

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 233

In the Matter of)	
)	JOINT OPENING BRIEF OF THE
IDAHO POWER COMPANY)	OREGON INDUSTRIAL
)	CUSTOMERS OF IDAHO POWER
Request for General Rate Revision)	AND THE CITIZENS' UTILITY
)	BOARD OF OREGON
_____)	

I. INTRODUCTION

Pursuant to the Prehearing Conference Memorandum of Administrative Law Judge (“ALJ”) Michael Grant, issued on May 21, 2013, the Oregon Industrial Customers of Idaho Power (“OICIP”) and the Citizens’ Utility Board of Oregon (“CUB”), collectively the “Joint Parties,” submit this opening brief to the Oregon Public Utility Commission (“Commission” or “OPUC”). The Joint Parties respectfully request that the Commission order amortization of the one-time tax benefits at issue in this docket based on Idaho Power Company’s (“Idaho Power” or “Company”) 2011 earnings.

II. BACKGROUND

This case stems from income tax method changes to the Uniform Capitalization (“UNICAP”) and Capitalized Repairs (“Repairs”) income tax accounting methods that resulted in a large one-time, tax benefit approved by the Internal Revenue Service (“IRS”) and a

Congressional Joint Committee in 2011.¹ The benefit attributable to the UNICAP method change is approximately \$59.7 million.² The benefit attributable to the Repairs method change is about \$33.2 million.³ On an Oregon allocated basis, the tax benefits subject to amortization amount to approximately \$5.23 million,⁴ an amount nearly three times Idaho Power's annual revenue requirement increase in its 2011 general rate case.⁵

According to Idaho Power, pursuant to the tax method changes it took, "a taxpayer is taking a new calculation methodology, applying it to historical data, and accumulating the net result. . . . *but without amending years of tax returns.*"⁶ The culmination of the tax method changes occurred when the Joint Committee on Taxation approved Idaho Power's one-time tax benefit in 2011, which, in Idaho Power's own words, was the same year Idaho Power "reversed the . . . uncertain tax position liability *to its 2011 earnings*,"⁷ and the same year that Idaho Power's shareholders and Idaho customers reaped the benefits of the tax method changes.⁸

Although Idaho Power anticipated that it might obtain this benefit, it did not file an application for deferral of the large tax benefit, as the Company regularly does for *costs* it

¹ See UM 1562-UM 1582 Idaho Power/200, Marchioro/4, 6. The Commission has taken official notice of the record in dockets UM 1562 and UM 1582 through Administrative Law Judge Grant's Scheduling Order dated May 21, 2013 in this docket. This brief will therefore cite to filings in those dockets the same as filings in this proceeding.

² *Re Deferral of Recognized Tax Benefits and Application for Deferral of Tax Benefits Recognized by Idaho Power Company*, OPUC Docket Nos. UM 1562 and UM 1582, Order No. 13-160, at 2 n.2 (April 30, 2013).

³ *Id.* at 2.

⁴ *Id.*

⁵ In its initial filing in UE 233, Idaho Power requested a \$5.8 million increase in annual customer rates in its Oregon jurisdiction. UE 233 Idaho Power/100, Said/2. Idaho Power, Staff and Intervenors entered into a Partial Stipulation that reduced Idaho Power's requested rate increase by \$3.989 million, resulting in a \$1.811 million rate increase for Idaho Power's Oregon customers. *Re Idaho Power Company Request for a General Rate Revision*, OPUC Docket No. UE 233, Order No. 12-055, 1 (Feb. 23, 2012).

⁶ UM 1562-UM1582 Idaho Power/200, Marchioro/4 (emphasis added).

⁷ UM 1562-UM1582 Idaho Power/200, Marchioro /6 (discussing reversal of UNICAP tax position in September 2011); *id.* at 8-9 (discussing reversal of Repairs tax position in April 2011).

⁸ UM 1562-UM1582 CUB/200, Jenks-Feighner/16.

expects to incur but which fall outside of its general rate proceedings.⁹ OICIP and CUB first became aware of the one-time 2011 benefit in the fall of 2011 as part of Idaho Power's 2011 general rate case proceeding.¹⁰ On November 17, 2011, Commission Staff filed an Application for Deferral of Tax Benefits Recognized by Idaho Power (docket UM 1562) pursuant to ORS 757.259(2)(e) in an effort to defer the tax benefits associated with the UNICAP method change for refund to customers. On January 25, 2012, Idaho Power responded to Staff's Application with a Motion to Dismiss on the grounds that Staff's Application for Deferral would constitute retroactive ratemaking.

While the Motion to Dismiss was pending, the parties to UE 233 reached a partial settlement, which included an agreement to remove the issues involving the one-time benefits associated with the UNICAP and Repairs tax methodology changes for litigation in separate proceeding(s).¹¹ The on-going annual benefits associated with the UNICAP and Repairs tax method changes were included in the Partial Stipulation.¹²

On February 23, 2012, OICIP and CUB filed an Application for Deferral of Tax Benefits Recognized by Idaho Power Company (docket UM 1582), pursuant to ORS 757.259(1)(a)(A), as well as a motion to hold docket UM 1562 in abeyance. On April 11, 2012, ALJ Shani Pines granted OICIP and CUB's Motion, and consolidated dockets UM 1562 and UM 1582. ALJ Pines Ruling directed the parties to proceed with the issues raised in UM 1582. The parties proceeded to file testimony, and simultaneous opening and closing briefs, for the issues raised in

⁹ See UM 1562-UM 1582 CUB/100, Jenks-Feighner/20.

¹⁰ UM 1562-UM 1582 CUB/100, Jenks-Feighner/1-2.

¹¹ Order No. 12-055, at Appendix A, p. 7, ¶ 18 (February 23, 2012).

