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Public Utilities Commission of Ohio  
Docketing Division  
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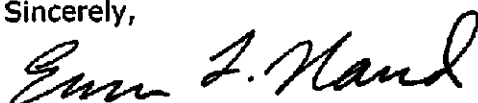
Re: Enclosed Documents For Filing In Case Nos. 07-1132-EL-UNC et al.

Dear Sir or Madam:

Enclosed for filing in Case Nos. 07-1132-EL-UNC, 07-1191-EL-UNC, 07-1278-EL-UNC and 07-1156-EL-UNC, please find an original and 15 copies of Memorandum in Reply of Ormet Primary Aluminum Corporation.

Also enclosed are two extra copies of each document to be date-stamped and returned to me in the enclosed, self-addressed Federal Express envelope. Thank you for your assistance in this matter, if you have any questions please contact me at the number below.

Sincerely,



Emma F. Hand

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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Columbus	)	
Southern Power Company and Ohio Power	)	
Company for Approval of an Additional	)	Case No. 07-1132-EL-UNC
Generation Service Rate Increase Pursuant to	)	Case No. 07-1191-EL-UNC
Their Post-Market Development Period Rate	)	Case No. 07-1278-EL-UNC
Stabilization Plan.	)	
	)	
In the Matter of the Application of Columbus	)	
Southern Power Company and Ohio Power	)	
Company to Update Each Company's	)	Case No. 07-1156-EL-UNC
Transmission Cost Recovery Rider.	)	

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MEMORANDUM IN REPLY OF  
ORMET PRIMARY ALUMINUM CORPORATION

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Pursuant to Rule 4901-1-12, Ohio Administrative Code, Ormet Primary Aluminum Corporation ("Ormet") respectfully submits this Memorandum in Reply to the memoranda contra to Ormet's Motion to Intervene filed by Columbus Southern Power Company and Ohio Power Company (collectively "AEP-Ohio") and the Industrial Energy Users-Ohio ("IEU-Ohio") in this proceeding. Contrary to the assertions of those memoranda, Ormet's intervention and participation in this proceeding is merited and should be allowed. Although Ormet's motion to intervene was not filed by the original deadline set by the Public Utilities Commission of Ohio ("Commission") in this case – because Ormet was unaware of the harm it would suffer – the circumstances are extraordinary and warrant allowing Ormet to intervene in the proceeding pursuant to Ohio Administrative Code 4901-1-11 to remedy the harm it has incurred.

Neither AEP-Ohio nor IEU-Ohio have demonstrated that they will be unduly prejudiced by Ormet's request to intervene for purposes of the limited relief requested in Ormet's application of rehearing, yet Ormet has demonstrated that it will be harmed greatly if relief is not granted. As set forth in the memorandum in support of Ormet's motion to intervene, Ormet meets all of the criteria for a late intervention: (1) Ormet has good cause for not intervening by

the Commission's deadline; (2) Ormet has a significant interest in the proceeding; (3) Ormet's legal position in this proceeding warrants intervention; (4) Ormet's participation will not unduly delay or prolong the proceeding or unjust or unreasonably prejudice another party; (5) Ormet's participation will contribute to the full development of the proceeding and the equitable resolution of the issues; and (6) Ormet's interest is not adequately represented by other parties to the case. Furthermore, if, despite the arguments offered below, the Commission should find that Ormet's pleadings are procedurally insufficient, but desires nonetheless to hear Ormet's case, the Commission is empowered under General Provision 4901-1-38(B) to waive any requirement, standard or rule set forth in its regulations, or prescribe different practices or procedures to be followed in this case.

