

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Lon-Term Forecast Report of Ohio Power Company and Related Matters)	Case No. 18-501-EL-FOR
)	
In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into Renewable Energy Purchase Agreements for Inclusion in the Renewable Generation Rider)	Case No. 18-1392-EL-RDR
)	
In the Matter of the Application of Ohio Power Company to Amend Its Tariffs)	Case No. 18-1393-EL-ATA
)	

**MEMORANDUM CONTRA THE JOINT MOTION OF NATURAL RESOURCES
DEFENSE COUNCIL AND OHIO PARTNERS FOR AFFORDABLE ENERGY TO
EXCLUDE THE DIRECT TESTIMONY OF NOAH DORMADY
BY
THE KROGER CO.**

I. INTRODUCTION.

In our administrative system, as in our judicial system, litigants often have to live with unfavorable case law, orders, and testimony. Just because a party may not like the ways things are, that does not mean they have the right to undo that outcome. To the extent the unfavorable outcome results in the potential for future prejudice, our administrative system has built in checks and balances to avoid any such prejudice. The Public Utilities Commission of Ohio (“Commission”) is uniquely structured so that learned experts in the areas of law and policy can contribute at all levels, from Commissioners to staff, and from counsel to party witnesses. The system thrives because it benefits from the collective expertise of these experts at every level.

Now, however, Natural Resources Defense Council and Ohio Partners for Affordable Energy (collectively, “Joint Movants”) have moved to exclude Witness Noah Dormady’s

testimony filed on behalf of the Office of the Ohio Consumers' Counsel ("OCC") on the basis that his participation in this pending case as an expert witness on behalf of a particular party somehow disqualifies both his testimony and his participation in the case while he is seeking appointment **by the Governor** (not the Commission) to the Commission.¹ Obviously, Joint Movants are unhappy with Dr. Dormady's Direct Testimony, so they have resorted to this eleventh-hour filing in an unprecedented attempt to avoid the impacts of Dr. Dormady's testimony. As a procedural matter, Joint Movants' Motion is untimely. Joint Movants could have, and should have, filed a written motion immediately after Dr. Dormady's application for a commissioner position was made public (i.e., January 17, 2019) so that the proper motion practice could have occurred, instead of waiting until late Friday afternoon on January 25, 2019 to make an oral motion.² Joint Movants chose not to do so, however, and as a result the parties have been forced to respond on short notice, so that the Commission could consider this issue on an expedited basis.

As a result, pursuant to the Attorney Examiners' direction given during the hearing on this matter on January 25, 2019 and Ohio Adm. Code 4901-1-12, The Kroger Co. ("Kroger") hereby submits its Memorandum Contra Joint Movants' Motion to Exclude OCC witness Dr. Dormady's testimony and his participation as a witness in the above-captioned proceeding. As discussed below, Joint Movants are hoping to take advantage of this accelerated briefing schedule because they have no legal support for their arguments. First, and most important, Joint Movants affirmatively concede that the Ohio Ethics Commission ("OEC") – not the Commission – "has the authority to interpret Chapter 102 of the Revised Code," under which Joint Movants' "complaint"

¹ See Joint Motion Of Natural Resources Defense Council And Ohio Partners For Affordable Energy To Exclude The Direct Testimony Of Noah Dormady (the "Motion").

² Interestingly, Joint Movants' Motion came after an attempt by the utility (Ohio Power Company ("AEP Ohio")) to raise similar concerns or attempt to discredit Kroger's expert witnesses' testimony by pointing out that an employee of Kroger has also applied for appointment to the Commissioner seat vacancy. Presumably, AEP Ohio was trying to imply that this fact somehow tainted the testimony of the independent consultant with an independent consulting firm.

arises. Upon information and belief, Joint Movants have not raised their “complaint” to the OEC; instead, they have raised it to the Commission, and they have cited non-binding OEC advisory opinions as primary support (which, in fact, offer no support at all). It is unlawful for the Commission to consider Joint Movants’ Motion, as the Commission is not tasked with determining ethics complaints.

Additionally, Joint Movants make their Motion under Ohio Admin Code 4901-1-12 and R.C. 102.03(D) and (E), claiming that the provisions of that statute preclude witnesses with applications for appointment to the Commission before the Public Utilities Commission Nominating Council (“Nominating Council”) from participating in pending cases before the Commission. However, Joint Movants have failed to establish **any** of the elements necessary to sustain their claims.³ First, Dr. Dormady is not a “public official or employee” of OCC because his limited engagement as an expert witness in this case required him to find facts, formulate plans, and make recommendations for the Commission to consider – he was not vested by law with the authority to exercise discretionary, decision-making duties on behalf of OCC. Beyond that, testifying for OCC is lawful: Dr. Dormady is eligible to apply for the open Commissioner position, and Ohio law does not preclude applicants from testifying before the Commission.

