

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

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

**INTERLOCUTORY APPEAL:
IMMEDIATE INTERLOCUTORY APPEAL TO COMMISSIONERS OR
REQUEST FOR CERTIFICATION TO COMMISSIONERS
AND
APPLICATION FOR REVIEW
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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January 30, 2019

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At the hearing last Friday two of AEP's supporters (for its re-monopolization of power plants at Ohioans' expense) began a miscarriage of justice that necessitates immediate correction by PUCO Commissioners. Moving to prevent OSU Professor Noah Dormady from testifying for OCC, 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) accused Professor Dormady of an unfounded state ethics issue that the PUCO has no jurisdiction to hear. No other Parties in these cases saw fit to join that motion or to file a separate motion with these allegations.

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. It could be expected that NRDC and OPAGE, who are supporters of AEP's re-monopolization plan and OK with making Ohioans pay energy subsidies, would not be welcoming of Professor Dormady's testimony that is critical of AEP. In advance of the hearing, NRDC counsel informed OCC that he planned to argue the testimony could be considered prejudicial. But nothing prepared us for NRDC/OPAGE's wild accusation that the Professor should be prevented from testifying for OCC because of a supposed ethics violation related to his application to serve Ohioans as a PUCO Commissioner.

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 then informed the PUCO of OPAGE'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 outlandish 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 like." Tr. VIII at 2278. Mr. Dove's law firm colleague Mr. Allwein, on behalf of OPAGE, similarly did not offer any precedent at hearing for supporting NRDC's extraordinary allegation that The Ohio

State University Professor is in violation of Ohio ethics law and his testimony thus should be excluded.

For OCC, Assistant Consumers' Counsel Healey rebutted the unsubstantiated motion of NRDC and OPAE, and noted the following regarding the improperly raised question of ethics:

Further, in an abundance of caution, OCC, in fact, contacted the Ohio Ethics Commission along with Dr. Dormady. They provided information and guidance to OCC and Dr. Dormady, and based on this information and guidance, there is no basis to conclude that Dr. Dormady has any conflict of interest here. (Tr. VIII at 2279)

That's where the whole travesty should have ended. However, PUCO hearing officers Parrot and See allowed NRDC and OPAE a further opportunity for attacking Professor Dormady's ethics, this time in writing. (And others were allowed to respond in writing.) Tr. VIII at 2283 and 2405. (The transcript pages with the ruling are attached.) NRDC and OPAE on Monday filed their written motion with more detailed ethics accusations about OCC's witness. That filing deepened the problem, for Professor Dormady, for OCC and for justice, of the PUCO entertaining this issue that is outside its jurisdiction (in addition to just being wrong). As OCC advised the PUCO yesterday in footnote 7 of its Memorandum Contra, OCC is more fully addressing the jurisdictional issue in this Interlocutory Appeal.

The PUCO lacks the jurisdiction to consider whether OSU Professor Dormady has what NRDC and OPAE allege is a conflict of interest under the state's ethics law that should preclude his testimony for OCC. In this interlocutory appeal the Ohio Consumers' Counsel asks the PUCO Commissioners to:

- Reverse the PUCO hearing officers' Friday ruling in which they further entertained the arguments from NRDC and OPAE by inviting a Monday filing, instead of denying the arguments at hearing;
- Deny the motion of NRDC and OPAE for lack of PUCO jurisdiction to hear it;
- Strike the Monday filing of NRDC and OPAE and their related arguments wherever they appear in the record;
- Bar NRDC and OPAE from continuing their arguments in the case that impugn the integrity of OCC witness Dormady; and
- Allow Professor Dormady to testify for OCC.

The Commissioners should bring an abrupt end to NRDC and OPAE's effort for a violation of the PUCO's jurisdiction and their encroachment on the jurisdiction of the Ohio Ethics Commission and prosecutors, as set forth by the Ohio Legislature in R.C. 102, et seq. If NRDC and OPAE are so inclined, their representatives can submit allegations to the Ohio Ethics Commission. In a formal complaint at the Ethics Commission, the law would require them to swear under oath to a complaint (per R.C.102.03(D) and (E)), among other things.

For justice, this interlocutory appeal of the Attorney Examiners' Ruling should be immediately heard by the Commissioners under Ohio Admin. Code 4901-1-15(A)(2). Alternatively, this interlocutory appeal should be certified by the Attorney Examiners to the full Commission for review, under Ohio Admin. Code 4901-1-15(B). The Interlocutory Appeal should be certified to the PUCO because the Ruling presents a new or novel question of interpretation, law, or policy. Even NRDC and OPAE admit this

issue has never been presented to the PUCO before.¹ Additionally, an immediate determination by the Commissioners is needed to prevent the likelihood of (further) undue prejudice to OSU Professor Dormady, OCC, AEP's consumers, and any others.

These positions are more fully explained in the attached Memorandum in Support.

