ORDER NO. 13 416

ENTERED NOV 12 2013

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 233
(Phase II)

In the Matter of IDAHO POWER COMPANY, Request for General Rate Revision.	ORDER

DISPOSITION: EARNINGS TEST APPLIED; NO REFUND TO CUSTOMERS

In this order we apply an earnings test to determine what amount of income tax refunds received by Idaho Power Company should be amortized in rates under ORS 757.259(5). The result of the earnings test is no refunds to customers.

I. INTRODUCTION

This case is the second phase of these proceedings that arose from two income tax accounting method changes related to Idaho Power's 2009 federal income tax return.[1] In the first phase, we granted an application filed by the Citizens' Utility Board of Oregon (CUB) and the Oregon Industrial Customers of Idaho Power (OICIP), and designated the tax refunds as amounts eligible for amortization in rates.[2] We concluded that the tax refunds qualified for retroactive rate treatment under subsection (1)(a)(A) of ORS 757.259 as "amounts lawfully imposed retroactively by order of another governmental agency." We further concluded that, unlike other utility expenses and revenues generally deferred under the statute, the tax refunds did not require a preliminary deferred accounting order to make them subject to amortization. For this second phase, we reopened Idaho Power's 2011 general rate case to provide a forum to address the proper ratemaking treatment of the tax refunds under ORS 757.259.

[1] The two accounting changes concerned the capitalization of overhead costs to utility property produced (UNICAP) and deducting repair costs that have been capitalized to utility assets (Repairs). The tax refunds at stake in this case represent a cumulative recalculation of the company's taxes going back to 1987 for UNICAP and 1999 for Repairs.

[2] *In the Matter of Idaho Power Company*, Docket No. UM 1582, Order No. 13-160 (Apr 30, 2013).

The amount of the tax refunds allocable to Oregon is about $4.86 million.[3] The changes in tax accounting result in annual changes, so that financial impact can be calculated for each of the applicable years, from 1987 through 2009.

On July 9, 2013, the parties filed stipulated facts and this matter was submitted upon the filing of simultaneous opening and closing briefs. Opening and closing briefs were filed by Idaho Power and the Commission Staff. CUB and OICIP filed a joint opening brief. CUB and OICIP each filed a closing brief.

II. DISCUSSION

Based on the stipulated facts, there are no disputed facts. As framed by the parties, there are four primary issues to be decided.

A. Is an Earnings Test Required?

Because the tax refunds automatically qualified for retroactive rate treatment without the need for a deferral proceeding, the first question is whether an earnings test is necessary before the refunds may be amortized in rates. ORS 757.259(5) provides that amounts subject to retroactive treatment shall be allowed in rates as follows:

> 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.* (emphasis added.)

If the tax refunds had been "deferred" in a proceeding under ORS 757.259(2), there would be no question that an earnings review would be necessary. However, because the refunds are subject to amortization without formal deferral, the issue arises whether an earnings review is required.

1. Positions of Parties

a. Idaho Power

Idaho Power contends that an earnings review is required under the text and context of the statute. At the outset, Idaho Power notes that the first sentence of subsection (5) clearly applies to amounts "described in this section," which includes amounts made available for amortization under subsection (1)(a)(A). Idaho Power contends that there is no indication that the legislature intended that the earnings test not apply to amounts imposed by a government body. Moreover, had the legislature intended to exclude an earnings review of such amounts, Idaho Power asserts that it would have made its intent clear—as it did elsewhere on two occasions. Idaho Power points out that in subsection

[3] In Order No, 13-160 the amount of the refund allocable to Oregon was estimated to be about $5.23 million. The amount reported in this order is based on the stipulation submitted by the parties.

(5), the legislature expressly excluded an earnings review for amounts subject to an automatic adjustment clause. Similarly, in subsection (4), the legislature specifically excluded several categories of deferred amounts from the earning test.[4] Idaho Power further argues that the rationale underlying the earnings test applies equally to amounts deferred under subsection (2) and amounts amortized under subsection (1)(a)(A). Neither does the legislative history support the application of an earnings review to one type of expense or revenue, but not the other.

