**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| Ormet Primary Aluminum Corp.,  Complainant,  v.  Ohio Power Company,  Respondent. | )  )  )  ) ) ) ) ) ) | Case No. 13-2206-EL-CSS |

**BRIEF**

**BY**

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**BRIEF**

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# I. INTRODUCTION

At a time when residential customers in Ohio are (on average) paying higher electricity rates than their counterparts in thirty-two other states,[[1]](#footnote-1) Ohio Power Company has returned yet again to the well (its Ohio customers) to charge its customers increased rates to collect revenues it is losing because one of its customers has gone out of business and has left unpaid bills. The focus of the Public Utilities Commission of Ohio (“PUCO”) should be on protecting the electric bills of Ohio Power’s customers.

In this regard, the Ohio Power Company (“Ohio Power,” “Utility” or “AEP Ohio”) and Ormet Primary Aluminum Corporation (“Ormet” or “Customer”) (together “Signatory Parties”) filed a Stipulation and Recommendation. In it, AEP Ohio seeks to confirm that it has the right to charge Ohioans for $49.3 million in payments related to unpaid bills and “unrecovered discounts” pertaining to its Customer.[[2]](#footnote-2) A portion of these charges – approximately $5 million -- exceeds the amounts that the PUCO previously authorized AEP Ohio to collect from other customers.

AEP Ohio claims that its Stipulation resolves “billing disputes” that arose under the unique arrangement. But the Stipulation and Recommendation addresses issues beyond billing disputes. These additional issues and their associated costs will inflate the burden of residential customers in AEP Ohio’s service territory, who are currently paying the highest residential electric rates in Ohio.

The delta revenues addressed in the Stipulation and Recommendation arise from the difference between the discounted rate that Ohio Power charged its Customer and the tariffed-rate that would otherwise apply. And under prior PUCO decisions, delta revenues for the Ohio Power/Ormet unique arrangement include certain of the Customer’s electric bills where it was permitted to delay payment.[[3]](#footnote-3)

Of the $49.3 million at issue, the PUCO has not yet ruled that Ohio Power may collect $4,983,157.[[4]](#footnote-4) The $4.98 million is not delta revenue, but rather pertains to the “remaining billed unpaid amounts from 2013 under the unique arrangement.”[[5]](#footnote-5) The “remaining billed unpaid amounts from 2013” are the Customer’s unpaid bills for its September and October 2013 usage, which are in excess of discounts and delayed payments authorized by the PUCO.[[6]](#footnote-6) In the Stipulation and Recommendation, Ohio Power asks the PUCO to confirm that it may charge other customers for $49.3 million that it has not collected from its Customer through 2013, including this $4.98 million in “remaining billed unpaid amounts.”

Ohio Power also proposes that it gets to keep the first $7.24 million it receives from the bankruptcy proceeding. That $7.24 million represents the **only** dollars Ohio Power has not collected in tariffed rates from the unique arrangement. Only after AEP Ohio obtains this $7.24 million would other customers be given any credit toward the more than $200 million they have already paid to the utility.

# II. ARGUMENT

## AEP Does Not Meet The PUCO’s Three-Part Test For Considering Settlements And Should Therefore Not Be Permitted To Charge Customers For An Additional Five Million Dollars.

Under Ohio Admin. Code 4901-1-30(D), no stipulation is binding on the PUCO. This provision allows the PUCO to modify or reject the stipulation. The PUCO has adopted a three-part test to evaluate whether a stipulation is reasonable and should be adopted:[[7]](#footnote-7)

(1) Is the settlement a product of serious bargaining among capable, knowledgeable parties with diverse interests?

(2) Does the settlement, as a package, benefit ratepayers and the public interest?

(3) Does the settlement package violate any important regulatory principle or practice?

The Ohio Supreme Court (“Court”) has endorsed the PUCO’s analysis using these criteria.[[8]](#footnote-8) The Court has noted, however, that a stipulation does not divest the PUCO of its responsibility to determine just and reasonable rates: “A stipulation entered into by the parties present at a commission hearing is merely a recommendation made to the commission and is in no sense legally binding upon the commission. The PUCO may take the stipulation into consideration, but must determine what is just and reasonable from the evidence presented at the hearing….”[[9]](#footnote-9) It is the stipulating parties who bear the burden of showing that the Stipulation is reasonable and meets the three-prong test. Here, the Stipulation fails to meet any of the three criteria.