1. Ormet has Shown Good Cause for its Motion to Intervene

IEU-Ohio alleges that Ormet does not allege or describe any extraordinary circumstance supporting its intervention request. IEU-Ohio is wrong: the "extraordinary" circumstance existing in this case, articulated in Ormet's Memorandum in Support of its Intervention at pages 8-9, is that Ormet could not have anticipated that AEP-Ohio would enter into a settlement in this proceeding that would impose \$4 million of costs on Ormet in a manner that fully ignores and is contrary to the 2006 Stipulation approved by this Commission in Case No. 05-1057-EL-CSS ("2006 Stipulation").<sup>1</sup>

Under Ormet's 2006 Stipulation with AEP-Ohio, it is clearly stated that "losses to the metering point," which, contrary to AEP-Ohio's assertion, clearly include all transmission losses including the PJM-related losses, are to be accounted for in the fixed price of generation to be paid by Ormet and the market price to be filed annually by AEP-Ohio. Thus, until the

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<sup>1</sup> Ormet Primary Aluminum Corp. v. South Central Power Co., Commission Case No. 05-1057-EL-CSS, Supplemental Opinion and Order Granting Intervention at p. 10 (issued Nov. 8, 2006).

Commission's January 30, 2008 Order in this proceeding was brought to Ormet's attention and Ormet received the bill from AEP-Ohio at the end of January projecting that these costs would be included in the February bill, Ormet could not have anticipated that it would not be shielded from these costs by its 2006 Stipulation with AEP-Ohio.

IEU-Ohio's assertion that the January 30 Order does not change Ormet's obligations under its 2006 Stipulation with AEP-Ohio is without merit. The 2006 Stipulation clearly stated that all costs of transmission losses were to be included in the market rate, and to the extent any losses were not recovered from Ormet through its fixed generation rate, those losses were to be recovered through AEP-Ohio's Ohio Franchise Tax phase-out regulatory liability<sup>2</sup> – this is the arrangement that was approved by this Commission in the November 8, 2006 Order. As a result of the 2008 Stipulation and Recommendation approved in the January 30, 2008 Order ("2008 Stipulation"), Ormet is now being required to pay \$4 million in costs under the Transmission Cost Recovery Rider ("TCRR") that under its 2006 Stipulation with AEP-Ohio were to be recovered out of Ormet's fixed generation cost and Ohio Franchise Tax phase-out regulatory liability. Even had Ormet received copies of the filings in this proceeding early enough to intervene in a timely manner, it would have had no reason to believe that it would not be shielded under its 2006 Stipulation from the shifting of costs accounted for under its 2006 Stipulation onto Ormet. Thus, because Ormet could not have known that this proceeding would alter its 2006 Stipulation with AEP-Ohio in this manner, Ormet had good cause for its failure to intervene by the deadline set by this Commission, and the circumstances in this case are extraordinary enough to warrant permitting Ormet to intervene at this juncture.

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<sup>2</sup> 2006 Stipulation at para. 12.

2. The Nature of Ormet's Interest Warrants Intervention At This Time

AEP-Ohio acknowledges that Ormet has an interest in the TCRR at page 5 of its memorandum contra Ormet's motion to intervene and application for rehearing. AEP-Ohio subsequently argues, however, that Ormet's interest does not warrant late intervention because Ormet failed to file a timely intervention. This assertion is based upon circular logic and should be disregarded. That Ormet failed to receive timely notice that its interests were in jeopardy in no way indicates that such interests are insubstantial. Indeed, Ormet has demonstrated that it has a \$4 million interest in this proceeding. If the Commission were to apply AEP-Ohio's logic, and deem that the absence of a party from the initial proceeding indicated a lack of interest in the proceeding, then no late intervention would be granted, because none could meet the requirement of having an interest in the proceeding.

3. Ormet's Legal Position Warrants Intervention at This Time

AEP-Ohio's argument that Ormet's legal position does not warrant intervention at this time also lacks merit. Ormet has demonstrated that the settlement violates the criteria for approval of such settlements. As applied to Ormet, the 2008 Stipulation was not the result of serious bargaining by knowledgeable and capable parties, is not in the public interest, and violates regulatory principles and good public policy.