Respectfully submitted,

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¹ See Joint Motion of NRDC and OPAGE to Exclude the Direct Testimony of Noah Dormady at 2 (Jan. 28, 2019) (claiming that this presents a conflict that "hereto has not been presented to the Commission.").

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A. The PUCO Commissioners should find that, with regard to the Examiners’ ruling, the PUCO lacks jurisdiction to address if a witness has violated Ohio’s ethics law, for purposes of ruling on a motion to exclude testimony or for any other purpose. The Ohio Legislature vested that jurisdiction in the Ohio Ethics Commission and prosecutors, where accusers may file complaints at the Ethics Commission and the accused may be heard with due process protections including that much of the process is private to protect the rights of the accused. The Monday motion of NRDC and OPAAE to exclude testimony should be denied and struck from the case along with striking their arguments wherever made on the PUCO’s record.....	7
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MEMORANDUM IN SUPPORT

I. BACKGROUND

At day-end Friday, January 25, 2019, OCC called to the stand Ohio State University Professor Dormady, to testify to evidence of bias in how AEP surveyed its customers. The Natural Resources Defense Council (by Mr. Dove) then made an oral motion to exclude the testimony of the Professor. Tr. VIII at 2276-77. Ohio Partners for Affordable Energy (by Mr. Allwein, a law firm colleague of Mr. Dove) supported the motion. Tr. VIII at 2282. No other party in the case has joined the NRDC/OPAE motion.

The NRDC/OPAE objection to the Professor testifying for OCC is as follows. NRDC/OPAE assert that Professor Dormady is testifying in the capacity of a Consumers' Counsel employee while applying to serve the Ohio public as a PUCO Commissioner. (This assertion that Professor Dormady is an OCC employee is news to OCC that hired the Professor as an independent contractor.) NRDC and OPAE allege that this situation causes a conflict of interest under the Ohio ethics statutes.² And NRDC and OPAE allege

² R.C. 102.03 (D) and (E).

that the Professor's testimony should be excluded because it would be prejudicial and given undue weight should he eventually become a Commissioner.

Notably lacking in the NRDC/OPAE oral motion was any citation to the rules of evidence that allow a party to move to preclude a witness from testifying on the basis of an alleged, unproven ethics violation or alleged prejudice related to a pending application for a PUCO Commissioner seat. The Attorney Examiners deferred ruling and allowed additional time for NRDC and OPAE to submit their joint motion in writing to the PUCO, which they did late Monday. In that filing, the NRDC and OPAE presented arguments that still lack any citation to the rules of evidence for allowing a party to move to preclude a witness from testifying. But more to the point, NRDC and OPAE continued to fail to demonstrate how the PUCO has jurisdiction to hear ethics issues that another state agency (the Ethics Commission) was created to hear.

II. STANDARD OF REVIEW

Under Ohio Adm. Code 4901-1-15(A), there are certain circumstances adversely affecting a party that allow the party to take an interlocutory appeal directly to the PUCO Commissioners without the need for the appeal to be certified to the PUCO by the attorney examiner.

Nonetheless, even if a party does not satisfy the criteria in Ohio Adm. Code 4901-1-15(A), the PUCO's procedural rules allow an interlocutory appeal of an Attorney Examiner ruling to be taken if the appeal is certified by the Examiners to the PUCO under Ohio Admin. Code 4901-1-15(B). The standard applicable to certifying such an appeal is "that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an

immediate determination by the commission is needed to prevent the likelihood of undue prejudice ... to one or more of the parties, should the commission ultimately reverse the ruling in question.”³

Once an appeal has been certified under Ohio Adm. Code 4901-1-15, the PUCO may affirm, reverse, or modify the ruling or dismiss the appeal.⁴

III. IMMEDIATE INTERLOCUTORY APPEAL

The PUCO Commissioners should immediately hear this appeal of the Attorney Examiners’ Ruling. The Ruling was that the PUCO would entertain a written motion to exclude OCC’s testimony based on state ethics law, thus allowing NRDC and OPAE to memorialize further scurrilous claims about OCC’s witness, OSU Professor Dormady. But the NRDC/OPAE motion should have been denied outright on Friday, without a second chance for NRDC/OPAE. Ohio Admin. Code 4901-1-15(A) affords an immediate appeal under certain circumstances.

If the PUCO finds that Rule 15(A) does not allow for this appeal to be immediately heard, then the PUCO should grant a waiver to immediately hear it for the administration of justice, without the need for certification by the Attorney Examiners. Under Ohio Admin. Code 4901-1-38(B), the PUCO may “waive any requirement of this chapter for good cause shown....”

The good cause for a waiver is the need to stop the PUCO’s entertaining of the baseless NRDC/OPAE motion that has unfairly cast an OCC witness and testimony as unethical. The motion clearly is *ultra vires* the PUCO’s jurisdiction.

³ Ohio Admin. Code 4901-1-15(B).