### The settlement was not a product of serious bargaining among capable, knowledgeable parties with diverse interests.

The first prong of the settlement test asks whether the negotiations over the settlement took place in an environment of sufficient conflict (i.e. “serious bargaining”) between signatories. Also, diversity of interests is an important component to assure that a stipulation is reasonable. The PUCO has found that when diverse interests are present, there is strong support for the reasonableness of a settlement package.[[10]](#footnote-10)

But here the settlement was not the product of serious bargaining because the parties involved in the settlement did not have diverse interests. OCC Witness Slone testified that the proposed stipulation does not meet the first prong of the settlement test. He testified that the proposed stipulation was an agreement between two parties with limited interests.[[11]](#footnote-11)

Nor is there broad based support for the Stipulation.[[12]](#footnote-12) In fact, no representative of any customer participated, even though the Stipulation seeks the PUCO’s approval to charge other non-stipulating customers increased rates.[[13]](#footnote-13)

Also, the negotiations between the Customer and Ohio Power did not consider the interests of those who were not included in the negotiations. By this time in the history of unique arrangements, Ohio Power is well acquainted with parties who have a diverse (different) view of paying subsidies to it. Indeed, OCC was a party to the underlying unique arrangement case (Case No. 09-119-EL-AEC), from which the “billing dispute” in this case arose.[[14]](#footnote-14) And AEP Ohio was clearly aware of the PUCO’s recent holding[[15]](#footnote-15) that OCC may raise its concerns regarding allocation of delta revenue responsibility for unpaid bills at “the proper time.”

Nonetheless, Mr. Allen testified that AEP Ohio had no duty to “reach out to OCC and include them in negotiations.” Mr. Allen concludes this because OCC was not a party at the time the settlement discussions occurred.[[16]](#footnote-16)

An approach contemplated by the PUCO’s settlement standard, and consistent with Civ. Rule 19, would have been for Ohio Power to invite diverse others (that Ohio Power should have reasonably known to be interested) to the negotiation once the negotiations turned to resolving issues affecting others. But, this was not an open process where those who would be affected by the agreement (customers who were to pay the delta) were invited to attend. Mr. Slone testified that rather than inviting OCC and others into discussions, Ohio Power proceeded to sign a stipulation that laid the burden of the unpaid bills on other customers.[[17]](#footnote-17) These were the very same customers who were excluded from settlement discussions. Mr. Allen does not dispute that OCC and others were excluded from the Stipulation discussions.

In any event, OCC did ultimately move to intervene. And OCC did so within the time allowed by the PUCO, under Ohio Admin. Code 4901-1-11. As such, the first prong of the settlement standard should be applied in the context of OCC’s timely intervention, meaning that the settlement does not include “diverse” interests in the absence of OCC’s signature. In other words, the settlement by the stipulators (AEP and its Customer) should be judged in the context of all the parties ultimately in the case. It should not be judged with reference to just the parties in the case when the two like-minded (non-diverse) parties concluded a settlement before others intervened. If AEP’s approach to the three-part test is allowed, utilities may be filing more settlements with their applications to initiate cases, when there are no parties in a case to affect the outcome of settlements. That AEP and its Customer did not later secure OCC’s signature for the settlement or a revised settlement should be held against their satisfaction of the first prong of the settlement standard.

The exclusion of entire customer classes in settlement negotiations, especially when those customer classes may be charged increased rates, is wrong. The oft-quoted Supreme Court footnote in the *Time Warner* case addresses the Court’s “grave concern” regarding partial stipulations arising from settlement talks “from which an entire customer class was intentionally excluded.”[[18]](#footnote-18)

Although Mr. Allen testified that, on advice of Counsel, the *Time Warner* case is “non-binding” and does not serve as precedent,[[19]](#footnote-19) such a view ignores subsequent Ohio Supreme Court holdings and PUCO practice. For example, in *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, 109 Ohio St.2d 328, 2006-Ohio-2110, the Court struck down a partial stipulation implementing a utility’s rate stabilization plan where customer groups did not agree to the rates and did not participate in negotiations. Mr. Allen’s testimony in this respect is contrary to *Ohio Consumers’ Counsel v. Pub. Util. Comm.*, and PUCO practice. It should not be accorded any weight.

The lack of diverse interests for a settlement--where two parties who will not pay the rate increases “negotiate” an agreement that others will pay the rate increases--should be fatal to the proposed settlement. The Stipulation and Recommendation fails under the first prong of the three-prong test. Consequently, the PUCO should reject it.

