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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In The Matter of the Application for Establishment of a Reasonable Arrangement between Eramet Marietta, Inc. and Columbus Southern Power Company.	:	Case No. 09-516-EL-AEC

REPLY BRIEF OF THE STAFF SUBMITTED ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

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INTRODUCTION

Staff will address only new matters which arose in the initial briefs. Silence should not be taken as acquiescence in the positions of any party, rather, it is an indication that the matter was sufficiently discussed previously.

ARGUMENT

A. OCC and OEG

The OCC and the OEG filed a joint initial brief and jointly have three criticisms of the proposed stipulation. Each will be discussed separately in the following sections.

1. Hard Cap

The issue of a hard cap is somewhat difficult to discuss as the difference between the positions of the Staff and OCC and OEG is so small. All three agree that the obligation of the ratepayers to fund the delta arising from one of these special arrangements should be specifically limited. Staff believes that the stipulation does exactly this by setting an overall limit on the amount of power which is covered by the agreement. In fact, the stipulation establishes several caps depending on the circumstances of the operation: a base usage of 38 million kWhrs per month at current plant utilization; 46 million if the northside facilities are restarted; 48 million if the three existing furnaces are all operated; and 56 million should both of these things occur. Joint Ex. 1 at 5-6. The advantage of the approach in the stipulation is that it addresses the concern, certainty for ratepayers, without losing sight of the goal, economic development. The stipulation tracks the economic benefit. As the operation expands, so does the cap.

The OCC and OEG criticize this structure and claim that there is no cap or at least there should be one single cap at the lowest usage level. In most situations OCC and OEG would be right and Staff too would support a single cap. This is not the typical situation. In this situation we have discrete, identifiable activity levels associated with highly specific power requirements. A furnace runs or it does not. If it runs, it uses a quite specific amount of power. The Eramet situation offers the Commission the chance to increase the economic effect that it is seeking in a focused, stepwise fashion.

The problem with the OCC-OEG position is that it mixes ends and means. The end sought is economic development. The means to get there must fence in the obligation of ratepayers to fund this development and a cap is a means to do this. The cap must fit the circumstances and that is what the stipulation does. Having a single cap is not an end in itself and it certainly should not thwart the very economic development that is the goal of the entire exercise. The OCC-OEG position is akin to making a lawnmower safer by removing the blade. The series of hard caps in the stipulation is a strength, not a weakness, and is another reason that the stipulation should be approved.

OCC and OEG criticize the caps in the stipulation saying that they are not "hard" since reopening of the arrangement can be sought by Eramet. This is no criticism at all. That a hypothetical future arrangement could have a different cap says nothing whatever about the caps proposed in the stipulation. The caps in the stipulation are firm across the period that the arrangement continues. They can do no more than this.

2. POLR Offset

It is obvious that CSP should be paid for its lost revenues due to any arrangement approved in this case. The question is what revenues those are. In Ormet, the Commission determined that where the company was exposed to no shopping risk, it should not be paid for a risk it did not bear. The Commission therefore reduced the amount of the delta revenue for which other customers could be billed by the POLR charge. The arrangement proposed in the stipulation is different than the one in Ormet. These differences have already been discussed in great detail by others. It only remains for the Commission to decide whether these differences are sufficient to warrant different treatment than was afforded in Ormet. Staff has no opinion on this topic.

3. Arrangement Starts Immediately

OCC and OEG criticize the stipulation because it begins the discount for Eramet immediately and doesn't wait for the $40 million investment to occur. This argument again confuses the goal with the means to achieve it. Eramet S.A. wants the assurance that comes with a long-term energy supply contract before it would be willing to place large amounts of investment anywhere. If the assurance is not forthcoming, the investment will simply go to China or Norway. Whether the OCC-OEG idea is meritorious or not, it is not available. We do not have the leverage to obtain that condition.

B. CSP

CSP spends most of its initial brief discussing the POLR offset, a topic on which the Staff has, as noted, no opinion. It does however present two arguments unrelated to the POLR offset issue that Staff does need to address. These are whether a sole source arrangement can be approved by the Commission and whether a utility must consent to a special arrangement before the Commission could order it.

