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.	**REPLY BRIEF OF PORTLAND GENERAL ELECTRIC COMPANY**

I. INTRODUCTION

The arguments made by Gresham, Staff, and CUB are premised on a fundamental misunderstanding of law. They fail to recognize the legal effect of the Circuit Court's judgment of February 13, 2012[1] (the "First Judgment"), which ruled that Gresham's tax increase was "void, unlawful, and unenforceable." That judgment was legally binding on Gresham and on PGE. As a result of entry of that judgment, PGE did not owe any payments to Gresham for the additional tax. That remained true until entry of the Circuit Court's judgment of March 31, 2017[2] (the "Second Judgment"), which made Gresham's tax increase "lawful and enforceable" from that point forward. During the entire period of the appeal, Gresham's tax increase was not "lawfully imposed" on PGE. Because PGE had no legal obligation to pay the additional tax during that period, PGE therefore did not pay it to Gresham and PGE did not record any liability or expense for it.[3]

The other parties' failure to recognize the legal significance of the court's judgments leads them to draw faulty conclusions about what PGE *could* or *should* have done to recover the cost of the additional tax from customers. They argue that PGE should have billed

[1] Judgment, *Northwest Natural Gas Co. v. City of Gresham* (Mult. Cty. Case No. 1107-08422, Feb. 13, 2012).

[2] Judgment, *Northwest Natural Gas Co. v. City of Gresham* (Mar. 31, 2017).

[3] A business "incurs" or "accrues for" a liability or expense for accounting purposes when (a) it is probable and (b) its amount can be reasonably estimated. FASB Accounting Standards, ASC 450-20-25-2. It 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.

customers for the additional tax pending the appeal. But it would not have been proper for PGE to bill customers for the additional tax under OAR 860-022-0040 because the tax was not in fact "imposed upon" PGE during the period of the appeal. They also argue that PGE should have requested deferral of the tax cost pending the appeal. But PGE could not have properly obtained a deferral order with respect to a *possible future* expense because deferral is available only for expenses that have already been incurred by a utility. *See* ORS 757.259(5) ("the amount *was* prudently *incurred*" (emphasis added)).

After the conclusion of the appeal, the additional tax was "imposed" on PGE as a matter of law—both as to ongoing taxes and with respect to the amount of taxes based on PGE's gross revenues during the period of the appeal (the retroactive taxes). PGE therefore "incurred" the retroactive taxes as an accounting expense, and PGE paid that amount to Gresham. PGE then had two choices. Under OAR 860-022-0040, a utility is *required* to charge customers for all city privilege taxes in excess of 3.5 percent of the utility's gross revenues in the city. These charges for excess taxes are not included in the utility's costs for ratemaking purposes, *see* OAR 860-022-0040(1), but instead are directly billed to customers without the need for any special rate filing to authorize them, *see* OAR 860-022-0040(1) ("shall be itemized or billed separately"), (6) ("shall be charged"). However, rather than simply billing customers as authorized under OAR 860-022-0040, a second option was also available. PGE could apply to the Commission for a rate schedule under ORS 757.259(1) that would authorize deferred collection from customers over a defined period of time. The second option was clearly the preferable one under the circumstances, and therefore PGE filed its application with the Commission.

This proceeding is governed by ORS 757.259(1) and ORS 757.210, which grant discretion to the Commission within the statutory framework provided. However, the Commission's discretion is limited by OAR 860-022-0040, which *requires* that city privilege taxes in excess of the 3.5 percent threshold be directly charged to customers within the city. Therefore, the Commission may properly exercise its discretion to determine the period of time over which PGE should charge customers for the retroactive tax expense. PGE suggests that five

years is an appropriate period, reducing the monthly impact on customers and reflecting the period of time over which Gresham residents may benefit from the City's expenditure or investment of its additional tax revenue.

II. THE EFFECT OF THE FIRST COURT JUDGMENT WAS THAT GRESHAM'S ADDITIONAL TAX WAS NOT IMPOSED ON PGE DURING THE PERIOD OF THE APPEAL

The Circuit Court's First Judgment made Gresham's additional tax unenforceable, and no payments were owing or due until the Circuit Court's Second Judgment made the tax enforceable. Both Staff and Gresham fail to acknowledge the legal effect of the court judgments on PGE, and this essential failing permeates and corrupts their entire analysis. The Commission should not make the same legal error.

PGE's complaint in its court action sought a judicial declaration that Gresham's increase in its tax from 5% to 7% was preempted and therefore void.[4] The Circuit Court granted the relief sought, entering a judgment declaring that "the City of Gresham's Resolution 3056, to the extent it purports to increase its Utility License Fee . . . from 5% to 7% of gross revenue, violates ORS 221.450 and is void, unlawful, and unenforceable[.]" (First Judgment, 2.) Tellingly, Staff says it "does not agree with the conclusory statements" on pages 1-2 of PGE's Opening Brief to the effect that the privilege tax was "void and unenforceable." (Staff Response, p. 3.) But those precise words—included in the table on page 2 of PGE's brief—are directly quoted from the court's First Judgment.

The First Judgment was immediately binding on Gresham and PGE and established their legal rights and obligations from that point forward. Oregon law on declaratory judgments provides that courts "have power to declare rights, status, and other legal relations . . . and such declarations shall have the force and effect of a judgment." ORS 28.010. Any party "whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract or franchise may have determined any question of construction or

[4] Complaint, ¶ 13, *Northwest Natural Gas Co. v. City of Gresham* (July 1, 2011).

validity . . . ." ORS 28.020. When a declaratory judgment is entered by a court, it "governs the rights and obligations of the parties that are subject to the judgment." ORS 18.082(a); *In re Dahl's Estate,* 196 Or 249, 255 (1952).