¹² *Id.*; see also *Stipulated Facts*, OPUC Docket No. UE 233, at ¶ 8 (filed July 9, 2013) (*hereinafter* "Stipulated Facts").

OICIP and CUB’s deferral application. Specifically, the parties disputed (1) whether ORS 757.259(1)(a)(A) was applicable to the one-time tax benefits at issue, (2) whether the Commission was required to grant a deferral prior to amortization, (3) whether the Commission could conduct an earnings review prior to granting an application for deferral, and (4) the appropriate time period for the earnings test.

On April 30, 2013, the Commission issued Order No. 13-160, resolving three of the four issues. The Commission found that ORS 757.259(1)(a)(A) was applicable to the tax benefits at issue in this case, and that it “need not issue a deferred accounting order to make the tax refunds subject to amortization in rates.”¹³ The Commission also declined Idaho Power’s request to examine its earnings in the UM 1562 – UM 1582 proceeding, stating that it “prefer[red] to examine Idaho Power’s earnings within the context of a proceeding under ORS 757.210 to change rates.”¹⁴ The Commission designated OICIP and CUB’s Application for Deferral as one to designate amounts subject to amortization under ORS 757.259(1)(a)(A) and granted the application, reopening UE 233 to provide a forum for amortization.¹⁵ In its Order, the Commission noted that it “generally reviews a utility’s earnings based on a comparison of authorized and actual return on equity” and asked the parties to provide the appropriate information in the reopened proceedings.¹⁶ The Commission did not address the parties’ final disputed legal issue—the appropriate time frame for the earnings review.

On July 9, 2013, OICIP, CUB, Commission Staff and Idaho Power filed stipulated facts that include earnings based on authorized and actual return on equity (or “ROE”) for the years

¹³ Order No. 13-160 at 8.

¹⁴ *Id.* at 9.

¹⁵ *Id.*

¹⁶ *Id.* at 9 n.20.

that support each party's respective theory of the case. The sole legal issue remaining in this docket is the appropriate year(s) for which the Commission should conduct an earnings review to determine whether the Commission should amortize the one-time tax benefits at issue into rates.

III. ARGUMENT

The Commission should review the Company's 2011 earnings and amortize into rates the entire one-time tax benefit received by Idaho Power in 2011. The appropriate time frame for the earnings review is one recent year—2011—the year that the Joint Committee on Taxation approved Idaho Power's one-time tax benefit, the year that Idaho Power “reversed the . . . uncertain tax position liability to its 2011 earnings,”¹⁷ and the same year that Idaho Power's shareholders and Idaho customers reaped the benefits of the tax methodology changes.¹⁸ Amortization is necessary because, even without considering the full effects of the one-time tax benefit in 2011, Idaho Power's shareholders enjoyed the benefits of Idaho Power's 17.833% return on equity without type one adjustments—11.75% with type one adjustments—well in excess of the Company's 2011 authorized rate of 10.175%.¹⁹ Allowing Idaho Power to retain the one-time benefit it received in 2011 would result in Idaho Power earning almost 900 basis points in excess of its authorized ROE in 2011 even on a type one adjusted basis.

Staff and the Company have illogically advocated for an earnings review that would have the Commission look back more than two decades over the years between 1987 and 2009 because “the refunds received by Idaho Power due to the changing tax methods are related to the

¹⁷ UM 1562-UM1582 Idaho Power/200, Marchioro /6 (discussing reversal of UNICAP tax position in September 2011); *id.* at 8-9 (discussing reversal of Repairs tax position in April 2011).

¹⁸ UM 1562-UM1582 CUB/200, Jenks-Feighner/16.

¹⁹ *Stipulated Facts* at Attachment 1.

years 1987 through 2009.”²⁰ From this premise, Staff and Idaho Power conclude that, on average over that lengthy period of almost a quarter century, the Company’s historic earnings fell outside of their proposed range of reasonableness. Accordingly, Staff and Idaho Power would assign the entirety of the tax benefit received in 2011 as a windfall to the Company’s shareholders who would thus earn almost 900 basis points in excess of their authorized earnings for that year, and not require the Company to share with customers *any* of the one-time tax benefit.²¹ The Commission should not adopt that reasoning because it is unsupported by the statute, the regulations, Commission precedent, or logic. Alternatively, even if the Commission somehow determines that it must examine earnings for years between 1987 and 2009 where data is available, it should require Idaho Power to refund to customers the tax benefit for each individual year that the Company’s Type 1 ROE After Tax Benefit²² was within the zone of reasonableness, and for every year in which Senate Bill (“SB”) 408²³ was in effect and for which a refund would not lead to unconstitutionally confiscatory rates.

A. The Applicable Legal Standard Provides the Commission with Broad Discretion to Amortize the Entirety of the One-Time Tax Benefit Obtained in 2011.

As clarified by the Commission in Order No. 13-160, ORS 757.259(1)(a)(A) does not require the approval of a deferral application before the tax refunds may be amortized into rates.²⁴ Subsection (5) of ORS 757.259 provides the Commission with the authority to amortize

²⁰ *Idaho Power Company’s Opening Brief*, OPUC Docket Nos. UM 1562 and UM 1582, at 17 (filed Oct. 8, 2012); *see also Staff’s Opening Brief*, OPUC Docket Nos. UM 1562 and UM 1582, at 7-9 (filed Oct. 8, 2012).

²¹ *Idaho Power Company’s Opening Brief*, OPUC Docket Nos. UM 1562 and UM 1582, at 18-19; *Staff’s Opening Brief*, OPUC Docket Nos. UM 1562 and UM 1582, at 7-8.

²² *Stipulated Facts* at Attachment 1, Column J.

²³ SB 408 bill was enacted as Oregon Laws 2005, chapter 845, sections 2 to 5, parts of which were codified at ORS 757.267, 757.268, and 757.210.