In the event that the Commission decides that an earnings test is not required by the statute, Idaho Power supports Staff's recommendation that the Commission apply an earnings review regardless. The company cites *In Re Northwest Natural Gas Company*, docket UG 221, Order No. 12-437, as an example where the Commission has exercised its discretion to apply an earnings test where there was no statutory requirement.

b. Staff

Originally Staff argued that ORS 757.259(5) requires an earnings test. However, after further review, Staff believes that the earnings test is required only when the amounts to be amortized were formally deferred under ORS 757.259(1)(a)(b). As Staff would have the Commission parse the statute:

> [T]he conjunctive 'and' before 'upon review of the utility's earnings at the time of the application to amortize deferral' is intended to join the requirement for a ORS 757.210 rate proceeding that is applicable to both ORS 757.259(1)(a)(A) and ORS 757.259(1)(a)(B) amounts with the requirement regarding an earnings review that applies only to amounts deferred under ORS 757.259(1)(a)(B). The 'and' in the sentence is not intended to join the two statutory requirements (ORS 757.210 rate proceeding and earnings review) so that they apply to amortization of both types of amounts (those under ORS 757.259(1)(a)(A) and those deferred under ORS 757.210(1)(a)(B)).[5]

Notwithstanding Staff's view that an earnings test is not required, it believes that it is appropriate, or even necessary, for the Commission to examine Idaho Power's earnings in this case. According to Staff, the Commission should only amortize the refunds if doing so would be consistent with the Commission's general powers expressed in ORS 756.040.

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[4]In its entirety, ORS 757.259 subsection (4) provides: "The commission may authorize deferrals under subsection (2) of this section beginning with the date of application, together with interest established by the commission. A deferral may be authorized for a period not to exceed 12 months beginning on or after the date of application. However, amounts deferred under subsection (2)(c) and (d) or (3) of this section are not subject to subsection (5), (6), (7), (8) or (10) of this section, but are subject to such limitations and requirements that the commission may prescribe and that are consistent with the provisions of this section."
[5] Staff Opening Brief at 4 (Jul 16, 2013).

c. CUB/OICIP

In their joint opening brief, CUB/OICIP state that "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 issue into rates."[6] In their reply briefs, they address the statutory interpretation issue raised by Staff.

If the Commission were to adopt Staff's view that an earnings test is not required, CUB argues that the Commission should order straight amortization of the refunds. If the Commission nevertheless decides to apply an earnings test, CUB offers its view of how the earnings test should be applied.

OICIP agrees with Staff that an earnings test is not required. However, OICIP argues that the amounts must be refunded under ORS 757.269, which provides generally for the setting of rates based on income taxes paid by the utilities. OICIP relies on subsection (2)(d), which provides as follows:

> (2) During ratemaking proceedings conducted pursuant to ORS 757.210, the Public Utility Commission must ensure that the income taxes included in the electric or natural gas utility's rates:
>
> * * * * *
>
> (d) Are reduced by tax benefits generated by expenditures made in providing regulated utility service to the to the utility's customers in this state, regardless of whether the taxes are paid by the utility or an affiliated group.

According to OICIP, this statute "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 measureable at the time Idaho Power made its initial rate case filing."[7]

2. Resolution

Although the ORS 757.259 is poorly written, we are convinced that the statute requires the application of an earnings test when amortizing the tax refunds. First, we note that ORS 757.259(1) expressly requires that all amortizations are "subject to the limitations contained in this section." The earnings test provided in subsection (5) is the only limitation on the amortization of "amounts lawfully imposed by order of another governmental agency".[8] If we were to read the earnings test requirement out of the amortization of amounts under ORS 757.259(1)(a)(A), the language in the statute would be rendered superfluous.

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[6] CUB/OICIP Joint Opening Brief at 5 (Jul 16, 2013).
[7] OICIP Reply Brief at 4 (Aug 12, 2013)
[8] ORS 757.259 (1)(A).

