

March 31, 2017

Via Email: [PUC.FilingCenter@state.or.us](mailto:PUC.FilingCenter@state.or.us)

Commission Chair Lisa Hardie  
Commissioner Steve Bloom  
Commissioner Megan Decker  
Oregon Public Utility Commission  
201 High Street SE, Suite 100  
Salem, OR 97301

RE: PGE's Advice No. 17-05, Schedule 134 Gresham Privilege Tax Payment  
Adjustment - Advice No. 17-05

Dear Commissioners:

The City of Gresham ("Gresham") recommends that the Oregon Public Utility Commission ("OPUC" or the "Commission") reject, or suspend and investigate Portland General Electric Company's ("PGE") Advice No. 17-05, including Schedule 134, Gresham Retroactive Privilege Tax Payment Adjustment (collectively "Advice No. 17-05") pursuant to ORS 757.210 and 757.259. PGE is seeking to unlawfully charge its current customers located within Gresham approximately \$7 million in privilege taxes that PGE elected not to collect from Gresham customers from 2012 to 2016.

Advice No. 17-05 violates the rule against retroactive ratemaking and does not fit within Oregon's limited statutory exceptions to the prohibition because PGE is attempting to recoup costs assessed prospectively that should have been collected from past customers. Thus, PGE has not met its burden to show that Schedule 134 is fair, just and reasonable. Gresham's current customers should not be responsible for or burdened by PGE's decision not to timely collect privilege taxes. If the Commission elects not to simply reject Advice No. 17-05, then it should be suspended to review its lawfulness and investigate the factual and policy assumptions implicated by PGE's filing.

## **1. Background**

Gresham passed Resolution No. 3056 in May 2011, which increased its utility license fees, effective over a month later, on July 1, 2011. On July 1, 2011, both PGE and Northwest Natural began collecting the increased fees. Although PGE and Northwest Natural ("NW

Natural”) challenged the legality of Resolution No. 3056, both utilities initially collected the full amount of Gresham’s imposed license fees.

PGE decided to stop collecting Gresham’s increased fees after winning the first judicial decision on January 12, 2012. The Circuit Court’s finding was reversed on July 2, 2014, when the Court of Appeals concluded that Gresham’s utility license fee was lawfully imposed upon PGE and NW Natural. PGE and NW Natural continued to challenge Resolution No. 3056, but PGE chose not to begin collecting the fees again. In total, from January 2012 to August 2016, PGE did not collect Gresham’s increased fees. It was not until after the Oregon Supreme Court decision, on May 5, 2016, that PGE decided to begin re-collecting Gresham’s fees.

Notably, unlike PGE, NW Natural chose to collect Gresham’s fees throughout the entire judicial process. Thus, NW Natural never stopped collecting the full amount of the utility license fees due, and after the Supreme Court’s decision paid Gresham the full amount imposed since July 2011. NW Natural has not made a filing similar to PGE’s Advice No. 17-05 to ask that current utility customers pay for license fees that were effective over the last six years. NW Natural, also unlike PGE, agreed to pay Gresham interest back to 2011.

Also worth noting, PGE chose not to request deferral of the disputed license fee under ORS 757.259(2). Gresham is not conceding that ORS 757.259(2) is applicable in this situation, but merely points out that it allows broader recovery than ORS 757.259(1), and also provides additional customer protections. PGE chose not to request deferral when Gresham appealed the first judicial decision by the Circuit Court or when the Court of Appeals ruled in favor of Gresham, which precludes recovery under ORS 757.259(2).

## **2. PGE’s Advice Filing No. 17-05**

Advice No. 17-05 proposes to recover nearly \$7 million from PGE’s Gresham customers over a five-year period, but the accuracy of PGE’s number has not been verified. To begin with, because PGE’s obligation to pay interest on the utility license fee that were not paid during the litigation has not been decided, PGE acknowledges that the total amount due to Gresham is still at issue, which renders PGE’s proposal premature. Although PGE explains that it has proposed recovery of approximately five years to “roughly match” the period of time in which PGE did not collect the full tax from its customers, it fails to acknowledge any differences in its Gresham customers base.<sup>1</sup> For example, PGE has not explained to what degree its current customers may be paying for customers that have left Gresham. Likewise, PGE has not justified why any new customers should pay for uncollected amounts from old customers, why recovery should not be broadly spread over all of PGE’s customers, or explained why PGE’s shareholders should not pay all or even a portion of the fee. Gresham and the customers who would pay the uncollected fees have also not had the opportunity to thoroughly review and challenge PGE’s Schedule 134

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<sup>1</sup> Advice No. 17-05 at 2.

and the supporting workpapers to determine if it was correctly calculated. The Commission should better understand PGE's calculation before permitting recovery of an additional \$7 million from a select group of PGE's customers.

The Commission reviews proposed tariff changes to determine whether the resulting tariff provisions are fair, just and reasonable. The Commission is statutorily prohibited from authorizing a rate or schedule of rates that is not fair, just and reasonable, and requires utilities proposing a tariff change to submit a detailed statement setting forth the reasons and grounds relied upon in support of the proposed change.<sup>2</sup> The Commission may conduct a hearing, either upon its own initiative or upon written complaint, to determine whether a proposed rate or schedule meets the statutory requirements. Advice No. 17-05 does not set out detailed reasoning to support PGE's proposed tariff change and, instead, merely provides the conclusory statement that ORS 757.259(1) authorizes the Commission to include "such costs" retroactively. If it does not reject the filing, the Commission should conduct a hearing to better understand PGE's reasoning before permitting any recovery under PGE's tariff.

