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

I. INTRODUCTION

As a result of a judgment entered on March 31, 2017, PGE became legally obligated to pay additional privilege taxes to the City of Gresham based on revenues collected within the city during a period of several years starting January 13, 2012. The issue before the Commission now is whether PGE may implement a new rate schedule reflecting the additional privilege tax obligation as an amount "lawfully imposed retroactively by order of another governmental agency" under the authority of ORS 757.259(1). A secondary issue, assuming the Commission does permit a new rate schedule reflecting the retroactive privilege tax obligation, is whether the schedule should apply to customers within the City of Gresham in accordance with OAR 860-022-0040.

II. FACTUAL BACKGROUND

A timeline is provided below. We assume the Commission is familiar with the general course of events, as previously described in PGE's Advice Filing of February 24, 2017, Staff's Report of April 13, 2017, and PGE's letter of April 14, 2017. For purposes of our analysis under ORS 757.259(1), only a few dates are critical. First, on July 1, 2011, as a result of a Resolution passed by the City Council of Gresham, PGE became obligated to pay additional privilege taxes to Gresham, at the rate of 7% instead of 5% of gross revenues collected within the city. PGE's payments to Gresham would be due annually on March 1, based on the preceding year's revenues. Second, on February 13, 2012, as a result of a circuit court opinion and

judgment determining that Gresham had exceeded its authority, PGE was relieved of any obligation to pay the additional 2% in privilege taxes. Third, on March 31, 2017, as a result of an opinion of the Oregon Supreme Court and a new circuit court judgment entered upon remand, PGE again became obligated to pay the additional 2% in privilege taxes to Gresham. The retroactive component of that obligation, calculated based on PGE's gross revenues collected within Gresham in past years, *and for which PGE has not yet charged its customers in Gresham*, amounts to approximately $7 million. The underlying period of revenue runs from January 13, 2012, through August 31, 2016, which is the period of time when PGE was not charging its customers for the additional 2% in privilege taxes. PGE filed Advice 17-05, Schedule 134 to recover the $7 million through separate charges to Gresham customers.[1]

DATE	EVENT
05/17/2011	City of Gresham passes Resolution adopting 2% privilege tax increase, changing the rate from 5% to 7%
07/01/2011	Effective date of Gresham Resolution
07/01/2011	*PGE implements additional 2% privilege tax on Gresham customer bills*
07/01/2011	PGE files court action for declaratory judgment regarding lawfulness of Gresham's additional 2% privilege tax
01/12/2012	Circuit court issues opinion determining that the additional 2% privilege tax exceeds Gresham's authority
01/13/2012	*PGE stops including additional 2% privilege tax on customer bills*
02/13/2012	Circuit court enters judgment consistent with its opinion, declaring that Gresham's additional 2% privilege tax is "void, unlawful, and unenforceable" (signed 2/1/2012, filed 2/2/2012, entered on court docket 2/13/2012)
03/01/2012[2]	PGE makes annual privilege tax payment to Gresham, applying 5% rate to 2011 revenues
03/13/2012	Gresham files appeal without seeking stay of circuit court judgment

[1] The exact amount, as set forth in PGE's filing, is $6,983,739. For simplicity's sake we will use the rounded amount of $7 million in this brief.
[2] Each payment referenced in this table was transmitted within a day or two of the date cited.

03/01/2013	PGE makes annual privilege tax payment to Gresham, applying 5% rate to 2012 revenues
03/01/2014	PGE makes annual privilege tax payment to Gresham, applying 5% rate to 2013 revenues
07/02/2014	Court of appeals issues opinion reversing circuit court decision
09/03/2014	PGE petitions to Oregon Supreme Court, and circuit court judgment remains in effect
03/01/2015	PGE makes annual privilege tax payment to Gresham, applying 5% rate to 2014 revenues
03/01/2016	PGE makes annual privilege tax payment to Gresham, applying 5% rate to 2015 revenues
05/05/2016	Oregon Supreme Court issues opinion affirming in part and reversing in part opinion by court of appeals
06/09/2016	PGE requests reconsideration of Oregon Supreme Court decision
07/14/2016	Oregon Supreme Court denies reconsideration
08/04/2016	Oregon Supreme Court issues appellate judgment and remands case to circuit court
08/18/2016	Appellate judgment entered in circuit court
08/25/2016	PGE makes additional 2% privilege tax payment to Gresham based on revenues from 7/1/2011 through 1/12/2012
09/01/2016	*PGE again implements additional 2% privilege tax on Gresham customer bills*
Fall 2016 – Winter 2017	PGE and City of Gresham engage in settlement discussions, no settlement reached
02/24/2017	PGE files Advice No. 17-05, Schedule 134 for recovery of Gresham's 2% tax increase for the period from 1/13/2012 through 8/31/2016
03/01/2017	PGE makes annual privilege tax payment to Gresham, applying 7% rate to 2016 revenues
03/01/2017	PGE makes additional 2% privilege tax payment to Gresham based on revenues from 1/13/2012 through 12/31/2015
03/31/2017	Circuit court enters new judgment in accordance with Oregon Supreme Court opinion, declaring that Gresham's' additional 2% privilege tax is "lawful and enforceable" (signed and filed 3/29/2017, entered on court docket 3/31/2017)

04/21/2017	PUC suspends effective date of Advice No. 17-05 for six months, from 5/01/2017 to 11/01/2017

Copies of the circuit court judgments from February 13, 2012 (the "First Judgment") and March 31, 2017 (the "Second Judgment") are attached for reference.

Still pending before the circuit court is the question of whether any interest is due on the retroactive tax obligation. If the court does determine that some amount of interest is due, then PGE will add such amount to its calculations for Schedule 134.

III. THE COMMISSION HAS AUTHORITY TO IMPLEMENT THE PROPOSED SCHEDULE

ORS 757.259(1) provides a mechanism for including in rates any changes in a utility's expenses that result from government action. As expressed by PUC Commissioner Charles Davis at the time of the law's adoption, "it is not a question of whether the changes in revenue or in expense resulting from government action will be included in rates charged for service, it is a question of when that should begin." (Written Testimony of Charles Davis Before the Senate Business, Housing, & Finance Committee, May 21, 1987 (emphasis original).) The statute answers the question of when: "a rate or rate schedule . . . [m]ay reflect . . . [a]mounts lawfully imposed retroactively by order of another governmental agency." ORS 757.259(1). 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.

In the matter at hand, PGE was not legally obligated to pay the additional privilege taxes to the City of Gresham for a five-year period, from February 13, 2012 until March 31, 2017, during which time the circuit court's initial declaratory judgment remained in effect. Specifically, the judgment declared that the additional privilege tax was "void, unlawful, and unenforceable." (First Judgment, 2.) Then, on March 31, 2017, following the appeal, and as a result of the circuit court's new declaratory judgment that the tax was "lawful and enforceable," PGE became obligated to pay the additional privilege taxes on a retroactive basis. (Second Judgment, 2.) These circumstances fit within the authority provided by ORS 757.259(1) and are

consistent with the statute's intended purpose. It is fair, just, and reasonable to apply the statute here to permit PGE to recover costs that were imposed retroactively as a result of governmental action as contemplated by the statute.

Furthermore, including the additional amount of taxes as a separate charge on Gresham customers' bills is required by OAR 860-022-0040. That rule sets a threshold amount of 3.5% for city taxes that are based on a utility's gross revenues from operations within the city. City taxes up to the 3.5% threshold are included in the utility's general operating expenses, which in turn form the basis for setting the utility's rates that are charged to customers in the utility's entire service territory. City taxes in excess of the 3.5% threshold must be separately charged to customers who reside in the city that imposed the taxes. This rule ensures that a city does not unfairly raise revenue for its own residents by imposing taxes that are ultimately paid for by customers throughout the service territory—shifting the costs for city services from residents to nonresidents. PGE has at all relevant times included Gresham's taxes up to the 3.5% threshold in its operating expenses, and PGE has separately charged Gresham customers for incremental taxes above 3.5%.[3] In accordance with the rule, any additional amount of taxes that PGE is now obligated to pay Gresham on a retroactive basis must be charged to Gresham customers.

A. ORS 757.259 Expressly Authorizes the Commission to Implement PGE's Proposed Schedule 134

ORS 757.259(1) provides that "[i]n addition to powers otherwise vested in the Public Utility Commission, and subject to the limitations contained in this section, under amortization schedules set by the commission, a rate or rate schedule: (a) May reflect: (A) Amounts lawfully imposed retroactively by order of another governmental agency[.]" In opposing the implementation of Advice No. 17-05, Gresham offers strained interpretations of the phrase "imposed retroactively" and the term "governmental agency" to support its argument that

[3] During the period when the 7% rate was deemed unlawful, PGE applied the rate of 5% and charged Gresham customers for the 1.5% increment above the 3.5% threshold. PGE is now applying the 7% rate and charging Gresham customers for the 3.5% increment above the 3.5% threshold.

the statute does not apply here. (Gresham Letter to Commission, March 31, 2017, pp. 3-4.) Correctly interpreted, the statute applies broadly to any tax, charge, fee, or other amount that any government or governmental subdivision or entity imposes on a utility based on a past service period. To the extent the statute is susceptible to multiple interpretations, the legislative history supports the conclusion that it does apply in these circumstances, and that it authorizes the Commission to implement Schedule 134.