Gresham argues that the Circuit Court's First Judgment had no immediate effect on its own, without a further judgment granting some form of injunctive relief. (Gresham Response, p. 23.) This argument flatly contradicts basic principles of declaratory judgments, as cited above. In fact, ORS 28.010 expressly provides that a court's declaration has the force and effect of a judgment "whether or not further relief is or could be claimed." PGE had no need to apply for further relief. Gresham's additional tax had been voided by the First Judgment, and PGE was thereby relieved of any obligation to pay it. The need for injunctive relief would arise only if Gresham made efforts to collect the tax after the court had declared it to be invalid and unenforceable. But once a taxing scheme has been declared invalid by a court, the taxing authority "may not continue to assess or collect taxes under that scheme." *Atkins v. Dep't of Revenue,* 13 Or Tax 65, 70 (1994), *aff'd,* 320 Or 713 (1995). *See also Patel v. City of San Bernardino,* 310 F3d 1138, 1142 (9th Cir. 2002) ("There is no dispute that once a state tax has been finally declared unconstitutional the state may not continue to collect the tax.") (quoting John F. Coverdale, *Remedies for Unconstitutional State Taxes,* 32 Conn L Rev 73, 84 (1999)). As a more general principle, when any city ordinance is declared to be invalid by a court's judgment, "city officials will be foreclosed from enforcing it." *Gaffey v. Babb,* 50 Or App 617, 623 (1981). It is therefore generally "unnecessary" for a court to issue an injunction enjoining enforcement. *Id.* at 633.

Gresham and Staff also confuse the legal effect of a Circuit Court judgment with the legal effect of opinions and orders that may be issued during the course of court proceedings. The judgment entered by the Circuit Court is the "exclusive statement of the court's decision in the case," which "governs the rights and obligations of the parties," and which triggers the right to appeal. ORS 18.042(1)(a), (c). The judgment is deemed to incorporate previous written decisions of the court that are consistent with its terms. ORS 18.042(2). Just as the judgment

entered by the Circuit Court concludes the case in that court, if there is then an appeal, the appellate process will be concluded by issuance of an appellate judgment. ORS 19.270(6). When an appeal is taken first to the Court of Appeals and then to the Supreme Court, a single appellate judgment will issue after the entire appeals process has concluded. ORS 19.270(6)(b). Following the conclusion of the appeal, the Circuit Court then enters any orders necessary to effectuate the appellate judgment. ORS 19.270(8). Gresham and Staff are simply wrong to the extent they suggest that the trial court's opinion[5] or the opinions of the appellate courts[6] had the same legal and binding effect on the parties as court judgments.

Gresham further suggests erroneously that the intermediate appellate ruling effectively restored the validity of Gresham's additional tax. (Gresham Response, p. 3.) But during the entire pendency of an appeal, the underlying judgment remains in effect, unless it has been stayed. ORS 19.270(1)(b); *Home Builders Ass'n of Metro. Portland v. City of W. Linn*, 204 Or App 655, 663 (2006). Gresham never sought or obtained a stay. Therefore, throughout the appeal period, Gresham remained bound by the Circuit Court's determination in its First Judgment that the additional tax was "void, unlawful, and unenforceable."

Gresham and Staff's briefs are permeated with repeated assertions that PGE "owed" the additional tax during the during the pendency of the litigation, that PGE "failed" to pay it or collect it (or "chose" not to pay what it owed), and that PGE has now paid an "overdue" tax.[7] These assertions all reflect a misunderstanding of the legal effect of court judgments. Nevertheless they are the centerpiece of Gresham's argument: "This dispute centers on an overdue, unpaid tax." (Gresham Response, p. 2.) Unfortunately for Gresham, it just lost on this exact issue in the Circuit Court. Gresham was asking the court to award post-judgment interest under ORS 82.010(a), which establishes a nine percent rate of interest on "moneys after they

[5] *See, e.g.*, Gresham Response, p. 23 ("Requiring the parties to request a stay, would mean that at best PGE may not have been required to collect the amounts after the Circuit Court opinion, but should have started collected them again after the Court of Appeals opinion").

[6] *See, e.g.*, Gresham Response, p. 3 ("Despite the Court of Appeals concluding that Gresham was entitled to pass Resolution 3056, PGE continued to not collect the fees from its Gresham customers").

[7] *See generally*, Gresham Response, Staff Response.

become due" (emphasis added). Gresham argued that additional taxes had been due on each of the annual payment dates during the period of the appeal.[8] The court rejected Gresham's argument and declined to award interest under ORS 82.010(a).[9] The court observed that Gresham had not sought a stay of the First Judgment during appeal, and the additional taxes were not clearly due until the court had entered its Second Judgment following the appeal. Opinion, p. 4, *Northwest Natural Gas Co. v. City of Gresham* (June 5, 2017) (the "Interest Opinion," attached for reference). Gresham will be bound by the court's decision on this legal issue, and the Commission should likewise accept the court's determination as to when PGE's payments to Gresham were "due."

