

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 324

In the Matter of)	
)	
PORTLAND GENERAL ELECTRIC)	CITY OF GRESHAM’S RESPONSE
COMPANY,)	TO PGE’S MOTION TO STRIKE
)	
Advice No. 17-05 (ADV 523), Schedule 134)	
Gresham Privilege Tax Payment Adjustment)	
_____)	

I. INTRODUCTION

Pursuant to OAR 860-001-0420(4), the City of Gresham (“Gresham” or the “City”) files this response to Portland General Electric Company’s (“PGE’s”) motion to strike (“PGE’s Motion”) portions of Gresham’s response brief regarding Advice No. 17-05 and Schedule 134 Gresham Privilege Tax Payment Adjustment (“Advice No. 17-05”). PGE maintains that comparisons to Northwest Natural Gas Company’s (“NW Natural”) handling of this same tax dispute, as well as references to Gresham’s poverty levels, are irrelevant and not supported by proper evidence in the record. The Public Utility Commission of Oregon (the “Commission”) should deny PGE’s Motion for several reasons.

The scope of issues addressing Advice No. 17-05 includes comparing PGE’s actions to other similarly situated utilities, including NW Natural, and the broader policy implications of allowing utilities to include the retroactive recovery in rates of taxes imposed by a municipality. PGE had notice that Gresham intended to compare PGE’s actions with those of NW Natural, agreed to an expedited briefing schedule for this

proceeding, and did not object to addressing Gresham’s expressly stated concern that Advice No. 17-05 should be rejected in part because PGE acted unreasonably and should have acted like NW Natural, which “chose to collect Gresham’s fees throughout the entire judicial process.”¹ Prior to the briefing schedule being adopted, Gresham articulated this argument in both a letter and at the public meeting that instigated this proceeding urging the Commission to either reject or investigate Advice No. 17-05. PGE then agreed that there were no issues of fact and waived any opportunity to argue that NW Natural’s situation should be hidden from the Commission. PGE then agreed to set the schedule to address the issues raised by both its filing, and Gresham’s written and oral comments. Thus, PGE cannot claim to be surprised by Gresham’s arguments, and should be estopped from claiming that basic knowledge of NW Natural’s actions is not included in scope of the issues to be briefed.

More importantly, the Commission is not a court and its statutory authority is to represent the customers of all utilities in all matters that it has jurisdiction over while considering the legitimate interests of all the utilities that it regulates. No decision that the Commission makes is limited to consideration of the discrete facts at issue, but the Commission must always be cognizant of the broad policy implications of its actions. It would be irresponsible and inappropriate for the Commission to address PGE’s filing and ignore the prejudicial impact that a narrow decision in this matter could have on the other utility customers and utilities.

¹ PGE’s Advice No. 17-05, Schedule 134 Gresham Privilege Tax Payment Adjustment, ADV 523, Gresham’s Letter to Commission at 2 (Mar. 31, 2017).

There are a number of other reasons to deny PGE's Motion. Even if an evidentiary hearing were now needed, the portions of Gresham's brief that PGE is attempting to strike would be admissible under the Commission's broader standards for evidence and official notice. Most of the portions of Gresham's brief that PGE has objected are admissible via official notice, including the fact that NW Natural challenged Gresham's Resolution 3056, that NW Natural reached a stipulation with Gresham on this issue, NW Natural has not sought recovery of past due taxes, and the census data indicating that Gresham's poverty rate exacerbates the inequity of Advice No. 17-05. The Commission can also resolve the issues in this proceeding as a motion for summary judgment using information that can be officially noticed and the limited affidavit of Gresham representative Patricia Tate.

It is important to keep in mind that the facts about NW Natural's treatment are from the same core of operative facts that gave rise to this action (Gresham's tax increase) and were addressed openly with PGE and the Commission before setting the briefing schedule. As PGE and NW Natural's treatment of Gresham's tax increase involves the same common nucleus of facts, NW Natural's handling of Gresham's tax is relevant when considering PGE's handling of that same tax increase.

At its heart, PGE's Motion seeks to exclude from the Commission's determination facts and policy arguments that are harmful to its position in this case. There were two utilities faced with exactly the same situation which took radically different approaches to the problem of what to do after Gresham prospectively imposed a tax that the utilities were challenging in court. Now the Commission is faced with its own decision regarding whether PGE should be allowed to pass on the costs associated

with its past due and prospectively imposed taxes, the Commission should understand the potential ramifications of any decision. A conclusion that PGE's Advice No. 17-05 does not violate Oregon law and the rule against retroactive ratemaking could mean that other utilities that took different approaches, including NW Natural, may have illegally collected rates without proper authorization from the Commission. In other words, if the Commission agrees that PGE was barred from collecting rates during the pendency of its court challenges, then it is likely that so was NW Natural. Gresham believes the opposite: that NW Natural complied with the law, and that the Commission should be aware of the broad implications of any order in this case, including its impact on other utilities. Finally, the fact that another utility made a different and more reasonable decision when facing the same situation is evidence as to the imprudence associated with PGE's decision, and who should be responsible for PGE's past due taxes.

