

**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 Pla)
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: RECORD CLOSED; TESTIMONY OF DANIEL W. MEEK NOT ADMITTED INTO RECORD; MOTION TO STRIKE PORTIONS OF TESTIMONY DISMISSED; BRIEFING SCHEDULE ESTABLISHED

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 counsel and witness for the Utility Reform Project (URP) in the above-captioned proceedings. 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 3.7¹ . . . I do find that he cannot act as both counsel and witness.

¹ The Oregon Rules of Professional Conduct (ORPC) became effective as of January 1, 2005. These rules replaced the Oregon Rules of Professional Responsibility. ORPC 3.7, the current lawyer-advocate rule, is unchanged from its predecessor, DR 5-102.

The ruling also indicated that filings by URP made by Mr. Meek while a witness for URP were defective and could be cured by “URP’s other listed counsel, Ms. Williams” filing them instead. Following the ruling, Ms. Linda K. Williams filed all documentation on behalf of URP.

It was later determined that Ms. Williams was not an attorney of record for URP in these proceedings and was, therefore, not authorized to make filings on behalf of URP. ALJ Kirkpatrick informed Ms. Williams, by telephone, that she needed to correct this situation by filing documentation of her authority to act as URP’s attorney. An ALJ memorandum, dated August 23, 2005, advised URP that Mr. Meek’s testimony would not be accepted into the record while he continued to be the attorney of record for URP.

On August 23, 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 queried whether it was the intent of the July 25, 2005 ruling to prohibit Mr. Meek from acting as a lawyer at the hearing in these proceedings if he also acted as a witness. If so, URP challenged this ruling, asserting that the “substantial hardship” exception to ORPC 3.7 of the Oregon Rules of Professional Conduct applied. Finding that this assertion was not supported, a ruling issued on August 26, 2005, clarified what action URP needed to undertake in order to comply with ORPC 3.7. On the same day, URP withdrew, with protest, the pre-filed testimony of Mr. Meek. Mr. Meek appeared at the hearing, on August 29 and 30, 2005, and conducted cross-examination on behalf of URP.

At the beginning of the hearing in this proceeding, the presiding ALJ ruled that URP could have a post-hearing opportunity to brief the issue of whether Mr. Meek’s testimony should be allowed into the record under the hardship exception to ORPC 3.7, or alternatively, to submit documentation that Mr. Lazar or Ms. Williams had reviewed Mr. Meek’s testimony and adopted it.

PGE’s Motion in Limine was also addressed at the start of the hearing. On August 25, 2005, PGE requested that cross-examination be limited to the scope of each witness’ written testimony and to the scope of the proceeding. The motion was granted in part, with cross-examination limited to the scope of the proceeding, as outlined in Order No. 04-597. It was ruled that objections involving the scope of a particular witness’ written testimony would be handled on a case-by-case basis, however. In response to PGE’s motion, URP made a motion at the hearing to strike portions of the pre-filed testimony of Staff and PGE that it considered outside the scope of the proceeding. In order to efficiently proceed with the hearing, ALJ Kirkpatrick ruled that URP could have a post-hearing opportunity to file a motion to strike the pre-filed testimony of PGE or Staff on the basis that the testimony includes what counsel for URP identified as, “future facts.” URP was directed to fully and precisely define this term in any motion. With regard to the testimony of PGE, URP was also allowed to move to strike testimony on the basis that the testimony sets forth legal conclusions.

On September 6, 2005, URP filed two affidavits: one on behalf of Linda K. Williams and the other on behalf of Mark McDougal. Both affidavits provide information supporting the admission of Mr. Meek’s pre-filed testimony into the record

despite ORPC 3.7. These affidavits appear to be filed in lieu of a brief on the issue and will be treated as such.