### The Stipulation as a package does not benefit the public and the public interest.

OCC Witness Slone testified that the Stipulation as a package does not benefit the public and the public interest.[[20]](#footnote-20) It benefits only Ohio Power and the Customer’s investors. Since the Customer has shut down operations as of October 4, 2013, the $4.98 million in additional subsidy that other customers would pay under the Stipulation does not provide economic benefits to employees and the community. Both of these benefits underlie the PUCO’s initial approval of the unique arrangement.[[21]](#footnote-21) Indeed, it appears that the unique arrangement is at an end because the terms of the unique arrangement are no longer being followed. One of those terms is the requirement for continuing employment of at least 650 employees at the Hannibal plant, a requirement that has not been met since October 4, 2013.[[22]](#footnote-22)

Mr. Allen nonetheless testifies that the Stipulation benefits customers and the public interest.[[23]](#footnote-23) Mr. Allen’s conclusion is based upon what he characterizes as an “obvious” but “unlikely” benefit: if AEP Ohio does recover something on its administrative claims in the Bankruptcy Court, it has committed to “refund any such recovery to ratepayers.”[[24]](#footnote-24) In evaluating this alleged benefit, two points must be considered. First, under AEP Ohio’s approach any refund to ratepayers will only occur **after** AEP recovers $7,239,473 from its Customer through the bankruptcy process – the amount AEP has not been permitted to collect from other customers.[[25]](#footnote-25) Thus, AEP is not proposing to “refund ***any*** such recovery.”

AEP is only proposing to refund the amount recovered in excess of the first $7.24 million – which it proposes to keep for itself.[[26]](#footnote-26) Second, to use Mr. Allen’s own words, such recovery is “*unlikely”* as it “continues to appear likely that administrative claims in bankruptcy will not be paid in full, if at all.”[[27]](#footnote-27) Such unlikely and conditional benefits to the public and public interest do not fulfill the requirement that the stipulation benefits the public and the public interest.

Not only do customers not benefit, they will actually be harmed under the Stipulation, as OCC Witness Slone testified. Customers will be forced to pay an additional subsidy of $4.98 million.[[28]](#footnote-28) Charging customers for any additional unpaid bills would be unjust and unreasonable. As the PUCO aptly noted back in 2009, the ability of other customers to fund the delta revenues is not unlimited.[[29]](#footnote-29) And, in its October 2, 2013 Opinion and Order, the PUCO acknowledged the “significant” economic burden already imposed on Ohio Power’s customers who paid the subsidies.[[30]](#footnote-30)

The Stipulation fails to provide benefits to the public and is not in the public interest. It fails the second prong of the stipulation criteria. The Stipulation should accordingly be rejected.

### The Stipulation violates important regulatory principles and practices.

The Stipulation violates the first and second prongs of the test by disregarding the role and interests of customers in reaching a negotiated resolution. And, as OCC Witness Slone testified, it also contravenes the third prong of the test.[[31]](#footnote-31)

Mr. Slone testified that the Stipulation contravenes the PUCO’s August 21, 2013 Entry. There, the PUCO indicated that AEP’s Customer is not relieved of its obligation to pay the non-deferred portion of its electric bills.[[32]](#footnote-32) Yet the Stipulation does exactly that—it relieves the Customer of its obligation to pay for its bills.[[33]](#footnote-33)

Mr. Slone also testified that under the unique arrangement the Customer had to maintain 650 full-time employees.[[34]](#footnote-34) Since it failed to do so, the unique arrangement, as of October 4, 2013, ceased to exist.[[35]](#footnote-35) With no reasonable arrangement, the Customer was obligated to pay AEP Ohio’s existing tariff rate. With no reasonable arrangement, no delta revenues could accrue. Thus, the $4.98 million is not delta revenues for the PUCO to even consider in this proceeding.

Additionally, the Stipulation violates the PUCO’s policy on bad debts. The PUCO generally makes the utility responsible for managing unpaid bills of customers while providing for recovery of uncollectible amounts through base rates.[[36]](#footnote-36) OCC does not address here, and does not concede, that the Customer’s unpaid bills would qualify for rate recognition in a future rate proceeding. But a base rate proceeding is the appropriate forum to address such an issue.

Ohio Power’s proposal for special rate treatment of one customer’s unpaid bills through a rider is not appropriate and would make other customers guarantors of Ohio Power’s bad debt. The Stipulation would create for Ohio Power a dollar-for-dollar recovery of bad debts from customers, through a rider mechanism (the Economic Development Rider). The Stipulation assumes that Ohio Power should be given extraordinary recovery of its customers’ bad debts. Ohio Power should not be given such special ratemaking treatment at its other customers’ expense.[[37]](#footnote-37)

Mr. Allen calls OCC’s claims on bad debt policy “marginally relevant, at best.”[[38]](#footnote-38) Mr. Allen also testifies that whatever general bad debt policy that exists is simply not applicable here.[[39]](#footnote-39) Mr. Allen claims that the PUCO’s decision in Case 09-119-EL-AEC and its approved contract with its Customer “are clear that all billed unpaid amounts are delta revenue.”[[40]](#footnote-40) Mr. Allen relies on an excerpt of the July 15, 2009 Opinion to support this claim. That excerpt states that “[a]t the end of the term of the unique arrangement, AEP-Ohio will be permitted to recover any remaining deferred amounts, including carrying charges through its economic development rider.”[[41]](#footnote-41) Mr. Allen then points to the contract that defines delta revenues as including billed unpaid amounts.