II. ARGUMENT

A. The Scope of Briefing Includes a Comparison of PGE's Actions to Those of Northwest Natural When Addressing Whether Advice No. 17-05 Is Appropriate

PGE invokes rules of evidence that pertain to an official evidentiary record that is inconsistent with the process that PGE agreed upon to resolve the issues raised by Advice No. 17-05. The Commission determined and the parties already agreed that formal evidence was not needed to resolve the issues scheduled for briefing, which include the comparison of PGE's actions with NW Natural's handling of Gresham's tax. PGE understood the scope of issues presented in Gresham's legal briefs when it agreed to an expedited schedule that did not include the official taking of evidence. Had PGE believed that any such evidence was needed to address this comparison, then it should

have requested a hearing when the briefing schedule was set.

PGE maintains that it confined its briefs to the proposed schedule and that Gresham did not.² Contrary to PGE's motion, however, Gresham raised the issue of NW Natural's handling of these same taxes in its very first letter to the Commission objecting to Advice No. 17-05. The City's March 31, 2017 letter stated,

Notably, unlike PGE, NW Natural chose to collect Gresham's fees throughout the entire judicial process. Thus, NW Natural never stopped collecting the full amount of the utility license fees due, and after the Supreme Court's decision paid Gresham the full amount imposed since July 2011. NW Natural has not made a filing similar to PGE's Advice No. 17-05 to ask that current utility customers pay for license fees that were effective over the last six years. NW Natural, also unlike PGE, agreed to pay Gresham interest back to 2011.³

Likewise, at the public meeting discussing Advice No. 17-05, Gresham's oral comments similarly addressed NW Natural's handling of this tax matter. The City's attorney stated,

NW Natural provides a contrast to PGE as an example of a prudent utility decision in this case. NW Natural also appealed the license fee, but NW Natural collected the license fee from the customers and held that fee pending the resolution of the litigation. NW Natural has already fully paid the license fee and its actions ensured that the customers that used their services during that period paid the costs of the utility license fee. Current and future NW Natural customers will not pay higher rates because of any actions by NW Natural.⁴

The City's attorney further discussed NW Natural's situation at the same meeting stating that: "Both NW Natural and PGE, at least for a brief period of time, did collect the fee

² PGE's Motion at 1-2.

³ PGE's Advice No. 17-05, Schedule 134 Gresham Privilege Tax Payment Adjustment, ADV 523, Gresham's Letter to Commission at 2 (Mar. 31, 2017).

⁴ PGE's Advice No. 17-05, Schedule 134 Gresham Privilege Tax Payment Adjustment, Public Meeting at 5:02 (Apr. 18, 2017) [hereinafter Public Meeting"].

back in 2011.”⁵

PGE had multiple opportunities to identify that it had concerns with Gresham raising the issue of, and comparing PGE’s actions with, NW Natural’s treatment of the City’s prospectively imposed tax. In response to the City’s March 31, 2017 letter, PGE submitted its own letter stating that it “views the facts related to the Gresham resolution and court challenge quite differently from the City”.⁶ PGE listed a number of factual and other disagreements with the City’s letter, but never mentioned that it disagreed with or had any concerns regarding the comparison to NW Natural’s circumstances and actions. Similarly, at the public meeting PGE’s attorney did not object to the facts related to NW Natural, and remarked afterwards that PGE did not think there were factual issues to resolve.⁷ For example, PGE’s attorney stated that, from PGE’s perspective that Gresham raised only legal issues and that “we don’t think there are factual issues here.”⁸ Essentially, PGE stated that it was not going to dispute any of the facts raised in Gresham’s letters and comments. Only then did Gresham’s attorney agree to a schedule that would resolve issues with legal briefs, which relied upon PGE’s agreement not to dispute the facts Gresham identified as relevant.

Commission Chair Hardie even outlined the scope of issues to be addressed in briefing as: “I assume, anyone correct me, that probably the scope of the legal issues would be the objections raised by the City of Gresham in their Letter.”⁹ Chief

⁵ Id. at 6:36-43.

⁶ PGE’s Advice No. 17-05, Schedule 134 Gresham Privilege Tax Payment Adjustment, ADV 523 at 2 (Apr. 14, 2017).

⁷ Public Meeting at 7:35-9:36.

⁸ Id. at 8:03-07

⁹ Id. at 14:14-23

Administrative Law Judge Grant responded: “Yes,” and then outlined that PGE has the burden of proof and would file the first brief addressing the issues.¹⁰ PGE did not “correct” Chair Hardie or disagree with either the Chair or Judge Grant.

Now, however, PGE characterizes this same issue as “unsubstantiated assertions” and “alleged conduct” and requests additional discovery and an evidentiary hearing to “remedy these factual deficiencies” for appeal.¹¹ Either PGE has changed its mind, previously misstated its position, or was somehow not paying attention and unaware that Gresham would, for a third time, compare PGE’s actions to those of NW Natural.

PGE waited until after the City fully briefed the issue to raise its concerns, which will prejudice Gresham if the City is prevented from at least fleshing out the legal and factual arguments it has repeatedly raised when challenging Advice No. 17-05. PGE had an opportunity to object to the consideration of NW Natural’s handling of this situation at the time that Gresham raised it, agreed that it did not disagree with or want to dispute Gresham’s factual allegations, and should be barred from objecting now because it did not do so when the time the information was offered twice.

B. PGE Is Estopped From Arguing that the Briefs Cannot Include a Comparison to NW Natural’s Actions

PGE should be barred or estopped from making assertions that comparisons to NW Natural are outside of the proper scope of legal briefs because PGE’s Motion is contradictory to its prior position articulated before and during the public meeting on the same matter. Not only are the basic facts that NW Natural was subject to the tax and collected amounts from ratepayers during the appeals relevant and within the proper

¹⁰ Id. at 14:24-44.

