



Portland General Electric Company
Legal Department
121 SW Salmon Street • Portland, Oregon 97204
503-464-7822 • Facsimile 503- 464-2200

Barbara Halle
Associate General Counsel

December 29, 2017

Via Email: puc.filingcenter@state.or.us

Attn: Filing Center
Public Utility Commission of Oregon
201 High Street SE
Salem, Oregon 97301-3398

Re: UE 324 – Gresham Privilege Tax Payment Adjustment

Dear Filing Center:

Enclosed for filing in the above-referenced docket please find Portland General Electric Company's ("PGE") Response to Gresham's Motion for Clarification.

Please advise if there is difficulty in opening the attached PGE Response or if there are questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "B. Halle", is written over a light blue rectangular background.

Barbara Halle
Associate General Counsel

BWH: rds

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UE 324**

In the Matter of

PORTLAND GENERAL ELECTRIC
COMPANY,

Advice No. 17-05 (ADV 523), Schedule 134
Gresham Privilege Tax Payment Adjustment.

**PORTLAND GENERAL ELECTRIC
COMPANY'S RESPONSE TO
GRESHAM'S MOTION FOR
CLARIFICATION**

I. INTRODUCTION

On February 24, 2017, PGE made its Advice filing No. 17-05, Schedule 134, requesting an effective date of May 1, 2017. The Commission suspended the tariff after the City of Gresham filed comments with the Commission that raised a number of factual and legal issues and Staff recommended that the Commission open an investigation. The Commission set a schedule for the parties to brief the legal issues, and all briefs were filed by June 20, 2017. On November 28, 2017, the Commission issued its order in this matter¹, deciding that pursuant to ORS 757.259(1)(a)(A) PGE was legally entitled to collect from customers within the City of Gresham the approximately \$7 million PGE paid to Gresham for privilege taxes that PGE had not collected from its customers after the Circuit Court ruled that the privilege tax was unlawful on January 12, 2012. The issue of whether PGE would be required to pay interest to Gresham on this amount had not yet been decided by the Circuit Court at the time of PGE's initial Advice Filing, but has since been resolved. The interest amount awarded by the Court was paid by PGE, and Gresham acknowledged full satisfaction of the award on June 28, 2017.

¹ Order No. 17-482 (Nov. 28, 2017).

At a pre-hearing telephone conference held on December 14 to determine whether there were any remaining factual issues that the Commission needed to resolve, Gresham announced that it was going to file a “request for clarification” regarding the Order. A schedule was set for Gresham’s filing and PGE’s response. This is PGE’s response to the Motion for Clarification that Gresham filed on December 22 (the “Motion”).

II. GRESHAM’S “MOTION FOR CLARIFICATION”

Gresham raises three main points in the Motion that they claim they are asking the Commission to clarify. The first concerns whether PGE was “authorized” to collect privilege taxes from customers at any time during which PGE actually collected those privilege taxes, and whether any of those collections were “illegal”. The second is whether the Commission based a part of the Order on the fact that Gresham did not ask for a stay of the Circuit Court’s decision in this matter, and whether PGE should have asked for a stay of any appellate decisions. The third is whether PGE is precluded from collecting the interest amount of \$229,856 from customers because this amount does not constitute privilege taxes imposed by Gresham.

Before responding to these points substantively, PGE points out that in no way are any of these matters a basis for a request for “clarification”², nor are they properly raised at this point in the docket. Privilege taxes actually collected by PGE from customers in Gresham are not at issue in this docket. PGE asked the Commission to permit Advice No. 17-05 to go into effect so that PGE could collect privilege taxes from customers in Gresham that PGE had paid to Gresham but had not yet collected. Therefore, all of the references to whether PGE started collecting privilege taxes from customers at the wrong time, or prematurely, are irrelevant, in addition to being legally incorrect. Even if Gresham were just asking for “clarification” on these matters, which it is not³,

² As PGE will point out later in this Response, Gresham’s own words in this filing belie its representation that this Motion is a request for “clarification”. It is an attempt to get the Commission to reconsider its Order in all but name.