⁴ Ohio Admin. Code 4901-1-15(E).

IV. REQUEST FOR CERTIFICATION

In the event the PUCO Commissioners do not immediately hear this appeal, the criteria for an appeal to be certified to the full PUCO, which are satisfied here, are as follows: does the appeal present a new or novel question of interpretation, law, or policy, or is it taken from a ruling which represents a departure from past precedent and, which requires immediate determination by the commission to prevent the likelihood of undue prejudice to one or more of the parties, should the commission ultimately reverse the ruling in question.⁵ As explained below, the Ruling satisfies the criteria because the Ruling presents a new and novel question of interpretation, law, or policy.

A. The Ruling presents a new and novel question of interpretation of law.

In their oral argument NRDC and OPAE did not cite any rule of evidence, any court precedent, or any PUCO precedent for their motion to exclude OCC's testimony of Professor Dormady. Instead, they cited the Ohio ethics laws (R.C. 102.03(D) and (E)) and made vague reference to the Professor's testimony somehow being an advisory opinion.

Legal citation from NRDC and OPAE was forthcoming in the additional opportunity that the PUCO Examiners allowed for NRDC and OPAE to commit their allegations to writing. But that citation is of no moment for purposes of certifying this Interlocutory Appeal to the Commissioners. With or without citation, the issue is a new and novel question that qualifies for certification under the PUCO's rule. In their Joint

⁵ Ohio Admin. Code 4901-1-15(B).

Motion, NRDC and OP AE stated that their issue “presents, upon information and belief, a conflict that hereto has not been presented to the Commission.”⁶

We cannot find PUCO precedent that an expert witness’s testimony should be excluded because an opposing party has made accusations claiming that the witness has violated Ohio ethics laws. As explained in detail below, allegations regarding violations of the ethics laws are subject to specific legal procedures and processes designed to protect the accused. Those state procedures were lost to the Professor (and to OCC) in these PUCO cases. This presents a new and novel question of law, satisfying Ohio Admin. Code 4901-1-15(B). As stated, NRDC and OP AE have conceded as much.⁷

B. An immediate determination is needed to prevent undue prejudice.

The Examiners’ Ruling required the NRDC/OP AE motion to exclude the testimony of Professor Dormady to be filed by the close of business on Monday January 28, 2019 (with memoranda contra filed by noon the next day Tuesday). These events that involve more process on issues that are outside the PUCO’s jurisdiction are prejudicial to OCC and to the Professor. The PUCO’s process on this issue should be shut down. Indeed, the process should have ended upon hearing the NRDC and OP AE oral arguments. NRDC and OP AE should not have been allowed to cast even more aspersions toward the Professor (OCC’s witness) in their written motion.

For this reason, an immediate determination is needed, satisfying Ohio Adm. Code 4901:1-15(B). The Attorney Examiners should certify this appeal.

⁶ Joint Motion at 2.

⁷ See Joint Motion of NRDC and OP AE to Exclude the Direct Testimony of Noah Dormady at 2 (Jan. 28, 2019) (claiming that this presents a conflict that “hereto has not been presented to the Commission.”)

This Application for Review also meets the terms of Ohio Adm. Code 4901-1-15(C), because the application has been filed “within five days after the ruling is issued” and the application does “set forth the basis of the appeal and citations of any authorities relied upon.”

V. APPLICATION FOR REVIEW

The Attorney Examiner’s ruling allowed NRDC/OPAE a further opportunity to advance an argument lacking any jurisdiction for the PUCO to hear (which became an opportunity to further and unfairly disparage the ethics of OCC’s witness). The ruling should be reversed. This process at the PUCO falls far short of the protections for an accused person at the Ohio Ethics Commission where such ethics matters are to be heard. The Examiners’ Ruling erroneously entertains arguments by NRDC and OPAE that the PUCO can exclude testimony on the basis that there has been an alleged ethics violation. But the Ohio Ethics Commission, not the PUCO, has jurisdiction to determine if there is a violation of the state ethics law that NRDC and OPAE are claiming.

NRDC and OPAE admit that the Ohio Ethics Commission has authority to interpret the ethics laws and to investigate violations.⁸ But they nonetheless persist in urging the PUCO to rule that the OSU Professor has a conflict of interest under Ohio ethics laws that requires him to immediately cease participating for OCC in the pending PUCO case.⁹ This argument fails. There is no jurisdiction at the PUCO for these misplaced assertions.

⁸ See Joint Memorandum of NRDC and OPAE to Exclude the Direct Testimony of Noah Dormady at 4-5.

⁹ Id. at 4-5.

