

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Lon-Term Forecast	)	
Report of Ohio Power Company and Related	)	Case No. 18-501-EL-FOR
Matters	)	
	)	
In the Matter of the Application Seeking	)	
Approval of Ohio Power Company's Proposal	)	
to Enter into Renewable Energy Purchase	)	Case No. 18-1392-EL-RDR
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	)	

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**MEMORANDUM CONTRA THE NATURAL RESOURCES DEFENSE COUNCIL'S  
MOTION TO EXCLUDE WITNESS**

**BY  
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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**I. INTRODUCTION**

In all cases that it considers, the Public Utilities Commission of Ohio (Commission) benefits from the testimony and expertise of learned experts in the areas of law and policy at issue before it. Each litigated case presents its own facts and the collective decades of experience held by the witnesses who submit testimony and evidence assists the Commission in processing those facts to render a decision that accords with Ohio law. Although the case is heard by administrative law judges with expertise in the industry, the case is ultimately decided by the Commissioners that make up the Commission. R.C. 4901.02. Commissioners who hail from a variety of backgrounds within the industry's ambit are able to carefully consider the matters before them and apply their experience to the evidence in the record in rendering decisions. The statute establishing the Commission specifically states the qualifications of the Commissioners, encouraging those with experience in a variety of fields to apply. R.C.

4901.02(D) and 4901.05. The statute also establishes a limitation on those eligible to become a Commissioner:

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

R.C. 4901.04. Other than the minimum qualifications and limitations stated in R.C. 4901.02(D), 4901.04, and 4901.05, all applicants may timely apply to become a Commissioner. The Commission is “a creature of statute and may exercise only that jurisdiction conferred upon it by the General Assembly.”<sup>1</sup>

The Natural Resources Defense Council (NRDC) and Ohio Partners for Affordable Energy (OPAE) 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 current experience and participation in a pending case as an expert witness on behalf of a particular party somehow disqualifies the testimony and Dr. Dormady’s participation in the case while he is seeking appointment by the Governor (not the Commission) to the Commission. NRDC and OPAE waited until the day that Dr. Dormady took the stand, which was over a week after the Commissioner application deadline, to make its oral motion to exclude the testimony, essentially disqualifying the witness. Given that the oral motion was vague, based upon purported ethical grounds that would have harmful consequences, and encountered strenuous objections by

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<sup>1</sup> *Columbus S. Power Co. v. Pub. Util Comm.*, 67 Ohio St.3d 535, 537, 620 N.E.2d 835 (1993) (internal citations omitted).

numerous parties, the attorney examiners required a written motion to be filed on January 28, 2019.<sup>2</sup> Given the public policy implications and importance of such allegations, NRDC and OPAE could have and should have filed a written motion prior to the time that OCC witness Dormandy was scheduled to take the stand so that the proper motion practice could have occurred. But it chose to blindsides the bench and most parties with a motion that could have a chilling effect on the industry and the Commissioner application process.

Interestingly, the Joint Motion came after an attempt by the utility (Ohio Power Company (AEP Ohio)) to raise similar concerns in an attempt to somehow imply the appearance of impropriety of an employee for a party to the proceeding (who was not a witness in the case) to also seek appointment to the Commissioner through the statutory Commissioner application process. Incredibly, AEP Ohio attempted to discredit the testimony of an opposing party's witness (who was an independent consultant with an independent consulting firm) by asking the independent consultant if an employee of his client had applied for appointment to the Commissioner seat vacancy. Notably AEP Ohio, NRDC, and OPAE are all supporting AEP Ohio's application while the two intervenors that have been subjected to the inappropriate allegations of misconduct are opposing AEP Ohio's application.

NRDC and OPAE make their baseless Joint Motion under R.C. 102.03, claiming that the provisions of that statute preclude witnesses with applications for appointment to the Commission pending before the Public Utilities Commission Nominating Council (Nominating Council) from participating in pending cases before the Commission.<sup>3</sup>

Pursuant to the Attorney Examiners' directive during the hearing on this matter on January 25, 2019 and Ohio Adm. Code 4901-1-12, the Ohio Manufacturers' Association Energy

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<sup>2</sup> See Joint Motion of Natural Resources Defense Council and Ohio Partners for Affordable Energy to Exclude the Direct Testimony of Noah Dormady (January 28, 2019) (Joint Motion).

