

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of	)	
Ormet Primary Aluminum Corporation )	)	
and Ormet Aluminum Mill Products )	)	
Corporation,	)	
	)	
Complainants,	)	Case No. 05-1057-EL-CSS
	)	
v.	)	
	)	
South Central Power Company and	)	
Ohio Power Company,	)	
	)	
Respondents.	)	

SUPPLEMENTAL OPINION AND ORDER

The Commission, considering the complaint, the evidence of record, the arguments of the parties, and the applicable law, and being otherwise duly advised, hereby issues this supplemental opinion and order.

APPEARANCES:

Dinsmore & Shohl LLP, by John E. Selent and Edward T. Depp, 1400 PNC Plaza, 500 West Jefferson St., Louisville, Kentucky 40202, and Brian S. Sullivan, 255 E. 5<sup>th</sup> St., Suite 1900, Cincinnati, Ohio 45202, on behalf of Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation.

Thompson Hine LLP, by Robert P. Mone, William R. Case, Thomas E. Lodge, Kurt P. Helfrich and Carolyn S. Flahive, 10 W. Broad St., Suite 700, Columbus, Ohio 43215-3435, on behalf of South Central Power Company.

Marvin I. Resnik, American Electric Power Service Corporation, 1 Riverside Plaza, 29<sup>th</sup> Floor, Columbus, Ohio 43215, on behalf of Ohio Power Company.

McNees, Wallace & Nurick, LLC, by Samuel C. Randazzo, Lisa G. McAlister and Daniel J. Neilsen, 21 East State Street, Columbus, Ohio 43215, on behalf of Industrial Energy Users-Ohio.

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Nathaniel Hawthorne, 27600 Chagrin Boulevard, Suite 260, Cleveland, Ohio 44122, on behalf of the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union.

Boehm, Kurtz & Lowery, by David F. Boehm and Michael L. Kurtz, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202, on behalf of Ohio Energy Group.

Jim Petro, Attorney General of the State of Ohio, by Duane W. Luckey, Senior Deputy Attorney General, by Thomas W. McNamee and William Wright, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the staff of the Public Utilities Commission of Ohio.

Janine L. Migden-Ostrander, Ohio Consumers' Counsel, by Jeffrey L. Small, Assistant Consumers' Counsel, Office of Consumers' Counsel, 10 West Broad Street, Columbus, Ohio 43215, on behalf of the residential consumers of Columbus Southern Power Company and Ohio Power Company.

#### OPINION:

##### I. History Of This Proceeding

On November 14, 1996, in Case Nos. 96-999-EL-AEC and 96-1000-EL-PEB, the Commission approved a joint petition by Ohio Power Company (Ohio Power) and South Central Power Company (South Central) to reallocate their service territories such that, effective December 31, 1999, all of the facilities of Ormet Primary Aluminum Corporation and its affiliates in Hannibal, Ohio (Hannibal Facilities) were reallocated to South Central's service territory. In the Finding and Order, the Commission also approved an Interim Agreement and a Curtailment and Indemnity Agreement between Ohio Power and Ormet Primary Aluminum Corporation.

In addition, Ormet Primary Aluminum Corporation and South Central executed an "Agreement for Electric Service," (Service Agreement) which provided for the sale of a maximum of 20 MW of electric power and energy to Ormet Primary Aluminum Corporation from South Central (Joint Ex. 1 at 5). Under this arrangement, Ormet would obtain the remaining electricity to serve the Hannibal Facilities' load from the market (Joint Ex. 1 at 4). This agreement was amended effective January 1, 2004, with the execution of the "First Amendment to and Modification of Agreement for Electric Service" (First Amendment) in which South Central and Ormet Primary Aluminum Corporation agreed to terminate in total any obligation of Ormet to buy, and of South Central to sell to Ormet, electric power and energy (Joint Ex. 1 at 5-6).

Subsequent to the execution of the First Amendment, Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation (Ormet) filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court (Joint Ex. 1 at 6). On January 25, 2005, Ormet curtailed operations at the Hannibal Facilities. Operations at the facilities have not been restarted (Joint Ex. 1 at 7).