On that same day, URP filed a motion to strike numerous excerpts of PGE's pre-filed testimony and one Staff exhibit on the grounds that the testimony includes "future facts," defined as "alleged facts * * * unknown and unknowable in early 1995 when the Commission set UE 88 rates." URP's motion also seeks to strike numerous excerpts of the pre-filed testimony of PGE on the grounds that the testimony constitutes "legal opinion, argument, or discussion." Appendix A contains a listing of the pre-filed testimony excerpts that PGE seeks to strike. URP did not further explain or justify the motion to strike.

On September 9, 2005, Staff responded. URP had moved to strike two pages of an exhibit that Staff characterized as a "breakdown of staff's estimates of the financial impact of the alternate ratemaking scenarios" set forth by PGE and URP. Staff asserts that the testimony at issue does not contain fact, but rather illustrates different ratemaking scenarios.

On September 9, 2005, PGE responded. PGE presumed that URP's motion to strike is based on a misunderstanding of PGE's Motion in Limine and the ruling granting that motion in part. PGE asserts that the ruling did not exclude all references to events after 1995, but rather limited the facts to be considered in these proceedings to facts that could have been considered by the Commission in originally setting UE 88 rates. PGE argues that it is unnecessary to strike testimony involving discussion of regulatory principles, even when current examples are provided, or background information about relevant regulatory or accounting events after UE 88, such as the UM 989 settlement. PGE offers such information for illustrative reasons, but not as facts to be relied on. PGE also asserts that testimony expressing opinion about what the Commission would have done is offered as a position, not as factual evidence. Finally, to the extent witnesses describe their understanding of legal statutes and how they should be applied, such testimony is not offered as legal opinion.

PGE also procedurally challenges URP's motion. PGE asserts that the motion is untimely and prejudicial to PGE. Observing that the testimony subject to the motion was filed in February and June of this year and that the basis of URP's motion is Order No. 04-597, entered on October 18, 2004, PGE argues that the motion to strike could have been made well in advance of the hearing. PGE states substantial prejudice would be caused to PGE if URP's motion is granted, as the record in this proceeding is closed because PGE will not have any opportunity to revise its testimony. PGE also contends that URP fails to meet its burden to justify why PGE's testimony should be stricken. PGE states that URP puts "conclusory labels on over 59 separate pieces of testimony and exhibits" without explanation as to what the labels mean or why the designated testimony fits the label. PGE asserts that "[s]uch unsubstantiated claims cannot warrant the extreme remedy URP seeks—striking testimony without the opportunity to submit alternative testimony."

RULING

Substantial Hardship Exception to ORPC 3.7 Does Not Apply

Pursuant to OAR 860-012-0005, attorneys representing parties in proceedings before the Commission are required to conform to all applicable ethical standards, including the ORPC. OAR 860-012-0035(j) authorizes and directs ALJs to take any action that is consistent with the duties of an ALJ. Such action includes ensuring that attorneys appearing before the Commission fulfill obligations to abide by OAR 860-012-0005 and the ORPC. ALJs, therefore, have an independent obligation to enforce rules governing the conduct of attorneys, regardless of whether any party in a proceeding complains of an ethical violation.

Presiding ALJs in these proceedings have sought to enforce the “lawyer advocate rule,” which is codified as ORPC 3.7. This rule prohibits a lawyer from acting as an advocate when the lawyer is likely to also be a necessary witness in the proceeding, unless a specific exception applies.² Mr. Meek has long been the attorney of record for URP in these proceedings. Nevertheless, URP submitted pre-filed testimony by Mr. Meek in these remand proceedings. To the extent that Mr. Meek acted as both advocate and witness in these remand proceedings, he did so in violation of ORPC 3.7(a). URP’s withdrawal of Mr. Meek’s testimony cured this defect.

URP continues to argue, however, that Mr. Meek’s testimony should be admitted into the record under ORPC 3.7(a)(3), the “substantial hardship exception.” URP contends that Mr. Meek should be allowed to serve in a dual role on its behalf due to “substantial hardship” caused by: 1) the timing of the ruling that disqualified Mr. Meek as a witness (“Forcing URP to abandon the counsel of its choice five weeks before the hearing date would have worked a particular hardship upon it.”³); and 2) the financial circumstances of the organization as a non-profit with limited resources.