1. Sole Source Agreements Are Just Another Customer Choice

Whether the stipulation is a sole source agreement or not is only of interest because of the POLR offset question. Because the Staff has no opinion about the POLR offset question, it has no reason to be concerned about whether this specific agreement is sole source. OCC and OEG want the Ormet-style POLR adjustment and so argue that the proposed arrangement is sole source. CSP does not want the adjustment and argues the arrangement is not sole source in an effort to avoid the Ormet-style POLR adjustment. It is entirely predictable.

CSP, however, goes one step farther. In its zeal to avoid the extension of an Ormet-style POLR offset to the delta revenues associated with the proposed arrangement, it argues that any sole source agreement is improper as a violation of a purported public policy. This is too far.[1] There is no public policy against sole source agreements.

We do not need to guess about public policy in this area. The General Assembly has already spoken. In implementing Chapter 4928 the Commission is to:

> Ensure the availability of unbundled and comparable retail electric service **that provides consumers with the supplier, price, terms, conditions, and quality options they elect** to meet their respective needs.

O.R.C. 4928.02(B)(emphasis added). CSP's argument would work at cross-purposes with the General Assembly's stated policy. Customers are free to fashion arrangements to their liking. The General Assembly has determined that customers "elect" options to meet their own needs.

CSP would insert an artificial limitation such that customers could only have one kind of contract, a call option. This is to say a situation where the seller must sell but the buyer does not have to buy. This is a traditional structure of utility tariffs, indeed the standard service offer still works in this way, but it is not common in other arenas. An arrangement where the buyer must buy and the seller must sell is really the norm outside of some relatively special applications (commodities markets and some real estate transaction). CRES provider contracts work in this way typically. Regardless of this, the legislature's intent, that customers have a free hand to make deals, is quite clear. The

[1] Again, Staff notes that this discussion does not speak to the particular proposal before the Commission. Rather this relates to the broader topic of whether **any** sole source agreement could be proper.

Commission should not artificially limit the ability of customers to bargain away their freedom to buy from a different supplier. The customer's freedom to choose is hers to do with as she chooses.

It should be noted that there are circumstances where a sole source agreement would violate the law. One might imagine a situation, clearly **not** the case before the Commission, where a utility was using its position in the market to force customers to surrender their ability to shop elsewhere. In such a hypothetical situation, the Commission would be right to reject that limitation. The customer did not "choose" that limitation, it was forced on her. That is a situation where the sole source provision is being used anti-competitively. No such concerns are present in the situation now facing the Commission.

In short, CSP is wrong. Customers can waive or bargain away their ability to shop for a period if they wish. Whether Eramet did so in this case and whether that matters, are topics on which the Staff has no position.

2. The Agreement Of A Public Utility Is Not Required

CSP argues the public utility involved in the reasonable arrangement must agree to it. This was the way the section operated for decades since only the utility could apply under it. The utility could act unilaterally. But the General Assembly altered this situation. It allowed some customers to unilaterally seek, and the Commission to approve, a reasonable arrangement. Utility agreement does not figure into it. A review of the statute reveals this.

Prior to the passage of SB 221, the introductory section of O.R.C. 4905.31 provided:

> Except as provided in section 4933.29 of the Revised Code, Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923 of the Revised Code do not prohibit a public utility from filing a schedule or entering into any reasonable arrangement with another public utility or with its customers, consumers, or employees providing for ...

Further, the law provided that:

> No such arrangement, sliding scale, minimum charge, classification, variable rate, or device is lawful unless it is filed with and approved by the commission.

Having obtained the approval of the Commission:

> Every such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as the commission directs.

Thus the statutory process before SB 3 was quite clear. The utility proposed an arrangement, the Commission considered it, and the utility adjusted its schedules to reflect whatever the Commission ordered. This was the way that the section operated for decades. Then things changed.