On August 25, 2005, Ormet filed a petition to transfer rights to furnish electric service and/or reallocate certified electric service territories, a complaint for inadequate service against South Central and a complaint for unjust, unreasonable and discriminatory proposed rates against Ohio Power. This pleading requests that the Commission: transfer South Central's rights to serve Ormet's facilities to Ohio Power or reallocate the service territories of Ohio Power and South Central such that all of Ormet's facilities are part of Ohio Power's certified territory; and order Ohio Power to serve Ormet, upon such transfer or reallocation, at rates in accordance with Ohio Power's unbundled standard tariff GS-4 rate schedule.<sup>1</sup>

Ohio Power and South Central both filed answers to the complaint on September 20, 2005. In addition, South Central and Ohio Power filed motions to dismiss the complaint on September 20, 2005. The motions to dismiss were denied by the attorney examiner on October 27, 2005.

Section 4933.83(B), Revised Code, provides for a two-step process under which: (1) the Commission must find that an electric supplier has failed to provide, or propose to provide, physically adequate service and order that such failure be corrected within a reasonable time; and (2) if such electric supplier fails to comply with the Commission's order, the Commission may authorize another supplier to serve and shall amend the certified territories of the respective electric suppliers. Therefore, on February 14, 2006, the Commission held an evidentiary hearing to determine whether South Central provided, or proposed to provide, physically adequate service to Ormet.

On June 14, 2006, the Commission issued its Opinion and Order. In the Opinion and Order, the Commission determined that South Central did not provide, or propose to provide, physically adequate service and the Commission ordered further hearings in this proceeding regarding whether the failure to propose to provide physically adequate service had been corrected by South Central and whether the Commission should authorize another supplier to serve or should order such other remedy authorized by law.

On July 14, 2006, South Central and Ohio Power each filed applications for rehearing. On August 9, 2006, the Commission issued its Entry on Rehearing, denying the

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<sup>1</sup> On November 29, 2005, after the commencement of Case No. 05-1057-EL-CSS, Ormet filed motions to reopen Case Nos. 96-999-EL-AEC and 96-1000-EL-PEB and to transfer its facilities back to the certified territory of Ohio Power. The Commission denied Ormet's motions to reopen Case Nos. 96-999-EL-AEC and 96-1000-EL-PEB and to transfer its facilities back to the certified territory of Ohio Power in its June 14, 2006 Opinion and Order.

applications for rehearing filed by South Central and Ohio Power. On August 25, 2006, South Central filed an application for further rehearing, which was denied on September 13, 2006.

On October 5, 2006, the evidentiary hearing in this matter was held pursuant to the Commission's June 14, 2006, Opinion and Order. However, on October 20, 2006, Ohio Power, Columbus Southern Power Company (Columbus Southern Power), Ormet, South Central, Ohio Energy Group (OEG), United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW) and the Commission Staff filed a stipulation (Stipulation) to resolve all issues in this proceeding (Joint Ex. 2). The hearing continued on October 26, 2006, at which time Ohio Power and Columbus Southern Power presented a witness supporting the Stipulation. No party to this proceeding opposed the adoption of the Stipulation by the Commission.

## II. Summary of the Stipulation.

The Stipulation was intended by the signatory parties to resolve all outstanding issues in this proceeding. The Stipulation includes, *inter alia*, the following provisions:

- 1) The Stipulation should be considered as a joint petition, submitted by Ohio Power, Columbus Southern Power, and South Central pursuant to Section 4933.83, Revised Code, to reallocate the service territories of Ohio Power, Columbus Southern Power and South Central such that Ormet's Hannibal Facilities will be located in a joint Columbus Southern Power/Ohio Power service territory effective January 1, 2007. South Central Power shall have no obligation to provide electric service to the Hannibal Facilities, except that South Central Power shall retain its service obligation prior to, on and after January 1, 2007, with respect to three facilities enumerated in the Stipulation.
- 2) As part of the Stipulation, Ormet has entered into an electric services contract with Ohio Power and Columbus Southern Power. The contract will not be transferable by Ormet to any other party without the consent of Columbus Southern Power and Ohio Power (AEP Ohio).
- 3) Generation, transmission and distribution service will be supplied by AEP Ohio. Such services will meet Ormet's peak demand of approximately 520 MW at a 99 percent load factor. AEP Ohio's generation service will be supplied only for consumption at Ormet's Hannibal Facilities and will not be resold or transferred by Ormet.
- 4) Ormet shall not switch to service from a competitive retail electric service provider prior to January 1, 2009. Ormet cannot initiate any proceeding to require either Columbus Southern Power or Ohio Power, or both, to provide

generation service under any established rate schedule of either Columbus Southern Power or Ohio Power or at a rate lower than such scheduled without the express written consent of AEP Ohio.