- A. The PUCO Commissioners should find that, with regard to the Examiners’ ruling, the PUCO lacks jurisdiction to address if a witness has violated Ohio’s ethics law, for purposes of ruling on a motion to exclude testimony or for any other purpose. The Ohio Legislature vested that jurisdiction in the Ohio Ethics Commission and prosecutors, where accusers may file complaints at the Ethics Commission and the accused may be heard with due process protections including that much of the process is private to protect the rights of the accused. The Monday motion of NRDC and OPAE to exclude testimony should be denied and struck from the case along with striking their arguments wherever made on the PUCO’s record.**

The Ohio ethics law (R.C. Chapter 102) provide specific procedures, commensurate with the gravity of the subject and potential consequences for the accused, for accusations that one has violated the law. Claims relating to ethics violations are brought before the Ohio Ethics Commission through submitted allegations or a formal complaint process.¹⁰ In the formal complaint process, the claimant is required to sign an affidavit, under oath, based on personal knowledge, alleging a violation of the Ohio ethics laws.¹¹ When an allegation is received or such a complaint is lodged, the Ohio Ethics Commission can seek additional information about the complaint, and all information is considered confidential.¹²

The Ohio Ethics Commission then investigates the complaint. If the complaint is frivolous, then the investigation ends, and the complaint is dismissed.¹³ If the Ohio Ethics Commission believes that the complaint is not frivolous, then it is required to hold a hearing.¹⁴ The accused is entitled to notice of the hearing, is required to have the

¹⁰ R.C. 102.06(B).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

opportunity to be represented by counsel (or to have counsel assigned to him or her),¹⁵ is entitled to examine the evidence against him or her, is entitled to produce evidence and call or subpoena witnesses, to confront his accusers, and to cross-examine witnesses at the hearing.¹⁶ And for protection of the accused, any such hearing “shall be closed to the public.”

Rather than following the stringent procedures for justice as addressed under the ethics laws at the agency with jurisdiction (which is not the PUCO), NRDC and OPAE showed up with no precedent at a PUCO hearing to publicly accuse an Ohio State University Professor of violating the Ohio ethics laws. Tr. VIII at 2276-2277. Their approach misuses the ethics law to try to exclude the Professor’s testimony that they, as supporters of AEP’s proposal, don’t like because the Professor would testify that AEP’s survey is biased.

NRDC and OPAE did not make their complaint through sworn statements. Instead, they chose a forum (the PUCO) suited to their purpose and offered their makeshift complaint to the PUCO’s Attorney Examiners in the form of a motion to exclude testimony. Their improvised process for claiming that OCC’s witness (the OSU Professor) has violated ethics laws is contrary to the protective legal processes and the system of justice set forth under Ohio ethics law. The PUCO Commissioners should take

¹⁵ The PUCO should observe R.C. 9.84 for keeping the Professor and his personal counsel informed about any further opportunities for their advocacy on these issues. The statute provides that: “Except as otherwise provided in this section, any person appearing as a witness before any public official, department, board, bureau, commission, or agency, or any representative of a public official, department, board, bureau, commission, or agency, in any administrative or executive proceeding or investigation, public or private, if the witness so requests, shall be permitted to be accompanied, represented, and advised by an attorney, whose participation shall be limited to the protection of the rights of the witness, and who may not examine or cross-examine witnesses. The witness shall be advised of the right to counsel before the witness is interrogated.”

¹⁶ *Id.*

the several actions to end this process that is outside PUCO jurisdiction, as OCC specified above.

In this developing miscarriage of justice and in contrast with the Ethics Commission's structured and protective process, NRDC and OPAAE made the spectacle of inflammatory ethics accusations against OCC's witness on the record at a public hearing and then in more detail in a written motion. Compared to the process at the Ohio Ethics Commission, there has been no formal notice of any hearing on the ethics claim. The accused was not informed of an opportunity to hire counsel or have counsel appointed for him under R.C. 9.84 (even though he ultimately retained his own counsel). He was not given an opportunity to subpoena or call witnesses. He was not given an opportunity to confront his accusers. And he was not permitted to cross-examine his accusers regarding the basis for their claims against him. The accusations have been made and allowed to be made in a public forum at the PUCO despite the ethics law providing that these matters are to be addressed through a generally non-public process at the Ethics Commission.¹⁷

The PUCO should:

- Reverse the PUCO hearing officers' Friday ruling in which they further entertained the arguments from NRDC and OPAAE by inviting a Monday filing, instead of denying the arguments at hearing;
- Deny the motion of NRDC and OPAAE for lack of PUCO jurisdiction to hear it;
- Strike the Monday filing of NRDC and OPAAE and their related arguments wherever they appear in the record;

¹⁷ See R.C. 102.06(B).

- Bar NRDC and OP AE from continuing their arguments in the case that impugn the integrity of OCC witness Dormady; and
- Allow Professor Dormady to testify for OCC.¹⁸

VI. CONCLUSION

The PUCO Commissioners should immediately hear this appeal, under Ohio Admin. Code 4901-1-15(A). Alternatively, the PUCO Attorney Examiners should certify the appeal to the Commissioners for review, under Ohio Admin. Code 4901-1-15(B).