²⁴ OPUC Order No. 13-160 at 8-9.

amounts subject to ORS 757.259 and discusses the requirements for amounts described in the statute to be amortized in rates.

Unless subject to an automatic adjustment clause under ORS 757.210 (1), *amounts described in this section shall be allowed in rates only to the extent authorized by the commission in a proceeding under ORS 757.210 to change rates and upon review of the utility's earnings at the time of application to amortize the deferral.* The commission may require that amortization of deferred amounts be subject to refund. The commission's final determination on the amount of deferrals allowable in the rates of the utility is subject to a finding by the commission that the amount was prudently incurred by the utility.²⁵

The legislative history itself declares:

[The section] also requires a review of the utility's *earnings at the time of the application*. The earnings review will allow the Commission to determine whether amortization of deferred income or expense amounts is warranted based on the utility's earnings; *if earnings are higher than authorized, expense amortization through rates will not be appropriate.*²⁶

The legislative history used the present tense with the word *are* instead of the past tense with the word *were* – thus confirming that the relevant earnings are the utility's recent earnings and not earnings two decades or more in the distant past. There is no indication or suggestion in the legislative history or the statute that the Commission would review earnings reaching almost a quarter century into the past.

Oregon Administrative Rule 860-027-0300(9) provides the Commission with parameters to use in determining the appropriate period selected for an earnings review in the event of a deferral:

Upon request for amortization of a deferred account, the energy or large telecommunications utility shall provide the Commission with its financial results

²⁵ ORS 757.259(5)(emphasis added).

²⁶ Or. H. Comm. on Env. and Energy, *Hearing on H.B. 2145*, at Exhibit B at 5 (emphasis added). This excerpt of the legislative history is included as Attachment 1 to CUB and OICIP's Joint Opening Brief in docket UM 1562-UM 1582.

for a 12-month period or for multiple 12-month periods to allow the Commission to perform an earnings review. *The period selected for the earnings review will encompass all or part of the period during which the deferral took place or must be reasonably representative of the deferral period.*²⁷

Although this regulation requires the Commission to focus on the deferral period, in this case the Commission has already determined there was no need for a deferral because “the statute deems amounts retroactively imposed by other governmental agencies as automatically qualified for amortization.”²⁸

In the absence of a deferral period, the Commission has even broader discretion than normal to determine the appropriate time period to review the utility’s earnings for this particular one-time tax benefit. In OPUC Order No. 93-257, the Commission discussed its discretion in determining the appropriate period for the earnings review, stating that:

[T]he earnings test should be designed to further the purpose of the deferral in the first instance. Because deferral and amortization is an extraordinary proceeding, the earnings test could well vary with the circumstances of each case... In the future, the Commission intends to tailor earnings tests to fit the type of deferral.²⁹

Finally, the Commission has specifically articulated a legal standard for determining when amortization is appropriate, stating that it must “determine if the utility’s earnings were sufficient at the time of the deferral to absorb the deferred amounts and still earn a reasonable return on investment.”³⁰ The premise of the earnings review is simple – if the utility’s earnings are within a zone of reasonableness to the authorized return on equity during the relevant time

²⁷ OAR 860-027-0300(9)(emphasis added).

²⁸ Order No. 13-160 at 8.

²⁹ *In re Portland General Elec. Co.*, OPUC Docket Nos. UE 82, UM 445, Order No. 93-257 at 11 (1993).

³⁰ *In re Portland General Electric Co.: Application to Amortize Boardman Deferral*, OPUC Docket No. UE 196, OPUC Order No. 10-051, at 5-6 (2010) (emphasis added).

period the utility should absorb and extraordinary expense or refund to customers an extraordinary benefit.³¹

B. The Earnings Relevant to the One-Time Tax Benefit Are the Company’s Earnings When It Obtained the Legal Right to the One-Time Benefits in 2011—Thus Justifying a Refund of the Entire One-Time Tax Benefit.

The Commission has clarified that amounts retroactively imposed by other governmental agencies do not require an application for deferral before the Commission can designate the amounts as subject to amortization under ORS 757.259(5).³² Accordingly, there is no “deferral period” for consideration or inclusion in an earnings review for applications filed pursuant to ORS 757.259(1)(a)(A)—once the amounts in question are identified, the Commission can move straight to the question of amortization and the earnings review. As discussed below, Commission precedent interprets the earnings review in the context of a deferral application, and therefore, a deferral period. These precedents lead to the conclusion that 2011 is the appropriate time frame for the earnings review under the unique facts of this case.

1. The 2011 earnings are the relevant earnings because the triggering event giving rise to the funds at issue occurred in 2011.

The purpose of the deferral period is to identify a point in time, or “triggering event,” from which the Commission can begin to determine the appropriate earnings review required by ORS 757.259(5). Pursuant to OAR 860-027-0300(9), the Commission’s earnings review must include all or part of the deferral period or be reasonably representative of the deferral period. In this proceeding, the only period of time that fits the legal requirement of identifying the equivalent of a deferral period for the earnings review is 2011.

³¹ See Or. H. Comm. on Env. and Energy, *Hearing on H.B. 2145*, at Exhibit B at 5.

³² OPUC Order No. 13-160 at 8.