While the parties at the table may have been knowledgeable and capable and may have conducted serious bargaining as pertained to their interests, the result of that bargaining was to impose \$4 million of costs improperly onto an absent party, Ormet, in violation of Ormet's 2006 Stipulation with AEP-Ohio. This imposition of that level of cost on a non-party, particularly where there was no equivalent countervailing benefit to the non-party, establishes that AEP-Ohio and IEU-Ohio were not engaged in serious bargaining through knowledgeable and capable representatives vis-à-vis Ormet.

Additionally, allowing parties to a case to settle their differences in a manner that shifts \$4 million of costs onto a non-party in violation of a Stipulation between that non-party and a participant in the negotiations is not in the public interest. Moreover, AEP-Ohio is incorrect to suggest that its market price filing in Case No. 07-1317-EL-UNC ("2008 Market Price Filing") would need to be amended upward to reflect the credit Ormet seeks to offset the harm imposed on Ormet by the 2008 Stipulation, thereby increasing costs to AEP-Ohio's other customers. Contrary to its assertion on page 13 of its memorandum contra, AEP-Ohio has already reflected the costs of the marginal losses at issue into its 2008 Market Price Filing; therefore any additional recovery from Ormet constitutes double recovery. Any suggestion, such as that made by IEU-Ohio, that the marginal transmission losses should be recovered from Ormet under the TCRR and not through the market price, is inconsistent with the 2006 Stipulation and constitutes a collateral attack upon the Commission's November 8, 2006 Order in Case No. 05-1057 approving that Stipulation.

In its 2008 Market Price Filing, AEP-Ohio calculates the market price by taking the sum of three factors. One of those factors is based on prices equal to the hourly weighted average of the hourly locational marginal prices ("LMP") posted by PJM Interconnection, LLC ("PJM") for the AEP/Dayton Hub. One of the costs summed into the LMP price of that hub, is the AEP/Dayton Marginal Loss Price, the same type of marginal losses being recovered through the TCRR under the 2008 Stipulation.<sup>3</sup> AEP-Ohio goes on to adjust the AEP/Dayton Hub LMP to the AEP Zone LMP (which includes marginal losses) by taking into account the historical

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<sup>3</sup> In its 2008 Market Price Filing, AEP-Ohio calculates the market price taking the sum of the Standard Base-Load Energy Product ("Energy Price"), the Load Factor Cost and the Capacity Cost. The Energy Price is based on the Intercontinental Exchange ("ICE") AEP-Dayton On-Peak and Off-Peak Prices for 2008. According to the ICE website, these prices are based on the hourly weighted average of the hourly LMP prices posted by PJM for the AEP/Dayton Hub. See, <https://www.theice.com/productguide/lookupProduct.do>. The PJM AEP/Dayton Hub LMP is equal to the PJM System Price (PJM) plus the AEP/Dayton congestion Price, plus AEP/Dayton Marginal Loss Price. AEP-Ohio goes on to adjust the AEP/Dayton Hub LMP price to the AEP Zone LMP (which also includes marginal losses) by taking into account the historical difference between these two LMPs.

difference between these two LMPs.

Therefore, the market rate AEP-Ohio has proposed in Case No. 07-1317-EL-UNC does include marginal transmission losses, as required under its 2006 Stipulation with Ormet. Accordingly, Ormet's proposed solution is consistent with the public interest because it prevents double-recovery of costs by AEP-Ohio (and would not have an impact upon AEP-Ohio's other customers). In contrast, the 2008 Stipulation is not in the public interest and violates public policy because it permits double-recovery by AEP-Ohio. Thus AEP-Ohio's argument that Ormet has not raised legal points regarding the 2008 Stipulation that warrant permitting its intervention in this case at this late date is incorrect, because Ormet has demonstrated that the 2008 Stipulation results in double-recovery by violating the 2006 Stipulation.

Similarly, IEU-Ohio's argument that the Commission has no evidentiary basis upon which to base the relief requested by Ormet is misplaced. The Commission is not prohibited from taking into evidence the contract and affidavits submitted by Ormet because (1) the contract is already part of the Commission's record in Case No. 05-1057-EL-CSS; and (2) Ormet could not have entered the affidavits at the hearing because it was not a party to the case at that time, and only parties to a case may enter evidence at hearing. With regard to the 2006 Stipulation, that document is already in the Commission's record in Case No. 05-1057-EL-CSS as a Commission-approved Stipulation and Recommendation; Ormet therefore could have simply cited to the document to demonstrate its point. Ormet attached the full contract merely as a convenience to the Commission and the parties.

