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VIA ELECTRONIC AND U.S. MAIL

PUC Filing Center
Public Utility Commission of Oregon
PO Box 1088
Salem, OR 97308-1088

Re: UE 233 – Idaho Power Company’s Application for Authority to Increase its Rates and Charges for Electric Service to its Customers in the State of Oregon

Attention Filing Center:

Enclosed for filing in Docket UE 233 is an original five copies of Idaho Power Company’s Reply Brief.

A copy of this filing has been served on all parties to this proceeding as indicated on the attached Certificate of Service.

Please contact me with any questions.

Very truly yours,

A handwritten signature in blue ink that reads "Wendy McIndoo".

Wendy McIndoo
Office Manager

Enclosures
cc: Service List

1 determine whether the utility could have absorbed some or all of the deferred amounts”
2 and still have earned a reasonable rate of return.¹ In this case, the tax benefits received
3 by Idaho Power are the result of the Company recalculating its taxes for the years 1987
4 through 2009 as if it had been using the new tax methods in the first instance.² Therefore
5 the tax benefits relate to a prior period and the Commission’s earnings review should
6 examine the Company’s earnings during that prior, look-back period.

7 The Citizens’ Utility Board of Oregon (“CUB”) and the Oregon Industrial Customers
8 of Idaho Power (“OICIP”) argue that the earnings test should focus on the Company’s
9 2011 earnings, instead of the period corresponding to the tax recalculation, relying entirely
10 on one word in ORS 757.259’s legislative history. Specifically, CUB and OICIP point out
11 that Commissioner Charles Davis used the term “are” rather than “were” when he testified
12 that the earnings review should examine whether the utility’s earnings “are” higher than
13 authorized at the time of the application for amortization. CUB and OICIP argue that if the
14 earnings review was intended to examine the utility’s earnings during a past period,
15 Commissioner Davis would have testified that the earnings review would examine what
16 the utility’s earnings “were,” not what the utility’s earnings “are.” This argument is a weak
17 one for several reasons:

18 *First*, contrary to the CUB/OICIP assertion, Commissioner Davis’ use of the present
19 tense in referring to the Company’s earnings does not suggest that the present year’s
20 earnings to be are to be evaluated in all cases. Rather, the usage appears to be entirely
21 ambiguous on that point.

22 *Second*, the CUB/OICIP argument ignores entirely the Commission’s rule and
23 precedent, which has been clear that ORS 757.259(5) requires examination of a utility’s

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25 ¹ *Re PacifiCorp*, Dockets UE 121/UM 995, Order No. 02-410, 2002 WL 1773021 at * 6 (June 20,
2002).

26 ² Idaho Power/200, Marchioro/4, ll. 14-25, 7, ll. 23-24.

1 earnings during the deferral period even if the deferral period predates the application for
2 amortization.³ In Docket UM 1224 the Commission addressed the proper earnings review
3 for an ORS 757.259(2) deferral related to the taxes actually paid by Portland General
4 Electric Company (“PGE”).⁴ The deferred amount was \$26.5 million, which represented
5 the amount PGE collected from customers for taxes less the amount PGE actually paid in
6 taxes.⁵ In other words, PGE’s customers paid \$26.5 million to PGE for taxes that PGE
7 never actually paid. At the time of amortization, which was years after the relevant tax
8 year, PGE and Staff argued that the Commission’s earnings review should look at PGE’s
9 earnings during the relevant tax year, not at the time of amortization.⁶ The Commission
10 agreed that even when there is a significant period of time between the deferral period and
11 the request for amortization, the earnings review must examine the deferral period.⁷ Thus,
12 in that case the earnings review looked at the applicable tax year. Here too the
13 Commission should examine the tax years to which the benefits are attributed even
14 though those years preceded the application for amortization under ORS
15 757.259(1)(a)(A).

16 **2. The Analogous “Deferral Period” is the Look-Back Period (1987-2009).**

17 In this case the Commission properly concluded that ORS 757.259(1)(a)(A) does not
18 require an application for deferral prior to amortization and therefore there is no “deferral
19 period.”⁸ In the absence of a deferral period, the Commission should examine the utility’s
20 earnings during a period of time that is logically related to the tax benefits in question.