As acknowledged by the Commission, Idaho Power “was not entitled to the tax benefits until Congressional approval and IRS finalization in September 2011.”³³ There was no assurance that Idaho Power would receive any retroactive tax benefits until that triggering event occurred. It is therefore indisputable that the tax benefits at issue in this case were not eligible for amortization into rates prior to September 2011. Even if Idaho Power wished to refund this benefit to Oregon customers, it could not have been expected to do so until Joint Committee approval and final IRS sign off in September 2011. Accordingly, the triggering event, or deferral period equivalent, occurred in 2011—the year that the government approved the \$92.9 million benefit and the Company reversed its uncertain tax position with regard to the one-time tax benefits. The Company itself argued that the Commission could determine 2011 to be the appropriate deferral period in UM 1562, as a ground for establishing that Staff’s deferral application was filed after the deferral period.³⁴

The Commission clarified the timing of the earnings review in *In Re Utility Reform Project and Ken Lewis*.³⁵ The Commission noted that in legislative testimony, Commissioner Davis “envisioned that the earnings reviewed would be contemporaneous with the deferral period, *as well as the request for amortization*.”³⁶ The Commission went on to state that “we conclude that ORS 757.259(2) directs us to review a utility’s earnings for an interval that includes the deferral period.”³⁷ Likewise, the Commission’s administrative rule discussing amortization in rates of deferred amounts states that “[t]he period selected for the earnings

³³ *Id.* at 6.

³⁴ See *Idaho Power’s Motion to Dismiss*, OPUC Docket No. UM 1562, at 6 (Jan. 25, 2012).

³⁵ *In Re Utility Reform Project and Ken Lewis: Application for Deferred Accounting*, OPUC Docket No. UM 1224, Order No. 09-316 (2009).

³⁶ *Id.* at 12 (emphasis added).

³⁷ *Id.* at 14.

review will encompass all or part of the period during which the deferral took place or must be reasonably representative of the deferral period.”³⁸

The Commission has stated, “[o]ur rules, envision the testing of earnings that are contemporaneous with *both* the deferral period and the utility’s request for amortization.”³⁹ It would not be possible to conduct an earnings test that is contemporaneous with either, let alone both, the “deferral period” and the request for amortization in this docket if – as proposed by Idaho Power and Staff – the earnings review included all years that “relate back” to the UNICAP and Repairs one-time benefits and excluded 2011.

The Commission’s precedent regarding when a deferral period properly begins is instructive in determining the beginning of the deferral period equivalent in this case. In *Re PacifiCorp, Portland General Elec. Co., and Idaho Power Co.*,⁴⁰ the Commission addressed a proposed deferral of loans made by the utilities to Grid West in 2000. Grid West was originally to repay the loans once it became operational. In April 2006, however, Grid West voted to dissolve, and the utilities filed for deferral of the anticipated loss from the unrecoverable loans.⁴¹ The Industrial Customers of Northwest Utilities (“ICNU”) objected to the deferral, arguing that the Grid West expenses were incurred prior to the submission of the deferral application, and therefore the utilities were prohibited by ORS 757.259(4) from deferring the expenses associated with the loans.⁴² Staff supported the deferral applications and, relying on general accounting principles (“GAAP”), argued that the loans became expenses on the utilities’ books only after the

³⁸ OAR 860-027-0300(9).

³⁹ *In Re Utility Reform Project and Ken Lewis*, Order No. 09-316 at 12 (emphasis in original).

⁴⁰ OPUC Docket Nos.UM 1256, 1257, 1259, Order No. 06-483 (2006).

⁴¹ *Id.* at 1.

⁴² *Id.* at 3.

loans became unrecoverable.⁴³ Because the loans became unrecoverable after the deferral applications were filed, Staff argued there was no violation of ORS 757.259(4).⁴⁴ The Commission agreed with Staff’s analysis.⁴⁵ The Commission noted it had relied on GAAP in the past, but also relied on a practical argument, stating, “GAAP notwithstanding, logic dictates that a loan is not an expense at the time it is made simply due to the expectation that it will be repaid. . . . We decline to interpret the statute so narrowly as to reach an absurd or unreasonable result.”⁴⁶

The same logic controls the outcome of this case. The Commission’s precedent provides guiding principles – (1) the Commission will examine earnings during a period that includes the deferral period or a period analogous to a deferral period if there is no deferral, (2) that period does not commence until the utility actually incurs the expense or accrues the revenue, and (3) the Commission will apply a logical approach determining when that period commences so as to avoid an absurd construction of the statute. Here, the deferral period is 2011, which is the year Idaho Power obtained the legal right to the *one-time* tax benefit, reversed its uncertain tax position to its 2011 earnings, and shared the benefit with its Idaho customers.⁴⁷ The deferral period in UM 1256/1257/1259 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. Logically, therefore, the equivalent of the deferral period in this case did not commence when Idaho Power first paid taxes in 1987 and thereby incurred the remote possibility

⁴³ *Id.* at 2.

⁴⁴ *Id.*

⁴⁵ *Id.* at 3.

⁴⁶ *Id.*

⁴⁷ See UM 1562-UM 1582 CUB/200, Jenks-Feighner/16.

of a future accrual of a retroactive tax benefit over twenty years later.

Idaho Power’s and Staff’s proposal seems especially absurd when considering that Idaho Power itself stated that, under the tax method changes it utilized, “a taxpayer is taking a new calculation methodology, applying it to historical data, and accumulating the net result. . . . *but without amending years of tax returns.*”⁴⁸ Such a multi-decade earnings review would also be inconsistent with the reality of the one-time benefit to which Idaho Power obtained a legal right in 2011—neither the Company’s former ratepayers nor shareholders will in any way benefit from the application of the tax benefits to the period between 1987 and 2009.

2. An earnings review of data over two decades old contradicts the purpose of the statute.

It is also important to remember that the underlying protection afforded to the utility by the earnings review—to ensure that the utility can absorb the costs or revenues that were deferred⁴⁹—is not compromised by amortizing the one-time tax benefits into rates. As noted above, the legislative history directs that the purpose of the earnings review is to determine what the utility’s earnings *are* at the time contemporaneous to the application and not what the utility’s earnings *were* decades ago.⁵⁰

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. Those accounting books have closed. And those shareholders have been compensated for their invested equity. Indeed, the record reflects that Idaho Power’s

⁴⁸ UM 1562-UM 1582 Idaho Power/200, Marchioro/4 (emphasis added).