But Mr. Allen’s interpretation is flawed. The PUCO’s Order was issued on July 15, 2009. As OCC Witness Slone points out,[[42]](#footnote-42) the PUCO’s Order addressed the delta revenues and deferred amounts that were known then and created under the order. The delta revenues being considered here –unpaid bills by AEP’s Customer -- were not known then nor were they created under the July 15, 2009 Order, or any subsequent order. They are simply unpaid bills of a customer.

This point is reinforced by the fact that the Customer specifically sought permission from the PUCO to defer paying certain bills. Those deferral requests were specifically reviewed by the PUCO in earlier proceedings. And in its October 17, 2012 Order the PUCO ruled that Ormet should be permitted to defer paying its October and November 2012 bills, but expressly ruled that AEP-Ohio could only defer $20 million of such billed unpaid amounts.[[43]](#footnote-43) Had the July 15, 2009 Order already addressed this issue (as claimed by Mr. Allen), then the PUCO’s October 17, 2012 order would have been an unnecessary Order.

For these reasons the PUCO should find that the third prong of the settlement criteria is not met. The PUCO should decline to approve the Settlement.

## The Stipulation Amounts To A Belated Application For Rehearing That Contravenes R.C. 4903.10. It Must Be Rejected.

Mr. Allen testified that the PUCO’s July 15, 2009 decision and its approved contract with its Customer “are clear that all billed unpaid amounts are delta revenue.”[[44]](#footnote-44) But his interpretation does not square with the PUCO’s October 17, 2012 Entry. In that Entry the PUCO ruled that Ormet should be permitted to defer paying its bills, but also determined that AEP Ohio could only defer as delta revenues $20 million of Ormet’s billed unpaid amounts: “With regard to Ormet’s request that any missed deferred payment be treated as delta revenue, we grant the request subject to the $20 million cap.”[[45]](#footnote-45) That meant that Ormet’s billed unpaid amounts over and above $20 million could not be treated as delta revenues. Thus, the PUCO’s October 17, 2012 Entry is inconsistent with Mr. Allen’s interpretation of the July 15, 2009 Order. By limiting to $20 million what AEP Ohio can charge customers for recovery of billed unpaid amounts, the PUCO pre-determined that Mr. Allen’s position that all billed unpaid amounts are delta revenue is simply wrong.

Notably, AEP Ohio failed to seek rehearing of the PUCO’s October 17, 2012 Entry that limited what it could charge customers for its unpaid bills. Yet under Mr. Allen’s view, that PUCO Entry was inconsistent with and contradicted the July 15, 2009 Order and contract. Essentially then, in this stipulation AEP Ohio is seeking a belated rehearing of the PUCO’s October 17, 2012 Entry. Mr. Allen wants the PUCO to change its October 17, 2012 ruling to permit AEP Ohio to collect $4.98 million more of Ormet’s unpaid bills.

But the time to seek a change the PUCO’s October 17, 2012 ruling has long passed. R.C. 4903.10 requires that an application for rehearing shall be filed within thirty days after the Entry has been entered on the journal of the PUCO. Further, the statute specifies that “[n]o cause of action arising out of any order of the commission, other than in support of the order, shall accrue in any court to any person, firm, or corporation unless such person, firm, or corporation has made a proper application to the commission for rehearing.” A “proper application” is one that meets, inter alia, the thirty-day deadline for rehearing.

AEP Ohio, however, did not apply for rehearing of the October 17, 2012 Entry within the thirty-day period of the statute. It failed to make a proper application for rehearing to the PUCO. AEP Ohio cannot circumvent the requirements of the law.[[46]](#footnote-46) The PUCO should treat the stipulation, that seeks to charge customers for more unpaid bills from Ormet, as a late-filed application for rehearing. “The logic of words should yield to the logic of realities.”[[47]](#footnote-47)The reality is that this amounts to an untimely application for rehearing.

And, where no application for rehearing is filed within thirty days as required, the

PUCO has no power to entertain it.Thus, the PUCO fundamentally lacks jurisdiction on this matter. The PUCO should reject the claims under the Stipulation that seek to require customers to pay even more of a subsidy than they have paid to date.

## If the PUCO Adopts AEP’s Settlement, Our Secondary Recommendation Is For The PUCO To Modify The Settlement By Prohibiting AEP Ohio From Charging Customers For $4.98 Million In Unpaid Bills.