The Commission should reject Joint Movants’ Motion not only because it is not based in law and is not properly before the Commission, but also because it would set an untenable precedent as the Commission conducts its business in the years to come. It would also call into question the validity of numerous past appointments to prior Commissioner vacancies as those applicants had applied for vacancies when they were employed by or represented parties that were involved in pending proceedings before the Commission.

³ The process by which Commissioners are appointed is prescribed by R.C. Chapter 4901.

II. AS JOINT MOVANTS AFFIRMATIVELY CONCEDE, THE COMMISSION LACKS JURISDICTION TO HEAR COMPLAINTS BROUGHT UNDER CHAPTER 102 OF THE OHIO REVISED CODE.

Joint Movants have moved to exclude Dr. Dormady's testimony under R.C. 102.03(D) and (E).⁴ Before even considering the merits of that argument, however, the Commission should deny Joint Movants' Motion for lack of subject matter jurisdiction. Simply stated, the Commission lacks jurisdiction to consider a claim of an ethics violation under R.C. 102.03. The Commission is "a creature of statute and may exercise only that jurisdiction conferred upon it by the General Assembly."⁵ The Commission cannot, and should not, unilaterally extend its authority into areas of law where the General Assembly has never provided for such authority, but, in fact, has vested the OEC with such authority.

Title 49 of the Ohio Revised Code establishes Ohio's laws governing public utilities.⁶ It contains provisions establishing Commission jurisdiction in several areas within the realm of public utilities. Joint Movants raise their concerns or complaint regarding OCC witness Dr. Dormady's testimony under R.C. 102.03, which is found in a different section of the Revised Code entirely. R.C. 102.03 is part of Chapter 102 of the Revised Code, which includes laws related to ethics and public officials and sets forth a complaint process before the Ohio Ethics Commission, or OEC. Specifically, R.C. 102.01(F) states that the ethics matter raised by Joint Movants falls within the **exclusive** jurisdiction of the OEC:

(F) Except as otherwise provided in division (A) of section 102.08 of the Revised Code, "appropriate ethics commission" means:

(1) For matters relating to members of the general assembly, employees of the general assembly, employees of the legislative service commission, and

⁴ See Motion at 1.

⁵ *Columbus S. Power Co. v. Pub. Util Comm.*, 67 Ohio St.3d 535, 537, 620 N.E.2d 835 (1993) (internal citations omitted).

⁶ See R.C. 4901-R.C. 4999.

candidates for the office of member of the general assembly, the joint legislative ethics committee;

(2) For matters relating to judicial officers and employees, and candidates for judicial office, the board of commissioners on grievances and discipline of the supreme court;

(3) For matters relating to all other persons, the Ohio ethics commission.

R.C. 102.01 (emphasis added). No provision of Chapter 102 of the Revised Code charges the Commission with authority to handle such matters. Indeed, the only reference in R.C. 102.03 to the Commission -- which is the only reference throughout Chapter 102 to the Commission -- relates to *former* Commissioners or attorney examiners who wish to represent public utilities. *See* R.C. 102.03(A)(2) (“For twenty-four months after the conclusion of service, no former commissioner or attorney examiner of the public utilities commission shall represent a public utility, as defined in section 4905.02 of the Revised Code, or act in a representative capacity on behalf of such a utility before any state board, commission, or agency.”).

To be clear, R.C. 102.06(B) sets forth a specific notice, investigation, and hearing process before the OEC – not the Commission – if a complaint under R.C. 102.03 is raised in order to afford all parties due process. R.C. 102.06 states in pertinent part:

- (A) The **appropriate ethics commission shall receive and may initiate complaints against persons subject to this chapter concerning conduct alleged to be in violation of this chapter . . .**
- (B) The appropriate ethics commission **shall** investigate complaints, may investigate charges presented to it, and may request further information . . . Before the commission proceeds to take any formal action against a person who is the subject of an investigation based on charges presented to the commission, **a complaint shall be filed against the person. If the commission finds that a complaint is not frivolous, and there is reasonable cause to believe that the facts alleged in a complaint constitute a violation of section . . . 102.03, . . . of the Revised Code, it shall hold a hearing. . . . The person against whom the complaint is directed shall be given reasonable notice by certified mail of the date, time, and place of the hearing and a statement of the charges and the**

law directly involved and shall be given the opportunity to be represented by counsel, to have counsel appointed for the person if the person is unable to afford counsel without undue hardship, to examine the evidence against the person, to produce evidence and to call and subpoena witnesses in the person's defense, to confront the person's accusers, and to cross-examine witnesses. The commission shall have a stenographic record made of the hearing. The hearing shall be closed to the public.

Id. (emphasis added).

