

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2018 Long-Term)
Forecast Report of Ohio Power) Case No. 18-501-EL-FOR
Company and Related Matters.)

**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM
OPPOSING MOTION OF NATURAL RESOURCE DEFENSE COUNCIL AND
OHIO PARTNERS FOR AFFORDABLE ENERGY
TO DISQUALIFY DR. NOAH DORMADY FROM TESTIFYING**

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I. INTRODUCTION

In this matter, the Ohio Power Company is seeking a determination of need based in part on a poorly performed study prepared by Navigant Consulting (“Navigant”). AEP-Ohio Ex. 2 at 1 and 7; AEP-Ohio Ex. 6 and 10. In response to Ohio Power’s attempt to redefine need based on customer surveys, the Office of the Ohio Consumers’ Counsel (“OCC”) has submitted the testimony of Dr. Noah Dormady, who provides a litany of reasons why the Navigant study is unreliable. Direct Testimony of Noah Dormady (Jan. 2, 2019).

Parties supporting Ohio Power’s application, the Natural Resources Defense Council and the Ohio Partners for Affordable Energy,¹ have moved to disqualify Dr. Dormady. Joint Motion of Natural Resources Defense Council and Ohio Partners for Affordable Energy to Exclude the Direct Testimony of Noah Dormady (Jan. 28, 2019) (“Motion”). According to NRDC, Dr. Dormady’s application disqualifies him from testifying because “under R.C. 102.03(D) & (E) and various Opinions of the Ohio Ethics

¹ For convenience, the moving parties will be referred to as NRDC.

Commission Dr. Dormady's participation in this case represents a conflict of interest and should cease immediately." *Id.* at 1.

At best the alleged conflict of interest presented by NRDC is hypothetical and does not demonstrate that it or the process will be prejudiced if Dr. Dormady testifies. Moreover, those reasons do not address the fact that Dr. Dormady is demonstrably an expert on the subject on which he is testifying, is competent to testify, and is providing relevant testimony. Even if the hypothetical conflict were to occur, the Commission is not an enforcement arm for the appropriate ethics commission and should not seek to enforce those laws by disqualifying Dr. Dormady from testifying. Based on prior practice, moreover, it can and should be expected that any potential conflict of interest can be remedied by recusal. Because there is no legal or reasoned basis to disqualify Dr. Dormady from testifying, NRDC's motion should be denied.

II. ARGUMENT

A. The Motion ignores that Dr. Dormady is competent to testify and is providing relevant and qualified expert testimony

Although the Commission is not bound by the Rules of Evidence in contested proceedings, it must exercise its discretion to conduct hearings in a manner that does not prejudice parties. R.C. 4903.22; *Greater Cleveland Welfare Rights Organization v. Public Utilities Commission of Ohio*, 2 Ohio St. 3d 62, 68 (1982). Under the Rules of Evidence, Dr. Dormady would be competent to testify and his testimony addresses a matter that is relevant to the resolution of the application filed by Ohio Power. Under the Commission's discretion to monitor its own proceedings, the policies reflected in the Rules of Evidence do not justify disqualification.

Rule 601 of the Ohio Rules of Evidence provides that every person is competent to testify with a few exceptions.² None of the exceptions applies to Dr. Dormady. Under Rule 601, therefore, Dr. Dormady is competent to testify.

² Rule 601 provides:

Every person is competent to be a witness except:

(A) Those of unsound mind, and children under ten years of age, who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.

(B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:

- (1) a crime against the testifying spouse or a child of either spouse is charged;
- (2) the testifying spouse elects to testify.

(C) An officer, while on duty for the exclusive or main purpose of enforcing traffic laws, arresting or assisting in the arrest of a person charged with a traffic violation punishable as a misdemeanor where the officer at the time of the arrest was not using a properly marked motor vehicle as defined by statute or was not wearing a legally distinctive uniform as defined by statute.

(D) A person giving expert testimony on the issue of liability in any medical claim, as defined in R.C. 2305.113, asserted in any civil action against a physician, podiatrist, or hospital arising out of the diagnosis, care, or treatment of any person by a physician or podiatrist, unless:

(1) The person testifying is licensed to practice medicine and surgery, osteopathic medicine and surgery, or podiatric medicine and surgery by the state medical board or by the licensing authority of any state;

(2) The person devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school and

(3) The person practices in the same or a substantially similar specialty as the defendant. The court shall not permit an expert in one medical specialty to testify against a health care provider in another medical specialty unless the expert shows both that the standards of care and practice in the two specialties are similar and that the expert has substantial familiarity between the specialties.

If the person is certified in a specialty, the person must be certified by a board recognized by the American board of medical specialties or the American board of osteopathic specialties in a specialty having acknowledged expertise and training directly related to the particular health care matter at issue.