III. PGE APPROPRIATELY DID NOT CHARGE CUSTOMERS DURING THE PERIOD OF THE APPEAL FOR A SPECULATIVE, FUTURE TAX EXPENSE

Both Gresham and Staff strenuously argue that PGE should have charged customers in 2012, 2013, 2014, 2015, and 2016 for a tax that had been held to be "void, unlawful, and unenforceable" by a court judgment—and which PGE therefore had no legal obligation to pay and accordingly was not paying during those years. Gresham and Staff argue that PGE would have been justified in charging customers based on PGE's *anticipation* of the *possibility* that the tax would become enforceable after the conclusion of the appeal. It is extraordinary that Staff in particular is advocating such a position. The approach they suggest is not consistent with the requirements of OAR 860-022-0040, and furthermore it would not beneficial to customers as a general matter.[10]

OAR 860-022-0040(1) addresses city privilege taxes that are "imposed upon energy utilities." Such taxes up to 3.5 percent of gross revenues within a city are "allowed as operating expenses ... for rate-making purposes." Accordingly, in rate-making proceedings, PGE

[8] *See* Defendant City of Gresham's Memorandum in Support of Amended Petition for Supplemental Relief, pp. 4-5.
[9] The court has decided to award some interest to Gresham at a much lower rate on a discretionary, equitable basis (i.e., not based on Gresham's theory that the taxes were "due").
[10] As the Commission well knows, customer advocacy groups have in the past filed litigation to challenge direct charges to utility customers for local taxes that had not in fact been paid to the local government. *See Util. Reform Project v. Oregon Public Utility Com'n*, Marion Cty. Case No. 05C13380, Complaint filed April 18, 2005.

includes that portion of Gresham's taxes when PGE calculates its actual costs and estimated *anticipated* costs for purposes of setting future rates. But as for taxes in excess of 3.5 percent, the rule requires that those "costs" be "itemized or billed separately." OAR 860-022-0040(1), (6). Therefore, in rate-making proceedings, PGE does not include the portion of Gresham's taxes in excess of 3.5 percent. Because OAR 860-022-0040 provides direct authority for utilities to charge customers directly for city privilege taxes in excess of 3.5 percent, there is no need for any prospective rate-making application for those charges. Rather, PGE charges customers for such costs on an as-incurred basis.[11]

OAR 860-022-0040 provides no authority for a utility to charge customers for *speculative, uncertain future costs.* The rule applies to "costs" that are "imposed upon energy utilities." OAR 860-022-0040(1). Nevertheless, Gresham argues that PGE should have charged customers for the additional tax during the years the appeal was continuing because PGE could have "predicted that one possible outcome" was that it would ultimately lose the appeal and have to pay the additional tax. (Gresham Response, p. 17.) The text of OAR 860-022-0040 provides no support for this argument. It would be extraordinary to interpret this rule to allow a utility to charge customers directly for an expense that the utility has not paid, has no present legal obligation to pay, and has no obligation to pay on any known future date.[12]

IV. PGE APPROPRIATELY DID NOT APPLY FOR DEFERRAL AS TO A SPECULATIVE, FUTURE TAX EXPENSE

Gresham and Staff also try to fault PGE by arguing that PGE should have filed a deferral proceeding with the Commission back in 2012, after Gresham's tax increase had been invalidated by the First Judgment and the lengthy appeal process began. But their argument is not supported by the deferral statute itself, which requires that a utility have actually incurred the

[11] PGE normally "incurs" or "accrues for" the tax liability on a month-to-month basis, calculating the amount that will be due based on PGE's gross revenues in Gresham for each month. Then, following the end of the year, PGE makes a single payment to Gresham based on gross revenues for the year. *See* footnote 3 above, citing the relevant accounting standard for accrual of an expense.

[12] Gresham and Staff both argue that the approach taken by NW Natural during the appeal period was a better approach. The relevant facts as to NW Natural have not been fully presented in this proceeding, nor is NW Natural a party.

expense that it seeks to defer. ORS 757.259(2) permits deferral orders as to specific kinds of "incurred" amounts, "accruing" amounts, and "costs." In addition to those specified items, subsection (2)(e) permits deferral orders as to "[i]dentifiable utility expenses." Ultimately, as to any expense that a utility seeks to defer, the Commission must find that "the amount *was* prudently *incurred* by the utility." ORS 757.259(5) (emphasis added). The statute provides no basis for a utility to obtain an order of deferral for an expense that the utility may, or may not, be legally required to pay at an unknown date in the future. This makes sense. The Commission needs certain information to make an order of deferral: the amount of the expense, when it was paid, and how it benefits ratepayers. Also, a deferral order sets a time period over which an expense will be recovered, which is not feasible when the timing and amount of the expense itself is still unknown. For all these reasons—the language of the statute and obvious practical considerations—deferral applications are filed close in time to when an expense is actually incurred. *See In Re NW Natural, Request for General Rate Revision*, Docket No. UG 221, Order No. 12-437 at 22 (Nov. 16, 2012) ("To the extent NW Natural believed these expenses should have been recognized in rates, the company could have filed for a deferral order *coincident with the timing of expense incurrence*." (emphasis added));[13] Written Testimony of Charles Davis Before the Senate Business, Housing, & Finance Committee, May 21, 1987, at p. 4 (purpose of deferral statute is to authorize "recovery of a *cost already incurred* by the utility" (emphasis added)).[14]

V. NOW THAT THE TAX HAS BEEN IMPOSED ON PGE BY THE SECOND JUDGMENT, PGE HAS THE RIGHT TO CHARGE CUSTOMERS UNDER OAR 860-022-0040

As explained above (in Section III), OAR 860-022-0040 authorizes—indeed *requires*—an energy utility to bill customers directly for the cost of all city privilege taxes in excess of 3.5 percent of the utility's gross revenues in the city. *See* OAR 860-022-0040(1)

[13] This case is cited in Gresham's Response at pp. 14, 26.

[14] The deferral statute does accommodate some future uncertainties as the "full extent" of costs, i.e. "the net cost." Davis Testimony, at p. 4. For example, a utility may properly apply for deferral as to an expense that it has actually incurred, but as to which it anticipates there may be a future offset.

("*shall be* itemized or billed separately"), (6) ("*shall be* charged") (emphasis added). These charges are normally billed without the need for any special rate filing with the Commission because the rule specifically authorizes them.