SB 221 amended the introductory language of O.R.C. 4905.31 to allow mercantile customers to present proposed arrangements to the Commission for its consideration. The changes are (with legislative notations maintained for clarity):

> ~~Except as provided in section 4933.29 of the Revised Code,~~ Chapters 4901., 4903., 4905., 4907., 4909., 4921., ~~and~~ 4923.<u>, 4927., 4928., and 4929.</u> of the Revised Code do not prohibit a public utility from filing a schedule or <u>establishing or</u> entering into any reasonable arrangement with another public utility or with <u>one or more of</u> its customers, consumers, or employees<u>, and do not prohibit a mercantile customer of an electric distribution utility as those terms are defined in section 4928.01 of the Revised Code or a group of those customers from establishing a reasonable arrangement with that utility or another public utility electric light company,</u> providing for...

Thus, it is apparent that the General Assembly meant to give the mercantile customers the same ability that the utility formerly had under O.R.C. 4905.31, the unilateral ability to make an application for the Commission's consideration.

CSP argues that the phrase "reasonable arrangement with that utility" requires the agreement of the utility. It does not. Filings under this section have always been unilateral. CSP's own filings have always been unilateral.[2] Under the pre-SB 221 version of ORC 4905.31 only the utility could file and it filed unilaterally. SB 221 changed this so that customers could file as well. An examination of the statute makes this clear. It provides:

[2] See, 01-1473-EL-AEC, 07-860-EL-AEC, 00-858-EL-AEC, and 00-855-EL-AEC.

> No such schedule or arrangement is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility or the mercantile customer or group of mercantile customers of an electric distribution utility and is posted on the commission's docketing information system and is accessible through the internet.

Ohio Revised Code Section 4905.31. If the General Assembly had meant that there had to be agreement between the utility and the customer, it would have required a joint application. It didn't.

CSP's sister company Ohio Power has even used the pre-SB 221 version of the statute to try to cancel contracts without the approval of the counter-parties. See, *In the matter of the Application of Ohio Power Company to cancel certain special power agreements*, case no. 75-161-EL-SLF. This application was strongly opposed by the counter-parties to the contracts and was not done with their approval. While Ohio Power's request was denied by the Commission, it was for a failure of proof not because of any lack of authority to proceed. Clearly agreement is not required.

The statute provides that an applicant may propose "any other financial device that may be practicable or advantageous to the parties interested." Ohio Revised Code Section 4905.31(E). CSP would read this provision to mean that the proposal must be advantageous to *it*. The quoted language says nothing of the sort. It refers not to the customer, not to the utility, but rather to "the parties interested." This phrasing is not accidental. The parties interested in these arrangements are quite broad. Certainly in an economic development sense everyone in Ohio has an interest in these arrangements.

That is the driving force behind allowing these arrangements at all. The other customers who may have to pay for the cost of the arrangement have an interest. That is why OCC and OEG were granted intervention. No one has a veto. The discretion is left to the Commission to determine what should be approved.

It appears that CSP's error arises from confusing "arrangement" with "contract". CSP seems to believe that this section deals only with contracts, specifically bilateral contracts. CSP would say that you cannot have a bilateral contract without agreement of the signatories. Whether or not CSP is right about contracts, the section does not deal with contracts, it deals with arrangements, a much broader term. While a contract is one sort of arrangement, there are many arrangements that are not contracts. Staff recognizes that the section has generally been applied in situations where a bilateral contract was proposed. Although that was the general way the statute has been applied, there is no such limitation in it. CSP's argument goes too far. The statute does not require the utility's agreement for an arrangement to be approved.

Rejecting CSP's argument does not resolve the problem before the Commission. Determining that the utility's agreement is not a prerequisite before a reasonable arrangement can be approved pursuant to ORC 4905.31, still leaves the question as to whether this reasonable arrangement should be approved without the utility's agreement. As discussed in the initial brief, Staff believes that the proposal in the stipulation is reasonable and beneficial for the public and should be approved.

CONCLUSION

The Commission should approve the Stipulation submitted in this case. The various arguments presented against the stipulation, whether to reject it *in toto* or to impose artificial conditions on it, are unavailing. It balances real benefits and the possibility of a very large investment in Ohio's future with real protections for consumers. The result benefits the State of Ohio.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the **Reply Brief of the Staff Submitted on Behalf of the Public Utilities Commission of Ohio** was served this 8th day of September, 2009 by electronic mail or by regular U.S. mail, postage prepaid upon the following parties of record.

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