

ORDER NO. 13 160

ENTERED APR 30 2013

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UM 1562, UM 1582

In the Matter of

IDAHO POWER COMPANY,

Deferral of Recognized Tax Benefits
(UM 1562)

and

CITIZENS UTILITY BOARD OF OREGON
and OREGON INDUSTRIAL CUSTOMERS
OF IDAHO POWER,

Application for Deferral of Tax Benefits
Recognized by Idaho Power Company.
(UM 1582)

ORDER

DISPOSITION: APPLICATION GRANTED; DOCKET UE 233 REOPENED

In this order, we conclude that certain tax refunds received by Idaho Power Company are subject to direct amortization under ORS 757.259(1)(a)(A). We further conclude, however, that further proceedings are required to determine the appropriate ratemaking treatment of the tax refunds.

I. INTRODUCTION

These cases arise from two income tax accounting method changes reflected in Idaho Power's 2009 federal income tax return. 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 benefits represent the cumulative recalculation of the company's taxes going back to 1987 for UNICAP and 1999 for Repairs. The changes are unrelated to each other.¹

¹ The proper ratemaking treatment of the tax benefits was first raised in Docket UE 233, Idaho Power's general rate case. There, the parties reached resolution of the ongoing annual benefit from the UNICAP and Repairs method changes in a partial stipulation we approved in Order No. 12-055. The partial stipulation expressly reserved the right for parties to litigate treatment of the retroactive, one-time benefit in other proceedings.

The amount of the tax savings attributable to UNICAP is about \$59.7 million.² The amount attributable to Repairs is about \$33.2 million. The amount of the tax benefits allocable to Oregon is about \$5.23 million.³

On November 17, 2011, Staff filed an application seeking deferral of \$2.9 million associated with the UNICAP tax method change, based on ORS 757.259 (2)(e). Staff's application was docketed as UM 1562.

On January 25, 2012, Idaho Power filed a motion to dismiss Staff's application. As grounds for its motion, Idaho Power argued that the relief requested by Staff would constitute unlawful retroactive ratemaking.

On February 23, 2012, the Oregon Industrial Customers of Idaho Power (OICIP) and the Citizens' Utility Board of Oregon (CUB) (Joint Parties) filed a motion to hold docket UM 1562 in abeyance, pending a decision on their application relating to the UNICAP and Repairs tax benefits based on ORS 757.259(1)(a)(A). Their application was docketed as UM 1582.⁴

On February 28, 2012, Idaho Power filed its response opposing Joint Parties' motion. On February 29, 2012, Staff filed its response supporting Joint Parties' motion.

On April 11, 2012, the administrative law judge (ALJ) granted the Joint Parties' motion, ruling that the issues raised in docket UM 1562 would be held in abeyance pending the resolution of the issues in docket UM 1582. The ALJ also consolidated the dockets.

The parties proceeded to file testimony in docket UM 1582. After all parties waived cross-examination, the hearing was canceled and the matter was submitted on simultaneous opening and closing briefs.

II. DISCUSSION

This docket involves the interpretation and application of ORS 757.259, which provides a means to address extraordinary utility expenses or revenues outside a general rate case proceeding. The Joint Parties characterize their request as an application to defer the tax benefits under ORS 757.259(1)(a)(A), which addresses "[a]mounts lawfully imposed retroactively by order of another governmental agency." The Joint Parties ask the Commission to authorize the "deferral" of the tax benefits now, and then amortize them

² The tax benefit at the time of the filing was \$65.3 million. At the end of 2010, \$59.7 million of the UNICAP remained, because as time passes the benefit at inception becomes smaller as depreciation continues to be claimed on the property additions to which the capitalized overheads are related.

³ The portion of the refund allocable to Idaho was incorporated in Idaho Power's rates for its Idaho customers in a manner that is not relevant to this proceeding.

⁴ As part of their filing, the Joint Parties also asked the Commission to open a rulemaking proceeding and adopt a rule that would require "immediate disclosure" by utilities of any tax benefit greater than \$500,000, to be made available to ratepayers through deferral. The ALJ responded to that request by providing information to the Joint Parties about the procedure for filing a petition for rulemaking under OAR 860-001-0250.

in a subsequent proceeding that will include a review of Idaho Power's earnings under ORS 757.259(5).