³ See, e.g., Gresham’s own words in this regard: “If PGE was *not authorized* to collect the specific amount collected during any time in which it actually collected monies, then PGE did so *illegally* and the *improper* collections should *reduce* the

there is no need for the Commission to provide such “clarification” because it is outside the scope of this proceeding.

The requests for “clarification” regarding either party’s failure to request a stay of any court’s decision is likewise a red herring. The legal effects of the courts’ decisions are not facts or language to be “clarified”. If Gresham believes that these legal effects were not properly considered by the Commission, or not given the correct weight, then Gresham should have filed a motion for reconsideration in accordance with ORS 756.561 and OAR 860-001-0720, which it did not do.

Finally, the issue of whether PGE should be able to collect the interest amount from customers is likewise not a fact or language to be “clarified”. As presented, it is a new legal issue that the Commission should not allow to be raised at this point in the proceeding⁴.

Nonetheless, PGE will respond to these points in order.

A. All amounts that PGE collected from customers in Gresham for City-imposed privilege taxes were collected legally.

Contrary to Gresham’s argument, PGE both legally ceased collecting the privilege taxes after the Circuit Court order and then legally reinitiated collection after the Supreme Court issued the appellate judgment. The amounts that PGE collected from Gresham customers pursuant to Gresham’s Privilege Tax Resolution (the “City Resolution”) from its effective date of July 1, 2011 until the order was issued by the Circuit Court on January 12, 2012 were in accordance with the City Resolution and OAR 860-022-0040. Once the Circuit Court issued its ruling, absent a stay requested by Gresham and granted by the court, any party to the case could legally act in accordance with the court’s order⁵. As

new rates that PGE seeks to impose in Advice No. 17-05.” Motion at 3. See also: “If the Commission determined that only the First Judgment and Second Judgment had *legal effect*, and that the Other Judgment did not have any *legal effect*, then the effect of PGE’s actions stopping and re-starting its collections, which were not consistent with the First and Second Judgments, must also be clarified.”[emphasis added in both]

⁴ PGE has consistently included interest in its “Purpose” statement in the Advice filings in this docket.

⁵ See: Homebuilders Association of Metropolitan Portland v. City of West Linn, 204 Or. App. 655, 663 (2006)(“The ability of a party to proceed according to the trial court’s decision after a notice of appeal has been filed is governed by ORS

the Circuit Court ruling stated that the additional 2% privilege tax was “void, unlawful and unenforceable”, PGE ceased collecting that extra 2% privilege tax starting on January 13, 2017.

The same holds true with respect to PGE reinitiating collection after the appellate court judgment became effective. The judgment of the Supreme Court is effective when a copy of the appellate judgment is entered in the court's register and sent by the State Court Administrator to the court from which the appeal was taken. ORS 19.450; see also Oregon Rules of Appellate Procedure 14.05.⁶ A review of the record shows that the Supreme Court judgment was entered in the court's register on August 4, 2016, and it was entered by the Circuit Court on August 18, 2016. See **Exhibit 1**(attached).

PGE began collecting the additional privilege tax from customers in Gresham on September 1, 2016, the next available start of PGE's billing cycles. Between January 13, 2012 and September 1, 2016, PGE did not collect the additional privilege tax from its customers. The legality of any collections during this period is thus a non-issue. No factual matter exists for the Commission to “clarify”. To the extent that Gresham is requesting that the Commission draw a legal conclusion about PGE's collection of privilege taxes, that (a) is not a proper subject of a “motion for clarification” and (b) Gresham should have raised it earlier in this proceeding when the legal issues were set for briefing.

B. PGE did not need to ask for a stay of the Court of Appeals or Supreme Court decisions.

PGE addressed the importance of Gresham's failure to ask for a stay on Page 10 of its Opening Brief⁷. As a legal matter, PGE believes Gresham's failure to ask for a stay to be significant. Whether

19.330, which provides, “The filing of a notice of appeal does not automatically stay the judgment that is the subject of the appeal. A party may seek to stay a judgment in the manner provided by ORS 19.335, 19.340, or 19.350, or as provided by other law.” Petitioners did not seek to stay the trial court's judgment in this case. Thus, the city was not barred from proceeding according to that judgment.”)

