

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the 2018 Long-Term)
Forecast Report on behalf of Ohio Power) Case No. 18-0501-EL-FOR
Company and Related Matters.)

In the Matter of the Application Seeking)
Approval of Ohio Power Company's)
Proposal to Enter into Renewable Energy) Case No. 18-1392-EL-RDR
Purchase Agreements for Inclusion in the)
Renewable Generation Rider.)

In the Matter of the Application of Ohio) Case No. 18-1393-EL-ATA
Power Company to Amend its Tariffs.)

**MEMORANDUM CONTRA
JOINT MOTION OF NATURAL RESOURCES DEFENSE COUNCIL AND
OHIO PARTNERS FOR AFFORDABLE ENERGY
TO PREVENT OHIO STATE UNIVERSITY PROFESSOR DORMADY FROM
TESTIFYING ON BEHALF OF THE OHIO CONSUMERS' COUNSEL FOR
RESIDENTIAL CONSUMERS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Bruce Weston (0016973)
Ohio Consumers' Counsel

Maureen R. Willis, Counsel of Record
Senior Counsel (0020847)
William J. Michael (0070921)
Christopher Healey (0086027)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
65 East State Street, 7th Floor
Columbus, Ohio 43215
Telephone [Willis]: (614) 466-9567
Telephone [Michael]: (614) 466-1291
Telephone [Healey]: (614) 466-9571
Maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
Christopher.healey@occ.ohio.gov

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At the hearing last Friday two of AEP’s supporters (for its re-monopolization of power plants at Ohioans’ expense) initiated a misguided effort to exclude relevant and compelling testimony submitted by the OCC. Moving to prevent OSU Professor Noah Dormady from testifying for OCC and the 1.3 million consumers that OCC represents, the Natural Resources Defense Council (“NRDC”), through attorney Robert Dove, and Ohio Partners for Affordable Energy (“OPAE”), through attorney Chris Allwein (both attorneys with the law firm of Kegler Brown Hill & Ritter) made an outlandish accusation that OCC’s witness, Professor Dormady, had violated state ethics. For starters, the PUCO lacks any jurisdiction to entertain such an argument that under state law

belongs at the Ohio Ethics Commission. And there is no basis for preventing Professor Dormady from testifying for OCC on behalf of Ohio consumers.

The Professor's testimony for the Ohio Consumers' Counsel ("OCC") describes how there is bias in AEP's survey for researching customer attitudes on renewable energy. Despite the Professor stating on the first page of his publicly filed testimony that "I am employed by The Ohio State University," NRDC attorney Dove asserted that the Professor should be considered an OCC employee under the Ohio ethics law: "He is testifying in a capacity as an employee of Consumers' Counsel which – while seeking a position as a Commissioner at the PUCO. He has been granted an interview and, under the Ohio Ethics Commission, this is a conflict of interest." Tr. VIII at 2276 (Jan. 25, 2019). Mr. Dove then added another unsupported count for NRDC's motion, that the Professor's testimony should be excluded as "prejudicial, if he were to be appointed as a Commissioner...." Tr. VIII at 2276-77. Mr. Allwein informed the PUCO of OPAAE's support for NRDC's motion. Tr. VIII at 2282.

Other than citing to the general statute for the Ohio Ethics Commission, NRDC showed up at hearing with no specific precedent for its misplaced allegation impugning this OSU Professor's integrity. The most NRDC attorney Dove could offer is that "I have several ethics' opinions that I'm happy to e-mail out if you would like¹." Tr. VIII at 2278. Mr. Dove's law firm colleague Mr. Allwein, on behalf of OPAAE, similarly did not offer any precedent for supporting NRDC's extraordinary allegation that The Ohio State

¹ Mr. Dove though did not make good on his offer, and parties were not provided the ethics opinions to support his arguments. Those opinions were only made known through the 4:15 p.m. Monday filing of the Joint Motion.

University Professor is in violation of Ohio ethics law and his testimony thus should be excluded. Transcript VIII at 2276-2277.

OCC Attorney Healey responded orally to the allegations of NRDC and OPAE. Tr. VIII at 2278-2281. As part of the response, OCC's Attorneys advised that OCC had in fact contacted the Ethics Commission along with Professor Dormady. The Ohio Ethics Commission provided information and guidance² to OCC and Professor Dormady, and based on this information and guidance, there is no basis to conclude that Professor Dormady has any conflict of interest. Id.