Idaho Power disputes both the merits and procedural posture of the Joint Parties' application. Idaho Power first contends that the tax benefits it received are not subject to ORS 757.259(1)(a)(A), because they were not "ordered" by a governmental agency. Alternatively, Idaho Power argues that, even if the Commission determines the tax benefits are subject to ORS 757.259(1)(a)(A), no initial deferral of the amounts is necessary, because the statute allows amounts retroactively imposed by another government agency to be directly amortized. For that reason, Idaho Power contends that we may perform an earnings review now, and deny the application because the company's earnings during the applicable period were unreasonably low.

We begin with a brief summary of the UNICAP and Refund tax adjustments that gave rise to the challenged refunds. We then address: (1) whether the tax refunds are subject to ORS 757.259(1)(a)(A); and (2) whether the tax refunds require deferral prior to amortization.

A. Background

The UNICAP adjustment began with a series of interactions between Idaho Power, the Internal Revenue Service (IRS), and the U.S. Department of Treasury dating back to 2002. Following Idaho Power's adoption of a certain tax methodology and the issuance of subsequent restrictions by the IRS and the Treasury Department, the company began discussions with the IRS about the allocation of mixed service costs in the uniform capitalization methods of electric utilities. On September 1, 2010, the company and the IRS reached agreement on the UNICAP method change. Under the agreement, Idaho Power was allowed to use the new method on its 2009 federal income tax return and recalculate the company's 1987 through 2008 taxes based on the new method.

Idaho Power filed its 2009 tax return in September 2010. The company received a cash refund in November 2010, relating to its 2009 federal tax return.

The size of that resulting refund was such that it required review by the United States Congress's Joint Committee on Taxation. The Joint Committee completed its review in September, 2011, resulting in the Commissioner of the IRS signing off on the agreement in September 2011.

The one-time tax benefit was calculated by applying the new UNICAP method to the prior tax years: 1987–2008. The purpose of the adjustment was to compute the net cumulative effect on taxable income had the method been available to the taxpayer in the prior years. The adjustment was an administratively practical way to determine the tax benefits that did not require Idaho Power to go back and amend each of its tax returns from that prior period. Thus, it is possible to determine what portion of the total refund is properly attributable to each of the prior years.

The Repairs adjustment dates to October 2009, when the company began evaluating a capitalized repairs deductions income tax method of accounting.⁵ In December 2009, Idaho Power filed an Application for Change in Accounting Method with the IRS requesting the change to the Repairs method. While the Repairs method change was a 2009 event for tax purposes, the change covered the tax years 1999 to 2008, as well as 2009. The actual benefit amount was finalized when the company filed its 2009 tax return in September 2010. Again, the adjustment calculations provide a net deductible amount for each year in the period, so that it is possible to calculate the financial impact in each of those years.

The IRS audited the Repairs method as part of the company's 2009 tax year examination. In April 2011 the Company and the IRS reached an agreement regarding the Repairs method.

B. Applicability of ORS 757.259(1)(a)(A)

We begin with the initial question whether the tax benefits received by Idaho Power are subject to retroactive rate treatment under ORS 757.259(1)(a)(A). That provision allows rates to reflect, under amortization schedules set by this Commission, "amounts lawfully imposed retroactively by order of another governmental agency."

1. Position of Parties

a. Joint Parties

The Joint Parties argue that the tax benefits are subject to ORS 757.259(1)(a)(A) because they are "amounts lawfully imposed retroactively by order of another governmental agency." The Joint Parties rely on the plain language of the statute, its legislative history, and prior Commission interpretation of the provision.

The Joint Parties first contend that there is no question that the IRS is a governmental agency, and that its action here falls within the broad meaning of the term "order." The Joint Parties note that "order" is broadly defined as "an authoritative indication to be obeyed."⁶ They also argue that the IRS's action in this case is an "order" under the federal administrative procedures act, where the term is defined as "the whole or a part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of an agency in a matter other than rule making but including licensing."⁷

⁵ "Capitalized repairs" are "expenditures related to utility assets that are capitalized for financial accounting purposes that are currently deductible for income tax purposes." Idaho Power's Opening Brief at 6, citing Idaho Power/200, Marchioro/6, ll. 12-14 (Oct 8, 2012).

⁶ Joint Parties' Opening Brief at 10, quoting Webster's II New Riverside University Dictionary at 827 (1984) (Oct 8, 2012).

⁷ Joint Parties' Opening Brief at 11, quoting 5 U.S.C. Sec. 551(6).