Second, ORS 757.259(5) states that the earnings test provisions contained in that subsection apply to "amounts described in this section." As "amounts lawfully imposed" under ORS 757.259(1)(a)(A), the tax refunds plainly qualify as "amounts described in this section."

We do not read the language requiring an earnings test at the time to "amortize the deferral" as an indication that the legislature intended to impose an earnings review only when amortizing amounts deferred under a formal accounting order. Had the legislature intended to treat amounts deferred automatically under ORS 757.259(1)(a)(A) differently from amounts deferred under ORS 757.259(1)(a)(B), it would have written the language accordingly. The phrase "amounts described in this section" could have been modified to prescribe different treatments for amounts described in subsections (1)(a)(A) and (1)(a)(B). Indeed, as Idaho Power notes, the legislature did provide explicit exceptions to the earning test requirement related to automatic adjustment clauses and certain types of deferrals. Because the legislature has shown its plain intent to exempt specific categories from an earnings test, it is inappropriate to infer another category for exemption.

Our conclusion to read the term "deferral" generically to address both amounts imposed retroactively by a government agency and other amounts requested to be deferred is supported by legislative history. Throughout his sponsoring testimony, former Commission Chair Charles Davis discussed the two types of amounts interchangeably, including when addressing the earnings test.[9] He identified only one distinction—that amounts retroactively imposed by a government agency were directly subject to amortization without the need for public notice and a comment proceeding to approve the deferral.[10] Other legislative history shows that the Commission traditionally used the term "deferred amounts" to include amounts imposed by a government agency. An exhibit that lists utility deferred accounts provides five key reasons for the deferral. Among those reasons is "retroactive changes imposed by a governmental agency."

Furthermore, no party has suggested a policy reason for why the legislature would have intended to have different treatments for the two categories of amounts that qualify for amortization. In both cases the legislature has provided for exceptions to the rule against retroactive ratemaking. Generally these exceptions are for revenues and expenses that were not foreseen in a general rate case. The earnings test is a materiality standard. The recognition of the revenues or expenses in rates depends on the utility's earnings. The purpose of the earnings test is to protect both the customers and the utility from an unfair result, regardless of how the amounts became subject to amortization.

We further conclude that, even if an earnings test is not required by ORS 757.259(5), an earnings test is appropriate to be consistent with our general powers expressed in ORS 756.040. No party has offered a compelling reason to distinguish the types of

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[9] Testimony, House Environment and Energy Committee, HB 2145, Mar 11, 1987, Ex B (statement of Charles Davis).

[10] This observation is consistent with our earlier finding in Order No. 13-160, Docket No. UM 1562, that the tax refunds automatically qualified for amortization as amounts retroactively imposed by another government agency.

amortizations as regards the applicability of an earnings review. In all cases, whether and to what extent to allow an exception to the rule against retroactive ratemaking should be subject to the materiality test that is inherent in an earnings test.

OICIP's reliance on ORS 757.269 is misplaced. The statute, essentially enacted to replace Senate Bill 408 (SB 408), codifies the ratemaking treatment of income taxes. The purpose of that section is to ensure that the tax benefits generated by providing regulated services are considered when setting prospective rates—regardless of the utility's corporate structure and status as a taxpayer. The provision does not apply to determining whether tax benefits generated by expenditures made in earlier years should be amortized under ORS 757.259.

B. What Period of Earnings Should Be Examined?

1. Positions of Parties

a. CUB/OICIP

CUB/OICIP contend that the earnings review only should examine Idaho Power's earnings for the year 2011—the year when the Joint Committee on Taxation approved Idaho Power's tax refunds and the same year that the company reaped the benefits of the tax methodology changes. Based on Idaho Power's earnings for that year, CUB/OICIP propose that the entire amount of the refunds be amortized in rates. They dismiss proposals by Idaho Power and Staff to base the earnings review on the period to which the tax refunds are attributable—1987 through 2009.

