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.	STAFF'S RESPONSE BRIEF

1. Introduction

Staff of the Public Utility Commission of Oregon (Staff) submits its Response Brief in accordance with the schedule set by the Commission in its Order No. 17-153. In its Opening Brief, Portland General Electric Company (PGE or Company) presents both legal and "fairness" arguments in support of its position that it may retroactively collect from its customers located within the City (City Customers) increased privilege taxes which the City of Gresham (City) imposed upon the Company by its Resolution made effective on July 1, 2011.[1]

PGE's primary legal argument is that its proposed new rate Schedule 134 (Schedule), which will apply retroactively to the City Customers, is permitted by ORS 757.259(1)(a)(A). *See* PGE Opening Brief at 4-6, 10. Apart from ORS 757.259, the Company also argues that it is *required* by OAR 860-022-0040(6) to impose the privilege tax upon the City Customers, regardless of whether it does so prospectively or retroactively. *See* PGE Opening Brief at 14-16. As its final legal argument, PGE asserts that its Schedule does not constitute retroactive ratemaking because "it does not offend any of the principles underlying the general prohibition on retroactive ratemaking, nor does it constitute retroactive ratemaking in the traditional sense." PGE Opening Brief at 13-14.

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[1] The City originally structured the privilege tax increase as an increase to "utility license fees." However, the Oregon Supreme Court found that the "utility license fee" increase was actually an increase to the "privilege tax" the City imposes on utilities operating within its boundaries. *See Northwest Natural Gas Co. v. City of Gresham*, 359 Or 309, 327 (2016) (*NWN v. Gresham)*. In keeping with the Court's finding, Staff will refer to the cost imposed by the City upon PGE as an increase to the privilege tax.

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For its "fairness" arguments, PGE asserts that it acted in the interests of its customers by challenging the City's privilege tax increase in court. PGE Opening Brief at 11-12. Based upon this premise, the Company then argues that the Commission should not now penalize it by denying its request for retroactive recovery of its costs. PGE Opening Brief at 12. Also in the "fairness" category, PGE argues that "the privilege tax is a cost that is beyond [its] ability to control" and as such, the Commission should allow it to recover this cost. PGE Opening Brief at 12, 14. Finally, the Company argues that fairness is on its side because its actions in not timely collecting the increased privilege tax costs from the City Customers had the positive result that the City received an extra $7 million this year (as opposed to the City receiving it over the past five years on an annual basis). *Id.* at 12-13.

For the following reasons, Staff concludes that the Commission has no legal authority to allow PGE to retroactively recover from the City Customers its costs arising from the City's privilege tax increase because the City imposed the tax prospectively, not retroactively. Further, since the Commission has no legal authority to grant the Company's request, PGE's various "fairness" arguments, meritorious or not, are not relevant.

2. Statement of Relevant Law

Staff agrees with PGE that the relevant laws are ORS 757.259 and OAR 860-022-0040(6). In pertinent part, ORS 757.259(1)(a)(A) provides that the Commission "may reflect amounts lawfully imposed retroactively by order of another governmental agency." ORS 757.259(2)(e) further provides that the Commission may authorize the deferral of utility expenses or revenues which the Commission finds should be deferred "in order to minimize the frequency of rate changes or to match appropriately the costs borne by and benefits received by ratepayers."

OAR 860-022-0040(6) provides, in relevant part, that PGE is permitted to charge an "excess amount" of city taxes to its customers within the city and that this is to appear as a separate line item on the customer's bill. In the present case, the "excess amount" stated in the

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rule is Gresham's 2011 increase to the privilege tax it imposed upon utilities that operate within its boundaries.

3. Statement of Facts

Staff agrees for the most part with PGE's Statement of Facts. *See* PGE Opening Brief at 1-4. However, Staff does not agree with the conclusory statements that PGE inserts in its factual rendition. For example, PGE's statements about the legal effect of the circuit court and Oregon Supreme court judgments (i.e. that the City's Resolution increasing the privilege tax was void and unenforceable from the time of the circuit court's judgment until the Oregon Supreme Court's decision) are necessarily statements of the law (as PGE views it), not statements of fact. *See* PGE Opening Brief at 1-2.