⁶ ORAP 14.05(2) The decision of the Supreme Court or Court of Appeals is effective: (a) With respect to appeals from circuit court or the Tax Court, on the date that the Administrator sends a copy of the appellate judgment to the court below.

⁷ For ease of reference, we repeat it here: “The circuit court issued its opinion that the privilege tax was invalid on January 12, 2012, and it entered judgment declaring that the Privilege Tax Resolution was “void and unenforceable” on February 13, 2012. (First Judgment, 1-2.) Gresham filed an appeal on March 13, 2012. At that time, Gresham could have obtained a

the Commission took this into consideration in determining when Gresham lawfully imposed the privilege tax increase in Order No. 17-482 is something that the Commission could “clarify” if it wishes to do so.

However, to the extent that Gresham now maintains that PGE is the party that should have obtained a stay after the Court of Appeals ruled adversely to it, that argument fails because, as a procedural matter, no judgment existed from which PGE could have sought a stay. After the Court of Appeals issued its decision, PGE timely filed a petition for review of the Court of Appeals decision under ORS 19.240 and 19.255. The judgment of the Court of Appeals thus did not issue or become effective, *see* ORAP 14.05, *infra*. Therefore, no judgment or order existed from which PGE could (or was required to) request a stay. And, as explained above, the appellate judgment of the Supreme Court became effective on the date that the copy of the appellate judgment was entered in the court’s register and mailed by the State Court Administrator to the court from which the appeal was taken.⁸ PGE then began collecting the additional privilege tax from customers in Gresham on September 1, 2016, the next available start of PGE’s billing cycles. No stay was thus necessary.

C. It is appropriate for the Commission to allow PGE to include the amount it paid to Gresham in interest pursuant to the Circuit Court Order Granting Supplemental Relief in the total to be collected from Gresham customers over five years as stated in the Third Supplemental Filing of Advice No. 17-05 made by PGE on December 15 (the “Amended Tariff Filing”).

As a preliminary matter, Order No. 17-482 did not specifically address the payment of interest by PGE to Gresham. Under these circumstances, this is not a proper subject for a motion for clarification, as there is nothing in the Order to “clarify”. Raising this issue now shows that Gresham is really asking for reconsideration of Order No. 17-482 to try and persuade the Commission to rule in its favor on this new issue. The Commission should decline to do so.

stay pursuant to court procedures. *See* ORS 19.330-350. Had it done so, it could have continued to require PGE to pay the tax on a prospective basis.” Because Gresham elected not to seek a stay, the circuit court's judgment remained in effect until after the appellate judgment became effective in accordance with ORS 19.450 and ORAP 14.05(2)(a).

⁸ See **Exhibit 1**.

Substantively, however, it is disingenuous for Gresham to now argue that it did not technically impose interest on the unpaid privilege tax amounts when Gresham itself asked the court to award post-judgment interest under ORS 82.010(a), which establishes a nine percent rate of interest on "moneys after they become due". Gresham argued that additional taxes had been due on each of the annual payment dates during the period of the appeal. Clearly if it was up to Gresham, it would have imposed these amounts on PGE. The Circuit Court rejected Gresham's argument and declined to award interest under ORS 82.010(a), although it did impose a lesser amount of prejudgment interest awarded as "supplemental relief".⁹ PGE paid this prejudgment interest to Gresham on or about June 22, 2017, as Gresham acknowledged.

It is appropriate for PGE to include interest in the amount it collects from Gresham customers as stated in the Amended Tariff Filing. As the Commission stated in Order No. 17-482, "by the time Gresham lawfully imposed the amounts following the circuit court's order on remand in 2017, the tax was applied retroactively to past periods" and they concluded that "the amounts were imposed by an 'order' within the meaning of the statute." As this prejudgment interest was inextricably tied to the unpaid privilege taxes that PGE owed to Gresham after Oregon Supreme Court ruled that the tax was lawful, the Commission should allow the amended tariff to go into effect and permit PGE to collect the interest amount from customers as part of that rate schedule¹⁰. Further, to do otherwise would act to discourage utilities from challenging costs they have strong reason to believe are unlawful, which would not be consistent with the Commission's opinion in this matter.

