

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UE 324

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

I. INTRODUCTION

Pursuant to OAR 860-001-0420, and OAR 860-001-0720, the City of Gresham (“Gresham”) moves the Public Utility Commission of Oregon (the “Commission”) for clarification of its conclusions in Order No. 17-482 (the “Order”). Gresham is not seeking to challenge or alter the meaning of the Order at this time, but rather to clarify ambiguity and to ensure that Portland General Electric Company’s (“PGE’s”) Advice No. 17-05 and Schedule 134 Gresham Retroactive Privilege Tax Payment Adjustment filing of December 15, 2017 (“Advice No. 17-05”) is consistent with the Commission’s decision. The Order appears to confirm that PGE collected unlawful rates on at least two separate occasions and, without clarification on this point, Gresham is not sure how to best seek redress on behalf of its constituents. Specifically, Gresham seeks clarification:

- Regarding the specific dates upon which the courts authorized PGE to collect monies from customers, and, if PGE illegally collected amounts when it was not authorized, whether PGE’s total collections should be reduced by any amounts illegally collected; and
- Whether interest amounts added to Advice No. 17-05 should be removed because those amounts were not taxes retroactively imposed by Gresham, but imposed as equitable relief by the court.

According to the Order, Gresham initially imposed the increased privilege tax prospectively in 2011, but it did not do so lawfully after “the circuit court struck down that increase shortly after enactment.”¹ In response to the Order, Gresham asks the Commission to clarify the dates by which the Commission found that Gresham lawfully imposed its fee increase upon PGE. More specifically, Gresham asks whether the Commission has determined the fee was not lawfully imposed: 1) between January and February 2012 (i.e., between the circuit court’s opinion and first judgment); 2) between July 2014 and either May or August 2016, or March 2017 (i.e., between either appellate decision and either circuit court judgment); or 3) between August 2016 and March 2017 (i.e., between the circuit court’s second and third judgments).²

While the different time periods at issue may amount to as little as only one month, and may therefore seem inconsequential compared to the total amounts recoverable after years of under-collection, Gresham wants to ensure the Commission and parties have absolute clarity on the facts³ and that any new amounts imposed on Gresham’s constituents by PGE are as accurate as possible. If the Commission determined that Gresham lawfully imposed its fee increase on PGE between January and

¹ Re PGE Advice No. 17-05, Schedule 134 – Gresham Privilege Tax Payment Adjustment, Docket No. UE 324, Order No. 17-482 at 9 (Nov. 28, 2017) (“We next conclude that Gresham lawfully imposed the amounts retroactively. Although Gresham, CUB, and Staff are correct that the city initially attempted to impose the increased privilege tax prospectively in 2011, they fail to acknowledge that the city did not do so lawfully at that time. The circuit court struck down that increase shortly after enactment, and the circuit court's judgment controlled during the pendency of the appeal. 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.”).

² A timeline of the relevant dates is included below on page 4.

³ Order No. 17-482 at 2 (“The facts are not disputed. We summarize them below based on the parties’ briefs and the appellate decisions.”).

February 2012, for example, then that month was imposed prospectively rather than retroactively, which means it cannot now be recovered under ORS 757.259(1)(a)(A). Longer time periods may also be implicated by the Commission’s clarification. 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 new rates that PGE seeks to impose in Advice No. 17-05.

Additionally, Gresham asks the Commission to clarify whether the Commission based its conclusions in the Order upon the fact that Gresham did not request a stay of the first circuit court decision. The Order notes this in the Facts section, but does not include this in the Discussion, Conclusion, or Order sections.⁴ If this was an unstated basis for the Commission’s decision, then Gresham asks the Commission to clarify whether PGE was similarly required to request a stay of either the appellate court decision (in July 2014) the supreme court decision (in May 2016), or the appellate judgment filed in the circuit court (in August 2016)—all of which were prior to the final circuit court judgment order in March 2017. If PGE were under the same obligation to file a stay, and likewise failed to do so, Gresham seeks to clarify whether PGE collected illegal rates during any period in which PGE should have sought a stay.

