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 EMERGENCY MOTION FOR CLARIFICATION AND RELIEF FROM ORDERS OF JULY 25 AND AUGUST 23, 2005**

MOTION

Utility Reform Project (URP) seeks clarification of footnote 1 to the Hearing Officer's Memorandum Ruling of July 25, 2005, and the Ruling of August 23, 2005. Depending upon the nature of the clarification, we seek further relief.

DISCUSSION

In the Hearings Officer's July 25, 2005 Ruling, footnote 1, states and concludes:

> [Attorney Daniel]. 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.

The footnote further advised undersigned (a ratepayer and counsel for the Class Action Plaintiffs in these dockets, Morgan, Kafoury and Gearhart, "MGK") to offer cure by re-filing a motion on behalf of URP previously filed by Mr. Meek. Taking this as an instruction, undersigned has since July 25, 2005, filed matters on behalf or URP or jointly with MGK and URP. However, the Ruling of August 23, 2005, the hearings

officer notes that the testimony of Daniel Meek was (also) filed by undersigned, and it was sponsored by the MGK parties.

URP is an Oregon nonprofit corporation. Following the July 25, 2005 ruling undersigned has since discussed the situation with the board, and the board has agreed to her representation within a limited scope, and undersigned now appears specially to make this motion on behalf of URP. URP's first request for a clarification of footnote 1 is:

> Is it the intent of the hearings officer to *sua sponte* disqualify Daniel Meek from continued representation of it in this proceeding because of his pre-filed expert opinion testimony filed on its behalf, despite the absence of any request from any party?

If so, URP seeks a further clarification:

> Is it the intent of the hearings officer to disqualify Meek from appearing further as attorney for URP in this proceeding if URP withdraws its sponsorship of Meek's testimony, and the Meek testimony remains filed on behalf of MGK?

If the disqualification of Meek as URP attorney is intended to disqualify him from cross-examination of the witnesses of other parties, then URP seeks the opportunity to be heard on the record before it is further deprived of its right to counsel of its choice. RPC 3.7(a)(3). No other party has objected or offered any evidence on the issue.

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.

One of the original justifications for the rule against permitting an attorney to appear as both advocate and witness in the same trial was the perceived need to preserve the integrity of the judicial process by avoiding even the appearance that an attorney may be manufacturing evidence to support the client's case. This rationale, has been strongly criticized, and is generally rejected today, leaving a rule without its original underpinnings.[1] *See* ***Com. v. Willis***, 380 PaSuper 555, 583, 552 A2d 682, 696 (1988); ABA/BNA LAWYER'S MANUAL OF PROFESSIONAL CONDUCT, § 61:504 at 16-17 (1988) (commentators have rejected the rationale and the ABA Model Code does not offer it as a justification); Note, *The Advocate-Witness Rule*, 52 NYU LAW REV 1365, 1390-93 (1977) ("Reliance on an unsubstantiated and incalculable fear of public criticism to justify the advocate-witness rule obscures the often substantial burdens that the rule imposes on clients").

Application of the advocate witness rule demands a balancing of the litigants' interests. MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.7 *comment* (1984). URP never had the opportunity or benefit of such factfinding. 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

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1. Other situations, such as where the attorney testimony might *harm* a client, or confuse a jury of laypersons, are not relevant in this case.

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).

The inquiry under these "substantial hardship" balancing factors requires an opportunity to be heard and present evidence and a decision based on findings of fact. Moreover, the right to counsel carries with it a right to counsel of one's choice. The right of choice, however, is subject to judicial discretion if accommodation of the right to choice would result in "a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." ***State v. Greenough***, 8 OrApp 86, 92, 493 P2d 59, 62 (1972). Meek is URP's choice of counsel. There appears to be no disruption to orderly presentation of the case. The ruling/footnote was not made in response to a party who demonstrated harm or prejudice but was *sua sponte* by the hearings officer, without consideration of the factual exceptions within RPC 3.7.

A party "is entitled not only to have counsel, but to have effective counsel." ***State v. Pflieger***, 15 OrApp 383, 388, 515 P2d 1348, 1350 (1973). Effective counsel in the current situation means counsel who has had an opportunity to adequately prepare cross-examination on complex ratemaking matters. Daniel Meek and expert witness Jim Lazar conferred specifically for such cross-examination purposes. Lazar

and Williams have busy schedules and have not been able to confer in the three weeks since the July 25, 2005, ruling. Moreover, undersigned has other work commitments, some on related utility matters, others in totally unrelated cases, with court set deadlines and litigation tasks. It is a substantial hardship to attempt to undertake additional tasks with no notice within a month of the hearing.

URP thus seeks a clarification of the language referenced above. If, in fact, the intent of the language is to disqualify Meek as URP counsel without an opportunity to be heard, URP requests that Meek be allowed to continue as counsel under RPC 3.7(a)(3). The disqualification of Meek is a substantial hardship at this stage of the proceeding.

Dated: August 23, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing UTILITY REFORM PROJECT EMERGENCY MOTION FOR CLARIFICATION AND RELIEF FROM ORDERS OF JULY 25 AND AUGUST 23, 2005 by email to the email addresses shown below, which comprise the service list on the Commission's web site as of this day.

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Dated: August 23, 2005

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Linda K. Williams