21 _____
22 ³ OAR 860-027-0300(9).

23 ⁴ *Re Utility Reform Project and Ken Lewis*, Docket UM 1224, Order No. 09-316 at 7 (Aug. 18, 2009).

24 ⁵ Order No. 09-316 at 7.

25 ⁶ Order No. 09-316 at 7.

26 ⁷ Order No. 09-316 at 14.

⁸ *Re Idaho Power Company*, Dockets UM 1562, UM 1582, Order No. 13-160 at 9 (Apr. 30, 2013).

1 Here, the tax benefits relate to the amount of taxes that Idaho Power would have paid in
2 the years in the look-back period had the Company used the new tax methods in the first
3 place.⁹ Thus, the look-back period is analogous to a deferral period.

4 CUB and OICIP claim that 2011 is comparable to the deferral period.¹⁰ CUB and
5 OICIP argue that Idaho Power was not entitled to the tax benefits until the “triggering
6 event,” which they argue was the decision in 2011 by the U.S. Congress Joint Committee
7 on Taxation to approve Idaho Power’s 2009 tax.¹¹ This argument ignores Order No. 11-
8 365 wherein the Commission concluded that a tax refund, which was received by NW
9 Natural in 2010 but related to tax years 2002 to 2009, was properly excluded from an
10 earnings review examining the utility’s 2010 earnings. Like here, in the NW Natural case
11 the utility was not entitled to the tax refund until 2010, there was no assurance that NW
12 Natural would receive the tax refund until 2010, and even if NW Natural had intended or
13 been required to share the tax refund with customers, it would not have done so until
14 2010. Despite all these facts the Commission found “no rationale supporting the case that
15 the refund is not an entry related to activity from prior years” and excluded the refund from
16 NW Natural’s 2010 earnings review.¹²

17 CUB and OICIP also argue that it is “absurd” to examine the look-back period when
18 doing so requires consideration of earnings data that is so old it no longer exists.¹³ This
19 point is nothing more than a red herring. The two years for which Idaho Power does not
20 have the ability to calculate the Company’s earnings (1987 and 1988) have *zero tax*
21 *benefits*. Thus, the lack of earnings data from these years is irrelevant for purposes of the
22 earnings review in this case.

23 ⁹ Order No. 13-160; Idaho Power/200, Marchioro/4, ll. 23-25.

24 ¹⁰ Joint OICIP-CUB Opening Brief at 9-13.

25 ¹¹ Joint OICIP-CUB Opening Brief at 9.

26 ¹² *Re Northwest Natural Gas Company*, Docket UM 903, Order No. 11-365 at 4 (Sept. 22, 2011).

¹³ Joint OICIP-CUB Opening Brief at 14.

1 CUB and OICIP further argue that examination of the Company's earnings during the
2 look-back period is illogical because "those accounting books have closed" and "bolstering
3 the Company's ROE for that period of time will have no effect on the reasonableness of
4 the returns to those shareholders and will not affect the Company's access to capital
5 during that period."¹⁴ In every case amortization occurs after the deferral period and
6 therefore the deferral period's "books are closed" and the amortization will have no effect
7 on the utility's ability to attract capital during the prior deferral period. Nevertheless, the
8 Commission has consistently applied the earnings review to the deferral period. As
9 discussed above, in Order No. 09-316 the Commission reviewed PGE's earnings during
10 the deferral period (2005) even though the application for amortization was filed in 2007.¹⁵
11 In that case, the 2005 accounting books were closed and bolstering PGE's ROE for 2005
12 would have no effect on its ability to attract capital in 2005. Nevertheless, the Commission
13 properly applied the earnings test and concluded that PGE was not required to amortize
14 the deferred amounts.

15 CUB and OICIP also argue that it is unfair to allow Idaho Power's shareholders to
16 retain the tax benefits when the Company has not indicated that it used the tax benefits to
17 offset low dividends during the years when the Company was under-earning during the
18 look-back period.¹⁶ Nothing in ORS 757.259 or Commission precedent suggests that it is
19 appropriate to deny amortization only if the utility intends to use the amounts to somehow
20 offset dividends paid during the look-back period. Indeed, CUB and OICIP cannot point to
21 a single instance where the Commission has not required amortization on the condition
22 that the utility use the amounts not amortized in a particular manner.

