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FILE

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application For	)	
Establishment of a Reasonable Arrangement	)	**Case No. 09-516-EL-AEC**
Between Eramet Marietta, Inc. and	)	
Columbus Southern Power Company	)	

COLUMBUS SOUTHERN POWER COMPANY'S POST-HEARING BRIEF

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INTRODUCTION

On June 19, 2009, Eramet Marietta, Inc. (Eramet) filed an application in this proceeding pursuant to §4905.31, Ohio Rev. Code.[1] The application requested that the Commission "enable" a reasonable arrangement between Eramet and Columbus Southern Power Company (CSP). In particular, Eramet characterized its application as complying with §4901:1-38-05, Ohio Admin. Code. (Application ¶5, p. 2).[2] Eramet's application also "urges the Commission to address [the appropriate treatment of the costs and

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[1] Eramet Ex. 1.

[2] §4901:1-38-05, Ohio Admin. Code, pertains to "unique arrangements." Unique arrangements have no particular standards to meet other than being reasonable, furthering the policies set out in §4928.02, Ohio Rev. Code, proposing terms and conditions not provided in the tariff of the electric utility which would be party to the unique arrangement and not violating §§4905.33 or 4905.35, Ohio Rev. Code. Despite Eramet's references to a unique arrangement, its testimony sponsored by Robert Flygar also addresses the standards for approval of a economic development arrangement under §4901:1-38-03, Ohio Admin. Code. (Eramet Ex. 3A, pp 10, 11). Eramet views its application presenting elements of economic retention/development and of a unique arrangement. (Tr. II, pp. 197-199).

benefits of its proposed arrangement] and the treatment of 'delta revenues'..." (*Id.*, ¶6, p.4).[3]

The Staff sponsored testimony of Robert Fortney to provide Staff's perspective of the application, including the issue of delta revenues. In that regard, Mr. Fortney referred to the Commission's recent order in Case No. 09-119-EL-AEC, the case concerning Ormet Primary Aluminum Corporation's application for a unique arrangement with CSP and Ohio Power Company -- AEP Ohio (the *Ormet Case*). (Staff Ex. 1, pp. 2-6). As Mr. Fortney noted, in the *Ormet Case* the Commission found that AEP Ohio would be Ormet's exclusive supplier and, that therefore there was no risk that Ormet would shop for competitive generation and then return to AEP Ohio's Provider of Last Resort (POLR) service during the term of the unique arrangement (*Id.* at 5).

Consequently, the Commission ordered that any POLR charges Ormet pays to AEP Ohio during the term of the unique arrangement "must be used to reduce AEP-Ohio's ratepayers' delta revenue obligations created by the arrangement." (*Id.*)[4]

In supplemental testimony sponsored by Mr. Fortney in support of a settlement agreement reached by Staff and Eramet, he referred to the *Ormet Case* and then noted:

> The contract contemplated for Eramet has differences from the contract contemplated in the Ormet case. Whether those differences are sufficient to warrant a different outcome than in the Ormet case is an issue the Commission needs to decide, and Staff has no opinion. (Staff Ex. 2, p. 8).

[3] §4901:1-38-01 (C), Ohio Admin. Code, defines "delta revenue" as "the deviation resulting from the difference in rate levels between the otherwise applicable rate schedule and the result of any reasonable arrangement approved by the commission." This definition is synonymous with the term "revenue foregone" used in §4905.31, Ohio Rev. Code.

[4] Applications for Rehearing filed by AEP Ohio, and by other intervenors in the *Ormet Case*, are pending before the Commission.

While many issues can be raised concerning the merits of Eramet's application – both pro and con – CSP's brief will focus primarily on the delta revenue issue, including the POLR-related issue from the *Ormet Case.*[5] It is CSP's position that the Eramet-proposed arrangement does not result in an exclusive supplier relationship with CSP and that such a relationship is unnecessary to provide the benefits Eramet seeks from its proposal. Even if the Commission were to conclude that an exclusive supplier relationship is inherent in the Eramet proposal, there are significant differences between the Ormet and Eramet arrangements which warrant a conclusion that a POLR revenue offset to CSP's delta revenue recovery would be inappropriate. Of course, CSP also believes that even if there were no differences between the two arrangements, a POLR revenue offset is unlawful. If the Commission approves a reasonable arrangement for Eramet it should permit CSP to collect its delta revenues associated with the arrangement, without any offset for POLR revenues or any other matter.

THE STIPULATION

On August 5, 2009, a Joint Stipulation and Recommendation (Stipulation) was submitted in this proceeding.[6] Eramet and the Commission's Staff were the only two parties endorsing the Stipulation. Notably, CSP, the other party to the requested reasonable arrangement, is not a party to the Stipulation. Neither of the other two intervenors (Ohio Energy Group and Office of Consumers' Counsel) supported the Stipulation.

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[5] CSP also will address the PJM Demand Response Program issue raised in Eramet's testimony, and Eramet's indication of willingness to consider committing its customer-sited capabilities to CSP for use by CSP in meeting its energy efficiency requirements.

[6] Joint Exhibit 1.

The Stipulation states that the "term of the arrangement shall be ten (10) years... provided that at any point during such term, Eramet shall be entitled to seek to reopen and modify the rates and conditions of such arrangement in conjunction with its effort to secure corporate approvals [from Eramet's corporate parent] required to make a total capital investment of approximately $100,000,000...." (Stipulation, IV.B, p. 4 -- the "reopen and modify" provision).