With regard to the affidavits, non-parties may not enter evidence at hearing, thus they could not reasonably have been entered into evidence at that time. The statute prohibiting evidence from being taken on rehearing that could have reasonably been offered at the original hearing is meant to prevent parties from having two bites at the apple. However, unlike the

parties to the case, Ormet has not yet had its first bite at the apple. Because the rules permit persons not having entered an appearance in the case to make an application for rehearing under certain circumstances,<sup>4</sup> it follows that late intervenors also must be permitted to offer evidence on rehearing, to the extent necessary to enable the Commission to consider the interests not taken into account in the original proceeding.

4. Ormet's Intervention Will Not Unduly Prolong or Delay This Proceeding or Unjustly Prejudice Existing Parties

AEP-Ohio's assertion that Ormet's intervention and application for rehearing will unduly prolong and delay this proceeding and unjustly prejudice the existing parties is incorrect. Although AEP-Ohio complains that because it did not anticipate a request for rehearing it has moved on to other matters and has released its witnesses to take on other responsibilities, rehearing, including requests for rehearing by parties not making a prior appearance in the case, is explicitly provided for in the Ohio Revised Code,<sup>5</sup> and thus such an intervention and application for rehearing, though rare, is a possibility in any case before the Commission.

Moreover, Ormet has done its best to support judicial economy and prevent undue delay of the proceedings. Despite not learning of the impact of the January 30 Order on its interests until late in the proceeding, Ormet did meet the deadline for applications for rehearing and included within its application for rehearing both its explicit, formal request for leave to make such an application<sup>6</sup> and the affidavits it intended to offer to support in support of its legal argument. In this way, Ormet has sought to enable the Commission to make all necessary

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<sup>4</sup> Ohio Rev. Code § 4903.10.

<sup>5</sup> *Id.*

<sup>6</sup> Ormet notes that the language from In the Matter of the Commission's Investigation into the Disconnection of Local Exchange Service for Failure to Pay Message Toll Charges, Case No. 85-1930-TO-COI, quoted by AEP-Ohio at page 8 of its memorandum contra to support the proposition that leave to make rehearing must be first had by parties not previously appearing, makes it clear that in that case, no formal leave to file an application was sought from the Commission. Ormet did formally seek such leave from the Commission in its Memorandum in Support at pp. 9-11.



decisions as expeditiously as possible with as little delay to the resolution of the case as possible. Finally, Ormet has filed a very narrow request for rehearing addressing only the harm to Ormet; Ormet is not seeking to overturn the settlement, but rather is seeking a single, discrete solution to eliminate AEP-Ohio's double recovery under the 2008 Stipulation, in the form of a credit to Ormet, that would have no impact upon the settling parties.

5. Ormet's Participation in the Proceeding Would Assist in Fully Developing the Issues

AEP-Ohio, which apparently failed to take its 2006 Stipulation with Ormet into account in the proceedings, now seeks to prevent Ormet from asserting its interests, arguing that it is simply too late. The Commission should not countenance such an outcome. When important issues have not been brought to the Commission's attention in a proceeding, the interests of justice are served by allowing those issues to be introduced at whatever point they come to the Commission's attention. Arguably, that is precisely why the Commission's rules contemplate that a non-party may file a request for rehearing, as Ormet has done in this case. Ormet did not merely wait on the sidelines to see the outcome of the issues – Ormet had no effective notice that a resolution that would harm its interests was under discussion. Had Ormet been made aware of the implications of the proceeding at an earlier date, it would have intervened in time to have a seat at the bargaining table.