When the Second Judgment was entered, making Gresham's additional tax increase "lawful and enforceable," the additional tax was consequently "imposed upon" PGE as a matter of law. PGE accrued for and paid the taxes for the retroactive period as a lump sum.[15] PGE is now *required* by OAR 860-022-0040 to charge customers in Gresham for that cost.

The provisions of OAR 860-022-0040 for direct charges to customers make no reference to whether a tax is *prospective* or *retrospective*. That is because these provisions operate outside the usual context of rate-making. They require a utility to charge customers *when the utility incurs an actual cost*. What matters in the present circumstances is that a tax cost in excess of the 3.5 percent threshold was "imposed upon" PGE as a result of the Second Judgment and PGE therefore incurred and paid it.

The only reasonable legal alternative is for the Commission to grant deferral of that cost under ORS 757.259(1). PGE filed an application under ORS 757.259(1) so that the cost could be spread over a period of time, reducing the monthly impact on customers, and more closely matching the period of time over which Gresham residents may benefit from the increased tax revenue. As explained below, the Commission should approve the application.

VI. PGE APPROPRIATELY RELIES ON ORS 757.259(1) FOR AUTHORITY TO SPREAD THE CHARGE TO CUSTOMERS OVER A REASONABLE PERIOD

After the conclusion of the appeal, when the legal obligation was imposed on PGE to pay additional taxes to Gresham in an amount based on revenues in past periods, PGE rightfully relied on ORS 757.259(1) as authority to apply for a rate schedule to recover that amount of retroactive taxes from customers. PGE was justified in its reliance due to the Commission's precedent in the Colstrip matter, the language of the statute, and the framework

[15] See footnotes 3 and 11 above regarding the timing of expense "accrual" as distinct from the timing of when the legal obligation was imposed and when the payment was made.

established by OAR 860-022-0040.

As a general matter, ORS 757.259(1) and ORS 757.210 grant discretion to the Commission in these sorts of proceedings, bounded by the usual requirement that the Commission correctly interpret the law and exercise its discretion in a reasonable manner. ORS 183.482(8); *Util. Reform Project v. Oregon Pub. Util. Comm'n*, 277 Or App 325, 341 (2016). However, in the specific circumstances of this case, the Commission's discretion should be informed by and circumscribed by OAR 860-022-0040, which requires that city privilege taxes in excess of the 3.5 percent threshold be directly charged to customers within the city. The Commission is required to exercise its discretion in a manner consistent with its rules and consistent with its past practices. ORS 183.482(8)(b)(B); *Util. Reform Project*, 277 Or App at 341.

A. The Commission Should Follow Its Own Precedent in Colstrip

In all key respects, the current situation is similar to the one presented to the Commission in the Colstrip matter, and the Commission should apply the statute in a consistent manner here. The attempts by Gresham, Staff, and CUB to distinguish Colstrip serve only to emphasize how similar that situation was. And in fact, the argument for application of ORS 757.259(1) is *stronger* in the current situation than it was in Colstrip. Compare how the events unfolded in Colstrip with how they unfolded here: [16]

Colstrip	Gresham
Legislation implementing tax Contract between WECO and PGE on tax reimbursement	Resolution implementing tax
WECO pays taxes that it determines it owes, and PGE pays WECO *[Retroactive period]*	—

[16] The PUC filings on the Colstrip situation contain minimal facts. Additional details are available in the Interior Board of Land Appeals' decision, *W. Energy Co.*, GFS(MIN) 17(2007) (Sept. 12, 2007), available at https://www.doi.gov/oha/organization/ibla/Finding-IBLA-Decisions.

Government entities conduct audit and charge that WECO underpaid WECO disputes charge and notifies PGE PGE disputes obligation to WECO	PGE files court action to challenge tax
—	First judgment invalidates tax PGE does not pay tax after judgment *[Start of retroactive period]*
After adverse decision, WECO settles with government entities PGE settles with WECO	—
PGE files under ORS 757.259(1)	PGE files under ORS 757.259(1)
—	Second judgment makes tax valid *[End of retroactive period]*

In both situations, the tax obligation originated with a legislative act of a government body. Then PGE was involved in a legal dispute about the tax. Upon resolution of the legal dispute, PGE was required to pay the tax for a retroactive period and therefore filed for recovery under ORS 757.259(1).

The argument for application of ORS 757.259(1) is even stronger in the current situation than it was in Colstrip for a few reasons. First, the tax here is one that was assessed directly on PGE by a government agency (Gresham), not by an intermediary contractor. Second, PGE relied here on a court judgment declaring the tax to be void, unlawful, and unenforceable. PGE did not simply refuse to pay based on its own determination of its lawful tax obligation. Third, the legal dispute here was concluded by a court (a government agency) issuing a judgment that the tax was lawful and enforceable, and not by a settlement. All of these circumstances make it even more clear in the present circumstances that PGE's additional tax obligation was "lawfully imposed retroactively by order of another governmental agency."

The most important principle established by the Commission's decision in Colstrip is that the statutory phrase "[a]mounts imposed retroactively by order of another governmental agency" should not be read in a rigidly narrow way so as to refer only to the

original implementing tax legislation. Rather, when a utility has a good faith dispute with a government entity about its tax obligation and then that dispute is resolved, resulting in the utility owing additional taxes for a retroactive period, it is appropriate for the utility to apply for recovery of those additional taxes under ORS 757.259(1).

B. The Commission Should Interpret ORS 757.259(1) in a Manner That Is Consistent with the Colstrip Precedent and Mindful of the Legal Effect of Court Judgments

Following the Commission's precedent in Colstrip, and understanding how court judgments affected the imposition of Gresham's tax, it becomes clear that ORS 757.259(1) provides ample authority for recovery of PGE's retroactive tax obligation. We will address each of the key portions of the statutory text below.