URP’s arguments regarding inappropriate notice of the applicability of ORPC 3.7 are not compelling. ORPC 3.7(a) requires an attorney to withdraw as counsel as soon as the attorney should know, or as soon as it becomes obvious to the attorney, that the attorney is likely to be called as a witness on behalf of the client.⁴ Pursuant to ORPC 3.7(a), Mr. Meek should not have acted as an attorney on behalf of URP at any time if he knew (or should have known) that it was likely he would also file testimony.⁵ Mr. Meek cannot credibly argue that he did not know he would need to testify on behalf of URP at the start of this proceeding given URP’s contention that he is uniquely qualified to testify on its behalf. Mr. Meek also cannot claim that he was surprised by the

² ORPC 3.7(a) provides: “A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a witness on behalf of the lawyer’s client unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; (3) disqualification of the lawyer would work a substantial hardship on the client; or (4) the lawyer is appearing pro se.”

³ Affid. of Linda Williams, 3.

⁴ *In re Lathen*, 294 Or 157, 166-167, 654 P2d 1110, 1114-15 (Or 1982).

⁵ *Id.* at 165 (applies prior rule to prohibit a lawyer from acting as an advocate when that lawyer knows he, or a lawyer in his firm, may be called as a witness, holding that the hardship exception does not apply if the lawyer failed to ascertain earlier, at an appropriate time to withdraw from the case, that his law partner “ought to be called”).

application of ORPC 3.7, regardless of when notice was first provided that it would be enforced.⁶ At the start of these proceedings, Mr. Meek had the choice to act as URP's counsel or as its witness. By filing testimony, he chose to perform the latter role.⁷

While the Commission may be sympathetic to the resource position of URP, it is not clear how URP's financial concerns interfered with Mr. Meek's ability to abide by Rule 3.7. Given URP's statement that Mr. Meek was uniquely qualified to submit the testimony at issue, the expense associated with hiring an alternate witness was not an issue. Rather, URP needed to retain alternate counsel to conduct cross-examination, but it already had such counsel in Ms. Williams. As URP indicated in its August 23, 2005 motion for clarification, the real problem associated with Ms. Williams conducting cross-examination was the lack of preparation time available after notice that ORPC 3.7 prevented Mr. Meek from continuing to act as URP's attorney at the hearing. Again, however, Mr. Meek should have been aware of the applicability of ORPC 3.7 at the start of these remand proceedings.

URP also appears to contend that the Commission should disregard application of ORPC 3.7 because of the Commission's ability to properly weigh Mr. Meek's testimony. ORPC 3.7 does not include such an exception, however. While it may be true that the Commission would not be unduly swayed by the dual role of Mr. Meek, the Commission does not have the authority to disregard rules that govern the ethics of attorneys that appear before it.⁸

Mr. Meek's testimony will not be admitted into the record of this proceeding and will continue to be considered withdrawn. Should URP wish to further contest the applicability of ORPC 3.7, it would be appropriate to ask the Oregon State Bar for a formal ethics opinion.

The Commission may in its discretion, choose to consider the withdrawn testimony as comments. URP's request that Mr. Meek's testimony be admitted into the record will be alternatively treated as a request to consider the testimony as comments. Such request is granted. URP is also free to reiterate in briefs, any positions taken in Mr. Meek's testimony.

⁶ Attorneys are obligated to know of, and abide by, the ORPC. In any case, Mr. Meek was actually put on notice that ORPC 3.7 applied to attorneys appearing before the Commission prior to ALJ Grant's ruling on July 25, 2005. In Docket No. UE 170, ALJ Logan issued a ruling on July 18, 2005, indicating that Mr. Meek had withdrawn his testimony in that proceeding to avoid violation of ORPC 3.7 and advising advised Mr. Meek and all parties in that docket, that "in the future, all parties subject to the Oregon Rules of Professional Conduct must comply with Rule 3.7."