¹¹ PGE’s Motion at 3-4.

scope, PGE should be barred from filing the Motion on the grounds of estoppel.

While PGE's changed position does not rise to the level of judicial estoppel,¹² the Commission can exercise its broad powers to equitably estop PGE from raising concerns after the final briefs have been filed regarding the relevancy of facts associated with NW Natural. In Oregon, equitable estoppel is "the doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had."¹³

As explained above, PGE did not request an opportunity to dispute Gresham's factual assertions regarding NW Natural at the time they were made and essentially agreed that it would not dispute them. PGE's acts and conduct led to the Commission adopting a briefing schedule that assumed no disputed facts and would allow Gresham the opportunity to address all grounds upon which they objected to Advice No. 17-05. Both Gresham and the Commission took actions in reliance upon PGE's statements, and PGE should be barred from now seeking to strike material that it previously agreed (or at least did not dispute) could be addressed in these briefs.

C. As a Matter of Law, PGE Failed to Object to the Introduction of Relevant Evidence

PGE did not object to the City's reliance upon the facts associated with NW Natural's reasonable response and collection of the prospectively imposed taxes when offered, and should not be allowed to do so now. The parties agreed upon the relevant

¹² Judicial estoppel prevents "a party from assuming a position in a judicial proceeding that is inconsistent with the position that the same party has successfully asserted in a different judicial proceeding." Hampton Tree Farms v. Jewett, 320 Or. 599, 609, 892 P.2d 683 (1995).

¹³ Mitchell v. McIntee, 15 Or. App. 85, 88, 514 P.2d 1357 (1973).

facts underlying the legal briefs at the public meeting, and PGE cannot now object when it missed the opportunity to do so earlier.

The Commission's rules for evidence pertain to establishing an official evidentiary record, typically by an evidentiary hearing and the filing of formal testimony. The Commission follows the Oregon court rules, to the extent that they are not inconsistent with the Commission's own administrative rules.¹⁴ The Commission, however, accepts broader evidence as admissible when "it is of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs" and includes hearsay.¹⁵ The Commission has also confirmed that its rules require parties "objecting to the introduction of evidence must state the grounds for the objection at the time the evidence is offered."¹⁶

The facts the legal briefs are premised on are those included in the documents and oral statements made prior to and at the public meeting. PGE made its Advice No. 17-05, which includes a number of factual statements and claims. There were no affidavits or sworn testimony attached to PGE's filing. Gresham was asked if it objected to briefing the legal issues based on PGE's alleged facts, and Gresham agreed that the case could be resolved without disputing PGE's alleged facts. Gresham also filed a letter and made

¹⁴ OAR 860-001-0000(1).

¹⁵ OAR 860-001-0450(1)(b); see e.g., Re Pete's Mountain Water Co., Inc. Request for an Increase in Total Annual Revenues from \$111,079 to \$212,300, Docket No. UW 117, Order No. 07-219 (June 4, 2007) (relying on a summary of time records to substantiate the need for a full-time employee); Re Qwest Corp. Investigation to Review Costs and Established Prices for Certain Unbundled Network Elements Provided by Qwest Corp., Docket No. UM 1025, Order No. 03-533 (Aug. 28, 2003) (requiring access to critical elements of AT&T and WorldCom cost modeling).

¹⁶ OAR 860-001-0450(2).

oral comments at the hearing that included factual statements and claims not included in PGE’s filing. PGE was asked if it objected to briefing the legal issues or wished to dispute Gresham’s facts. As PGE failed to object “to the introduction of evidence to do so at the time the evidence is offered”, PGE must now live with any decision based on these facts that are harmful to its position.

D. Policy Arguments Are Legal Arguments That Address the Core Legal Issue Raised by Advice No. 17-05: Whether Schedule 134 Is Appropriate

PGE notes that the Order No. 17-153 adopting the briefing schedule states this proceeding will address the legal issues presented, but fails to acknowledge that Gresham’s policy argument regarding NW Natural addresses the main legal issue in this case.¹⁷ PGE fails to provide any authority for its suggestion that Gresham’s policy argument comparing NW Natural’s handling of the dispute must be struck from the record and instead accuses the City of deliberately confusing the issues before the Commission.¹⁸ PGE’s position is misguided. According to PGE, the legal issue is “whether Schedule 134 is appropriate.”¹⁹ Gresham believes that PGE’s Schedule 134 is not appropriate for a variety of reasons, including that the actions taken by NW Natural would have been an appropriate way for PGE to resolve these issues, had PGE opted to follow NW Natural’s lead.

The Commission’s statutory responsibility is to “represent the customers of any public utility . . . in all controversies respecting rates, valuations, service and all matters

¹⁷ PGE’s Motion at 2.

¹⁸ Id.

¹⁹ Id.

of which the commission has jurisdiction.”²⁰ In exercising this responsibility by making rates (which the Commission is doing in this case), the Commission’s is acting in its legislative capacity and has been granted broad power to perform this delegated function.²¹ The Commission has jurisdiction over all of Oregon’s investor owned utilities, including both PGE and NW Natural, and must protect the interests of both utilities and their customers. Just like the legislature, the Commission must take into consideration and “balance the interests of the utility investor and the consumer in establishing fair and reasonable rates” when making its decisions.²²

This means that the determination of the lawfulness of Advice No. 17-05 must be made with an understanding of the broader applicability of this dispute to other utilities and circumstances. In exercising its legislative function in this case, the Commission is not just setting rates for PGE, but making policy determinations to ensure that all its customers and regulated utilities are treated fairly. For example, whether the Commission’s order in this dispute could mean that NW Natural’s more reasonable actions may be deemed illegal by the Commission in a future proceeding. While NW Natural is not a party and the Commission’s decision will not directly require any specific action regarding that utility, it would be irresponsible for the Commission to decide issues in isolation and unaware of the potential full applicability of its order in other contexts.