Staff's Response Brief will also rely upon the facts as set forth in its public meeting memorandum dated April 13, 2017, and attached by the Commission to its Order No. 17-153.

Summarizing the relevant facts in a simple manner, after the City's Resolution became effective on July 1, 2011, PGE collected the City's privilege tax increase from the City Customers. However, PGE chose to cease its collection on January 13, 2012, after the Company won the first in a series of appeals concerning the legality of the Resolution. Ultimately, the Oregon Supreme Court affirmed the legality of the Resolution on May 5, 2016, shortly after which PGE commenced again collecting the tax increase from City Customers. In August 2016, PGE paid the City approximately $7 million that was incurred over the approximately five-year appeals period. PGE now seeks to retroactively recover this $7 million from the City Customers.

4. Argument

A. PGE may not retroactively recover its costs at issue under ORS 757.259(1)(a)(A)

(i) ORS 757.259(1)(a)(A) does not apply under the facts of this proceeding

ORS 757.259(1)(a)(A) is plainly worded. It says in a straight-forward manner that the Commission may allow PGE to recover amounts that were "lawfully imposed retroactively by

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order of another governmental agency." PGE's argument in support of the applicability of the law to the facts at issue fails because the City, a governmental agency, lawfully imposed its increase to the privilege tax upon PGE *prospectively*, not retroactively.[2] For this reason, PGE may not rely upon the statute as the legal basis for the Commission to allow it to retroactively collect the tax from the City's ratepayers under its proposed Schedule.

(ii) PGE's argument concerning the application of ORS 757.259(1)(a)(A) is difficult to follow

PGE's primary legal argument is difficult to follow and understand. After close consideration of the Company's Brief, PGE appears to argue that the statutory phrase "lawfully imposed retroactively by order of another governmental agency" should be interpreted so that it reads "legally obligated to pay as a result of government action." PGE's position requires that the statute be rewritten in this manner in order to get around the clear fact that the City lawfully imposed the increase to the privilege tax *prospectively* as of July 1, 2011, not retroactively as of March 31, 2017 (the latter being the date the circuit court entered its second judgment on remand from the Oregon Supreme Court).

To clarify, while not always easy to track, at its core, PGE's argument is focused on application of the word "retroactively" in ORS 757.259(1)(a)(A). This is because all facts point to a prospective imposition of the tax increase by the City. Indeed, PGE readily *agrees* that the City lawfully imposed the tax *prospectively*: "Gresham points out that when it originally imposed the fees, it did so prospectively, not retroactively…*[t]he premise is obviously true*…" PGE Opening Brief at 10 (emphasis added).

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[2] The status of the City as a "governmental agency" is not without doubt. For example, the Administrative Procedures Act (APA) defines an "agency" as a state board, commission, department, or division thereof, or officer authorized by law to make rules or to issue orders, except those in the legislative and judicial branches." ORS 183.310(1). This definition does not include cities. However, on balance, and for the reasons stated in PGE's Opening Brief, Staff concludes that a city qualifies as a "governmental agency" as that term is used in ORS 757.259(1)(a)(A). *See* PGE's Opening Brief at 6-10. However, Staff notes that the Commission need not make a final determination on this issue in the present case because, as discussed at length in this Response Brief, ORS 757.259(1)(a)(A) is inapplicable even assuming the phrase "governmental agency" includes cities.

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In order to get around this clear factual circumstance, PGE reinvents ORS 757.259(1)(a)(A), replacing its clear statutory language with the phrase "legally obligated to pay as a result of government action." PGE then applies this new language (which does not appear in the statute) to argue that the tax increase that *the City* clearly lawfully imposed *prospectively* back in July 2011 went through a metamorphosis as a result of the appeals process to become a tax increase that was really *imposed retroactively in March 2017 by the City in conjunction with the court system* (i.e. so-called "government action"): "In other words, a utility's rate schedule may include an expense when the utility legally becomes obligated to pay it as a result of government action…Thus the only way Gresham could (and did) lawfully impose the tax was retroactively, following the appellate judgment and based on the new declaratory judgment of the circuit court." PGE Opening Brief at 4, 10.