Thus, in this case, the Commission has only been delegated authority over the application process insofar as the Commission is charged with assessing whether an applicant is eligible for appointment, and if so, accepting his or her application. Its jurisdiction does not extend beyond that point and the eligibility requirements of R.C. 4901.04 and limitations in R.C. Chapter 4901 do not include the issues raised by the Joint Movants. The Commission certainly does not have jurisdiction to impose limitations on individuals on the basis of their application to serve as a commissioner aside from those set forth explicitly in R.C. Chapter 4901.

Dr. Dormady does not pose an issue regarding R.C. 4901.04. He does not represent or work for an entity that is regulated by the Commission. He has submitted testimony on behalf of OCC, which is not regulated by the Commission. In any event, Dr. Dormady is employed by The Ohio State University, not OCC, and is an outside consultant retained to offer testimony in this case.⁷

As noted above, Ohio law creates minimum experiential qualifications for commissioners by establishing that any person appointed to the Commission “shall have at least three years of experience in one or more of the following fields: economics, law, finance, accounting, engineering, physical or natural sciences, natural resources, or environmental studies.”⁸ The

⁷ See Direct Testimony of Noah Dormady at 1 (January 2, 2019) (“Dormady Testimony”).

⁸ R.C. 4901.02(D).

General Assembly did not seek commissioners with a background in ethics or other issues related to Joint Movants' Motion because it did not want the Commission to be the state body charged with resolving ethical disputes. The General Assembly could have codified the ethical obligations of current or former commissioners in Title 49 of the Revised Code such that their oversight would be delegated to the Commission itself. But the General Assembly did no such thing. As such, the Commission is not permitted to serve as the arbiter of ethical issues that a party such as Joint Movants may believe exist.

To remove any doubt on the matter, **Joint Movants expressly acknowledged the OEC's exclusive subject matter jurisdiction over their complaint**, affirmatively stating that "[t]he OEC has the authority to interpret Chapter 102 of the Revised Code...."⁹ Despite this concession, however, Joint Movants proceeded to spend seven pages arguing to the Commission that Dr. Dormady has violated Chapter 102 of the Revised Code.¹⁰ The Joint Movants' arguments *may* be appropriate before the OEC, as Joint Movants concede, but that is not for the Commission to determine. Because the Commission has no jurisdiction over Joint Movants' "complaint,"¹¹ it should deny Joint Movants' Motion and decline to exclude Dr. Dormady's testimony from this proceeding.

III. LAW AND ARGUMENT.

As discussed above, Joint Movants have moved to exclude Dr. Dormady's testimony under R.C. 102.03(D) and (E).¹² Even if the Commission finds it has jurisdiction over this "complaint" – which it should not – it should deny Joint Movants' Motion for two primary reasons: (A) Dr.

⁹ See Motion at 4-5.

¹⁰ *Id.* at 4-11.

¹¹ Joint Movants' "complaint" does not satisfy the requirements of R.C. 102.06(A) inasmuch as such complaints "shall be by affidavit."

¹² See Motion at 1.

Dormady is not a “public official or employee” of OCC; and (B) Dr. Dormady could not, and did not, violate R.C. 102.03(D) and (E) by applying for the open Commissioner position. Additionally, because Dr. Dormady has not violated Ohio law by testifying for OCC, fairness, equity, and protecting the integrity of the process demand that Dr. Dormady’s direct testimony be included.

A. Dr. Dormady, An Assistant Professor At The Ohio State University, Is Not A “Public Official Or Employee” Of OCC.

1. Dr. Dormady does not exercise discretionary, decision-making duties on behalf of OCC.

At the heart of Joint Movants’ legal position is the hypothesis that, because Dr. Dormady has been paid by OCC to provide testimony in this proceeding, he is therefore a “public official or employee” subject to R.C. Chapter 102.¹³ Joint Movants argue that, by filing testimony on OCC’s behalf, Dr. Dormady is “exercising OCC’s statutory right to participate in this case,” “advocating on behalf of all of AEP Ohio’s residential utility customers,” “participating on behalf of the public,” and “thus exercising the sovereign power, in this case the OCC’s, of the government.”¹⁴ Joint Movants are wrong.

There is no question that OCC is a “public agency” as defined by R.C. 102.01(C)(1).¹⁵ That does not mean, however, that anyone OCC ever retains or contracts with, for any purpose, is automatically a “public official or employee.” Contrary to Joint Movants’ assertion, Dr. Dormady does not, and cannot, exercise “sovereign power” or have discretionary, decision-making duties on behalf of OCC.¹⁶ Indeed, Joint Movants provide zero evidentiary support for this argument.

¹³ See Motion at 5-8.

¹⁴ *Id.* at 7.

¹⁵ See R.C. 102.01(C)(1) (“‘Public agency’ means the general assembly, all courts, any department, division, institution, board, commission, authority, bureau or other instrumentality of the state, a county, city, village, or township, the five state retirement systems, or any other governmental entity.”).