- 5) For the period between January 1, 2007 and December 31, 2008, Ormet will pay \$43 per megawatt-hour for generation service. In addition, Ormet will pay tariff rates and all applicable riders to AEP Ohio for transmission and distribution service. Such tariff rates and riders will be equivalent to Ohio Power's Schedule GS-4 for one-half (50 percent) of Ormet's load and Columbus Southern Power's Schedule GS-4 for one-half (50 percent) of Ormet's load.
- 6) Ormet will provide AEP Ohio a deposit equivalent to 130 percent of the anticipated monthly billing for the Hannibal Facilities at full operation.
- 7) Ormet will prepay, by electronic funds transfer, its monthly bill for generation, transmission and distribution services by making payments three business days prior to the start of each month and prior to the 15<sup>th</sup> of each month in an amount equivalent to one-half (50 percent) of the anticipated monthly billing for that month for the Hannibal Facilities. Should Ormet fail to make payment within two business days of when it is due, Ormet agrees that AEP Ohio shall have the unilateral right to disconnect service to Ormet three days after providing written notice of disconnect to Ormet.
- 8) AEP Ohio will make a filing, prior to the start of 2007, which will set a market rate for generation service to Ormet's Hannibal Facilities for 2007. Further, AEP Ohio will make a filing prior to the start of 2008 which will set a market rate for generation service to Ormet's Hannibal Facilities for 2008. Such market rate should reflect all generation-related services and will be subject to the Commission's review.
- 9) For the purpose of compensating AEP Ohio for the differential between service at the market rate and the \$43 per megawatt-hour charge for generation service provided for under the Stipulation, AEP Ohio will be permitted to amortize to income, in the amount of such differential, without reducing rates, their Ohio Franchise Tax phase-out regulatory liability, totaling \$56,968,000.
- 10) In the event that the amortization of the Ohio Franchise Tax phase-out regulatory liability does not fully compensate AEP Ohio for the differential between service at the market rate and the \$43 per megawatt-hour charge for generation service provided for under the Stipulation, AEP Ohio will be

permitted to recover that differential under the "Additional 4%" provision of the current rate stabilization plan, Case No. 04-169-EL-UNC.

### III. Intervention.

The Stipulation provides that Columbus Southern Power be permitted to intervene in this proceeding. Under the terms of the Stipulation, the Hannibal Facilities would be located in a joint Columbus Southern Power/Ohio Power service territory and Columbus Southern Power will provide one half of the generation service to the Hannibal Facilities. Therefore, the Commission finds that Columbus Southern Power should be permitted to intervene in this proceeding.

Further, on October 26, 2006, the Ohio Consumers Counsel (OCC) filed a motion to intervene in the proceeding. No party to the proceeding opposed the motion to intervene. In the motion to intervene, OCC notes that a motion to intervene, even when submitted out of time, may be granted under "extraordinary circumstances." At the hearing, OCC stated that it does not oppose the Stipulation and that its interest in this proceeding lies in the implementation of the Stipulation in subsequent proceedings. Therefore, the Commission finds that OCC's intervention will not unduly delay proceedings or unjustly prejudice any existing party. OCC's motion to intervene should be granted.

### VI. Evaluation of the Stipulation.

Rule 4901-1-30, Ohio Administrative Code, authorizes parties to Commission proceedings to enter into stipulations. Although not binding on the Commission, the terms of such agreements are accorded substantial weight. See *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio State 3d 123, 125 (1992), citing *Akron v. Pub. Util. Comm.*, 55 Ohio St. 2d 155 (1978). This concept is particularly valid where the stipulation is supported or unopposed by the vast majority of parties in the proceeding in which it is offered.