Citing legislative history of the statute, Joint Parties argue that the tax benefit falls within the type of events the legislature intended to be covered by statute. Specifically, the Joint Parties rely on testimony by former Public Utility Commissioner Charles Davis, who explained the bill was intended to address unanticipated expenses and revenues, which “often are the result of *governmental action*.”⁸ He later offered “unexpected or retroactive taxes” as an example of one type of circumstance that would trigger use of language that was later codified as ORS 757.259(1)(a)(A).⁹

Finally, the Joint Parties also rely on this Commission’s use of ORS 757.259(1)(a)(A) to authorize Northwest Natural Gas Company (NW Natural) to defer a refund ordered by the Federal Energy Regulatory Commission (FERC). They argue that “the case is instructive because it provides an example of the Commission using subsection (1)(a)(A) of the deferral statute to authorize a deferral of funds for later refund to customers[.]”¹⁰

b. Idaho Power

Idaho Power argues that ORS 757.259(1)(a)(A) does not authorize the request by CUB, because the IRS never “ordered” the company to make either tax method change. According to Idaho Power, there was no authoritative guidance issued either by the IRS or the Treasury Department that required the company to make the changes to its tax method. Idaho Power maintains that the benefits resulted from a management decision and were not imposed on the company by order of the IRS.

Idaho Power disputes the Joint Parties’ use of the legislative history. The company maintains that the legislative history addresses changes in the laws that are by their terms retroactive and mandatory, as opposed to the situation here where the savings were achieved by the action of the utility’s management.

Idaho Power also disputes the applicability of the NW Natural case cited by Joint Parties. The company argues that case is distinguishable, because the FERC order was a mandatory directive, whereas the IRS action in this case simply approved a company request and did not mandate either tax method change.

Finally, Idaho Power contends that, even if ORS 757.259(1)(a)(A) applies because the tax method changes were ordered by the IRS, only the portions of the benefits related to 1987 through 2008 are subject to the application. Idaho Power explains that the plain language of the statute applies only to amounts lawfully imposed retroactively by another governmental agency. Idaho Power argues that, to be retroactive, the tax changes must relate to a period prior to 2009, because the company’s 2009 taxes were not retroactively adjusted. Instead, Idaho Power notes, the taxes for 2009 were calculated using the new methods.

⁸ See Or. H. Comm. on Env. and Energy, Hearing on H.B. 2145, 64th Or. Leg., H.B. 2145, Ex. B at 1 (Mar 11, 1987).

⁹ *Id.* at 6.

¹⁰ Joint Parties’ Closing Brief at 9 (Oct 29, 2012).

c. *Staff*

Staff agrees with Joint Parties that the tax refunds are subject to the Commission's ratemaking authority under ORS 757.259(1)(a)(A). However, as discussed below, Staff opposes Joint Parties' proposal to "defer" the refunds.

2. *Resolution*

We find that the UNICAP and Repairs tax benefits fall within ORS 757.259(1)(a)(A). In this context, "order" is synonymous with "action" and action may include inaction, where the government agency acts permissibly to allow a result that it otherwise might have prevented. Contrary to Idaho Power's assertion, the statute does not require an order of government have a specified form. Idaho Power's tax return was subject to the oversight of the IRS, which itself acted when it approved the return, subject to the review of the congressional Joint Committee. The subsequent approval of the refund by the Joint Committee clearly was an "order" within the meaning of the statute.

This decision is supported by legislative history, which indicates that the statute was intended to address, among other things, unanticipated expenses and revenues that are the result of governmental action, including unexpected or retroactive taxes. Congressional approval and IRS finalization of the UNICAP and Repairs changes were governmental action that resulted in unexpected and retroactive tax benefits.

We also reject Idaho Power's alternative argument that the portion of the tax benefits related to the 2009 tax year were not "retroactive" for purposes of ORS 757.259(1)(a)(A). Although Idaho Power may have calculated its 2009 taxes using the new methods, it was not entitled to the tax benefits until Congressional approval and IRS finalization in September 2011. As the Joint Parties point out, "[s]imply put, 2009 is a prior time to 2011."¹¹

C. *Necessity of Deferral Prior to Amortization*

We now turn to questions relating to the procedural posture of the Joint Parties' application. The parties dispute whether the application should be treated as one for deferral of the tax benefits, or whether it is more properly viewed as one for amortization of the identified amounts. If the latter, the parties also dispute whether we may examine Idaho Power's earning at this time to determine whether amortization of the tax benefits is warranted.