In OCC’s application for rehearing filed on November 1, 2013 in Case No. 09-119-EL-AEC, OCC asked the PUCO to protect customers from paying Ohio Power any additional amounts in excess of $30.5 million related to deferred payments.[[48]](#footnote-48) In denying OCC’s application for rehearing, the PUCO characterized OCC’s recommendation as “premature” since no request had yet been made for additional amounts.[[49]](#footnote-49)

The PUCO stated that “OCC may raise its concerns regarding allocation of the delta revenue responsibility at the proper time for the Commission’s consideration.”[[50]](#footnote-50) In compliance with the PUCO’s ruling, OCC is now raising this consumer protection issue – as Ohio Power seeks to charge customers for the additional sum of $4.98 million. The PUCO should prohibit Ohio Power from charging other customers for this amount.

The PUCO has discretion to accept, reject, or modify the proposed Stipulation and Recommendation.[[51]](#footnote-51) The PUCO should exercise that authority to protect customers from AEP’s request that other customers pay the $4.98 million balance of “remaining billed unpaid amounts from 2013.” Modifying the Stipulation and Recommendation would be just and reasonable.

The PUCO has permitted Ohio Power to charge Ohioans for $232 million (through 2013) to support the Ormet special arrangement[[52]](#footnote-52) In addition, Ohio Power was previously authorized to bill other customers an additional $30.5 million in delayed payments if it is unable to collect such payments from its Customer. Notably, Ohio Power has itself borne very little of the electricity discount paid by its Ohio customers to help Ormet, its employees, and the local community.[[53]](#footnote-53) Ohio Power has sought at every turn to place the burden on customers to compensate itself for 100% of its billings to its customer.

The PUCO should consider an inequity that exists. Ohio Power has benefitted from the economic development for its customer.[[54]](#footnote-54) But its Ohio customers (and not Ohio Power) have paid AEP for almost the entire discount that AEP provided to its Customer. The responsibility for paying delta revenue should be shared (between the utility and customers). This sharing should recognize that “both the company and its customers benefit from the company’s policy of providing economic incentive rates to retain customers to attract new business in the utility’s service territory.” *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to increase the Rates and Charges for Electric Service*, Case No. 91-418-EL-AIR, Opinion and Order at 110 (May 12, 1992).

Moreover, Ohio Power has gained 540 MW of capacity and the associated energy that it can sell into the wholesale market—capacity and energy that were previously being used to serve Ormet’s load.[[55]](#footnote-55) This capacity will likely serve as a source of additional profit for Ohio Power. This additional income should be used, at a minimum, to offset the $4.98 million of unpaid bills if Ohio Power is ultimately unable to collect these bills. And, when Ohio Power opposed OCC’s proposal for customers to receive some benefit from these capacity sales that it can make, the PUCO decided in favor of Ohio Power. It ruled that Ohio Power can keep all that additional income without sharing any benefits with customers.[[56]](#footnote-56) Customers, on the other hand, have no such ability to mitigate their 100% share of the subsidy they pay to AEP Ohio.[[57]](#footnote-57)

Prohibiting Ohio Power from charging other customers another $4.98 million is consistent with the PUCO’s August 21, 2013 ruling. That ruling limited, to $10.5 million, the delta revenue all customers would pay for the one Customer’s delayed payments for 2013.[[58]](#footnote-58) There the PUCO ruled that the Customer could defer payments of its July and August 2013 bills, but limited the amount of delayed payments to $10.5 million. The PUCO ruled that if the Customer failed to pay AEP for the deferred amounts of $10.5 million, AEP Ohio was entitled to recover the amounts from customers. Deferred payments of any amounts in excess of $10.5 million, or for any period other than July and August, would have required a further order and additional deferral authorization. Yet none was given.

R.C. 4905.31 gives the PUCO the authority to allow a utility to collect delta revenue resulting from a unique arrangement.[[59]](#footnote-59) But the amount allowed is within the PUCO’s discretion. The statute is permissive, stating that the PUCO “may” authorize a utility to recover delta revenues from customers. The PUCO has stated that “[i]f the General Assembly had intended to require the recovery of delta revenues, the General Assembly would have used ‘shall’ or ‘must’ rather than ‘may.’”[[60]](#footnote-60) The PUCO has discretion to determine if a utility will be allowed to charge customers for delta revenues. The PUCO should exercise its discretion here, to deny the charges.