CUB/OICIP cite legislative history in support of their position, noting the use of the present tense "are" to describe the earnings test—"if earnings **are** higher than authorized, expense amortization through rates will not be appropriate"[11]—to suggest that the legislature intended that "the relevant earnings be the recent earnings." They also cite prior Commission decisions to support their view that "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."[12]

CUB/OICIP also rely on Order No. 06-483,[13] where the Commission considered whether to approve deferral for losses associated with utility loans. The Commission found that the deferral period started when the loans became unrecoverable, not when the loans were made. Applying the same logic in this case, the deferral period is 2011, which is the year Idaho Power realized the tax savings.

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[11] Emphasis in original.
[12] CUB/OICIP Joint Opening Brief at 7-8.
[13] Docket No. UM 1259 (Aug 22, 2006).

b. Idaho Power

Idaho Power believes that the earnings review should be based on the years to which the tax savings are attributable—1987 through 2009. The company explains that the tax refunds are the result of the company recalculating its past taxes as if it had been using the new tax methods in the first instance.

Although there was no formal deferral in this case, Idaho Power contends the Commission's general examination of earnings during the past deferral period is appropriate here because it will determine whether Idaho Power's earnings would have been reasonable if the company had employed the new tax methods in the first instance. Idaho Power cites the decision in another tax refund case where the Commission excluded a property tax refund from its review of the earnings in the year the refund was received, because it related to a prior period. The Commission found "no rationale supporting the case that the refund is not an entry related to activity from prior years."[14]

Idaho Power also relies on Commission precedents relating to amortization of deferrals, where the earnings test is based on the deferral period, not the time the application is filed.[15]

c. Staff

Staff recommends that the Commission apply the principles and precedents associated with deferred accounts to decide how to perform the earnings review. Staff agrees with Idaho Power that the review should encompass the years the refunded taxes were paid to the IRS, not the year in which Idaho Power received the refund.

In support of its position, Staff also cites Order No. 11-365, the property tax related decision relied on by Idaho Power. According to Staff, the Commission's rationale regarding the property tax refund being related to prior period activity "supports the conclusion that the Commission should review Idaho Power's earnings at the time it paid the refunded taxes from 1987-2009."[16]

2. Discussion

In a series of decisions, this Commission has determined that the appropriate time period for the earnings review is the deferral period. In Order No. 09-316, the Commission decided:

> In the extraordinary situation of deferred accounting, it is appropriate to review the utility earnings during the deferral period in order to determine whether retroactive ratemaking is appropriate to address the exceptional revenues or expenses that were deferred. If past ratepayers paid an

[14] *In Re Northwest Natural Gas Company,* Docket No. UM 903, Order No. 11-365 (Sep 22, 2011).
[15] *In Re Utility Reform Project and Ken Lewis,* Docket No. UM 1224, Order No. 09-316 (Aug 18, 2009)
[16] Staff Opening Brief at 6.

> appropriate amount of rates for service received, it is inappropriate to burden or enrich future ratepayers based on retroactive events[17].

Although this case does not involve a formal deferral period, this language is instructive with respect to deciding the period for the earnings review in this case. The Commission has concluded that the earnings test should examine whether past ratepayers paid reasonable amounts for service for the period in question. As noted above, "if past ratepayers paid an appropriate amount of rates for service received, it is inappropriate to burden or enrich future ratepayers based on retroactive events."[18] To make that determination here, we must examine earnings during the period when the tax refund accrued—in this case, from 1987 through 2009.

CUB's and OICIP's reliance on Order No. 06-483 is misplaced. In that case the Commission found that the deferral began when it became apparent that the loan would not be repaid. In this case the refunds were lying unclaimed until Idaho Power modified its tax accounting. There was no later change in the law that caused the refunds to suddenly appear. It was a management decision on the part of Idaho Power that resulted in it capturing these revenues.

