

**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 REPLY IN SUPPORT OF
MOTION TO STRIKE**

In opposing PGE's motion to strike, Gresham continues to demonstrate a misunderstanding of legal procedure—here, the scope of briefing that the Commission ordered.

PGE has maintained throughout this proceeding that Gresham's objections to Schedule 134 are based on erroneous legal arguments. At the outset, Staff issued its Report, noting that Gresham had raised "a number of factual and legal issues," and recommending that the Commission conduct a formal investigation, which "may very well concern the resolution of legal issues." Then, at the Commission's Public Meeting of April 18, 2017, Gresham invited the Commission to investigate the "legal, policy, and factual issues" related to PGE's filing. But the Commission determined it would be most efficient to receive briefing first on "threshold legal issues," such as whether ORS 757.259(1) applies to Schedule 134 and whether implementation of the schedule would constitute retroactive ratemaking. Then, after resolution of the threshold legal issues, the Commission would determine whether any factual issues remained and provide for an appropriate process to develop the factual record if needed.¹ Accordingly, the Commission's Order No. 17-153 sets forth "a briefing schedule for purposes of addressing the legal issues presented by [PGE's] filing." The Order attaches as an appendix the Staff Report "with information about the filing." The Staff Report summarizes the background facts relevant to PGE's filing—Gresham's passage of its privilege tax increase in 2011, the court proceedings

¹ See Public Meeting, Oregon Public Utility Commission (April 18, 2017) *available at* <http://www.puc.state.or.us/Pages/Live-Stream.aspx>, at 1:00 to 17:00.

over the next five years regarding the validity of that increase, and how PGE handled customer collections for Gresham's privilege taxes during that period. These are the core facts relevant to the legal issues presented by PGE's filing. There is no dispute about them.

Neither the Commission's Order nor the Staff Report make any mention of NW Natural. What NW Natural did is not relevant to the legal issues in this proceeding. To be clear, PGE does not dispute that NW Natural, unlike PGE, continued charging its customers for the increased privilege tax after the First Judgment had declared it to be invalid. But NW Natural is not a party to this proceeding and its conduct is not relevant to any legal issue presented.

PGE's motion to strike is based first on the irrelevance of Gresham's factual assertions and second on their lack of evidentiary support.² The Commission postponed development of an evidentiary record until after resolution of threshold legal issues. Gresham therefore should not have made unsupported factual assertions in its legal brief. Gresham does not cure the problem with the documents attached to its Response to PGE's Motion to Strike. Only one of those documents is a public record suitable for judicial notice (the stipulation of dismissal between Gresham and NW Natural on 11/29/2016), and it has no significance to any issue in this proceeding.

Gresham attempts to get its irrelevant factual assertions in through the back door—saying that the facts specific to NW Natural are part of a "policy" argument and then saying that a "policy" argument is really a "legal" argument. But legal arguments and policy arguments are distinct. Furthermore, policy arguments should concern how the Commission's rules and decisions will affect utilities' conduct going forward. Gresham is not actually focused on policy considerations but rather is making arguments about whether NW Natural's past conduct was legal, which is not a proper subject of this proceeding.

Gresham also argues that PGE is somehow precluded from challenging Gresham's assertions of fact. This argument is contrary to what the Commissioners said in the Public

² The specific assertions are identified in the attachment to PGE's motion; most, but not all of them, relate to NW Natural.

Meeting, is contrary to the Commission's Order setting the briefing schedule, and is contrary to law. As described above, the Commission decided to address threshold legal issues *before* getting into factual discovery. The parties' and the Commissioners' statements in the Public Meeting don't preclude PGE's motion to strike—they support it. Moreover, the proper time to object to evidence is "the time the evidence is offered." OAR 860-001-0450(2). The Commission has not set any schedule for offering evidence, nor has Gresham offered any. Rather, Gresham has asserted facts, despite the Commission's order limiting the scope of briefing to threshold legal issues. PGE therefore timely filed this motion to strike Gresham's irrelevant, unsubstantiated, and improper factual assertions.³ Gresham's arguments that PGE has stipulated to Gresham's facts, or has somehow waived or been estopped from contesting them, are not supported by the record in this case or by any legal principle.⁴

The purpose of this phase of the proceeding is to address legal issues presented by PGE's filing. PGE expects that resolution of those legal issues—based on the controlling statutes and regulations and the Commission's precedent—will dispense with Gresham's objections entirely because those objections are founded on erroneous legal arguments. It may then be unnecessary to develop an evidentiary record. However, to the extent that the Commission's resolution of legal issues does not dispense with all objections, PGE reserves its right to help develop a proper evidentiary record as to any relevant factual issues that may remain.

For all the reasons stated in PGE's Motion to Strike and this Reply, the Commission should grant the motion and strike the factual assertions identified in the attachment to the motion.

³ PGE also noted in its Reply Brief that the facts regarding Northwest Natural are not properly before the Commission in this proceeding. (Reply Brief of PGE, p. 7, n. 12.)

⁴ Gresham cites *Mitchell v. McIntee*, 15 Or App 85, 88 (1973) on equitable estoppel. That case states that the first element of equitable estoppel is "a false representation," which is not present here.

DATED this 13th day of July, 2017.

PORTLAND GENERAL ELECTRIC
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