

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

DR 10/UE 88/UM 989

In the Matters of)
)
The Application of Portland General Electric)
Company for an Investigation into Least Cost)
Plan Plant Retirement, (DR 10))
)
Revised Tariffs Schedules for Electric Service)
in Oregon Filed by Portland General Electric)
Company, (UE 88))
)
Portland General Electric Company's)
Application for an Accounting Order and for)
Order Approving Tariff Sheets Implementing)
Rate Reduction. (UM 989))

RULING

DISPOSITION: PROCEDURAL RULINGS CLARIFIED

Background

On July 25, 2005, Chief Administrative Law Judge (ALJ) Grant issued a ruling that addressed, among other issues, the inability of Mr. Daniel W. Meek to act as both witness and counsel for the Utility Reform Project (URP) in this proceeding. The ruling stated:

Mr. Meek has previously submitted testimony in this docket. Therefore, he should not be representing URP while appearing as a witness. *See Oregon Rules of Professional Conduct 3.7.* . . . I do find that he cannot as both counsel and witness.

The ruling went on to provide that Mr. Meek's response to a Motion to Strike by Portland General Electric (PGE) was not properly filed. The ruling directed the defect to be corrected by having the motion refiled by "URP's other listed counsel, Ms. Williams." Thereafter, Ms. Linda K. Williams has filed all documentation on behalf of URP.

It was later determined, however, that Ms. Williams is not an attorney of record for URP in this proceeding. Rather, she is listed as the attorney for the following three individuals: Patricia Morgan, Frank Gearhart and Kafoury Bros., LLC (MGK). Consequently, although Ms. Williams filed Mr. Meek's testimony, as well as other documents on behalf of URP, she is not authorized to do so.

ALJ Kirkpatrick informed Ms. Williams, by telephone, that she needed to correct this situation by filing documentation of her authority to act on behalf of URP. As of August 23, 2005, the Commission had not received such documentation. Consequently, in a memorandum dated that same day, ALJ Kirkpatrick indicated that Mr. Meek's testimony would not be accepted into the record until the situation was corrected.

On August 24, 2005, URP filed an emergency motion to clarify the import of the July 25, 2005 ruling and the August 23, 2005 memorandum, and to request relief if necessary. URP first seeks clarification of whether the intent of the July 25, 2005 ruling was that Mr. Meek could not act as a lawyer in this proceeding on behalf of URP in any manner if he also acted as a witness. If so, URP further seeks clarification of whether the intent is to disqualify Mr. Meek from appearing as an attorney if another party, MGK, sponsors Mr. Meek's testimony.

URP further states that URP is entitled to have Mr. Meek serve as counsel, alleging that his disqualification would work substantial hardship on the client." Rule 3.7(a)(3) of the Oregon Rules of Professional Conduct. On the same day, PGE filed a response. Without taking a position on how the Commission should exercise its discretion under OAR 860-012-0005(2), or whether URP satisfies the "substantial hardship" exception to Rule 3.7, the witness-advocate rule, PGE argued that the sponsorship of testimony is irrelevant, as Rule 3.7 applies when a lawyer acts as both witness and advocate.

Ruling

Pursuant to OAR 860-012-0005, attorneys representing parties in proceedings before the Public Utility Commission of Oregon (Commission) are required to conform to all applicable ethical standards, including the Oregon Rules of Professional Conduct. Having responsibility for the regulation of proceedings before the Commission under OAR 860-012-0035, ALJs have the independent obligation to enforce OAR 860-012-0005 and all ethical rules of conduct.

Chief ALJ Grant sought to enforce Rule 3.7 in his July 25, 2005 ruling, clearly stating that Mr. Meek should not represent URP while also appearing as a witness. The ruling directed Ms. Williams to serve as URP's counsel.

URP was responsible for taking all action necessary to implement this direction. As Ms. Williams was not then authorized to act on behalf of URP, URP

needed to authorize Ms. Williams to act on its behalf and to document such authorization with the Commission. Thereafter, in order to be in compliance with Rule 3.7 and the July 25, 2005 ruling, so long as Mr. Meek was a witness for URP, only Ms. Williams could represent URP. ALJ Kirkpatrick's phone call to Ms. Williams and her August 23, 2005 memorandum provided notice to URP of the need to comply with Rule 3.7 and the July 25, 2005 ruling prior to the introduction of Mr. Meek's testimony into the record.

URP has had one month to either cure the ethical defect identified in the July 25, 2005 ruling or request clarification or a hearing on the disqualification issue. When the hearing was rescheduled to begin on August 29, 2005, following a contested motion by URP and MGK to delay the procedural schedule, ALJ Kirkpatrick emphasized the firmness of the revised procedural dates.¹ URP cannot now seek to delay the hearing by bringing a motion that could have been brought a month ago. In any case, URP has not offered any compelling evidence that the "substantial hardship" exception to Rule 3.7 applies.

At this late date, URP has two options. First, Mr. Meek can remain a witness for URP if Ms. Williams acts as URP's attorney, meaning she conducts all cross-examination during the hearing. To do so, however, she must first file documentation with the Commission indicating that she is the counsel of record for URP. Alternatively, in order for Mr. Meek to act as URP's attorney and to conduct cross-examination on its behalf, another person must adopt his testimony. For example, URP's expert witness, Jim Lazar, could adopt Mr. Meek's testimony. Similarly, Ms. Williams could potentially act as a witness for URP. In order for her to do so, however, she would have to withdraw as counsel for MGK.

URP must take action by the close of business today, August 26, 2005. If URP takes no action, Mr. Meek's testimony will not be accepted into the record, but Mr. Meek will be allowed to conduct cross-examination during the hearing.

Dated at Salem, Oregon, this 26th day of August, 2005.

Traci A. G. Kirkpatrick
Administrative Law Judge

Michael Grant
Chief Administrative Law Judge

¹ Ruling and Consolidated Prehearing Conference Memorandum, May 2, 2005.