

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UE 233**

In the Matter of	)	
	)	REPLY BRIEF OF THE OREGON
IDAHO POWER COMPANY	)	INDUSTRIAL CUSTOMERS OF
	)	IDAHO POWER
Request for General Rate Revision	)	
_____	)	

**I. INTRODUCTION AND SUMMARY**

Pursuant to the scheduling orders in this case, the Oregon Industrial Customers of Idaho Power (“OICIP”) submit this Reply Brief to the Oregon Public Utility Commission (“Commission” or “OPUC”). The Commission reopened this general rate case to “provide a forum to address Idaho Power's earnings and the proper ratemaking treatment of the tax refunds.” Order No. 13-160 at 9. The arguments set forth in the opening briefs of Idaho Power Company (“Idaho Power” or “Company”) and the Commission Staff (“Staff”) are unpersuasive and do *not* warrant allowing Idaho Power to boost its recent earnings with the one-time tax benefit at issue. Oregon law provides the Commission with authority, and even an affirmative directive, to refund the large tax benefit to offset the rates, including amounts for taxes, paid by customers.

Specifically, having reviewed opening briefs, OICIP agrees with Staff’s interpretation that ORS 757.259 does *not* require an earnings review for amounts, such as the tax refund in this case, which are subject to immediate amortization without a prior deferral. If the Commission

adopts this interpretation, however, Staff is incorrect that the Commission should nevertheless use its generic ratemaking authority to ensure that shareholders from the period 1987 to 2009 earn 100 basis points *over* their authorized return on equity. *See Staff's Opening Brief* at 10. Instead, Oregon's statute that specifically addresses treatment of taxes in a general rate case, ORS 757.269, controls and leads to the conclusion that the tax benefits should be refunded to customers without an earnings review.

Alternatively, while OICIP maintains that the Commission should determine that no earnings review is required by the applicable statutes, OICIP stands by the arguments in the Joint Opening Brief filed by OICIP and the Citizens Utility Board of Oregon ("CUB") if the Commission elects to conduct an earnings review.

In sum, whether the Commission conducts an earnings review or not, the Commission should require Idaho Power to refund the large tax benefit it obtained to the Oregon customers responsible for Idaho Power's tax liabilities.

## **II. ARGUMENT**

### **A. Because the Statutes Require No Earnings Review, the Commission Should Refund the Tax Benefit to Customers.**

The Commission Staff's Opening Brief sets forth a persuasive interpretation that ORS 757.259 imposes no requirement for an earnings review for amounts subject to immediate amortization without prior deferral. Upon further consideration, OICIP agrees that the Commission should conclude that the deferral statute requires no earnings review when there is no deferral. Yet Staff incorrectly concludes that the Commission should nevertheless conduct an earnings test on earnings in long-past years. Instead, the Commission should conclude that Oregon's specific statutory provision governing treatment of taxes, ORS 757.269, controls this

case and directs the Commission to refund the tax benefit to customers.

OICIP agrees 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 of the application to amortize deferral’ does not apply to ORS 757.259(1)(a)(A) amounts.” *Staff’s Opening Brief* at 3-4. This is so 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.” Order No. 13-160 at 8. The statute applies the earnings test only to amounts that were previously subject to deferral. The legislative history confirms this by mentioning the earnings tests in the same breath as the *deferral*. See Or. H. Comm. on Env. and Energy, *Hearing on H.B. 2145*, 64th Or. Leg., H.B. 2145, Ex. B, at 5 (Mar. 11, 1987).<sup>1</sup>

Consequently, the Commission’s administrative rules and its prior orders discussing the appropriate earnings test all rely upon the type and timing of the *deferral*. See, e.g., OAR 860-027-0300(9); *In re Portland Gen. Elec. Co.: Application to Amortize Boardman Deferral*, OPUC Docket No. UE 196, Order No. 10-051, at 5-6 (2010) (stating the Commission 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.”); *In Re Utility Reform Project and Ken Lewis: Application for Deferred Accounting*, OPUC Docket No. UM 1224, Order No. 09-316, at 9-15 (2009) (concluding “that ORS 757.259(2) directs us to review a utility’s earnings for an interval that includes the deferral period”); *In re Portland General Elec. Co.*, OPUC Docket Nos. UE 82, UM 445, Order No. 93-257, at 11 (1993) (stating, “In the future, the Commission intends to

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<sup>1</sup> 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.

tailor earnings tests to fit the type of deferral.”).

In short, the earnings test is part and parcel with a deferral, and there is no requirement for an earnings test when amounts are subject to immediate amortization without prior deferral pursuant to ORS 757.259(1)(a)(A). In contrast, ORS 757.259(1)(a)(A) simply provides an exception to the rule against retroactive ratemaking that requires the same treatment of the tax benefit as would apply if it were included in Idaho Power’s initial rate case filing.

Thus Oregon’s specific statutory provision addressing taxes, ORS 757.269, controls treatment of the tax benefit in this general rate case. And ORS 757.269 contains specific directives for treatment of taxes without mention of an earnings test – *especially* an earnings test that reaches over two decades into the past. In fact, Oregon’s specific statute designed to address treatment of taxes in general rate cases provides:

(2) During ratemaking proceedings conducted pursuant to ORS 757.210, the Public Utility Commission *must ensure* that the income taxes included in the electricity or natural gas utility's rates:

\* \* \*

(d) *Are reduced by tax benefits* generated by expenditures made in providing regulated utility service to the utility's customers in this state....