¹⁶ Motion at 5.

Instead, Joint Movants attempt to blur the issue by arguing that OCC has discretionary, decision-making duties which it makes on behalf of the public.¹⁷ But that is not the standard, even by Joint Movants’ strained reading of OEC advisory opinions. Dr. Dormady is not “exercising OCC’s statutory right to participate in this case”;¹⁸ OCC is. Dr. Dormady did not “fil[e] direct testimony on OCC’s behalf;”¹⁹ he prepared testimony, and OCC filed it. The public must necessarily act through OCC in this proceeding, but not through Dr. Dormady.²⁰

To the contrary, the evidence before the Commission confirms that Dr. Dormady does **not** have “discretionary, decision-making duties” on behalf of OCC. In his direct testimony, Dr. Dormady confirms that he is an Assistant Professor of Public Policy at The Ohio State University (not an employee of OCC) and he is testifying to “provide an independent and objective assessment of Navigant’s Customer Survey.”²¹ In short, Dr. Dormady is not exercising OCC’s sovereign power of the state – he is taking advantage of his expertise in economics and public policy to offer an independent and objective assessment to aid the Commission in this proceeding.²²

2. Joint Movants’ authorities do not support their position, as Dr. Dormady’s individual’s job responsibility consisted of finding facts, formulating plans, and making recommendations.

In reaching their flawed conclusion, Joint Movants cite two irrelevant Advisory Opinions from the OEC: OEC Advisory Opinion Number 98-005 (“OEC 98-005”) and OEC Advisory

¹⁷ *Id.* at 7 (Noting the OCC’s statutory powers and duties are “clearly discretionary and involve decision-making qualities.”)

¹⁸ *See* Motion at 7.

¹⁹ *Id.*

²⁰ Joint Movants fail to explain how, if the public “must necessarily act” through Dr. Dormady, *see* Motion at 7, the public interest will be served by excluding Dr. Dormady’s testimony.

²¹ *See* Dormady Testimony at 1, 3.

²² *See McKay Mach. Co. v. Rodman*, 11 Ohio St.2d 77, 82, 228 N.E.2d 304, 308 (1967) (“Thus the function of the expert who gives opinion testimony in order to aid the [factfinder] in reaching a just determination is entirely separate from the function of the [factfinder] which must assess credibility and settle controverted issues of fact.”).

Opinion Number 75-004 (“OEC 75-004”).²³ Neither of these opinions addressed the issue at hand, which is whether experts who are retained to provide testimony to the Commission are “public officials or employees” of the entity that retained them for purposes of Chapter 102. Beyond that, however, Joint Movants’ attempts to cherry-pick favorable language from these opinions are undermined by holdings from the Supreme Court of Ohio, which are binding on the Commission.

In OEC 98-005, the OEC analyzed whether electrical safety inspectors employed by political subdivisions fell within the statutory definition of “public official or employee.”²⁴ In that case, “electrical safety inspectors” was a statutorily-defined term, meaning persons who held a certification of competency from the Board Building Standards to engage in the practice of electrical inspections.²⁵ The term “practice of electrical inspection” was also a defined term, meaning:

[A]ny ascertainment of compliance with the Ohio building code, or the electrical code of a political subdivision of this state by a person, who, for compensation, inspects the construction and installation of electrical conductors, fittings, devices, and fixtures for light, heat or power services equipment, or the installation, alteration, replacement, maintenance, or repair of any electrical wiring and equipment that is subject to any of the aforementioned codes.²⁶

Further, under Ohio law, only a person who held a certificate of competency could engage in the “practice of electrical inspection.”²⁷ Thus, the General Assembly granted electrical safety inspectors exclusive authority and discretion over certain matters, such as the inspection of electrical wiring and equipment for compliance with state and local electrical codes. **Because the**

²³ As stated above, Joint Movants have affirmatively conceded that the OEC is the appropriate venue for their complaint. *See* Motion at 4-5. While OEC Advisory Opinions likely have precedential value before the OEC, it should go without saying that OEC Advisory Opinions are not binding on the Commission. As discussed herein, the OEC Advisory Opinions cited by Joint Movants are wholly inapplicable to the issue before the Commission, so they should be ignored outright.

²⁴ *See* OEC 98-005 at 3-5.

²⁵ *Id.* at 3, citing R.C. 3783.01(A) and 3783.06.