The Attorney Examiners then allowed NRDC and OPAE to file their arguments in writing by yesterday, and allowed others including OCC until noon today to respond. This filing is OCC's response.

OCC, in representing 1.3 million residential customers of AEP Ohio, engaged outside expert witnesses to support its legal arguments (similar to how the PUCO engages outside consultants for audits and other matters). In particular, OCC's outside expert witnesses filed testimony challenging the AEP survey, asserting that the survey results do not establish need and cannot be relied upon because of the survey's significant flaws. OCC filed the testimony of two witnesses assessing the survey: Drs. Lesser and Dormady. Two parties supporting AEP's renewable projects, Natural Resources Defense Council ("NRDC") and Ohio Partners for Affordable Energy ("movants"), have now jointly moved to exclude the testimony of Professor Dormady.

² OCC in fact provided to NRDC Counsel copies of the advisory opinions that the Ohio Ethics Commission directed OCC to on Thursday, the day prior to Mr. Dove's oral motion. OCC has not requested a formal opinion from the Ethics Commission but understands a formal advisory opinion on the matter will take around three weeks at a minimum.

NRDC and OPAE may not like what Professor Dormady has to say about AEP's proposal.³ But there is no law, rule, statute, or precedent (PUCO or court) that supports the exclusion of Professor Dormady's relevant, compelling expert testimony. Contrary to Movants' assertions otherwise, the Ohio ethics laws do not prohibit Professor Dormady from testifying in this case. Under the nine-point test set forth in *Gillum v. Industrial Commission of Ohio*,⁴ Professor Dormady is not an OCC employee, but is an independent contractor. Independent contractors of state agencies are not subject to Ohio's ethics laws.⁵ And Professor Dormady's independent, short-term arrangement with OCC to perform specific tasks, including analyzing the surveys and presenting testimony, did not vest him with sovereign authority that would transform him into a public official or employee of the state.

Furthermore, Movants will not be prejudiced if Professor Dormady's testimony is considered by the sitting Commissioners and the Attorney Examiners in this proceeding. The PUCO Commissioners (and the Attorney Examiners) can properly execute their duty to give Professor Dormady's testimony the appropriate weight it should be given, even if Professor Dormady is successful in obtaining a seat as a PUCO Commissioner.

³ It is interesting timing that NRDC and OPAE are publicly accusing OCC's witness, Professor Dormady, on this issue, just as the PUCO nominating council is considering applicants including Professor Dormady for nomination as the next PUCO Commissioner.

⁴ 141 Ohio St. 373 (1943).

⁵ See Ohio Ethics Commission Advisory Opinion No. 75-012 at 3 ("The Ohio Ethics Commission has determined that independent contractors of public agencies are not included in that class of persons described by the phrase 'employed by' as used in Section 102.04 of the Revised Code."); Ohio Ethics Commission Advisory Opinion No. 75-016 at 2 (citing Advisory Opinion No. 75-012); Ohio Ethics Commission Advisory Opinion No. 75-028 (citing Advisory Opinion No. 75-012).

NRDC and OPAE's motion to prevent Professor Dormady from testifying should be denied.

I. BACKGROUND

OCC filed the direct testimony of expert witness Professor Noah Dormady in this case on January 2, 2019. Professor Dormady testifies on a single issue: the reliability and accuracy of a survey that Ohio Power Company ("AEP Ohio") conducted last year regarding customers' willingness to pay for renewable energy.

Professor Dormady is an expert on customers surveys, and OCC hired his company, Dormady Associates, LLC, in November 2018 as an independent contractor because of Professor Dormady's unique knowledge in this area. Dr Dormady's contract is a short-term arrangement under which he is to perform a specific set of tasks, including analyzing AEP's customer surveys and presenting testimony. As stated on the first page of his testimony, Professor Dormady is an employee of the Ohio State University, where he works as Assistant Professor of Public Policy. He is not now, and has never been, an employee of OCC.

OCC filed the testimony of Professor Dormady on January 2, 2019. On or around January 17, 2019, Professor Dormady applied for an open position as Commissioner of the PUCO. At the hearing in Case No. 18-501-EL-FOR, on January 26, 2019, OCC called Professor Dormady to testify on behalf of OCC, opposing AEP Ohio's application in this case. Counsel for NRDC moved to exclude Professor Dormady's testimony on the grounds that his pending application for the commissioner position created a conflict of interest. OPAE joined in that motion.