1. *Positions of Parties*

a. *Joint Parties*

As far as the Joint Parties are concerned, this proceeding is limited to determining whether the tax benefits received by Idaho Power should be deferred for later refund in

¹¹ Joint Parties' Closing Brief at 4.

rates. They contend that any discussion of amortizing the refund or examining Idaho Power's earnings is premature:

Allowing the outcome of an earnings test to determine whether a deferral application should be granted is improper and would compromise the procedural safeguards afforded to non-utility parties under the deferral statute.¹²

The Joint Parties emphasize our rules require deferral prior to amortization, and that they specifically provide that amounts may be amortized “*only* for utility expenses or revenues for which the Commission previously has authorized deferred accounting.”¹³ The Joint Parties also point out that ORS 757.259(5) requires amounts to be “allowed in rates only to the extent authorized in a proceeding under ORS 757.210 to change rates and upon review of the utility's earnings at the time of the application to amortize the deferral.” Thus, the Joint Parties contend:

The UM 1582 Application for Deferral did not trigger a proceeding under ORS 757.210 and does not propose to amortize or otherwise include any amount in rates at this time. Therefore, this is not the appropriate time for a formal review of all of Idaho Power's expenses and earnings.¹⁴

The Joint Parties also rely on the Commission's application of ORS 757.259(1)(a)(A) in the NW Natural case discussed above. There, the Commission approved a request by the utility to defer the retroactive refund from FERC's order, and indicated that the refund would be placed in rates in a subsequent proceeding.¹⁵ The Joint Parties also note that, in granting the deferral, the Commission did not require an earnings review.

b. Idaho Power

Idaho Power contends no deferral is necessary and that we should review its earnings now. The company distinguishes between subsection (1)(a)(A) and subsection (2) of ORS 757.259, noting that the former does not refer to “deferral,” unlike the latter, under which the Commission “may authorize deferral.” Because the Commission may amortize an amount under ORS 757.259(1)(a)(A) without a deferral, Idaho Power contends that the Joint Parties' application should be viewed as an application for amortization, rather than as an application for deferral. Therefore, Idaho Power contends that the earnings test is not only appropriate but is required by ORS 757.259(5).

According to Idaho Power, addressing the earnings test in this proceeding also promotes administrative efficiency. “The record * * * is fully developed with respect to the

¹² Joint Parties' Opening Brief at 13.

¹³ OAR 860-027-0300(9) (emphasis added).

¹⁴ Joint Parties' Opening Brief at 12.

¹⁵ See Order No. 92-438 (Mar 23, 1992).

earnings test and the issue has been placed squarely in front of the Commission for decision.”¹⁶ The company claims there is no practical justification for further litigation.

c. Staff

Staff likewise believes that no deferral is necessary, based on a plain reading of ORS 757.259(1)(a)(A). In the interest of efficiency and judicial economy, Staff recommends that we conduct the earnings review in this docket and decide whether the refunds should be amortized in rates. Staff acknowledges that this is not a rate proceeding under ORS 757.210 to change rates, but contends that the statute does not expressly require that the earnings review be conducted in an ORS 757.210 proceeding. Staff adds, however, that it does not object to the Joint Parties’ recommendation that the Commission delay the earnings test until a proceeding is opened under ORS 757.210.

2. Resolution

The positions of the parties reflect an inartfulness in the drafting of ORS 757.259 that has revealed itself as the statute has been applied to different circumstances over the years. In this case, we agree with Idaho Power and Staff that we need not issue a deferred accounting order to make the tax refunds subject to amortization in rates. We further conclude, however, that it is premature to examine Idaho Power’s earnings at this time for purposes of determining whether those amounts should be amortized.

ORS 757.259(1)(a) provides this Commission the authority to permit rates to reflect, through amortization schedules, retroactive adjustments for two types of revenue or expenses. The statute identifies these two types as:

- (A) Amounts lawfully imposed retroactively by order of another governmental agency; or
- (B) Amounts deferred under subsection (2) of this section.

Since ORS 757.259 was enacted, the vast majority of retroactive adjustments made under the statute have been done under subsection (1)(a)(B). For these adjustments, the statute requires an initial application for deferral and notice and an opportunity for comment and a hearing. If the application is granted, the deferred amounts are subject to amortization in a subsequent rate proceeding.