6. Ormet's Interest was Not Adequately Represented in the Proceeding

AEP-Ohio's argument that Ormet should not be permitted to argue at this time that its interests were not properly represented in the case is flawed – Ormet's interests could not have been represented by any other party to the case. AEP-Ohio does not argue, in its memorandum contra at page 7, that Ormet's interest was adequately represented. Rather, AEP-Ohio appears to be arguing that Ormet must have thought its interests were protected by the industrial intervenors in the case, or else it would have intervened in a timely manner. Therefore, AEP-Ohio argues, it

should not be permitted to intervene now.<sup>7</sup> Again, this argument is circular in nature – it assumes that if a party is intervening late, it must previously have concluded that its interests were adequately protected in the docket, and thus it should not be allowed to intervene late. To adopt this position would preclude all untimely interventions, regardless of the merits. Consequently, AEP-Ohio's position must be rejected.

Moreover, AEP-Ohio's argument is factually incorrect. Ormet never made a decision not to intervene based upon the participation of other industrial customer groups. Ormet simply lacked notice of the filing. If Ormet had had notice, it would not have had reason to believe its interests would not be shielded by the 2006 Stipulation.

Furthermore, Ormet's interests could not have been adequately represented by other GS-4 tariff customers in this proceeding, as is alleged by AEP-Ohio at page 10 of their memorandum contra. Other GS-4 customers did not have a Commission-approved Stipulation with AEP-Ohio that required all generation costs, including losses, be recovered through a fixed generation charge. Although AEP-Ohio claims otherwise, and asserts that Ormet is no different than any other customer in this regard, the marginal loss costs being recovered in the 2008 Stipulation are, by definition, to be included in the "losses to the metering point" that are included in the Market Rate under the 2006 Stipulation. Moreover, even if AEP-Ohio were correct that marginal loss costs are not properly included in "losses to the metering point," the 2006 Stipulation provides that the market rate is to reflect all generation-related services, including losses to the metering point. AEP-Ohio's testimony in this case makes it very clear that the marginal loss costs are generation costs. AEP Witness David M. Roush stated that "Under the Marginal Loss method,

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<sup>7</sup> AEP-Ohio's memorandum contra at p. 7.

the effect of losses is factored into the energy price (i.e. the Locational Marginal Price (LMP)).”<sup>8</sup> Furthermore, AEP made it clear through its 2007 Market Rate filing that transmission losses is one of the components that makes up the Market Rate, and that after May 31, 2006 transmission losses would be included in the LMP.<sup>9</sup> In its 2008 Market Rate filing, the transmission loss component is not separated out because the Energy Price (LMP), which is a component of the Market Price, includes the cost of transmission marginal losses.

### **Conclusion**

Ormet has amply demonstrated that the criteria for late intervention and rehearing under the Commission’s rules are met in this instance.

WHEREFORE, Ormet respectfully requests that the Commission grant its motion to intervene and allow it to participate in this proceeding.

Respectfully submitted,



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Dated: March 17, 2008

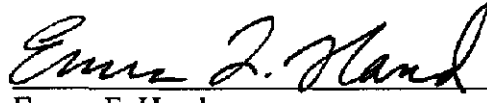
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<sup>8</sup> In the Matter of the Application of Columbus Southern Power Co. and Ohio Power Co. for Approval of an Additional Generation Serv. Rate Increase Pursuant to Their Post-Market Dev. Period Rate Stabilization Plans, Direct Testimony of David M. Roush On Behalf of Columbus Southern Power Company and Ohio Power Company at p. 6, Commission Case No., 07-1132-EL-UNC, (filed Oct. 24, 2007).

<sup>9</sup> Columbus Southern Power Co.’s and Ohio Power Co.’s Application to Set the 2007 Generation Market Price for Ormet’s Hannibal Facilities, Applicants’ Filing, Commission Case No. 06-150-EL-UNC (filed Dec. 26, 2006).

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum In Reply of Ormet Primary Aluminum Corporation was served by U.S. Mail and electronic mail upon counsel identified below for all parties of record this 17<sup>th</sup> day of March, 2008.

  
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