1. "Lawfully Imposed"

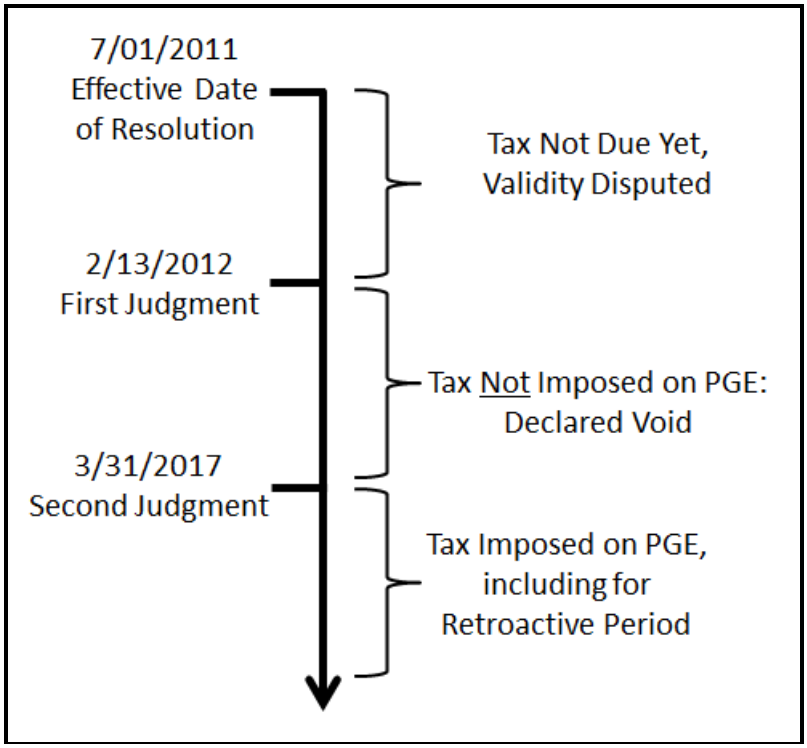
As discussed earlier, the Commission's precedent in Colstrip establishes that a tax is not "lawfully imposed" on a utility until after resolution of any disputes concerning its validity and the utility's legal obligation to pay it. Similarly, in the Idaho Power case cited by CUB, the Commission considered a *series* of government actions, resulting in the ultimate event that gave rise to the change in tax liability (a refund, in that case).[17] Gresham and Staff err in their analysis by focusing solely on Gresham's initial enactment of its resolution, as if it existed in a vacuum, without giving adequate consideration to the effect of PGE's legal dispute with Gresham and the effect of court judgments rendered in the legal proceedings.

Even if the Commission were to retreat from its position in Colstrip, the Commission should still rule that a tax is not "lawfully imposed" on a utility during a period of time when a court judgment is in effect that declares the tax to be void, unlawful, and unenforceable.

The following graphic illustrates the three time periods relevant to the question of when the additional tax was lawfully imposed. First, between the effective date of Gresham's

[17] *In re Idaho Power Co. Deferral of Recognized Tax Benefits*, UM 1562/UM 1582, Order No. 13-160, p. 6 (April 30, 2013) (*"Idaho Power Case"*).

resolution and the First Judgment, PGE was actively challenging the additional tax in court, and PGE's first payment for the additional tax was not due yet. Then, between the dates of the First Judgment and the Second Judgment, the additional tax was adjudged to be void, unlawful, and unenforceable. It was therefore not lawfully imposed on PGE during that period. Finally, upon entry of the Second Judgment, the tax was lawfully imposed on PGE, both as to ongoing taxes and based on past periods of revenue.



Gresham insists that the court proceedings are irrelevant and that the sole relevant fact was Gresham's "imposition" of the tax on the date the city adopted its Resolution. (Gresham Response, pp. 12-13.) But a tax may not in fact be "imposed on" a taxpayer who promptly disputes it in court. The Circuit Court recognized this. In its First Judgment, the court explained that Gresham's Resolution had "purport[ed] to increase" the tax (First Judgment, 2), and in its opinion the court similarly explained that the City had "attempted" to charge an increased tax. Opinion, p. 1, *NW Natural Gas Co. v. City of Gresham* (Jan. 12, 2012).

2. "Governmental Agency"

Again, following the Commission's precedent in Colstrip, a tax is imposed "by order of another governmental agency" when a government taxing authority is lawfully requiring payment after resolution of legal disputes as to the validity of the tax and the utility's obligation to pay it. Thus, in Colstrip, the fact that PGE's legal obligation arose as a direct result of a settlement with a contracting party did not remove the situation from the ambit of the statute.

Even if the Commission were to retreat from its position in Colstrip, the Commission should still rule that a court judgment qualifies as an "order of a government agency," which can result in lawful imposition of a tax. The Circuit Court's recent ruling on interest confirms that it was the courts, in combination with Gresham, that caused the additional tax to be imposed. Specifically, the Circuit Court observed that PGE had paid the additional amount of taxes "owed as a result of the Supreme Court's decision" and further that the additional taxes were "due under the City's resolution and the Supreme Court's ruling." Interest Opinion, pp. 3-4. Similarly, in the Idaho Power case, the Commission treated actions by the IRS and then by a congressional committee both to be orders of a government agency within the meaning of the statute.[18]

The case of *State v. Walker*, 192 Or App 535 (2004), cited by Gresham, provides support for interpreting the term "government agency" in a statute in a manner that best gives effect to the statute's purpose. The statute at issue in *Walker* provided that the limitations period for the crime of sodomy against a child started running upon a report to "a law enforcement agency or other governmental agency." The court concluded that "governmental agency" should be interpreted to mean an agency with an obligation to report instances of child abuse, such as a public school. 192 Or App at 698. Similarly, the term "government agency" in ORS 757.259(1) should be interpreted to mean a government agency that has the power to take action that results in lawful imposition of a tax. In this case, the combined actions of the City of Gresham and the state courts resulted in imposition of the retroactive tax obligation on PGE following conclusion

[18] *Idaho Power Case*, p. 6.

of the appeal.

3. "Retroactively"

In most circumstances, taxes are included in a utility's operating expenses for purposes of setting rates on a prospective basis. Accordingly, ORS 757.259(1) would typically apply when a utility is required to pay a tax cost, which it had no opportunity to include in the rate-setting process. The statute, however, is not limited to those taxes that are normally included in a utility's operating expenses. By its terms, the statute should also apply to tax costs that a utility would typically bill directly to customers as they are incurred.

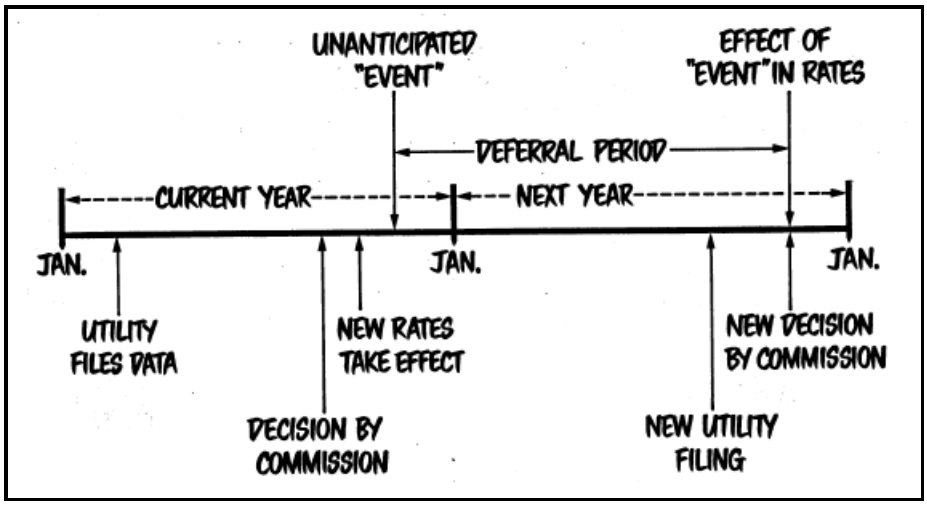
"'Retroactivity' ... is a deceptively simple word for a complex set of problems." *Whipple v. Howser*, 291 Or 475, 488–89 (1981). "In real time, all laws can operate only prospectively, prescribing legal consequences after their enactment; they cannot change the past. On the other hand, all new laws operate upon a state of affairs formed to some extent by past events." *Id.* The definition cited by Gresham is useful: "a retroactive action is one that affects *existing legal ... obligations arising out of past transactions*.'" (Gresham Response, p. 13 (quoting *U.S. Bancorp v. Department of Revenue*, 337 Or 625, 636-37 (2004) (emphasis added).)

Following the Commission's precedent in Colstrip, a tax is imposed on a utility "retroactively" when the utility's legal obligation to pay the tax is established (whether by settlement or judicial resolution of a dispute) *after* the relevant financial period for calculation of the tax has passed. This is also consistent with the Commission's decision in the Idaho Power case, in which it found that a current revenue event (entitlement to a refund) was retroactive within the meaning of ORS 757.259(1) because it *related to a prior tax year*.[19] In this case, the additional tax imposed on PGE as a result of the Second Judgment was "retroactive" because its amount was determined based on PGE's revenues in past years.

While PGE's current situation fits within ORS 757.259(1), it does not implicate the usual constitutional and policy concerns regarding retroactive rate-making. The classic

[19] *Idaho Power Case*, p. 6.

deferral situation, as reflected in the chart from legislative history attached to Gresham's brief (see copy below),[20] involves costs that would normally be included in the utility's operating expense calculations for purposes of setting rates. Thus, the first event in this graphic is the utility filing its data for a general rate case.



A scenario of that kind was presented in the Idaho Power case, involving *income taxes*, which are factored into rates on a prospective basis. Most of the events depicted in this graphic do not apply here because city privilege taxes in excess of 3.5% percent are not considered as part of general rate cases. For that reason, it is not relevant in the present circumstances to talk about whether the cost event (imposition of retroactive taxes) was "anticipated" in a prior rate case.[21]

Unlike the classic deferral situation, the present circumstances do not implicate traditional concerns about retroactive ratemaking for several reasons. First, because of OAR 860-022-0040, city privilege taxes in excess of the 3.5% threshold are never included in a utility's cost data for determining rates on a prospective basis. Rather, OAR 860-022-0040 requires a utility to bill customers for the cost of the excess taxes as they are incurred, on a dollar-for-dollar basis. Second, the additional tax obligation was not legally imposed on PGE

[20] Attachment B, H.B. 2145, House Committee on Environment and Energy, Testimony of Charles Davis at 10 (Mar. 11, 1987).

[21] For the same reason, it is also not appropriate to perform an earnings text, as CUB suggests. (CUB Response, p. 6.)

and was not paid by PGE until shortly *after* PGE filed its application with the Commission.