²⁶ *Id.*

²⁷ *Id.*

public authority which the electrical safety inspectors served could not make these determinations under Ohio law, the OEC decided that electrical safety inspectors were “public official[s] or employee[s]” for purposes of R.C. Section 102.03, “regardless of whether the [“electrical safety inspector”] is employed by the political subdivision, or is engaged by an independent contract.”²⁸

In OEC 75-004, the OEC analyzed the function of the Ohio Organized Crime Prevention Council (the “OOCPC”).²⁹ In short, the OEC determined that “the function of the [OOCPC] is to make recommendations.”³⁰ The OEC continued: “[n]owhere in the list of duties is placed the responsibility for implementation of whatever plan the Council may develop. In short, the Council has authority only to recommend and make suggestions.”³¹ As a result, the OEC concluded that “the members of the council have not been appointed to an ‘office’ of the state” for purposes of Chapter 102.³²

In further support of that conclusion, the OEC relied on a decision from the Supreme Court of Ohio, *State ex rel Herbert v. Ferguson, Auditor*, 142 Ohio St. 496 (1944), in which the Supreme Court of Ohio dealt with a commission called the Post War Program Commission (the “PWPC”), which among its functions, looked into the development of new state parks.³³ The OEC held that the PWPC functioned similarly to the OOCPC:

Part of the job of exploring the possibility of new state parks consisted of finding facts and assisting in the formulation of plans and the making of recommendations. **In that case the Supreme Court of Ohio held that with regard to these duties, “surely, this cannot be said to constitute the exercise of sovereign power.” A**

²⁸ *Id.* at 4.

²⁹ *See* OEC 75-004 at 3-5.

³⁰ *Id.* at 5.

³¹ *Id.*

³² *Id.*

³³ *Id.*

similar conclusion must be reached as to the duties performed by the Ohio Organized Crime Prevention Council.³⁴

Not surprisingly, Joint Movants failed to cite to the OEC's discussion of *Herbert* in its Motion. As stated in OEC 75-004, *Herbert* confirms that where an individual's job responsibility consists of finding facts, formulating plans, and making recommendations, "surely this cannot be said to constitute the exercise of sovereign power."³⁵ Instead, Joint Movants cite to another unrelated case, *State ex rel. Landis v. Bd. of Commrs. of Butler Cty.*, 95 Ohio St. 157, 115 N.E. 919 (1917), for the irrelevant conclusion that "acts which constitute sovereign power are more than mere clerical acts."³⁶

While Joint Movants do cite to binding law outside the OEC, they conveniently overlook the instructive holdings of those case, which align with *Herbert*, and thus misconstrue the Supreme Court of Ohio's interpretation of "public officials or employees." For example, Joint Movants cite *State ex rel. Milburn v. Pethtel*, 153 Ohio St. 1, 90 N.E.2d 686 (1950), for the proposition that "if [a person] 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."³⁷ Joint Movants fail to provide context for this excerpt, however, as the *Milburn* Court determined members of the county board of elections were public officers "within the meaning of Section 20, Article II of the

³⁴ *Id.* (underline emphasis in original; bold emphasis added).

³⁵ *Herbert*, 142 Ohio St. at 501 ("The act involved establishes a commission, the described functions of which, for the most part, consist of finding facts, assisting in the formulation of plans and the making of recommendations. Surely this cannot be said to constitute the exercise of sovereign powers.").

³⁶ Motion at 6, citing *Landis*, 95 Ohio St. 157 ("An appointee, though his duties are specifically fixed by law, if such duties do not require the exercise of political or governmental functions as a part of the sovereignty of the state, but simply involve the exercise of clerical acts in recording the transactions of officers who are invested with such functions, is not such a public or county officer as contemplated by the state Constitution.")

³⁷ See Motion at 5 (underline emphasis in original).

Constitution of Ohio,” **not** within the meaning of Chapter 102.³⁸ Even assuming, *arguendo*, that “public officers” has the same meaning in Section 20, Article II of the Ohio Constitution and in Chapter 102 of the Ohio Revised Code, Joint Movants also fail to include the very next sentence from *Milburn*, which reads “[a] public officer, as distinguished from an employee, **must be invested by law** with a portion of the sovereignty of the state **and authorized to exercise functions either of an executive, legislative, or judicial character.**”³⁹

From these authorities, a clear delineation emerges. Where an individual is statutorily granted exclusive authority and discretion over certain matters, including “functions either of an executive, legislative, or judicial character,” so that the public “must necessarily act through” the individual, as was true for the electrical safety inspectors in OEC 98-05, that individual is a “public official or employee” for purposes of Chapter 102. On the other hand, where an individual’s job responsibility consists of finding facts, formulating plans, and making recommendations, as was the case in OEC 75-04, and is the case here, “surely this cannot be said to constitute the exercise of sovereign power.”⁴⁰

Applying these principles to the proceeding before the Commission, it is clear that Dr. Dormady is not a “public official or employee” for purposes of Chapter 102. As he stated in his direct testimony, the purpose of Dr. Dormady’s testimony was “to provide an independent and objective assessment of Navigant’s Customer Survey[,] including methodology and the results.”⁴¹ The General Assembly has not vested Dr. Dormady with exclusive authority and discretion over

³⁸ *Milburn*, 153 Ohio St. at *4 (“Are members of the county board of elections public officers within the meaning of Section 20, Article II of the Constitution of Ohio?”).