C. What Portion of the Refunds Should Be Amortized in Rates?

Idaho Power was unable to calculate its earnings for the years 1987 and 1988. The parties stipulated to earnings for the other years as follows:

	Authorized ROE	Adjusted ROE
1989	12.75	11.84
1990	12.75	10.92
1991	12.75	10.029
1992	12.75	11.991
1993	12.75	9.125
1994	12.75	9.919
1995	10.5	10.496
1996	10.5	8.207
1997	10.5	7.051
1998	10.5	7.357
1999	10.5	7.369
2000	10.5	11.126
2001	10.5	7.039
2002	10.5	6.269
2003	10.5	6.054
2004	10.5	5.239
2005	10.25	5.286

[17] Order No, 09-316 at 14-15.
[18] *Id.*

2006	10.25	3.53
2007	10.25	1.256
2008	10.25	-2.6
2009	10.25	-1.27
2010	10.175	9.418
2011	10.175	16.157

The adjusted return on equity (ROE) for the years 1989-2009 represent what Idaho Power's Type 1 adjusted ROE would have been if the tax benefits are recognized for Type 1 ROE computational purposes in the years that the tax benefits were actually recorded by the company. The adjusted ROE for 2010 and 2011 represent what the company's Type 1 adjusted ROE would have been if the tax benefits are recognized for Type 1 ROE computational purposes exclusively in 2011.

1. Positions of Parties

a. CUB/OICIP

CUB/OICIP object to any averaging of prior year results. Assuming that the Commission applies the earnings test to the historical period, CUB/OICIP argue that Idaho Power should be required to share its tax benefits for those years where its earnings were within the zone of reasonableness, and for every year that SB 408 was in effect.

CUB/OICIP do not articulate exactly how the zone of reasonableness should be calculated or how it should be applied. They note, however, that in addressing a deferral of Pacific Power's excess power costs in docket UM 995, the Commission found that a 250 basis point deviation from forecasted earnings was within the reasonable band of earnings.[19] Further, CUB/OICIP note that, by adopting additional sharing percentages for earnings outside that range, the Commission concluded that even a deviation of 400 basis points does not rise to the level of confiscatory ratemaking and create an unconstitutional taking.

If the Commission were to adopt a zone of 250 basis points and apply that to the adjusted ROE results, Idaho Power's earnings would fall within the zone in 1989, 1990, 1992, 1995, 1996, and 2000. Assuming that CUB/OICIP intend that all of those tax savings be allocated to customers, the total Oregon allocated amount is about $360,000.

CUB/OICIP propose to augment the results of their earnings review by also requiring Idaho Power to refund all of its tax benefits attributable to the years when SB 408 was in effect (2006 – 2011). Although Idaho Power was exempt from the operation of SB 408, CUB/OICIP argue that its policy objectives applied to all energy utilities. They further argue that Idaho Power should be required to refund the tax benefits attributable to the years 2006 through 2011, regardless of its actual ROE. The total tax savings (Oregon-allocated) attributable to that period is about $2.5 million.

[19] *See* Order No. 01-420.

b. Idaho Power

Idaho Power argues that its earnings during the review period were unreasonably low, even with the inclusion of the tax benefits. The company reports that it failed to earn its authorized ROE by an average margin of 412 basis points over the entire period, after accounting for the tax refunds.

According to Idaho Power, there was only one year, 2000, when its earnings exceeded its authorized ROE. The tax benefits attributable to that one year are only about 5 percent of the total tax benefit. Idaho Power adds that, for the tax years for which the greatest part of the tax refunds are associated with, its earnings were especially low. "Ninety-two percent of the tax benefit is attributed to 1999 to 2009 and during that time period the company's average ROE, including the tax benefit, was 590 basis points below its authorized ROE."[20]

Idaho Power challenges CUB/OICIP's interpretation of Order No. 01-420,[21] noting that the sharing mechanism adopted in that case addressed deviations from forecasted net power costs, not earnings. Idaho Power explains that the Commission addressed only the amounts to be deferred, and did not examine the utility's earnings.

According to Idaho Power, when the Commission has conducted an earnings review related to net power cost deferrals, it consistently applied a 100 basis point earnings test. The company notes that its earnings during the review period typically were substantially more than 100 basis points below its authorized ROE. Idaho Power's earnings were within a 100 basis point range for three years—1989, 1992, and 1995. The Oregon-allocated net tax benefit for those three years is about $56,000.