1. Statutes are interpreted to carry out legislative intent, which is determined based on the text and context of the statute and, if necessary, the legislative history.

Statutory interpretation requires discerning the intent of the legislature. *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or 606, 610 (1993) (hereinafter "*PGE v BOLI*") (citing ORS 174.020). The first step in doing so is examining "both the text and context of the statute." *Id.* If the legislature's intent is not clear from the text and context inquiry, the next step is considering legislative history. *Id.* at 611. If legislative intent is still unclear, the next step is to apply maxims of statutory construction. *Id.* at 612. The text and context of ORS 757.259(1) clearly indicate the legislature's intent that ORS 757.259(1) would apply to the present situation, and to the extent the text is open to any question as to legislative intent, legislative history resolves it and supports this interpretation.

2. The text, context, and legislative history of ORS 757.259 show that the legislature intended for "governmental agency" to be broad and inclusive, encompassing any government actor capable of unilaterally imposing costs on a utility.

"Governmental agency" is a broad, inclusive term intended to cover every sort of instrumentality through which the power of government may be exercised, and which encompasses cities, city councils, courts, and any combination thereof. Gresham argues that the plain meaning of ORS 757.259(1) "suggests that cities, like Gresham, may not be included"

within the term "governmental agency." (Gresham Letter to Commission, March 31, 2017, p. 4.) The narrow interpretation Gresham suggests does not stand up to Oregon's rules of statutory interpretation. The term properly includes local government units like the City of Gresham. The term also properly includes the state courts, which played a role in the retroactive imposition of Gresham's tax on PGE.

Under Oregon law, "the text of the statutory provision itself is the starting point for interpretation and is the best evidence of the legislature's intent." *PGE v BOLI*, 317 Or at 610–11 (citing *State v. Person*, 316 Or 585, 590; *State ex rel. Juv. Dept. v. Ashley*, 312 Or 169, 174 (1991)). The "rule that words of common usage typically should be given their plain, natural, and ordinary meaning" applies at this level of analysis. *Id.* at 611.

Both the legal usage and ordinary usage of the term "governmental agency" support a broad, inclusive interpretation. The common legal definition of "governmental agency" is "a subordinate creature of federal, state or local government created to carry out a governmental function or to implement a statute or statutes." Black's Law Dictionary, 626 (5th ed 1979).[4] In ordinary usage, "governmental" means "of or relating to government or to the government of a particular political unit." Webster's Third New Int'l Dictionary, 983 (unabridged 1971); *Bayridge Assocs. Ltd. P'ship v. Dep't of Revenue*, 321 Or 21, 28 (1995) (quoting Webster's Third New Int'l Dictionary, 983 (unabridged 1993)). "Agency" means "a person or thing through which power is exerted or an end is achieved" or "a department or other administrative unit of a government." Webster's Third New Int'l Dictionary, 40 (unabridged 1971). Applying any of the above definitions, "governmental agency" clearly encompasses the City of Gresham, which is a political subdivision and a unit of government, as well as the courts, which carry out a government function.

[4] This is the edition of Black's Law Dictionary that was current at the time the statute was passed.

Further, while the legislature did not define the term in Chapter 757, it has defined "governmental agency" and "government agency" elsewhere in the statutes, and administrative agencies have defined and used the terms as well. These other definitions and uses are broad and inclusive, and would encompass the City of Gresham and the state courts.

- In Title 8 of the ORS (Commercial Transactions), "governmental agency" is defined to mean "an executive, legislative or judicial agency, department, board, commission, authority, institution or instrumentality of the federal government or of a state or of a county, municipality or other political subdivision of a state." ORS 84.004(9).

- In Title 36 of the ORS (Public Health and Safety), "government agency" is defined to mean "a unit of federal, state, local or tribal government." ORS 432.005(11).

- In Chapter 141 of the OAR (Department of State Lands), "government agency" means "an agency of the Federal Government, State of Oregon, and every political subdivision thereof." OAR 141-082-0255(68).

- In Chapter 150 of the OAR (Department of Revenue), "governmental agencies" includes "federal, state, and local subdivisions, such as towns and counties." OAR 150-316-0255(1).

While these provisions do not control the meaning of "governmental agency" in ORS 757.259(1), they indicate a common usage that is broad and inclusive.

"If the legislature's intent is clear from the above-described inquiry into text and context, further inquiry is unnecessary." *PGE v BOLI*, 317 Or at 611. In the case of ORS 757.259(1), the legislature's intent is clear from the text and context, and examination of legislative history is therefore unnecessary. However legislative history, too, supports a broad and inclusive interpretation of "governmental agency" as used in ORS 757.259(1).

The legislature enacted ORS 757.259(1) to accommodate situations where a utility is forced to pay costs over which it has no control. The legislative history of HB 2145, the bill enacting the statute at issue, is replete with evidence of that intent, and a broad, inclusive

interpretation of "governmental agency" is required to carry that intent out.

Commissioner Charles Davis of the PUC provided written testimony to the House Committee on Environment and Energy on March 11, 1987, and to the Senate Business, Housing, & Finance Committee on May 21, 1987, in support of the bill. In his testimony, Commissioner Davis explained that there are "circumstances in which expenses unanticipated at the time rates were approved by the Commissioner would have been included in rates had the Commissioner known of them. These often are the result of governmental action." (Davis Testimony, March 11, 1987, 1-2 (emphasis added).[5]) As examples of governmental action to which the provision would apply, Commissioner Davis cited acts of the Oregon Legislature (a state legislative body) and the Nuclear Regulatory Commission (a federal executive agency). (*See Id.* at 2.) These examples are consistent with the broad, inclusive scope of the term "governmental agency" in ORS 757.259(1). There is no reasonable interpretation of "governmental agency" that includes both a federal agency and a state legislature, but which excludes the City of Gresham and state courts.

A broad interpretation of "governmental agency" is also consistent with the overall purpose of the statute. In oral testimony, Bob Warren, a PUC representative, commented that the provision allows the Commission "to recognize retroactively costs imposed by another governmental agency over which the utility had no control." (Leg Hist., p. 14.) Empowering the Commission to include these uncontrollable, retroactive costs is consistent with utility ratemaking policy, which encourages utilities to operate efficiently while avoiding imposition of confiscatory rates. *See, e.g.,* Or. Op. Atty. Gen. OP-6076, *1, 1987 WL 278316 (hereinafter *"1987 AG Opinion"*) at *2 (citing *Narragansett Elec. Co. v. Burke,* 415 A2d 177, 178-79 (RI

[5] Commissioner Davis' written testimony to the Senate Committee was substantially identical to his testimony to the House Committee.

1980); *Id.* (citing *Bd. of Pub. Util. Comm'rs v. N.Y. Tel. Co.*, 271 US 23, 31 (1926)).

3. The excess privilege tax was "lawfully imposed retroactively" because PGE was required this year to pay a tax based on its revenues in a past service period.

The privilege tax PGE seeks to recover in Schedule 134 is precisely the sort of "[a]mount[] lawfully imposed retroactively" that ORS 757.259(1) contemplates. Gresham points out that when it originally imposed the fees in 2011, it did so prospectively, not retroactively, and concludes that ORS 757.259(1) therefore has no application here. (Gresham Letter to Commission, Mar. 31, 2017, p. 4.) The premise is obviously true, but it does not support Gresham's conclusion. While Gresham attempted to impose the privilege tax prospectively, the circuit court invalidated that attempt, and for the period of February 2012 through March 2017, the tax was not, in fact, imposed. Instead, the tax was only "lawfully imposed" after the circuit court entered judgment restoring the validity of the tax on remand from the Supreme Court—i.e., retroactively.

The circuit court issued its opinion that the privilege tax was invalid on January 12, 2012, and it entered judgment declaring that the Privilege Tax Resolution was "void and unenforceable" on February 13, 2012. (First Judgment, 1-2.) Gresham filed an appeal on March 13, 2012. At that time, Gresham could have obtained a stay pursuant to court procedures. *See* ORS 19.330-350. Had it done so, it could have continued to require PGE to pay the tax on a prospective basis. Because Gresham elected not to seek a stay, the circuit court's judgment remained in effect until after the appellate 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 and based on the new declaratory judgment of the circuit court.

