECTFULLY SUBMITTED this 12th day of August 2013.

CITIZENS UTILITY BOARD OF
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UE 233 – CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of August, 2013, I served the foregoing **REPLY BRIEF OF THE CITIZENS' UTILITY BOARD OF OREGON** in docket UE 233 upon each party listed in the UE 233 OPUC Service List by email and, where paper service is not waived, by U.S. mail, postage prepaid, and upon the Commission by email and by sending one original and five copies by U.S. mail, postage prepaid, to the Commission's Salem offices.

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Respectfully submitted,

A handwritten signature in black ink that reads "Sommer Templet". The signature is written in a cursive, flowing style.

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