The standard of review for considering the reasonableness of a stipulation has been discussed in a number of prior Commission proceedings. See, e.g., *Dominion Retail v. Dayton Power and Light*, Case Nos., 03-2405-EL-CSS et al., Opinion and Order (February 9, 2005); *Cincinnati Gas & Electric Co.*, Case No. 91-410-EL-AIR, Order on Remand (April 14, 1994); *Ohio Edison Co.*, Case Nos. 91-698-EL-FOR et al., Opinion and Order (December 30, 1993); *Cleveland Electric Illum. Co.*, Case No. 88-179-EL-AIR, Opinion and Order (January 31, 1989). The ultimate issue for our consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of a stipulation, the Commission has used the following criteria:

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

- (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 has endorsed the Commission's analysis using these criteria to resolve issues in a manner economical to ratepayers and public utilities. *Indus. Energy Consumers of Ohio Power Co. v. Pub. Util. Comm.*, 68 Ohio St. 3d 547 (1997)(quoting *Consumers' Counsel, supra*, at 126). The Court stated in that case that the Commission may place substantial weight on the terms of a stipulation, even though the stipulation does not bind the Commission.

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

In considering whether there was serious bargaining among capable and knowledgeable parties, the Commission evaluates the level of negotiations that appear to have occurred and takes notice of the experience and sophistication of the negotiating parties. In this case, it is clear from the record that all parties, at the time the Stipulation was filed, participated in negotiations. The signatory parties routinely participate in complex cases before the Commission and are represented by counsel who practice before the Commission on a regular basis. Moreover, the signatory parties represent a diversity of interests including the utility and industrial consumers as well as the Commission Staff (Joint Ex. 2 at 2). Therefore, the Commission finds that the first prong of the test is met by the Stipulation.

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

The Stipulation fully resolves the complex legal issues raised by Ormet in its petition filed on August 25, 2005. Further, the record in this case demonstrates that their Hannibal Facilities, when fully operating, employ approximately 1,000 people with total annual wages of \$40,000,000 and health care benefits costing over \$10,000,000 per year. In addition, Ormet pays approximately \$1,000,000 annually in taxes to Monroe County, Ohio and its school district (Joint Ex. 2 at 4). These extensive economic benefits can only be obtained through the resumption of operations at the Hannibal Facilities, and the Stipulation will facilitate the resumption of those operations. Therefore, upon careful consideration of the record in this proceeding, the Commission finds that the stipulation, as a package, benefits ratepayers and the public interest.

Further, based upon the record in this proceeding, the Commission finds that the adoption of the Stipulation will promote the purposes of Sections 4933.81 to 4933.90, Revised Code, and will further promote the provision of adequate service to all territories and electric load centers affected by the reallocation.

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

Finally, the Commission finds that the Stipulation does not violate any important regulatory principle or practice. Section 4933.83(E), Revised Code, authorizes any two or more electric suppliers to jointly petition the Commission for the reallocation of their own service territories and electric load centers and the designation of which portions of such territories and electric load centers are to be served by each of the electric suppliers. Ohio Power, Columbus Southern Power and South Central Power are "electric suppliers" as defined by Section 4933.81(A), Revised Code, and the Stipulation filed in this proceeding should be considered a joint petition under Section 4933.83(E), Revised Code.

At the October 26, 2006, hearing, AEP Ohio's witness Baker testified that the Stipulation does not violate any important regulatory principle or practice. Further, no party to this proceeding has objected to any element of the Stipulation on the basis that it violates an important regulatory principle or practice.

The Commission notes one issue regarding the implementation of the Stipulation which was raised at the hearing October 26, 2006, OCC inquired whether AEP Ohio would be making the filing for the generation market rate for the Hannibal Facilities for 2007 and 2008 in this docket or in a new docket. In order to resolve this question, the Commission directs AEP Ohio to make such filings in a new docket rather than in this proceeding.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) On November 14, 1996, in Case No. 96-999-EL-AEC and 96-1000-EL-PEB, the Commission approved a joint petition by Ohio Power and South Central to reallocate their service territories such that, effective December 31, 1999, all of the facilities of Ormet Primary Aluminum Corporation and its affiliates were located in South Central's service territory.
- (2) On August 25, 2005, Ormet filed a petition to transfer rights to furnish electric service and/or reallocate certified electric service territories, a complaint for inadequate service against South Central and a complaint for unjust, unreasonable and discriminatory proposed rates against Ohio Power. This pleading requests that the Commission: transfer South Central's rights to serve Ormet's Hannibal Facilities to Ohio Power or reallocate the service territories of



Ohio Power and South Central such that all of Ormet's Hannibal Facilities are part of Ohio Power's certified territory; and order Ohio Power to serve Ormet, upon such transfer or reallocation, at rates in accordance with Ohio Power's unbundled standard tariff GS-4 rate schedule.