<sup>3</sup> The process by which Commissioners are appointed is prescribed by R.C. Chapter 4901.

Group (OMAEG) hereby submits its Memorandum Contra NRDC and OPAE's Motion to Exclude OCC witness Dormady's testimony and his participation as a witness in the above-captioned proceeding. As is set out below, neither R.C. Chapter 4901, R.C. 102.03, nor any other provision of Ohio law precludes Dr. Dormandy's testimony and his participation in the current proceeding. In fact, R.C. 102.06(B) sets forth a specific notice, investigation, and hearing process with the Ohio Ethics Commission if a complaint under R.C. 102.03 is raised in order to afford all parties due process. Based upon information and belief, NRDC and OPAE have not initiated such a proceeding.

The Commission should reject NRDC and OPAE's attempt to eliminate testimony that it does not like not and that is adverse to their positions in this case under the guise of an ethical complaint improperly brought before this Commission. The Joint Motion should be rejected 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 Governor and Nominating Council conduct 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 to the vacancies when they were actively employed by or represented parties that were involved in pending proceedings before the Commission.

## **II. ARGUMENT**

### **A. The Commission Lacks Jurisdiction to Consider the Ethics Issues Raised.**

First, the Commission lacks jurisdiction to consider a claim of an ethics violation under R.C. 102.03. "It is axiomatic that the PUCO, as a creature of statute, may exercise only that jurisdiction conferred upon it by the General Assembly."<sup>4</sup> The Commission cannot, and should

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<sup>4</sup> *Columbus S. Power Co. v. Pub. Util Comm'n*, 67 Ohio St.3d 535, 537, 620 N.E.2d 835 (1993) (internal citations omitted).

not, unilaterally extend its authority into areas of law where the legislature has never provided for such authority.

Title 49 of the Ohio Revised Code establishes Ohio's laws governing public utilities.<sup>5</sup> It contains provisions establishing Commission jurisdiction in several areas within the realm of public utilities. NRDC and OPAE raise their concerns or complaints regarding OCC witness 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 for any alleged violations. As part of Chapter 102 of the Revised Code, claims under this statute fall under the exclusive jurisdiction of the Ohio Ethics Commission. R.C. 102.06(B) provides that the Ohio Ethics Commission shall investigate complaints related to R.C. 102.03, and R.C. 102.06(C)(1)(a) directs the Ohio Ethics Commission to report violations of R.C. 102.03 to the appropriate prosecuting authority.

Specifically, R.C. 102.01(F) states that the ethics matter raised by NRDC falls within the exclusive jurisdiction of the Ohio Ethics Commission. After establishing processes for addressing ethics matters relating to General Assembly members, employees, candidates, and legislative service commission and joint legislative ethics committee members, as well as judicial officers, employees, and candidates, R.C. 102.01(F) states that "for matters related to all other persons," the Ohio Ethics Commission has jurisdiction. Nowhere in this statute is the Commission vested with any authority to rule upon ethical issues.<sup>6</sup>

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<sup>5</sup> See R.C. 4901-R.C.4999.

<sup>6</sup> See R.C. 102.01.

R.C. 102.06(B) sets forth a specific notice, investigation, and hearing process with the Ohio Ethics Commission if a complaint under R.C. 102.03 is filed 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.**

R.C. 102.06 (emphasis added).

Although NRDC and OPAE concede that the Ohio Ethics Commission is the state agency with jurisdiction over R.C. Chapter 102, they failed to file a complaint with the Ohio Ethics Commission, failed to obtain an advisory opinion from the Ohio Ethics Commission, and incorrectly ask this Commission to interpret laws and opinions by the Ohio Ethics Commission.<sup>7</sup> One state agency is not empowered to interpret or adjudicate the decisions of other state agencies. Accordingly, NRDC and OPAE's suggestion that the Commission should act to

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<sup>7</sup> Joint Motion at 4-5.

enforce what it believes to be a proper interpretation of R.C. 102.03 is in direct contradiction to the General Assembly's explicit delegation of authority over these matters to the Ohio Ethics Commission. 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, minimum qualifications of R.C. 4901.05, and limitations in R.C. Chapter 4901 do not include the issues that NRDC and OPAE raise. 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.

