

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 324

In the Matter of)
)
)
PORTLAND GENERAL ELECTRIC)
COMPANY,)
)
Advice No. 17-05, Schedule 134 Gresham)
Privilege Tax Payment Adjustment.)
_____)

**RESPONSE BRIEF
OF THE
OREGON CITIZENS' UTILITY BOARD**

May 30, 2017

court's prior holding.⁴ PGE began collecting the additional 2% privilege tax from its Gresham customer bills on September 1, 2016.⁵ In its proposed new rate Schedule 134, PGE seeks to recover nearly \$7 million in privilege tax payments from its current Gresham customers which were not collected from January 13, 2012 through September 1, 2016.⁶

CUB recommends the Commission deny PGE's Schedule 134 because it constitutes prohibited retroactive ratemaking and does not qualify for an exception under ORS 757.259(1)(a)(A).

II. Argument

A. PGE's Retroactive Tax Recovery Violates the Rule against Retroactive Ratemaking.

The rule against retroactive ratemaking prohibits the PUC from ““setting future rates to allow a utility to recoup past losses or to refund to consumers excess utility profits.”” *Gearhart v. PUC*, 356 Or. 216, 237 (Or. Oct. 2, 2014) (citation omitted). *See also Or. Op. Atty. Gen.*, *1, 1987 Ore. AG LEXIS 74, *1 (March 18, 1987) (concluding that retroactive ratemaking orders are “absolutely impermissible” unless “expressly authorized by the legislature”...) (hereinafter “1987 AG Opinion”). One of the primary functions of the rule is to provide stability to both ratepayers and the utility. *See e.g., Gearhart* at 242. The rule protects the public by ensuring that present consumers are not required to pay for the utility's previously incurred expenses, and the utility is certain to retain profits that, through efficient operations, may exceed the authorized rate of return. *1987 AG Opinion*, *2-3; *Gearhart* at 242-243.

PGE's attempt to retroactively recover taxes owed by *prior* Gresham customers from *current* Gresham customers implicates the very principles that are the basis for the prohibition on

⁴ *Id.*

⁵ *Id.* at p. 3.

⁶ *Id.* at p. 2.

retroactive ratemaking. *See e.g. 1987 AG Opinion*, *3 (stating that the rule against retroactive ratemaking “is fair to the consumer in safeguarding him from surprise surcharges dating back over years that he had a right to assume were finished business for him and possibly over years when he was not even a consumer.”). The City of Gresham imposed a 2% increase in privilege taxes on the Company through its July 1, 2011 resolution.⁷ PGE did not collect the additional 2% from its Gresham customers from 1/13/2012 through 9/1/2016.⁸ There can be little doubt that PGE’s attempt to recover taxes from current Gresham customers, that would have been paid by 2012 Gresham customers, is “retroactive” and constitutes prohibited retroactive ratemaking.

PGE argues, unpersuasively, that its retroactive tax recovery from current customers is not retroactive ratemaking because the privilege tax was not an operational cost within PGE’s control.⁹ But the Company cites to no authority that would limit the rule against retroactive ratemaking only to losses attributed to the Company’s controllable operational costs. Instead, the doctrine of retroactive ratemaking is intended to shield utility customers from a utility recouping past losses through rates irrespective of why the losses occurred. *See 1987 AG opinion*, at *7 (discussing the rule against retroactive ratemaking as broadly prohibiting a company’s past *losses*, including unwarranted dividends or managerial imprudence, from being set in future rates).

Moreover, PGE’s argument ignores the fact that the Company’s losses are the result of a decision within its control. PGE, presumably confident that the circuit court’s decision would prevail, made the decision to stop collecting the additional 2% tax from its Gresham customers. The utility ultimately “must bear the risk” that Company decisions may result in Company

⁷ PGE’s Opening Brief, p. 1.

⁸ *Id.* at p. 3.