In this regard, an immediate determination by the PUCO is needed to prevent further undue prejudice to Ohio State University Professor Dormady, to AEP's residential consumers and to the Ohio Consumers' Counsel. The PUCO lacks the jurisdiction to hear the scurrilous claims by the Natural Resources Defense Council and Ohio Partners for Affordable Energy.

The Commissioners should reverse the Attorney Examiners' ruling allowing written, additional argument by the NRDC and OP AE. The PUCO should deny the NRDC/OP AE motion. The PUCO should then strike all of NRDC and OP AE's arguments on these issues and bar further repetition of the arguments at the hearing. And the PUCO should allow OCC to present, on behalf of consumers, the Professor's testimony showing bias in AEP's survey of customer opinions.

¹⁸ Nothing in OCC's filings regarding this matter should be considered a waiver of any right to file an original action or to seek other relief at the Supreme Court to end PUCO consideration of the NRDC/OP AE motion on state ethics.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Interlocutory Appeal was served by electronic service to the counsel identified below (provided electronically to the Attorney Examiners) this 30th day of January 2019.

/s/ Maureen Willis

Maureen Willis
Senior Counsel

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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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Agreements for Inclusion :
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Generation Rider. :

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

- - -

EXCERPT OF PROCEEDINGS

before Ms. Sarah Parrot and Ms. Greta See, Attorney
Examiners, at the Public Utilities Commission of
Ohio, 180 East Broad Street, Room 11-A, Columbus,
Ohio, called at 9:00 a.m. on Friday, January 25,
2019.

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VOLUME VIII

- - -

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On behalf of The Kroger Company.

1 APPEARANCES: (Continued)

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8 On behalf of the Ohio Environmental
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10 Kegler, Brown, Hill & Ritter, LPA
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15 On behalf of the Natural Resources
16 Defense Council.

17 Whitt Sturtevant, LLP
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23 On behalf of Direct Energy, LP and Retail
24 Energy Supply Association.

25 Benesch Friedlander Coplan & Aronoff, LLP
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On behalf of the Ohio Coal Association.

Dickinson Wright, PLLC
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1 APPEARANCES: (Continued)

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14 By Mr. Richard C. Sahli
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17 On behalf of the Sierra Club.

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3 A. I do not.

4 Q. And if I were to ask you the questions
5 found in this testimony today, would all of your
6 answers be the same?

7 A. They would.

8 MR. HEALEY: Thank you, your Honor. With
9 that, OCC moves for the admission of OCC Exhibit 24,
10 subject to cross-examination. Thank you.

11 EXAMINER PARROT: Mr. Whitt?

12 MR. DOVE: Your Honor, would now be a
13 good time to entertain motions to strike or exclude?

14 EXAMINER PARROT: Go ahead, Mr. Dove.

15 MR. DOVE: I would like to make a motion
16 to exclude Exhibit OCC Exhibit 24, Dr. Dormady's
17 direct testimony. He is testifying in a capacity as
18 an employee of Consumers' Counsel which -- while
19 seeking a position as a Commissioner at the PUCO. He
20 has been granted an interview and, under the Ohio
21 Ethics Commission, this is a conflict of interest.

22 Outside of the conflict, it is also
23 prejudicial, if he were to be appointed as a
24 Commissioner, to all the other parties because we
25 would have a Commissioner with direct testimony on

1 the record in an active case which would amount to an
2 advisory opinion.

3 So pursuant to the rules under the Ohio
4 Ethics Commission, I would move that his testimony be
5 excluded for reasons of prejudice and conflict of
6 interest.

7 MR. HEALEY: Your Honor, may I respond
8 please? First, I would like to clarify. Mr. Dove
9 identified Dr. Dormady as an employee of the Ohio
10 Consumers' Counsel which he is not. He is an
11 employee of the Ohio State University and is
12 representing the Ohio Consumers' Counsel in this
13 case. He is an independent contractor and not a
14 employee.

15 Second, if I may, Mr. Dove referenced the
16 Ohio Ethics Commission. Could he clarify what
17 specific rule or Ethics Commission provision he is
18 referring to?

19 MR. DOVE: Yes. I apologize. I wasn't
20 intending to make this motion since he hadn't been
21 announced as an interviewee, so I didn't print them
22 off. I am happy to send you e-mails with my
23 citations.

24 The specific statute that's violated here
25 would be Revised Code 102.03(D) and (E). And as far

1 as the characterization of his employment, the Ohio
2 Ethics Commission has held that the contractual
3 nature of the employment does not govern whether or
4 not he is an employee for purposes of this statute.
5 It's whether or not he executes the sovereignty of
6 the state. That is determined by looking at what the
7 agency he is testifying on behalf is appointed to do
8 and, in this case, it is represent residential
9 utility customers at the Public Utilities Commission.
10 He is doing that in his capacity as an expert witness
11 and, therefore, is an employee. The contractual
12 nature of his engagement with OCC is irrelevant.