4. Implementing PGE's proposed Schedule 134 is consistent with PUC precedent under ORS 757.259(1).

Implementing Schedule 134 is consistent with past practice of the Commission exercising the power granted to it by ORS 757.259(1). The Commission previously authorized

recovery of amounts lawfully imposed retroactively by other government agencies pursuant to Advice No. 08-16, Colstrip Tax and Royalty Payment Adjustment. (*See* PGE Advice No. 08-16, filed Nov. 11, 2008; Staff Report dated July 17, 2009, for Public Meeting of July 28, 2009; PUC Public Meeting Agenda for July 28, 2009; and PUC Minutes of Public Meeting on July 28, 2009.) In the Colstrip matter, the US Department of Interior and Montana Department of Revenue had charged the operator of the Colstrip plant for underpayment of taxes and royalties dating back to 1991 and the operator had passed the charge on to PGE as an owner of the Colstrip plant. PGE initially disputed the charges but ultimately reached a settlement to pay the charged taxes and royalties, totaling $2.201 million, but no interest or fines. The Commission approved PGE's proposed schedule to recover the payment in rates over a one year period under the authority of ORS 757.259(1).

In all relevant respects, the Colstrip tax matter and the Gresham tax matter are similar, and they should be subject to the same ratemaking treatment. First, each involved a demand by a government actor for payment of a tax. Second, in response to each of those demands, PGE initially disputed the obligation and then, following resolution of the dispute (either by court judgment or by settlement), PGE became legally obligated to pay the tax. Third, the amount of the tax obligation was determined based on a past service period, and the government actor contended that the tax should have been paid in the past—in other words, the tax was retroactive. And finally, close in time to when it actually made the payment, PGE filed a proposed schedule to recover the tax payment in its rates. The Commission approved PGE's proposed schedule for recovery of the retroactive Colstrip tax payment. The Commission should act in a consistent manner and similarly approve PGE's proposed schedule for recovery of the retroactive Gresham tax payment.

B. The Proposed Schedule 134 is Fair and Reasonable

When the City of Gresham increased its privilege tax from 5% to 7%, PGE was required by OAR 860-022-0040 to pass on that increase to Gresham customers, dollar for dollar.

The tax increase would have no effect on PGE's bottom line. Rather than simply accepting the increase, PGE acted in the interests of its customers when it challenged the lawfulness of the additional Gresham tax in court, incurring substantial legal expense to do so. PGE continued to act in the interests of its customers when it stopped charging them for a tax that the circuit court had determined to be unlawful. The Commission is responsible for "balanc[ing] the interests of the utility investor and the consumer in establishing fair and reasonable rates." ORS 756.040(1). Under the circumstances, where PGE acted for the benefit of its customers rather than for its own profit, the Commission should not penalize PGE but rather should allow PGE to recover its costs.

Schedule 134 reflects proper balancing of the interests of the utility and its customers in establishing fair and reasonable rates. As explained below, Schedule 134 is fair both to PGE and to its customers.

As to PGE, Schedule 134 is fair for the reason noted above—that PGE pursued the approach that it believed was best for its customers—and for three additional reasons. First, the privilege tax is a cost that is beyond PGE's ability to control; it is imposed by a government agency. This is not a circumstance involving operational efficiency or business risks. Second, PGE at all times complied with its legal obligations and with the court judgments that were in effect with respect to the privilege tax. Third, the $7 million that PGE was required to pay and did pay to Gresham this year is a current cost of doing business and providing service to Gresham customers. It is therefore fair and reasonable for the Commission to allow PGE to recover the cost starting this year.

As to PGE's customers, Schedule 134 is fair for the reason noted above—that customers stood to benefit from PGE's challenge to the legality of Gresham's tax increase—and for two additional reasons. First, the customers were protected from paying for Gresham's tax increase during the period of time when that increase was determined by a court to be unlawful. Second, Gresham received an extra $7 million in revenue this year as a result of PGE's retroactive payment. Gresham can use those funds to pay for city services this year. Gresham

can also invest those funds in order to pay for city services in future years. Gresham cannot use those funds to improve the services it provided to residents in past years. It is therefore fair and reasonable to charge current and future customers for the extra privilege taxes paid to Gresham.

Reasonable minds may differ as to the most appropriate recovery period—whether five years as proposed by PGE or a shorter period. The Commission certainly has flexibility in setting the period over which PGE recovers the $7 million. But there is no basis to force PGE to absorb this cost without recovery from customers, particularly when PGE has followed the ratemaking framework set forth in ORS 757.259(1) and OAR 860-022-0040.

C. PGE's Proposed Schedule 134 Does Not Constitute Retroactive Ratemaking

Retroactive ratemaking orders are prohibited unless they are expressly authorized by the legislature and are consistent with the Oregon and U.S. Constitutions. *1987 AG Opinion*, *1. ORS 757.259(1) creates a specific exception to the general prohibition on retroactive ratemaking. Gresham implicitly concedes that if ORS 757.259(1) applies, then there is no retroactive ratemaking problem. (Gresham Letter to Commission, Mar. 31, 2017, p. 5 ("Because there is no statutory exception applicable, PGE appears to be requesting authority to engage in retroactive ratemaking.") (emphasis added).) The statute applies here for all of the reasons discussed above.

Even without the statute, the Commission would have authority to approve Schedule 134 because it is fair and reasonable and, as explained below, 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.

1. Schedule 134 does not implicate any of the policy reasons behind the rule against retroactive ratemaking.

Schedule 134 does not implicate any of the usual concerns that can make retroactive ratemaking unfair and unreasonable and that give rise to the general rule against it. The purpose of the rule is to protect the public by "ensuring that present consumers will not be required to pay for past deficits of the company in their future payments," and by preventing the

utility from "employing future rates as a means of ensuring the investments of its stockholders." *1987 AG Opinion*, *1-2 (citing *Georgia Ry. & Power Co. v. Railroad Commission of Georgia*, 278 F 242 (DC Ga 1922). If utilities were allowed to impose past operational deficits on current customers to protect their investors, they would "lose all incentive to operate in an efficient, cost-effective manner, thereby leading to higher operational costs and eventual rate increases." *Id.* at *2 (citing *Narragansett Elec. Co. v. Burke*, 415 A2d 177, 178-79 (RI 1980)).

The privilege tax was not an operational cost within PGE's responsibility to control. Schedule 134 will allow PGE to pass on the cost of the increased privilege tax, dollar-for-dollar, to the customers who will benefit from it. This is no different in principle from the ratemaking treatment of privilege taxes that PGE is paying based on current periods—the payment by PGE is current, and the benefit to Gresham residents is current. The taxes imposed by Gresham should have a net neutral effect on PGE's bottom line.

2. Even without the authorization in ORS 757.259(1), Schedule 134 would not constitute prohibited retroactive ratemaking.

The general rule against retroactive ratemaking applies "when past profits or losses, including past expenses, are incorporated into future rates." *1987 AG Opinion*, *1. PGE filed Advice 17-05 on February 24, 2017. PGE paid the $7 million, as it was legally obligated, after it filed Advice 17-05 requesting Schedule 134. Thus when PGE filed Advice 17-05, the $7 million was an anticipated expense and PGE was requesting that the Commission allow it to charge for the expense in prospective rates. This is not retroactive ratemaking in the generally understood sense. The only sense in which the privilege tax is "retroactive" is that it is calculated based on PGE's gross revenues collected in a past period. PGE's payment of the tax is a current expense.

D. OAR 860-022-0040 Requires Charging Gresham's Additional Taxes to Customers in Gresham

It has always been the expectation that the additional privilege taxes imposed by the City of Gresham would be paid for through charges to PGE's customers in Gresham. That

approach is fair and reasonable, and it is required by OAR 860-022-0040, which governs the treatment of city taxes within the Commission's ratemaking process. That rule applies broadly to "all business or occupation taxes, license, franchise or operating permit fees, or other similar exactions or costs . . . imposed upon energy utilities by any city in Oregon for engaging in business within such city or for use and occupancy of city streets and public ways." OAR 860-022-0040(1). Gresham's franchise tax easily fits within the scope of the rule.

With respect to any such taxes and fees imposed by a city, the rule establishes a threshold amount at 3.5% of the utility's gross revenues from operations within the city. To the extent that the city's taxes and fees do not exceed that 3.5% threshold, the utility must treat them as general operating expenses and not charge customers for them separately. OAR 860-022-0040(1). But to the extent that the city's taxes and fees do exceed the 3.5% threshold, that excess amount "shall be itemized or billed separately" by the utility. OAR 860-022-0040(1) (emphasis added). The utility must pass those excess charges on to customers who reside in the city that is imposing the taxes and fees. "[S]uch excess amount shall be charged pro rata to energy customers within said city and shall be separately stated on the regular billings to such customers." OAR 860-022-0040(6) (emphasis added). This rule ensures that cities do not raise revenue for services to their own residents by imposing taxes that are paid for by utility customers throughout the utility's wider service territory.