⁹ *Id.* at p. 13-14.

losses. *1987 AG opinion*, at *6. That principle is true even when, as is the case here, the losses were the result of an assessment of the likelihood of success in the upper courts that proved to be mistaken.

B. No Exception to the Rule against Retroactive Ratemaking Applies to PGE’s Retroactive Tax Recovery from Current Gresham Customers.

The Commission must deny the Company’s Schedule 134 because no exception applies to the Company’s proposed retroactive ratemaking. The legislature may authorize exceptions to the well-settled rule against retroactive ratemaking. *1987 AG Opinion*, * 21. In 1987, the Oregon Legislature enacted ORS 757.259 authorizing the Commission to include in utility rates “[a]mounts lawfully imposed retroactively by order of another governmental agency...” ORS 757.259(1)(a)(A). PGE erroneously argues that its recovery request falls under this exception.

PGE’s request does not meet the plain language of the statute because the City of Gresham did not impose a retroactive tax. *See State v. Gaines*, 346 Or. 160, 171 (stating that the appropriate methodology for interpreting a statute is to begin with an examination of the text and context). In this case, PGE is lawfully required to collect an additional 2% privilege tax from its Gresham customers because of a Resolution (i.e. “order”) passed by the City Council of Gresham.¹⁰ However, Gresham’s tax was not “imposed retroactively” and therefore does not meet the plain reading of the statute.

The Commission’s previous applications of ORS 757.259(1)(a)(A) are illustrative of the plain meaning of the language in the statute. For example, in 2013 Idaho Power Company (“IPCO”) was allowed to receive retroactive tax benefits that were the result of two accounting changes “imposed retroactively” by the Internal Revenue Service and U.S. Department of

¹⁰ PGE’s Opening Brief, p. 1.

Treasury.¹¹ Similarly, in 2008 PGE obtained Colstrip Tax and Royalty Payments that had been “imposed retroactively” by the U.S. Department of Interior and the Montana Department of Revenue.¹² Contrary to those prior decisions, in which a governmental agency unexpectedly imposed amounts to be collected retroactively, in this case the City of Gresham imposed a prospective tax which the Company was aware of even if it chose not to collect it for nearly five years.

Since, based on the plain language of the statute, PGE’s Schedule 134 does not meet an exception to the rule against retroactive ratemaking, the Commission must deny PGE’s request. *See Gaines* at 172 (“a party seeking to overcome seemingly plain and unambiguous text with legislative history has a difficult task before it.”).

C. If an Exception Does Apply, the Company is Subject to an Earnings Test.

Should the Commission determine that PGE may retroactively recover \$7 million in taxes from Gresham customers, precedent requires the Company to be subject to an earnings test. In 2013, IPCO received a retroactive tax benefit as a result of two accounting changes.¹³ After determining that IPCO’s tax refunds were subject to direct amortization under ORS 757.259(1)(a)(A), the Commission found that an earnings test was appropriate and required by ORS 757.259(5).¹⁴ CUB maintains that the Commission should deny PGE’s retroactive tax recovery request. However, if the Commission approves recovery, it should follow its precedent in the IPCO case and order that PGE be subject to an earnings test under ORS 757.259(5).

¹¹ *In the Matter of Idaho Power Company Deferral of Recognized Tax Benefits*, UM 1562/UM 1582, Order No. 13-160, p. 1 (April 30, 2013).

¹² *PGE’s Advice No. 08-16, Colstrip Tax and Royalty Payment Adjustment*, (Nov. 14, 2008).

¹³ *In the Matter of Idaho Power Company Deferral of Recognized Tax Benefits*, UM 1562/UM 1582, Order No. 13-160, p. 1 (April 30, 2013).

¹⁴ *Id.* at 7-10.

III. Conclusion

For the foregoing reasons, CUB recommends the Commission deny PGE's Schedule 134.

Dated this 30th day of May, 2017.

Respectfully submitted,

May 30, 2017

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