⁴⁹ See *In Re Utility Reform Project and Ken Lewis*, OPUC Order No. 09-316 at 14 (“Reviewing the earnings of a utility during the deferral period provides the Commission with an opportunity to confirm whether costs or revenues that were deferred were truly exceptional, or whether they were absorbed by the utility.”).

⁵⁰ Or. H. Comm. on Env. and Energy, *Hearing on H.B. 2145*, at Exhibit B at 5 (emphasis added).

earnings on its regulated activities were not the major focus of the Company during a portion of the historic timeframe because Idaho Power was intent on building up the non-regulated side of the business that was generally regarded at that time as the venue with the best earnings potential in the industry.⁵¹ The Company went lengthy periods without asking to have its rates increased, and should not now use that failure as a basis to boost its earnings in this long-past time frame. Bolstering the Company's ROE for that period of time will have no effect on the reasonableness of the returns to those shareholders and will not affect the Company's access to capital during that period.

Idaho Power and Staff propose to improperly construe the statute in a manner that would lead to the absurd result of requiring consideration of earnings data so dated that it no longer even exists.⁵² It is obvious that amortizations under ORS 757.259(1)(a)(A) can involve refunds of expenses initially incurred several years prior to a government order authorizing the refund.⁵³ Yet there is nothing in the statute or the legislative history that requires amortizations under ORS 757.259(1)(a)(A) to unearth earnings data so old it no longer exists. The Joint Parties respectfully submit that the Commission should not read such an absurd requirement into the statute and should not set precedent that will require the analysis of data so old that is highly unlikely to even exist.

This case demonstrates the point. As CUB and OICIP noted in briefing in UM 1562-1582, Idaho Power and Staff proposed that the relevant timeframe for earnings review was 1987

⁵¹ See UM 1562-1582 CUB/20, Feighner-Jenks/3-6.

⁵² See *State v. Vasquez-Rubio*, 323 Or 275, 282-83, 917 P 2d 494 (1996).

⁵³ *In Re Northwest Natural Gas Co.: Application for Approval of Deferred Accounting for a Refund from the Northwest Pipeline Corp.* (hereinafter "*In re Northwest Natural Gas Co.*"), OPUC Docket No. UM 464, Order No. 92-438, at 1 (1992) (noting, in another case addressing amortization of a retroactive refund pursuant to ORS 757.259(1)(a)(A), that the utility initially incurred the expenses at issue as a carrying charge from 1977 to 1982, and received the refund on November 1, 1991).

through 2009, but they lacked the data necessary to calculate Idaho Power's actual earnings for the years 1987 through 1988.⁵⁴ Although Idaho Power accused that CUB and OICIP had "misrepresented the record with respect to availability of earnings data,"⁵⁵ Idaho Power now admits in this proceeding pursuant to ORS 757.210 that "the data necessary to calculate the ROE for 1987 and 1988 is unavailable and therefore the Company could not determine actual ROE for those years."⁵⁶ The Joint Parties anticipate that Idaho Power will argue that the lack of historic data in this case is immaterial because there would have been no benefit associated with UNICAP and Repairs had those methodologies been in place in 1987 and 1988. But this argument misses the point, and would lead to bad precedent. Idaho Power's argument would require the Commission to analyze earnings that are so dated they no longer exist. Such analysis is not contemplated by the statute or the Commission's precedent and would set bad policy for future cases.

3. Idaho Power's 2011 earnings necessitate amortization of the entire one-time benefit.

Idaho Power's earnings in 2011 justify refunding the one-time tax benefits to customers. As stated in the Stipulated Facts, Idaho Power's earnings for 2011 were not below any range of reasonableness. The Company's Oregon return on equity was a staggering 17.833% on an actual basis and 11.157% on a Type 1 adjusted basis.⁵⁷ Even more incredibly, the Company's 2011 ROE on a type one adjusted basis was 18.957% when taking into account the entirety of the one-

⁵⁴ See *CUB-OICIP Opening Brief*, OPUC Docket Nos. UM 1562-1582, at 19 (filed Oct. 29, 2012).

⁵⁵ *Idaho Power's Reply Brief*, OPUC Docket No. UM 1562-UM 1582, at 12 (filed Oct. 29, 2012).

⁵⁶ *Stipulated Facts* at ¶ 1.

⁵⁷ *Stipulated Facts* at Attachment 1.

time tax benefits that, thus far, Idaho Power has retained solely for its shareholders.⁵⁸ In contrast, Idaho Power's authorized return on equity for 2011 was 10.175%.⁵⁹ That means that the Company over-earned by more than 760 basis points in 2011, without factoring in the one-time tax benefits, and asks to over-earn by more than 880 basis points by retaining the one-time tax benefit. In other words, allowing Idaho Power to retain the entire one-time benefit would result in the Company earning almost 900 basis points in excess of the Company's authorized ROE in the year that Idaho Power itself states it "reversed the . . . uncertain tax position liability to its 2011 earnings."⁶⁰ Idaho Power Company's 2011 earnings clearly do not need the boost they received from the realization of the retroactive tax benefits, and the Commission should therefore amortize the entire amount into Oregon rates.

C. The Commission Should Reject Idaho Power's and Staff's Proposals to Apply the Earnings Review to Years 1987-2009.

Staff and Idaho Power argue that the Commission should look back more than 20 years, including years for which the Company has no data, and average the utility's earnings for that entire period when determining whether amortization is appropriate in this docket.⁶¹ By proposing to review earnings between 1987 and 2009, Idaho Power and Staff are requesting that the Commission review earnings that are entirely distinct from the actual impact of the one-time tax benefits.⁶² As stated by Idaho Power, the earnings review should be conducted during those years because "that inquiry will inform the Commission whether Idaho Power's earnings would

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ UM 1562-UM 1582 Idaho Power/200, Marchioro /6 (discussing reversal of UNICAP tax position in September 2011); *id.* at 8-9 (discussing reversal of Repairs tax position in April 2011).

