

**BEFORE THE OREGON PUBLIC UTILITIES COMMISSION**

**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)**

**UTILITY REFORM PROJECT NOTICE**

**AFFIDAVIT IN SUPPORT OF REQUEST THAT ATTORNEY DANIEL MEEK BE ALLOWED TO SUBMIT TESTIMONY IN THIS DOCKET**

I, Mark McDougal, being duly sworn, do depose and say:

1. I am a corporate officer of the Utility Reform Project and make these statements from my own knowledge of information I have received in that capacity and as participant in a polling the board on the topics herein.
2. I have reviewed the Affidavit of Linda k. Williams and believe it accurately presents the consensus of the Board, which was polled on the topics discussed therein

September 6, 2005

\_\_\_\_\_  
Mark McDougal

STATE OF OREGON                    )  
County of Multnomah               ) ss

So sworn before me in my presence this 6th day of September, 2005.

\_\_\_\_\_  
Notary Public of Oregon

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**UTILITY REFORM PROJECT NOTICE**

**AFFIDAVIT IN SUPPORT OF REQUEST THAT ATTORNEY DANIEL MEEK BE ALLOWED TO SUBMIT TESTIMONY IN THIS DOCKET**

I, Linda K. Williams, being duly sworn, do depose and say:

1. I am a corporate officer of the Utility Reform Project and make these statements from my own knowledge of information I have received in that capacity and as participant in a polling the board on the topics herein.
2. Footnote 2 to the Hearing Officer's Memorandum Ruling of July 25, 2005, appeared to be an instruction to me, Linda K. Williams (who is a member of URP and an attorney of other parties to this proceeding), regarding the submission of documents and not necessarily a direction to the URP board regarding its substantive rights to counsel and to submit testimony in this proceeding.
3. URP did not at first understand the substantive nature of the instruction because no party had claimed prejudice, there had been no notice or hearing which would be expected in a substantive ruling on attorney disqualification, and therefore no record of prejudice or need to overcome said record with evidence of hardship had been established.
4. The intention of the footnote to be a ruling of disqualification of either of the dual witness-advocate roles of Mr. Meek was later clarified, and the final disposition of that ruling has now been reserved.
5. The Oregon RPC 3.7 codifies the "advocate-witness rule" and provides:
  - (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be

a necessary witness except where:

\* \* \*

(3) disqualification of the lawyer would work substantial hardship on the client.

6. The URP Board is at a disadvantage because the Board has not been informed of the burdens of persuasion and proof in this matter.
7. Looking to some authority for what evidence should be provided to this forum, I rely upon the guidance of the Model Rules and commentary presented in URP's Motion for Clarification:

Application of the advocate witness rule demands a balancing of the litigants' interests. MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.7 *comment* (1984). \* \* \*. The comment to Model Rule 3.7 identifies the balancing factors as "the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses." *Id.* It further provides that "due regard must be given to the effect of disqualification on the lawyer's client." *Id.* To this list of factors offered in the comment to Rule 3.7 Professor Wydick would add "Who is the trier-of-fact?" on the theory that a judge is far less likely to be confused than a jury. Wydick, *Trial Counsel as Witness: The Code and the Model Rules*, 15 UC DAVIS LAW REV 651, 653 (1982).

8. I offer the following statements for the balancing test for this record.

*Prejudice to Parties*

9. URP has not been informed of the basis of alleged prejudice to others. In my role representing another party, to the best of my knowledge no showing of prejudice has been offered into the record. All of the parties had opportunity to do discovery of Meek's conclusions and work papers and to explore any facts which might suggest bias and be used for impeachment.
10. To the best of my knowledge no showing has been made by any party, or by the hearings officer, that the adjudicators in this cause, the Public Utility Commissioners, will be confused or unduly swayed by the dual role of Mr. Meek to the prejudice of others.
11. It appears unlikely that the Commissions, with their substantive experience and familiarity with the nature of the conduct of hearings (prefiled testimony, non-existent "demeanor" evidence), would be less than able to fairly perform their responsibilities.
12. The Board is aware that the very fact of the dual role may itself be construed as evidence of bias, and it accepts that possibility and does not consider that such dual role will seriously impair the testimony proffered, and expressly waives any "prejudice" that might be inferred to *its* interests.