OCC witness Dormady does not pose an issue regarding R.C. 4901.04. He is neither employed by nor a representative for an entity that is regulated by the Commission. OCC witness Dormady is employed by The Ohio State University, not OCC, and is an outside consultant retained to offer testimony in this case.<sup>8</sup> He has submitted testimony on behalf of OCC, which is not regulated by the Commission. Moreover, even if OCC witness Dormady were somehow ineligible to serve on the Commission, Ohio law would provide that his application to do so should be rejected, not that his testimony would be excluded and he would be disqualified as a witness in a case where he is qualified to offer testimony.

As noted above, Ohio law creates eligibility requirements,<sup>9</sup> qualification requirements,<sup>10</sup> and 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,

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<sup>8</sup> See Direct Testimony of Noah Dormady at 1 (January 2, 2019) (Dormady Testimony).

<sup>9</sup> R.C. 4901.04.

<sup>10</sup> R.C. 4901.05.

natural resources, or environmental studies.”<sup>11</sup> The General Assembly enumerated specific qualifications and requirements for applicants for the Commission and did not go beyond those delineated therein. The General Assembly did not give the Commission jurisdiction to deal with ethical issues related to the application process, the legality of an applicant’s employment on the Commission, or the legality of a sitting Commissioner’s ability to decide and vote on cases before the Commission. Clearly, the General Assembly did not intend for 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 oversight of those ethical issues would be delegated to the Commission itself. But the General Assembly did not; instead, the General Assembly conferred that specific authority to the Ohio Ethics Commission. As such, the Commission does not have the authority to serve as the arbiter of ethical issues that a party, such as NRDC or OPAE, may believe exists with regard to Commissioners or applicants for Commissioner vacancies.

**B. No Provision of Ohio Law or Rule of the Commission Precludes OCC Witness Dormady’s Testimony.**

**1. R.C. 102.03 Is Not Applicable.**

NRDC and OPAE moved to exclude the testimony of OCC witness Dormady under R.C. 102.03, claiming that the law precludes Dr. Dormady’s testimony because he has applied for appointment to the Commission and is under consideration for that appointment by the Governor and a recommendation from the Nominating Council. The statutory chapter and individual statutes relied upon undermines NRDC and OPAE’s interpretation of its meaning. The relevant Chapter is about current public officers and their employees and the representation of clients by

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<sup>11</sup> R.C. 4901.02(D).



those public officials or employees when the public official or employee participated in the matter in their capacity as the public official or employee. The law is not designed to prohibit individuals from participating in proceedings before state bodies to which they have applied to join, it only targets current and former officials of those bodies. In relevant part for the issue at hand, the law states as follows:

(1) No present or former public official or employee shall, **during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee** through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

(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.

R.C. 102.03(A) (emphasis added). The law plainly discusses situations as to when a present or former public official or employee may represent a client or act in a representative capacity on a going forward basis in a matter that they were personally involved in when they were a public official or employee and states that former Commissioners or attorney examiners at the Commission cannot represent public utilities for a period of twenty-four months after the conclusion of service. These provisions are typically referred to as the “revolving door” statute. OMAEG does not dispute the delineated restrictions on representation of clients in matters where the public official or employee was involved in personally during their public service or the representation of public utilities by Commissioners or attorney examiners that regulated and decided cases of the public utilities. OMAEG is not disputing that if an applicant is appointed to the Commission, he/she may be conflicted out of deciding cases that they were personally

involved in on behalf of a former client or employer that was a party to the proceeding (which is often done, especially for a period of time when a new Commissioner is appointed who worked in the industry). If Dr. Dormady is appointed to the Commission vacancy, he too would be conflicted out of participating in cases where he was personally involved in on behalf of his former client (i.e., OCC). Thus, Dr. Dormady would have to recuse himself from deciding the case at hand.

