BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UE 324

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY, Advice No. 17-05 (ADV 523), Schedule 134 Gresham Privilege Tax Payment Adjustment.	ORDER

DISPOSITION: THRESHOLD LEGAL ISSUES RESOLVED

In this order, we address threshold legal issues raised in response to a request by Portland General Electric Company (PGE) to recover certain privilege taxes paid to the City of Gresham. We address whether PGE's request constitutes retroactive ratemaking, and conclude that PGE may recover the privilege tax payment to Gresham under ORS 757.259(1)(a)(A).

I. INTRODUCTION

On February 24, 2017, PGE filed Advice No. 17-05 seeking to recover privilege taxes it was required to pay Gresham for the period of January 1, 2012, through August 31, 2016, and to establish a balancing account to track the difference between the amount collected and the amount authorized for recovery. The approximately $7 million payment reflects a 2 percent privilege tax increase that was adopted by Gresham in 2011, struck down by the circuit court in 2012, but ultimately upheld by the Oregon Supreme Court in 2016.

PGE contends that recovery is permissible under ORS 757.259(1)(a)(A), which allows us to include in rates "[a]mounts lawfully imposed retroactively by order of another governmental agency." PGE proposes to collect the revenues from Gresham customers over a five-year period. According to PGE, a typical Gresham residential customer would see a bill increase of $1.40 per month (1.82 percent).

On March 31, 2017, Gresham filed comments requesting that we reject PGE's proposed rate schedule as unlawful, citing the rule against retroactive ratemaking and arguing that

ORS 757.259(1)(a)(A) does not apply.[1] Alternatively, Gresham proposed that we suspend PGE's advice filing and conduct an investigation into the legal issues.

On April 14, 2017, PGE replied to Gresham to defend the lawfulness of its proposed rate schedule. PGE stated that the question of retroactive ratemaking was a legal issue that could be briefed and argued in an investigation following the suspension of the advice filing.

At our April 18, 2017 Regular Public Meeting, we suspended PGE's advice filing for six months.[2] We adopted a briefing schedule for the parties to address the legal issues presented by PGE's advice filing. Briefs were filed by PGE, Commission Staff, Gresham, and the Oregon Citizens' Utility Board (CUB).[3] We further suspended PGE's advice filing for an additional three months on October 9, 2017.[4]

II. FACTS

The facts are not disputed. We summarize them below based on the parties' briefs and the appellate decisions.[5]

In 2001, Gresham's City Council established a Utility Licensing Ordinance that included a fee to help compensate the city for the use of its public rights-of-way by entities providing utility services in the city. Initially, the city established a fee of 5 percent of the utility's gross revenues earned within the city. Gresham later adopted a resolution to increase the fee from 5 to 7 percent, effective July 1, 2011. The city explains this increase was part of a series of actions to avoid service reductions, such as closing fire stations or parks, after its fall 2010 General Fund budget forecast showed a deficit of $4.9 million.[6]

---

[1] ADV 523 Advice No. 17-05, Schedule 134 Gresham Privilege Tax Payment Adjustment, City of Gresham Comments (Mar 31, 2017).
[2] Order No. 17-153 (Apr 21, 2017).
[3] On June 21, 2017, PGE filed a motion to strike portions of Gresham's response brief. PGE sought to strike references to actions that Northwest Natural Gas Company had taken in response to Gresham's increased privilege tax. According to Gresham, NW Natural continued to collect the tax from Gresham customers after the circuit court had declared the tax invalid, so that NW Natural was not required to make a retroactive tax payment to Gresham. PGE argues that the information is irrelevant because NW Natural is not a party to this proceeding and its actions are not an issue in this case. We deny PGE's motion. The actions by a similarly situated utility are relevant, but we note that the actions of NW Natural are not an issue in this proceeding.
[4] Order No. 17-385 (Oct 9, 2017).
[5] *See NW Natural Gas Co. et al v City of Gresham,* 264 Or App 34 (2014); *aff'd in part and rev'd in part,* 359 Or 309 (2016).
[6] City of Gresham Response Brief at 2 (May 30, 2017).