PGE's argument fails for multiple reasons.

(iii) Statutory Construction: ORS 757.259(1)(a)(A) is plainly written and it should be applied as such

To determine legislative intent, the courts apply a specific framework which is set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993) (*PGE v. BOLI*), as modified by *State v. Gaines*, 346 Or 160 (2009). Under the *PGE v. BOLI* analysis, the court first examines the statute's text and context. Next, the court may consider any pertinent legislative history to the extent that it is useful to the court's analysis. Finally, if the legislature's intent remains unclear, the court will resort to maxims of statutory construction.[3] In *Gaines*, the Supreme Court set forth and explained the first of these steps as follows:

"[T]here is no more persuasive evidence of the intent of the legislature than 'the words by which the legislature undertook to give expression to its wishes…Only the text of a statute receives the consideration and approval of a majority of the members of the legislature…for it is

[3] One often used construction principle that has actually been codified is that, when interpreting a statute, the court strives to ascertain and declare only what is, and not insert what has been omitted, or omit what has been inserted. ORS 174.010.

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not the intent of the individual legislators that governs, but the intent of the legislature as formally enacted into law."[4]

The Court then went on to clarify that, contrary to the pronouncement in *PGE v. BOLI*, the Court will no longer require an ambiguity in the statutory text in order to consider pertinent legislative history.[5]

(iv) Text and context: The City lawfully imposed its tax prospectively

ORS 757.259(1)(a)(A) is plainly worded and, as such, is easily applied as written. Under the statute, a utility may, with the Commission's permission, reflect in its rates "amounts" that were "lawfully imposed retroactively by order of another governmental agency." Aside from perhaps the term "governmental agency," which is discussed in footnote 3 *infra*, each word in the statute is clear and of ready and certain meaning.[6] Further, this clear, plain statutory language fits the circumstances of this proceeding, as PGE urges, except for one very important statutory term.

The parts that fit the statute are: (1) a "governmental agency" (the City) (2) "lawfully imposed" (the City's Resolution, the lawfulness of which was affirmed by the Oregon Supreme Court) (3) an "amount" (the increase to the privilege tax) upon PGE. So far, the statute applies to the present circumstances as PGE argues.

However, the part of the statute that clearly does fit the facts at hand is the requirement that City had to have imposed the amount "retroactively." In this case, the City lawfully imposed the tax increase on a prospective basis – from July 2011 forward. Indeed, this is precisely what the Court concluded in *NW Natural v. Gresham*. PGE clearly owed the tax commencing from the date the City imposed it in July 2011. Indeed, PGE acknowledged and

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[4] *State v. Gaines*, 346 Or at 171.

[5] *Id.* at 171-172.

[6] As noted earlier, though it is not without doubt, for the purposes of this matter the phrase "governmental agency" may be read broadly to include cities. *See* Footnote 3, *infra*.

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conceded as much when it paid the entire $7 million to the City that was incurred while the appeal ran its course.

Because the text of ORS 757.259(1)(a)(A) is clear, and it is easily applied as such, there is no need to review its legislative history. The statute, as it was enacted and is written, does not apply to the present circumstances because the City *prospectively* imposed its tax increase upon all utilities operating within its boundaries – this included PGE.

However, in its Opening Brief, PGE seeks to rewrite the statute so that it applies to an amount that it is "*legally obligated to pay as a result of government action.*" The legislative history does not support PGE's attempt to rewrite the statute in this manner.

(v) Legislative history does not support PGE's position that "lawfully imposed" means "legally obligated to pay" or that "governmental agency" means "government action"

PGE summarizes what it believes to be the relevant legislative history on pages 6-10 of its Opening Brief. The majority of what PGE recounts concerns whether the City may qualify as a "governmental agency" as that term is used in the statute. As stated earlier, Staff does not object to this interpretation for the purposes of its Response Brief.