Indeed, the Ohio Supreme Court has affirmed a PUCO finding that it has discretion to disallow recovery of delta revenues from customers.[[61]](#footnote-61) The Court found that R.C. 4905.31 is “permissive” and does not require full recovery of delta revenues. It concluded that the PUCO has discretion whether to allow utilities to charge customers for delta revenues because the statute used permissive language in describing whether such revenue may be collected. The PUCO should disallow AEP’s proposal, to protect customers.

## If the PUCO Adopts AEP’s Settlement, Our Secondary Recommendation Is That The Settlement Should Be Modified To Give Customers The First $5 Million In Proceeds Coming Out Of Bankruptcy.

Under the Stipulation, the Utility proposes to keep the first $7.239 million that is collected from Ormet through the bankruptcy process.[[62]](#footnote-62) That $7.239 million represents the amount of the 2012 deferrals that would otherwise be absorbed by AEP Ohio if not ultimately paid by its Customer.[[63]](#footnote-63) The PUCO specifically ordered these deferrals to be absorbed by AEP Ohio when it imposed a $20 million delta revenue cap in its October 17, 2012 Order. These are the **only** dollars Ohio Power has not collected from customers, via tariffed rates, under the Ormet unique arrangement.

AEP proposes in its Settlement that its other customers not be given any credit through the Ormet bankruptcy process toward the more than $200 million they have already paid to AEP Ohio, unless AEP Ohio first receives $7.24 million. This is unfair.

OCC Witness Slone testified that this AEP proposal should be rejected.[[64]](#footnote-64) Mr. Slone instead recommended a provision under which any dollars received by AEP Ohio through the bankruptcy process would be credited in increments of $5.0 million, alternating between customers and Ohio Power. AEP Ohio’s customers would receive the first $5.0 million credit. Thus, if any significant dollars are recouped through the bankruptcy process, customers will have a better chance of receiving back some of the more than $200 million they have paid to subsidize AEP Ohio’s discount to its Customer.

# III. CONCLUSION

Two parties with like interests, AEP and its Customer, joined together to sign a Settlement that would have others (including residential consumers) pay. That is unfortunate for AEP Ohio’s consumers.

The Stipulation violates each of the three prongs of the PUCO’s test for evaluating Stipulations. It should be rejected. The PUCO should also consider AEP’s request (to charge other customers $4.98 million in unpaid bills) as a belated and unlawful application for rehearing. The PUCO has no jurisdiction to hear about the filing.

If the PUCO adopts the Stipulation, it should modify it to delete the provisions requiring customers to fund an additional $4.98 million on top of the $232 million they have already paid to subsidize AEP Ohio’s discounted rates to its Customer. The PUCO should determine that it is not just or reasonable to impose these further charges on customers who have already borne almost the entire subsidy for Ohio Power’s discounted rates.

Additionally, the PUCO should modify the way the Stipulation treats revenues Ohio Power receives through the bankruptcy process. Customers should be credited for the first $5.0 million of the proceeds that Ohio Power receives from the bankruptcy process. This is a way for customers to recoup some of the over $232 million they have paid in subsidies to AEP Ohio.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this Brief was served on the persons stated below via electronic transmission, this 30th day of May 2014.