The Commission has explained its reasons for adopting this rule and parallel rules applicable to other utilities. Such rules strike a balance between fair compensation to cities and the interests of utility customers who live elsewhere. Addressing the rule for telecom utilities in 1990, the Commission explained that the threshold percentage was based on "the average amount of franchise fees negotiated between Oregon cities and utilities," which was the "best available evidence of the value of the benefit accruing to non-municipal telephone customers as a result of their use of municipal access lines." Order 90-301 (AR 218), 5-6 (June 29, 1990). Several years later, in 2003, the Commission emphasized the mandatory nature of the rule, explaining that it had "established caps on the amounts of cities' assessments that will be allowed

in statewide rates (revenue requirement), and determined that the excess amounts must be separately billed to customers." Order No. 03-394 (AR 458), 1 (July 9, 2003) (emphasis added).

The application of OAR 860-022-0040 in the present circumstances is straightforward and clear. Gresham's privilege tax is set at 7% of a utility's gross revenues collected within that city. At all relevant times, from 2011 through the present, PGE has included in its general operating expenses the taxes it pays to Gresham up to the 3.5% threshold. For the period following the first court judgment, PGE paid privilege taxes to Gresham at the rate of 5% and included 3.5% in its general operating expenses—with the excess 1.5% charged separately to Gresham customers. Now PGE is paying privilege taxes to Gresham at the rate of 7% and including 3.5% in its general operating expenses—with the excess 3.5% charged separately to Gresham customers. PGE has at all times included the maximum amount of Gresham's privilege taxes in its general operating expenses. Therefore any additional taxes that PGE is obligated to pay to Gresham—whether based on a retroactive period or based on a current period—must be charged separately to Gresham customers.[6]

The approach described above is consistent with the approach taken recently by PGE and the City of Sherwood. As of January 1, 2015, PGE transitioned from paying Sherwood a 3.5% franchise fee to paying Sherwood a 5% privilege tax. Under OAR 860-022-0040, PGE is required to charge Sherwood customers for the portion of the 5% privilege tax in excess of the 3.5% threshold. Due to a misunderstanding between PGE and the City of Sherwood on the timing of the transition, several months passed during which PGE did not charge Sherwood customers for the 1.5% excess amount. PGE and the City of Sherwood therefore agreed that PGE should impose a make-up charge of 1.5%, on top of the ongoing amount of 1.5%, for a period of several months in order to get caught up.[7] Charging customers for the make-up amounts was appropriate because PGE already had been including, and continued to include, the

[6] As set forth in proposed Schedule 134, any large nonresidential customers with existing limitations on privilege tax obligations will be billed in accordance with these existing limitations. Also, for any direct access customer, proposed Schedule 134 would apply only to the portion of the bill for PGE's distribution services.

[7] A copy of the Implementation Agreement, as amended, is attached for reference.

amount of Sherwood's tax up to 3.5% in its general operating expenses. Under OAR 860-022-0040, PGE was required to charge the excess amounts to Sherwood customers.

IV. CONCLUSION

For the foregoing reasons, PGE respectfully requests that the Commission approve proposed Schedule 134.

DATED this 9th day of May, 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

GENERAL JUDGMENT GRANTING DECLARATORY RELIEF

This action came before the Court on the parties' cross motions for summary judgment. All parties agreed that this action presents a question of law upon which there are no disputed issues of material fact. The Court, for the reasons stated in its letter opinion dated January 12, 2012, attached and incorporated by reference herein, denies Defendant City of Gresham's motion for summary judgment and grants the motions for summary judgment of Northwest Natural Gas Company, Portland General Electric Company, and Rockwood Water People's Utility District (collectively, the "Plaintiffs"). It is hereby ORDERED AND ADJUDGED as follows:

1. With respect to Plaintiffs' claims for declaratory relief, the Court declares that (i) Defendant City of Gresham's Utility License Fee is a privilege tax within the meaning of

ORS 221.450; and (ii) the City of Gresham's Resolution 3056, 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;

2. The Court dismisses Defendant City of Gresham's claims for declaratory relief and costs with prejudice; and

3. The Court awards Plaintiffs their costs and disbursements in an amount to be determined by supplemental judgment in accordance with ORCP 68.

Dated: February 1, 2012.

The Honorable Stephen K. Bushong

Submitted by:

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

NORTHWEST NATURAL GAS COMPANY, an Oregon corporation, and PORTLAND GENERAL ELECTRIC COMPANY, an Oregon corporation, Plaintiffs, and ROCKWOOD WATER PEOPLE'S UTILITY DISTRICT, Intervenor-Plaintiff, v. CITY OF GRESHAM, a municipality and public body within the State of Oregon, Defendant.	Case No. 1107-08422 OPINION

INTRODUCTION

This case is before the court on cross-motions for summary judgment based on stipulated facts. Plaintiffs Northwest Natural Gas Company (NW Natural) and Portland General Electric Company (PGE), and Intervenor-Plaintiff Rockwood Water People's Utility District (Rockwood PUD),[1] allege that a 2011 resolution adopted by defendant City of Gresham (City) that increased certain utility license fees from 5 percent of gross revenues to 7 percent of gross revenues violates and is preempted by state law. Specifically, plaintiffs allege that the City's resolution

[1] This opinion refers to NW Natural, PGE and Rockwood PUD collectively as "plaintiffs" unless the context requires identifying them separately.

effectively imposes a "privilege tax" exceeding 5 percent of gross revenues, contrary to ORS 221.450. They ask the court to declare the City's resolution invalid as applied to them.

The City responds that its ordinance imposes a license fee, not a "privilege tax," so the resolution raising the fee to 7 percent of gross revenues does not violate—and is not preempted by—ORS 221.450. The City contends that the license fee is a valid exercise of its regulatory authority over the public right-of-way as part of the City's broad home rule powers and pursuant to express statutory authority set forth in ORS 221.420. The City further contends that ORS 221.450 was not intended to preempt Oregon cities from collecting this type of license fee in amounts exceeding 5 percent of gross revenues. The City seeks a declaration that its license fee is valid and is not preempted by state law in any respect.

For the reasons explained below, the court concludes under the circumstances of this case that ORS 221.450 precludes the City from charging a license fee from plaintiffs of more than 5 percent of the gross revenues earned within the city for the privilege of using the public-right-of way, as the City has attempted to do in Resolution 3056 (2011). Accordingly, plaintiffs' motions for summary judgment are granted and the City's motion for summary judgment is denied.

BACKGROUND

Statutory framework

"As early as 1911, the state legislature empowered the cities to regulate utilities." *Northwest Natural Gas Co. v City of Portland*, 300 Or 291, 304 (1985). A law enacted in 1911 gave cities broad authority to "determine by contract, ordinance or otherwise the quality and character of each kind of product or service to be furnished or rendered by any public utility…and all other terms and conditions not inconsistent with this Act upon which such public utility may be permitted to occupy the streets, highways or other public property within such

municipality[.]" *Id.* at 304-05, quoting Oregon Laws 1911, ch 279, § 61.[2] At that time, there was no express statutory limitation on the "terms and conditions" that cities might impose on public utilities that use the public right of way.

The 1911 statute is now codified (with minor changes) as ORS 221.420, which provides in pertinent part that a city may

> "Determine by contract or prescribe by ordinance or otherwise, the terms and conditions, including payment of charges and fees upon which any public utility, electric cooperative, people's utility district or heating company, or Oregon Community Power, may be permitted to occupy the streets, highways or other public property within such city and exclude or eject any public utility or heating company therefrom."

ORS 221.420(2)(a).

The legislature addressed the subject of a privilege tax on public utilities in 1931. *See* Or Laws 1931, ch 234, § 1. That statute provided in pertinent part:

> "The city council or other governing body of every incorporated city and town in Oregon hereby is authorized to levy and collect from every privately owned public utility operating within such city or town without a franchise, for the period of one year, a privilege tax for the use of the public streets, alleys and highways in such city or town, in an amount of not less than 5 per cent annually, of the gross earning revenue of such utility currently earned within the boundary of such city or town."

That law was amended twice in 1933. The legislature first amended the statute to shorten the time the utility had to operate without a franchise to be subject to the privilege tax from 1 year to 30 days, and eliminate the provision requiring the amount of the tax to be "not less than 5 per cent annually." Or Laws 1933, ch 466, § 1. Instead, the 1933 legislature provided that the privilege tax shall be "in such an amount...as shall be fixed by" the city council or governing body after a public hearing held "to determine such tax or charge." *Id.*

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[2] The 1911 statute was later enacted as part of the 1930 Oregon Code, section 61-250, and amended in 1931. *See* Or Laws 1931, ch 103, § 8.

The 1933 legislature amended the law again during a special session, eliminating the provision that would have allowed the city council to set the amount of the privilege tax without limitation and replacing it with a provision stating that the privilege tax is to be "in an amount not exceeding five percent of the gross revenues" of the utility, and provided that "the privilege tax herein authorized shall be for each year, or part of each year, such utility shall operate without a franchise." Or Laws 1933 (2d Spec Sess), ch 24, § 1.