³⁹ *Milburn*, 153 Ohio St. at 6, citing *State ex rel. Newman, State Librarian v. Skinner*, 128 Ohio St. 325, 191 N.E. 127, 93 A.L.R. 331 (1934) (emphasis added).

⁴⁰ *Herbert*, 142 Ohio St. at 501 (“The act involved establishes a commission, the described functions of which, for the most part, consist of finding facts, assisting in the formulation of plans and the making of recommendations. Surely this cannot be said to constitute the exercise of sovereign powers.”).

⁴¹ See Dormady Testimony at 3.

OCC's legal position in this proceeding; rather, Dr. Dormady's job responsibilities simply include finding facts, formulating plans, and making recommendations. As the Supreme Court of Ohio stated, in circumstances such as this, "surely this cannot be said to constitute the exercise of sovereign power."⁴² Dr. Dormady is not a "public official or employee" for purposes of Chapter 102.

B. Dr. Dormady Could Not, And Did Not, Violate Chapter 102 By Testifying For OCC.

Even if the Commission finds that it has jurisdiction over this "complaint" and that Dr. Dormady is a "public official or employee" of OCC – neither of which it should do – the Commission still should deny Joint Movants' Motion because Dr. Dormady could not, and did not, violate Chapter 102 by testifying for OCC.

1. Dr. Dormady is eligible to apply for the open Commission position, and Ohio law does not preclude Commissioner applicants from testifying before the Commission.

In order for Joint Movants' theory to be correct, Ohio law would have to preclude testifying witnesses from applying for open Commissioner positions. Of course, this is not the case. As the Commission is well aware, R.C. 4901.04 and 4901.05 plainly set forth the detailed eligibility and qualifications requirements for Commissioners:

No person in the employ of or holding any official relation to any person, corporation, or utility, which person, corporation, or utility is subject, in whole or in part, to regulation by the public utilities commission, and no person holding stocks or bonds of, or in any manner pecuniarily interested in, any such corporation or utility shall be appointed to the office of public utilities commissioner or be appointed or employed by the commission. If any such person becomes the owner of such stocks or bonds, or becomes pecuniarily interested in such corporation or utility otherwise than voluntarily, he shall, within a reasonable time, divest himself

⁴² *Herbert*, 142 Ohio St. at 501 ("The act involved establishes a commission, the described functions of which, for the most part, consist of finding facts, assisting in the formulation of plans and the making of recommendations. Surely this cannot be said to constitute the exercise of sovereign powers.").

of such ownership or interest. If he fails to do so, his office or employment shall become vacant.⁴³

Each public utilities commissioner shall be a bona fide resident of this state and shall not, during the commissioner's term of office, hold any other office of trust or profit. No commissioner shall engage in any occupation or business inconsistent with the commissioner's duties as commissioner, but shall devote entire time to the duties of that office.

As used in this section only, "office of trust or profit" means:

- (A) A federal or state elective office or an elected office of a political subdivision of the state;
- (B) A position on a board or commission of the state that is appointed by the governor;
- (C) An office set forth in section 121.03, 121.04, or 121.05 of the Revised Code;
- (D) An office of the government of the United States that is appointed by the president of the United States.⁴⁴

Joint Movants have failed to demonstrate how Dr. Dormady would violate either R.C. 4901.04 or R.C. 4901.05 by nature of having testified in this proceeding. Of note, neither R.C. 4901.04 nor R.C. 4901.05 precludes individuals who have testified as witnesses before the Commission from applying for open Commissioner positions. For this reason alone, Joint Movants' Motion should be denied. Of course, if Dr. Dormady is appointed Commissioner, then he may no longer serve as an Assistant Professor of Public Policy at The Ohio State University, but for the time being Dr. Dormady is permitted to maintain that occupation under Ohio law.

Moreover, the Commission provides additional guidance for the filing of testimony in Ohio Adm. Code 4901-1-29, the rule which governs the filing of expert testimony before the Commission. The Commission does not, by this rule or any other, limit the ability of prospective commissioners from participating in hearings as witnesses. In fact, the Commission has not

⁴³ R.C. 4901.04.

⁴⁴ R.C. 4901.05.

promulgated any rules limiting the involvement of prospective commissioners in proceedings before the Commission at all. Thus, in the final analysis, Joint Movants are unable to rely on any provision of Ohio law or rule of the Commission to support their motion. Without legal support, the motion should be denied.

2. Prohibiting Dr. Dormady from testifying would establish a precedent that would negatively impact the Commission’s consideration of not only this case, but also of future cases.