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¹⁴ Joint OICIP-CUB Opening Brief at 14-15.

25 ¹⁵ Order No. 09-316 at 1-2.

26 ¹⁶ Joint OICIP-CUB Opening Brief at 24.

1 Moreover, equity and the matching principle support the use of the Company's
2 proposed earnings review. CUB and OICIP would have customers today receive a
3 windfall tax refund associated with taxes that CUB and OICIP claim were paid by
4 customers over the last 20 years. It is unclear why it is fair for the Company's customers
5 in 2011 to receive the proceeds of a refund that resulted from taxes these customers did
6 not pay. Moreover, as demonstrated by the earnings review, the Company's customers
7 during the look-back period were not, in fact, paying rates that accurately reflected the
8 cost of service. As the Commission stated in UM 1224: "If past ratepayers paid an
9 appropriate amount of rates for service received, it is inappropriate to burden or enrich
10 future ratepayers based upon retroactive events."¹⁷

11 **3. Reviewing the Company's Earnings During the Look-Back Period will**
12 **not Create Unreasonable Incentives.**

13 CUB and OICIP claim that if the Commission accepts the Idaho Power and Staff
14 argument regarding the appropriate time period for the earnings review, "it will create an
15 incentive for utilities to delay making tax method changes that will result in substantial one-
16 time tax benefits so that they can 'rack-up' the benefits that they know they will not be
17 required to share with ratepayers . . ." ¹⁸ This argument makes sense only if the
18 Commission assumes that utilities have the ability to perfectly forecast future earnings
19 such that they know that delaying a tax method change will result in the Company failing
20 the earnings review when the method change is eventually adopted. This argument also
21 assumes that utilities will intentionally under-earn so that when they eventually change tax
22 methods the utility's shareholders can receive the entirety of the one-time benefits. Nor do
23 utilities have the ability to predict, for instance, when the United States Congress may
24 change tax law or when interpretations of existing law may occur as to create either the

25 ¹⁷ Order No. 09-316 at 13-14.

26 ¹⁸ Joint OICIP-CUB Opening Brief at 17.

1 requirement or the option to make a method change. These assumptions are entirely
2 unreasonable and therefore CUB's and OICIP's concerns are completely without merit.

3 **4. CUB and OICIP's Reliance on Order No. 01-420 is Misplaced.**

4 CUB and OICIP argue that even if the Commission accepts the look-back period as
5 the appropriate time period for the earnings review, Idaho Power's earnings during this
6 period were reasonable. To support this claim, CUB and OICIP rely on Order No. 01-420,
7 in which they claim that the Commission found that a utility under-earning by 250 basis
8 points, or even up to 400 basis points, is reasonable.¹⁹ However a careful reading of that
9 case demonstrates that CUB and OICIP's reliance is in error.

10 In Order No. 01-420 the Commission adopted a sharing mechanism related to a
11 PacifiCorp application to defer excessive net power costs.²⁰ The sharing mechanism,
12 which determined how much, if any, of PacifiCorp's excess net power costs would be
13 deferred, established a net power cost dead band that compared the Company's actual
14 net power costs to a baseline net power cost amount. PacifiCorp was allowed to defer the
15 actual net power costs variances only if the variance was outside dead bands calculated
16 based on PacifiCorp's authorized ROE. For example, if the net power cost variances were
17 within the dollar equivalent of 250 basis points of PacifiCorp's authorized ROE multiplied
18 by its rate base, then the variances could not be deferred.

19 CUB and OICIP erroneously claim that this sharing mechanism "demonstrates that
20 the Commission has found that a 250 basis point deviation from forecasted earnings is
21 within the reasonable band of earnings."²¹ However, the sharing mechanism dealt with
22 deviations from forecasted *net power costs*, not earnings. Indeed, in Order No. 01-420 the
23 Commission addressed only the amounts to be deferred and was not even examining

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¹⁹ Joint OICIP-CUB Opening Brief at 18-19.