Idaho Power further rebuts CUB/OICIP by citing Order No. 09-316, where the Commission found that earnings between 350 and 500 basis points below the company's authorized ROE was outside that range of reasonableness for amortization under ORS 757.285(5). According to Idaho Power, "under-earning by more than 400 basis points is wholly unreasonable."[22]

Next, Idaho Power disputes CUB/OICIP's claim that SB 408 policy requires that the tax benefits be refunded for the years when the statute was in effect. The company argues that nothing in the statutes suggests that the earnings review required by ORS 757.259(5) should be applied in a different manner simply because the subject is taxes.

In any event, Idaho Power claims that its earnings during that time period were clearly unreasonably low. The company notes its actual ROE for 2006 through 2009 was 2.441 percent, 0.555 percent, -3.582 percent, and -2.881 percent. Thus, if the SB 408 policy were to be applied to Idaho Power, the company argues, its earnings were well below the level that a reviewing court would find confiscatory.

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[20] Idaho Power Opening Brief at 9 (Jul 16, 2013).
[21] (May 11, 2001), Docket Nos. UM 995, UE 121, UC 578.
[22] Idaho Power Reply Brief at 9 (Aug 12, 2013).

c. *Staff*

Staff notes that, although the Commission has not established strict standards to determine whether amounts should be amortized, the Commission has stated a policy to tailor earning reviews to fit the type of deferral. In this case, Staff recommends the Commission adopt an earnings test that would require Idaho Power to refund the tax benefits down to a reasonable range of earnings.

In Staff's view, the potential range of reasonable utility earnings is from a maximum of 200 basis points above authorized ROE to a minimum of 200 basis points below authorized ROE. In this case, Staff recommends the Commission use the mid-point between authorized ROE and 200 basis points above for purposes of the earnings review in this case. This would require Idaho Power to return the refunds to the point that its earnings are 100 basis points above its authorized ROE. Staff provides the following table to illustrate the effects of the different ranges for the earnings test:

	Threshold	Years(s) Above Threshold	Total Tax Benefit	Total Refund
1	ROE + 200 bps	0	$0	$0
2	ROE + 100 bps	0	$0	$0
3	ROE	2000	$245,043	$223,735
4	ROE – 100 bps	2000, 1995, 1992, 1989	$300,895	$300,895
5	ROE – 200 bps	2000, 1995, 1992, 1990, 1989	$309,170	$309,170

Staff recommends alternative 2, which results in no refunds.

Staff adds that Idaho Power's earnings were so far below its authorized ROE that the results of an earnings review would be similar even if the Commission required refunds down to authorized ROE. Staff further states that it would only recommend refunds that result in utility earnings below its authorized ROE in extraordinary situations.

Finally, Staff states that its recommendation that no refunds be issued is reasonable considering Idaho Power's overall earnings during this period. Idaho Power's cumulative under-earning over the entire review period, compared to its authorized ROE, amounted to $39,196,763, while its one year of over-earning was only $223,735.

2. *Resolution*

This question of how much, if any, of the refunds are returned to ratepayers turns on the type of earnings tests adopted for this proceeding. The purpose of performing an earnings test under ORS 757.259 is to determine whether any amortization is appropriate.

The test ensures that utilities do not receive extraordinary relief through retroactive ratemaking for additional costs incurred when their overall earnings are sufficient. Conversely, the test ensures that utilities are not to refund amounts to customers while earnings are below reasonable levels.

Unlike most proceedings in which the Commission is asked to amortize expenses or revenues incurred during a relatively short period of time, the tax refunds here cover an extended period of time—25 years. For this reason, we must initially decide whether to examine Idaho Power's earnings on an average or annual basis.

Whether to apply an earning test on an annual or average basis depends on the unique circumstances of each case. Under the unique facts presented here, we conclude that averaging Idaho Power's earnings over the accrual period is most appropriate for two primary reasons. First, as noted, the amounts in question automatically qualified for amortization under ORS 757.259(1) (a)(A). Thus, unlike other recurring deferrals, the tax refunds did not accumulate through annual requests by the utility. To the contrary, Idaho Power received these tax benefits through one-time adjustments from the Internal Revenue Service. Therefore, a review of the average earnings over the entire accrual period is consistent with the nature of how the tax refunds become subject to amortization.