The Stipulation also sets out in the Pricing provision a series of discounted rates Eramet would pay instead of CSP's otherwise effective tariff rates, including all applicable riders. (*Id.* IV.D, pp. 5-8). In the Pricing provision of the Stipulation it again is expressly provided that:

> Eramet shall have the right to, without prejudice, propose for the Commission's consideration and potential approval such modifications to the reasonable arrangement as Eramet may judge are reasonably necessary to secure corporate approvals associated with the design, construction and operation of a new electric submerged arc furnace with support and logistics systems (raw material and liquid metal handling, casting system, and finished goods handling systems) that are capable of producing manganese alloys at Eramet's Marietta Facility (estimated capital expenditure of $100 million). Such reasonable arrangement modifications may include, *but are not limited to,* increasing the percentage differential between Eramet's Base Usage price and the price established by the otherwise applicable tariff, changes to the Base Usage quantity, changes to the remaining term of the reasonable arrangement, annual adjustments to the percentage differential between the Eramet Base Usage price and the price established by the otherwise applicable tariff and such other modifications as Eramet may judge are reasonably necessary to secure corporate approvals to invest the capital required [for the $100 million project]. (*Id.* pp. 7, 8; emphasis added)

In addition to the future $100 million investment referred to in the Term and Pricing provisions of the Stipulation, the Stipulation commits Eramet to make two separate investments of $20 million each -- one by December 31, 2011 and the other by

December 31, 2014. (*Id.* IV.E1, p.8). According to Eramet, these initial investments, along with the other provisions of the proposed arrangement "plants the seed for the future," and "sets the stage for our ability to pursue the hundred million dollars into the future." (Tr. II, p. 177, 178).[7]

Besides Eramet's ability under the Term and Pricing provisions of the Stipulation to request modifications of the reasonable arrangement, the Stipulation also recognizes that:

> the Commission has and shall have the ability to, at any time and after notice and an opportunity to be heard, consider and make modifications to Eramet's reasonable arrangement in the event that the Commission determines that Eramet has not satisfied its commitments in Sections IV.E1 [the two $20 million capital investments] and IV.E.2 [regarding minimum employment of 200 people] or made reasonable progress with regard to the effort described in Section IV.B to secure corporate approvals to make a total capital investment of approximately $100,000,000 and that modifications are thereby necessary. (Stipulation, IV.E 4).

In addition to this authority, the Stipulation also states that in the exercise of the Commission's continuing jurisdiction,

> "the Commission may, for good cause shown, amend, modify, or terminate the arrangement or schedule if Eramet's performance relative to such commitments is not substantially aligned with such commitments." (*Id.* IV.G, p. 10).

While this authority is conditioned on certain Commission determinations, §4905.31, Ohio Rev. Code, gives the Commission much broader authority over the reasonable arrangement sought by Eramet.

> Every such schedule or reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.

[7] Eramet's counsel has indicated that these quotes from the confidential portion of the transcript can be included in this publicly filed brief.

The Stipulation presented to the Commission does not address the delta revenue issue which Eramet's application had urged the Commission to address. That issue entails CSP's full recovery of delta revenues, and the related issue of whether CSP should be required to offset its recovery of delta revenues by some amount related to its POLR charge recoverable from Eramet.

In the absence of the delta revenues/POLR charge issue being addressed in the Stipulation, CSP chose not to support the Stipulation. This is not to say, however, that CSP does not support the type of economic development being proposed by Eramet as its basis for a long-term discounted rate. CSP's witness, Mr. Baker, testified regarding CSP's commitment, as part of AEP Ohio, to economic development.

> AEP Ohio is committed to economic development and has *continuously demonstrated this commitment in the communities* we serve. AEP Ohio has dedicated staff promoting our service territory in Ohio to prospective new businesses, both commercial and industrial, with the goal of attracting new jobs, investment and tax base for the state of Ohio. AEP Ohio collaboratively works with existing customers to provide adequate electrical infrastructure in an effort to retain existing jobs and investment. In September 2008, AEP (including AEP Ohio) was named in the top 10 list of utilities in economic development by Site Selection magazine (a publication of corporate real estate strategy area economic development). (CSP Ex. 1, pp. 2, 3).

THE STIPULATION DOES NOT, AND SHOULD NOT PROVIDE FOR AN EXCLUSIVE SUPPLIER RELATIONSHIP

Tied in with the question of a POLR charge offset to recovery of delta revenues is the question of whether the reasonable arrangement proposed by the Stipulation creates an exclusive supplier relationship between CSP and Eramet for the 10-year term of the contract.

In this regard, Staff's witness, Mr. Fortney, testified in support of the Stipulation. He testified that Staff "has no opinion on whether this is a sole-source agreement or not in the case of Eramet." (Tr. III, pp. 442, 443). He did note, however, that:

> One of the differences in the Ormet agreement from the Eramet agreement is the Ormet agreement filed by Ormet specified that it was a sole-source contract. I don't believe that either in the original application or in the stipulation the word "sole-source" or "exclusive" is used, although Eramet has, I believe, indicated that they intend not to shop. (*Id.* at 442).

Mr. Fortney added that while the provision of the Stipulation which would obligate CSP to supply Eramet's full requirements and would obligate Eramet to purchase its full requirements from CSP might suggest an exclusive supplier relationship, the reopen and modify language in the Term provision contradicts the existence of an exclusive supplier arrangement. (*Id.* at 444).

Mr. Fortney agreed that the "reopen and modification" language in the Stipulation's Term provision, which could lead to termination of the arrangement and Eramet receiving electricity from a source other than CSP, was linked to efforts to secure approval from Eramet's corporate parent for the future $100 million investment. (Tr. III, p. 445). However, the arrangement, including the rates and the initial two $20 million investments represents the seeds which set the stage for the later investment. Therefore, those rates and initial investments are themselves directly linked to the efforts to secure the corporate approvals for the $100 million investment. Consequently, the "reopen and modify" language can become effective early in the 10-year term of the proposed arrangement. Moreover, the other provisions in the Stipulation and in §4905.31, Ohio Rev. Code, which authorize Eramet to seek changes to the arrangement and authorize the Commission to order changes to the arrangement, support Mr. Fortney's suggestion that this does not appear to be an "exclusive supplier" arrangement. That position is further supported by Mr. Fortney's testimony that CSP would not need to be Eramet's exclusive supplier in order for the mechanics of the arrangement to work. (*Id.* at 518).