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1. U.S. Energy Information Administration, Table 5.6B (Oct. 2013). [↑](#footnote-ref-1)
2. *Ormet Primary Aluminum Corporation v. Ohio Power Company*, Case No. 13-2206-EL-CSS, Stipulation and Recommendation at 6 (Feb. 3, 2014). [↑](#footnote-ref-2)
3. See, e.g., *In re: Ormet*, Case No. 09-119-EL-AEC, Entry at ¶5 (Oct. 17, 2012); Entry at ¶20 (Aug. 21, 2013). [↑](#footnote-ref-3)
4. OCC’s efforts opposing approximately $13 million of the $49.3 million of delta revenues were unsuccessful. See, e.g., *In re: Ormet*, Case No. 09-119-EL-AEC, Opinion and Order at 7, 9, (July 15, 2009) (citing to OCC’s original position that the delta revenue should not exceed $32 million annually (for five years), the amount of wages of the Ohio workers at the Ormet plant). [↑](#footnote-ref-4)
5. *Ormet Primary Aluminum Corporation v. Ohio Power Company*, Case No. 13-2206-EL-CSS, Stipulation and Recommendation at 6. [↑](#footnote-ref-5)
6. Notably, the PUCO has not ruled that these charges pertaining to Ormet’s unpaid bills and September 2013 usage deferral are 1) appropriate or 2) that customers (and not AEP) should be responsible for them. [↑](#footnote-ref-6)
7. *In the Matter of the Restatement of the Accounts and Records of Cincinnati Gas & Electric Co., the Dayton Power and Light Co. and Columbus & Southern Ohio Electric Company*, Case No. 84-1187-EL-UNC, Opinion and Order (Nov. 26, 1985). [↑](#footnote-ref-7)
8. *Industrial Energy Consumers of Ohio Power Co. v. Pub. Util. Comm*., 68 Ohio St.3d 547 (1994) (citing *Consumers’ Counsel v. Pub. Util. Comm*., 64 Ohio St.3d 123, at 126 (1992)). [↑](#footnote-ref-8)
9. *Duff v. Pub. Util. Comm.,* 56 Ohio St.2d 367, 379 (1978). [↑](#footnote-ref-9)
10. *In re Restatement of Accounts and Records of CG&E, DP&L, and CSOE*, Case No. 84-1187-EL-UNC, Order at 7 (Nov. 26, 1985). [↑](#footnote-ref-10)
11. Direct Testimony of Gregory Slone at 5 (Apr. 22, 2014). [↑](#footnote-ref-11)
12. Id. [↑](#footnote-ref-12)
13. Id. [↑](#footnote-ref-13)
14. See Direct Testimony of William A. Allen at 6. [↑](#footnote-ref-14)
15. *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Entry on Rehearing at ¶10 (Nov. 13, 2013). [↑](#footnote-ref-15)
16. See Direct Testimony of William A. Allen at 10. [↑](#footnote-ref-16)
17. Id. at 6. [↑](#footnote-ref-17)
18. *Time Warner AxS v. Pub. Util. Comm*., 75 Ohio St.3d 2269, footnote 2. [↑](#footnote-ref-18)
19. Direct Testimony of William A. Allen at 10. [↑](#footnote-ref-19)
20. Direct Testimony of Gregory Slone at 6. [↑](#footnote-ref-20)
21. *In re: Ormet*, Case No. 09-119-EL-AEC, Opinion and Order at 11 (July 15, 2009). [↑](#footnote-ref-21)
22. Id. [↑](#footnote-ref-22)
23. Direct Testimony of William A. Allen at 14. [↑](#footnote-ref-23)
24. Id. (Emphasis added). [↑](#footnote-ref-24)
25. See Direct Testimony of William A. Allen at 8 (testifying that ratepayers would receive credit through the EDR only after AEP recoups its $7,239,473). [↑](#footnote-ref-25)
26. In this regard, OCC Witness Slone proposed that the stipulation be modified so that the first $5.0 million collected through bankruptcy process be credited to customers. Direct Testimony of Gregory Slone at 12-13. [↑](#footnote-ref-26)
27. Id. at 14. [↑](#footnote-ref-27)
28. Direct Testimony of Gregory Slone at 6. [↑](#footnote-ref-28)
29. *In re: Ormet*, Case No. 09-119-EL-AEC, Opinion and Order at 10 (July 15, 2009). [↑](#footnote-ref-29)
30. *In re: Ormet*, Case No. 09-119-EL-AEC, Opinion and Order at 20 (Oct. 2, 2013). [↑](#footnote-ref-30)
31. Direct Testimony of Gregory Slone at 7-8. [↑](#footnote-ref-31)
32. *In re: Ormet*, Case No. 09-119-EL-AEC, Entry at 7 (Aug. 21, 2013). [↑](#footnote-ref-32)
33. Id. [↑](#footnote-ref-33)
34. Direct Testimony of Gregory Slone at 8. [↑](#footnote-ref-34)
35. Id. [↑](#footnote-ref-35)
36. See, e.g., *In re: DP&L*, Case No. 83-777-GA-AIR, Opinion and Order at 11-12 (Aug. 7, 1984). [↑](#footnote-ref-36)
37. See, e.g., *In the Matter of the Application of East Ohio Gas Company for Approval of a Payment Matching Program and other Matters*, Case No. 01-2592-GA-UNC, Entry on Rehearing at 7 (Nov. 29, 2001) (PUCO disallowed a bad debt rider and instructed the utility that if it desired to seek extraordinary recovery of the bad debts, it should do so in the utility’s next rate case). [↑](#footnote-ref-37)