The Commission’s decisions regarding coal plant investments for Idaho Power and PacifiCorp provide an illustrative example of how inter-related Commission

²⁰ ORS 756.040.

²¹ Pac. Nw Bell Tel. Co. v. Katz, 116 Or. App. 302, 309-10, 841 P.2d 652 (1992).

²² ORS 756.040.

decisions based on the same operating facts can be.²³ PacifiCorp is the majority owner and operator of Jim Bridger, and Idaho Power is a minority owner. In a rate proceeding, the Commission concluded that PacifiCorp's coal plant scrubber upgrades were used and useful.²⁴ When considering Idaho Power's investments in the Jim Bridger 3 plant, the Commission agreed that the same scrubber upgrades were used and useful relying upon its decision with the same operative facts in the prior PacifiCorp case. While the Commission is not bound by same principles of precedent as a court, the Commission rarely issues orders reaching different conclusions when presented by the same set of facts.

In addition to determining the legal issue of whether Advice No. 17-05 is lawful under Oregon law and the principles of retroactive ratemaking, the Commission must also find that utility tariffs are fair, just and reasonable. Thus, even if the Commission agreed with PGE that ORS 757.259 does not bar recovery, PGE must also demonstrate the lawfulness under other laws and precedent, including ORS 757.210. For example, it may be more reasonable for shareholders to shoulder a portion of these costs, or for the fees to be collected from all of PGE's customers rather than those only within the City. The question in this case of whether PGE's request is appropriate should be made in the context of what other options were available to the company, and what other similarly situated utilities might have done if faced with the same situation. The Commission could determine that PGE's actions, in light of NW Natural's more reasonable decision,

²³ Re PacifiCorp, dba Pacific Power Request for a General Rate Revision, Docket No. UE 246, Order No. 12-493 (Dec. 20, 2012); Re Idaho Power Company, Request for General Rate Revision, Docket No. UE 233, Order No. 13-132 (Apr. 11, 2013).

²⁴ Docket No. UE 246, Order No. 12-493 at 32.

were imprudent and customers should not have to bear the full burden of PGE’s unilateral decision, especially when PGE did not seek approval or guidance from the Commission.

E. The Commission Can Take Official of Material Facts That PGE Objects To

PGE’s suggestion that a hearing is necessary is misguided because the Commission could simply take official notice of many of the facts that PGE objects to.²⁵ Pursuant to OAR 860-001-0460, the Commission or ALJ may take official notice of all matters which the courts in Oregon could take judicial notice, as well as records, rulings and reports of either the Commission or other governmental agencies. Oregon courts can take judicial notice of “judicially cognizable facts” from a source “whose accuracy cannot reasonably be questioned.”²⁶ But, as the Oregon Court of Appeals has noted, the Commission’s rules governing official notice are broader than the statutory requirement for judicial notice.²⁷ PGE objects to two areas in Gresham’s brief raising: 1) the issue of Gresham’s poverty rate and median household income data; and 2) comparisons with NW Natural. Much of this information can be officially noticed.²⁸

Gresham’s poverty rate meets the more restrictive standard for judicial notice because it can be determined from census data and the accuracy of the census records cannot reasonably be questioned. The poverty and median household information meets

²⁵ If the Commission believes official notice is required, then the City hereby moves for official notice of the facts listed in this section of this Response.

²⁶ ORS 183.450(4). Judicially facts are those capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ORS 40.065

²⁷ Chang v. Public Utility Commission of Oregon, 256 Or. App. 151, 172, 301 P.3d 934 (2013) (“the PUC has its own rules governing official notes which are different from and much broader than ‘judicially cognizable facts’ under the Oregon Evidence Code”).

²⁸ PGE’s Motion at 3-4.

the Commission's broader standard because it is a report from another governmental agency. The census data is relevant because it demonstrates how the inequity of PGE's actions affect PGE's ratepayers in Gresham.

The Commission can also take official notice of key facts regarding NW Natural's factual circumstances that PGE seeks to strike. The fact that NW Natural also appealed Gresham's Resolution 3056 is a public record in numerous pleadings, which are capable of official notice. Thus, PGE's attempt to strike the words "NW Natural" wherever mentioned is overly broad.²⁹ The Commission can also take notice of its own records,³⁰ and ascertain key facts including that NW Natural has not made a filing similar to Advice No. 17-05. In addition, the Commission can take notice that, on November 29, 2016, the court dismissed the complaint between NW Natural and Gresham pursuant to a stipulated agreement.³¹ That agreement was served to PGE and outlines the actions that PGE now objects to.³²

The NW Natural and Gresham stipulation, compromise and settlement that formed the basis upon which the NW Natural and Gresham agreed to dismiss their dispute was a document entitled: "Settlement Agreement and Release of All Claims".³³

The Settlement states:

On or about November 4, 2011, NW Natural and the City entered into a stipulated order (the "Stipulation") agreeing that NW Natural would

²⁹ E.g., PGE's first stricken language is simply to the words "NW Natural". PGE's Motion at Attachment 1 page 2 (moving to strike language explaining that NW Natural even challenged the legality of Resolution 3056).