More specifically, NRDC and OPAE move to exclude OCC witness Dormady's testimony under R.C. 102.03(D) and (E). Aside from the fact that the General Assembly has not even delegated the Commission the authority to interpret these provisions of law, they do not apply to this case.

R.C. 102.03(D) states as follows:

**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.**

Meanwhile, R.C. 102.03(E) provides that:

**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 an attempt to shoehorn the facts surrounding OCC witness Dormady's testimony into ones that actually would implicate this provision, NRDC and OPAE present a three-part argument that (1) the witness is an employee of OCC; (2) the witness's purported status as an employee of OCC makes him a public official; and, (3) the witness is using his status as a public official to seek this thing of value. None of these arguments are valid.

Nowhere in R.C. 102.03 (or in any other provision of Ohio law) has the General Assembly so much as suggested that an *applicant* for a Commissioner position is prohibited from appearing and representing a client before the Commission as either an attorney or an expert witness. Accordingly, the Commission should decline NRDC's invitation to rewrite Ohio law to limit the testimony that is offered by an independent consultant on behalf of his client that is an adverse party to the proceeding and to limit what the Commission can consider before rendering its decision in this case.

Moreover, the Commission provides additional guidance for the filing of expert testimony in Ohio Adm. Code 4901-1-29. The Commission does not, by this rule or any other, limit the ability of prospective applicants to the Commission from participating in hearings as witnesses. In fact, the Commission has not promulgated any rules limiting the involvement of prospective applicants to the Commission in proceedings before the Commission. Thus, in the final analysis, NRDC is unable to rely on any provision of Ohio law or rule of the Commission to support its motion. Without legal support, the motion should be denied.

## **2. OCC Witness Dormady Is Not a Public Official or Employee of OCC.**

OCC witness Dormady is not a public official or employee of OCC. He testified explicitly: "I am employed by The Ohio State University."<sup>12</sup> The Joint Motion does not contend otherwise. Rather, it states that Dr. Dormady is an independent contractor who is considered an employee of OCC and a public official under Ohio Ethics Commission precedent, Advisory Opinion No. 98-005.<sup>13</sup> Again looking past the Commission's lack of authority to even evaluate this precedent, the recitation of the facts of this case misses a crucial distinction between the

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<sup>12</sup> Dormady Testimony at 1.

<sup>13</sup> Joint Motion to Disqualify at 4.

electrical safety inspectors at issue in that case and OCC witness Dormady here. The Joint Motion correctly states that the test established is that an independent contractor hired by a state or political subdivision is considered to be a public official when the individual exercises “sovereign power,” defined as “discretionary, decision-making duties made on behalf of the public authority which the official or employee serve (sic).”<sup>14</sup> NRDC and OPAE, however, then proceed to misapply that test.

OCC witness Dormady is not exercising sovereign power here. The Joint Motion essentially argues that Dr. Dormady is exercising whatever statutory right that OCC may have by filing testimony. This is a misstatement of what is occurring in this case. Dr. Dormady’s testimony as one witness contains his assessments and recommendations of various issues in this case, and his assessments and recommendations help to support OCC’s position in this litigation. But it is not Dr. Dormady exercising OCC’s statutory rights, as Dr. Dormady is not the person who decided to file this testimony on behalf of OCC or, more importantly, the position that OCC is taking in the case. Dr. Dormady is not “empowered” to do anything on behalf of OCC regarding OCC’s statutory duties.<sup>15</sup> He is not a decision maker and he is not involved in OCC’s business or political dealings.<sup>16</sup> NRDC and OPAE fail to cite evidence that Dr. Dormady played any role in deciding which case OCC would “sue” or participate in as a party, when and how OCC intervened in this matter, and the position that OCC would take in the matter as a party. Rather, OCC is exercising its own statutory rights to participate in this proceeding, using Dr. Dormady’s testimony as one tool by which to do so. Conversely, the independent contractors in the opinion cited in the Joint Motion were actually hired and empowered by the counties and municipalities to conduct inspections and make their own determinations as to whether or not the

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<sup>14</sup> Ohio Ethics Commission Adv. Op. 98-005 at 4; Joint Motion to Disqualify at 4.