III. CONCLUSION

With the possible exception of the "clarification" of whether the Commission based any conclusions in Order No. 17-482 on the fact that Gresham did not request a stay of the first Circuit

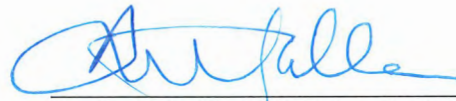
⁹ Limited Judgment Granting Supplemental Relief, Case No. 1107-08422, dated 6/20/2017.

¹⁰ In addition, the statute refers to "[a]mounts", which allows for both interest and privilege taxes to be included in the rate schedule. ORS 757.259(1)(a)(A).

Court decision, this Motion is for all intents and purposes an attempt by Gresham to get the Commission to draw new legal conclusions and modify or reject portions of the Order. These actions are not properly raised in a "motion for clarification". Gresham has not stated that this is a motion for reconsideration, but that is the conclusion to which its arguments inevitably lead. Had they wished to do so, Gresham would have had to meet the requirements of OAR 860-001-0720, which they have not done. For all of the reasons stated above, PGE urges the Commission to deny Gresham's motion and allow Advice No. 17-134 to go into effect on February 1, 2018.

DATED this 29th day of December, 2017

Respectfully submitted,



Barbara Halle, OSB No. 880540
Associate General Counsel
Portland General Electric Company
121 SW Salmon Street, 1WTC1301
Portland, Oregon 97204
(503) 464-8858 (phone)
(503) 464-2200 (fax)
barbara.halle@pgn.com

EXHIBIT 1 COVER PAGE

Description of this Exhibit: **Northwest Natural Gas Company vs City of Gresham**

Case#: 110708422

"Notice of Entry of Judgment"

Number of pages to this Exhibit: 4

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH
1021 SW Fourth Avenue Portland Oregon 97204
503-988-3022, option 3 <http://courts.oregon.gov/multnomah>

August 18, 2016

JEFFREY G CONDIT
Miller Nash Graham & Dunn LLP
111 SW 5th Ave Ste 3400
Portland OR 97204

Re: NORTHWEST NATURAL GAS COMPANY VS. GRESHAM CITY OF
Case #: 110708422 Case Type: Declaratory Judgment

NOTICE OF ENTRY OF JUDGMENT

The court entered a Judgment - Supplemental Creates Lien on 08/18/2016 in the court register.

This judgment contains a money award that has been noted in the court register.

This judgment creates a judgment lien. A judgment lien attaches a debt for the payment of money to the real property of the judgment debtor, who is identified in the judgment document.

Judgment Creditor: GRESHAM CITY OF; ROCKWOOD WATER PEOPLES UTILITY
Judgment Debtor: NORTHWEST NATURAL GAS COMPANY; PORTLAND GENERAL
ELECTRIC COMP; GRESHAM CITY OF

Why did I get this notice?

Oregon law (ORS 18.078) requires the court to send this notice when a judgment is entered. If you have questions about the judgment, contact the other party.

If this Notice says that a judgment lien was created:

What is a lien?

A lien is a claim attached to the real property of the person who owes a debt. Depending on the type of case and the amount of the money award, some judgments automatically attach a lien to real property. A lien may prevent property from being sold, or it may require a buyer to pay off the judgment before the seller gets any money.

How do I get rid of a lien?

Judgment liens stay attached to real property until the judgment is paid off, including costs and fees. Once the judgment is paid, the creditor (the person receiving the payment) has to file a Satisfaction of Judgment, which tells the court that the judgment is paid.

Verified Correct Copy of Original 8/15/2016.

IN THE SUPREME COURT OF THE STATE OF OREGON

NORTHWEST NATURAL GAS COMPANY, an Oregon corporation; and
PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation,
Plaintiffs-Respondents,

and

ROCKWOOD WATER PEOPLE'S UTILITY DISTRICT,
Intervenor-Respondent,
Petitioner on Review,

v.