⁶¹ *Idaho Power Company's Opening Brief*, OPUC Docket Nos. UM 1562 and UM 1582, at 18-19 (filed Oct. 29, 2012); *Staff's Opening Brief*, OPUC Docket Nos. UM 1562 and UM 1582, at 7-8 (filed Oct. 29, 2012).

⁶² *See Idaho Power Company's Opening Brief*, OPUC Docket Nos. UM 1562 and UM 1582, at 17.

have been reasonable if the Company had employed the new tax methods in the first instance.”⁶³
But Idaho Power did not employ the new tax methods at that time.

Interestingly, in addition to the arguments set forth above, Idaho Power’s proposition further supports the argument that 2011 is the appropriate year for the earnings review. Had the Company made the tax method changes in an earlier year, its ratepayers would have certainly enjoyed the benefits associated with each tax method change, as the benefits would have been reflected in rates much earlier than 2012. To argue that ratepayers should not receive *any* benefit from these tax method changes because the Company did not elect to make the tax method changes at an earlier time (which would have allowed customers to benefit from lower rates due to a lower tax burden) is self-serving. Additionally, if such logic is adopted by the Commission, it will create an incentive for utilities to delay making tax method changes that will result in substantial one-time tax benefits so that they can “rack-up” the benefits that they know they will not be required to share with ratepayers, effectively achieving a windfall for their shareholders using ratepayer dollars.

D. Alternatively, Even If the Commission is Inclined to Review Historic Earnings Divorced From Any Logical Equivalent of a Deferral Period, Idaho Power’s Historic Earnings Still Warrant Amortization of At Least Portions of the One-Time Benefit.

Neither ORS 757.259(1)(a)(A) nor the Commission’s rules provide any support for Idaho Power’s and Staff’s proposal to review historic earnings spanning two decades into the past. If, however, the Commission determines that an earnings review for years 1987-2009 is required, it should determine whether amortization is appropriate for each individual year. Should the Commission determine that an earnings review is required for each individual year related to the

⁶³ *Id.*

tax method changes, Idaho Power should be required to share its one-time tax benefits for the years in which its Type 1 ROE After Tax Benefit is within the zone of reasonableness, and for every year that SB 408 was in effect and for which a refund would not lead to unconstitutionally confiscatory rates.

1. Idaho Power's earnings were within a zone of reasonableness for a number of years during the two decade long historic period recommended by Staff and Idaho Power – thus requiring a refund for many of the tax years even under their theory of the statute.

Idaho Power and Staff improperly focus on the Company's historic earnings, and conclude that, on average, the historic data dictates a conclusion that Idaho Power should not be required to share the one-time tax benefits with its Oregon customers. Yet Idaho Power and Staff point to no precedent for *averaging* a utility's earnings over so many years. The only precedent cited by Staff was *In Re Utility Reform Project*, where the Commission found that the utility needed to retain the deferred resources because its actual return on equity was 350 to 500 basis points below its authorized return on equity.⁶⁴

The Commission has, however, defined a zone of reasonableness for deferrals in the past. Specifically, the Commission imposed an earnings band on deferrals in docket UM 995.⁶⁵ In that docket, PacifiCorp filed a deferral to recover excess net power costs due to a coal plant outage and poor hydro conditions.⁶⁶ The Commission required that the Company absorb the first 250 basis points of excess net power costs, that any excess power costs between 250 basis points and 400 basis points be shared 50/50, and that below 400 basis points, the costs be shared 75/25

⁶⁴ See UM 1652-UM 1582 Staff/100, Garcia/5.

⁶⁵ *In Re Application of PacifiCorp for an Accounting Order Regarding Excess Net Power Costs*, OPUK Docket Nos. UM 995, UE 121, UC 578, Order No. 01-420 (May 11, 2001).

⁶⁶ *Id.*

(customers getting 75% of the cost).⁶⁷ This demonstrates that the Commission has found that a 250 basis point deviation from forecasted earnings is within the reasonable band of earnings. By including 50/50 sharing between 250 and 400 basis points, and 75/25 sharing below 400 basis points, the Commission demonstrated that the 250 basis points is not the limit to allowable earnings. The fact that the Commission required a shareholder contribution even if PacifiCorp's actual ROE was more than 400 basis points outside of its authorized ROE suggests that even 400 basis points does not rise to the level of confiscatory ratemaking and create an unconstitutional taking.⁶⁸

This precedent should compel the Commission to determine, for purposes of this proceeding, that Idaho Power's earnings that were within the zone of reasonableness and are subject to amortization in rates regardless of the years analyzed.⁶⁹

The Commission should also reject Staff's argument that it would be "unfair to the utility to treat each year of the refund separately and cherry-pick years where earnings were higher to return refunds to customers."⁷⁰ As discussed above, the Commission has articulated a legal standard for determining when amortization is appropriate—when amounts are prudently incurred, and when a utility's earnings are sufficient at the time of the deferral to absorb the

⁶⁷ *Id.* at 29.

⁶⁸ *See id.* at 29-30.

⁶⁹ UM 1562 - UM 1582 OICIP/100, Reading/9.