<sup>15</sup> *State ex rel Milburn et al. v. Pethtel*, 153 Ohio St. 1, 6 (1950).

<sup>16</sup> *Id.*

wiring and equipment inspected complies with state and local electrical codes. These determinations are different than OCC witness Dormady's analysis of one issue in the case (i.e., whether the Navigant survey utilized to justify 'need' is reliable and bias) and his recommendations on that sole survey issue (not the case as a whole and not OCC's position as a whole). Contrary to the Joint Motion, Dr. Dormady in no way exercised OCC's sovereign power. OCC moved to intervene in the proceeding, OCC filed the testimony of several witnesses in this case, OCC established a position in this case, OCC is making the decisions as to how and in what manner it participates in this case, not an individual witness hired by the OCC to complete a task.

The Joint Motion cites to an Ohio Ethics Commission Advisory Opinion 75-004, which actually belies NRDC and OPAE's point. This advisory opinion addressed the question of whether members of the Ohio Organized Crime Prevention Council exercised sovereign power such that they are considered to be public officials.<sup>17</sup> The advisory opinion determined that they do not, as "the function of the Ohio Organized Crime Prevention Council is to make recommendations" and "[n]owhere in the list of duties is placed the responsibility for implementation of whatever plan the Council may develop."<sup>18</sup> The role of Dr. Dormady in this case is analogous. Dr. Dormady's role is not to exercise power, but rather to make recommendations on one issue in a case to the Commission. The Commission is not bound to, and often does not, accept every recommendation by every intervening party and witness.

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<sup>17</sup> See Ohio Ethics Commission Adv. Op. 75-004.

<sup>18</sup> Id. at 5.

**3. Filing Expert Testimony Is Not Using the OCC, a Public Official, or Any Purported Influence to Secure Anything.**

The Joint Motion contends that OCC witness Dormady is using his purported status as a public official or employee or influence to solicit or secure a position as a Commissioner. Even assuming that Dr. Dormady is a public official or employee of OCC, it is not readily apparent how OCC witness Dormady is supposedly using his purported status as a public official or employee or influence to solicit or secure a position as a Commissioner by filing testimony in a pending AEP Ohio case before the Commission, which does not even select the next Commissioner. NRDC and OPAE draw the Commission's attention to Exhibit 1 to their Joint Motion, which is Dr. Dormady's letter application addressed to Mike Koren, the Chairperson of the Nominating Council, to serve as a commissioner.<sup>19</sup> Importantly, Mike Koren is not a Commissioner and is not even employed by the Commission. The Nominating Council makes a four-person recommendation to the Governor in order for the Governor to appoint the next Commissioner. NRDC and OPAE do not demonstrate how a letter application to the Chairperson of the Nominating Council mentioning his general experience as a witness in matters before the Commission ("I have testified as an expert witness before the PUCO on matters of public and economic policy for the Office of the Ohio Consumers' Counsel, and my energy and environmental economics research has been sponsored by more than 17 state governments.") has any "influence" to "secure 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 that person's duties." In fact, R.C. 4901.02 requires a qualified and eligible applicant to a Commission vacancy to state his qualifications in his application to demonstrate how the applicant has at least three years of experience in "economics, law, finance, accounting,

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<sup>19</sup> Joint Motion to Disqualify at 10-11.

engineering, physical or natural sciences, natural resources, or environmental studies.” Dr. Dormady’s statement does exactly what he is required to do by law.