PGE and other utilities brought an action in circuit court challenging the lawfulness of the 2011 fee increase. In an action for declaratory judgment, PGE argued that the fee was a "privilege tax" and capped at the maximum rate of 5 percent set forth in ORS 221.450.[7]

On January 12, 2012, the circuit court agreed that the fee was a privilege tax and that the increase was preempted under ORS 221.450. In its judgment, the court concluded that Gresham's resolution to increase the fee was "void, unlawful, and unenforceable."

In March 2012, Gresham appealed the circuit court decision, but did not seek a stay of the court's judgment. On appeal, the Oregon Court of Appeals reversed the circuit court's decision and held that the city's fee was not preempted by state law. In an opinion issued July 2, 2014, the court concluded that the 5 percent rate cap in ORS 221.450 applies only to fees charged to utilities operating without a franchise agreement. The court held that, because PGE and the other utilities were not operating "without a franchise" within the meaning of the statute, the 5 percent rate cap did not apply.[8]

PGE sought review by the Oregon Supreme Court, which affirmed the Court of Appeals' decision on different grounds. The Court held that, while the fee was indeed a "privilege tax," the increase was nonetheless lawful under Gresham's independent home-rule authority that was not affected by ORS 221.450.[9] The Court remanded the case to the circuit court. On March 31, 2017, the circuit court entered a new judgment in accordance with the Oregon Supreme Court's opinion, declaring that Gresham's additional 2 percent privilege tax is "lawful and enforceable."

During this period, PGE's annual privilege tax payments to Gresham varied. PGE's payments are due annually on March 1, based on the preceding year's revenues. Each March 1 from 2012 through 2015, PGE made annual payments of 5 percent of its Gresham revenues for the preceding year. After the final appellate judgment, PGE made an additional 2 percent privilege tax payment on August 25, 2016, based on revenues from July 1, 2011, through January 12, 2012. PGE then made a 7 percent privilege tax payment on March 1, 2017, based on 2016 revenues. At the same time, it made an additional privilege tax payment to Gresham based on revenues from January 13, 2012, through December 31, 2015.

---

[7] ORS 221.450 provides in part: "[T]he city council or other governing body of every incorporated 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 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 boundary of the city. (Emphasis added.)

[8] *City of Gresham,* 264 Or App at 36.

[9] *City of Gresham,* 359 Or at 312.

During this same time, the amount PGE collected from Gresham customers also varied. As permitted by OAR 860-022-0040, PGE at all relevant times recovered 3.5 percent of the Gresham privilege tax from customers as part of its general operating expenses, and separately charged Gresham customers any incremental amounts in excess of the 3.5 percent threshold. When Gresham's fee increase became effective on July 1, 2011, PGE began collecting the additional 2 percent from Gresham customers. PGE then stopped collecting the increased amount on January 13, 2012, after the circuit court declared the increase unlawful. PGE did not commence collecting the additional 2 percent from Gresham customers until September 1, 2016, after the Oregon Supreme Court upheld the increase.

PGE now seeks to recover $7 million from Gresham customers to recover the additional 2 percent privilege tax on gross revenue from January 13, 2012, through August 31, 2016, which is the period of time when PGE was not charging its customers the additional 2 percent in privilege taxes.

III. DISCUSSION

A. Positions of the Parties

PGE contends that its request does not constitute retroactive ratemaking because it is seeking to recover a current expense that is legally required. PGE explains that, when it filed Advice No. 17-05, the $7 million tax payment was an anticipated expense that it sought to charge in prospective rates. According to PGE, the only sense in which the privilege tax payment is "retroactive" is that it is calculated based on its gross revenues collected in a past period. PGE argues that, with Gresham receiving the funds in March 2017, it is reasonable to conclude that the city may use the additional funds to provide benefits to its residents over the five-year collection period that PGE has proposed.

Regardless of the retroactive nature of its request, PGE contends its filing is authorized under ORS 757.259. That statute is generally recognized as a legislatively-approved exception to the rule against retroactive ratemaking. ORS 757.259(1)(a)(A) provides that we may allow rate schedules to reflect "[a]mounts lawfully imposed retroactively by order of another governmental agency."

According to PGE, ORS 757.259(1)(a)(A) "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."[10] PGE acknowledges that Gresham originally imposed its tax "prospectively," but contends that, given the circuit court's initial declaration that the tax was unenforceable, "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."[11]

PGE argues that its proposal is consistent with our decision to allow the company to recover taxes and royalties imposed retroactively relating to the operation of the Colstrip generating station.[12] There, the United States Department of the Interior and the Montana Department of Revenue had charged the operator of the Colstrip plant for underpayment of taxes and royalties, and the operator passed the charges on to PGE as an owner of the plant. PGE initially disputed the charges but eventually reached a settlement. We approved PGE's recovery of the settlement payment under ORS 757.259(1). In PGE's view, "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."[13]

PGE further defends its recovery under ORS 757.259(1) as fair and reasonable. PGE claims to have been acting on behalf of its customers when it challenged the lawfulness of the tax, which would have had no effect on the company's bottom line, and argues that the company should not be penalized for acting for the benefit of its customers rather than for its own profits.

In contrast, Gresham and CUB argue that PGE's request to recover taxes owed by prior customers from current customers implicates the essence of retroactive ratemaking. According to Gresham, the rule has two purposes—to protect both customers and utilities from having to settle-up if the rates do not accurately reflect the cost of service, and to provide stability by allowing customers the ability to rely on their rates not changing after they have been set and paid. In Gresham's view, PGE's proposal defeats both of these purposes. Gresham also disputes PGE's claim that the tax obligation is a current expense, arguing that "PGE's approach would allow a utility to avoid the rule against retroactive ratemaking simply by failing to pay a bill."[14] CUB adds that the rule is not limited to costs or losses within a utility's control.

Without discussion, Staff accepts that PGE's request constitutes retroactive ratemaking, and joins Gresham and CUB to argue that ORS 757.259(1)(a)(A) provides no legal

[10] PGE Opening Brief at 6 (May 9, 2017).
[11] *Id.* at 10.
[12] Advice No. 08-16, Colstrip Tax and Royalty Payment Adjustment. *See* Staff Report dated July 17, 2009, for Public Meeting on July 28, 2009.
[13] PGE Opening Brief at 11.
[14] City of Gresham Response Brief at 8.

exception to allow recovery. At the outset, Staff and Gresham question whether the state courts should be considered a governmental agency within the meaning of the statute. They do not believe the Commission needs to resolve that issue, however, because the courts did not impose the tax retroactively, but merely confirmed that Gresham had lawfully imposed it prospectively. CUB agrees that Gresham imposed the tax on PGE prospectively—not retroactively as required by the statute.

Gresham, CUB, and Staff also claim that PGE's reliance on the Colstrip tax matter is misplaced, because the tax and royalty payments at issue were imposed retroactively. Gresham explains that the underpayments there were apparently not known to PGE until they were past due, "which means that they were not in PGE's control, and arguably more likely retroactively imposed."[15] Gresham, CUB, and Staff contend that, in this case, Gresham imposed a prospective tax that PGE was aware of even if it chose not to collect it.

The opposing parties also dispute PGE's claim that the privilege tax was a cost beyond its control. They suggest that PGE could have protected itself during the legal challenge by simply continuing to collect and remit the tax increase to Gresham while the appeal process proceeded.[16] Both parties also suggest that PGE could have sought a deferral of the taxes under ORS 757.259(2).[17] Regarding PGE's assertion that it acted in the best interest of its customers when it challenged the tax, Staff states that PGE had no responsibility or obligation to challenge the tax increase, and note that PGE is permitted by law to collect the tax from its Gresham customers.

Finally, both Gresham and CUB suggest conditions to apply if we allow PGE to recover the $7 million privilege tax payment. First, Gresham argues that we should allocate the cost to all PGE customers rather than exclusively to Gresham customers. Gresham reasons that its residents should not be subjected to higher taxes than the city itself directed. Second, CUB argues that we should make any recovery subject to an earnings review under ORS 757.259(5). That provision requires that amounts allowed in rates under ORS 757.259(1) be subject to an earnings review "unless subject to an automatic adjustment clause under ORS 757.210(1)."

---

[15] City of Gresham Response Brief at 14.

[16] According to Gresham, faced with the same choice as PGE, NW Natural collected the tax from its Gresham customers while the appeals were pending. "If PGE is correct, then NW Natural violated the law by collecting fees illegally when Gresham did not seek a stay." *Id.* at 25.

[17] ORS 757.259(2)(e) provides for deferral of "identifiable utility expenses or revenues, the recovery of refund of which the commission finds should be deferred in order to minimize the frequency of rate changes or the fluctuation of rate levels or to match appropriately the costs borne by and benefits received by ratepayers."

B. Resolution

Our resolution reflects the evolution of PGE's arguments in support of its request to recover the Gresham privilege tax payment. Initially, PGE's sought approval under ORS 757.259(1)(a)(A)—a legislatively approved exception to the rule against retroactive ratemaking. In subsequent filings and briefs, PGE added the fundamental argument that its request does not constitute retroactive ratemaking, thus essentially rendering its initial reliance on ORS 757.259(1)(a)(A) as an alternative argument. We address both arguments as presented by the parties.

Generally stated, the rule against retroactive ratemaking prohibits a utility regulator from setting rates that allow a utility to recover past losses or require it to refund past profits. The rule is primarily derived from the fact that ratemaking is a legislative act and is applied prospectively absent explicit legislative direction to the contrary.

Although the rule against retroactive ratemaking is widely recognized, how the rule is defined and applied varies considerably. Some regulators and reviewing courts interpret the rule broadly and apply it rigidly, while others interpret it more narrowly and allow exceptions to remedy procedural and legal errors, address extraordinary losses or gains, or resolve unique circumstances.

In Order No. 08-487, we addressed ratemaking issues associated with the retirement of PGE's Trojan nuclear plant and examined how the rule against retroactive ratemaking has been interpreted and applied in Oregon.[18] Specifically, we addressed whether the rule prohibited our ability to award refunds to customers to remedy a prior legal error in the exercise of our ratemaking authority. We noted that the rule has generally been adopted in Oregon, but "the courts have not fully considered the rule or conclusively decided whether to interpret the rule narrowly (to prohibit only the consideration of past profits or past losses in setting future rates) or more broadly (to prohibit any action by the Commission that would affect past losses or profits)."[19]

Following a thorough review of the relevant case law and Oregon's statutory scheme for utility regulation, we determined not to adopt a broad interpretation that would prohibit a retroactive rate adjustment in the circumstances of that case. We concluded that our

---

[18] *In the Matters of the Application of Portland General Electric Company for an Investigation into Least Cost Plan Plant Retirement, Revised Tariffs Schedules for Electric Service in Oregon Filed by Portland General Electric Company; and Portland General Electric Company's Application for an Accounting Order and for Order Approving Tariff Sheets Implementing Rate Reduction*; Docket Nos. DR 10, UE 88, and UM 989, Order No. 08-487 (Sep 30, 2008).
[19] *Id.* at 38.

interpretation of the rule did not prevent us from reexamining past rates to determine a remedy to correct a legal error in our order setting those rates. Given the Commission's broad ratemaking authority, we held that we could, under the circumstances presented in that case, retroactively adjust past rates to "true-up" the estimated expenses and revenues used in the rate case test year to a utility's actual expenses and revenues.[20]

The Oregon Supreme Court upheld our decision in *Gearhart, et.al. v. Oregon Pub. Util. Comm'n,* 356 Or 216 (2014). In addressing the rule against retroactive ratemaking, the Court paraphrased our own narrow expression of the rule, and concluded that the rule did not prohibit the reexamination of past rates following the judicial reversal of a prior rate order. The Court relied on the fact that we had not reexamined past rates to capture excess profits or losses from past rates, but rather to remedy a legal error in setting those rates.[21]

In reaching its decision, the Court declined to definitively interpret the rule against retroactive ratemaking in Oregon. It explained:

> We have never expressly decided whether Oregon accepts some form of the rule against retroactive ratemaking. For purposes of this case, we need not precisely define the contours of that rule or decide whether Oregon accepts that rule in all circumstances. It is sufficient for present purposes to conclude, as we do, that the rule against retroactive ratemaking does not preclude the action that the PUC took on remand in this case.[22]

Given the Oregon Supreme Court's reluctance to conclusively define the meaning of the rule against retroactive ratemaking and the factual distinctions between that case and this one, the cited precedent does not control whether the rule against retroactive ratemaking allows or prohibits recovery here. Although we will not revisit here the scope of the rule against retroactive ratemaking nor apply the rule to the facts of this case, we note the relevance of this precedent to such a question. In future cases that turn on our application of the rule against retroactive ratemaking, we expect parties to address more fully the policy reasoning and factual circumstances detailed in this precedent.

We need not resolve the applicability of the rule here, because we decide that PGE's privilege tax payments to Gresham qualify for recovery under ORS 757.259(1)(A). That

[20] Order No. 08-487 at 41.
[21] *Gearhart*, 356 Or at 240.
[22] *Gearhart* 356 Or at 237.

statute allows us to include in rates "[a]mounts lawfully imposed retroactively by order of another governmental agency."

When interpreting a statute, our goal is to determine the intent of the legislature. To do this, we begin with the text of the statute itself, which serves as "the best evidence of the legislature's intent."[23] In this analysis, we may also examine legislative history, but the statute's "text and context remain primary, and must be given primary weight in the analysis."[24] If ambiguity remains as to the legislature's intent after an examination of the text in context of any legislative history, we may resort to general maxims of statutory construction.[25]

First, we conclude that Gresham is a "governmental agency" within the meaning of the statute. The plain, natural, and ordinary meaning of "governmental" is "of or relating to government or to the government of a particular unit."[26] "Agency" means "a department or other administrative unit of a government."[27] The combination of these two terms encompasses the City Council of Gresham, which is an administrative unit of a political subdivision with governmental powers and authority.

We next conclude that Gresham lawfully imposed the amounts retroactively. Although Gresham, CUB, and Staff are correct that the city initially attempted to impose the increased privilege tax prospectively in 2011, they fail to acknowledge that the city did not do so *lawfully* at that time. The circuit court struck down that increase shortly after enactment, and the circuit court's judgment controlled during the pendency of the appeal. By the time Gresham lawfully imposed the amounts following the circuit court's order on remand in 2017, the tax was applied retroactively to past periods.

Finally, we conclude that the amounts were imposed by an "order" within the meaning of the statute. We have previously clarified that the term "order," as used in the context of ORS 757.259(1)(a)(A), is synonymous with "action," and that "the statute does not require an order of government have a specified form."[28] The decision by Gresham's City Council to apply the privilege tax retroactively following final conclusion of the judicial proceedings, constitutes government action contemplated by the statute.

---

[23] *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993).
[24] *State v. Gaines*, 346 Or 160, 171 (2009).
[25] *Id.* at 172.
[26] *Webster's Third New Int'l Dictionary* at 983 (unabridged ed 2002).
[27] *Id.* at 40.
[28] *In the Matter of Idaho Power Company, Deferral of Recognized Tax Benefits*, Docket No. UM 1562, Order No. 13-160 at 6 (Apr 30, 2013).

This application of ORS 757.259(1)(a)(A) is consistent with our approval of PGE's recovery of payments of taxes and royalties in the Colstrip tax matter.[29] In both cases taxes were imposed prospectively and collected retroactively—in the Colstrip case because the mine operator underpaid the U.S. Department of the Interior and the Montana Department of Revenue at the time the payments were due; in this case because PGE successfully challenged Gresham's tax at the circuit court level, only to have the tax reinstated four years later by the Oregon Supreme Court.

Although not a basis for our legal conclusion here, we find that PGE acted in good faith when it challenged the tax. If PGE were not allowed to recover the tax after the circuit court decision was overturned by the Oregon Supreme Court, it would signal that a utility should not take the risk of challenging an apparently unlawful charge. Although that result would be harmful to PGE's shareholders in this case, such a precedent would likely be harmful to PGE's ratepayers in the long run. We also do not support the view that PGE should be denied recovery because the company had no obligation or responsibility to challenge Gresham's tax increase. To protect ratepayers from imprudent costs, PGE has a responsibility to evaluate the legality of costs imposed on customers and to consider challenging costs it has strong reason to believe are unlawful.

With our decision to allow PGE to recover the retroactive tax payment, we next consider the arguments presented by Gresham and CUB regarding conditions on recovery. We first decline Gresham's proposal that we allocate the cost to all PGE customers rather than exclusively to Gresham customers. Our policy regarding a utility's recovery of privilege taxes is set out in OAR 860-022-0040 and based on the principle of properly aligning the costs borne by and benefits received by ratepayers. Under that rule, taxes and fees imposed by a particular city are treated as general operating expenses up to a threshold of 3.5 percent of the utility's gross revenues from operations within that city, and the utility may recover these amounts from all ratepayers. To the extent a city's taxes and fees exceed this threshold, the rule provides that the excess amount must be itemized or billed separately by the utility and charged pro rata to customers in that city.

We find no reason to deviate from that policy here, and direct PGE to recover the additional tax from customers within Gresham's city limits. Although the delay associated with the appellate review will temporarily increase the amounts that would otherwise be charged to customers, we find no persuasive reason to require customers who reside outside of Gresham to bear these additional costs that will benefit residents of

[29]*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 29, 2009.

Gresham. Moreover, PGE's proposal to recover the additional amounts over a five-year period will mitigate the rate impact to Gresham customers.

We also reject CUB's argument that PGE's recovery of the additional amounts should be subject to an earnings test under ORS 757.259(5). ORS 757.259 requires a review of earnings, but the application of an earnings test is a matter of Commission policy. The use of an earnings review is tied to the general ratemaking principle that a utility is responsible for operating within a fixed level of rates, and should only be allowed to recover amounts through deferred accounting in extraordinary circumstances.[30] In other words, a utility should not be allowed to amortize a deferred amount if, despite the deferred cost, the rates charged provided the utility a reasonable return.

The policies underlying the use of an earnings test are not implicated here, because the privilege tax amounts over 3.5 percent of the utility's gross revenues are not part of the calculus used to set general rates for PGE (and therefore do not affect earnings). Under OAR 860-022-0040, privilege taxes equaling only the first 3.5 percent of the utility's gross revenues from city operations are treated as general operating expenses for purposes of setting rates. For any privilege taxes in excess of that threshold—like those imposed by Gresham—PGE is required to act essentially as a tax-collector and directly bill customers and remit amounts collected to the city. PGE, consistent with our rule, is simply seeking to recover amounts it is required to collect from Gresham customers. Under these circumstances, we find that whether or not PGE could absorb the costs and still earn a reasonable return on equity, the costs are the sort that should be borne by the customers within Gresham's city limits.

IV. CONCLUSION

We conclude that PGE may recover the tax payment under ORS 757.259(1)(a)(A). We also decline to apply an earnings test in these circumstances.

We further find that the rate treatment of PGE's tax payment is governed by OAR 860-022-0040(1) and (6), which require that the tax payment "be charged pro rata to energy customers within said city and shall be separately stated on the regular billings to such customers."

Finally, having decided there are no legal issues precluding PGE's recovery of the disputed amounts, we direct the Administrative Hearings Division to convene a conference with the parties to determine what, if any, additional proceedings are

[30] *See Util. Reform Project & Ken Lewis v. Pub. Util. Comm'n of Or*, 261 Or App. 388, 395 (2014).

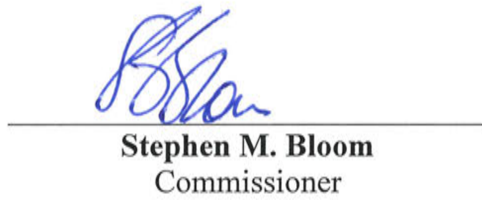
necessary to resolve any potential factual issues related to PGE's Advice No. 17-05. We expect any future proceedings to be expedited and limited solely to the factual issue raised by Gresham.

V. ORDER

IT IS ORDERED that the Administrative Hearings Division shall convene a conference to determine whether any additional proceedings are necessary to resolve potential factual issues related to PGE's Advice No. 17-05.

Made, entered, and effective NOV 28 2017.

Lisa D. Hardie
Chair



Stephen M. Bloom
Commissioner

Megan W. Decker
Commissioner