⁷⁰ UM 1562 - UM 1582 Staff/100, Garcia/9, lines 5-7. Staff cites to OPUC Order No. 93-257 at 9-10 to support its proposition that "the return of benefits to customers to the maximum extent possible must be consistent with the fair treatment of the utility." OICIP and CUB were unable to find support for Staff's claim in any portion of the order, but would note that the Commission expressly declined to establish earnings review standards with implications beyond that docket, and stated "[i]n the future, the Commission intends to tailor earnings reviews to fit the type of deferral." *In re Cancellation of the Certificate of Authority Held by 1-800 RECONEX INC.*, OPUC Docket No. CP 658, Order No. 93-257 at 11 (2009).

deferred amounts and still earn a reasonable return on investment.⁷¹ With regard to amortization or the earnings review, the Commission does not discuss fairness to the utility at all; rather, it must merely ensure that the utility's earnings were sufficient at the time of deferral to absorb the deferred amounts and still earn a reasonable return on investment. Thus, should the Commission determine that earnings tests for the years 1987-2009 are required, it should require the Company to amortize into rates the tax benefits associated with each year that the Company's earnings were within the zone of reasonableness.

2. For the years that SB 408 was in effect in Oregon, Idaho Power should be required to refund all of the tax benefits attributed to each year for which a refund would not lead to unconstitutionally confiscatory rates.

Should the Commission impose an earnings review for each year between 1987 and 2009, against the recommendation of the Joint Parties, Idaho Power should be required to refund the tax benefits associated with the years that SB 408 was in effect in Oregon (2006-2011) and for which a refund would not lead to unconstitutionally confiscatory rates. This treatment is justified because, while the deferral statute applies to a multitude of different types of extraordinary expenses and benefits that might fall outside the scope of a normalized general rate proceeding, SB 408 contained Oregon's express policy with regard to taxes during the 2006 to 2011 time frame.⁷²

In 2005, the Oregon legislature passed SB 408, which required the Commission to ensure that the amount of taxes paid by customers to the utility did not exceed the amount of taxes that

⁷¹ *In re Portland General Electric Co.: Application to Amortize Boardman Deferral*, OPUC Order No. 10-051 at 5-6.

⁷² *See, e.g., State v. Martindale*, 30 Or.App. 1127, 1130, 569 P.2d 659, 661 (1977) ("where there is a general and specific statute concerning the same subject, the specific controls").

the utility paid to the government.⁷³ By the policy applied to all energy utilities, the law required only larger utilities to file annual tax reports and true-up the difference. If customers paid more in taxes than the utility remitted to the government, customers were issued a refund. Conversely, if customers paid too little, the utility was permitted to surcharge customers to make up the difference. Although Idaho Power was exempt from this annual filing requirement in Section 3 of SB 408,⁷⁴ the legislature unambiguously declared in Section 2 of SB 408 the state-wide policy that, “Utility rates that include amounts for taxes should reflect the taxes that are paid to units of government to be considered fair, just and reasonable.”⁷⁵ SB 408 was repealed in 2011 due to implementation problems,⁷⁶ and replaced with SB 967, which requires the Commission to balance the interests of customers of the utility and the utility’s investors by setting fair, just and reasonable rates that include amounts for income taxes.⁷⁷

For tax years 2006 through 2009, the years that the large utilities were required to make filings with the Commission under Section 2 of SB 408, utilities were required to issue refunds when taxes paid to units of government were less than the taxes collected from ratepayers. Rather than limit this to the traditional zone of ROE reasonableness, returns of overpaid taxes were required up to the point that the utility could demonstrate a constitutional taking.⁷⁸ For example, in 2006, 2007, and 2009, Avista Utilities (“Avista”) claimed that the SB 408 refund of

⁷³ See Oregon Laws 2005, chapter 845.

⁷⁴ See *id.* at § 3(13)(b) (applying a limited definition of “public utility” which excluded Idaho Power).

⁷⁵ *Id.* at § 2(f).

⁷⁶ UM 1562 - UM 1582 CUB/200, Jenks-Feighner/8.

⁷⁷ See ORS 757.269.

⁷⁸ Attorney General’s Letter of Advice dated December 27, 2005, to Chairman Lee Beyer, “Re: Oregon Laws 2005, Chapter 845,” at 25, available online at <http://edocs.puc.state.or.us/efdocs/HAH/ar499hah10624.pdf> (The utility may argue for termination of the automatic adjustment clause, “[b]ut the utility must prove the automatic adjustment clause’s adverse impact upon the utility has a material adverse effect on its customers, and the Commission must find, in an order, that such a connection exists.”).

over-paid taxes would lead to confiscatory rates.⁷⁹ Specifically, Avista argued that a refund related to its 2006 SB 408 filing would lead to a 4.75% ROE,⁸⁰ a -0.44% ROE related to its 2007 SB 408 filing,⁸¹ and a 4.64% ROE related to its 2009 SB 408 filing.⁸² Despite Avista's claims, however, the Commission, either by order or settlement, approved SB 408 refunds for all three years, with \$1.5 million going back to customers in 2006,⁸³ \$2.4 million going back to customers in 2007,⁸⁴ and \$1.2 million going back to customers in 2009.⁸⁵

Therefore, should the Commission impose an earnings review for each year from 1987 to 2009 in this docket, Idaho Power should be required to refund the tax benefits attributed to years 2006 through 2011, regardless of its actual ROE, to be consistent with the policy in the state at that time. The record before the Commission does not demonstrate that requiring a refund of Idaho Power's retroactive tax benefit today will result in confiscatory rates to Idaho Power

⁷⁹ See, generally, *In Re Oregon Public Utility Staff Request the Commission Direct Avista Utilities to File Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, OPUC Docket No. UG 171.

⁸⁰ *Avista's letter re: Avista Utilities (Dkt. No. UG 171/Advice No. 07-10-G)/Claimed Violation of ORS 756.040*, OPUC Docket No. UG 171, at 3 (filed January 18, 2008). The Joint Parties request that the Commission take official notice of this and the other filings in docket UG 171 cited in notes 79 to 81. See OAR 860-001-460(1)(d).

⁸¹ *Avista's Request to Suspend and Terminate the Automatic Adjustment Clause*, OPUC Docket No. UG 171(2), at 3 (filed May 5, 2009).