25 ²⁰ *Re PacifiCorp*, Dockets UM 995/UE 121/UC 578, Order No. 01-420 at 29 (May 11, 2001).

26 ²¹ Joint OICIP-CUB Opening Brief at 19.

1 PacifiCorp's earnings.²² The Commission specifically observed that "when we address
2 amortization of the deferred amounts, we will consider whether this same mechanism will
3 be applied to the amount to be amortized."²³

4 In cases where the Commission has conducted an earnings review related to net
5 power cost deferrals, the Commission has consistently found that under-earning by a
6 substantially smaller margin is unreasonable. In Order No. 07-015 the Commission
7 adopted a PCAM for PGE that included an earnings test to determine whether the utility is
8 earning an acceptable rate of return. In that case, the Commission "establish[ed] an
9 earnings deadband of \pm 100 basis points around the company's allowed ROE . . ."²⁴
10 Similarly, Idaho Power's PCAM uses the same 100 basis point spread for its earnings
11 review.²⁵ And as recently as December 2012 the Commission adopted a PCAM for
12 PacifiCorp that also used the same 100 basis point earnings test.²⁶ In each of these
13 cases the Commission determined that if the utility was under-earning by more than 100
14 basis points, the utility's earnings were unreasonably low.²⁷

15 Here, Idaho Power's earnings during the look-back period were substantially lower
16 than 100 basis points below the Company's authorized ROE. Indeed, the Company failed
17 to earn its authorized ROE by an average margin of 412 basis points during the 1987-
18 2009 look-back period.²⁸ And during the years to which the vast majority—92 percent—of

19 ²² Order No. 01-420 at 29.

20 ²³ Order No. 01-420 at 29.

21 ²⁴ Order No. 07-015 at 26.

22 ²⁵ *Re Idaho Power Co.*, Docket UE 195, Order No. 08-238 at 3 (Apr. 28, 2008).

23 ²⁶ *Re PacifiCorp*, Docket UE 246, Order No. 12-493 at 15 (Dec. 20, 2012).

24 ²⁷ *See Re Portland General Electric Co.*, Dockets UE 180/UE 181/UE 184, Order No. 07-015 at 26
25 (Jan. 12, 2007) ("the Commission will apply an earnings test to determine whether the utility is
26 earning an acceptable rate of return. An earnings test serves to protect customers from paying for
higher-than-expected power costs when the utility's earnings are reasonable, while it protects the
Company from refunding power cost savings when it is underearning. We establish an earnings
deadband of \pm 100 basis points around the company's allowed ROE . . .").

26 ²⁸ Stipulated Facts, Attachment 1.

1 the tax benefits relate, the Company's earnings were on average 590 basis points below
2 its authorized ROE.²⁹

3 In addition to misunderstanding the sharing mechanism in Order No. 01-420, CUB
4 and OICIP also fail to reconcile the conclusion they draw from that order with other
5 Commission precedent. In Order No. 09-316 the Commission found that PGE's earnings
6 were between 350 and 500 basis points below the utility's authorized ROE.³⁰ The
7 Commission concluded that "any ROE within this range is outside any reasonable range of
8 ROE for purposes of amortization under ORS 757.259(5), and that PGE needs to retain
9 deferred revenues in order to not fall further outside the zone of reasonableness."³¹ Thus,
10 contrary to CUB's and OICIP's arguments, under-earning by more than 400 basis points is
11 wholly unreasonable.

12 **5. Senate Bill 408 Does Not Change the Nature of the Earnings Review.**

13 CUB and OICIP argue that for the years that Senate Bill 408 ("SB 408") was in effect
14 (2006-2011) Idaho Power should be required to refund to customers the tax benefits
15 unless the Company can demonstrate that the refund would lead to constitutionally
16 confiscatory rates.³² While the Company disputes that SB 408 mandates a different
17 approach to the ORS 757.259 earnings review,³³ even if the Commission is inclined to
18 apply a stricter earnings review for these years, the Company's earnings were consistent
19 with levels that have been found confiscatory.