CSP does not believe that it is appropriate to permit, let alone encourage a proliferation of arrangements which are based on exclusive supplier relationships. Instead, "customer choice" should be honored in a manner consistent with the policies set out by Ohio's General Assembly. As Mr. Baker testified:

> "an exclusive supplier" provision is contrary to the basic premise of SB 3 and SB 221. That is, the development of competitive electric generation markets for retail customers in Ohio. In fact, the preamble to SB 3 indicates that one of its purposes is "to provide for competition in retail electric service." SB 3 together with amendments made in SB 221 sets forth the State's policy to ensure diversity of electricity supplies and suppliers, to recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment, and to ensure effective competition in the provision of retail electric service.
>
> From these policy pronouncements it is clear that a contract by which one of CSP's largest customers pulls its power requirements from the market, to circumvent the delta revenue provisions of SB 221, will serve to stifle the development of a competitive retail electric generation market. Eramet should not be permitted to insist on such a provision and it should not be ordered by the Commission to place such a provision in an arrangement to be established with CSP. (CSP Ex. 1, pp. 4,5).[8]

Eramet's proposed arrangement could be implemented in a manner which best preserves customer choice. There is no reason that Eramet needs to forfeit its right to exercise choice over the ten-year life of the arrangement. Without an "exclusive supplier" provision Eramet could remain a Standard Service Offer customer of CSP, albeit served under terms of a special arrangement, or to switch to a Competitive Retail

[8] See §4928.02 (C) (G) and (H), Ohio Rev. Code.

Electric Service (CRES) provider. As Mr. Fortney testified, the mechanics of the Stipulation would work even without an exclusive supplier relationship. (Tr. III, p. 518).

Mr. Baker also expressed his concern regarding the enforceability of an arrangement containing an exclusive supplier relationship. (CSP Ex. 1, p. 5). This concern is consistent with basic legal principles.

> "[W]here there is a strong public policy against a particular practice, a contract or clause inimical to that policy will likely be declared unconscionable and unenforceable unless the policy is clearly outweighed by some legitimate interest in favor of the individual benefited by the provision." 8 Williston on Contracts (4th Ed. 1998) 43, Section 18:7.

The Supreme Court of Ohio has declared contracts unconscionable and void where the contract purports to violate important public policies, including policies articulated by the General Assembly in statutes. *See e.g. Taylor Building Corp. of America v. Benfied,* 117 Ohio St.3d 352, 884 N.E.2d 12 (2008). An "exclusive supplier" provision that contradicts the public interest as expressed in Ohio's policy adopted in SB 3 and SB 221 should be considered void as against public policy and unenforceable. The Commission's adoption of a contractual provision which is contrary to public policy and casts uncertainty over the enforceability of the contract would be unreasonable and unlawful.

<u>CSP IS LEGALLY ENTITLED TO FULL RECOVERY OF REVENUE FOREGONE, WITHOUT ANY OFFSET</u>

Even if the Commission were to conclude that an approval of Eramet's proposed arrangement, as modified by the Stipulation would create an exclusive supplier relationship between CSP and Eramet, such a conclusion should not result in a POLR revenue offset to CSP's full delta revenue recovery. Mr. Baker identified three reasons such a reduction would be inappropriate:

> First, the Commission's order in CSP's Electric Security Plan (ESP) specifically rejected arguments that POLR charges can be avoided if a customer agrees not to shop. That conclusion was affirmed on rehearing just eight days prior to the filing of this testimony. I am aware that in its order in the Ormet case the Commission distinguished its ESP ruling from its Ormet ruling on the basis that the ESP ruling applies to Standard Service Offer while the Ormet ruling applies to a reasonable arrangement under §4905.31, Ohio Rev. Code. While I know the difference between Standard Service Offer and a reasonable arrangement, I believe the Commission's rationale in the Ormet case is a classic example of there being a difference without a distinction. Moreover, as noted above, I believe that "an exclusive supplier" provision would violate the state policy of promoting competition. In this regard, if every large industrial and commercial customer could avoid paying the POLR charge by agreeing to make AEP Ohio its exclusive supplier, the potential for competition would be significantly impaired. (CSP Ex. 1, p.7).

Mr. Baker went on to discuss his second reason:

> CSP's ESP, as modified by the Commission, reflects a total package that the Commission held to be more favorable, in the aggregate, than a Market Rate Offer. The position taken by the intervenors, and taken by the Commission in the Ormet case, results in a further modification of CSP's ESP. I believe it is inappropriate to make rulings which diminish the beneficial aspects of CSP's ESP without modifying other ESP provisions which would restore the balance of the Commission's ESP order. (*Id.* at 7, 8).

Finally, Mr. Baker testified:

> I have been advised by counsel, that the statute pursuant to which Eramet filed its proposal provides for recovery of all revenues foregone under the contract and there is no statutory authority for the Commission to offset revenue foregone by an amount of expense reductions, whether actual or not. The revenue foregone should equal the difference between what Eramet would pay under CSP's applicable rate schedule and what it does pay under the unique arrangement rate – no more and no less. (*Id.* at 8).

Regarding Mr. Baker's final point, the Commission lacks authority to preclude CSP from recovering all revenue foregone as a result of a unique arrangement and such a preclusion would conflict with its orders in CSP's *ESP case*.

As amended by Am Sub. S.B. No. 221 (SB 221), §4905.31, Ohio Rev. Code, provides, in part, as follows:

> Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., 4927., 4928., and 4929. of the Revised Code do not prohibit a public utility from filing a schedule or establishing or entering into any reasonable arrangement ... with one or more customers ... and do not prohibit a mercantile customer of an electric distribution utility... from establishing a reasonable arrangement with that utility or another public utility electric light company, providing for any of the following:
>
> (E) Any other financial device *that may be practical or advantageous to the parties interested.* In the case of a schedule or arrangement concerning a public utility electric light company, such other financial device may include a device to recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program...
>
> ...
>
> Every such schedule or reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission. (emphasis added).