⁷ It is also not valid to argue that Mr. Meek is uniquely qualified to be URP's attorney. As observed by the Oregon State Bar, the Oregon Supreme Court has had that deprivation of an attorney's particular skills do not qualify as a substantial hardship. Oregon Formal Ethics Opinion No. 1991-9 citing *In re Lathen*, 294 OR 157.

⁸ If Mr. Meek was not an attorney, he would still be subject to the ORPC pursuant to OAR-860-012-0005(1), but the Commission would have the discretion under OAR 860-012-0005(2) to decide whether he would be allowed to appear as both a witness and a representative of URP; that discretion does not exist in the case of an attorney.

Motion to Strike Denied

URP objected to PGE's Motion in Limine, arguing that if granted, portions of PGE's own testimony, as well as the testimony of Staff, should be stricken. The purpose of allowing URP to have an opportunity to make a motion to strike testimony that contained "future facts" (as defined by URP) after the hearing was to recognize the short notice provided by PGE's Motion in Limine (made August 25, 2005, only two business days before the hearing) and to allow URP to have an opportunity to explain how PGE's Motion in Limine, as partially granted, might apply to the testimony of PGE and Staff. All URP states in its motion, however, is that the motion to strike PGE and Staff testimony, classified as "future fact," is made "for the same reasons stated in the PGE Motion in Limine and/or adopted by the ALJ at the hearing on August 29, 2005." URP then classifies significant portion of the testimony of PGE and Staff as "future fact," without further explaining the significance of this term, as directed to do.

URP's motion is inadequate. It fails to explain how granting PGE's Motion in Limine, in part, warrants striking portions of the pre-filed testimony of PGE and Staff. URP makes conclusions about the testimony of PGE and Staff without any explanation of those conclusions. Without such explanation, I cannot adequately evaluate the merits of URP's motion, and must deny it.

I also note that a motion to strike made for the same reasons as PGE's Motion in Limine—i.e., that testimony "should be limited to the issues in Phase I of this proceeding"—could have been made at any time before the hearing. The Motion in Limine, in relevant part, merely calls for cross examination to be limited to the scope of this first phase of the proceeding. Parties were advised long ago that all testimony in this phase should be limited to the scope outlined in Order No. 04-597. Indeed, I specifically directed parties long ago to move to strike another party's testimony that was believed to be outside the scope of the first phase of these proceedings.⁹ URP's motion is, therefore, untimely and would cause undue prejudice to PGE and Staff; consequently, it is denied on these grounds, as well.

URP's motion to strike PGE testimony deemed to constitute "legal opinion, argument, or discussion" is also inadequate. Again, URP's motion set forth conclusions about the testimony of PGE but fails to provide any explanation of those conclusions. Without such explanation, I cannot adequately evaluate the merits of URP's motion, and must deny it.

Briefing Schedule Established

PGE and Staff requested a somewhat expedited briefing schedule with opening briefs due three weeks after the close of hearings, reply briefs due three weeks later, and response briefs due two weeks later. URP requested a slightly longer briefing schedule, asking that at least four weeks be allowed to submit opening briefs. I was

⁹ See, Ruling and Consolidated Prehearing Conference Memorandum, 3 (April 28, 2004) ("The scope of this first phase has been established and affirmed by the Commission and does not need to be revisited in any way. Should a party believe another party's testimony is outside the parameters of the established scope of this first phase, that party may file a motion to strike the testimony.")

reluctant to set a briefing schedule until the record was closed in these proceedings. Consequently, I indicated, at the hearing, that I would set a briefing schedule when the record was closed. This ruling closes the record.