13 MS. BOJKO: Your Honor, may I have that
14 statutory reference listed again?

15 MR. DOVE: Sure. Ohio Revised Code
16 102.03(D) and (E) and I have several ethics' opinions
17 that I'm happy to e-mail out if you would like.

18 MR. HEALEY: May I respond in substance
19 now, your Honor?

20 EXAMINER PARROT: Yes.

21 MR. HEALEY: Thank you. Mr. Dove has
22 identified no known objection that would preclude
23 Dr. Dormady from testifying in this case. Contrary
24 to his claims, there is no statute, rule of evidence,
25 law, or other PUCO or court precedent for his motion.

1 As everyone in this room knows, our colleagues
2 routinely proceed through their careers and represent
3 different interests. This includes past and present
4 Commissioners, some of whom have previously been
5 advocates in this forum. The PUCO should be careful
6 not to set a precedent, suggesting anyone who
7 advocates on behalf of a party in a PUCO proceeding
8 is then considered incapable of acting fairly and
9 objectively should that person later work for the
10 Commission Staff or be appointed to the Commission.

11 Based on OCC's thorough search of case
12 law, the only situation in which a court has found an
13 expert witness disqualified for conflict of interest
14 is if the expert previously had privileged
15 communications with the opposing party with respect
16 to that very case. That is not the case here.

17 Further, in an abundance of caution, OCC,
18 in fact, contacted the Ohio Ethics Commission along
19 with Dr. Dormady. They provided information and
20 guidance to OCC and Dr. Dormady, and based on this
21 information and guidance, there is no basis to
22 conclude that Dr. Dormady has any conflict of
23 interest here.

24 Obviously, if he is ultimately appointed
25 to the Commission, we would expect that he would

1 recuse himself from deciding this case, but to
2 suggest that the other four Commissioners would then
3 be incapable of providing a fair and balanced
4 decision in this case simply because Dr. Dormady has
5 subsequently been appointed to the Commission goes
6 too far.

7 I personally believe that all the
8 Commissioners could in that situation and would, in
9 fact, decide this case on the merits and without
10 bias.

11 In conclusion, Dr. Dormady's pending
12 application to be a Commissioner does not impact the
13 weight of his expert judgment and there is no basis
14 to conclude that his testimony in any way is impacted
15 by his pending application, nor is there any basis to
16 conclude that other Commissioners would be biased in
17 their evaluation of the evidence.

18 MR. DOVE: If I may respond.

19 MR. HEALEY: I apologize. If I may go
20 one step further, the reference to RC 102.03(D) and
21 (E) referred to public officials and employees and
22 there is a specific exception for teachers and
23 professors who are not considered public officials or
24 employees unless they have administrative duties at
25 the university beyond their normal teaching and

1 research duties which Mr. Dormady does not and,
2 therefore, those statutes do not apply to him.

3 MS. BOJKO: Your Honor, before Mr. Dove
4 responds, I think you might want me to respond. I
5 support OCC's comments and add that I concur that I
6 believe Mr. Dove has misinterpreted, misrepresented
7 Revised Code 102.03(D) and (E) and who that applies
8 to and in what cases and what representative capacity
9 applies.

10 MR. DOVE: Your Honor, I appreciate that,
11 as a public employee -- or as a professor, he is
12 exempt from the statute. I am not claiming that he
13 is an employee by virtue of his employment at OSU.
14 As I indicated, I am claiming he is an employee by
15 virtue of his testimony today as a -- an expert
16 witness before OCC.

17 Like I said, I can provide these sheets.
18 This is straight out of the Ohio Ethics Commission.
19 I am quoting what they are -- what public employees
20 are allowed to do when it comes to seeking
21 employment.

22 This would be considered an improper
23 source because he is testifying actively in a
24 proceeding before the Commission while soliciting
25 employment from the Commission. That is a conflict.

1 The fact that our colleagues have gone on
2 to the Commission after they're done is irrelevant.
3 There are statutory provisions that require certain
4 waiting periods. It's not about what you've done
5 before. It's what you are actively doing. The
6 conflict under the ethics rules starts the moment you
7 solicit employment. So he is actively participating
8 in a case while he is soliciting employment and, in
9 fact, up for an interview next week.

10 MR. ALLWEIN: Your Honors, if I may, good
11 afternoon. I support Robert's motion here.

12 Professor Dormady used his testimony in this case as
13 a bullet point as to why he should get the job as a
14 Commissioner and that -- I think that demonstrates
15 what Robert is saying about, you know, he is active
16 in this case while he is actively seeking employment.

17 And I would also like to say that OCC may
18 have called the Ohio Ethics Commission, but I would
19 certainly like to see an express opinion from them
20 regarding what was said to them, how it was
21 presented, and, you know, what the response was.