### *Hardship*

13. Utility Reform Project is a non-profit Oregon corporation incorporated in 1984. Among its activities, it has participated in Oregon utility rate matters before the Oregon Public Utility Commission (OPUC) in dozens of proceedings. It has solicited pro bono legal advice, recruited volunteers for research and office tasks, and received modest contributions sufficient for filing fees, copies and other costs.
14. Attorney Daniel Meek is uniquely qualified to submit testimony in this cause. He has over 25 years of experience as briefly outlined in proffered URP Ex. 205.
15. His role as occasional witness-advocate has heretofore not been alleged to have prejudiced any party. Most recently, his testimony was accepted into the record in Docket No. UM 1121 although he performed therein in the dual role as witness-advocate.
16. Despite very limited financial resources, URP participated in and sought court review of the final orders in the following OPUC dockets: DR 10, UE 88, and UM 989. Exclusive of any professional fees, it has incurred court filing fees and costs for service of process, copies and postage in excess of \$1,500 in the DR 10 and UE 88 appeals. It has thus far incurred the costs of participating in the UM 989 case and filing fees and costs in the Marion County Circuit Court and Court of Appeals.
17. I do not intend to itemize all the costs incurred in the remand proceeding DR 10/UE 88/UM 989, but provide an example of one substantial cost. URP has incurred a debt to its very experienced professional economist expert witness, Jim Lazar, of Olympia, Washington, in the current amount of \$4,400. Mr. Lazar's bill includes time invested in discussing the testimony of PGE witnesses with attorney Daniel Meek in an effort to prepare him for meaningful cross-examination of other witnesses. This is time-consuming, and Mr. Lazar had other commitments.
18. Forcing URP to abandon the counsel of its choice five weeks before the hearing date would have worked a particular hardship upon it.
19. The hearings officer has suggested that URP seek another person to adopt the testimony originally proffered by Mr. Meek. I am aware that this procedure has occasionally been used, but point out that the adopting witness thereby swears under oath and penalties of perjury that the testimony is in fact the adoptee's testimony. This may be possible when the adoptee has the same qualifications and job description as the original sponsoring witness, but under the circumstances, expert economist Jim Lazar does not have the "same" qualifications as Mr. Meek, nor has he had the opportunity to review all of the record in such a manner that he can state that he has independently researched the record and arrived at exactly the same testimony, word for word.
20. URP has already expended substantial resources in securing the expert testimony of Mr. Lazar and is handicapped in financial ability to find another qualified expert who could, even if time permitted, ethically adopt and sponsor the testimony of Mr. Meek.

21. Under these circumstances having a surrogate adopt Mr. Meek's testimony would not be ethical or proper and the integrity of the testimony would suffer in credibility.
22. For the foregoing reasons of financial hardship and the particular circumstances as they have arisen, URP suffers a hardship if Mr. Meek cannot submit testimony.
23. If however, it is determined that he cannot appear as advocate and witness, then URP withdraws his testimony.

September 6, 2005

\_\_\_\_\_  
Linda Williams

STATE OF OREGON                    )  
County of Multnomah               ) ss

So sworn before me in my presence this 6th day of September, 2005.

\_\_\_\_\_  
Notary Public of Oregon

### CERTIFICATE OF SERVICE

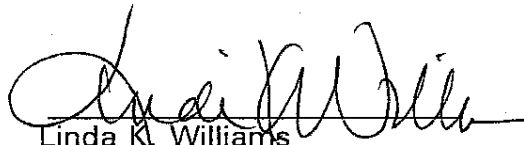
I hereby certify that I served a true copy of the foregoing:

1. UTILITY REFORM PROJECT NOTICE: AFFIDAVIT [MARK MCDOUGAL] IN SUPPORT OF REQUEST THAT ATTORNEY DANIEL MEEK BE ALLOWED TO SUBMIT TESTIMONY IN THIS DOCKET
2. UTILITY REFORM PROJECT NOTICE: AFFIDAVIT [LINDA K. WILLIAMS] IN SUPPORT OF REQUEST THAT ATTORNEY DANIEL MEEK BE ALLOWED TO SUBMIT TESTIMONY IN THIS DOCKET

by email to the email addresses shown below, which comprise the service list on the Commission's web site as of this day.

STEPHANIE S ANDRUS DEPARTMENT OF JUSTICE 1162 COURT ST NE SALEM OR 97301-4096 stephanie.andrus@state.or.us	PAUL A GRAHAM DEPARTMENT OF JUSTICE 1162 COURT ST NE SALEM OR 97301-4096 paul.graham@state.or.us
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LINDA K WILLIAMS KAFOURY & MCDOUGAL 10266 SW LANCASTER RD PORTLAND OR 97219-6305 linda@linda.williams.net	

Dated: September 6, 2005

  
 Linda K. Williams