Gresham also asks the Commission to clarify whether PGE may include the additional “interest” amount recently awarded by the circuit court in Advice No. 17-05. PGE’s most recent filing indicates that it will be passing along \$7.2 million rather than the original \$7 million requested. The Commission has determined that the original \$7 million constitutes increased privilege taxes retroactively imposed by Gresham that are

⁴ See id. at 3.

recoverable under ORS 757.259(1)(a)(A). The additional \$229,856 is not an increased privilege tax, however, and was not imposed by Gresham. The additional amount is equitable relief separately awarded by the circuit court to compensate Gresham for the loss of use of the \$7 million from 2012 to 2017, and should not be recovered from ratepayers.⁵

II. MOTION

A brief timeline of the relevant events is as follows:

| Date | Event |
|------------|--|
| 07.01.2011 | PGE began collecting increased fees pursuant to Resolution 3056, and challenged its legality at Multnomah County Circuit Court |
| 01.12.2012 | Circuit Court initial Opinion (granting summary judgment) |
| 01.13.2012 | PGE stops collecting Gresham’s increased fees |
| 02.13.2012 | Circuit Court initial Judgment Order (declaring Resolution 3056 was “void, unlawful, and unenforceable”) (“First Judgment”) |
| 07.02.2014 | Court of Appeals Opinion (reversing Circuit Court decision) |
| 05.05.2016 | Supreme Court Opinion (affirmed Court of Appeals decision) |
| 08.18.2016 | Circuit Court files Appellate Judgment Order (the “Other Judgment”) |
| 09.01.2016 | PGE began collecting Gresham’s increased fees (again) |
| 03.31.2017 | Circuit Court’s final Judgment Order (the “Second Judgment”) |

A. Getting The Dates Precisely Right

As the chart above makes clear, PGE stopped collecting the increased privilege taxes before the first circuit court judgment (February 2012) and started re-collecting

⁵ See Northwest Natural Gas Co. v. City of Gresham, Opinion at 4 (June 5, 2017) (“Here, it seems equitable to award the city prejudgment interest to compensate it for the loss of the use of funds that it would have received from PGE beginning March 1, 2012, under the City’s resolution, but did not receive from PGE until after the Supreme Court’s ruling.”).

them before the final circuit court judgment (March 2017). Although PGE referred to these two judgments as the “First Judgment” and the “Second Judgment” there was also a third judgment order entered by the circuit court between those two judgments in August 2016 (the “Other Judgment”).⁶ The Commission should clarify the legal effect of all three judgments. 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.

For example, PGE stopped collecting the day after the circuit court’s initial opinion (i.e., PGE did not wait for the First Judgment) and then started re-collecting months after the Supreme Court’s opinion rather than waiting for the Second Judgment. PGE’s actions, as well as its own pleadings, suggest that the Other Judgment in August 2016 had a legal effect on the First Judgment in February 2012. PGE argued,

Because Gresham elected not to seek a stay, **the circuit court's judgment remained in effect until after the appellate judgment [i.e., the Other Judgment] was entered on August 18, 2016**, and then the circuit court's judgment on remand was entered on March 31, 2017. Thus **the only way Gresham could (and did) lawfully impose the tax was retroactively, following the appellate judgment [on August 18, 2016]** and based on the new declaratory judgment of the circuit court [on March 31, 2017].⁷

The Commission appears to have adopted PGE’s position that the resolution was not legally imposed until 2017, but PGE began re-collecting immediately after the Other Judgment in August 2016. PGE’s pleadings are riddled with inconsistencies on this front, and Advice No. 17-05 itself states that it is “[t]o recover from Customers in the

⁶ The appellate judgment order was also entered by the supreme court on August 4, 2016, but the Order’s rationale seems to focus only on the circuit court filings.

⁷ PGE’s Opening Brief at 10 (emphasis added).