An analysis of the plain language of this statute reveals that nothing in §4905.31, Ohio Rev. Code, authorizes the Commission to offset the recovery of the revenue foregone due to the unique arrangement. Further, any such reduction in recovery of revenue foregone would not be "advantageous" to both parties to the contract. In addition, as Mr. Baker pointed out, such a result conflicts with the Commission's recent orders in CSP's *ESP case*.

The authority to offset the recovery of revenues foregone cannot be read into the statutory language. While such authority is not found in §4905.31, Ohio Rev. Code, elsewhere in SB 221 the General Assembly provided such offset authority in contexts other than §4905.31, Ohio Rev. Code.

For instance, in §4928.142 (D), Ohio Rev. Code, the General Assembly provided that:

> In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment... and accordingly, the *commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost* responsibility. The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The *commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess* of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. (emphasis added).

Another example of an explicit offset provision is found in §4928.143 (B) (2) (c), Ohio Rev. Code, where the General Assembly provided that:

> Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

These provisions demonstrate that in some instances the General Assembly chose to have the Commission offset revenue recovery by cost savings or other considerations such as impact on return on equity. In those instances, the Commission was given explicit authority to make such an offset. The absence of such authorization in §4905.31, Ohio Rev. Code, is particularly telling in light of the presence of such authorization in other provisions in the same piece of legislation. The legislative canon *expressio unius est exclusio alterius* applies, meaning the inclusion of one thing implies exclusion of the other. *See Crawford-Cole v. Lucas Co. Dept. of Jobs & Family Services*, 121 Ohio St.3d 560, 566, 906 N.E.2d 409, 414 (2009).

An order that CSP's recovery of revenue foregone should be offset by POLR charges also is contrary to the Commission's order in CSP's ESP proceeding. That order specifically rejected arguments that POLR charges can be avoided if a customer agrees not to shop. That conclusion was affirmed on rehearing on July 23, 2009.

In particular, the Commission's entry on rehearing in the ESP cases explicitly referenced OEG's position that the POLR rider should be "avoidable by those customers who agree not to shop during the ESP through a legally binding commitment." (*ESP Cases*, Entry on Rehearing, p. 25). The Entry on Rehearing's discussion of OEG's request referenced OEG's application for rehearing at page 6. (*Id.*) OEG's application for rehearing in the ESP cases argued (at p. 6):

> [T]here is no cost or risk to the Companies of being the POLR if a customer makes a legally binding commitment not to shop during the ESP. *** If a customer elects to waive its rights to shop during the three-year ESP term, then there is no risk or cost to the Companies and no basis for the Companies to impose the POLR option charge. Therefore, customers who agree not to shop during the ESP should not pay the POLR charge.

OEG's position in the *ESP Cases* was based on the testimony of its witness Mr. Baron, who presented specific proposals for customers to "opt out" of POLR by entering into a legally binding agreement not to shop during the ESP.[9]

[9] The Hearing Examiners took Administrative Notice of this material. (Tr.III, p.409).

OEG witness Baron recognized that AEP Ohio incurred the POLR risk upon commencement of the ESP and that the POLR risks are incurred prior to actual shopping. During cross examination, Mr. Baron admitted that "In order for the concept to have some effect, customers would have to opt in or opt out or basically agree to these waiver provisions prior to the start of the ESP." (*Id.* at 147). During questioning, Mr. Baron explained that once the ESP becomes effective "the company at that point does incur some -- begin to incur some risk." (*Id.* at 149). Thus, Mr. Baron explained that under OEG's proposal the concept was for customers ideally to make the waiver prior to the beginning of the ESP period, in recognition that the risk begins when the ESP is effective. (*Id.* at 150). Consequently, it follows that months into the ESP period customers cannot begin to make commitments not to shop and avoid the POLR charge (as is being advocated in the current case) – and OEG should be estopped from arguing to the contrary.

In any case, notwithstanding the extensive development of OEG's proposals in the ESP record and the Commission's explicit consideration of those proposals in its orders in the *ESP Cases*, the Commission did not accept the invitation to allow customers to avoid the POLR charge by agreeing that AEP Ohio would be the customers' exclusive provider.

On the contrary, the Commission adopted a nonbypassable POLR charge reflecting 90 percent of the estimated POLR costs presented by the Companies and found that only customers who agreed to return at a market price at the time they decide to shop will avoid the POLR charge during the time they are served by a CRES provider. (*ESP Cases*, Opinion and Order, p.40.) In other words, regardless of whether a customer promised not to shop during the ESP term, all customers would pay the POLR charge for the entire time they are served under AEP Ohio's SSO and would only avoid POLR charges during the period they are actually served by a CRES provider if they promised to return at a market price. Thus, the Commission explicitly wrestled this issue to the ground in the *ESP Cases* and only allowed the POLR charge to be bypassed under narrow circumstances – rejecting OEG's broader proposal to avoid POLR charges anytime a customer promised not to shop. The Commission's Entry on Rehearing (at p. 26) stated that "the Commission carefully considered all of the arguments, testimony, and evidence in the proceeding and determined that the Companies should be compensated for the cost of carrying the risk associated with being the POLR provider, including the migration risk." Offsetting CSP's recovery of delta revenue by POLR revenue would squarely conflict with the decision in the *ESP Cases* to reject the proposal to avoid the POLR charge by promising not to shop.

As noted elsewhere in this brief, both the Commission and Eramet are permitted to reopen the agreement during the term of the contract and order or request modifications. Moreover, as noted earlier "an exclusive supplier" provision would violate the state policy of promoting competition (thus leading to the same conclusion that Eramet could shop in the future). When these considerations are combined with the Stipulation's provisions regarding the level of firm/full requirements service, it is evident that the effect of the proposed agreement is to receive SSO service based on a different pricing method. Notwithstanding the Commission's bare statement in the *Ormet Case* that the SSO POLR risks do not apply to Ormet's proposed unique arrangement, the above-discussed findings and conclusions reached in the *ESP Cases* suggest that the POLR risks do apply to the proposed Eramet arrangement.