CITY OF GRESHAM, a municipality and public body within the state of Oregon,
Defendant-Appellant,
Respondent on Review.

Court of Appeals
A150990

S062535 (Control)

NORTHWEST NATURAL GAS COMPANY, an Oregon corporation; and
PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation,
Plaintiffs-Respondents,
Petitioners on Review,

and

ROCKWOOD WATER PEOPLE'S UTILITY DISTRICT,
Intervenor-Respondent,

v.

CITY OF GRESHAM, a municipality and public body within the state of Oregon,
Defendant-Appellant,
Respondent on Review.

Multnomah County Circuit Court
110708422

Court of Appeals
A150990

S062556

FILED
16 AUG 15 AM 7:47
CIRCUIT COURT
FOR MULTNOMAH COUNTY

APPELLATE JUDGMENT and SUPPLEMENTAL JUDGMENT

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State St, Salem OR 97301-2563

Verified Correct Copy of Original 8/15/2016

APPELLATE JUDGMENT and SUPPLEMENTAL JUDGMENT

On review from the Court of Appeals.*

Argued and submitted May 11, 2015.

Bruce L. Campbell, Portland, argued the cause for petitioners on review Portland General Electric Company and Northwest Natural Gas Company.

Casey M. Nokes, Portland, argued the cause for petitioner on review Rockwood Water People's Utility District.

David R. Ris, City Attorney, Gresham, argued the cause and filed the brief for respondent on review.

Before Balmer, Chief Justice, and Kistler, Walters, Landau, Baldwin, Brewer, and Nakamoto, Justices.

The decision of the Court of Appeals is affirmed in part and reversed in part. The judgment of the trial court is affirmed in part and reversed in part, and remanded for entry of declaratory judgment in favor of Rockwood Water People's Utility District.

*Appeal from Multnomah County Circuit Court,
Stephen K. Bushong, Judge.
264 Or App 34, 330 P3d 65 (2014).

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Petitioner on Review Rockwood People's Utility District as to Respondent on Review City of Gresham; Respondent on Review City of Gresham as to Petitioners on Review Northwest Natural Gas Company and Portland General Electric Company.

[X] Costs allowed, payable by Respondent on Review City of Gresham as to Petitioner on Review Rockwood People's Utility District; Petitioners on Review Northwest Natural Gas Company and Portland General Electric Company as to City of Gresham.

APPELLATE JUDGMENT and SUPPLEMENTAL JUDGMENT

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
Supreme Court Building, 1163 State St, Salem OR 97301-2563
Page 2 of 3

MONEY AWARD

JUDGMENT #1

Creditor(s): Rockwood People's Utility District
 Attorney: Casey Nokes, 1001 SW 5th Ave Ste 3400, Portland OR 97204
 Debtor(s): City of Gresham
 Attorney: David Ris
 Costs: \$455.00
 Total Amount: \$455.00
 Interest: Simple, 9% per annum, from the date of this appellate judgment.

JUDGMENT #2

Creditor(s): City of Gresham
 Attorney: David Ris, 1333 NW Eastman Pkwy, Gresham OR 97030
 Debtor(s): Northwest Natural Gas Company and Portland General Electric Company
 Attorney: Bruce Campbell
 Costs: \$800.60
 Total Amount: \$800.60
 Interest: Simple, 9% per annum, from the date of this appellate judgment.

**\$355 filing fee due State Court
 Administrator when costs and
 disbursements are collected.
 (ORS 20.140)**

Appellate Judgment
 Effective Date: August 4, 2016



c: David R Ris
 Casey M. Nokes
 Jeffrey G Condit
 Bruce L Campbell

**THIS IS THE APPELLATE JUDGEMENT OF
 THE APPELLATE COURTS AND SHOULD
 BE ENTERED PURSUANT TO ORS 19.450.**

APPELLATE JUDGMENT and SUPPLEMENTAL JUDGMENT

REPLIES SHOULD BE DIRECTED TO: State Court Administrator, Records Section,
 Supreme Court Building, 1163 State St, Salem OR 97301-2563
 Page 3 of 3

Verified Correct Copy of Original 8/15/2016.