The Governor of Ohio is charged, under Ohio law, with filling a seat on the Commission every year.⁴⁵ Thus, the Nominating Council established by R.C. 4901.021, will submit a list of four names to the Governor under R.C. 4901.021(D)(2) for his or her consideration each year. Notably, R.C. 4901.021(D)(2) directs the Nominating Council that, to the extent possible, the council “shall continually attempt to ensure that the primary focus of the background of two commissioners is in energy and that the primary focus of the background of two commissioners is in transportation or communications technology.” This law effectively mandates that the Nominating Council should consider and prioritize applicants with a background in the areas of the Commission’s expertise. It is therefore unsurprising that applicants with expertise to offer in this, or other, proceedings are now under consideration for possible appointment to the Commission. Further, it is a safe assumption that, in the future, similar candidates will be considered. By granting this Motion, the Commission would be binding itself to possibly disqualifying witnesses and attorneys involved in proceedings before the Commission every single year and indeed, calling into question the rights of certain current Commissioners to remain in their position.

⁴⁵ R.C. 4901.02.

Joint Movants contend that “Dr. Dormady’s application to the PUCO for the opening Commissioner seat constitutes soliciting ‘anything of value’ from an ‘improper source,’”⁴⁶ but it is not far off to say that, accepting that position, any participants in Commission matters would be prohibited from either participating in those matters and protecting their client’s interests or themselves seeking a commissioner position. The Commission should welcome the insights of witnesses and representation by attorneys who are qualified for consideration to serve on the Commission. Limiting those individuals from participating in proceedings limits both the parties that those individuals represent or offer testimony on behalf of and the Commission itself. Without knowledgeable witnesses testifying (for fear of disqualifying themselves from becoming Commissioner), the Commission’s hearings will suffer; and without knowledgeable Commissioners (who were not experienced or familiar enough with Commission proceedings to ever present evidence or testimony in Commission proceedings), the Commission’s rulings will suffer. This precedent would not benefit anyone, and the Commission should decline to establish it, as all interested parties are encouraged to protect their interests and Commission should want knowledgeable and energy experienced commissioners.

C. Joint Movants Misstate The Law Regarding The Statutory Definition Of “Anything Of Value”; That Notwithstanding, Dr. Dormady’s Cover Letter Did Not Violate R.C. 102.03(D) or (E).

In addition to the above legal and equitable considerations, Joint Movants’ theory regarding Dr. Dormady’s alleged violation of R.C. 102.03(D) and (E) should be dismissed on sight on the basis of a false premise. To this end, Joint Movants make much ado about Dr. Dormady’s application for employment as a Commissioner.⁴⁷ Specifically, Joint Movants contend that by acknowledging his role as an expert witness, Dr. Dormady is “soliciting, accepting, or using his

⁴⁶ See Motion at 9.

⁴⁷ See Motion at 8-11.

position to seek employment (anything of value) from improper sources.”⁴⁸ Joint Movants believe that “[a]nything of value’ expressly includes future employment pursuant to R.C. 102.01(G) and R.C. 1.03.”⁴⁹

Joint Movants are wrong, as **they misquote R.C. 1.03** in order to misleadingly present their desired conclusion. While R.C. 102.01(G) does incorporate R.C. 1.03’s definition of “anything of value,” R.C. 1.03 does not define “anything of value” to include “future employment.” Rather, **R.C. 1.03(H) defines “anything of value” to include “[a]ny promise of future employment.”**⁵⁰ There is a key difference between seeking employment, by noting one’s professional background and experience in an application cover letter, and soliciting the promise of employment by implicitly offering authority or influence. However, Joint Movants chose to hide that distinction from the Commission. Joint Movants’ Motion should be dismissed on this additional basis. Needless to say, Joint Movants have not argued, and cannot argue, that Dr. Dormady’s cover letter sought the promise of future employment in return.

That notwithstanding, on Pages 10 and 11 of the Motion, Joint Movants accuse Dr. Dormady of using his cover letter to the Nominating Council as “an attempt to use his status as an expert witness to gain a favorable decision,” in violation of R.C. 102.03(D).⁵¹ Again, as demonstrated above, Dr. Dormady is not subject to R.C. 102.03(D), and the Commission has no jurisdiction over Joint Movants’ “complaint.” Regardless, however, Joint Movants’ argument is further misguided because, even assuming all of Joint Movants’ factual accusations as true, Dr. Dormady’s actions do not violate R.C. 102.03(D).

⁴⁸ *Id.* at 8.

⁴⁹ *Id.* (emphasis added).

⁵⁰ *See* R.C. 102.01(G); R.C. 1.03(H) (emphasis added).

⁵¹ Motion at 11.