However, importantly, PGE does not offer sufficient legislative history to support its argument that the statutory phrase "lawfully imposed" should be interpreted to mean "legally obligated to pay" and that the statutory phrase "governmental agency" means "government action."

For support for its argument about "legally obligated to pay," PGE offers just one statement from then-PUC Commissioner Davis. *See* PGE Opening Brief at 4. Unfortunately for the success of PGE's assertion, Commissioner Davis speaks in very general terms about "when" an expense that arises from "government action" should be included in rates. That is all, nothing further. Indeed, this statement from Commissioner Davis does not even use the phrase "legally obligated to pay." With no other support from legislative history, PGE makes a gigantic leap and

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asserts: "In other words, a utility's rate schedule may include an expense when the utility becomes legally obligated to pay it as a result of government action." *See* PGE Opening Brief at 4.

However, merely saying so does not make it true. PGE may not properly rely upon Commissioner Davis' testimony, which does not even mention the phrase "legally obligated to pay," to rewrite the statute that was passed by the legislative body containing the specific, clear phrase "lawfully imposed." "Lawfully imposed" does not mean "legally obligated to pay." The two phrases encompass different activities and different time periods. The City's Resolution was lawful when it was first imposed in July 2011, a conclusion emphatically put to rest by the Oregon Supreme Court. That is when the increase to the privilege tax was imposed upon the Company. Conversely, when PGE may be "legally obligated to pay" something could, and may well be, at a different time than when something was "lawfully imposed." PGE's offered interpretation of the statute is clearly contrary to what the legislature intended when it enacted ORS 757.259(1)(a)(A) and as such, it should be given no weight.[7]

The legislative history case PGE attempts to make for claiming that "governmental agency" means "government action" is only marginally better. The Company offers two pieces of testimony from Commissioner Davis in which the phrase "government action" appears. *See* PGE Opening Brief at 4, 9. However, Commissioner Davis did not offer this testimony as advocacy for substituting the phrase "government action" for "governmental agency." He was merely speaking about possible "actions" that a governmental entity take (i.e. acts taken by a state legislature or a federal agency). *See* PGE Opening Brief at 9. He was not trying to rewrite the statute in a way that could greatly expand its meaning.

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[7] Although tempting, Staff decided not to go down the rabbit hole of trying to determine what exactly the phrase "legally obligated to pay" means. PGE argues that, for a matter on appeal, it means when the final court judgment is issued. This may, or may not, be true, and the answer may be different for different types of appeals. In the end, it is not necessary to attempt to decipher this phrase because it is not part of ORS 757.259(1)(a)(A).

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PGE makes its "government action" argument in order to assert that the privilege tax was really imposed by a group of government actors acting in concert - i.e. the City, the circuit court, the Court of Appeals and the Oregon Supreme Court. Under the Company's theory, employing the non-statutory phrase "government unit," the tax was not retroactively imposed until the circuit court entered the Supreme Court's judgment on remand on March 31, 2017. *See* PGE Opening Brief at 4-5, 10.

PGE's application of its substitute phrase "government action" is inconsistent with ORS 757.259(1)(a)(A)'s use of the phrase "by order of another governmental agency." Clearly under the statute, a governmental agency taking a specific action is envisioned. In contrast, PGE's substitute "government action" phrase could expand the statute's reach to include a large group of governmental entities, including as PGE urges in this case, a city, the circuit court, the Court of Appeals and the Oregon Supreme Court, each taking multiple "actions" at different times, but still in some way acting in concert. PGE has failed to show that this is the result the legislature intended under the phrasing of ORS 757.259(1)(a)(A). Applying the clear, plain language of the statute, the City was the sole actor which lawfully imposed its tax increase upon PGE prospectively as of July 1, 2011.

Also along these lines, while not clear how it fits into the Company's "government action" argument, PGE further asserts that the existing statutory phrase "governmental agency" includes the state courts. *See* PGE Opening Brief at 7-9. It is not necessary to consider the issue of the status of the state court as a "governmental agency" because it is manifestly clear that the Resolution increasing the privilege tax was lawfully imposed by the *City*, not the state courts. Even under its convoluted, twisting argument, PGE concedes this latter point. *See* PGE Opening Brief at 10 ("the only way Gresham could (and did) impose the tax was retroactively, following the appellate judgment…).