The Attorney Examiners found that Professor Dormady's cross-examination should be deferred to a later date, and instead, directed parties to brief the issue of NRDC's motion to exclude Professor Dormady's testimony. Transcript VIII at 2405. The Attorney Examiners allowed parties seeking to exclude Professor Dormady's testimony the weekend and a full day (Monday) to file their written motion. Movants took advantage of the Attorney Examiner's ruling and near the end of day (4:15 p.m.) NRDC and OPAE filed a joint motion to exclude the testimony of Professor Dormady. No other Parties in these cases saw fit to join that motion or to file a separate motion with these allegations. Per the Attorney Examiner's oral ruling on January 25, this memorandum contra was due on (January 30, 2019) at noon less than 24 hours after the filing of the movants' motion and OCC filed it accordingly. And the timing for filing a memorandum contra was further affected by the fact that parties like OCC, OMA, and IEU (who would file memorandum contra) were tied up in hearing until the close of business on January 29.⁶

OCC objects to the NRDC/OPAE motion for the reasons set forth below. The PUCO should deny the motion because there is no legal basis to exclude Professor Dormady's expert testimony in this case. Moreover, the PUCO is without jurisdiction to even entertain the Movants' allegations of conflict of interest under Ohio Ethics Laws.⁷ And the movants' allegations are strained, to put it mildly.

⁶ It should be noted that the Movants' counsel failed to attend the evidentiary hearing on January 29, 2019, allowing them another day (in addition to Saturday and Sunday) to devote to drafting their motion.

⁷ This lack of jurisdiction is addressed in OCC's Interlocutory appeal, filed contemporaneously with this memorandum. Rather than repeat those arguments here, OCC incorporates those arguments by reference.

II. RECOMMENDATIONS

- A. **R.C. 102.03(D) and (E) apply only to someone who is a “public official or employee” of the State of Ohio. Professor Dormady is neither, so NRDC and OPAA are wrong in claiming a violation of R.C. 102.03(D) or (E).**

Joint Movants reference on R.C. 102.03(D)and (E) to allege that Professor Dormady’s participation in this case amounts to a violation of Ohio Ethics laws. Joint Memorandum at 4-11. Joint Movants are wrong.

R.C. 102.03(D) provides: “No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person’s duties.”

R.C. 102.03(E) provides: “No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person’s duties.”

In each case, the law only applies to an individual that is a “public official” or “employee” of the State of Ohio. Professor Dormady is neither, and thus these statutes do not apply to him.

- 1. College professors are not “public officials” or “employees” of the State for purposes of Ohio Ethics laws (R.C. 102.03(D) and (E)), so NRDC and OPAE are wrong in claiming that *Professor Dormady* is an employee of OCC.**

Professor Dormady is employed as an Assistant Professor of Public Policy at the Ohio State University.⁸ The Ohio Revised Code specifically exempts college professors from the definition of “public official or employee” unless they perform or have the authority to perform “administrative and supervisory functions.”⁹ Professor Dormady teaches classes and performs research; he does not perform or have the authority to perform administrative and supervisory functions. Thus, he is not a “public official or employee” by virtue of his position as a professor at the Ohio State University.¹⁰

- 2. Professor Dormady (through his limited liability corporation, Dormady Associates, LLC) is an independent contractor hired by OCC and is not an employee. Thus, NRDC and OPAE are wrong in claiming he is a “public official or employee” of OCC for purposes of Ohio Ethics laws (R.C. 102.03(D) and (E)).**

As explained above, R.C. 102.03(D) and (E) apply only to someone who is a “public official or employee” of the State. Professor Dormady is not an employee of OCC. Instead, he (through his LLC) is performing work on behalf of OCC as an independent contractor. The Professor says right on the first page of his testimony that he is an employee of OSU.

The Ohio Ethics Commission has repeatedly concluded that independent contractors are not subject to the Ohio ethics laws. In Advisory Opinion No. 89-009, the

⁸ Direct Testimony of Noah Dormady on Behalf of the Office of the Ohio Consumers’ Counsel at 1:9-10 (Jan. 2, 2019) (the “Dormady Testimony”).