As a related matter, CSP's ESP, as modified by the Commission, reflects a total package that the Commission held to be more favorable, in the aggregate, than a Market Rate Offer. Applying POLR revenues as a credit against delta revenue recovery results in a further modification of CSP's ESP – even after those aspects of the *ESP Cases* have been finalized. It is inappropriate to make rulings which modify CSP's ESP without a record-based conclusion that such a modification was necessary in order to ensure that the modified ESP "is more favorable in the aggregate as compared to the expected results that would otherwise apply" under a market rate offer. *See* §4928.143(C)(1), Ohio Rev. Code.

The overall package and balancing of interests reached in the *ESP Cases* is undermined by a POLR offset to recovery of delta revenues. If the Ormet order is extended to other customers and every mercantile customer could avoid paying the POLR charge by agreeing to make their electric utility their exclusive supplier, the potential for competition in Ohio would be significantly impaired. That result would substantially undermine the Commission's orders in the *ESP Cases*. In the *ESP Cases*, the Commission plainly stated that "[t]he POLR charge was proposed to collect a POLR *revenue requirement* of \$108.2 million for CSP." (*ESP Cases*, Opinion and Order, p.38) (emphasis added). Similarly, when deciding to grant 90% of the CSP's proposal, the Commission ordered that "the POLR rider shall be established to collect a POLR *revenue requirement* of \$97.4 million for CSP..." (*Id.*, p. 40) (emphasis added). This demonstrates that the Commission's intention was to increase CSP's revenue requirements and create a nonbypassable revenue stream as part of the overall ESP decision – not just create a charge that can simply be avoided by a promise not to shop. It is unreasonable and unlawful for the Commission to issue an order that undermines that result.[10]

The facts and the applicable law provide for recovery of all revenues foregone under an Eramet arrangement. There is no statutory authority for the Commission to offset these revenues foregone by an amount of expense reductions, whether actual or not. The revenues foregone should equal the difference between what Eramet would pay under CSP's applicable rate schedules and what it would pay under the unique arrangement rate – no more and no less.

Finally, Mr. Fortney's testimony left open the question of whether, assuming the *Ormet Case* was decided properly, there are factors which distinguish the arrangement contemplated by the Stipulation from the factors present in the *Ormet Case.* As Mr. Fortney testified:

> The contract contemplated for Eramet has differences from the contract contemplated in the Ormet case. Whether those differences are sufficient to warrant a different outcome than in the Ormet case is an issue the Commission needs to decide, and Staff has no opinion.

The most glaring difference between the Eramet and Ormet arrangements is the amount of delta revenues for which customers would be responsible. Mr. Fortney

[10] The orders in the *ESP Cases* were issued pursuant to § 4928.143, Ohio Rev. Code. That statute specifies the parameters for setting standard service offer rates by establishing an electric security plan. Alternatively, an EDU can set its standard service offer rates by establishing a market rate offer under § 4928.142, Ohio Rev. Code. However, § 4905.31, Ohio Rev. Code, is the purported basis for approving the Eramet unique arrangement. CSP submits that the Commission lacks authority under § 4905.31, Ohio Rev. Code, to approve the proposed arrangement without providing for full recovery of foregone revenues. But in this context of discussing the orders in the *ESP Cases*, CSP submits that it is unlawful for the Commission to approve SSO rates under either the ESP or the MRO statute only to proceed to undermine those rates (and in the case of the POLR charge, an explicit revenue requirement) by approving a unique arrangement in a separate case.

provided estimated amounts of delta revenues under the Stipulation. He estimated that for 2009 and 2010 delta revenues would be about $3.8 million a year. For 2011 he estimated delta revenues of $5.8 million; for 2012, $5.2 million; for 2013, $4.7 million; for 2014, $4.4 million; and for 2015, $4.0 million. (Tr. III, pp. 433-437). Over these seven years delta revenues would be approximately $32 million. These estimates are admittedly rough since Mr. Fortney's assumptions concerning changes over time in CSP's tariff rates, including riders, and Eramet's consumption level may not be totally accurate.

OCC also presented testimony concerning its estimates of Eramet-related delta revenues under the Stipulation. Dr. Ibrahim concluded that "estimates for delta revenues shall vary from as low as $37.2 million to $57.7 million." (OCC Ex. 9B, p.9). These estimates are somewhat overstated since they do not reflect the reduction in CSP's tariff rate required by the Commission's rehearing entry in CSP's ESP case. (Tr. II. pp. 301, 302). Further, the high-end estimate is based on the assumption that CSP's rates would increase 7.6 percent each year from 2012 – 2018. (Tr. IV, p. 557).

By way of comparison, the Commission *limited* the delta revenue in just the first year of the Ormet arrangement to $60 million.[11] In 2010 there would be additional delta revenues of $60 million; $54 million in 2012; $44 million in 2013; $34 million in 2014; $24 million in 2015; $14 million in 2016; and $4 million in 2017. This is a total of $294 million over the term of the Ormet arrangement. That was the context of the Commission's conclusion that "AEP-Ohio shall credit any POLR charges paid by Ormet to its economic development rider *in order to reduce the impact of the unique*

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[11] While the Commission limited AEP Ohio's timely collection of delta revenues to $54 million, the $6 million differential would be deferred for future collection.

arrangement on other ratepayers' bills." (*Ormet Case,* Opinion and Order, p. 14 emphasis added).