22 Trust but verify.

23 EXAMINER PARROT: All right. With this,
24 we are going to take a recess.

25 Off the record.

1 (Recess taken.)

2 EXAMINER PARROT: Let's go back on the
3 record.

4 Thank you, everyone, for your patience.
5 At this time we are going to ask any of the
6 interested parties, any party in this room that is
7 interested on this -- in this question, we are going
8 to ask that memoranda be filed no later than this
9 Monday on this issue.

10 And with that, Dr. Dormady, we are going
11 to ask that you stand down for now and, following
12 review of the memoranda, we will decide how to
13 proceed from that point.

14 MR. HEALEY: Just to be clear --

15 EXAMINER SEE: Close of business.

16 EXAMINER PARROT: Close of business
17 Monday.

18 MR. HEALEY: Just to be clear, it will be
19 only one round of memoranda for everyone and then a
20 decision will be made?

21 EXAMINER PARROT: That's correct.

22 MR. HEALEY: Thank you, your Honor.

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EXAMINER SEE: I think there is one more issue we need to take up on the record.

MR. HEALEY: Yes, your Honor, very briefly. I would ask the Bench please reconsider the schedule on filing the papers regarding Mr. Dormady for next week. This was Mr. Dove's motion which was made earlier. We ask that he be required to file his motion for exclusion, or whatever it might be, on Monday, and then OCC have a reasonable opportunity to

1 file a memo contra by Wednesday.

2 This would be similar to the January 8
3 Entry in this case regarding motions to strike and
4 with Rule 4901.112 in which parties have a reasonable
5 opportunity for a memo contra. We wouldn't know what
6 we were filing a memo contra to until we see his
7 motion, your Honors, as to ethical, you know, various
8 sources, but we don't know what those are to be able
9 to respond effectively.

10 MR. NOURSE: Your Honor, I would suggest,
11 first of all, I think there were advanced notices and
12 discussions, from what I've heard, but Mr. Dove can
13 address that, but I would -- I did talk to Mr. Dove
14 and I think he was willing to file a motion, if it's
15 helpful, in advance of Monday or at least e-mail it
16 around to folks. You know, we have been working to
17 complete this hearing and don't want to delay it any
18 further and so I am not sure what -- what you guys
19 want to do, it's up to you, but that's my
20 perspective.

21 MS. BOJKO: Your Honor, we would support
22 the filing of a motion because although Mr. Dove
23 offered to send around his -- what he relied upon to
24 make the statements he did, he didn't really assert,
25 besides the citation, any other authorities for his

1 motion or any kind of details to why he is stating
2 what he is stating, so we would support the filing
3 first so that parties could do a memo contra and
4 there are many parties that this affects that were
5 not in those pre-discussions, so I was not aware of
6 his motion that he was going to make today and the
7 details, so I don't think it's fair to characterize
8 that parties knew.

9 MR. NOURSE: No. I wasn't involved
10 either, but I said Mr. Dove can address, it's my
11 understanding, that he raised with OCC at least a day
12 in advance but.

13 MR. DOVE: That is an accurate
14 characterization. I didn't involve other parties
15 because it didn't involve other parties' witnesses.
16 I didn't see the need for that. I am fine with the
17 schedule you ordered. I'll abide by whatever you
18 order, but I don't want to delay this proceeding any
19 longer than it already has been.

20 MR. NOURSE: And, your Honor, could I
21 just point out that, I mean, I think the issue has
22 been clearly raised. OCC is aware of exactly what it
23 is. And you are not going to do a reply,
24 so everybody can address their perspective on it, I
25 think, at once.

1 MS. WHITFIELD: Actually, your Honor,
2 this actually could impact Kroger. As you saw
3 whenever Mr. Bieber was on the stand, AEP did try to
4 raise the issue because Mr. Denis, at Kroger, is also
5 a candidate for the Commission, that that somehow --

6 MR. NOURSE: I don't think we made any
7 allegations about that. We asked a couple of factual
8 questions. We didn't make any motions. We are not
9 trying to exclude his testimony; simple and factual
10 testimony.

11 MS. WHITFIELD: But also I would ask -- I
12 would because your Honors said that Mr. Dove did not
13 need to send around the Ethics Commission Orders he
14 was referring to, I asked him for them and,
15 consistent with your direction to him, he is just
16 going to wait and put them in his motion, so I would
17 also ask to have a day or two to actually see what he
18 is relying upon.

19 MS. WILLIS: And, your Honor, if I could
20 add, in the discussions earlier with Mr. Dove,
21 Mr. Dove did not indicate that he -- the premise of
22 his argument appears to be that Mr. Dormady is an
23 employee of OCC and not an independent contractor.
24 The conversations were rather vague that -- just that
25 there would be a motion to exclude and that there was

1 some ethical and/or prejudicial issue.