³⁰ OAR 860-001-0460(1)(d).

³¹ Attachment A (NW Natural v. City of Gresham, Multnomah Circuit Court Case No. 1107-08422, Stipulated Limited Judgment Dismissal (Nov. 29, 2016).)

³² Id.

³³ Attachment C (Affidavit of Patricia Tate).

continue to pay the 5 percent license fee, but would not be required to pay the additional 2 percent license fee (the “additional 2 Percent Fee”) imposed by Resolution No. 3056 pending the outcome of the Lawsuit. In the event that the City prevailed in the Lawsuit, the Parties agreed that NW Natural would pay the City the additional 2 Percent Fee plus interest on such amounts at the rate earned at the Local Government Investment Pool (“LGIP”). NW Natural continued to collect the additional 2 Percent Fee from customers.³⁴

Following the completion of the final Circuit Court judgment, NW Natural paid the full amount, plus interest, to the City.³⁵

Thus, PGE cannot dispute the facts that NW Natural appealed Resolution 3056, NW Natural reached a stipulation with the City of Gresham, and NW Natural has never sought to recover any past due amounts resulting from a failure to collect taxes prospectively imposed under Resolution 3056—all of which are capable of official notice. The City’s affidavit also provides basic factual information that supports the remaining facts related to any comparison between PGE and NW Natural, namely that NW Natural collected the amounts from its customers in the City during the pendency of all appeals and has now fully paid its taxes to Gresham.

F. Gresham Is Not Objecting to PGE’s Extra-Record Facts

PGE has raised factual allegations regarding a Colstrip deferral and its agreement with the City of Sherwood. As mentioned in both the briefs of Staff and City, it is impossible to verify the factual allegations in both circumstances.³⁶ In the Colstrip case,

³⁴ Attachment B (Settlement Agreement and Release of All Claims with NW Natural (Nov. 7, 2016)).

³⁵ Attachment C (Affidavit of Patricia Tate).

³⁶ See Staff’s Response Brief at n.8 (“Staff does not understand the process PGE says it used under this rule with the City of Sherwood when the latter increased its privilege taxes.”); City of Gresham’s Cross-Response Brief at 4 (“Gresham shares Staff’s concerns as to the legality of the Sherwood charges PGE relied upon, but

the Commission's records are incomplete, so the true facts cannot be determined.³⁷ In the City of Sherwood case, there is no real evidence regarding the specific details of any under or over payment.³⁸

Rather than seek to strike PGE's references to these circumstances, Gresham and Staff have addressed them based on the information available, and explained why they are dissimilar and not applicable. The practical difference in why PGE is seeking to strike certain material while Gresham and Staff are not is that the Colstrip and Sherwood examples are not actually helpful to PGE's case, while PGE understands that the comparison to NW Natural is extremely harmful to PGE. Thus, PGE wants to ensure that the Commission considers PGE's actions in isolation without having the benefit of understanding that there was a lawful and prudent course of action for PGE to take (e.g., NW Natural's decision to collect the fees during the pendency of the appeals).

III. CONCLUSION

For the reasons stated above, the Commission should deny PGE's Motion.

notes that it does not have access to all of the facts of that matter, that the available facts are easily distinguishable, and therefore the Sherwood matter does not provide precedent to support PGE's current filing.").

³⁷ See Staff's Response Brief at 10 ("PGE cites to a decision made by the Commission at its Public Meeting held on July 28, 2009, and says its current situation with the City is 'similar.'").

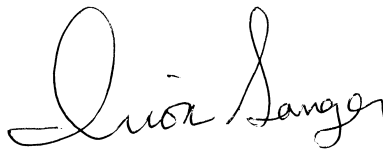
³⁸ See Staff's Response Brief at n.8 ("Staff has serious questions about the legality of the 'make-up charge' asserted by PGE upon the City of Sherwood's ratepayers").

Dated this 6th day of July 2017.

Respectfully submitted,

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A handwritten signature in black ink that reads "Irion Sanger". The signature is written in a cursive style with a large initial "I" and a long, sweeping underline.

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Of Attorneys for the City of Gresham

Attachment A

NW Natural v. City of Gresham, Multnomah Circuit Court Case No. 1107-08422, Stipulated Limited Judgment Dismissal (Nov. 28, 2016)

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

NORTHWEST NATURAL GAS
COMPANY, an Oregon corporation, and
PORTLAND GENERAL ELECTRIC
COMPANY, an Oregon corporation,

Plaintiffs,

and

ROCKWOOD WATER PEOPLE'S
UTILITY DISTRICT,

Intervenor-Plaintiff

v.

CITY OF GRESHAM, a municipality and
public body within the State of Oregon,

Defendant.

Case No. 1107-08422

STIPULATED LIMITED JUDGMENT OF
DISMISSAL

Based upon the stipulation of the parties below, and it appearing to the Court that
the captioned matter has been fully compromised and settled between plaintiff Northwest Natural
Gas Company and defendant City of Gresham, and that there is no further reason for delay, it is
hereby:

ORDERED AND ADJUDGED that the captioned matter be dismissed between

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1 plaintiff Northwest Natural Gas Company and defendant City of Gresham, with prejudice and
2 without costs or attorney fees to the parties.