38. Direct Testimony of William A. Allen at 13. [↑](#footnote-ref-38)
39. Id. [↑](#footnote-ref-39)
40. Direct Testimony of William A. Allen at 12. [↑](#footnote-ref-40)
41. Id. at 11. [↑](#footnote-ref-41)
42. Direct Testimony of Gregory Slone at 11. [↑](#footnote-ref-42)
43. *In re: Ormet*, Case No. 09-119-EL-AEC, Entry at 5 (Oct. 17, 2012). [↑](#footnote-ref-43)
44. Direct Testimony of William A. Allen at 11. [↑](#footnote-ref-44)
45. *In re: Ormet*, Case No. 09-119-EL-AEC, Entry at ¶5 (Oct. 17, 2012). [↑](#footnote-ref-45)
46. See, e.g., *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and the Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, Case No. 10-176-EL-ATA, Entry at ¶ 15 (Dec. 22, 2012)(ruling that utility could not avoid the requirements of the PUCO’s rules on interlocutory appeals by calling its filing an application for rehearing, rather than an interlocutory appeal)(citing *In re Cincinnati Gas & Electric Company,* Case No. 05-59-EL-AIR, Entry at 2 (Nov. 3, 2005)). [↑](#footnote-ref-46)
47. U.S. Supreme Court Justice Brandeis, *DeSanto v. Pennsylvania* (1927), 273 U.S. 34, 43. [↑](#footnote-ref-47)
48. *In re: Ormet,* Case No. 09-119-EL-AEC,Application for Rehearing (Nov. 1, 2013). [↑](#footnote-ref-48)
49. *In re: Ormet,* Case No. 09-119-EL-AEC*,* Entry on Rehearing at ¶10 (Nov. 13, 2013). [↑](#footnote-ref-49)
50. Id. [↑](#footnote-ref-50)
51. Ohio Admin. Code 4901-1-30(D). [↑](#footnote-ref-51)
52. *In re: Ormet*, Case No. 09-119-EL-AEC, Opinion and Order at 2 (Oct. 2, 2013). [↑](#footnote-ref-52)
53. It was not until 2012 that Ohio Power was required to pick up a slight portion of the Ormet costs. See *In re: Ormet*, Case No. 09-119-EL-AEC, Opinion and Order at ¶5 (Oct. 17, 2012) (where the PUCO capped Ormet’s deferred payment at $20 million). Ohio Power alleges that it has had to shoulder $7.2 million relating to the October/November 2012 billing deferrals and has acted as an interest-free bank for the deferred billing payments in 2012 and 2013. See Ohio Power Reply Comments in *In The Matter of the Application of Ohio Power Company to Adjust the Economic Development Cost Recovery Rider*, Case No. 14-193-EL-RDR (Mar. 7, 2014). [↑](#footnote-ref-53)
54. Ohio Power has benefitted from economic development in the area served by Ormet to a similar degree as the communities in which Ormet operates. Both residential and commercial electric service have no doubt been greater than they would have been in the absence of Ormet. [↑](#footnote-ref-54)
55. *In re: Ormet,* Case No. 09-119-EL-AEC, Executed Power Agreement, Article 4.01 at 11 (Sept. 18, 2009). [↑](#footnote-ref-55)
56. *In re: Ormet*, Case No. 09-119-EL-AEC, Entry on Rehearing at ¶12 (Nov. 13, 2013). [↑](#footnote-ref-56)
57. The PUCO in the past, allowed Ormet subsidies to be reduced if the London Metal Exchange (LME) prices exceeded the target prices in the agreement. *In re: Ormet*, Case No. 09-119-EL-AEC, Opinion and Order at 12 (July 15, 2009). Unfortunately, customers never received delta revenue credits because the price of aluminum in the LME never rose above the target price. Id., Opinion and Order at 19-20 (Oct. 2, 2013). Customer contributions were also reduced by Ormet’s payment of provider of last resort charges. *In re: Ormet*, Case No. 09-119-EL-AEC, Opinion and Order at 13-14 (July 15, 2009), upheld on appeal, *In re: Ormet Primary Aluminum Corp.,* 129 Ohio St.3d 9, 2011-Ohio-2377, 949 N.E.2d 991. [↑](#footnote-ref-57)
58. *In re: Ormet*, Case No. 09-119-EL-AEC, Entry at ¶19 (Aug. 21, 2013). [↑](#footnote-ref-58)
59. *In re: Ormet*, Case No. 09-119-EL-AEC, Entry on Rehearing at ¶12 (Sept. 15, 2009) (affirming its earlier ruling that the Provider Of Last Resort charges paid for by Ormet could be credited to the economic development rider); affirmed by the Ohio Supreme Court in *In re: Ormet Primary Aluminum Corp.,* 129 Ohio St.3d 9, 2011-Ohio-2377, 949 N.E.2d 991, ¶16. [↑](#footnote-ref-59)
60. Id. See also R.C. 4905.31. [↑](#footnote-ref-60)
61. *In re: Ormet Primary Aluminum Corp.,* 129 Ohio St.3d 9, 2011-Ohio-2377, 949 N.E.2d 991, ¶16. [↑](#footnote-ref-61)
62. Stipulation and Recommendation at 7, ¶5. [↑](#footnote-ref-62)
63. Id. [↑](#footnote-ref-63)
64. Direct Testimony of Gregory Slone at 12-13. [↑](#footnote-ref-64)