As Idaho Power and Staff point out, ORS 757.259(1)(a)(A) treats amounts that are retroactively imposed by other governmental agencies differently than those commonly deferred and amortized under ORS 757.259(1)(a)(B). The statute treats these amounts the same as other amounts previously deferred; therefore, there is no requirement for an application and proceeding to initially defer these amounts under ORS 757.259(2). Rather, the statute deems amounts retroactively imposed by other governmental agencies as automatically qualified for amortization. Therefore, it is not necessary to defer the tax refunds before amortizing them in rates.

¹⁶ Idaho Power’s Opening Brief at 16.

This is the conclusion reached by the Commission in the NW Natural decision discussed above. Although the Commission Staff requested the company seek a deferred account for the FERC refund, the Commission noted that “[t]he FERC Order brings the refund under ORS 757.259(1)(a) which does not require the utility to obtain the Commission approval of the deferral.”¹⁷

We acknowledge that ORS 757.259 does not provide a process for which to resolve disputes whether a certain revenue or expense qualifies for amortization under ORS 757.259(1)(a)(A). Due to this fact, and the confusion created by our rules limiting amortizations to only those amounts previously deferred, the Joint Parties’ decision to file an application seeking to defer the tax refund amounts is understandable.

Nonetheless, we conclude that an application to defer these amounts is neither necessary nor contemplated under ORS 757.259. Accordingly, we treat the application as one to designate the tax refunds as subject to amortization under ORS 757.259.(1)(a)(A), and grant it.

We decline, however, Idaho Power’s request that we examine its earnings in this proceeding to preliminarily determine whether the tax benefits should be amortized. We prefer to examine Idaho Power’s earnings within the context of a proceeding under ORS 757.210 to change rates.¹⁸

To provide a forum to address Idaho Power’s earnings and the proper ratemaking treatment of the tax refunds, we reopen docket UE 233, Idaho Power’s 2011 general rate proceeding filed under ORS 757.210. As noted above, although the parties filed a stipulation that already resulted in a general rate increase approved in Order No. 12-055, the parties expressly reserved for separate determination the treatment for the one-time tax benefits at issue here.¹⁹ We intend that these additional proceedings in reopened docket UE 233 to be expedited.²⁰

D. Docket UM 1562

As noted above, proceedings in docket UM 1562 have been held in abeyance, pending the completion of this matter. The subject matter of docket UM 1562 is subsumed within the breadth of this decision, so that no further proceedings are required in that docket. According, that case is dismissed as part of the disposition of this proceeding.

¹⁷ Order No. 92-438 at 1.

¹⁸ Under ORS 757.259(5), amounts subject to amortization may be allowed in rates only “in a proceeding under ORS 757.210 to change rates and upon a review of the utility’s earnings[.]”

¹⁹ *In Re Idaho Power Company*, Docket No. UE 233, Order No. 12-055, Appendix at 9 (Feb 23, 2012).

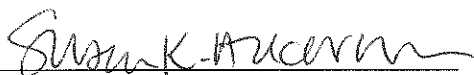
²⁰ Although the Commission generally reviews a utility’s earnings based on a comparison of authorized and actual return on equity, the parties here presented evidence only on Idaho Power’s rate of return. This inconsistency confused many of the parties’ recommendations, which were based on return on equity considerations but applied to rate of return results. We ask the parties to correct this discrepancy in the reopened proceedings.

III. ORDER

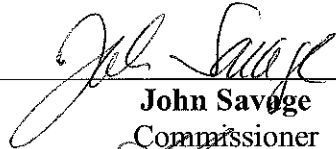
IT IS ORDERED that:

1. The application of the Citizens' Utility Board of Oregon and Oregon Industrial Customers of Idaho Power filed on February 23, 2012 (Docket UM 1582), is treated as one to designate amounts subject to amortization under ORS 757.259(1)(a)(A) and is granted;
2. The application of the Staff of the Public Utility Commission of Oregon filed on November 17, 2012 (Docket UM 1562) is dismissed; and
3. Docket UE 233 is reopened for further proceedings.

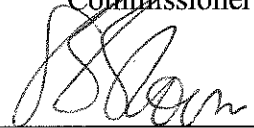
Made, entered, and effective APR 30 2013.



Susan K. Ackerman
 Chair



John Savage
 Commissioner



Stephen M. Bloom
 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.