Signed: 11/29/2016 08:50 AM

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10 **Circuit Court Judge Nan G. Waller**
11 proxy signed by KRR


12 IT IS SO STIPULATED:

13 NORTHWEST NATURAL GAS COMPANY CITY OF GRESHAM

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1 **CERTIFICATE OF READINESS**

2 Pursuant to UTCR 5.100(a), the proposed order or judgment was served on
3 counsel for Plaintiff Portland General Electric Company, Intervenor-Plaintiff Rockwood Water
4 People's Utility District, and the City of Gresham on November 18, 2016. The proposed order or
5 judgment is ready for judicial signature because:

6 1. Each party affected by this order or judgment has stipulated to the order or
7 judgment, as shown by each party's signature on the document being submitted.

8 2. Each party affected by this order or judgment has approved the order or
9 judgment, as shown by each party's signature on the document being submitted or by written
10 confirmation of approval sent to me.

11 3. I have served a copy of this order or judgment on each party entitled to
12 service and:

13 a. No objection has been served on me.

14 b. I received objections that I could not resolve with a party despite
15 reasonable efforts to do so. I have filed a copy of the objections I received and indicated which
16 objections remain unresolved.

17 c. After conferring about objections, [role and name of objecting
18 party] agreed to independently file any remaining objection.

19 4. Service is not required pursuant to subsection (3) of this rule, or by statute,
20 rule, or otherwise.

21 5. This is a proposed order or judgment that includes an award of punitive
22 damages and notice has been served on the Director of the Crime Victims' Assistance Section as
23 required by subsection (5) of this rule.

24 6. Other:
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1 **CERTIFICATE OF COMPLIANCE WITH UTCR 5.100**

2 I hereby certify that on November 18, 2016, not less than three days before
3 submission to the court, I served the foregoing proposed form of Stipulated Limited Judgment of
4 Dismissal on the attorney or party listed below by the method(s) indicated:

5 **Conventional Paper or E-mail Service, pursuant to ORCP 9:**

6 Stephen A. Redshaw, OSB No. 944146
7 Portland General Electric
8 1 WTC0301
9 121 SW Salmon Street
 Portland, OR 97204
 stephen.redshaw@pgn.com

10 *Attorney for Plaintiff Portland General Electric Company*

11 Clark I. Balfour, OSB No. 791529
12 Casey M. Nokes, OSB No. 076641
13 Cable Huston LLP
14 1001 SW Fifth Avenue, Suite 2000
15 Portland, OR 97204
 cbalfour@cablehuston.com
 cnokes@cablehuston.com

16 *Attorney for Intervenor-Plaintiff Rockwood Water People's Utility District*

17 David R. Ris, OSB No. 833588
18 City Attorney
19 City of Gresham
20 1333 NW Eastman Parkway
 Gresham, OR 97030
 david.ris@greshamoregon.gov

21 *Attorney for Defendant City of Gresham*

22
23 **Electronic Service, via OJD eFiling (using Odyssey File & Serve), pursuant to**

24 **UTCR 21.100:**

25 Stephen A. Redshaw
26 *Attorney for Portland General Electric Company*

1 Clark I. Balfour
2 Casey M. Nokes
3 *Attorney(s) for Intervenor-Plaintiff Rockwood Water People's Utility District*

4 David R. Ris
5 *Attorney for Defendant City of Gresham*

6 DATED this 28th day of November, 2016.

7
8 *s/ Elisa J. Dozono*

9 Jeffrey G. Condit, OSB No. 822238

10 jeff.condit@millernash.com

11 Elisa J. Dozono, OSB No. 063150

12 elisa.dozono@millernash.com

13 Miller Nash Graham & Dunn LLP

14 111 SW Fifth Avenue, Suite 3400

15 Portland, OR 97204

16 Phone: (503) 224-5858

17 Fax: (503) 224-0155

18
19 *Attorneys for Plaintiff Northwest Natural*
20 *Gas Company*

Attachment B

Settlement Agreement and Release of All Claims with NW Natural
(Nov. 9, 2016)

SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS

I. PARTIES

This Settlement Agreement and Release of All Claims (this "Settlement Agreement") is entered into between Northwest Natural Gas Company, a domestic Oregon corporation headquartered at 220 N.W. Second Avenue, Portland, Oregon ("NW Natural") and the City of Gresham, a municipal corporation of the State of Oregon (the "City"). NW Natural and the City are individually referred to as "Party" or collectively as the "Parties."

II. RECITALS

A. NW Natural has been providing natural gas utility services to customers within the City under a ten-year utility license first granted on July 1, 2002, and renewed on July 1, 2012, by the City pursuant to Gresham Revised Code ("GRC") 6.30 and 6.35 (the "License").

B. On or about May 17, 2011, the City adopted Resolution No. 3056 increasing its utility license fee imposed under GRC 6.30 on utilities operating within the City's rights-of-way from 5 percent to 7 percent effective July 1, 2011.

C. On or about July 5, 2011, NW Natural, along with Portland General Electric Company ("PGE") and Rockwood Water People's Utility District (collectively, the "Plaintiffs"), brought a declaratory action against the City in Multnomah County Circuit Court, Case No. 1107-08422 (the "Lawsuit") challenging this increase. The Plaintiffs argued that the City's increase of its utility license fee from 5 percent to 7 percent of utility gross revenues violated ORS 221.450, which limits such privilege taxes to "no more than 5%" of gross revenues.