ORS 757.269(2) (emphasis added). This version of the statute became effective on May 24, 2011, prior to the time Idaho Power filed its general rate case application in this docket on July 29, 2011. *See* 2011 Oregon Laws, ch. 137, § 1 (effective May 24, 2011). It therefore controls treatment of the one-time tax benefit now at issue in this rate case just as if the one-time benefit was known and measurable at the time Idaho Power made its initial rate case filing.

Although ORS 757.269 has not been thoroughly vetted by the Commission, the policy set forth is clear – customers should *not* overpay for utility taxes. The statute does not state that the

Commission should, or even could, conduct an earnings review of a hypothetical deferral period that did not occur over the period from 1987 to 2009, as Staff and Idaho Power would have the Commission conclude.<sup>2</sup> The arguments of Staff and Idaho Power are a stretch even under the deferral statute that specifically calls for an earnings review of deferred amounts, but they become entirely unsupportable under the tax statute that makes no mention whatsoever of an earnings test. Instead, it affirmatively instructs that the Commission “must ensure” rates are “reduced by tax benefits.” This case regards such a tax benefit. As such, Oregon law directs the Commission to treat the benefits like any other tax liability or expense in a general rate case, and consequently to refund the Oregon portion of the one-time benefit to Oregon customers.

Grasping at straws to reach its predetermined result, however, Staff continues to argue that the Commission’s general ratemaking authority requires a review of long-past earnings in this general rate case. Staff is unable to cite any precedent where the Commission analyzed long-past earnings in a general rate case outside the context of a prior deferral, and its argument to do so is not persuasive. Furthermore, the Commission should not adopt Staff’s recommendation to shoehorn a requirement for an earnings review through the Commission’s general ratemaking authority in ORS 756.040 because “where there is a general and specific statute concerning the same subject, the specific controls.” *State v. Martindale* , 30 Or.App. 1127, 1130, 569 P.2d 659, 661 (1977). Here, the specific statutory provision governing treatment of taxes, ORS 757.269, controls over general ratemaking provisions, such as ORS 756.040.

Aside from being the most logical reading of the applicable statutes, OICIP’s statutory

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<sup>2</sup> OICIP acknowledges that there would have been no benefit associated with UNICAP and Repairs had those methodologies been in place in 1987 and 1988. However, Idaho Power and Staff both argue the Commission should review Idaho Power’s earnings from 1987-2009. *Staff’s Opening Brief* at 6, lns. 11-12; *Idaho Power’s Opening Brief* at 6.

interpretation also would appropriately incent utilities to be forthright in the filing of deferral applications not only when they expect to incur future expenses, but *also* when they expect to obtain future benefits. Ironically, had Idaho Power simply filed a deferral application prior to obtaining the legal right to the one-time tax benefit in 2011, it could now argue that ORS 757.259(5) clearly requires an earnings test to amortize *deferred* amounts. Instead, Idaho Power did not propose to defer the expected tax benefits, and has engaged in a tireless effort to keep for itself tax benefits that rightfully should be refunded to customers who are responsible for Idaho Power's tax liabilities. This conduct should not be encouraged. Disallowing Idaho Power's attempt to keep the tax benefits will send the appropriate signal to utilities that they can ensure an earnings test will result *only* if they are forthright with the filing of a deferral application when it is reasonably certain that they will obtain a tax benefit.

**B. Even If An Earnings Review Is Required, the Commission Should Refund the Tax Benefit.**

Alternatively, while OICIP maintains that the Commission should determine that no earnings review is required, or even allowed under ORS 757.269, OICIP stands by the arguments in the Joint Opening Brief filed by OICIP and CUB if the Commission elects to conduct an earnings review. Nothing in Staff's or Idaho Power's Opening Briefs provides a persuasive reason to boost the earnings of shareholders from years past at the expense of the Company's current customers. OICIP fully endorses, and therefore will not repeat, the points made in the Reply Brief of CUB regarding the appropriate outcome of an earnings review if the statutes at issue called for an earnings review (which OICIP asserts is not the case).

**III. CONCLUSION**

In conclusion, while presenting novel legal issues, this case presents the straightforward

question of whether Idaho Power should be allowed to charge its customers for its tax liabilities and then direct large tax benefits to its shareholders. Despite Idaho Power's legal maneuverings since the Oregon parties first became apprised of this tax benefit, the Commission now plainly has the ability, and even a legislative directive, to order Idaho Power to share this tax benefit with its Oregon customers. The equities do not favor Idaho Power in this case. For these reasons and the reasons set forth in prior filings on this matter, the Commission should order amortization of the one-time tax benefits.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of August 2013.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12<sup>th</sup> day of August, 2013, a true and correct copy of the within and foregoing OREGON INDUSTRIAL CUSTOMERS OF IDAHO POWER'S REPLY BRIEF IN DOCKET UE 233 was served as shown to:

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