Second, we believe a review of average earnings is most appropriate given Idaho Power's significant and almost constant under-earning throughout the entire period covered by the tax refunds. As demonstrated in the chart above, Idaho Power earned above its authorized ROE during just one year—in 2000 its actual ROE was 62.6 basis points above its authorized ROE. In every other year, Idaho Power's earnings were less, generally significantly less, than authorized levels. In 15 years, the company's earnings were at least 250 basis points below its authorized ROE. In eight years, earnings were at least 400 basis points below target levels. In five years, actual earnings were less than half of that authorized. In two years, earnings were negative. As Staff summarizes, Idaho Power's cumulative under-earning over the entire review period, compared to its authorized ROE, amounted to $39,196,763, while its one year of over-earning was only $223,735. Averaging the earnings in these circumstances most fairly reflects the purpose of the earnings test as stated above: "the test ensures that utilities are not to refund amounts to customers while earnings are below reasonable levels."

In the typical case we would decide on a range of basis points to be applied to the earnings to determine the outcome of the earnings test. In this case the average earnings are so far below the authorized ROE that there is no reasonable basis point range to be applied that would trigger a refund. As noted, Idaho Power's earnings over the entire period, even after recognizing the tax benefits, was over 400 basis points below its authorized ROE. Because these earning are outside any reasonable range for purposes of amortization under ORS 757.259(5), we conclude that Idaho Power should retain the tax benefits in order to not fall further outside the zone of reasonableness.

We reject CUB/OICIP's proposal to apply the SB 408 policy for the years 2006 through 2011. First, this is a proceeding to determine whether the amortization of certain amounts is appropriate under ORS 757.259, and not a proceeding to set comprehensive rates on a prospective basis. Second, as Staff notes, "if the converse of the [CUB/OICIP] recommended method is applied to a request by Idaho Power to surcharge customers for a charge imposed retroactively by a governmental agency, Idaho Power could be allowed to surcharge customers up to an amount that significantly exceeds its authorized ROE."[23] Third, Idaho Power's earnings were so dismal those years that the result could be considered confiscatory.

D. Are there policy reasons to require the return of the refund?

1. Positions of Parties

a. CUB/OICIP

Aside from their technical and legal arguments, CUB/OICIP claim that the overall policy behind rate-setting supports the amortization of Idaho Power's tax benefits. They note that Oregon law requires that a utility's rates must be fair, just and reasonable, and that the Commission has broad discretion in applying earnings tests. They argue that refunding the tax benefit to ratepayers under ORS 757.259 would be an appropriate exercise of the Commission's lawful discretion where the tax benefits are the result of retroactive governmental action, not superior utility management.

CUB/OICIP argue that retention of the tax benefits by Idaho Power would be a windfall for the company and its current shareholders, at a time when the company's earnings are well within any zone of reasonableness. They point out that there is no evidence Idaho Power used any of its tax refunds to off-set low dividends to shareholders from prior years, when earnings were low.[24] Meanwhile, Idaho Power has had several rate increases during a down economy. CUB/OICIP claim that the company's retention of the benefits is unwarranted, and propose that the funds instead be amortized in rates for the benefit of customers.

b. Idaho Power

Idaho Power argues that Commission policy supports the company's retention of the full amount of the tax refunds. Idaho Power states that the earnings review established that, during the review period, its customers were not paying rates that accurately reflected the cost-of-service. The company cites Order No. 09-316: "If past ratepayers paid an appropriate amount of rates for service received, it is inappropriate to burden or enrich future ratepayers based upon retroactive events."[25]

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[23] Staff Reply Brief at 4.
[24] "Low dividends" would be highly speculative, given that Idaho Power would base its dividend pay-out on company-wide earnings, not Oregon earnings.
[25] Idaho Power Opening Brief at 13.

Idaho Power argues that nothing in ORS 757.259 or Commission precedent suggests that it would be necessary for the company to use the tax benefits to off-set low dividends during the years when the company was under-earning. According to Idaho Power, the Commission never has required that funds be used in a particular manner in an amortization proceeding.