⁹ R.C. 102.01(B) (“Public official or employee” does not include a person who is a teacher, instructor, professor, or other kind of educator whose position does not involve the performance of, or authority to perform, administrative or supervisory functions.”).

¹⁰ Id. In any event, NRDC conceded that Professor Dormady’s employment by the Ohio State University causes no conflict, stating “I am not claiming he is an employee by virtue of his employment at OSU.”).

Ethics Commission succinctly concluded: “The Commission has consistently held that an independent contractor who provides services to a public agency is not generally within the class of persons who are subject to Chapter 102 of the Revised Code.” In that opinion, the Ethics Commission explained that this is state policy because an independent contractor “does not generally exercise the public trust.”¹¹

The Ethics Commission reached a similar conclusion in Advisory Opinion No. 77-008: “The Ohio Ethics Commission has determined that independent contractors of public agencies are not within the class of persons described by the phrase ‘employed by’ for purposes of the Ohio Ethics Laws.” Again, in Advisory Opinion 93-013, the Ohio Ethics Commission stated: “An independent contractor is not generally a public official or public employee, as that term is defined for purposes of R.C. 102.03 of the Revised Code.” And the Ohio Ethics Commission has reached the same conclusion with respect to R.C. 102.04(A), which refers to persons “employed by ... the state,” a phrase substantially similar to the references in R.C. 102.03 to an “employee” of the state.¹²

It should be noted in this very case, that NRDC retained an expert witness, Gabriella Stebbins, from an outside firm.¹³ Ms. Stebbins testified she works for Energy Futures Group, (which is not NRDC). In addition, Mr. Allwein representing the Sierra

¹¹ Ohio Ethics Commission Advisory Opinion No. 89-009 at 3.

¹² See Ohio Ethics Commission Advisory Opinion No. 75-012 at 3 (“The Ohio Ethics Commission has determined that independent contractors of public agencies are not included in that class of persons described by the phrase ‘employed by’ as used in Section 102.04 of the Revised Code.”); Ohio Ethics Commission Advisory Opinion No. 75-016 at 2 (citing Advisory Opinion No. 75-012); Ohio Ethics Commission Advisory Opinion No. 75-028 (citing Advisory Opinion No. 75-012).

¹³ Testimony of Gabriella Stebbins on behalf of the Natural Resources Defense Council (January 2, 2019).

Club in another PUCO matter, sponsored an expert witness, Peter Lanzalotta.¹⁴ Mr. Lanzalotta is with Lanzalotta & Associates (which is not the Sierra Club).

- a. **The Ohio Ethics Commission’s nine-part test for determining whether an individual is an independent contractor or employee establish that Professor Dormady is an independent contractor of OCC, and not an employee, so NRDC and OPAE are wrong in asserting otherwise.**

Whether an individual is an employee or an independent contractor depends on the evaluation of a nine-factor test. In *Gillum v. Industrial Commission of Ohio*,¹⁵ the Supreme Court of Ohio identified nine factors considered in determining whether an individual is an employee or an independent contractor:

- a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- b) whether or not the one employed is engaged in a distinct occupation or business;
- c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- d) the skill required in the particular occupation;
- e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- f) the length of time for which the person is employed;
- g) the method of payment, whether by the time or by the job;

¹⁴ *In re FirstEnergy ESP IV*, Case No. 14-1297-EL-ESP, Supplemental Testimony of Peter J. Lanzalotta (May 11, 2015).

¹⁵ 141 Ohio St. 373 (1943).

- h) whether or not the work is a part of the regular business of the employer; and
- i) whether or not the parties believe they are creating the relationship of master and servant.¹⁶

The Ethics Commission has adopted these nine factors as the test for evaluating whether an individual is an employee or an independent contractor for purposes of the Ohio ethics laws, but with some qualifications.¹⁷ Most notably, although all nine factors may be considered, the Ethics Commission has determined that factor (b) is the most important factor: “the primary test for purposes of the ethics legislation is (b) whether the one employed is engaged in a distinct occupation or business.”¹⁸

And indeed, in each instance in which the Ohio Ethics Commission found that the individual in question was engaged in a distinct occupation or business, he or she was found to be an independent contractor and therefore not subject to the Ohio ethics laws:

- In Advisory Opinion No. 75-012, the individual was a member of the Ohio Constitutional Revision Commission. The individual’s “distinct occupation or business” was that of a lawyer, and thus, he or she was an independent contractor and not an employee of the Ohio Constitutional Revision Commission.
- In Advisory Opinion No. 77-008, the individual was a hearing examiner for the State Personnel Board of Review. The individual’s “distinct occupation or business” was that of a lawyer, and thus, he or she was an independent contractor and not an employee of the State Personnel Board of Review.