2 MR. DOVE: If it would enable the parties
3 to file on Monday to get this done, I am happy to
4 send around what I was prepared to send around
5 earlier today, with the understanding that I have the
6 right to supplement it now that I am writing a brief.
7 I am not going to preview my brief for them.

8 MS. WILLIS: Well, your Honor, this is --
9 typical Commission procedure is when a motion is
10 made, you have an opportunity to reply through a memo
11 contra. It's highly unusual for a motion to be made
12 and a reply to that motion to be filed
13 simultaneously.

14 I think it defeats the whole purpose, and
15 it undermines, you know, the rules of the Commission
16 to try to have both of them filed at once, and OCC
17 would be certainly willing to expedite and file a
18 response in a very expedited manner, either one or
19 two days, so that there is no further delay. And it
20 would seem to me, your Honors, that we have a full
21 line up on Monday. We will not get through our
22 witnesses all on Monday, my guess, probably going to
23 Tuesday. So if -- if we can resolve this issue by
24 allowing us to have additional time, we can go
25 forward in an expeditious manner and have it

1 resolved, understanding that your Honors will take
2 some time to review the documents.

3 MS. BOJKO: Your Honor, I would also note
4 this magnitude of a motion is typically done in
5 writing and ahead of time, and I think that this
6 motion in particular should have and could have been
7 done before the witness appeared on the stand today,
8 and I think that something with this policy type of
9 decision needs to be carefully considered by the
10 Commission and done properly through the motion
11 practice.

12 MR. DOVE: Respectfully, I would like to
13 respond because I did bring this up with the party,
14 with OCC yesterday. I purposefully was not
15 attempting to try and sandbag anyone. I didn't even
16 intend to make the motion until he was announced as
17 an interviewee because if he didn't have an
18 interview, it may not have been as relevant if we
19 knew it was done and over with.

20 So I don't appreciate the
21 characterization that I waited until the last minute
22 because I did not. I brought this up yesterday. We
23 didn't even know he had applied until Friday. That
24 was not public information until Friday.

25 MR. NOURSE: Your Honor, I would just add

1 in, if you are going to do the filings Monday
2 simultaneously, I think that's what you said earlier,
3 that the Commission make every effort to try to rule,
4 I guess, and if we are talking about tentatively
5 scheduling Dormady for Tuesday with the expectation
6 of a ruling, you know, that would be fine with us,
7 and then obviously we'll defer to you but that's our
8 request.

9 MR. HEALEY: I'm sorry, but Dormady is
10 not available Tuesday, so that's moot. He teaches
11 all day long on Tuesday.

12 MR. ALLWEIN: How about Thursday?

13 MS. WILLIS: Well, Monday -- Monday,
14 Tuesday -- we already indicated Monday, Tuesday he is
15 not available. So we will be getting to him
16 Wednesday anyways.

17 MS. LEPPLA: Your Honor, just because the
18 witness is not available doesn't mean we should not
19 address this issue in a timely manner and, you know,
20 thoroughly, and I think that your proposal to have
21 briefs due Monday makes sense, and Mr. Dove has
22 offered to provide all the citations to all the
23 parties, and they can review those in advance of
24 filing Monday, and I think that makes the most sense
25 and will make this the most expeditious so that it

1 can be --

2 MS. WILLIS: I am not sure Mr. Dove made
3 that representation. He said he wanted to hold back,
4 he is not going to give us his brief ahead of time,
5 so I don't think that's true.

6 MR. DOVE: I just said I would offer the
7 same citations I offered to offer earlier today.

8 MS. WILLIS: And you wanted to
9 supplement.

10 (Discussion off the record.)

11 EXAMINER PARROT: Thank you, everyone.
12 All right. We are on the record.

13 Mr. Dove, we are going to ask that you
14 file your written motion and memorandum in support by
15 Monday. As we previously indicated, any memoranda
16 contra will be due Tuesday at noon.

17 MR. HEALEY: Thank you, your Honor. We
18 certainly can do that.

19 EXAMINER SEE: At noon.

20 MS. WILLIS: Appreciate that.

21 EXAMINER PARROT: We will reconvene
22 Monday at 9:00 a.m.

23 We are off the record.

24 (Thereupon, at 8:08 p.m., the hearing was
25 adjourned.)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the excerpt of proceedings taken by me in this matter on Friday, January 25, 2019, and carefully compared with my original stenographic notes.

Karen Sue Gibson, Registered
Merit Reporter.

Carolyn M. Burke, Registered
Professional Reporter.

(KSG-6683)

- - -

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Case No(s). 18-0501-EL-FOR, 18-1392-EL-RDR, 18-1393-EL-ATA

Summary: Application Interlocutory Appeal: Immediate Interlocutory Appeal to Commissioners or Request for Certification to Commissioners and Application for Review by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Patricia J Mallarnee on behalf of Office of the Ohio Consumers' Counsel and Willis, Maureen Ms.