### **3. Retroactive Ratemaking**

Advice No. 17-05 appears to violate the rule against retroactive ratemaking. Generally speaking, the rule against retroactive ratemaking prohibits a utility or commission from setting future rates to allow a utility to recoup unforeseen costs, or allow customers a refund to accommodate for excessive profits. It effectively protects utilities and customers alike from having to "settle up" when rates do not match a utility's cost of service. Although the exact contours of the rule's applicability in Oregon are unknown, the Commission, the Attorney General's office, and the Oregon Legislature have all confirmed its applicability in Oregon.<sup>3</sup> PGE's filing has requested authority to set its future rates to recoup fees that PGE unilaterally decided not to collect from customers as much as five years ago.

Advice No. 17-05 concludes that one of Oregon's statutory exceptions to the rule against retroactive ratemaking permits recovery of the fees that PGE decided not to collect, but that does not appear to be correct. ORS 757.259(1) has two simple requirements. First, the fees must be "imposed retroactively." Second, that the fees be imposed "by order of another governmental agency." Advice No. 17-05 does not explain how either requirement is met.

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<sup>2</sup> ORS 757.210; OAR 860-022-0025.

<sup>3</sup> See *Gearhart v. Public Utility Commission of Oregon*, 356 Or. 216, 237 (2014) (*Re Application of PGE for an Investigation into Least Cost Plan Plant Retirement*, Docket No. DR 10, Order No. 08-487 at 36 (Sep. 30, 2008) ("It is generally accepted that the rule against retroactive ratemaking exists in Oregon.") (citation omitted); AG Opinion 6076 (Mar. 18, 1987) ("We conclude that retroactive ratemaking orders are absolutely impermissible unless they are expressly authorized by the legislature"); ORS 757.259 and 757.268.

Gresham imposed these fees prospectively, not retroactively. Gresham adopted Resolution 3056 in May of 2011 to be effective in July of 2011. Gresham's resolution was forward looking, and had future effect. The plain meaning of the terms prospective and retroactive do not support PGE's assertion that the fees were imposed retroactively. Starting in July 2011, PGE began collecting the fees and simply decided to stop collecting them during part, but not all, of the judicial review process. PGE should not be permitted to claim that prospectively assessed fees were imposed retroactively merely because PGE refused to collect them.

Moreover, it is unclear whether Gresham is another governmental agency under the terms of the statute. The term "another governmental agency" is not defined, but the plain meaning of ORS 757.259(1) suggests that cities, like Gresham, may not be included. Because the statute first refers to the Commission and then to "another governmental agency," at minimum it confirms that the Commission should be considered a governmental agency. The statute also refers specifically to an "order" from another governmental agency, which would be a typical action from a state agency, like the Commission, but may not be a likely vehicle for action from a city like Gresham.

Even assuming *arguendo* that ORS 757.259(1) applies, PGE has not explained whether ORS 757.259(1) permits recovery among only a select portion of its customers. Advice No. 17-05 states that PGE intends to recover "from Gresham customers" instead of its entire service territory. The authority to limit collections to PGE's customers in Gresham appears to come from OAR 860-22-0040 and Rule F of PGE's tariff, which allows PGE to collect a certain portion of Gresham's fees directly from its Gresham customers as a separate line item on their "regular billing." But this is precisely what PGE declined to do. OAR 860-22-0040 and Rule F do not expressly permit PGE to pass along any past uncollected fees along with the currently assessed ones. ORS 757.259(6), which applies to amounts collected under ORS 757.259(1), also includes protections that could limit PGE's ability to collect amounts from a subset rather than all of its customers. Thus, ORS 757.259 may not allow PGE to recover only from its Gresham customers and OAR 860-22-0040 and Rule F may not allow PGE to recover retroactively. PGE has the burden to prove its rates are just and reasonable, and has not met that burden here.

PGE's current customers should not be forced to pay exactions for services provided in the past. The rule against retroactive ratemaking protects ratepayers by ensuring that they know their utility's cost of service at the time they use that service. PGE's filing is akin to renegeing on an agreement with its customers because PGE is asking its customers to pay more over the next five years for services that were rendered and paid for over the last five years. To make matters worse, PGE was aware that its customer base changes and it could have easily collected those fees from its past customers to avoid this problem. Instead, PGE chose not to do so, perhaps confident that it would ultimately win its lawsuit. But, PGE did not win its lawsuit, and PGE's customers should not be forced to pay for PGE's erroneous business decisions.

**4. Conclusion**

In sum, PGE's determination that ORS 757.259(1) permits recovery has not been demonstrated by PGE's Advice No. 17-05 filing. Because there is no statutory exception applicable, PGE appears to be requesting authority to engage in retroactive ratemaking. The Commission should therefore reject Advice No. 17-05 prior to the May 1, 2017 effective date, or, in the alternative, open an investigation pursuant to ORS 757.210 to determine the veracity of PGE's assertions, the legality of the filing, and determine whether PGE should be responsible for all or a portion of the license fees that it elected not to collect from past customers.

Respectfully submitted,

/s/ David R. Ris  
David R. Ris  
City Attorney

c: Adv. 17-05 Service List (*via PUC*)