That statute is now codified (with minor changes) as ORS 221.450, which provides in pertinent part that a city

> "may levy and collect a privilege tax from Oregon Community Power and from every electric cooperative, people's utility district, privately owned public utility, telecommunications carrier as defined in ORS 133.721 or heating company. The privilege tax may be collected only if the entity is operating for a period of 30 days within the city without a franchise from the city and actually using the streets, alleys or highways, or all of them, in such city for other than travel on such streets or highways. The privilege tax shall be for the use of those public streets, alleys or highways, or all of them, in such city in an amount not exceeding five percent of the gross revenues of the cooperative, utility, district or company currently earned within the boundaries of the city."

ORS 221.450.[3]

A statute enacted in 1987 states that the legislature "intends by ORS 221.415, 221.420, 221.450 and 261.305 to reaffirm the authority of cities to regulate use of municipally owned rights of way and to impose charges upon publicly owned suppliers of electrical energy, as well as privately owned suppliers for the use of such rights of way." Or Laws 1987, ch 245, § 1, codified at ORS 221.415.

[3] ORS 221.450 has been amended several times since 1933, most recently in 2007. *See* Or Laws 2007, ch 807, § 41. The limit on the "privilege tax" to "an amount not exceeding 5 percent of the gross revenues...earned within the boundary of the city" has remained unchanged since 1933.

The City's Ordinances and Resolutions

In 2001, the City enacted Ordinances 1523 and 1524, which became part of the Gresham Revised Code (GRC) as Articles 6.30 and 6.35. Ordinance 1523 is a Utility Licensing Ordinance that, among other things, requires any utility occupying a public right-of-way to obtain a license from the City.[4] GRC 6.30.070(1). One purpose of the ordinance was to secure "fair and reasonable compensation to the city and its residents for permitting use of the public right of way." GRC 6.30.020(2). The license obtained by a utility grants it permission "to use public rights-of-way within the city for a specified and dedicated purpose." GRC 6.30.030. The utility is required to pay a license fee in an amount to be determined by the city council. GRC 6.30.110(1). Under the ordinance, the amount of the license fee "may be a percentage" of the utility's gross revenue; the ordinance does not specify any particular percentage or place other limits on the amount of the license fee. GRC 6.30.110(2)(a). The ordinance also provides that any utility operating in the city without a license for 30 days or more "shall pay a privilege tax in the amount set by council resolution for the use of those public rights-of-way." GRC 6.30.110(6)(a).

In October 2001, the City enacted Resolution 2509, which established the license fee and privilege tax amounts under Ordinance 1523. Under that resolution, the license fee and privilege taxes were set at 5 percent of gross revenues for gas and electric companies. City-owned utilities such as the City's water, wastewater and stormwater utility, and special district utilities such as Rockwood PUD, were not required to pay a license fee or privilege tax at that time. [5]

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[4] The companion Ordinance 1524 addresses installation, repair and other construction activities by utilities on the public right-of-way.

[5] That changed within the next two years. In 2002, the City adopted Resolution 2591, which required the City's water, wastewater and stormwater utility to pay a 5 percent license fee. Resolution 2607, adopted in 2003, required Rockwood PUD to pay a license fee of 5 percent of user fees collected.

Plaintiffs have each been using the public right-of-way pursuant to utility licenses issued by the City under Ordinance 1523. The City granted NW Natural a ten-year utility license effective July 1, 2002.[6] The City granted PGE a ten-year utility license effective July 1, 2002.[7] The City granted Rockwood PUD a ten-year utility license effective July 1, 2001.[8]

On May 17, 2011, the City adopted Resolution 3056, which increased the utility license fee under GRC 6.30.100 from 5 percent to 7 percent of gross revenues, effective July 1, 2011. Plaintiffs challenge the validity of that increase, contending that the license fee is a "privilege tax" that cannot exceed 5 percent of gross revenues under ORS 221.450.

Legal standards—municipal authority, preemption and statutory construction

The City's power to adopt ordinances and resolutions concerning the utilities' use of the public right of way and any preemptive effect of state law on those ordinances and resolutions are generally governed by the "home rule" amendments to the Oregon Constitution. *See LaGrande/Astoria v. PERB*, 281 Or 137, 140-42, *aff'd on reh'g*, 284 Or 173 (1978); *Thunderbird Mobile Club v. City of Wilsonville*, 234 Or App 457, 469-70 (2010).[9] The primary purpose of the home rule amendments was "to allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature, as was the case before the amendments." *LaGrande/Astoria*, 281 Or at 142. The amendments "also carve out some limited autonomy for municipal ordinances from overriding state law, but otherwise do not limit the primacy of state

[6] NW Natural's license replaced a 20-year franchise agreement granted by the City on November 3, 2001 and accepted by NW Natural on December 14, 2001. The franchise agreement was subsequently extended to June 30, 2002.

[7] PGE's license replaced a ten-year utility license granted in 1992. PGE operated under a franchise agreement during the period 1972-1992.

[8] Rockwood PUD never had a franchise agreement with the City. Its utility license was recently renewed for another ten years.

[9] The "home rule" amendments are two amendments enacted through the initiative in 1906 that "together provide 'home rule' for cities and towns." *LaGrande/Astoria*, 281 Or at 140. Those amendments are now set forth in Article XI, section 2 and Article IV, section 1(5) of the Oregon Constitution.

legislation over inconsistent municipal enactments." *Thunderbird Mobile Club*, 234 Or App at 470.

In this case, the parties do not dispute that the City has the authority to regulate the use of the public right-of-way and to charge utilities fees and taxes for the privilege of using the public right-of-way.[10] Nor do the parties dispute that the Oregon legislature has the authority to override the City's regulation.[11] Rather, the only question in this case is whether the legislature, when it enacted ORS 221.450, effectively displaced the City's authority to collect a 7 percent license fee.

LaGrande/Astoria describes the principles that apply in determining whether a statute displaces a city's ordinance. The "first inquiry must be whether the local rule in truth is incompatible with the legislative policy, either because both cannot cooperate concurrently or because the legislature meant its law to be exclusive." *LaGrande/Astoria*, 281 Or at 148. "[W]hen a local enactment is found incompatible with state law in an area of substantive policy, the state law will displace the local rule." *Id.* at 149. Courts must assume that the legislature did not mean to displace local laws "unless that intention is apparent." *Id.* In this context, a state law "prevails over contrary policies preferred by local governments if it is clearly intended to do so[.]" *Id.* at 156.[12]

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[10]Rockwood PUD contends that, if the City's 7 percent license fee is not barred by ORS 221.450, the City has no authority to unilaterally impose a 7 percent license fee on a public utility district. In light of the court's determination that the City's 7 percent license fee is barred by ORS 221.450, it is not necessary for the court to decide Rockwood PUD's alternative argument.

[11]As the Supreme Court explained in *LaGrande/Astoria*, "it is elementary that the legislature has plenary authority except for such limits as may be found in the constitution or in federal law." 281 Or at 142.

[12]This principle applies "unless the [state] law is shown to be irreconcilable with the local community's freedom to choose its own political form." *LaGrande/Astoria*, 281 Or at 156.

Determining whether the City's 7 percent license fee is "incompatible" with ORS 221.450[13] requires the court to ascertain the intent of the enacting legislature by examining the statute's text and context, along with any relevant legislative history, and if necessary, by resorting to relevant canons of statutory construction. *State v. Gaines*, 346 Or 160, 171-73 (2009); *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12 (1993). *See Proctor v. City of Portland*, 245 Or App 378, 380-83 (2011) (applying *Gaines/PGE* analysis in determining whether the City of Portland's business license law had "the essential features of a 'business license tax' as understood by the 1987 legislature" when it enacted laws prohibiting cities from imposing such a tax on real estate brokers).

ANALYSIS

Plaintiffs contend that the City's 7 percent license fee is incompatible with and displaced by ORS 221.450. The City contends that that the statute does not displace its license fee because "the statute contains not a whit of intent to effect preemption."[14] The City further contends that its license fee is not incompatible with ORS 221.450 because it is a regulatory license fee, not a privilege tax within the meaning of the statute.

The City's first argument is plainly wrong. The legislature's "use of the word 'preempt' is not necessary to state a preemptive effect[.]" *Thunderbird Mobile Club*, 234 Or App at 472. As the Court of Appeals has noted, "a number of state statutes…explicitly displace local regulation." *Id.* ORS 221.450 expressly authorizes a city to levy and collect a privilege tax for the use of the public right-of-way if a utility operates for a period of 30 days within the city without a franchise, and it expressly limits the amount of the authorized privilege tax to "an amount not exceeding five percent of the gross revenues" the utility earned within city

[13]Plaintiffs do not contend that the legislature meant ORS 221.450 to be exclusive or otherwise occupied the field in this area.
[14]City's Memorandum in Support of Motion for Summary Judgment at 6.

boundaries. It is clear from the text that the legislature intended to preclude cities from levying and collecting privilege taxes from utilities using the public right-of-way without a franchise in any amount exceeding five percent of gross revenues. The text of the statute is a sufficient expression of legislative intent to displace any local privilege tax that exceeds the statute's five percent limitation.