¹⁶ *Gillum*, 141 Ohio St. 373, 381-82.

¹⁷ See Ohio Ethics Commission Advisory Opinion No. 75-012 (“The traditional tests used to distinguish employees from independent contractors are set forth in *Gillum v. The Industrial Commission*...”).

¹⁸ Ohio Ethics Commission Advisory Opinion No. 75-012 at 3. See also Ohio Ethics Commission Advisory Opinion No. 77-008 at 2 (identifying (b) as the “primary test”); Ohio Ethics Commission Advisory Opinion No. 77-028 at 3 (identifying (b) as the “primary test”). Ohio Ethics Commission Advisory Opinion No. 75-016 at 2 (identifying (b) as the “primary test”).

- In Advisory Opinion No. 75-028, the individual was a hearing examiner for the Ohio Civil Rights Commission. The individual's "distinct occupation or business" was that of a lawyer, and thus, he or she was an independent contractor and not an employee of the Ohio Civil Rights Commission.
- In Advisory Opinion No. 75-016, the individual was appointed as special counsel by the Ohio Attorney General. The individual's "distinct occupation or business" was that of a lawyer, and thus, he or she was an independent contractor and not an employee of the Ohio Attorney General.

Here, Professor Dormady is testifying as an expert witness on surveys on behalf of the Office of the Ohio Consumers' Counsel. He has a distinct occupation or business, namely, Assistant Professor of Public Policy at the Ohio State University as well as a business, Dormady Associates , LLC.. Professor Dormady is an energy and environmental economist and public policy scholar. He thereby easily satisfies the Ohio Ethics Commission's primary test because he has a "distinct occupation or business."

Many of the other factors also confirm that Professor Dormady is an independent contractor of OCC and not an OCC employee. Given its own use of independent contractors in addition to employees, the PUCO would be well familiar with the distinction between contractors and employees.

Factor (a) considers the extent of control that OCC may exercise over the details of Professor Dormady's work. Under the terms of OCC's contract with Professor Dormady, Professor Dormady was to perform work at the direction of OCC, but the details of his work were his own. He drafted his own testimony and made decisions regarding what would be included in his testimony, including his expert opinions that were rendered in his testimony. Thus, while OCC attorneys consulted with Professor Dormady regarding his testimony, Professor Dormady retained primary control over his

work product. Retaining primary control over work is indicative of an independent contractor, as opposed to an employee.

Factor (c) considers whether the type of work is usually done under the direction of the employer or by a specialist without supervision. This factor also supports a conclusion that Professor Dormady is an independent contractor.

OCC routinely hires outside consultants to testify as expert witnesses in PUCO proceedings and is permitted to do so by statute (R.C. 4911.12(B)).¹⁹ As the PUCO would know (as a state agency), the State of Ohio has different processes for hiring contractors and employees, respectively.

Factor (d) considers the skill required in the particular occupation. Here, Professor Dormady has the skills required to evaluate customer surveys. Thus, this factor also supports a conclusion that Professor Dormady is an independent contractor, and not an employee of OCC.

Factor (e) considers whether OCC supplied Professor Dormady with instrumentalities, tools, and a place of work. OCC did none of these things. Professor Dormady's work was done with his own tools and instrumentalities and was performed outside of OCC's office. The fact that OCC did not supply Professor Dormady with instrumentalities, tools and a place of work is indicative of Professor Dormady's status as an independent contractor, not an employee of OCC.

Factor (f) considers the length of time for which Professor Dormady was employed. Under his contract, he was hired specifically for this matter. And when his

¹⁹ R.C. 4911.12(A) authorizes the Consumers' Counsel to hire employees, and R.C. 4911.12(B) authorizes the Consumers' Counsel to contract for services of outside consultants.

work on this matter is complete, his contract will be closed, as is typical for similar engagements. This factor, therefore, supports a conclusion that Professor Dormady is an independent contractor of OCC and not an employee of OCC.