- (3) Ohio Power and South Central both filed answers to the complaint on September 20, 2005.
- (4) Hearings were held in this proceeding on February 14, 2006, October 5, 2006, and October 26, 2006.
- (5) On October 20, 2006, Ohio Power, Columbus Southern Power, Ormet, South Central, OEG, USW and the Commission Staff filed a stipulation to resolve all issues in this proceeding
- (6) The ultimate issue for the Commission's consideration is whether the agreement, which embodies considerable time and effort by the signatory parties, is reasonable and should be adopted. In considering the reasonableness of the stipulation, the Commission has used the following criteria:
  - (a) Is the settlement a product of serious bargaining among capable, knowledgeable parties?
  - (b) Does the settlement, as a package, benefit ratepayers and the public interest?
  - (c) Does the settlement package violate any important regulatory principle or practice?
- (7) The Stipulation was the product of serious bargaining among capable, knowledgeable parties representing a diversity of interests including the utilities and industrial and commercial consumers as well as the Commission Staff.
- (8) The Stipulation, as a package, benefits ratepayers and the public interest. The Stipulation fully resolves the significant legal issues raised by Ormet's petition filed on August 25, 2005. Further, resumption of operations at the Hannibal Facilities will result in extensive economic benefits to this state, and the Stipulation will facilitate the resumption of those operations.
- (9) The Stipulation does not violate any important regulatory principles or practices.

- (10) Section 4933.83(E), Revised Code authorizes any two or more electric suppliers to jointly petition the Commission for the reallocation of their own service territories and electric load centers and the designation of which portions of such territories and electric load centers are to be served by each of the electric suppliers.
- (11) Ohio Power, Columbus Southern Power and South Central Power are "electric suppliers" as defined by Section 4933.81(A), Revised Code, and the Stipulation filed in this proceeding should be considered a joint petition under Section 4933.83(E), Revised Code.
- (12) Adoption of the Stipulation will promote the purposes of Sections 4933.81 to 4933.90, Revised Code, and will further promote the provision of adequate service to all territories and electric load centers affected by the reallocation.
- (13) The Stipulation submitted by the parties is reasonable and, as indicated herein, shall be adopted by the Commission.
- (14) By adopting this Stipulation, the Commission approves the electric services agreement entered into between AEP Ohio and Ormet.

ORDER:

It is, therefore,

ORDERED, That intervention by Columbus Southern Power and OCC be granted. It is, further,

ORDERED, That the Stipulation presented in these proceedings be adopted. It is, further,

ORDERED, That the request of Ohio Power, Columbus Southern Power and South Central Power to reallocate their service territories, effective January 1, 2007, be granted. It is, further,

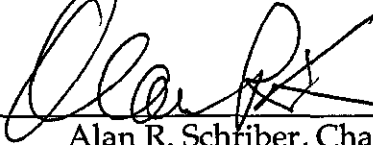
ORDERED, That Columbus Southern Power and Ohio Power provide, within 14 days, two copies of the approved revised quadrangle maps to our Docketing Division to be date stamped and placed in the Commission's map filed. It is, further,

ORDERED, That the electric services agreement entered into between AEP Ohio and Ormet be approved. An executed copy of the agreement shall be filed in this docket within 15 days after execution. It is, further,


ORDERED, That the Commission's approval of this contract does not constitute state action for purposes of antitrust laws. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

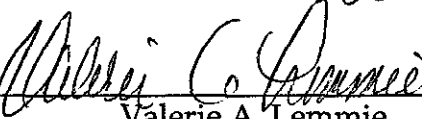
THE PUBLIC UTILITIES COMMISSION OF OHIO



Alan R. Schiber, Chairman



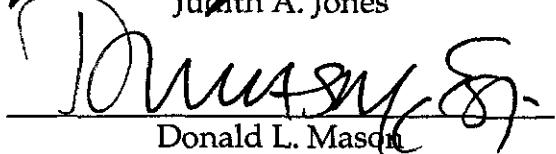
Ronda Hartman Fergus



Valerie A. Lemmie



Judith A. Jones




Donald L. Mason

GAP:ct

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Renee J. Jenkins  
Secretary