Idaho Power also claims that equity and the matching principle support the company's retention of the full amount of the tax refunds. "CUB/OICIP would have customers today receive a windfall tax refund associated with taxes that CUB and OICIP claim were paid by customers over the last 20 years. It is unclear why it is fair for the company's customers in 2011 to receive the proceeds of a refund that resulted from taxes these customers did not pay."[26]

2. Resolution

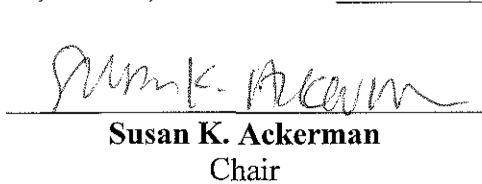
Given our conclusion that an earnings review is required by ORS 757.259(5), we decline to find the discretion to override the statute to effectuate an equitable remedy. Current ratepayers have no better equitable claim to the refunds than current shareholders.

The equity resides with the earlier ratepayers who were denied the benefit of the tax deductions in the derivation of their rates because Idaho Power did not claim all of its deductions when paying its taxes. Offsetting their equitable claim is the company's earnings that were well below its authorized levels during that earlier period.

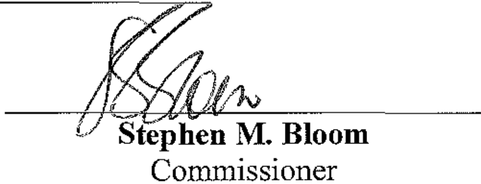
III. ORDER

IT IS ORDERED that the result of the earnings test in these proceedings is no refund to customers.

Made, entered, and effective NOV 12 2013.



Susan K. Ackerman
Chair



Stephen M. Bloom
Commissioner

Commissioner Savage dissents from the majority opinion:

The Commission should review Idaho Power's earnings on an annual basis for the period from 1989 to 2009 to determine whether and to what extent the tax refunds should be amortized into rates. Like Staff, I would apply a "restrictive earnings test" and would require Idaho Power to refund tax benefits to the extent the company's adjusted ROE in a year exceeds its authorized ROE plus 50 basis points. Using this test, Idaho Power would refund about $43,000 to its ratepayers.

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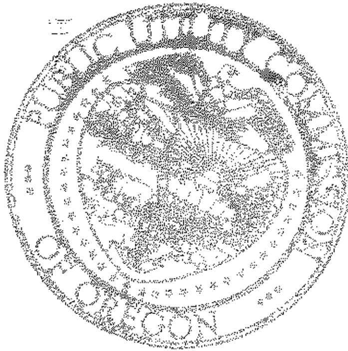
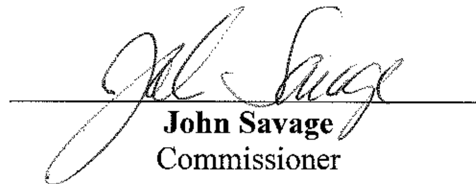
[26] Idaho Power Reply Brief at 6.

The difference in results is negligible. What matters is the design of the earnings test and the reasons for the design.

I disagree with the majority's decision to examine Idaho Power's average earnings over the entire period on two grounds. First, tax adjustments should be analyzed on an annual basis because taxes are imposed on an annual basis. The lump-sum refund amount under consideration is simply the sum of annual tax refund adjustments for the period. It is good regulatory policy to match benefits (or costs) and earnings as precisely as possible. Here, only a year-by-year approach does that.

Second, averaging can generate perverse results. I could modify the essential fact set here such that Idaho Power earned more than authorized ROE for most of the period and still amortize no refunds simply because averaging is used. Averaging should be used sparingly, if at all, for this reason.[27]





John Savage
Commissioner

A party may request rehearing or reconsideration of this order under ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.

[27] Although it doesn't apply here, the use of averaging also can create improper incentives going forward. The utilities determine when they request amortization. If averaging is used, utilities can time a request for amortization to assure full recovery of costs or minimize the amount of benefits accruing to customers.