Factor (g) considers the method of payment. Professor Dormady is paid hourly for his work on this matter, up to a contractual maximum. Likewise, Professor Dormady does not receive any employee benefits from OCC, cannot participate in the Ohio Public Employees Retirement System by virtue of his contract with OCC, and does not have any taxes withheld when OCC pays him for his work. Professor Dormady is not part of OCC payroll during his limited contract; rather he is compensated from a separate consultant budget fund.

Factor (h) considers whether the work is a part of the regular business of OCC. Representing Ohio residential utility consumers is OCC's mission. In PUCO cases where OCC appears as a party, it is not unusual to include the filing of expert testimony in that representation. Similar to the PUCO, that testimony may be sponsored by in-house experts (OCC employees) or by hired consultants (Independent Contractors such as Professor Dormady). OCC structures its representation this way because it is financially impossible to retain on staff all the expertise that could be required to adequately represent Ohio consumers in the complex field of utility issues. Just because OCC routinely files expert testimony in a case, the fact that it is part of the regular business of OCC does not make it determinative of Professor Dormady's status. The need for an expert in surveys is not an issue that appears routinely in cases.

Factor (i) considers whether OCC and Professor Dormady believe they are creating the relationship of master and servant. Both parties believe and agreed that he is

an independent contractor, as part of the state process for procuring contractor services. Thus, this factor supports a conclusion that Professor Dormady is an independent contractor, not an employee.

When these factors are considered, -especially factor (b), which is the primary test, they overwhelmingly support a conclusion that Professor Dormady is an independent contractor and not an employee of OCC. Thus, he is not subject to the Ohio ethics laws, and NRDC's motion to prevent his testimony in this case should be denied.

b. Professor Dormady does not exercise the “sovereign power” of OCC, so NRDC and OPAE are wrong in claiming he is an employee of OCC.

NRDC and OPAE assert that Professor Dormady is a “public official or employee” under the Ohio Ethics law because he is exercising OCC's sovereign power. Joint Memorandum at 5-8. They allege that as an OCC expert witness with filed testimony, he is advocating on behalf of all AEP residential customers. According to Movants that advocacy is an exercise of OCC's sovereign power. Joint Memorandum at 7. Joint Movants rely primarily on *State ex rel Milburn et al v. Pethtel*, 153 Ohio St. 1 (1950). Joints Movants though have misapplied the holding in this case.

OCC does not disagree that the Ohio Ethics Commission has found that an individual is considered an employee of a state agency, and therefore subject to the Ohio ethics laws, if that individual exercises “sovereign power” of the agency. But the Ethics Commission has held that while public employees share in the responsibility of the public trust exercised by their elected and appointed superiors, generally independent contractors do not. Adv. Ops. No. 75-012 and 89-003. This is primarily due to the independent, short-term nature of the contract work they undertake, along with their engagement to perform a specific set of tasks. Here Professor Dormady is under contract

to provide specific services related to this consolidated proceeding. His employment through OCC does not extend to “multitudinous cases involving business or political dealings with individuals in the public” as described in *State ex rel Milburn et al v. Pethtel*, 153 Ohio St. 1, 6 (1950). Professor Dormady’s seven month contract terminates on the close of business on June 30, 2019.

Joint Movants assert that Professor Dormady exercises OCC’s sovereign power when he testifies as an OCC witness on behalf of OCC. Here Joint Movants misconstrue and overstate the holdings of the Ohio Supreme Court. While Joint Movants rely on the *Milburn v. Pethtel* decision, they only provide the PUCO with a short excerpt of the case, which is misleading. When the Court’s full description of sovereign power is examined, it is clear that Professor Dormady is not exercising sovereign power of the state.

In *Milburn v. Pethtel*, the Court fully described sovereign power as follows: ““If specific statutory and independent duties are imposed upon an appointee in relation to the exercise of the police powers of the state, if the appointee is invested with independent power in the disposition of public property or with power to incur financial obligations upon the part of the county or state, if he is empowered to act in those multitudinous cases involving business or political dealings between individuals and the public, wherein the latter must necessarily act through an official agency, then such functions are a part of the sovereignty of the state.” Viewed in full, the Court’s description of sovereign power shows how misplaced Movants’ arguments are.