As more than two weeks have passed since the hearing, URP's concerns about the due date for opening briefs should have been alleviated. Consequently, opening briefs will be due three weeks from today, on October 10, 2005. Reply briefs will be due three weeks later, on October 31, 2005, and PGE's response brief will be due on November 14, 2005.

Despite establishing this schedule, I understand that it is highly likely that Staff will need to change counsel prior to the due date for reply briefs. Rather than try to anticipate, upfront, the time that will be needed to address this change in counsel, revisions to the schedule should be handled by expedited motion.

A separate memorandum will be issued shortly setting forth a list of all exhibits admitted into the record for these proceedings.

Dated this 19th day of September, 2005, at Salem, Oregon.

Traci A. G. Kirkpatrick
Administrative Law Judge

APPENDIX A: URP MOVES TO STRIKE THE FOLLOWING:

EXHIBIT	PAGE(S)	LINES	REASON
PGE 6000	2	16-20	Future Fact
PGE 6000	4	8-13	Legal Opinion
PGE 6000	9	3-27	Legal Opinion
PGE 6000	16	7-11	Future Fact
PGE 6000	21	2-3	Future Fact
PGE 6000	23	4-8	Future Fact
PGE 6000	35	14-18	Future Fact
PGE 6100	3	18-27	Future Fact/Legal Opinion
PGE 6100	4	1-6	Future Fact/Legal Opinion
PGE 6100	19	19-24	Legal Opinion
PGE 6100	23	6-24	Future Fact
PGE 6100	24	1-7	Future Fact
PGE 6200	11	15-17	Future Fact
PGE 6201	All	N/A	Future Fact
PGE 6300	4	8-22	Legal Opinion
PGE 6300	5	11-16	Legal Opinion
PGE 6300	6	20-22	Future Fact
PGE 6300	7	1-2	Future Fact
PGE 6300 ¹⁰	All	N/A	Future Fact
PGE 6302 ¹¹	?	?	?
PGE 6303	N/A ¹²	N/A	Future Fact
PGE 6400	16	1-13	Future Fact
PGE 6400	17	1-23	Future Fact
PGE 6400	18	1-13	Future Fact
PGE 6400	24	19-22	Future Fact
PGE 6400	25	1-2	Future Fact
PGE 6400	27	All	Future Fact
PGE 6401	All		Future Fact
PGE 6402	All		Future Fact
PGE 6500	12	17-21	Future Fact
PGE 6500	13	1-29	Legal Opinion
PGE 6500	14	1-3	Legal Opinion
PGE 6500	14	19-23	Future Fact
PGE 6500	15	All	Future Fact
PGE 6500	16	Figure 2	Future Fact
PGE 6500	19	18-22	Future Fact/Legal Opinion
PGE 6500	20	1-23	Future Fact/Legal Opinion
PGE 6500	21	1-24	Future Fact/Legal Opinion
PGE 6500	22	1-17	Future Fact/Legal Opinion
PGE 6500	23	1-19	Future Fact/Legal Opinion
PGE 6500	24	8-21	Legal Opinion
PGE 6500	27	2-3	Legal Opinion
PGE 6500	30	10-13	Future Fact
PGE 6500	30	13-30	Legal Opinion
PGE 6500	31	4-15	Legal Opinion
PGE 6500	32	1-6	Future Fact
PGE 6500	32	12-15	Legal Opinion
PGE 6500	32	16-27	Future Fact
PGE 6600	12	5-7	Legal Opinion
PGE 6600	12	18-23	Future Fact
PGE 6800	12	10-12	Future Fact
PGE 6800	18	2-3	Future Fact
PGE 7000	2	3-7	Future Fact
PGE 7000	7	17-19	Future Fact/Legal Opinion
PGE 7000	8	2-7	Future Fact
Staff 102	2-3	All	Future Fact

¹⁰ URP may have intended to designate PGE 6301.

¹¹ No details were provided.

¹² URP moved to strike "all references to facts not known as of January 1995."