D. On or about November 4, 2011, NW Natural and the City entered into a stipulated order (the "Stipulation") agreeing that NW Natural would continue to pay the 5 percent license fee, but would not be required to pay the additional 2 percent license fee (the "additional 2 Percent Fee") imposed by Resolution No. 3056 pending the outcome of the Lawsuit. In the event that the City prevailed in the Lawsuit, the Parties agreed that NW Natural would pay the City the additional 2 Percent Fee plus interest on such amounts at the rate earned at the Local Government Investment Pool ("LGIP"). NW Natural continued to collect the additional 2 Percent Fee from customers.

E. On or about February 15, 2012, the Multnomah County Circuit Court entered its judgment granting Plaintiffs' motions for summary judgment and declaring the City's resolution increasing its license fee from 5 percent to 7 percent void, unlawful, and unenforceable. The City appealed this judgment to the Oregon Court of Appeals.

F. On or about July 2, 2014, the Oregon Court of Appeals issued its decision reversing and remanding the Multnomah County Circuit Court's decision. Northwest Natural Gas Co. v. City of Gresham, 264 Or App 34, 330 P3d 65 (2014). The Plaintiffs petitioned the Oregon Supreme Court to review the Court of Appeals decision. The Supreme Court granted review on November 20, 2014.

G. On May 5, 2016, the Oregon Supreme Court issued its decision affirming in part and reversing in part the decision of the Court of Appeals. Northwest Natural Gas Co. v. City of Gresham, 359 Or 309, ___ P2d ___ (2016). The Supreme Court upheld the Court of Appeals determination that the City could lawfully increase the license fee from 5 percent to 7 percent on NW Natural and PGE, albeit on different grounds. NW Natural and PGE petitioned for reconsideration of this decision, which was denied on July 14, 2016. The appellate judgment was issued on August 4, 2016.

H. NW Natural began paying the additional 2 Percent Fee to the City with its second quarter payment in August 2016, so it owes payment of the 2 percent fee collected from July 1, 2011, to March 31, 2016.

I. The Parties are ready and willing to enter into this Settlement Agreement to resolve all the outstanding disputes between them, and any claims between them, known or unknown, arising from the Lawsuit, the Stipulation, the application of the GRC, and any other potential claim or defense arising from the facts as described in the recitals.

III. AGREEMENT

In consideration for the foregoing recitals, which are incorporated by reference, and the mutual promises and covenants contained in this Settlement Agreement, the Parties agree as follows:

1. Payment.

Within ten business days of the execution of this Settlement Agreement, NW Natural will deliver a check or send a wire transfer in the amount of \$2,058,327.03 payable to the City. The City will accept this amount as payment in full for all amounts due and owing as a result of the Lawsuit, the Stipulation, or that could be assessed for any utility license fees or interest under GRC 6.30 for the period of July 1, 2011, to March 31, 2016, by the City under the GRC or other law.

2. Conclusion of Lawsuit.

Concurrent with the execution of this Settlement Agreement, the Parties will enter into a stipulation in the form of the attached Exhibit A dismissing with prejudice all claims asserted by each Party against the other Party under the Lawsuit and without costs and attorneys' fees to either Party.

3. Releases.

a. City's Release. In consideration of the promises and consideration described in this Settlement Agreement, and to the fullest extent permitted by law, the City, and any and all of its officers, agents, employees, and assigns (if any), and each of them, hereby release, acquit, and forever discharge NW Natural, and each of its corporate parents, corporate affiliates and related entities, and all such entities' current and former agents, directors, officers, managers, members, employees, advisors, shareholders, successors, and assigns (if any), and each of them, from any and all claims, liabilities, demands, actions, suits, demands for damage, expenses, attorneys' fees, and compensation of every kind and nature whatsoever, whether arising in contract or tort or common law, that any of them ever had, or now have, whether known or unknown, whether asserted or unasserted, arising out of or relating to the Lawsuit, the Stipulation, NW Natural's payment or nonpayment of any utility license fees or interest for the period of time at issue in the Lawsuit and the Stipulation, the License, or the GRC or other applicable law, except as set forth in this Settlement Agreement. Notwithstanding this Paragraph 3.a., the City reserves its rights to investigate and audit any report or fee payment pursuant to GRC 6.30.110(8).

b. NW Natural's Release. In consideration of the promises and consideration described in this Settlement Agreement, and to the fullest extent permitted by law, NW Natural, and any of its corporate parents, corporate affiliates, agents, directors, officers, managers, members, employees, advisors, successors, and assigns (if any), and each of them, hereby release, acquit, and forever discharge the City, and each of the City's agents, advisors, personal representatives, and assigns (if any), and each of them, from any and all claims, liabilities, demands, actions, suits, demands for damage, expenses, attorneys' fees, and compensation of every kind and nature whatsoever, whether arising in contract or tort or common law, that any of them ever had, or now have, whether known or unknown, whether asserted or unasserted, including without limitation any arising out of or relating to the Lawsuit and the Stipulation, the License, or the GRC or other applicable law, except as set forth in this Settlement Agreement.

4. Dispute Resolution. Any disputes arising in connection with the terms or enforcement of this Settlement Agreement shall be resolved by confidential mediation or binding arbitration in accordance with the procedures of the Arbitration Service of Portland or other procedures agreed upon by the Parties.

5. Further Assurances. The Parties agree to take any and all actions and to execute and deliver, from time to time and at any time, such further documents as may reasonably be requested by any other Party in order to carry out and effectuate completely the purposes and intent of this Settlement Agreement.