Even if the Ormet delta revenues are divided in half to reflect that all AEP Ohio customers would absorb those costs and only CSP customers will absorb the Eramet delta revenues, the Eramet delta revenues still pale in comparison to $147 million ($296 million ÷ 2). The need to "reduce the impact of the [Eramet] unique arrangement on other ratepayers' bills," even using the top end of Dr. Ibrahim's estimate, cannot be said to reach the magnitude of the Ormet situation. As Dr. Ibrahim calculated, if there were no POLR credit to the delta revenue recovery the average residential customer would pay about an extra $2.00 over 29 months. (Tr. II, 305). This is about 7 cents a month.

Another distinction between the Eramet and Ormet arrangements which counsels against applying the Ormet precedent for a POLR credit is that the delta revenue in Ormet would be based not just on a fixed price compared to applicable tariff rates. The actual discount will fluctuate with aluminum prices on the London Metals Exchange and with rate levels at which Ormet believes it can remain in operation. The Eramet arrangement does not include such exotic adjustment factors. The delta revenues are much more predictable for Eramet. Consequently, if there is a need to reduce impacts on ratepayers' bills there is less need in the case of Eramet-related delta revenues.

A REASONABLE ARRANGEMENT PROPOSED BY AN ELECTRIC UTILITY'S MERCANTILE CUSTOMER CANNOT BE APPROVED UNDER §4905.31, OHIO REV. CODE, UNLESS THE ELECTRIC UTILITY AGREES TO BE BOUND BY THE ARRANGEMENT.

Prior to the enactment of SB 221, §4905.31, Ohio Rev. Code, allowed a "public utility" to file a schedule or enter into "any reasonable arrangement" with another public utility or with "its customers, consumers or employees" providing for certain enumerated outcomes, including variable rates and different classifications of service. The statute provided that no "such arrangement" is lawful until it was filed with and approved by the Commission.

SB 221 amended §4905.31, Ohio Rev. Code, in three significant respects:

> 1) It now provides that a public utility is allowed to file a schedule or "establish or" enter into any reasonable arrangement with another public utility or with "one or more of" its customers, consumers or employees.
>
> 2) It now also provides that "a mercantile customer of an electric distribution utility" or a group of such customers may establish a reasonable arrangement with "that utility (the EDU serving the service territory in which the customer is located) or another public utility electric light company."
>
> 3) The application for approval of an arrangement may be filed with the Commission by either the public utility or the mercantile customer(s).

These changes. however, do not allow mercantile customers to establish an arrangement without the agreement of the electric distribution utility by unilaterally submitting a proposed arrangement for approval by the Commission. An analysis of the statute as modified shows there can be no arrangement approved by the Commission if the public utility to be bound by the arrangement does not agree to its terms.

a. <u>Common usage interpretation of the statute, as amended.</u>

As a general rule the words in a statute must be read in accordance with the common usage of the terms.[12] Therefore, the terms "establish" and "arrangement" should be given their ordinary meaning. The term "establish" is not ambiguous; it is commonly

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[12] §1.42, Ohio Rev. Code, provides: "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." See also *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 17 (2000).

used as a synonym for "create, originate or bring into existence."[13] "Arrangement" is ambiguous; it may mean either a "mutual agreement or understanding" or "a preliminary step or measure."[14] To ascertain which meaning of "arrangement" is intended in this instance, it is necessary to look at the context in which the words appear. The statute states that a "mercantile customer of an electric distribution utility" is not prohibited "from establishing a reasonable arrangement with that utility or another public utility electric light company." Since "establishing" means "creating or bringing into existence," then the ambiguity of "arrangement" suggests that the statute means either that:

> a mercantile customer is not prohibited from creating or bringing into existence a reasonable [*mutual agreement or understanding*] with its EDU or other public utility electric light company; or
>
> a mercantile customer is not prohibited from creating or bringing into existence a reasonable [*preliminary step or measure*] with its EDU or other public utility.

The former is a fair and reasonable interpretation of the statute; the latter is not.

In common usage one would not speak of creating a preliminary measure with another. "Creating" connotes that the object created has a sense of finality or permanence; it has come into existence. A preliminary step or measure lacks this quality of permanence and instead implies that something more needs to happen before the object is established. On the other hand, one would speak of creating a mutual agreement or understanding with another, and in such instances permanence and finality are implied. Thus, a mercantile customer can work with a utility to mutually establish an arrangement but cannot independently do so.

[13] Webster's Third New International Dictionary at 778; Black's Law Dictionary (8th ed.) at 568.

[14] Webster's at 120.

It also is significant that the statute provides that the mercantile customer may establish "a reasonable arrangement *with* [its EDU] or another public utility electric light company." The clear indication is that the customer is working cooperatively *with* the utility to jointly establish the arrangement.

b. <u>The context of the statute.</u>

The paragraph of the statute requiring Commission approval also confirms that the mutual agreement interpretation is the better reading of the statute. It states that "no such . . . arrangement is lawful unless it is filed with and approved by the commission." The statute goes on to provide that the public utility "is required to conform its schedules of rates, tolls, and charges to such arrangement." The statute thus envisions that the arrangement submitted to the Commission is an arrangement already in existence [i.e. established] which becomes lawful and immediately enforceable upon approval. As a matter of common usage and basic contract law, a preliminary step or measure lacks the requisite finality to become a lawful and enforceable arrangement upon approval by the Commission.[15] Indeed it is difficult to imagine how the Commission could "approve" a mere preliminary measure or how a public utility could be "required to conform its schedules of rates, tolls and charges to [a preliminary measure]" that had not evolved into an agreement or understanding.

[15] *Extracorporeal Alliance LLC v. Rosteck*, 285 F. Supp. 2d 1028 (N.D. Ohio 2003); *Kostelnik v. Helper*, 96 Ohio St. 3d 1, 2002-Ohio-2985; Motorist *Mut. Ins. Co. v. Columbus Fin. Inc.*, 168 Ohio App.3d 691, 2006-Ohio-5090.

c. Giving effect to the amendment.