The more difficult issue in this case is whether the City's license fee is a "privilege tax" as understood by the 1933 legislature that enacted the statute now codified at ORS 221.450. The text of the 1933 legislation offers some insight into what the legislature meant by "privilege tax." The bill expressly authorizes cities and towns to levy and collect from privately-owned public utilities "actually using the streets, alleys and/or highways in such city or town for other than travel on such streets or highways, a privilege tax *for the use of said public streets, alleys and/or highways*..." Or Laws 1933 (2d Spec Sess), ch 24, § 1 (emphasis added). Thus, the text of the bill identifies the purpose of the "privilege tax": it compensates cities and towns for the utilities' use of the right-of-way for purposes other than travel. And the text specifies that the "privilege tax" may be based on a percent of the gross revenues the utility earns within a city.

The fact that the "privilege tax" was expressly imposed only on utilities operating "without a franchise" is informative, especially when viewed in context. "A franchise is a contract between a city and a franchisee." *Rose City Transit v. City of Portland*, 18 Or App 369, 380 (1974). The 1933 legislature was presumably aware of the contractual nature of a franchise to use the public right-of-way. *See Whitbeck v. Funk*, 140 Or 70, 73-74 (1932); *City of Joseph v. Joseph Water Works Co.*, 57 Or 586, 590-91 (1911) (discussing the contractual nature of a franchise granted by a city and accepted by the franchisee).[15] The 1933 legislation continued the

[15]The Oregon Supreme Court explained that a franchise is a privilege granted by a city "accepted and acted upon by the company...given in consideration of the performance of a public service, and is protected against hostile

1931 legislature's policy of authorizing cities to levy a "privilege tax" on utilities using the right-of-way without a franchise. At that time, a privately-owned public utility using the public right-of-way under a franchise agreement would be required to pay whatever taxes or fees the parties incorporated into their agreement.

Conversely, a privately-owned public utility using the public right-of-way without a franchise might not have to pay *anything* for the privilege of using the right-of-way prior to enactment of the 1931 legislation. The 1931 legislation, then, was apparently designed to give cities clear authority to levy and collect a "privilege tax" from utilities using the right-of-way without a franchise. Without the legislation, a utility might decline to enter into a franchise agreement and claim a right to use the public right-of-way for free. Thus, from a city's perspective, the 1931 legislation eliminated a potential "free rider" problem and provided an incentive for utilities to obtain a franchise. From a utility's perspective, the 1931 legislation left it with two options: it could use the public right-of-way with a franchise (in which case it would not have to pay a privilege tax but would have to pay whatever taxes or fees it agreed to pay under the terms of its franchise agreement), or it could use the right-of-way without a franchise (in which case it would be required to pay a privilege tax "in an amount not less than" five percent of its gross revenues within the city). *See* Or Laws 1931, ch. 234, § 1.

The legislation that limited the authorized "privilege tax" to "an amount not exceeding" five percent of the utility's gross revenues was enacted in a special session shortly after the 1933 legislature passed a bill that gave cities authority to levy a privilege tax without any limitation under state law. *See* Or Laws 1933, ch. 466, § 1; Or Laws 1933 (2d Spec Sess), ch 24, § 1.

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legislation by the state and by the municipality." *Copeland v. City of Waldport*, 147 Or 60, 67 (1934), quoting *Tillamook Water Company v. City of Tillamook*, 139 F 405 (D Or 1905), *aff'd* 150 F 117 (9th Cir 1906). *See also Elliott v. City of Eugene*, 135 Or 108, 116 (1931) (describing exclusive garbage hauling franchise granted by the city as a contract "that the state cannot impair").

Thus, within the span of 2 years, the legislature's policy choice changed from authorizing cities to levy a privilege tax of *at least* 5 percent of gross revenue, to authorizing cities to set the amount of the privilege tax without limitation, and finally, to limiting the amount to *no more than* 5 percent of gross revenue.[16] In all instances, the tax was to be levied on utilities operating without a franchise, leaving cities and utilities free to negotiate the terms of a franchise agreement if they so chose.

The context of the 1933 legislation also includes the precursors to ORS 221.420 originally enacted in 1911, as discussed above. Those laws gave cities broad authority to "determine by contract or prescribe by ordinance or otherwise" the terms and conditions upon which public utilities are permitted to use the public right-of-way. But if the 1911 legislation gave cities authority to unilaterally assess fees or taxes on utilities using the public right-of-way without any limitation, the 1931 legislation authorizing cities to collect privilege taxes from utilities using the right-of-way without a franchise would have been unnecessary and meaningless. In evaluating these related statutes, the court must construe the statutes "in a manner that will give effect to all." *Bolt v. Influence, Inc.*, 333 Or 572, 581 (2002). Moreover, there is no evidence that any city attempted to use the authority described in the 1911 legislation to levy a tax or fee based on a percentage of a utility's gross revenues to compensate cities for using the public right-of-way.

Under the statutory scheme established in 1933 (and in effect ever since), utilities using the public right-of-way had 2 options available: they could obtain a franchise (and pay cities whatever compensation they agreed to pay as part of the franchise agreement), or they could operate without a franchise (and pay a "privilege tax" not exceeding 5 percent of gross revenue).

[16] The parties did not submit any legislative history for the 1933 legislation, so the court does not have any evidence other than the text and context of the legislation to discern the policy considerations underlying the 1933 legislative changes

That is how the Oregon Supreme Court described the statutory scheme in *US West Communications v. City of Eugene*, 336 Or 181, 183 n. 1 (2003) ("If certain conditions are met, a city either may enter into a franchise agreement that determines the 'charges and fees upon which any public utility *** may be permitted to occupy the streets, highways or other public property within such city,' ORS 221.420(2), or may impose a privilege tax "for the [utility's] use of [the] streets, alleys or highways within the city, ORS 221.450").[17]

The City's position would mean that, when the legislature amended the 1931 legislation in 1933 to limit a city's authority to assess a "privilege tax," the legislature did not intend to place any limitations on a city's authority to assess fees unilaterally---that is, without a franchise agreement---based on a percentage of a utility's gross revenues to compensate the city for the utility's use of the right-of-way. When the legislature used the term "privilege tax" in the 1931 and 1933 legislation, it was presumably aware of how the Oregon Supreme Court had used that term.[18] In *Northwest Auto Co. v. Hurlburt*, 104 Or 398 (1922), the court stated in upholding the validity of a local tax levied on automobile sales:

> "The courts in speaking of financial exactions of the character herein discussed have sometimes called them licenses, and sometimes privilege taxes. Again, they are sometimes spoken of as license fees or license taxes; but by whatever name they may be called, they partake of the nature of a tax in many respects, and the designation given in the statute is immaterial, the court being interested in the substance rather than in the name. In *Briedwell v. Henderson*, [99 Or 506 (1921)], we held it to be properly called a privilege tax, the result of this tax being substantially a license, a certificate that the person paying the sum required was permitted to use a particular car upon the highway for the whole or what time might remain of the current year."

104 Or at 408.

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[17]The City notes that this description in *US West Communications* is *dicta* that is not binding on this court. That may be true, but that does not mean that the Oregon Supreme Court's description of the statutory scheme is inaccurate.

[18]*See Owens v. Maass*, 323 Or 430, 438 (1996); *State v. Waterhouse*, 209 Or 424, 436 (1957) (court presumes that a statute was enacted in light of existing judicial decisions that have a direct bearing on it).

Thus, when the 1933 legislature decided as a matter of policy to limit the amount of the "privilege tax" that cities could unilaterally impose and collect from utilities using the public right-of-way without a franchise to 5 percent of the utility's gross revenues, the legislature intended to limit the "financial exactions" the city could impose on utilities for the privilege of using the public right-of-way, regardless of whether those "exactions" are called license fees, license taxes or privilege taxes.

The license fee imposed by the City in its 2001 ordinance is a "financial exaction" imposed on utilities for using the public right-of-way. The initial amount of that "financial exaction"—5 percent of gross revenues—did not run afoul of ORS 221.450. But when the city raised its "financial exaction" to 7 percent of gross revenues, it exceeded the limit set forth in ORS 221.450 for utilities operating without a franchise. A utility operating with a license issued by the City does not have a "franchise" in the sense of a negotiated agreement that could be accepted or rejected by the utility because under the ordinance, a utility does not have the option of using the public right-of-way without a license.[19] Since 2001, NW Natural, PGE, and Rockwood PUD have all used the public right-of-way with a license but without a franchise. The "financial exactions" that the City may impose on them for using the right-of-way is limited by ORS 221.450 to 5 percent of the gross revenues the utilities earn within the City's boundaries.