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(vi) Colstrip Tax case is not applicable

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." *See* PGE Opening Brief at 10-11 [citing to the Commission's decision based upon the Staff public meeting memo, identified as Consent Agenda Item CA 8, concerning the retroactive recovery of the Colstrip Tax and Royalty Payments (Colstrip Memo)]. Unlike the present circumstances between the City and PGE, the situation in Colstrip is a proper example of the application of ORS 757.259(1)(a)(A).

As PGE relates in its Opening Brief, in the Colstrip matter, the U.S. Department of Interior and the Montana Department of Revenue had *retroactively* charged the operator of the Colstrip plant for its underpayment of taxes and royalties. The plant operator then passed those charges on to PGE. PGE subsequently asked for the Commission's permission to recover these costs retroactively from its ratepayers under ORS 757.259(1)(a)(1). The Commission accepted Staff's recommendation that the statute applied and approved the Company's request.

The facts of the Colstrip matter are not the same as in the present case. Here, as discussed extensively in this Response Brief, the City imposed its privilege tax increase upon PGE *prospectively*. In the Colstrip matter, the Department of Interior and the Montana Department of Revenue had *retroactively* charged the operator of the Colstrip plant for its underpayment of taxes and royalties, which then passed the costs on to PGE. As such, the precedent set by the Colstrip matter actually supports Staff's position – ORS 757.259(1)(a)(A) does not apply because the facts here involve the prospective imposition of the privilege tax increase by the City as of July 1, 2011.

B. OAR 860-022-0040(6) does not "require" PGE to retroactively collect the tax

PGE asserts that OAR 860-022-0040(6) "requires" it to retroactively collect the privilege tax from the City Customers. PGE Opening Brief at 5, 14-17. The Company's argument misreads the rule and, further, it would be unlawful for the Commission to apply the rule as PGE

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urges. This is so because the Commission cannot lawfully adopt a rule, outside of express statutory authorization, that permits or requires a utility to retroactively collect costs in rates.

OAR 860-022-0040(1) permits a utility to collect in rates from *all* ratepayers the costs that a city imposes upon that utility up to a certain percentage of the utility's gross revenues. For an electric utility, this threshold is 3.5 percent. OAR 860-022-0040(1). OAR 860-022-0040(6) then permits the utility to collect in rates those costs imposed by a city beyond the threshold amount ("excess amount") from that city's energy customers.

OAR 860-022-0040(6) does not contain the words "prospectively" or "retroactively" when it speaks in terms of cost recovery. But, PGE takes this omission and concludes, without any basis, that the rule must operate retroactively. *Id.*

PGE's interpretation is incorrect. In order for the rule to be lawful, it can only apply on a prospective basis. This conclusion is based upon Opinion OP-6076 issued by the Oregon Department of Justice in 1987. *See* Or. Op. Atty. Gen. OP-6076, 1987 WL 278316 (Issued March 18, 1987). In this Opinion, the Attorney General emphatically concluded that the Commission has no inherent authority to allow a utility to retroactively include past costs in current rates. ORS 757.259 was enacted in large part as a result of the Department's advice. Retroactive recovery of costs must be authorized by statute. Since OAR 860-022-0040(6) is not based upon a statute that authorizes the retroactive recovery of past costs in current rates, the rule may only be read to allow a utility to collect in rates the referenced "excess amounts" on a current, going-forward basis.[8]

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[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. *See* PGE Opening Brief at 16-17. According to PGE, the Company and the City of Sherwood agreed to allow PGE to include a "make-up charge" in the City's customer rates. The make-up charge was imposed to account for a several-month period during which the Company did not charge Sherwood's ratepayers for an "excess amount" arising from an increase to the privilege tax. For the reasons stated in the main text, unless the City of Sherwood imposed the tax increase upon PGE retroactively, Staff has serious questions about the legality of the "make-up charge" assessed by PGE upon the City of Sherwood's ratepayers.