1. *the amendment to allow a utility to "establish" an arrangement.*

Another equally important rule of statutory interpretation applicable here is that all portions of the statute must be given effect.[16] Applied in this context, the rule requires that there be some reason for the General Assembly to have amended §4905.31, Ohio Rev. Code, to allow a public utility to "establish" a reasonable arrangement with "one or more" of its customers, when the statute already provided that a public utility could "enter into" an arrangement with its customers. Such reason exists.

In an early case interpreting the statute, an Ohio appellate court had held that a public utility could not enforce a special contract with one of its customers because the utility had filed only a generic arrangement with the Commission and had not submitted for approval the actual contract signed by the customer.[17] Yet, as we now know, at times a public utility may want to offer a general arrangement to all its customers or to customers in a specific class and leave it to the individual customer to decide whether to actually "enter into" the offered arrangement.[18] SB 221's amendment to the statute clarifies that this type of arrangement - a generic offer to enter into a particular special contract with customers - can be submitted to the Commission for approval even though the utility and any particular customer have not yet formally entered into such arrangement. The amendment also expressly clarifies that a special arrangement need not

[16] §1.47(B), Ohio Rev. Code, provides that in enacting statutes, it is presumed that the entire statute is intended to be effective.

[17] *Lake Erie Power & Light Co. v. The Telling-Belle Vernon Co.*, 57 Ohio App. 467 (Cuyahoga, 1937).

[18] See e.g., *In the matter of the application of The Cleveland Electric Illuminating Company for authority to expand its Competitive Pilot Program*, Case No. 93-0142; *Weiss v. Pub. Util. Comm.* (discussing lawfulness of CEI's Competitive Pilot Program).

be offered to all customers and may be established or entered into with "one or more customers" but less than all.

2. *the amendment to allow a customer to establish an arrangement.*

In order to read the SB 221 amendment as authorizing only mutually agreeable arrangements between a utility and one or more customers, there also has to be a reason why the General Assembly would have authorized the mercantile customer, as well as the utility, to establish an arrangement and to submit it to the Commission for approval. Such reason also exists.

Prior to the amendment, the statute authorized a public utility to enter into a special contract only with its own customers. A utility could not enter into a special contract with a party not already a customer nor could a customer enter into a special contract with a different utility operating outside the certified territory. SB 221 fills in this gap for mercantile customers of EDUs, consistent with the overall goal of the act of fostering competition in the electric industry. The new language recognizes that a mercantile customer has the option of establishing a special contract not only with its EDU but also with some other public utility electric light company.[19] This language also suggests mutual agreement – it would be strange for the Commission to force an EDU serving another territory to enter into an arrangement – yet the serving EDU and the non-serving EDU provider are on equal footing under the language used in the statute.

SB 221 also gives the mercantile customer and its EDU or another public utility electric light company the option of having the customer submit the application for approval of the mutual arrangement. There is an obvious reason for this change too.

[19] In this connection, see §4928.146, Ohio Rev. Code, which provides that §4928.141 to 4928.145, Ohio Rev. Code, do not prohibit electric distribution utilities from providing competitive retail electric service to electric load centers within the certified territory of another such utility.

Two likely reasons for proposing a special contract are to have the arrangement support economic development or to further energy efficiency. In both of these situations, the customer has the key role to play in persuading the Commission that the arrangement furthers the intended purpose. For example, to justify an economic development arrangement, the customer has to provide the documentation to establish, among other things, the number of jobs that will be created, the customer's financial viability and the secondary and tertiary benefits of the project. §4901:1-38-03(A) (2), Ohio Admin. Code. In the case of an energy efficiency arrangement, the customer must describe its status in the community and how the arrangement furthers state policy and must submit verifiable information to establish that it meets the criteria for an energy efficiency arrangement. §4901:1-38-04(A) (1) and (2), Ohio Admin. Code. The fact that in some instances the customer logically bears the burden of establishing the reasonableness of the arrangement is a good reason for allowing the customer, instead of the public utility, to submit the application for approval.

Another good reason for allowing the customer, in lieu of the public utility, to submit the arrangement to the Commission is that the utility may not want to actively support or bear the burden of persuasion regarding the amount of discount being requested by the mercantile customer, leaving that determination to the Commission. This consideration is applicable not only in reasonable arrangements for economic development and energy efficiency, but also for unique arrangements under §4901:1-38-05, Ohio Admin. Code.

Thus, §4905.31, Ohio Rev. Code, as amended, is properly read, according to common usage, as continuing to allow only arrangements agreed to by the public utility and its customer(s), as opposed to opening the door to unilateral arrangements proposed by the customer and not supported by the public utility. In fact, this is the reading given to the statute by the Commission itself. In its September 17, 2008, Finding and Order adopting Chapter 4901:1-38, Ohio Admin. Code, the Commission "determined that it is necessary to approve all reasonable arrangements *entered into between the utility and one or more of its customers.*" (emphasis added).[20]

Based on these arguments, the Commission should confirm its earlier recognition that §4905.31, Ohio Rev. Code, pertains to reasonable arrangements entered into between the utility and one or more of its customers. Unilateral agreements cannot be imposed on the utility.

CUSTOMER-SITED CAPABILITIES

Eramet's application (at pp. 3,4) and the Stipulation (IV.F, pp. 9, 10) refer to Eramet's commitment to work with CSP to determine how and to what extent Eramet's customer-cited capabilities *might be* committed to CSP to assist CSP meeting its statutory energy efficiency requirements, Besides the projects described by Eramet's witness, Mr. Bjorklund, Eramet's witness, Mr. Flygar, testified that Eramet "is contemplating several other customer-sited energy efficiency projects that it is willing to consider committing to CSP to meet Ohio's portfolio requirements." (Eramet Ex. 3A, p. 12).

Mr. Baker addressed Eramet's willingness to consider committing projects it is contemplating undertaking.

[20] *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17 and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD.Finding and Order (Sept. 17, 2008), p. 7.