Professor Dormady has no discretionary, decision-making authority with respect to the Consumers’ Counsel’s statutory duties. He has no statutory and independent duties in relation to the police powers of the state. Professor Dormady has no power to

independently dispose of public property. He has no power to incur financial obligations on the part of the state. And he is not empowered to act in multitudinous cases involving business or political dealings. Instead, Professor Dormady's duty as an independent contractor of the OCC is limited to responsibilities specifically set forth in his contract, for this consolidated case before the PUCO. Once his duties are performed, the contract ends. Professor Dormady does not share in the responsibilities of public trust exercised by elected and appointed officials such as the Consumers' Counsel or the Deputy Consumers Counsel or the OCC Governing Board.²⁰ He has been given no authority or administrative discretion to exercise the sovereign powers of OCC. Because he does not exercise sovereign authority when he testifies for OCC, Professor Dormady is not otherwise subject to the Ohio ethics provisions.

B. NRDC and OPAE are wrong in claiming that Professor Dormady's testimony is an "advisory opinion."

NRDC and OPAE allege that were Professor Dormady to be appointed to the PUCO, his testimony would amount to an advisory opinion. Joint Memorandum at 3. There is no legal support for this view. Indeed, two of the PUCO's current Commissioners were appointed from jobs advocating for industry entities (one of which was AEP) that are subject to PUCO oversight.

First, Professor Dormady's expert testimony on behalf of OCC is in no way the opinion of the PUCO. If Professor Dormady is subsequently appointed as a Commissioner, his testimony does not somehow transform into a ruling by the PUCO in

²⁰ See Ohio Ethics Commission Advisory Opinion No. 92-001 (describing sovereign powers as those exercised by an individual in a "continuous and permanent" position, which powers can *only* be exercised by that person); Ohio Ethics Commission Advisory Opinion No. 85-005 (stating that an individual has sovereign power if he or she has independent power in the disposition of public property or power to incur financial obligations upon the state).

this case. Undoubtedly, if Professor Dormady is appointed as a Commissioner, he will recuse himself from deciding this matter, and his fellow Commissioners will consider the case without him. Contrary to Joint Movants, recusal is not a “hollow remedy.” See Joint Memorandum at 3. Indeed, two of the PUCO’s current Commissioners were appointed from jobs advocating for industry that is subject to PUCO oversight.

Further, the characterization as an “advisory opinion” is simply incorrect. An unlawful advisory opinion by a court is one in which the court rules on a legal issue despite the lack of a justiciable conflict.²¹ But here, there is a conflict. AEP Ohio and other parties are seeking a finding of need, and OCC and other parties are opposing AEP Ohio’s application. Any ruling on this question would not be an advisory opinion, so NRDC’s reference to advisory opinions misses the point, even under NRDC’s attempt to conflate the concepts of testimony and administrative decisions, which are not at all the same thing.

- C. The only basis for disqualifying an expert witness for an alleged conflict of interest is if the witness had privileged conversations with the opposing party about the case in question. That did not happen here, so NRDC and OPAE are wrong in claiming that OCC’s witness should not be allowed to testify for consumers.**

Disqualification of expert witnesses is rare, and rightfully so. The *only* identifiable grounds on which an expert might be disqualified for a conflict of interest is if the witness had privileged conversations with the opposing party regarding the case. For example, in *Mullins v. Comprehensive Pediatric & Adult Medicine, Inc.*, 2009-Ohio-1310, the appellee’s counsel had prior privileged conversations with the appellant’s

²¹ *State ex rel. Food & Water Watch v. State*, 2018-Ohio-555, ¶ 29.

expert witness about the very case in which the appellant's expert witness was seeking to testify. The court ruled that the witness must be disqualified.

There is no allegation that Professor Dormady had any privileged conversations with AEP Ohio, NRDC, or any other party adverse to OCC in this case. Thus, there is no basis to disqualify him and prevent his testimony for OCC under the very limited exception regarding expert witness conflicts of interest.

D. There is no rule of evidence that supports the exclusion the testimony of an expert witness based on the witness's pending job application before the PUCO, so NRDC and OPAE are wrong in seeking to prevent his testimony for OCC and consumers.

Ohio Rule of Evidence 702 provides that a witness may testify as an expert if (A) the witness's testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons, (B) the witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony; and (C) the witness's testimony is based on reliable scientific, technical, or other specialized information. There is no dispute that Professor Dormady meets each of these requirements. There is no evidentiary rule that supports the exclusion of Professor Dormady as an expert and prevention of his testimony for consumers based on his application for a position as a PUCO commissioner.