If the statutory limitation did not apply, the City would have the unilateral authority to impose "financial exactions" on utilities using the public right-of-way in any amount. Under the terms of the ordinance, the license requirement would give the City the unilateral and unlimited authority to charge whatever license fees its city council deems appropriate to fairly compensate

[19]Under the ordinance, a utility using the right-of-way without a license is subject to penalties for committing a Class A violation. GRC 6.30.160. It also would be required to pay a 5 percent privilege tax (GRC 6.30.110(6)); an additional penalty of 2 percent of the utility's gross revenues (GRC 6.30.110(7)(g); and could risk having its unauthorized system removed from the public right-of-way at the utility's expense. GRC 6.30.120(4).

the City for the use of the public-right-of-way. A utility that declined to enter into a franchise agreement with the City would still have to obtain a license to comply with the ordinance; it would not have the option of using the right-of-way without a license and paying a "privilege tax" that state law limits to 5 percent of the utility's gross revenues.

When the 1933 legislature limited the City's authority to collect a "privilege tax" from utilities using the public way without a franchise, it understood that cities could collect more than 5 percent of gross revenues if a utility *agreed* to pay more as part of its franchise agreement with the city. Absent an agreement, the legislature intended to limit the "financial exactions" that the City could unilaterally impose on utilities using the right-of-way to 5 percent of gross revenues, regardless of whether the City called the exaction a "license fee" instead of a "privilege tax." It follows that the 7 percent license fee imposed in 2011 pursuant to Resolution 3056, as applied to NW Natural, PGE and Rockwood PUD, violates ORS 221.450.

CONCLUSION

Plaintiffs' motions for summary judgment are granted, and the City's motion for summary judgment is denied, for the reasons set forth in this opinion. Plaintiffs' counsel may submit a form of declaratory judgment consistent with this opinion.

DATED this 12th day of January, 2012.

Stephen K. Bushong
Circuit Court Judge

I hereby certify that on January 25, 2012 the following counsel of record was served via email with a form of General Judgment Granting Declaratory Relief, and agreement was reached with such counsel of record on changes to the proposed form. The resulting revised proposed form of General Judgment Granting Declaratory Relief is submitted with this Certificate:

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by the following indicated method or methods on the date set forth below:

☒ **E-mail.**

☐ **E-mail service, pursuant to ORCP 9 G.**

☐ **Facsimile communication device.**

☒ **First-class mail, postage prepaid.**

☐ **Hand-delivery.**

DATED: January 31, 2012.

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ATTACHMENT 2

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

NORTHWEST NATURAL GAS COMPANY, an Oregon corporation, and PORTLAND GENERAL ELECTRIC, 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 **LIMITED JUDGMENT GRANTING DECLARATORY RELIEF RELATED TO PLAINTIFF PORTLAND GENERAL ELECTRIC**

This matter comes before the Court following the decision of the Supreme Court of Oregon in *Northwest Natural Gas Co. v. City of Gresham*, 359 Or 309, 374 P3d 829, *reconsideration den* 2016 Or LEXIS 444 (2016).

It is hereby ADJUDGED that:

As to the claims for declaratory relief by Plaintiff Portland General Electric and Defendant City of Gresham, the Court declares:

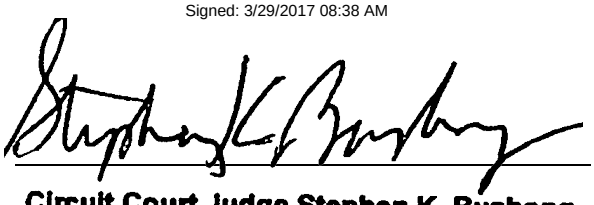
1. In rendering this Limited Judgment, the Court determines there is no just reason for delay. ORCP 67 B.

Gresham City Attorney's Office
1333 NW Eastman Parkway
Gresham, Oregon 97030-3813
Telephone (503) 618-2507
FAX (503) 667-3031

2. The utility license fee imposed by Defendant City of Gresham is a privilege tax and Plaintiff Portland General Electric was operating without a franchise within the meaning of ORS 221.450;

3. Defendant City of Gresham's is not preempted by ORS 221.450 from imposing a seven percent privilege tax on Plaintiff Portland General Electric and Resolution No. 3056 is lawful and enforceable.

Signed: 3/29/2017 08:38 AM



Circuit Court Judge Stephen K. Bushong

Submitted by:

David R. Ris, OSB No. 833588
Attorney for Defendant City of Gresham
Phone: (503) 618-2507
Email: david.ris@greshamoregon.gov

Gresham City Attorney's Office
1333 NW Eastman Parkway
Gresham, Oregon 97030-3813
Telephone (503) 618-2507
FAX (503) 667-3031

UTCR 5.100 CERTIFICATE OF READINESS

The proposed judgment is ready for judicial signature because:

I have served a copy of this judgment on each party entitled to service and:

No objection has been served on me.

DATED this 23rd day of March, 2017.

CITY OF GRESHAM

By /s/ David R. Ris

David R. Ris, OSB No. 833588
david.ris@greshamoregon.gov
City Attorney
Gresham City Attorney's Office
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Of Attorneys for Defendant City of Gresham

Gresham City Attorney's Office
1333 NW Eastman Parkway
Gresham, Oregon 97030-3813
Telephone (503) 618-2507
FAX (503) 667-3031

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2017, I caused a true copy of the foregoing LIMITED JUDGMENT GRANTING DECLARATORY RELIEF RELATED TO PLAINTIFF PORTLAND GENERAL ELECTRIC to be served via the electronic eFile & Serve system, and via first class mail, postage prepaid, to the following:

Jeffrey G. Condit / Elisa J. Dozono
Miller Nash LLP
111 SW 5th Avenue, Suite 3400
Portland, OR 97204-3699
Attorneys for Plaintiffs
Northwest Natural Gas Co. and Portland General Electric

Casey M. Nokes / Thomas A. Brooks
Clark I. Balfour
Cable Huston Benedict Haagensen & Lloyd LLP
1001 SW 5th Avenue, Suite 2000
Portland, OR 97204-1136
Attorneys for Intervenor-Plaintiff
Rockwood Water People's Utility District

DATED this 23rd day of March, 2017.

CITY OF GRESHAM

By /s/ David R. Ris
David R. Ris, OSB No. 833588
david.ris@greshamoregon.gov
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ATTACHMENT 3

IMPLEMENTATION AGREEMENT

This Implementation Agreement ("Agreement") is made and entered into by and between Portland General Electric Company, an Oregon corporation ("PGE") and the City of Sherwood, an Oregon municipality ("City") on August 31, 2015. PGE and City may be referred to in this Agreement individually as a "Party" or collectively as the "Parties."

WHEREAS, PGE has been providing electric light and power service within the City; and

WHEREAS, the City has the authority to regulate the use of the public right-of-way within the City and to receive compensation for the use of the public right-of-way; and

WHEREAS, the Sherwood Municipal Code and the City's schedule of Master Fees and Charges require quarterly payment for use of the public right-of-way of a 5% privilege tax ("Privilege Tax") based on the gross revenue for utilities operating in the City; and

WHEREAS, during the term of its Franchise Agreement with the City, PGE paid the City a franchise fee of 3.5% of its gross revenues from customers in the City rather than the Privilege Tax; and

WHEREAS, the Franchise Agreement expired on June 30, 2014, and the Parties discontinued their negotiations for a new franchise in July 2014; and

WHEREAS, the Parties acknowledge that PGE made an annual franchise fee payment in March 2014 under the then current Franchise Agreement between the Parties, as payment in full for the entire calendar year 2014 for the use of the public right-of-way; and

WHEREAS, despite PGE's Franchise Agreement with the City expiring at the end of June 2014, and the Parties discontinuing negotiations for a new franchise in July 2014, due to a misunderstanding between the Parties regarding when the Privilege Tax applied to PGE, PGE made a payment in March 2015, equivalent to an annual 3.5% franchise fee ("Lump Sum Payment") rather than a quarterly Privilege Tax payment.

WHEREAS, the Parties desire to memorialize their intent and agreement with respect to the implementation of the Privilege Tax as it relates to PGE.

NOW THEREFORE, the Parties agree as follows:

1. Effective Date of the Privilege Tax. The Parties agree that the Privilege Tax applied to PGE as of January 1, 2015.

2. Itemized Billing. In accordance with OAR 860-022-0040 (the "OAR"), a charge of 3.5% of PGE's Gross Revenues (defined in the OAR) for use of the public right-of-way is allowed as an operating expense for PGE and will not be separately billed to PGE customers. The OAR requires right-of-way fees or taxes that exceed 3.5% of PGE's Gross Revenues to be billed separately. In the case of the Privilege Tax, 1.5% of the 5% Privilege Tax ("Direct Billed Portion") will be included as an itemized line item on PGE bills to PGE customers within the City.