VII. IT IS FAIR THAT CUSTOMERS WHO BENEFIT FROM THE ADDITIONAL TAX PAYMENT WILL BE CHARGED FOR THE ADDITIONAL TAX

While PGE's right to recover the additional tax cost from customers in Gresham is clearly established by OAR 860-022-0040, the Commission may properly exercise its discretion under ORS 757.259(1) and ORS 757.210 to determine *what period of time* is "fair, just, and reasonable" for recovery of the cost. In doing so, the Commission may "exercise . . . considerable discretion to balance the interests of utility investors and customers and the public in general[.]" *Gearhart v. Pub. Util. Comm'n of Oregon*, 255 Or App 58, 61, 299 (2013), *aff'd*, 356 Or 216 (2014). PGE proposed a five-year period of recovery because the additional taxes are based on a five-year period of revenues, and Gresham's original expectation was that the taxes would be collected in due course, which ended up amounting to a five-year period. Five years is therefore a reasonable period for spreading the cost now so as to reduce the impact on customers' monthly bills.

In its exercise of discretion, the Commission should ask who will benefit from the $7 million in additional taxes paid by PGE to Gresham in March 2017. The answer is simple. Customers who *currently* live in Gresham benefit to the extent that Gresham spends the additional tax revenue on current services to residents, such as police and firefighting.[22] Customers who will live in Gresham in *future* years will benefit to the extent that Gresham invests the additional tax revenue in buildings, equipment, and parks, or sets the money aside to fund future services to residents.[23] It would be reasonable for the Commission to conclude that Gresham may use the additional funds to provide benefits to its residents over the five-year collection period that PGE has proposed.

To the extent that the Commission has concerns about spreading the charges equitably among current customers and future customers—in other words, whether the charges

[22] *See* Gresham Response, p. 2 (revenues are used to fund police and fire positions, including salaries and benefits).
[23] *See* Gresham Response, p. 2 (revenues are used for assets such as fire stations and parks).

should be spread over five years as PGE proposes, or a shorter or longer period—the Commission may hold an evidentiary hearing on the subject of how the City expects to spend the additional revenue.

Gresham and Staff both make arguments about fairness *to the City*, and Gresham argues vigorously for deference to its taxing authority over its residents. (Gresham Response, pp. 6-7; Staff Response, p. 13.) But the Commission's focus is fairness to *utilities* and *customers*. ORS 756.040(1). Gresham chose to tax utilities, rather than taxing city residents directly. Gresham has no right to control how and when PGE's tax expense is billed to utility customers.

VIII. POLICY CONSIDERATIONS SUPPORT PGE'S APPLICATION

PGE never offered to serve as Gresham's tax collector. But Gresham chose to raise revenue by increasing taxes on utilities, with the full knowledge and expectation that every dollar of those taxes would ultimately be paid for by Gresham residents, as required by OAR 860-022-0040. Because PGE was the taxpayer, it was put in the position of having to determine at the outset whether the tax increase was lawful and should be paid. And then, having concluded that the legality of the tax increase was doubtful, PGE was the proper party to seek a judicial ruling. PGE therefore bore the burden and expense of a multi-year court proceeding, which would provide no financial benefit to PGE if it were successful. Throughout the court proceedings, while PGE was absorbing the legal expenses, PGE always expected that customers would pay for the cost of any tax liability that was determined by the courts to exist. That is because OAR 860-022-0040 makes clear that the cost of any city privilege taxes over 3.5 percent of gross revenue collected within that city will be borne by city residents, and ORS 757.259(1) provides a mechanism for recovery of that cost when the additional tax obligation is imposed on a retroactive basis. There is no reason to penalize PGE now when it acted at all times consistent with its legal obligations to Gresham and consistent with its obligations to customers.

Gresham's position in this proceeding is not surprising. Gresham passed its tax increase in 2011 because it had a severe budget deficit and was seeking new sources of revenue

to fund city services. It can be politically difficult to pass new taxes. Residents would likely resist imposition of any new taxes directly on them. Gresham's tax increase on utilities accomplished the same thing, but through an indirect route—residents would pay for the tax through a surcharge on their utility bills, and the increase might not attract much attention. Now, after the conclusion of the court proceedings, Gresham has collected an additional $7 million in revenue, which it can use to fund city services this year or over the next several years. Yet Gresham is vigorously advocating against imposition of that cost on its residents. For Gresham, that would be the best of both worlds—collecting revenue to fund city services, without its residents having to pay for it. Gresham is seeking a windfall.

As for Staff and CUB, they purport to take the side of customers in this proceeding and therefore largely support Gresham's arguments. In doing so, however, they adopt arguments that fundamentally misrepresent the effect of court judgments and further misrepresent, and seek to avoid, the requirements of OAR 860-022-0040 and ORS 757.259.

IX. CONCLUSION

Within the legal framework of OAR 860-022-0040 and ORS 757.259, PGE must be permitted to recover its retroactive expense for the additional Gresham privilege tax. The Commission should approve PGE's application and permit recovery of the retroactive tax expense over a period of five years, or over a shorter or longer period as the Commission may determine is appropriate in its discretion.

DATED this 13th day of June, 2017.

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ATTACHMENT 1

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 OPINION

INTRODUCTION

This case is before the court on the City of Gresham's petition for supplemental relief pursuant to ORS 28.080 after the Oregon Supreme Court's decision in *Northwest Natural Gas Co. v. City of Gresham,* 359 Or 309 (2016). The only issues in dispute are (1) whether the City is entitled to recover prejudgment interest on the additional utility license fees paid by defendant Portland General Electric Company (PGE) after the Supreme Court's ruling; and (2) if so, the interest rate that should be used in calculating the amount of prejudgment interest owed.

For the reasons stated in this opinion, the court concludes that the City is entitled to supplemental relief in the form of prejudgment interest on the additional license fees paid by PGE, calculated at the rates of return on the City's investment portfolio during the relevant time period.