E. NRDC and OPAE would not be prejudiced if Professor Dormady becomes a commissioner, and the remaining commissioners have to evaluate, among other things, Professor Dormady's testimony for consumers in these cases.

Joint Movants claim that if Professor Dormady is ultimately appointed as a commissioner, then even once he recuses himself from these proceedings (as he

undoubtedly would), his then fellow commissioners would be unable to fairly evaluate his testimony on behalf of OCC, simply because he is now their colleague. Joint Memorandum at 2. This claim is unfounded and wrongly implies that the Attorney Examiners and the Commissioners themselves cannot fulfill their duty to properly weigh the evidence put before them and reach a just and reasonable decision. Indeed, two of the PUCO's current Commissioners were appointed from jobs advocating for industry entities (one of which was AEP) that are subject to PUCO oversight.

Professor Dormady's testimony stands on the merits of his expert opinions. There simply is no basis for Joint Movants to speculate they will be prejudiced by the status of Professor Dormady if he is subsequently appointed to the PUCO. To suggest otherwise impugns the integrity of the entire PUCO process.

III. CONCLUSION

There is no basis whatsoever to prevent Professor Dormady from testifying on behalf of OCC in these cases. NRDC and OPAE are wrong across the board with their outlandish accusations.

The Professor is a qualified expert testifying on behalf of AEP Ohio's 1.3 million residential consumers. His pending application for a position as commissioner has no bearing on his testimony, there is no conflict of interest and it's just plain unfair to Professor Dormady, the Ohio Consumers' Counsel and consumers for NRDC and OPAE to be making their accusations in these hearings. The PUCO should allow Professor Dormady to testify and ensure a fair PUCO process where OCC may fully exercise its rights under law to represent Ohio consumers on issues affecting their utility service.

Respectfully submitted,

Bruce Weston (0016973)
Ohio Consumers' Counsel

/s/ Maureen R. Willis

Maureen R. Willis, Counsel of Record
Senior Counsel (0020847)
William J. Michael (0070921)
Christopher Healey (0086027)
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

65 East State Street, 7th Floor
Columbus, Ohio 43215

Telephone [Willis]: (614) 466-9567

Telephone [Michael]: (614) 466-1291

Telephone [Healey]: (614) 466-9571

Maureen.willis@occ.ohio.gov

William.michael@occ.ohio.gov

Christopher.healey@occ.ohio.gov

(Willing to accept service by e-mail)

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum Contra was served on the persons stated below via electronic transmission this 29th day of January 2019.

/s/ Maureen R. Willis _____

Maureen R. Willis
Senior Counsel

SERVICE LIST

Thomas.mcnamee@ohioattorneygeneral.gov	stnourse@aep.com
kboehm@BKLLawfirm.com	cblend@aep.com
jkylereohn@BKLLawfirm.com	tony.mendoza@sierraclub.org
mpritchard@mwncmh.com	rsahli@columbus.rr.com
fdarr@mwncmh.com	cmooney@ohiopartners.org
paul@carpenterlipps.com	mnugent@igsenergy.com
Bojko@carpenterlipps.com	joliker@igsenergy.com
Dressel@carpenterlipps.com	rdove@keglerbrown.com
mleppla@theOEC.org	whitt@whitt-sturtevant.com
jstock@beneschlaw.com	glover@whitt-sturtevant.com
jrego@beneschlaw.com	callwein@opae.org
dparram@bricker.com	mjsettineri@vorys.com
mdortch@kravitzllc.com	glpetrucci@vorys.com
cpirik@dickinsonwright.com	ktreadway@oneenergyllc.com
todonnell@dickinsonwright.com	dborchers@bricker.com
wvorys@dickinsonwright.com	tdougherty@theoec.org
cluse@dickinsonwright.com	ctavenor@theoec.org
msilberman@beneschlaw.com	

Attorney Examiners

Sarah.parrot@puc.oh.us.gov
Greta.see@puc.oh.us.gov

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Summary: Memorandum Memorandum Contra Joint Motion of Natural Resources Defense Council and Ohio Partners for Affordable Energy To Prevent Ohio State University Professor Dormady From Testifying on Behalf of the Ohio Consumers' Counsel for Residential Consumers by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Willis, Maureen R Mrs.