⁸² *Avista's letter re: 2009 Tax Report Filing of Avista Corporation, Docket UG 171(4) Avista's Claim that Staff's Proposed Refund Violates ORS 756.040*, OPUC Docket No. UG 171(4), at 2 (filed Jan. 12, 2011).

⁸³ *In Re Oregon Public Utility Staff Request the Commission Direct Avista Utilities to File Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, OPUC Docket No. UG 171, Order No. 08-203, at 3 (Apr. 11, 2008).

⁸⁴ *In Re Oregon Public Utility Staff Request the Commission Direct Avista Utilities to File Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, OPUC Docket No. UG 171(2), Order No. 09-449, Appendix A (April 11, 2011).

⁸⁵ *In Re Oregon Public Utility Staff Request the Commission Direct Avista Utilities to File Tariffs Establishing Automatic Adjustment Clauses Under the Terms of SB 408*, OPUC Docket No. UG 171(4), Order No. 11-119, at 1 (Apr. 11, 2011).

during the 2006 to 2011 timeframe.⁸⁶ Idaho Power made no showing that its rates were confiscatory during the relevant time period through a general rate case or an appeal thereof, and should not be able to retroactively thwart the State's policy on utility taxes in effect at that time.

D. Policy Implications Warrant a Refund to Customers in this Case.

Aside from the technical and legal arguments raised in this case, the overall policy behind rate-setting supports the amortization of Idaho Power's large tax benefits. Oregon law requires the Commission to ensure the Company's rates for all of its expenses, including income taxes, are fair, just and reasonable.⁸⁷ Additionally, the administrative rule regarding the appropriate period selected for an earnings review provides the Commission with discretion in selecting the financial results to consider in an earnings review.⁸⁸ Refunding retroactive tax benefits to ratepayers under ORS 757.259 is an appropriate exercise of the Commission's lawful discretion and justifiably warrants a refund to ratepayers for a tax benefit the utility has received by retroactive governmental action, rather than by way of superior utility management.

Staff succinctly stated the policy of the deferral statute as applied to Idaho Power's one-time tax benefits when it stated:

Idaho Power collects revenues to pay it[s] tax liabilities from ratepayers. Accordingly, tax benefits realized by the company relating to an agreement with the federal government about how assets will be capitalized for tax purposes are appropriately shared with ratepayers.⁸⁹

⁸⁶ See *Amer. Toll Bridge Co. v. Railroad Comm'n of Cal.*, 307 U.S. 486, 494-96 (1939) (explaining that heavy burden a utility must meet to prove rates are confiscatory).

⁸⁷ See ORS 757.210, 757.269.

⁸⁸ See OAR 860-027-0300(9).

⁸⁹ *Staff's Application for Deferral of Tax Benefits Recognized By Idaho Power Co.*, OPUC Docket No. UM 1562, at 2 (Nov. 17, 2011).

More generally, the policy in Oregon is that taxes paid should match taxes collected, and utility expenses and revenues should match appropriately the costs borne by and benefits received by ratepayers.⁹⁰

The \$92.9 million in tax benefits at issue in this docket would be a windfall to the Company and its current shareholders at a time when their actual earnings are well within any zone of reasonableness. Furthermore, the Company has produced no evidence to demonstrate that it used any of the one-time benefit to offset low dividends to shareholders from prior years when the Company claims its earnings were low. The Company's Oregon customers, in contrast, have experienced several recent rate hikes during a down economy.⁹¹ In addition to the rate increase in UE 233, the Company recently received authorization to include Langley Gulch in its Oregon rates – resulting in an approximate 7% rate increase.⁹² Under these circumstances, the proposal to use a one-time tax benefit to make up for what the Company perceives to be, on average, subpar earnings over a period reaching over twenty years into the past is not warranted. The Commission should apply the earnings review to the year 2011 and amortize the one time tax benefits for refund to ratepayers.

IV. CONCLUSION

OICIP and CUB respectfully request that the Commission order amortization of the one-time tax benefits at issue in this docket based on Idaho Power's 2011 earnings. Ratepayers funded Idaho Power's tax expenses, and Idaho Power received the one-time, governmentally imposed tax benefits by retroactive governmental action –*not* by superior utility management.

⁹⁰ See ORS 757.269; ORS 757.259(2)(e).

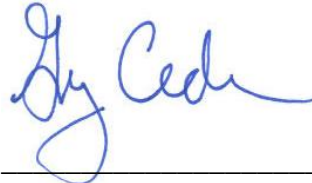
⁹¹ See UM 1562-UM 1582 CUB/100, Jenks-Feighner/19.

⁹² See *In Re Idaho Power Co.: General Rate Revision Application for Authority to include the Langley Power Plant Investment in Rate Base*, OPUC Docket No. UE 248, Order No. 12-358 (2012).

The refunds must, therefore, be returned to customers who undeniably fund Idaho Power's tax liabilities. Should the Commission decline to implement the Joint Parties' proposal for the earnings review in this docket, the Commission should apply the earnings review to each year related to the tax method changes, un-averaged, and require Idaho Power to amortize a refund into rates for each year that the Company was within the zone of reasonableness, and for each year that SB 408 was in effect in Oregon and for which a refund would not lead to unconstitutionally confiscatory rates.

RESPECTFULLY SUBMITTED this 16th day of July 2013.

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UE 233 – CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of July, 2013, I served the foregoing **JOINT OPENING BRIEF OF THE OREGON INDUSTRIAL CUSTOMERS OF IDAHO POWER AND 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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UE 233- Certificate of Service JOINT OPENING BRIEF OF THE OREGON INDUSTRIAL CUSTOMERS OF IDAHO POWER AND THE CITIZENS' UTILITY BOARD OF OREGON

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Respectfully submitted,

A handwritten signature in cursive script that reads "Sommer Templet".

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