6. Notices. Communications relating to this Settlement Agreement must be in writing and must be delivered personally, sent by first-class mail, postage prepaid, or by facsimile, e-mail, or by private messenger or courier service, to the Parties or their assigns at the following addresses:

If to NW Natural: MardiLyn Saathoff
220 N.W. Second Avenue
Portland, Oregon 97209
E-mail: mys@nwnatural.com
Facsimile: 503.220.2584

With a copy to: Shawn M. Filippi
220 N.W. Second Avenue
Portland, Oregon 97209
E-mail: smf@nwnatural.com
Facsimile: 503.220.2584

If to the City: Erik Kvarsten, City Manager
Gresham City Hall
1333 N.W. Eastman Parkway
Gresham, Oregon 97080
E-mail: teresa.hall@greshamoregon.gov
Facsimile: 503.618.3301

With a copy to: David R. Ris, City Attorney
Gresham City Hall
1333 N.W. Eastman Parkway
Gresham, Oregon 97080
E-mail: david.ris@greshamoregon.gov
Facsimile: 503.661.3031

7. Miscellaneous Provisions.

a. Permanent Accord. This Settlement Agreement is a permanent and binding accord and resolution of the rights and obligations of the Parties with respect to all matters which are the subject of this Settlement Agreement.

b. Integration Clause. This Settlement Agreement, together with any instruments envisioned by it, constitutes a full and complete integration of the Parties' Settlement Agreement. There are no separate, independent, written, verbal, or side agreements, promises, covenants, or representations concerning the subject of this Settlement Agreement not contained in this Settlement Agreement. This Settlement Agreement cannot be modified in any manner, except by an instrument in writing signed by the Parties.

c. Voluntary Action. The signatories to this Settlement Agreement represent and warrant that they have read this Settlement Agreement, that they understand its terms, and that they have been advised of their legal rights by attorneys of their selection. The Parties acknowledge that they execute this Settlement Agreement voluntarily and upon their best judgment and solely for the consideration described in this Settlement Agreement.

d. Successors and Assigns. This Settlement Agreement shall be binding upon and inure to the benefit of the Parties, their heirs, successors, representatives, agents, and assigns.

e. Counterparts/Electronic Images. This Settlement Agreement may be executed in two or more counterparts, which together shall constitute one final agreement, with each of the executed counterparts being as enforceable as if they were fully executed originals. The Parties agree that a printed reproduction from an electronic record of this Settlement Agreement shall be equivalent to, and may be substituted for, the original of this Settlement Agreement.

f. No Admission of Liability. The Parties to this Settlement Agreement agree that the consideration and mutual releases provided in this Settlement Agreement do not constitute an admission of liability on any of the Parties' part and that liability is expressly denied.

g. Choice of Law. This Settlement Agreement shall be interpreted in accordance with the laws of the State of Oregon.

h. Neutral Interpretation. This Settlement Agreement constitutes the product of negotiations of the Parties, and this Settlement Agreement will be interpreted in a neutral manner and not more strongly for or against any Party based upon the source of the draftsmanship.

i. Representation by Counsel. Each Party to this Settlement Agreement is represented and advised by counsel in regard to the negotiation, drafting, and execution hereof, and, in executing this Settlement Agreement, is doing so upon the advice of its respective counsel and did not rely upon any statement by or representation of any other Party or

its counsel. Each Party agrees that they will bear their own costs, expenses, and attorneys' fees arising out of the negotiation, drafting, and execution of this Settlement Agreement.

IN WITNESS WHEREOF, the Parties have executed this Settlement Agreement on the dates set forth below.

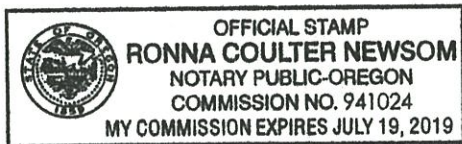
DATED: November 7, 2016

NORTHWEST NATURAL GAS COMPANY

By: *MardiLyn Saathoff*
MardiLyn Saathoff, Senior Vice President,
Regulation and General Counsel

STATE OF OREGON)
) SS
COUNTY OF Multnomah)

This instrument was acknowledged before me on November 7, 2016, by MardiLyn Saathoff as Senior Vice President, Regulation and General Counsel of Northwest Natural Gas Company.



Ronna Coulter Newsom
Notary Public for Oregon
My commission expires: 7/19/19
Commission No: 941024

Attachment C

Affidavit of Patricia Tate

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)


AFFIDAVIT OF PATRICIA TATE

I, Patricia Tate, being first duly sworn on oath, depose and say:

1. My name is Patricia Tate. I am a paralegal with the City of Gresham. My business address is City of Gresham, 1333 NW Eastman Parkway, Gresham, Oregon 97030.
2. In November 2016, Northwest Natural Gas Company and the City of Gresham entered into a "Settlement Agreement and Release of All Claims." A true and correct copy of the "Settlement Agreement and Release of All Claims" is attached to this affidavit as Exhibit A.
3. On or about December 5, 2016, Northwest Natural Gas Company paid in full the additional 2 percent license fee imposed by Resolution No. 3056 plus interest identified in Recital D of the "Settlement Agreement and Release of All Claims."

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE AND IS SUBJECT TO PENALTY FOR PERJURY.

SIGNED THIS 5th day of July, 2017, at Gresham, Oregon.



Patricia Tate

STATE OF OREGON)
) ss.
County of Multnomah)

SUBSCRIBED AND SWORN to before me this 5th day of July, 2017.





NOTARY PUBLIC FOR OREGON
My Commission Expires: 2/15/2020