> CSP is interested in all customers' customer-sited capabilities in the context of energy efficiency and peak demand response achievements required of CSP under SB 221. However, the details of benefits and measurements in Eramet's application are vague and indefinite. Eramet witness Flygar testifies that Eramet is merely "willing to consider committing" customer-sited capabilities to CSP for integration into its compliance portfolio for energy efficiency and that Eramet is willing to "negotiate in good faith" to address these matters. It is CSP's view that, if the Commission is to consider the energy efficiency and demand response capabilities that are directly associated with the proposed facility investments as benefits, those capabilities need to be presently committed to CSP's compliance portfolio as part of this proceeding. Otherwise, Eramet would be obtaining a discount from CSP (paid for by other ratepayers) that helps fund facility investments while also fully preserving the ability to extract an additional price from CSP (and ultimately other ratepayers) for the capabilities of that same facility investment. If there is no present commitment of Eramet's resources as part of this case, then the Commission should assign no value in this case to the energy efficiency and demand response capabilities associated with the facility investments.

Whatever decision the Commission makes in this case regarding the rate discount arrangement sought by Eramet should be based on actual commitments, such as the two $20 million capital investments to which Eramet would commit. No weight should be assigned to the possible future transactions involving Eramet's to-be-built customer-sited capabilities. As Mr. Flygar testified, "There's no present commitment as part of the value, if you will, of the proposed special arrangement." (Tr. II, p. 196). CSP, of course, looks forward to negotiating the issues concerning those future projects as they go forward.

<u>PJM DEMAND RESPONSE PROGRAMS</u>

In the testimony of Eramet's witness, Mr. Flygar, he raised an issue that had been addressed in the Commission's July 23, 2009, Entry on Rehearing in CSP's *ESP Case.* The Commission's Entry clarified that customers with reasonable arrangements are prohibited from participating in PJM's Demand Response Programs (DRP) unless and until the Commission decides otherwise in a subsequent proceeding.[21] Since "Eramet participates in PJM's Reliability Model-Interruptible Load for Reliability Program, which is considered a PJM DRP" (Eramet Ex. 3A, p. 13) it has asked the Commission to address the effect on Eramet of the rehearing language, should the Commission approve a reasonable arrangement in this proceeding.

Mr. Baker responded to this portion of Mr. Flygar's testimony:

> In prohibiting participation in the PJM demand response programs by customers that already have obtained discounts, the Commission avoids a result that I believe would be "double dipping" for such customers to obtain additional financial benefits by managing their load through participation in the PJM demand response programs. There are two primary reasons why this is true.
>
> First, AEP Ohio and, by extension, all of its customers incurs a cost associated with a retail customer's participation in the PJM demand responses programs. Specifically, AEP Ohio must continue to count the load of PJM demand response participants as firm under its Fixed Resource Requirements option and the cost of doing so will be reflected in AEP Ohio's retail rates – a cost that could be avoided if the customer had instead participated in an AEP Ohio demand response program. Necessarily, the dollars that do come into Ohio from Load Serving Entities (LSEs) on the East Coast only flow in that direction because those LSEs avoid capacity in the eastern part of PJM – which would need to be added by AEP Ohio since it must treat a retail PJM demand response customer as firm load. Again, a customer already receiving a discount indirectly financed by other ratepayers should not be permitted to impose such additional costs on AEP Ohio's other customers.
>
> Second, as a related matter, the PJM demand response programs provide direct competition for AEP Ohio's efforts to obtain a commitment from mercantile customers to dedicate their limited demand response capabilities and resources for the purpose of compliance with SB 221's peak demand reduction mandates. In other words, the more demand response resources are dedicated to

[21] Entry on Rehearing, p. 41. An intervenor in the *ESP Case* has sought rehearing of this clarification.

> the PJM programs, the less demand response resources will be available to the State of Ohio generally and for AEP Ohio specifically. That is why CSP maintains that a customer already receiving a discount should, in exchange for receiving its service discount subsidy from other customers, make its demand response capabilities available for commitment to AEP Ohio in order to help reduce the peak demand reduction compliance costs borne by all customers. (CSP Ex. 1, pp. 11, 12).

Mr. Baker went on, however, to address Eramet's current PJM DRP participation:

> CSP recognizes that Eramet already has registered and is committed to participation in the PJM demand response programs for the 2009-2010 planning year. If the Commission approves a reasonable arrangement for Eramet, CSP recommends that the Commission direct Eramet not to participate in PJM demand response programs during any subsequent planning years during the term of the agreement. The Companies are intending to work with their industrial and commercial customers interested in PJM demand response programs to develop additional AEP Ohio demand response programs comparable to the PJM programs. (*Id.* at 12).

CSP does not read the Commission's Entry on Rehearing as contemplating a reconsideration of this issue in a proceeding involving a single customer and in which the main focus of the proceeding is on the merits of the proposed reasonable arrangement itself. The "subsequent proceeding" to which the Commission referred in its Entry on Rehearing should be the same "subsequent proceeding" contemplated for the broader issue of prohibiting Standard Service Offer customers' from participating in PJM DRP. (Entry on Rehearing, p. 40). If, however, the Commission chooses to address in this case the narrower issue raised by Eramet it should adopt the position supported by Mr. Baker.

CONCLUSION

To the extent the Stipulation might be applied in a manner which establishes an exclusive supplier relationship between Eramet and CSP, and results in a POLR-related offset to CSP's full recovery of revenue foregone under §4905.31, Ohio Rev. Code, the Stipulation would violate the law and important regulatory principles and would violate the public interest as expressed in §4928.02, Ohio Rev. Code. Moreover, a settlement of contract terms which is not acceptable to one of the would-be parties to the contract is pointless. A special contract under §4905.31, Ohio Rev. Code, requires mutual consent.

Unless the Commission makes clear in its order in this case that it agrees to provide CSP with full recovery of revenues foregone, without any offset, it should reject the Stipulation and deny Eramet's application.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Columbus Southern Power Company's Post-Hearing Brief was served by U.S. Mail upon the individuals listed below this 24th day of August 2009.

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