Nothing in this division shall be construed to limit the power of the trial court to adjudge the testimony of any expert witness incompetent on any other ground, or to limit the power of the trial court to allow the testimony of any other witness, on a matter unrelated to the liability issues in the medical claim, when that testimony is relevant to the medical claim involved.

This division shall not prohibit other medical professionals who otherwise are competent to testify under these rules from giving expert testimony on the appropriate standard of care in their own profession in any claim asserted in any civil action against a physician, podiatrist, medical professional, or hospital arising out of the diagnosis, care, or treatment of any person.

(E) As otherwise provided in these rules.

Dr. Dormady's testimony is also relevant to the proceeding. His testimony addresses the Navigant study. Given that Ohio Power is seeking to justify need for the 900 MWs of generic renewable generation facilities based on that study, testimony addressing the study's merits is evidence having a tendency to make the existence of a fact that is of consequence to the determination of the application less probable than it would be without the evidence. R. Evid. 401 and 402; Tr. Vol. I at 62 (determination of scope of hearing).

Further, NRDC has not challenged the expertise of Dr. Dormady, and a review of his expertise shows why. Dr. Dormady has published peer-reviewed articles on public policy and economic analysis including the use of survey methods for economic measurement and has received funding for his work from federal, state, and non-governmental organizations and private sources and conducted survey-based economic research. Direct Testimony of Noah Dormady at 2 (Jan. 2, 2019). The prefiled testimony alone shows that he has the expertise to address the lack of merit of the Navigant study. R. Evid. 702; *In the Matter of the Regulation of the Electric Fuel Component Contained within the Rate Schedules of The Dayton Power & Light Company and Related Matters*, Case No. 86-07-EL-EFC, Opinion and Order (Feb. 18, 1987).

In one respect, NRDC's complaint with Dr. Dormady is that he may have an interest in the outcome of the case that may affect other decision makers. Motion, Memorandum in Support at 3. The suggestion that his alleged "bias" would affect other decision makers itself is far-fetched, but in any case it does not operate to disqualify him from testifying. Even if the witness has a demonstrated financial interest in the outcome of the case,

disqualification of the witness is not the answer. *Ray v. Ramada Inn North*, 181 Ohio App. 3d 350 (2d Dist. Ct. App. 2009).

The Rules of Evidence provide a guide to the proper determination of NRDC's motion. Under the Rules, Dr. Dormady is competent to testify, the testimony is relevant, and Dr. Dormady's credentials appear to be superior to those of the Navigant witnesses who provided supporting testimony for the Navigant study, one of whom admitted she was unfamiliar with statistical analysis. Thus, Dr. Dormady should be permitted to testify.

B. NRDC's Motion to Disqualify Dr. Dormady from Testifying Does Not Demonstrate Prejudice

Despite Dr. Dormady's qualifications to testify, NRDC argues that he should be disqualified due to an alleged conflict of interest that causes prejudice. The conflict of interest is based on two facts: Dr. Dormady is under contract with OCC to submit testimony, and he is seeking a position on the Commission. Motion, Memorandum at 3. Based on these facts, NRDC claims there is a violation of R.C. 102.03 causing a conflict of interest. *Id.* This violation, according to NRDC, would cause prejudice if Dr. Dormady is appointed to the Commission such that recusal would be a "hollow victory" since his opinions would be part of the record and constitute "an improper advisory opinion." *Id.*

In seeking to disqualify Dr. Dormady, NRDC carries a heavy burden to demonstrate that it will be prejudiced if Dr. Dormady testifies. "No prejudice will be presumed where none is demonstrated." *State v. Freeman*, 20 Ohio St. 3d 55, 57 (1985). NRDC's motion falls short of demonstrating that it is prejudiced.

First, NRDC is not prejudiced currently. If there is some sort of conflict that needs to be avoided, the alleged prejudice would occur only if Dr. Dormady becomes a

Commissioner. At this point, Dr. Dormady remains a candidate, and NRDC has not demonstrated how his candidacy creates any prejudice to it or the process.

Second, the suggestion that NRDC might be prejudiced is based on a set of contingencies that demonstrate that NRDC's claims of prejudice are remote and hypothetical. To secure a position as a Commissioner, Dr. Dormady will need the Nominating Council to list him as one of the four recommended candidates for a seat on the Commission. R.C. 4901.021(D)(2). Then, he will need the Governor to appoint him. R.C. 4901.021(F). The Ohio Senate will then have to consent to the nomination. *Id.* Finally, the other Commissioners will have to ignore that Dr. Dormady was a witness and, if Dr. Dormady correctly recuses himself from the decision, allow him to unduly influence their independent votes on the pending application with the result that the application is denied or substantially modified to the detriment of NRDC. On its face, the claim that a "conflicted" Dr. Dormady could prejudice the current hearing process or affect the decision is at best premature and so contrived and remote as to appear absurd.