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C. PGE's Schedule 134 does not concern an "anticipated" expense

Relying upon its argument that the City actually imposed its privilege tax increase as of March 31, 2017, PGE then asserts that its Schedule 134 seeks to recover an "anticipated expense." As such, under PGE's logic, the Schedule does not involve retroactive ratemaking. *See* PGE Opening Brief at 14.

Staff earlier explained at length in this Response Brief why the March 31, 2017, date is not the effective date for the privilege tax. The correct date is July 1, 2011. *See* Staff Response Brief at subsection (4)(A). PGE's argument here about the privilege tax being an "anticipated expense," being based upon its earlier argument in support of the March 31, 2017 effective date for the privilege tax increase, fails for the same reasons as did its prior argument. The City lawfully imposed its increase to the privilege tax upon utilities operating within its boundaries on July 1, 2011.

D. Because ORS 757.259(1)(a)(A) does not apply to the present facts, whether PGE's "fairness" arguments have merit, the Commission has no authority to approve PGE's Schedule. Even so, Staff disagrees with certain aspects of PGE's "fairness" arguments.

For the reasons stated earlier in this Response Brief, the Commission is without authority to allow PGE to retroactively include the City's privilege tax increase, imposed as of July 1, 2011, in current rates. As such, PGE's arguments about the "fairness" of allowing it to do so are not pertinent and not relevant. Simply put, the Commission has no authority to allow a utility to retroactively impose costs upon its ratepayers based simply upon the "fairness" of doing so. However, even though the Commission is without authority in this matter, Staff will briefly address each of PGE's three "fairness" arguments because Staff does not entirely agree with PGE's perspective on the matter.

For its first "fairness" argument, PGE asserts that it acted in the best interest of its customers when it challenged the City's Resolution in court. PGE Opening Brief at 12. That may or may not be so, but in weighing this argument, it is important to note that, from a

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regulatory aspect, PGE had no obligation or responsibility to take on this challenge. As discussed earlier, PGE is permitted by law to pass through the City's privilege tax to its ratepayers (socializing the cost up to the threshold amount, and then collecting the excess amount in rates from the City Customers). As such, PGE had no regulatory obligation to challenge the Resolution on behalf of its customers.

Further, due to intergenerational equity concerns, newer City Customers would be worse off because of PGE's actions if Schedule 134 became effective. This is because such new customers would have to pay for the past tax increases which were incurred when they were not City Customers.

For its second "fairness" argument, PGE asserts that the privilege tax is a cost that was "beyond its ability to control." PGE Opening Brief at 12, 14. This is simply not true. PGE had at least two options it could have employed to protect itself while it challenged the lawfulness of the Resolution in court.

First, PGE could have simply collected and remitted the tax increase to the City while the appeals process proceeded. If PGE had won its legal challenge, then presumably the City would have had to refund the tax payments to PGE for refund to its customers (or, perhaps the City could have effectuated the refund process directly on its own).

Second, PGE could have asked the Commission for a deferral of the privilege tax increase under ORS 757.259(2)(e). In this manner, with the Commission's permission, PGE could have included the privilege tax increase in rates to the City Customers on a then-current basis, for later amortization after conclusion of the appeals process.

For its final "fairness" argument, PGE asserts that the City is better off because of the Company's actions because it received an "extra $7 million in revenue this year as a result of PGE's retroactive payment." PGE Opening Brief at 12. This claim is dubious in light of the fact that the "price" the City paid for its "extra $7 million" was not receiving the increase to the privilege tax amount in annual remittances from the Company for the five years preceding PGE's

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payment. And, as shown by the fact that the issue is currently being litigated, presumably the City is not happy with PGE's position that it should not have to pay the City interest on the $7 million. *See* PGE Opening Brief at 4.

But, as stated earlier, these "fairness" considerations are not relevant because the Commission has no independent authority to allow a utility to retroactively impose costs on its ratepayers based upon the "fairness" of doing so.

5. Conclusion

For the reasons stated, the Commission should not approve PGE's Schedule 134.

DATED this 26th day of May, 2017.

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