City of Gresham the privilege taxes and court-ordered, associated interest amounts assessed retroactively by the City of Gresham **following an Oregon Supreme Court decision in 2016.**” These inconsistencies are difficult to square with the Commission’s rationale and could ultimately have an effect on the total amount recoverable under ORS 757.259(1)(a)(A).

B. The Legal Effect of Both Parties’ Failure to File a Stay

PGE maintains that it “at all times complied with its legal obligations and with the court judgments that were in effect with respect to the privilege tax.”⁸ But, this appears to be inconsistent with the Order. In addition to the inconsistencies described above, Gresham seeks clarity on the Commission’s views on the role the lack of Gresham filing a motion to stay played in its determination. More specifically, Gresham would like to know if the Commission determined that Gresham’s failure to request a stay of the circuit court’s order(s) formed the basis for the Commission’s determination that Gresham could not lawfully impose its fee increase until 2017.

This is important because PGE similarly failed to request a stay of the appellate decisions, and continued to rely upon the initial opinion. PGE did not start re-collecting the fees from ratepayers after the Court of Appeal’s opinion in 2014, but did start re-collecting shortly after the Supreme Court’s opinion in 2016. Gresham is not clear whether, according to the Commission’s order, PGE illegally began re-collecting in 2016.

If PGE was illegally collecting Gresham’s increased fees because PGE’s actions were not taken consistent with the relevant judgments, or PGE should have sought a stay of the court opinions, then PGE should be required to return any illegally collected

⁸ Id. at 12.

money to its customers. Specifically, PGE’s Advice No. 17-05 should be reduced by the amount of illegal collections, reducing the amount that PGE recovers from customers.

PGE asserted in its Response Brief, “[i]t is appropriate for PGE to make an accounting entry reflecting accrual of a liability prior to the date of a court judgment establishing that liability when PGE knows the court’s ruling and knows that entry of judgment will follow in due course.”⁹ The Order suggests that the Commission likewise determined that it was appropriate for PGE to begin re-collecting, perhaps because PGE knew that the entry of judgment would follow in due course. The Commission should explain its rationale for determining that Gresham did not lawfully impose its fee increase until 2017, so that the parties can understand whether PGE’s collections up until that time were legal.

Finally, the Commission should clarify the legal basis to provide a clear record, if Gresham elects to appeal the Commission’s order. The lack of clarity regarding the operative dates for the lawfulness of PGE’s actions adds confusion to the basis upon which the Commission has ruled that PGE can collect Advice No. 17-05 from customers. The precise basis for the Commission’s order will not only help insulate it from an appellate reversal, but will make any issues upon appeal clearer.

C. The Additional “Interest” Was Not Retroactively Imposed by Gresham

The circuit court determined that Gresham may not have been eligible for statutory relief, but granted equitable relief to compensate Gresham for the loss of the use of the \$7 million due under Gresham’s resolution from 2012 to 2017, when PGE was not

⁹ PGE’s Response Brief at n. 3.

paying Gresham the increased amounts.¹⁰ PGE’s Advice No 17-05 adds the \$229,856 awarded by the circuit court to the amounts recoverable.¹¹ Whether this award is interest or something else, it is not a privilege tax and was not imposed by Gresham. This means that the additional amount is not properly included under OAR 860-022-0040. These amounts should be removed from Advice No. 17-05.

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¹⁰ See Northwest Natural Gas Co. v. City of Gresham, Opinion at 4 (June 5, 2017) (“Here, it seems equitable to award the city prejudgment interest to compensate it for the loss of the use of funds that it would have received from PGE beginning March 1, 2012, under the City’s resolution, but did not receive from PGE until after the Supreme Court’s ruling.”).

¹¹ Advice No. 17-05 (Dec. 15, 2017) (“the Circuit Court has ruled on the interest issue and PGE has paid Gresham the court-ordered interest amount of \$229,856 in June 2017).

III. CONCLUSION

For the reasons stated above, the Commission should clarify the Order.

Dated this 22nd day of December 2017.

Respectfully submitted,

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