20 CUB and OICIP claim that Idaho Power's earnings during 2006-2011 were not
21 confiscatory. To support this argument CUB and OICIP incorrectly claim that the

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²⁹ Stipulated Facts, Attachment 1.

23 ³⁰ Order No. 09-316 at 15.

24 ³¹ Order No. 09-316 at 15.

25 ³² Joint OICIP-CUB Opening Brief at 20.

26 ³³ See Idaho Power Company's Opening Brief at 13-14. Indeed, as CUB and OICIP acknowledge
SB 408 did not apply to Idaho Power.

1 Commission “either by order or by settlement, approved SB 408 refunds” for Avista even
2 though Avista argued that the refund would result in ROEs of less than 5 percent.³⁴
3 Contrary to CUB’s and OICIP’s representation, however, every case cited was resolved by
4 a stipulation wherein Avista withdrew its claims of confiscatory rates.³⁵ Therefore, the
5 Commission never ruled on the issue of whether the rates were confiscatory and these
6 cases do not stand for the proposition that actual ROEs less than 5 percent are not
7 confiscatory *per se*.

8 Moreover, the Company’s actual earnings during this time period, without the
9 inclusion of the tax benefits, were clearly unreasonably low. The Company’s actual ROE
10 for 2006 through 2009³⁶ were 2.331 percent, 0.555 percent, -3.582 percent, and -2.881
11 percent.³⁷ These levels are well below levels that the Oregon Supreme Court has found
12 confiscatory.³⁸ Therefore, even if the Commission agrees that SB 408 requires the
13 imposition of a stricter earnings review, Idaho Power’s actual ROE during 2006 to 2009
14 were at a level consistent with confiscatory rates.

15 **B. ORS 757.259(5) Requires an Earnings Test.**

16 Staff concluded that Idaho Power’s earnings during the look-back period were
17 unreasonably low and agrees with Idaho Power that the tax benefits should not be
18 amortized.³⁹ However, Staff also argues that the earnings review required by ORS
19 757.259(5) applies to only deferrals and not amounts amortized under ORS
20 757.259(1)(a)(A).⁴⁰ Despite this conclusion, Staff argues that an earnings review is

21 ³⁴ Joint OICIP-CUB Opening Brief at 22.

22 ³⁵ See Orders Nos. 08-203, 09-449, and 11-119.

23 ³⁶ There are no tax benefits attributed to 2010 and 2011.

23 ³⁷ Stipulated Facts, Attachment 1.

24 ³⁸ See *Pac. Tel. & Tel. Co. v. Wallace*, 158 Or. 210, 277 (1938) (rates resulting in returns of 4.29
25 and 3 percent are confiscatory).

25 ³⁹ Staff Opening Brief at 3-4.

26 ⁴⁰ Staff Opening Brief at 3-4.

1 nevertheless necessary to ensure that Idaho Power's rates are just and reasonable under
2 ORS 756.040.⁴¹

3 The Company agrees with Staff that the Commission should conduct an earnings
4 review and that the Company's earnings during the look-back period were unreasonably
5 low and therefore the Commission should deny the requested amortization. However, the
6 Company disagrees with Staff's legal conclusion that ORS 757.259(5) does not require an
7 earnings test for applications under ORS 757.259(1)(a)(A).

8 When interpreting Oregon statutes, the goal is to determine the intent of the
9 legislature and the first step in the analysis requires an examination of the text and context
10 of the statute.⁴² The first sentence of ORS 757.259(5) makes clear that subsection (5),
11 which includes the earnings review, applies to all "amounts described in this section [ORS
12 757.259]," unless subject to an automatic adjustment clause. There is no carve-out for
13 amounts subject to ORS 757.259(1)(a)(A). If the legislature had intended that the
14 earnings review not apply to amounts under ORS 757.259(1)(a)(A) it could have made
15 that intent clear, as it did with respect to amounts subject to an automatic adjustment
16 clause.⁴³ Therefore it is reasonable to conclude that the legislature intended the earnings
17 review to apply to amounts subject to both ORS 757.259(1)(a)(A) and ORS 757.259(2).