C. If a Conflict Arises, the Remedy Is Recusal, Not Disqualification

The issues raised by NRDC do not mature if Dr. Dormady is not appointed to the Commission.³ If Dr. Dormady is successful, however, the remedy to address his role as a witness in this case, just as it would be if he were an attorney and represented a party before the Commission in a matter that then came before him as a Commissioner, is recusal.

Once the matter is before the Commission for decision, a person that participated in the case as a material witness should take steps to prevent a conflict of interest if he

³ In this regard, the Motion is also not ripe and should be dismissed on that basis as well. *State, ex rel. Duncan, v. Mentor City Council*, 105 Ohio St. 3d 372 (2005).

would otherwise be “judging” the case. See Ohio Code of Judicial Conduct Rule 2.11.⁴ Under that circumstance and as has been the practice of prior Commissioners in multiple instances in which a Commissioner served as counsel in a matter that later came before the Commission for a decision, the Commissioner has properly recused himself. See, e.g., *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1693-EL-RDR, *et al.*, Finding and Order (Apr. 4, 2018); Minutes of the Commission Meeting at 2 (Apr. 4, 2018) (Commissioner Conway recuses himself in a matter in which he appeared as counsel for Ohio Power Company).

Since recusal addresses the concerns raised by NRDC and does not become an issue unless Dr. Dormady is named a Commissioner, the Commission should deny NRDC’s motion to disqualify Dr. Dormady from testifying.

D. The Commission is not an enforcement arm of the appropriate ethics commission

In its Motion, NRDC also assumes that the Commission may enforce the state ethics laws by disqualifying Dr. Dormady from testifying. The Commission, however, is not charged with enforcing Chapter 102 of the Revised Code.

It is axiomatic that the Commission is a creature of statute and draws its authority from Chapter 49 of the Revised Code. *Office of Consumers’ Counsel v. Public Utilities Commission of Ohio*, 67 Ohio St. 3d 153, 166 (1981). The scope of its authority is the regulation of public utilities providing retail utility services in Ohio. See, generally,

⁴ Although the Commission’s laudatory practice is for a Commissioner to recuse himself, recusal may not be mandatory. See n.5 *infra*.

R.C. Ch. 4905. No statutory provision vests the Commission with authority to enforce Chapter 102, the Ohio ethics statutes. That authority, if it applies to Dr. Dormady based on the facts alleged in the Motion, rests with the appropriate ethics commission and prosecuting attorneys, and enforcement is by complaint, not disqualification to testify. R.C. 102.06.

In its Motion, NRDC is requesting the Commission to disqualify Dr. Dormady as a means of enforcing R.C. 102.03(D) and (E). While the Commission has authority to address the scope of the evidence presented in its hearing to assure an orderly process, it is not an enforcement arm for the appropriate ethics commission. As a result, disqualifying Dr. Dormady based on an alleged violation of the Ohio ethics laws is not within the Commission's authority and should be rejected.⁵

III. CONCLUSION

The Motion does not provide a lawful or reasoned basis to disqualify Dr. Dormady from testifying in this case. NRDC has not demonstrated that it is prejudiced, an adequate remedy exists to address any conflict of interest if it does arise, and the Commission is not the proper entity to decide whether Dr. Dormady has violated R.C. 102.03. Moreover, disqualification and what it implies would render the process for applying for a Commissioner's position a minefield for those most likely to be interested and qualified.

⁵ The limits on the Commission's authority to disqualify a sitting Commissioner were addressed by the Supreme Court of Ohio in *Ohio Transport, Inc. v. Ohio Public Utilities Commission*, 164 Ohio St. 98 (1955). In that case, the appellant was charged with violations of its contract carrier certificate. Prior to the hearing on the complaint, the Commission's chairman made three statements that were alleged to indicate that he had prejudged the guilt of the appellant. Subsequently, the Commission found that the appellant violated its certificate and revoked it. An appeal to the Court followed. In the appeal, the appellant argued that the Commission erred when it failed to disqualify the Chairman from participating in the proceeding. The Court rejected appellant's alleged error, holding that the Commission is a creature of statute and that Ohio law did not provide the Commission with the legal authority to disqualify one of its members from participating in the case. Further, it found that the appellant had not demonstrated that the Chairman's statements demonstrated bias and that the unanimous decision demonstrated that the appellant was not prejudiced.

That outcome cannot be the one intended by the General Assembly when it enacted R.C. 102.03(D) and (E). Accordingly, NRDC's motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

In accordance with Rule 4901-1-05, Ohio Administrative Code, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Opposing Motion of Natural Resource Defense Council and Ohio Partners for Affordable Energy to Disqualify Dr. Noah Dormady from Testifying* was sent by, or on behalf of, the undersigned counsel for Industrial Energy Users-Ohio, to the following parties of record on this 29th day of January 2019, *via* electronic transmission, hand-delivery or U.S. mail, postage prepaid.

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