Further, as the Joint Motion concedes,<sup>20</sup> Dr. Dormady did not even list his testimony in this pending matter on his letter application or in his curriculum vitae, thus rendering the contention that he is actually using the testimony in this case to secure or solicit a position as commissioner curious. The Joint Motion then contends that Dr. Dormady is attempting to “use his status as an expert witness to gain a favorable decision from the Nominating Council regarding his private interests of future employment with the Commission.”<sup>21</sup> This is based entirely on the fact that Dr. Dormady’s letter application references expert testimony that he filed in the past as evidence of his experience and qualifications as required by R.C. 4901.02.<sup>22</sup>

Put more simply, NRDC and OPAE ask the Commission to reach the patently absurd conclusion that an applicant for a position to be appointed to the Commission by the Governor is committing *an ethical violation* by drawing the Nominating Council’s attention to the fact that he has experience of participating in proceedings before the Commission as an expert witness in areas of practice that have been deemed relevant to the General Assembly.<sup>23</sup> This is not an ethical violation. It’s a standard statement of qualification on a job application, nothing more. One that likely every applicant for a Commission vacancy has made. For NRDC and OPAE to suggest otherwise without any stated basis is preposterous.

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<sup>20</sup> Id. at 11 (noting that Dr. Dormady referred to his testimony before the Commission in the past tense).

<sup>21</sup> Id.

<sup>22</sup> Id. at 11, Exhibit 1.

<sup>23</sup> R.C. 4901.02.

**4. There is No Evidence that OCC Witness Dormady has been Promised Anything of Value.**

Assuming that Dr. Dormady is a public official or employee of OCC, NRDC and OPAE misstate the law and fail to demonstrate that OCC witness Dormady has been promised anything of value by the Nominating Council, the Governor, the Commission, or by anyone else as required by the law. R.C. 102.01 defines “anything of value” as having the same meaning as provided in R.C. 1.03. Contrary to NRDC and OPAE’s assertion,<sup>24</sup> R.C. 1.03 provides, in relevant part, that a **promise of** future employment (not future employment) is considered something of value. This is a crucial distinction, as the Joint Motion does not demonstrate that Dr. Dormady has received any promise of future employment or that he has attempted to somehow secure such a promise by following the standard, statutory application process to be considered for an open seat on the Commission. Absent that demonstration, NRDC and OPAE fail to establish that either R.C. 102.03(D) or R.C. 102.04(E) has been implicated by Dr. Dormady’s filing of testimony in this case, as both provisions require a showing that “anything of value” has either been solicited or secured.

**C. Prohibiting OCC Witness 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 (independent of the Commission who will decide this case) is charged, under Ohio law, with filling a seat on the Commission every year.<sup>25</sup> The Nominating Council (independent of the Commission who will decide this case) established by R.C. 4901.021 submits a list of four names to the Governor under R.C. 4901.021(D)(2) for his or her consideration each year. NRDC and OPAE do not point to any evidence that OCC has any

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<sup>24</sup> Joint Motion at 8.

<sup>25</sup> R.C. 4901.02.



influence over the Nominating Council or that OCC has a role in the Nominating Council's operations. 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 prohibiting testimony and disqualifying witnesses and attorneys involved in proceedings before the Commission every single year.

The Commission should welcome the insights of witnesses and representation by attorneys who are experts in the industry and 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 the testimony that may be offered on behalf of the parties as well as the Commission itself. This precedent would not benefit anyone and the Commission should decline to establish it.

Additionally, to the extent that NRDC is arguing that OCC witness Dormady would be compromised in his assessment of this case should he ultimately be appointed to the Commission, the argument is without merit. First, as explained previously, 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 a Commissioner recused himself.<sup>26</sup> Should Witness 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 involved in his current capacity with OCC.

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 NRDC and OPAE may believe exists. 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 and upending the statutory process for applying for a Commission vacancy.

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<sup>26</sup> 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).

### III. CONCLUSION

The Commission should reject NRDC's attempt to preclude testimony despite lacking a basis in law or policy. The Commission should accept the testimony of Witness Dormady and all other individuals who are qualified as experts and filed testimony within the realm of their expertise. Such a decision would assist the Commission in this case, and for years to come.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served upon all parties of record via electronic mail October 4, 2018.

/s/ Brian W. Dressel  
Brian W. Dressel

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Summary: Memorandum Memorandum Contra The Natural Resources Defense Council's Motion To Exclude Witness By The Ohio Manufacturers' Association Energy Group electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group