BACKGROUND

In May, 2011, the City adopted a resolution that increased certain utility license fees from 5 percent of gross revenues to 7 percent of gross revenues. Plaintiffs brought this action, seeking a declaration that the resolution violated and was preempted by ORS 221.450. In its answer to the complaint, the City did not assert and affirmative defenses or counterclaims, but its prayer for relief included a request for a declaration that its license fee was lawful and enforceable and a request for "such other relief as the Court deems just and equitable under the circumstances." In an opinion dated January 12, 2012, this court ruled in plaintiffs' favor. The court entered judgment declaring that the City's resolution, "to the extent it purports to increase its Utility License Fee owed by Plaintiffs from 5% to 7% of gross revenue, violates ORS 221.450 and is void, unlawful and unenforceable." Judgment dated February 1, 2012.

Based on that judgment, PGE stopped collecting the increased fees from its ratepayers and remitted to the City utility license fees of 5 percent of gross revenue. The City appealed this court's judgment, but did not seek a stay of the judgment pending appeal. The Oregon Supreme Court held that the license fee was a "privilege tax" within the meaning of ORS 221.450, and that the affected utilities were operating "without a franchise" within the meaning of the statute. *Northwest Natural Gas Co. v. City of Gresham*, 359 Or at 312. The court further held that the City "was not preempted by ORS 221.450 from imposing the seven percent privilege tax" on PGE. *Id.* The court reversed the judgment entered by this court, and remanded for entry of

judgment in favor of Intervenor-Plaintiff Rockwood Water People's Utility District (Rockwood PUD). *Id.* at 350.

After the appellate judgment issued, this court entered a limited judgment in favor of Rockwood PUD, and entered a limited judgment of dismissal based on a settlement between the City and plaintiff Northwest Natural Gas Company. The City then filed a petition for supplemental relief under ORS 28.080, seeking supplemental relief from PGE. PGE objected, contending among other things that supplemental relief was premature because this court had not yet entered a new declaratory judgment after the Supreme Court's reversal of this court's original declaratory judgment.

This court agreed that supplemental relief was premature at that juncture. On March 29, 2017, this court entered a limited judgment declaring the rights and obligations of the remaining parties—the City and PGE—consistent with the Supreme Court's opinion. The City then filed an amended petition for supplemental relief. In its amended petition, the City acknowledged that PGE had paid the additional 2 percent of gross revenues owed as a result of the Supreme Court's decision, but alleged that PGE had failed to pay any interest on the previously unpaid license fees. The City sought to recover prejudgment interest on those previously unpaid license fees calculated at the rate of 9 percent per annum pursuant to ORS 82.010.

In response, PGE acknowledged that it did not pay any interest on the previously unpaid license fees. PGE contended that it did not owe prejudgment interest because (1) the City did not plead an entitlement to prejudgment in its original answer to the complaint; (2) prejudgment interest was not "due" until the court entered its second declaratory judgment on March 29, 2017; (3) the City has not satisfied other legal prerequisites to an award of prejudgment interest;

and (4) even if the City is entitled to recover prejudgment interest, the amount owed should not be calculated at the statutory rate.

DISCUSSION

The City's prayer for relief in its original answer "is sufficient to embrace a claim for interest where, under all the circumstances of the case, it seems equitable to do so." *Cross of Malta Bldg. Corp. v. Straub*, 257 Or 376, 384 (1971). It is not sufficient to embrace a claim to recover interest on moneys that become due under ORS 82.010(1)(a). *See Emmert v. No Problem Harry, Inc.*, 222 Or App 151, 158 (2008); *Lithia Lumber Co. v. Lamb*, 250 Or 444, 447 (1968). The City did not plead a claim for prejudgment interest under ORS 82.010(1)(a) until it filed its petition for supplemental relief under ORS 28.080 on February 14, 2017, it did not seek a stay of this court's declaratory judgment pending appeal, and the additional 2 percent license fee may not have been "due" within the meaning of ORS 82.010 until this court entered a declaratory judgment consistent with the Supreme Court's opinion on March 29, 2017.

The court concludes under the circumstances that the City is not entitled to recover prejudgment interest under ORS 82.010, but it is not precluded from recovering prejudgment interest as equitable supplemental relief under ORS 28.080. *See Dry Canyon Farms v. U.S. National Bank of Oregon*, 96 Or App 190, 193-94 (1989). The court further concludes that it has discretion to award interest on the money that would be due under the City's resolution and the Supreme Court's ruling. *See Strickland v. Arnold Thomas Seed*, 277 Or 165, 184 (1977); *Stephan v. Equitable S & L Assn.*, 268 Or 544, 571-73 (1974). It is undisputed that PGE did not remit the additional license fees due beginning on March 1, 2012 until 2016-17.

"The manner in which this discretion will be exercised depends upon the facts and circumstances of the particular case." *Strickland*, 277 Or at 184. 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. The parties have offered declarations supporting various rates of interest that might be appropriate to compensate the City for the loss of use of those funds. The court concludes that the most appropriate of the alternative rates offered by the parties are the rates the City earned on its total investment portfolio during the relevant period. *See Declaration of Mark Tolliver,* p. 2.[1]

CONCLUSION

For the reasons stated in this opinion, the City is entitled to supplemental relief in the form of prejudgment interest calculated at the rates the City earned on its total investment portfolio during the relevant time period. The City's attorney may submit an appropriate form of judgment consistent with this opinion.

DATED this 5th day of June, 2017.

Stephen K. Bushong
Circuit Court Judge

[1]PGE contends that the rates earned on investments in the Local Government Investment Pool or the U.S. Treasury rates would be appropriate. *See Delaration of Natalia Pavlova,* ¶¶ 3, 4. However, the City only invests a portion of its investment portfolio in the Local Government Investment Pool. *Declaration of Mark Tolliver*, p. 2.