Due to a misunderstanding between PGE and City regarding when the Privilege Tax applied to PGE, PGE did not start collecting the Direct Billed Portion from PGE customers within the City on January 1, 2015. PGE will begin collecting the Direct Billed Portion from PGE customers within the City on September 1, 2015. Since PGE did not collect the Direct Billed Portion from PGE customers within the City for the period January 1, 2015 through August 31, 2015, PGE will collect an additional 1.5% ("Makeup Portion") from PGE customers within the City beginning on September 1, 2015 for a period not to exceed eight (8) months until PGE has been reimbursed for an amount up to, but not greater than, the Direct Billed Portion PGE paid to the City for the period January 1, 2015 through August 31, 2015 prior to collecting it directly from PGE customers within the City.

3. Payment Schedule. Beginning January 1, 2015, PGE shall remit the Privilege Tax on a quarterly basis according to the following payment schedule:

    a. First quarter Privilege Tax payment shall be paid to the City no later than April 15th.
    b. Second quarter Privilege Tax payment shall be paid to the City no later than July 30th.
    c. Third quarter Privilege Tax payment shall be paid to the City no later than November 15th.
    d. Fourth quarter Privilege Tax payment shall be paid to the City no later than February 15th.

    For calendar year 2015, the Parties agree to allocate the Lump Sum Payment to the quarterly payments due during calendar year 2015 until such amounts are exhausted, at which point PGE shall pay its quarterly payments in accordance with this Section 3. An example of such allocation is attached to this Agreement as Exhibit A. All Privilege Tax payments shall be calculated based on Gross Revenues for the calendar quarter for which payment is due.

    Except as expressly set forth in this Agreement, PGE shall comply with all applicable Privilege Tax provisions of the Sherwood Municipal Code and the Master Fees and Charges.

4. Waiver. Failure to enforce any term, condition or obligation of this Agreement shall not be construed as a waiver of a breach of any term, condition or obligation of this Agreement. A specific waiver of a particular breach of any term, condition or obligation of this Agreement shall not be a waiver of any other, subsequent or future breach of the same or any other term, condition or obligation of this Agreement.

5. Severability. If any section, subsection, sentence, clause, phrase, or other portion of this Agreement is, for any reason, held to be invalid or unconstitutional by a court of competent jurisdiction, all portions of this Agreement that are not held to be invalid or unconstitutional shall remain in effect until this Agreement is terminated or expired. After any declaration of invalidity or unconstitutionality of a portion of this Agreement, either party may demand that the other party meet to discuss amending the terms of this Agreement to conform to the original intent of the parties.

6. Notice. Any notice provided for under this Agreement shall be sufficient if in writing and (1) delivered personally to the following addressee, (2) deposited in the United States mail, postage

prepaid, certified mail, return receipt requested, (3) sent by overnight or commercial air courier (such as Federal Express or UPS), or (4) sent by facsimile transmission with verification of receipt, addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

If to City:

City Manager, City of Sherwood Oregon
22560 SW Pine StreetSherwood, Oregon 97140
FAX # (503) 625-5524

With a copy to: City Attorney
City of Sherwood, Oregon
22560 SW Pine Street
Sherwood OR 97140
FAX # (503) 625-5524

If to PGE:

Portland General Electric Company
Attn: Government Affairs
121 SW Salmon St., 1 WTC 3rd Floor
Portland, Oregon 97204
FAX: (503) 464-2354

With a copy to:
Portland General Electric Company
Attn: General Counsel
121 SW Salmon Street, 1 WTC 17th Floor
Portland, Oregon 97204
FAX: (503) 464-2200

Any such notice, communication or delivery shall be deemed effective and delivered upon the earliest to occur of actual delivery, three (3) business days after depositing in the United States mail, one (1) business day after shipment by commercial air courier or the same day as confirmed facsimile transmission (or the first business day thereafter if faxed on a Saturday, Sunday or legal holiday).

7. Controlling Law. THE AGREEMENT SHALL BE INTERPRETED IN ACCORDANCE WITH AND GOVERNED BY THE SUBSTANTIVE AND PROCEDURAL LAWS OF THE STATE OF OREGON WITHOUT REGARD TO CHOICE-OF-LAW PRINCIPLES. THE PARTIES IRREVOCABLY CONSENT TO THE JURISDICTION OF THE COURTS OF THE STATE OF OREGON OR OF THE U.S. DISTRICT COURT FOR THE STATE OF OREGON FOR ANY ACTION, SUIT, OR PROCEEDING IN CONNECTION WITH THE AGREEMENT AND WAIVE ANY OBJECTION THEY MAY NOW OR HEREAFTER HAVE REGARDING CHOICE OF FORUM.

IN WITNESS WHEREOF, the parties, through their duly authorized representatives, have executed this Franchise as of the dates indicated below.

PORTLAND GENERAL ELECTRIC COMPANY	CITY OF SHERWOOD
By: Bill Nicholson	By: Joseph Gall
Name: Bill Nicholson	Name: Joseph Gall
Title: Sr VP CST+D	Title: City Manager
Date: 8/28/15	Date: 8/31/15

EXHIBIT A

Hypothetical Example of Privilege Tax Payment Allocation

Annual Gross Revenue for 2014: $13,000,000. Lump Sum Payment for 2015 based on 3.5% of 2014 Gross Revenue made on 4/1/15: $455,000.

Gross Revenue for 1/1/15 – 3/31/15: $3,000,000. 5% Privilege Tax owing: $150,000. $150,000 of the $455,000 paid 4/1/15 is applied to the $150,000 owing on 5/15/15 for the 2015 first quarter Privilege Tax payment. $305,000 remaining from the $455,000 paid 4/1/15 will be applied to the 7/30/15 payment (to the extent owing). Since PGE will not begin collecting the Direct Bill Portion (1.5%) from PGE customers within the City until 9/1/15, PGE effectively pre-paid $45,000 on behalf of PGE customers within the City.

Gross Revenue for 4/1/15 - 6/30/15: 3,000,000. 5% Privilege Tax owing: $150,000. $150,000 of the $305,000 remaining from the $455,000 paid 4/1/15 applied to the $150,000 owing on 7/30/15 for the 2015 second quarter Privilege Tax payment. $155,000 remaining from the $455,000 paid 4/1/15 will be applied to the 11/15/15 payment (to the extent owing). Since PGE will not begin collecting the Direct Bill Portion (1.5%) from PGE customers within the City until 9/1/15, PGE effectively pre-paid $45,000 on behalf of PGE customers within the City.

Gross revenue for 7/1/15 – 9/30/15: $3,000,000 ($1,000,000 for each month during this period). 5% amount owing: $150,000. $150,000 of the remaining $155,000 from the $455,000 payment made on 4/1/15 applied to the 11/15/15 payment for the 2015 third quarter Privilege Tax payment. $5,000 remaining from the $455,000 paid 4/1/15 will be applied to the 2/15/16 payment (to the extent owing). Since PGE will not begin collecting the Direct Bill Portion (1.5%) from PGE customers within the City until 9/1/15, PGE effectively pre-paid $30,000 (for July and August) on behalf of PGE customers within the City.

Gross revenue for 10/1/15 – 12/31/15: $4,000,000. 5% amount owing: $200,000. $5,000 of the remaining $455,000 payment made on 4/1/15 applied to the 2/15/16 payment for the 2015 fourth quarter Privilege Tax payment. PGE will pay remaining $195,000 amount due.

Gross revenue for 1/1/15 – 8/31/15 (period of time PGE did not collect the Direct Bill Portion from PGE customers within the City): $8,000,000. 3.5% of the 5% Privilege Tax for this period of time ($280,000) is included in PGE's general rates as an operating expense. 1.5% of the 5% Privilege Tax for this period of time ($120,000) will be collected from customers within the City as a separate line item on the bill. Since PGE did not begin collecting such amounts from PGE customers within the City on January 1, 2015, PGE will collect an additional 1.5% from PGE customers within the City beginning September 1, 2015 (for a total of 3%) until PGE has reimbursed itself for the 1.5% portion of the 5% Privilege Tax ($120,000) it prepaid on behalf of PGE customers within the City.

AMENDMENT TO IMPLEMENTATION AGREEMENT

This Amendment to Implementation Agreement ("**Amendment**") is dated and effective September 15, 2015 ("**Effective Date")** by and between the City of Sherwood and Portland General Electric Company. Capitalized terms not defined in this Amendment shall have the meaning set forth in the Agreement (defined below).

WHEREAS, the Parties have entered into that certain Implementation Agreement, dated August 31, 2015 (the " **Agreement**"); and

WHEREAS, the Parties hereto desire to amend the Agreement, modifying the payment due date for the first quarter Privilege Tax payment.

NOW, THEREFORE, in consideration of the premises set forth above and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Payment Schedule. Section 3(a) of the Agreement is hereby deleted and replaced with the following: "First quarter Privilege Tax payment shall be paid to the City no later than May 15th."

2. No Other Modifications. Except as expressly provided in this Amendment, all of the terms and provisions of the Agreement are and will remain in full force and effect.

IN WITNESS WHEREOF, the Parties have executed this Amendment as of the date first written above.

City of Sherwood

By_____

Name: Joseph Gall
Title: City Manager

Portland General Electric Company

By_____

Name:
Title: