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	)	**CITY OF GRESHAM'S RESPONSE BRIEF**

I. INTRODUCTION

The City of Gresham ("Gresham" or "City") requests that the Public Utility Commission of Oregon ("Commission") reject Portland General Electric Company's ("PGE's") Advice No. 17-05 and Schedule 134 Gresham Privilege Tax Payment Adjustment ("Advice No. 17-05"). PGE's filing undermines Gresham's taxing authority and violates the rule against retroactive ratemaking because it effectively requires PGE's current and future customers in Gresham to pay higher taxes to "settle up" for uncollected rates associated with former Gresham customers' past service. Gresham's current and future customers should not be harmed by PGE's unilateral decisions not to collect these taxes from its customers at the correct time, and not to seek Commission pre-approval to stop collecting the fees or open a deferred account. If the Commission does not completely reject Advice No. 17-05, then it should not require Gresham's current and future citizens to shoulder all the costs associated with PGE's unpaid taxes, and instead either allocate these amounts to all of PGE's ratepayers or require PGE to absorb at least

a portion of the costs, including the higher interest owed solely because PGE elected not to collect them.

II. FACTUAL BACKGROUND

This dispute centers on an overdue, unpaid tax.[1] On May 17, 2011, Gresham passed Resolution 3056, increasing its privilege taxes on utilities like PGE by two percent. In the Fall of 2010, the City's General Fund budget forecast showed a deficit of $4.9 million below what was needed to meet the minimum required ending fund balance. Resolution 3056 was the last part of a three-pronged strategy of cost containment, workforce reduction, and revenue enhancement. These combined actions – which included eliminating numerous police and fire positions and enacting limitations to existing salary and benefit expenses – were intended to avoid further service reductions such as closing fire stations or parks.

Ultimately, Gresham wanted to control both revenues for services as well as the level of its city taxes on its customers, and relied upon its taxing authority over utilities operating within its city to do so. Gresham determined that seven percent, rather than five or nine percent, struck the right balance between its citizens' needs and their overall tax liability. When Resolution 3056 became effective on July 1, 2011, PGE and Northwest Natural ("NW Natural") began collecting the increased fees from their customers in Gresham pursuant to OAR 860-022-0040, and challenged the legality of Resolution 3056.

The Multnomah County Circuit Court ("Circuit Court") issued its first opinion on January 12, 2012, incorrectly stating that Resolution 3056 was an impermissible tax

[1] See Attachment A (Timeline of Events related to Advice No. 17-05).

because it exceeded the statutory limit for franchise fees that could be imposed upon a utility by a city. PGE stopped collecting Gresham's increased fees the very next day, on January 13, 2012, despite the fact that the Circuit Court did not enter its first judgment order until a month later, on February 13, 2012. NW Natural, however, continued to collect the fees from customers, and held them in an account pending resolution of the appeal. PGE decided not to request deferral under ORS 757.259(2), or request clarification from the Commission as to whether either ORS 757.259(1) or OAR 860-022-0040 would apply to the facts of this case.

Gresham appealed the Circuit Court's decision on March 13, 2012. Two years later, on July 2, 2014, the Oregon Court of Appeals ("Court of Appeals") issued its opinion reversing the Circuit Court decision. The Court of Appeals found that Gresham's tax increase was not subject to the statutory limit, and was therefore lawful and enforceable. PGE and NW Natural appealed the Court of Appeals opinion on September 3, 2014.

Despite the Court of Appeals concluding that Gresham was entitled to pass Resolution 3056, PGE continued to not collect the fees from its Gresham customers. PGE also decided (again) not to request deferral of the its overdue tax liability under ORS 757.259(2), or request clarification from the Commission as to whether either ORS 757.259(1) or OAR 860-022-0040 might apply. This is significant because ORS 757.259(2) could have permitted recovery, if the Commission deemed it was appropriate for PGE to do so.

The Supreme Court of Oregon ("Supreme Court") affirmed the Court of Appeals decision on May 5, 2016. PGE, facing final resolution of the legality of Resolution 3056,

decided (again) not to begin collecting the increased fees from its customers in Gresham nor to make any filings before the Commission. The Supreme Court issued an appellate judgment on August 4, 2016.

On September 1, 2016, PGE began collecting Gresham's increased fees again. On February 24, 2017, PGE filed Advice No. 17-05, claiming that it was permitted to automatic recovery pursuant to ORS 757.259(1) because the taxes were imposed retroactively by another governmental agency. PGE also claimed that OAR 860-022-0040 permitted its retroactive recovery be limited to only its customers in Gresham. Finally, on March 31, 2017, the Circuit Court issued its final judgment order.

PGE's Advice No. 17-05 filing did not mention that PGE decided not to collect the amounts throughout the appeal process, or that it could have taken other actions that would have avoided this entire case. For example, PGE did not mention that NW Natural had decided to continue collecting Gresham's increased taxes throughout the appeal process and had already settled up with Gresham (including paying interest on its overdue taxes) when the appeal process concluded. The Commission set this briefing schedule after the City of Gresham challenged it and requested the Commission more closely scrutinize Advice No. 17-05 to determine whether Oregon's statutes and rules permit PGE's recovery as requested.

III. ARGUMENT

Despite PGE's claims, Advice No. 17-05 and Schedule 134 seek authority to implement impermissible retroactive ratemaking. PGE attempts to rely upon ORS 757.259(1), a statutory exception to retroactive ratemaking, but that exception does not apply given the unique set of facts and circumstances at issue. In short, ORS 757.259(1)

is not available to PGE because Gresham imposed its taxes prospectively. PGE simply chose not to pay its taxes during the appellate review. Moreover, ORS 757.259(1) only applies to taxes imposed by "another governmental agency" which is not defined by the statute and may not apply here. PGE is in a problem of its own making, because it chose not to collect Gresham's taxes or make any Commission filings, and PGE's current and future customers should not be harmed by PGE's unilateral business decisions.

Taken as a whole, PGE's views of its obligations to Gresham are inconsistent with, and PGE undermines, its own arguments with its efforts to justify its actions over the years. When addressing ORS 757.259(1), PGE attempts to claim that Gresham's taxes have been imposed by the courts in 2017 rather than by Gresham in 2011. Yet, when addressing OAR 860-022-0040, PGE claims its debt was imposed by the City, which would mean that it was imposed in 2011. PGE cannot have it both ways. In reality, the amount owed to Gresham is simply an overdue tax, which was prospectively imposed by the City in 2011.

Taken to their logical conclusions, PGE's own arguments would mean that NW Natural violated the law.[2] NW Natural continued its collection throughout the entire legal proceeding, which according to PGE was inconsistent with the Circuit Court's judgment. In reality, NW Natural has fully complied with the spirit and letter of the law,

[2] PGE's arguments even imply that PGE violated the law. PGE stopped collecting immediately after the initial Circuit Court opinion and started recollections before the final Circuit Court judgment was issued. If PGE is correct that the Circuit Court's judgment order is the key determination of when PGE needed to collect monies from ratepayers (which Gresham strongly disagrees), then PGE did not act consistent with its legal theory in this case by taking actions based on some (but not all) court opinions rather than the Circuit Court's initial and final judgment orders.

and PGE is attempting to justify recovery under ORS 757.259(1) because it failed to request a deferral pursuant to ORS 757.259(2), seek permission from the Commission to stop collections, or seek to enforce the Circuit Court's judgment upon the City.

Finally, a critically important issue that PGE ignores is that, if the Commission approves Advice No. 17-05 and allows PGE to collect more than the 7% that Gresham has determined is the proper amount, then PGE's actions will significantly undermine the City's taxing authority. City governments must make decisions about when the need to provide services warrants asking citizens to pay more for those services. These actions are not taken lightly, in part because Gresham residents are arguably the most vulnerable to cost increases of any population in the region.[3]

Gresham's elected representatives chose to limit its citizen's tax liability to no more than seven percent to account for specific revenue shortfalls. By failing to collect the fees from past customers and attempting to charge those fees to current and future customers, the practical result will be Gresham's current and future citizens will pay **more** than seven percent to make up for PGE's business decision. This is unlike NW Natural, which took appropriate actions that allowed it to both fully exercise its legal rights to challenge Resolution 3056 and to do so in way that ensured that none of Gresham's citizens paid any more than the City authorized.

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[3] Gresham's poverty rate is 18.2%*, which is about 1.5 times greater than the metropolitan region, and twenty percent higher than the rate in the City of Portland. Gresham's median household income is $46,457, which is only about three quarters of the amount in the metro region ($63,850), and less than the median income statewide ($54,148). * Data from the US Census American Community Survey 2015 1-year estimate. More information can be found at: https://censusreporter.org/profiles/16000US4131250-gresham-or/.

Allowing PGE to charge current and future customers will essentially have the practical result of PGE, without any consultation or pre-approval from the City or the Commission, usurping the City's sole right to determine the tax burden that is ultimately placed on its citizens. Specifically, if approved, PGE's attempt to collect the amounts after rather than during the appeal will result in Gresham's citizens paying more than the seven percent the City has determined is the appropriate amount. The Commission should be careful to ensure that any decision in this proceeding does not unduly infringe on the statutory and constitutional powers of another instrument of the state and municipal government.

A. PGE's Proposed Schedule 134 Constitutes Retroactive Ratemaking

Allowing PGE to charge past due taxes to current and future customers would effectively permit retroactive ratemaking because it would allow PGE to increase future rates to compensate for its past services rendered. The prohibition against retroactive ratemaking has two purposes, both of which do not support PGE's collection in this situation. First, it protects both customers and utilities alike from being asked to settle-up if rates do not accurately reflect the cost of service. Second, the prohibition against retroactive ratemaking provides stability in the regulatory process, because parties and customers can rely on rates not changing after they have been set and paid. Former Public Utility Commissioner Charles Davis explained retroactive ratemaking to the Oregon Legislature in 1987, noting:

> From the customer's viewpoint, the principle underlying the prohibition against retroactive ratemaking is that the customers should know what a utility service costs him at the time he takes it. The posted tariff on the day of service represents a contract between the customer and the utility.

> The customer should not expect to pay more and the utility should not expect to get less.[4]

PGE first contends its filing "does not offend any of the principles underlying the general prohibition on retroactive ratemaking, nor does it constitute retroactive ratemaking in the traditional sense."[5] This is incorrect. PGE creatively attempts to portray its debt as a current payment by stating that "when PGE filed Advice 17-05, the $7 million was an anticipated expense. . . ."[6] The expense was anticipated many times before PGE filed this case, including in 2011 when the City imposed the tax, in 2014 when the Court of Appeals reversed the erroneous Circuit Court opinion, and earlier in 2016 when the Supreme Court affirmed that decision.

PGE's approach would allow a utility to avoid the rule against retroactive ratemaking simply by failing to pay a bill. PGE does not get to decide when its taxes are due; PGE was obligated to start complying with the Resolution on July 1, 2011, the effective date of the City's resolution. If the Internal Revenue Service allowed taxpayers to claim their taxes were not due until the final resolution of a judicial challenge, people could use the court process to circumvent their tax liability.

Allowing PGE to settle-up with its Gresham customers flatly contradicts the purpose of the rule in its most traditional sense. PGE's filing would mean that certain customers did not know what their utility service costs were at the time they took it. PGE's filing undermines that "contract" between the customer and utility that former Commissioner Davis referred to, introduces a new level of uncertainty to the regulatory

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4 H.B. 2145, House Committee on Environment and Energy, Testimony of Charles Davis at 3 (Mar. 11, 1987).

5 PGE's Opening Brief at 13.

6 Id. at 14 (emphasis in original).

process, and creates a brand new exception to the rule against retroactive ratemaking.

PGE asserts that retroactive ratemaking is limited to situations that prevent a utility from ensuring that stockholder investments are guaranteed or their "bottom line" is effected, and that this situation does not apply because the privilege tax is merely passed through from PGE to its customers.[7] Retroactive ratemaking applies to more than just profits or losses, and includes all other expenses, like taxes, as well.[8] If retroactive ratemaking did not apply to taxes, then there would not be two specific statutory exceptions to retroactive ratemaking available for taxes.[9]

PGE also attempts to distinguish between operational costs, which are under its control, and taxes, which the utilities have no control over. PGE's assertion that the rule does not apply to costs that it has "no control" over is irrelevant because: 1) the prohibition against retroactive ratemaking applies to all types of costs despite a utility's ability to control them; and 2) PGE was in control of when it charged ratepayers and simply chose not to collect them during the appeal process. For example, utilities do not control the weather, but generally file deferred accounting requests to cover the costs storm damage that exceed the amounts included in rates or insurance.[10] The fact that PGE initially collected the additional taxes, however, demonstrates that these taxes were

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7 Id. at 12-14.

8 Oregon Department of Justice, Opinion Request OP-6067 at 2 [hereinafter "DOJ Opinion 6067"] ("However the rule [against retroactive ratemaking] is stated, it applies when past profits or losses, including past expenses, are incorporated in future rates."); id. at 8 (concluding the Commission lacked authority for its practice of "deferring the collection of revenues to cover the operating costs and return on rate base until a specific later period").

9 ORS 757.259(1) applies to certain taxes retroactively imposed, and ORS 757.259(2) could apply to other taxes more generally.

10 See e.g., Re PGE Application for Deferral of Storm-Related Restoration Costs, Docket No. UM 1817, PGE's Application at 2 (Jan. 11, 2017).

under PGE's control and that PGE had authority to collect them from customers.

PGE claims that it acted in the best interest of its customers by not charging past customers, without acknowledging the inequity this filing places upon current and future customers.[11] First, PGE's customers that also took service during the time in which PGE failed to collect the fee have reasonably relied on their rates as having been completely paid for their electricity consumption. These customers that continue to reside in the City would effectively be saddled with a large past-due balance by PGE through this filing. Second, current customers that were not served during the time in which PGE failed to collect the fee would be required to pay for costs that should have been charged to past customers. PGE also effectively rewards those customers who have left Gresham by allowing them to avoid paying their fair share of the overdue taxes. Thus, the changes to PGE's customer base in Gresham during the appellate review exacerbate the inequity of PGE's filing. Finally, PGE's actions may have resulted in higher interest costs than if PGE had collected the amounts when due, which effectively penalizes all its customers.

NW Natural, rather than PGE, acted in the best interest of its customers and secured a more equitable result. Both NW Natural and PGE appropriately challenged a tax that they did not believe should be paid. By collecting Gresham's taxes throughout, however, NW Natural was able to match their customers' actual past use with their legal obligations, and avoid unnecessary litigation. In addition to the generational inequity problems mentioned above, PGE's customers will pay higher legal fees because PGE is still litigating the issue of interest at the Circuit Court, and is currently litigating whether it is permitted to retroactively recover its overdue taxes before the Commission and any

[11] PGE's Opening Brief at 12.

potential appeals.[12]

B. ORS 757.259(1) Does Not Permit Recovery by PGE Because Gresham Imposed Its Tax Increase Prospectively

Both PGE and Gresham agree that retroactive ratemaking is prohibited unless, expressly authorized by the legislature.[13] By relying upon one of Oregon's statutory exceptions, ORS 757.259(1), PGE effectively concedes that Advice No.17-05 constitutes retroactive ratemaking.[14] The main problem for PGE is that ORS 757.259(1) does not apply. Despite PGE's claims, the courts did not "lawfully impose" any tax retroactively, but merely confirmed that Gresham had already lawfully imposed it. Another problem for PGE, is that it could have requested a deferral under ORS 757.259(2), but elected not to. The statutory exception to retroactive ratemaking that PGE relies upon, ORS 757.259(1), has two substantive requirements that preclude PGE's recovery: 1) the amounts must be imposed retroactively; and 2) the amounts must be imposed by a governmental agency. The applicability of each of these statutory exceptions is addressed in detail below.

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12 Id. at 4 ("Still pending before the circuit court is the question of whether any interest is due on the retroactive tax obligation. If the court determines that some amount of interest is due, then PGE will add such amount to its calculations for Schedule 134.").

13 Compare id. at 13 ("Retroactive ratemaking orders are prohibited unless they are expressly authorized by the legislature and … Gresham implicitly concedes that if ORS 757.259(1) applies, then there is no retroactive ratemaking problem") with id. ("Even without the statute, the Commission would have the authority to approve Schedule 134 because it is fair and reasonable").

14 While PGE now asserts that the Advice No. 17-05 may not constitute retroactive ratemaking, PGE filed Advice No. 17-05 only pursuant to ORS 757.259(1), which necessarily means that the rule against retroactive ratemaking is implicated. In other words, there would be no need to file Advice No. 17-05 as an exception to a rule, if the rule did not apply in the first place.

1. The City's Privilege Tax Was Not "Imposed Retroactively" by Either the City or the Court

The late-paid taxes at issue in this proceeding were imposed prospectively by Gresham in 2011, which means that Gresham's fees are expressly excluded from ORS 757.259(1). Should the Commission undergo statutory interpretation of ORS 757.259(1), the plain meaning, context, and legislative history of the statute support a conclusion that Gresham's taxes were imposed prospectively and therefore not expressly provided for.[15] Moreover, the relevant court and Commission precedent also suggests these taxes were imposed prospectively. PGE's position that the fees were imposed retroactively is simply unsupportable.

The plain language of ORS 757.259(1) expressly limits the provision to amounts "imposed retroactively". Black's Law Dictionary defines "retroactive" as "extending in scope or effect to matters that have occurred in the past" and similarly defines a "retroactive law" as "[a] legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect."[16] Thus, the plain meaning of retroactively imposed would include an imposition that looks back, or provides a new effect based on events in the past. Conversely, Black's Law Dictionary

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[15] Gresham largely agrees with PGE's characterization of the legal analysis that a court performs when interpreting a statute, with the exception that PGE neglected to mention that PGE v. Bureau of Labor & Indus., 317 Or. 606, 610, 859 P.2d 1143 (1993) was modified by State v. Gaines, 346 Or. 160, 206 P.3d 1042 (2009). The important modification was that the statutory text does not need to be ambiguous for the court to consider the relevant legislative history. Gaines, 346 Or. 171-72. In this case, the legislative history strongly supports a conclusion that Advice 17-05 is not authorized under ORS 757.259(1) because Gresham's taxes were prospectively imposed on PGE.

[16] Black's Law Dictionary (10th ed. 2014).

defines "prospective" as "[e]ffective or operative in the future."[17] Thus, a court decision that confirms a city's legal right to impose a tax on is not a "retroactive" action.

Gresham adopted Resolution 3056 in May of 2011 to be effective in July of 2011. Gresham's resolution did not affect matters that occurred in the past, or involve facts that existed before the resolution came into effect. Instead, when Gresham imposed its two percent tax increase, it only involved PGE's future tax amounts. Thus, the plain meaning of "retroactive" confirms Gresham's fees were not retroactively imposed and the plain meaning of "prospective" means that Gresham's imposed the fees prospectively.

Oregon precedent also confirms that Gresham's taxes were imposed prospectively. According to Oregon's courts, "a retroactive action is one that affects existing legal rights or obligations arising out of past transactions or occurrences."[18] Because Gresham's tax affected PGE's obligation to Gresham going forward, Oregon precedent supports that it was not a retroactive action.

The Commission's previous orders also suggest that the taxes were imposed prospectively. Commission precedent has distinguished between the generally prospective nature of utility ratemaking and retroactive ratemaking on several occasions. In one such example, the Commission staff ("Staff") argued against a deferral request filed by NW Natural under ORS 757.259(2) explaining that NW Natural's request amounted to improper "cherry picking" of certain utility costs and ran afoul of the

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17 Id.

18 U.S. Bancorp v. Department of Revenue, 337 Or. 625, 103 P.3d 85 (2004); see also Whipple v. Howser, 291 Or. 475, 488-89, 632 P.2d 782 (1981) (explaining the retroactive effect is a question of legislative intent); cf. Quarty v. U.S., 170 F.3d 961 (9th Cir. 1999) (affirming retroactive application of taxes with "effective dates prior to the dates of the actual enactment").

holistic nature of utility ratemaking. Staff noted,

> Rates are set prospectively to cover all utility costs, and once they are set, they remain in place until the Commission changes them. When costs fluctuate between rate cases, … both the company and its ratepayers gain or lose with respect to various categories, as some costs go up, while others go down. It is inappropriate to allow the company to recover its "excess" costs for one specific cost category, while ignoring all other categories.[19]

Permitting PGE to recover Gresham's fees would be a deviation from the Commission's practice of prohibiting retroactive rate recovery, because it would allow PGE to "cherry pick" certain costs that have not been specifically provided for by statute.

PGE's assertion that Advice No. 08-16, Colstrip Tax and Royalty Payment Adjustment provides Commission precedent that is similar "[i]n all relevant respects" is inaccurate.[20] First, in Colstrip, the underpayments were apparently not known to at least PGE until they were past due, which means that they were not in PGE's control, and arguably more likely retroactively imposed. More important, PGE was not the operator, but instead the entity that operated the mine was liable for the taxes and then notified PGE that, as a partial owner, it would be subject to the obligation to the government agencies.[21] The fact that a settlement was reached with the U.S. Department of Interior and Montana Department of Revenue that allowed PGE to avoid paying interest or fines should not be relied upon by the Commission as precedent in this proceeding.

Finally, the legislative history for Oregon's statutory exceptions to retroactive ratemaking also indicates that the taxes were imposed prospectively. In considering

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19 Re Northwest Natural Gas Co., dba NW Natural, Request for General Rate Revision, Order No. 12-437 at 19 (Nov. 16, 2012).

20 PGE's Opening Brief at 11.

21 PGE Advice No. 08-16, Staff Report at 1 (July 17, 2009).

whether to pass ORS 757.259, the legislature relied upon testimony of Commissioner Davis, who relied upon a Department of Justice ("DOJ") opinion regarding the rule against retroactive ratemaking. That DOJ opinion stated that the rule against retroactive ratemaking "applies when past profits or losses, including past expenses, are incorporated in future rates . . . ."[22] It went on to distinguish between retroactive and prospective ratemaking:

> Technically, retroactive rate making occurs when an additional charge is made for past use of utility service, or the utility is required to refund revenues collected, pursuant to then lawfully established rates for such past use. … Prospective rate making to recover unexpected past expense, or to refund expected past expense which did not materialize, is as improper as is retroactive rate making.[23]

The DOJ opinion concludes the prohibition against retroactive ratemaking "protects ratepayers by ensuring that they know the maximum cost of service at the time they use the service." This opinion, which was the impetus for the legislative action, reinforces the conclusion that Gresham's fees were not imposed retroactively.

Commissioner Davis also explained what "retroactive rates" meant to the Oregon Legislature. Commissioner Davis offered,

> if the amounts in question, whether they represent costs retroactively imposed on the utility, or those deferred at its request, are later amortized in rates, the rates are said to be made retroactively because they reflect a cost already incurred by the utility, as opposed to one which is expected in the future.[24]

Gresham's taxes reflect "costs already incurred" by PGE, as opposed to one which is expected in the future. The mere fact that PGE was aware of the Resolution,

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22 DOJ Opinion 6067 at 2 (Mar. 18, 1987).

23 Id. at 3.

24 H.B. 2145, House Committee on Environment and Energy, Testimony of Charles Davis at 4 (Mar. 11, 1987).

collected amounts under it for about six months, and could have requested deferral five years ago means that it should not be permitted to pretend that this is a newly incurred cost. Simply put, the fact that PGE calls the payment of its overdue tax a "current expense" does not mean that it was currently incurred.[25]

PGE also claims that the legislative history suggests ORS 757.259(1) should be interpreted broadly, but the legislative history is riddled with examples where legislators expressed concern that both ORS 757.259(1) and ORS 757.259(2) should be interpreted narrowly and highlighted that retroactive events are "unexpected" events. The official record for HB 2145 lists the first major issue discussed at the hearings as "[t]he exact dimensions of the 'unanticipated' events to insure they are not abused."[26] Representative Ron Eachus stated that HB 2145 would provide "specific authority" and stressed the "goals were to limit it and make sure it was applied in out-of-the ordinary circumstances, applied on a temporary basis and applied where generally small amounts are in effect."[27] Representative Rocky Barilla said the idea that this bill would take care of unanticipated risk "bothered him" and that he "does not want to see this mechanism being used to try to cure any and all events. We can justify anything under this bill if we want to and the relief under this bill should be very narrowly construed.[28]

Commissioner Davis stressed that ORS 757.259(1) was designed for "certain situations" where the utility "**had no opportunity to predict**" the retroactively implied

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25 PGE's Opening Brief at 14.

26 H.B. 2145, House Committee on Environment and Energy, Staff Measure Analysis at 1 (June 9, 1987).

27 H.B. 2145, Senate Committee on Business, Housing, and Finance, Committee Minutes at 11 (May 21, 1987).

28 H.B. 2145, House Committee on Environment and Energy, Committee Minutes at 15 (Apr. 8, 1987).

costs, and ORS 757.259(2) was designed for where "the utility asks that a cost be deferred and not reflected in rates until a later date."[29] Commissioner Davis even provided a chart that demonstrated the timing of a retroactively imposed "unanticipated event" should begin the beginning of a deferral period.[30] While PGE challenged the City's tax in good faith, PGE could have predicted that one possible outcome was that the courts would ultimately affirm Gresham's ability to impose the tax.

With respect to ORS 757.259(1) specifically, Bob Warren, a Commission representative, characterized this provision as an "emergency clause" added for costs "over which the utility had no control."[31] Commissioner Davis added that although retroactive tax increases were "not common, there have been occasions where this has occurred" and they would be covered by the measure. The Commissioner also provided examples, "[i]n recent years there have been special property tax assessments, and the Federal Tax Reform Act of 1986 disallowed use of most investment tax credits retroactive to the first of the year. If these amounts are material, recovery of rates could be permitted."[32] Thus, none of these examples are situations like Gresham's fee where the utility simply chose not to pay a prospectively applied tax increase.

Finally, Commission Davis's testimony confirmed the Attorney General's Office had indicated the current statutes "do not allow the deferral of ratemaking to

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29 H.B. 2145, House Committee on Environment and Energy, Testimony of Charles Davis at 3-4 (Mar. 11, 1987) (emphasis added).

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

31 H.B. 2145, House Committee on Environment and Energy, Committee Minutes at 14 (Apr. 8, 1987).

32 H.B. 2145, House Committee on Environment and Energy, Testimony of Charles Davis at 6 (Mar. 11, 1987).

accommodate many of these mandated and unanticipated changes in expense between formal rate proceedings."[33] More specifically, AG Opinion 6067 states, "[w]e conclude that retroactive ratemaking orders are absolutely impermissible unless they are expressly authorized by the legislature . . . ."[34] The AG Opinion went on to explain,

> Deferred collection would not protect ratepayers in the required manner. On the contrary, deferred collections harm ratepayers because deferred collections mask the true cost of service and result in ratepayers at one time paying for service that was provided to other customers in the past. A deferred collection order, therefore, would violate the rule against retroactive ratemaking.[35]

Absent the express applicability of a statutory exception, PGE is requesting authority to engage in impermissible retroactive ratemaking.

Overall, the legislative history suggests that ORS 757.259(1) be construed narrowly and ORS 757.259(2) more broadly, because ORS 757.259(1) is an automatic pass-through while ORS 757.259(2) requires Commission approval.[36] PGE conflates the history of the entire statute to support a broad interpretation of ORS 757.259(1) when the legislative history confirms the opposite is true: the Oregon Legislature did not want ORS 757.259 to be widely used when it created either specific, limited exception.

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33 Id. at 4.

34 H.B. 2145, House Committee on Environment and Energy, DOJ OP-6067 at 1 (Mar. 18, 1987).

35 Id. at 10.

36 ORS 757.259(1) does not have the same specific statutory provisions that require public notice, opportunity for comment and hearing, nor is it limited to the date of the deferral application. Richard Jarrett testified in favor of the deferred accounting practice as a "rate making tool which solves administrative problems of frequent rate changes and provides the best mechanism to match revenues and costs and stabilities rates for consumers." H.B. 2145, House Committee on Environment and Energy, Committee Minutes at 6 (Mar. 25, 1897).

2. Gresham's Tax Increase May Not Have Been Imposed By "Another Governmental Agency"

Again, ORS 757.259(1) allows recovery of "[a]mounts lawfully imposed retroactively by order of another governmental agency", but the term "another governmental agency" is not defined by the statute. Unlike the term "retroactive" which clearly prevents PGE from collecting prospectively imposed taxes upon customers after the fact, the statute is not clear whether either Gresham or the courts should be considered another governmental agency. PGE argues that governmental agency should mean both Gresham and the courts, but the language of the statute, the context, and the legislative history do not support PGE's position. This is especially true regarding any assertion that a court, especially one simply affirming the lawfulness of a prospectively imposed tax, should be considered a governmental agency, which appears to be the primary basis for PGE's claim that the taxes were retroactively imposed.

Both PGE and the City agree that dictionaries do not clearly resolve this issue, but the language of the statute has other important clues limiting the term governmental agency that PGE does not address. Most important is that the legislature, if it had wanted, could have clearly included cities or the courts in the definition, but it elected not to. Next, the statute does not say "a" government agency but rather says "another" governmental agency, with reference to the Commission. If the term "other governmental agency" meant *any other* governmental agency, then the reference to the Commission becomes redundant. PGE's view that the term should be construed in the broadest way possible would render the legislature's exact words meaningless. The statute also references an "order" which would not be a typical vehicle for a city. A city would not lawfully impose amounts by an order. Thus, the plain meaning of the statue

implies that it is referring to other agencies similar to the Commission, and not a city or court.

PGE points to other broad definitions of "governmental agency" elsewhere in Oregon's statue, but that offers limited value because it ignores the context.[37] There are other similar statutes that exclude cities and courts. For example, Oregon's Administrative Procedures Act, which applies to the Commission, defines agencies more narrowly and excludes courts and cities. ORS 183.310 defines "agency" as a "state board, commission, department, or division thereof" and specifically does not include a city. None of these definitions are dispositive of the legislature's intent when drafting ORS 757.259(1), but merely confirm that there are arguments both ways as to whether the City should be considered another government agency.

With respect to the context and legislative history of the statute, one thing becomes more clear: there is very little support that a court should be considered a governmental agency. PGE's suggestion that court orders from the judicial rather than the executive branch of government are "another governmental agency" that should be included in ORS 757.259(1) is unconvincing. The examples discussed in the legislative history of ORS 757.259(1) (e.g., the Nuclear Regulatory Commission decision) do not support extending a broad meaning of government agency.

3. The City's Tax Increase Was Imposed by Gresham, Not the Courts

PGE appears to suggests that its overdue taxes were imposed by the Court rather than by Gresham, because this allows PGE to characterize the debt as one that is

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[37] In 2004, the Oregon Court of Appeals construed the phrase "other governmental agency" narrowly, based on the precise context of the statute. State v. Walker, 192 Or. App. 535, 539, 86 P.3d 690 (2004).

retroactively imposed by the court.[38] PGE concedes that it originally passed along Gresham's tax increase prospectively, but claims it stopped collecting the tax increase because it was found unlawful by the Circuit Court.[39] PGE suggests that it was legally barred from collecting the taxes until the entire appellate proceeding was complete and that Gresham should have sought a stay of the Circuit Court's decision, but PGE has not offered any legal support for that claim.[40] This argument is inconsistent with PGE's actions, its own arguments, and could lead to absurd results when applied to NW Natural's handling of this matter.

Contrary to PGE's arguments, Gresham was not required to seek a stay, and PGE should have collected the disputed amounts throughout the appeal process. Gresham could have requested a stay of the Circuit Court opinion, but its failure to do so did not have an impact on PGE's obligation to comply with the Resolution. A Circuit Court's declaratory judgment is not self-executing and does not directly control the conduct of a defendant. Gresham did not repeal the Resolution or in any way stop charging PGE for the full amount of taxes.

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38 Gresham does not believe that the Commission needs to address PGE's arguments regarding the legal effect of the various court actions because the tax was prospectively imposed by the City and not any court. That is all the analysis required by ORS 757.259(1). In addition, a court opinion affirming the lawfulness of a statute, rule or ordinance is not acting retroactively. Gresham, however, addresses PGE's arguments herein.

39 Worth noting, PGE retained the money it collected from its Gresham ratepayers until judicial review was complete.

40 PGE's Opening Brief at 10 ("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" and "Gresham could have obtained a stay pursuant to court procedures."). Gresham reserves the right to file a responsive brief if PGE identifies any legal authority in subsequent briefing for its unsupported claim that Gresham attempted but somehow failed to impose the privilege tax prospectively.

It is PGE, if it did not agree with Gresham's continued imposition of the tax, that would need to seek legal action, like an injunction, to prevent the City from imposing the tax. The "distinguishing characteristic of a declaratory judgment", which PGE and NW Natural obtained, "is the absence of coercive relief."[41] Thus, a court may declare its opinion as to what the law means, but ORS 28.080 provides the legal vehicle to require "action to conform with that declaration."[42] Further relief or coercive relief includes injunctive relief, specific performance, and other orders of "execution."[43] Since Gresham did not repeal or modify the Resolution, it was incumbent upon PGE to use its legal options to require Gresham to do so, which could have included using ORS 28.080 to obtain "further relief" or "coercive relief" based on the declaratory judgment.[44]

It is important to recognize that the City taxes PGE, and not its citizens. The appeal process merely confirmed the City's right to tax PGE, and did not address PGE's ability to recover those fees from its customers. The City did not need to request the Circuit Court opine as to whether PGE should collect the increased taxes throughout the appeals process because this was beyond the scope of the issues in dispute and potentially in the Commission's (rather than the Court's) primary jurisdiction. Moreover, Gresham would have had no reason to know whether PGE stopped collecting the increased taxes,

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41 Ken Leahy Constr., Inc. v. Cascade Gen., Inc., 329 Or. 566, 572, 994 P.2d 112 (1999).

42 Ashland Drilling, Inc. v. Jackson County, 168 Or. App. 624, 632, 4 P.3d 748 (2000) overruled in part on other grounds Thunderbird Mobile Club, LLC v. City of Wilsonville, 234 Or. App. 457, 228 P.3d 650 (2010); Aspgren v. Columbia City, 34 Or. App. 991, 1002 n 3, 581 P.2d 536 (1978) (the court declares what the parties' rights are, but leaves it up to the prevailing party to apply to the court for supplemental relief).

43 Ken Leahy Constr., 329 Or. at 572, 575 (citing Edwin Borchard, Declaratory Judgments, at 441 & n 71 (2d ed 1941)).

44 Id. at 574-76.

or that a stay was needed for that purpose.

PGE's separately attempts to distinguish between the various court opinions and judgments, none of which is legally significant in the context of declaratory relief. Even assuming *arguendo* that Gresham was required to seek a stay after the Circuit Court decision to maintain its tax authority, that means that PGE should have been required to seek a stay after the Court of Appeals reversed that decision. Assuming the Circuit Court's opinion as to the legality of Gresham's tax meant that PGE should not collect the taxes, then so should the Court of Appeals' opinion mean that PGE should collect the taxes. Declaratory relief is after all, just a clear statement declaring what the law means and both appeals courts provided one of those as well. Requiring the parties to request a stay, would mean that at best PGE may not have been required to collect the amounts after the Circuit Court opinion, but should have started collected them again after the Court of Appeals opinion.

PGE's actions are also inconsistent with its arguments because PGE never waited to take actions based on judgment orders, but stopped collecting the increased fees the day after the Circuit Court issued its opinion and started recollecting months after the Supreme Court opinion, both of which occurred before the relevant judgment orders. PGE's Opening Brief appears to argue that the Circuit Court's judgments rather than court opinions formed the basis of its legal obligations. PGE states, "[a]s a result of a judgment entered on March 31, 2017, PGE became legally obligated to pay additional privilege taxes to the City of Gresham . . . "[45]

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[45] PGE's Opening Brief at 1; see also id. at 2 ("on March 31, 2017 … PGE again became obligated to pay the additional 2% in privilege taxes to Gresham"); id. at

PGE, however, consistently took actions based on court opinions, and prior to the issuance of the Circuit Court's final judgment orders. According to PGE's own timeline, the Circuit Court issued its opinion on January 12, 2012 and PGE stopped collecting the fee on January 13, 2012. Yet the Circuit Court did not issue its first judgment order until February 13, 2012. PGE also did not wait for the final judgment action to begin re-collecting Gresham's fees.[46] According to PGE's own timeline, PGE began re-collecting Gresham's fees on September 1, 2016, whereas the final judgment order was not issued until March 31, 2017.

PGE, however, failed to take action to start re-collecting the fees from ratepayers after the Court of Appeal's opinion in 2014. If the Commission accepts PGE's legal theory that it is court judgments rather than opinions that matter, then PGE violated the law by taking actions consistent with some (but not all) judicial opinions and not judgments. The Commission should consider PGE's actions (as well as its current legal arguments) reflective of the various legal theories presented by PGE.

Therefore, if the Commission agrees that legal rights flowed from the court orders issued rather than Gresham's passage of the resolution, and that stays should have been sought (which Gresham disagrees with), then PGE's shareholders and not customers are responsible for at least part of the fees that PGE did not collect. Determining the exact timing may be difficult given that PGE did not act consistently. However, the Commission could require PGE to be responsible for the unpaid taxes from the date of

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4 ("from February 13, 2012 until March 31, 2017, during which time the circuit court's initial declaratory judgment remained in effect"); id. at 10 ("the circuit court invalidated that attempt, and for the period of February 2012 through March 2017 the tax was not, in fact, imposed").

[46] Id. at 3.

the Court of Appeals opinion on July 2, 2014 to when PGE started collecting the fees again on September 1, 2016, if the Commission allows PGE any recovery.

Finally, PGE's arguments lead to absurd results in the case of NW Natural. If PGE is correct, then NW Natural violated the law by collecting fees illegally when Gresham did not seek a stay, and NW Natural may be subject to lawsuits for illegally collecting amounts under an unlawful ordinance. This would mean that NW Natural's customers who timely paid the fees as they became due, which is a more equitable result overall, may now have legal claims against NW Natural.

4. PGE Elected Not to Seek Deferred Accounting

As mentioned above, there is a second statutory exception to retroactive ratemaking, ORS 757.259(2), which PGE chose not to utilize. PGE has not explained why it decided to rely on ORS 757.259(1) rather than ORS 757.259(2). PGE could have requested deferred accounting under this provision at numerous times, including when the Court of Appeals reversed the original Circuit Court decision. This may have permitted full recovery, if PGE had simply taken action at that time.

PGE's Opening Brief cites testimony from Commissioner Davis stating, "it is not a question of <u>whether</u> the changes in revenue or in expense resulting from government action will be included in rates charged for service, it is a question of <u>when</u> that should begin."[47] The "when", in this case, was back in 2012 and "when" PGE decided not to collect Gresham's fees during the appellate process. Thus, the only reason there is a question about "whether" PGE can charge these taxes to its customers is because PGE

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[47] <u>Id.</u> at 4 (citing Written Testimony of Charles Davis Before the Senate Business, Housing & Finance Committee, May 21, 1987) (emphasis in in original).

failed to collect them "when" it should have. The Commission has decided before that a utility's failure to request deferral under ORS 757.259(2) constituted waiver of the opportunity to recover the expenses and should do so again here.[48]

C. Gresham's Citizens Should Not Be Required to Pay for All the Costs of PGE's Decision Not to Collect the Taxes

OAR 860-022-0040 was never intended for this unique situation in which a utility failed to collect taxes over a multi-year period of time, and may not apply to retroactive collections. PGE argues that it is *required* to pass along Gresham's charges dollar for dollar, but that is not correct. A better reading of OAR 860-022-0040 is that it *allows* PGE to pass along Gresham's charges at the time they are prospectively imposed. What OAR 860-022-0040 does *require*, is that PGE include any excess pass-through amounts as a separately stated line item "on the regular billings to such customers." This emphasis on the "regular billings" has a temporal element that suggests that retroactive recovery may not be permissible under OAR 860-022-0040. Thus, the Commission should not allow PGE to use OAR 860-022-0040 to circumvent the rule against retroactive ratemaking.

If the Commission determines recovery is appropriate, then PGE should recover from its entire service territory rather than its Gresham customers. PGE ignores this option in its Opening Brief and attempts to frame the only options as either retroactive

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[48] See Re Northwest Natural Gas Co., dba NW Natural, Request for General Rate Revision, Docket No. UG 221, Order No. 12-437 at 22 (Nov. 16, 2012) (explaining that "the company could have filed for a deferral order coincident with the timing of expense incurrence. If the application had been granted, the company could have begun deferring its expenses on the date of the deferral application. Having failed to so, the company waived the opportunity to collect these pre-application amounts as expenses and amortize them in rates.").

recovery from its Gresham customers or no recovery at all. Although OAR 860-022-0040 supports a general policy that the city residents pay the taxes imposed by their own city, those residents should not be subjected to higher taxes than the City directed as a result of PGE's business decision.[49]

The purpose of OAR 860-022-0040, according to PGE's Opening Brief, is to thwart cities seeking to raise revenue for their own residents by imposing taxes on a utilities' entire service territory.[50] That is not what Gresham tried to do here. Gresham tried to control its own taxing authority and has been thwarted by PGE's choice to address the tax collection issue differently from NW Natural.

PGE relies upon two old telecom cases for the proposition that it is required to pass along Gresham's fees to its customers in Gresham. The first order addresses valuation between customers inside and outside the city imposing the tax, and does not suggest PGE would be required to pass along city fees.[51] The second, distinguishes between the 3.5 percent cap (which is included in ratemaking) from the amounts that *must* be included as a separate line item on customers' bills *if* the utility chooses to recover amounts above the 3.5 percent cap.[52] The idea that the Commission might

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49 To be clear, Gresham believes that PGE's shareholders (rather than any ratepayers) should be responsible for PGE's failure to collect the taxes, seek enforcement of the Circuit Court's order, request deferral under ORS 757.259(2), or request Commission authorization to stop collecting the fees from customers.

50 PGE's Opening Brief at 5.

51 Re Proposed Rulemaking in Connection with Municipal Privilege Tax, Docket No. AR 218, Order No. 90-1031 (June 29, 1990); see also Re Rule Relating to City Fees, Taxes, and Other Assessments, Docket No. AR 218, Order No. 91-1153 (Sept. 11, 1991) (correcting Order No. 90-1031).

52 Re Rulemaking to Clarify the Rules Relating to City Fees, Taxes, and Other Assessments Imposed Upon Utilities and Telecommunications Cooperatives, Docket No. AR 458, Order No. 03-395 at 1 (July 9, 2003).

require utilities to pass along those excess taxes, rather than allow them to pay excess taxes from shareholder profits, is not addressed in either of these orders.

PGE's analogy to the City of Sherwood tax is similarly misguided. First, that city did not oppose PGE's proposal, and their settlement was not approved by the Commission. Moreover, the misunderstanding that resulted in under collection only lasted "a few months" whereas this issue has been litigated for nearly six years, and the interest issue is still being litigated at the Circuit Court.

Finally, PGE suggests that Advice No. 17-05 is fair for several reasons, none of which correctly balance between equitable compensation to the cities and the interests of utility customers that live elsewhere. First, PGE claims that it "pursued the approach that it believed was best for its customers . . . ."[53] Gresham takes PGE at its word, but cautions that the result PGE is seeking is not in the best interest of those same customers. Second, PGE claims the "tax is a cost that is beyond PGE's ability to control", but as this brief explains earlier, that is not correct.[54] PGE, like NW Natural, could have chosen to collect the taxes. Alternatively, PGE could have made a Commission filing to clarify its recovery options and potentially allow recovery under ORS 757.259 if appropriate. Third, PGE notes "at all times [it] complied with its legal obligations and with the court judgments that were in effect with respect to the privilege tax."[55] As explained above, PGE took action before judgments were entered, did not comply with the Court of Appeals opinion, and therefore complied with some but not all of the relevant court orders. These inconsistent actions do not mean it is fair to allow some ratepayers to not

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53 PGE's Opening Brief at 12.
54 Id.
55 Id.

pay their share of PGE's tax liability and effectively saddle other ratepayers with a large past-due bill. We are here because of a PGE business decision, which should not be entirely shouldered by Gresham's current and future citizens.

D. Gresham Citizens Should Not Be Required to Pay for the Interest Associated with PGE's Decision Not to Collect the Taxes

PGE's decision not to pay Gresham's increased taxes may require PGE to pay higher interest on the overdue amount. At a minimum, the interest should be paid by PGE's shareholders or PGE's entire service territory rather than PGE's current Gresham customers. It was PGE's decision to take this approach, which could subject PGE to nine percent statutory interest all the way back to 2011. PGE could have paid or at least collected the amounts at the time, which could have subjected it to a lower interest rate as well as allowed it to place the amounts in an interest bearing account that could have eliminated the need for customers to pay any costs associated with interest on the principal due. If PGE is required to pay this interest, and collects it from Gresham's citizens, then the citizens of Gresham will end up paying much more than it would have if PGE had just collected the amount during the judicial review process. Thus, PGE should be responsible for all the costs associated with interest that could easily have been avoided had PGE made different choices.

IV. CONCLUSION

For the reasons stated above, the Commission should reject PGE's request to allow Advice No. 17-05 and Schedule 134 to go into effect on July 1, 2017.

Dated this 30th day of May 2017.

Respectfully submitted,

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Of Attorneys for the City of Gresham

Attachment A

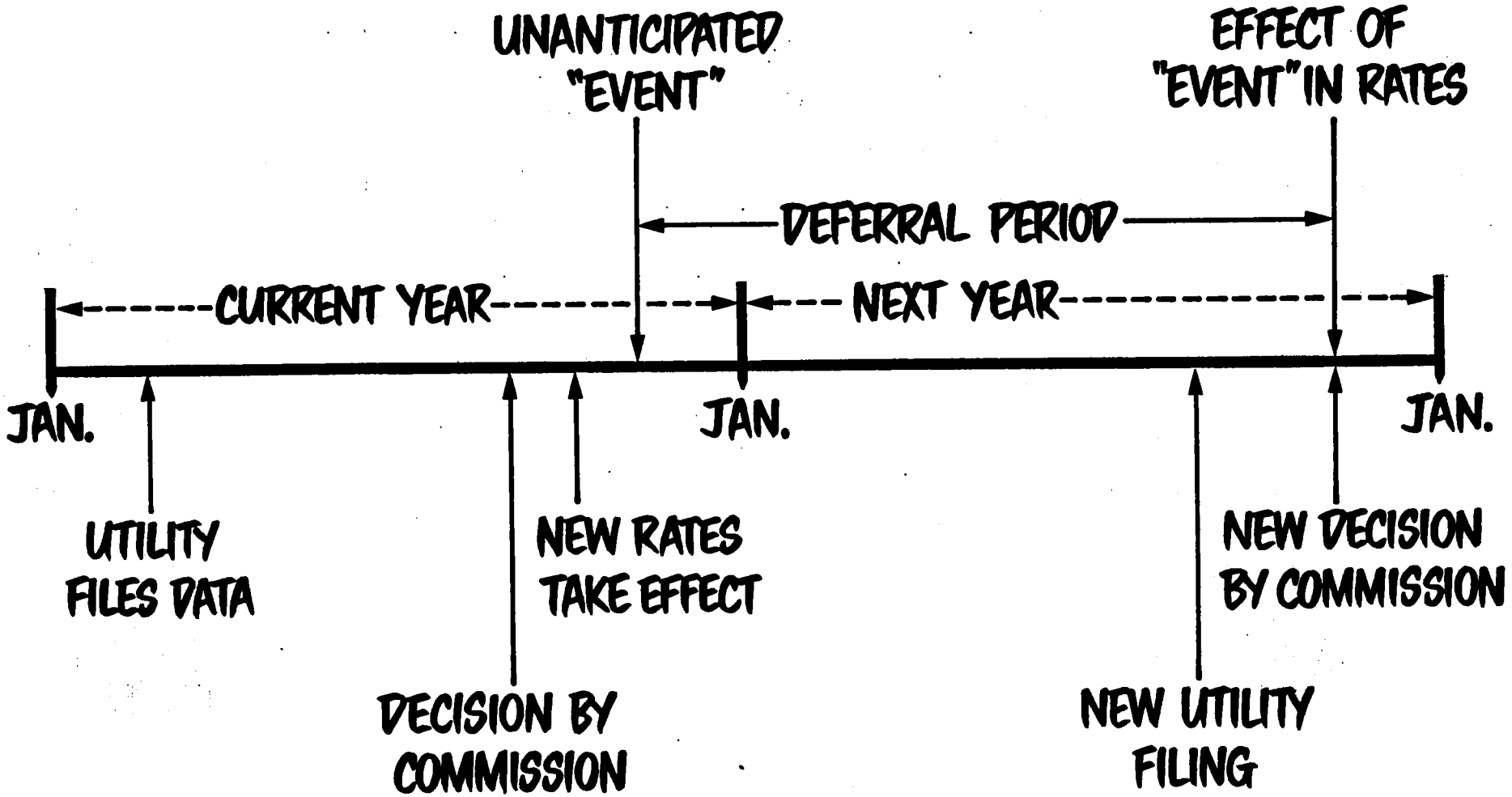
Timeline of Events related to Advice No. 17-05

Timeline of Events related to Advice No. 17-05

Date	Event
05.17.2011	City of Gresham passed Resolution 3056
07.01.2011	Resolution 3056 became effective
07.01.2011	PGE began collecting increased fees pursuant to Resolution 3056
07.01.2011	PGE challenged legality of Resolution 3056 at Multnomah County Circuit Court
08.26.2011	The Commission urged early resolution of litigation among Circuit Court parties
01.12.2012	Circuit Court Opinion invalidated Resolution 3056
01.13.2012	PGE stops collecting Gresham's increased fees
02.13.2012	Circuit Court's initial Judgment Order
03.13.2012	Gresham appealed
07.02.2014	Court of Appeals Opinion reversed Circuit Court decision
09.03.2014	PGE appealed
05.05.2016	Supreme Court Opinion affirmed Court of Appeals decision
08.04.2016	Supreme Court's appellate Judgment Order
08.18.2016	Circuit Court's appellate Judgment Order
09.01.2016	PGE began collecting Gresham's increased fees (again)
02.24.2017	PGE filed Advice No. 17-05 and Schedule 134
03.01.2017	PGE begins paying Gresham full 7% (from its 2016 revenues)
03.31.2017	Circuit Court's final Judgment Order
03.31.2017	PGE pays Gresham overdue additional 2% (from 01.13.2012 to 12.31.2015)

Attachment B

Excerpt of Legislative History


UNANTICIPATED "EVENT"
EFFECT OF "EVENT" IN RATES
DEFERRAL PERIOD
CURRENT YEAR
NEXT YEAR
JAN.
JAN.
JAN.
UTILITY FILES DATA
DECISION BY COMMISSION
NEW RATES TAKE EFFECT
NEW UTILITY FILING
NEW DECISION BY COMMISSION