Once again, Joint Movants' authorities fail them. Joint Movants cite OEC 98-05 for the proposition that R.C. 102.03(D) prohibits Dr. Dormady from "using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees regarding his private interest."⁵² In reality, OEC 98-05 notes that R.C. 102.03(D) "prohibits a public official or employee **who engages in private outside employment or business activity** from ... using his relationship with other public officials and employees to secure a favorable decision or action by the other officials or employees **regarding his private interest**."⁵³

Joint Movants missed the point by failing to cite OEC 98-05 in its entirety. Throughout their Motion, Joint Movants maintain that Dr. Dormady is **not** engaging in private outside employment or business activity by testifying as an expert witness for OCC. Under OEC 98-05, however, Dr. Dormady's actions would only be unlawful if (a) he was engaging in private outside employment or business activity; (b) he used his relationship with other public officials and employees to secure a favorable decision or action by other officials or employees; and (c) the favorable decision regarded his private interest, which is his outside employment or business activity. Obviously, Dr. Dormady does not meet this standard; his actions were lawful.

In addition to all of the above, however, Joint Movants also have wholly failed to explain how Dr. Dormady's actions violate the last provisions of R.C. 102.03(D) and (E), respectively: even if Dr. Dormady used his authority or influence to secure something of value (by soliciting it), how did that new value "manifest a substantial and improper influence" upon Mr. Dormady with respect to Mr. Dormady's duties to OCC? The timeline of Dr. Dormady's Direct Testimony is key here: OCC filed Dr. Dormady's Direct Testimony on January 2, 2019, and Dr. Dormady filed his application on January 17, 2019. Even if, *arguendo*, Dr. Dormady was soliciting a promise of

⁵² *Id.* at 10.

⁵³ OEC 98-05 at 10-11 (emphasis added).

future employment (something of value) in his January 17, 2019 cover letter, how was that promise of future employment of such a character as to manifest a substantial and improper influence upon his January 2, 2019 Direct Testimony? Joint Movants have no explanation for this, and therefore they cannot establish all of the elements of their claims.

D. If Dr. Dormady Is Appointed Commissioner Before The Conclusion Of This Proceeding, Then The Proper Remedy Will Be Recusal.

Finally, to the extent that Joint Movants are arguing that Dr. Dormady would be compromised in his assessment of this case should he ultimately be appointed to the Commission, that argument is without merit; Joint Movants cannot create the “appearance of impropriety” simply by challenging Dr. Dormady’s testimony. First, the Commission has a well-established precedent to address its rendering of decisions in cases where one of its members was involved in the case prior to his or her appointment to the Commission. That commissioner can simply recuse himself or herself from the decision on the case. This process was actually used in, among many other cases, the Ohio Power Company’s (“AEP Ohio”) latest electric security plan case, when Commissioner Daniel R. Conway recused himself and did not sign the Commission’s Opinion and Order.⁵⁴ Should Dr. Dormady be appointed to the Commission, he could follow that same precedent and recuse himself from the Commission’s consideration of this matter and others in which he was a testifying expert witness.

There is no reason for the Commission to establish a new rule unmoored from the parameters established by Ohio law when such a simple solution exists that addresses whatever issue Joint Movants may believe exists. Additionally, to the extent Joint Movants worry that Dr. Dormady’s testimony “would effectively be transformed into an improper advisory opinion of a

⁵⁴ See *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Opinion and Order at 127 (April 25, 2018) (Opinion and Order unsigned by Daniel R. Conway).

pending or sitting Commissioner,” their worry is not founded in the law. Unlike the OEC, Commissioners do not offer “advisory opinions.” Joint Movants seem to imply that the other sitting Commissioners cannot make an impartial decision on this case, or will be unduly influenced if Dr. Dormady becomes a Commissioner, but such inflammatory accusations are not rooted in the law.

This is ultimately a non-issue, as the Commission can address it through a remedy that fully eliminates the alleged issue without limiting consideration of learned testimony in the proceedings under its jurisdiction.

IV. CONCLUSION.

The Commission should reject Joint Movants’ attempt to preclude testimony despite lacking a basis in law or policy. The Commission should accept the testimony of Dr. Dormady for consideration in this proceeding. Accordingly, for the foregoing reasons, Joint Movants’ Motion to Exclude 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 Memorandum Contra The Joint Motion Of Natural Resources Defense Council And Ohio Partners For Affordable Energy To Exclude The Direct Testimony Of Noah Dormady by The Kroger Co. was sent by, or on behalf of, the undersigned counsel to the following parties of record this 29th day of January 2019, via electronic transmission.

/s/ Angela Paul Whitfield

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Summary: Memorandum Memorandum Contra The Joint Motion of Natural Resources Defense Council and Ohio Partners for Affordable Energy to Exclude the Direct Testimony of Noah Dormady by The Kroger Co. electronically filed by Mrs. Angela Whitfield on behalf of The Kroger Co.