18 Moreover, the Commission's discretion to include in rates amounts under both ORS
19 757.259(1)(a)(A) and ORS 757.259(2) provides further support for the application of the
20 earnings review to amounts covered by both provisions.⁴⁴ According to both the

21 ⁴¹ Staff Opening Brief at 4.

22 ⁴² ORS 174.020; *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610 (1993).

23 ⁴³ The legislature also specifically provided that amounts deferred under ORS 757.259(2)(c) and (d)
24 and ORS 757.259(3) are not subject to the earnings review in ORS 757.259(5). This provides yet
another example of the legislature's clear intent to exclude certain amounts from the earnings
review.

25 ⁴⁴ ORS 757.259(1)(a); *see contra* ORS 757.259(3) ("Upon request of a public utility, the
26 commission by order *shall* allow deferral of amounts provided as financial assistance under an
agreement entered into under ORS 757.072 for later incorporation into rates.") (emphasis added).

1 legislative history and the Commission's orders, the ORS 757.259(5) earnings review is
2 intended to protect both the utility and customers: "[a]n earnings test serves to protect
3 customers from paying higher-than-expected . . . costs when the utility's earnings are
4 reasonable, while it protects the Company from refunding . . . cost savings when it is
5 under-earning."⁴⁵ The rationale underlying the earnings review applies equally to amounts
6 deferred under ORS 757.259(2) and amounts amortized under ORS 757.259(1)(a)(A) and
7 neither Staff, the legislative history, nor Commission precedent provides a meaningful
8 distinction that supports the application of an earnings review to one type of expense or
9 revenue but not the other.

10 In the event that the Commission concludes that an earnings review is not required
11 by ORS 757.259(5), the Company supports Staff's conclusion that the Commission should
12 nevertheless apply an earnings review and deny amortization. Application of an earnings
13 review in this case is consistent with Commission precedent and, in light of the
14 Commission's discretion, is a reasonable way to determine whether to allow amortization.
15 In cases where the Commission has established automatic adjustment clauses, which are
16 explicitly excluded from the earnings review under ORS 757.259(5), the Commission has
17 still required an earnings review prior to amortization. For example, when approving NW
18 Natural's Site Remediation Recovery Mechanism ("SRRM") in UG 221, the Commission
19 explicitly required an earnings review even though one is not required by ORS
20 757.259(5).⁴⁶ Consistent with this practice, the Commission should review Idaho Power's
21 earnings during the look-back period and deny amortization.

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25 ⁴⁵ Or. H. Comm. on Env. And Energy, *Hearing on H.B. 2145*, at Exhibit B at 5; Order No. 07-015 at
26 26.

26 ⁴⁶ *Re Northwest Natural Gas Company*, Docket UG 221, Order No. 12-437 at 31 (Nov. 16, 2012).

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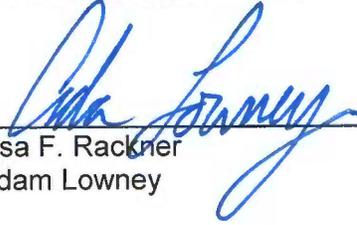
III. CONCLUSION

The Commission should deny the amortization of the tax benefits resulting from the UNICAP and Repairs tax method changes. The evidence in the record demonstrates that Idaho Power's earnings during the years to which the tax benefits are attributed (1987-2009) were unreasonably low and therefore the Commission should conclude that the tax benefits should not be amortized.

Moreover, the Commission should conclude that amounts under ORS 757.259(1)(a)(A) are subject to the ORS 757.259(5) earnings review. When read in context and in light of the legislative history of ORS 757.259, the earnings review required by ORS 757.259(5) applies to amounts under ORS 757.259(1)(a)(A). There is no principled distinction between amounts amortized under ORS 757.259(1)(a)(A) and amounts deferred under ORS 757.259(2) that supports the disparate treatment Staff interprets the statute to require.

Respectfully submitted this 12th day of August, 2013.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served a true and correct copy of the foregoing document in
3 UE 233 on the following named person(s) on the date indicated below by email addressed
4 to said person(s) at his or her last-known address(es) indicated below.

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