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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

MEMORANDUM CONTRA COLUMBUS SOUTHERN POWER COMPANY'S APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE OHIO ENERGY GROUP

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The Office of the Ohio Consumers' Counsel ("OCC") represents approximately 700,000 residential electric consumers of the Columbus Southern Power Company ("CSP" or "Company"). The Ohio Energy Group ("OEG") represents AK Steel Corporation, Aleris International, Inc., ArcelorMittal, BP-Husky Refining, LLC, Brush Wellman, E.I. dupont de Nemours & Company, Ford Motor Company, GE Aviation, Griffin Wheel, Linde, Inc., Proctor & Gamble Distribution Company, PPG Industries, Inc., Republic Engineered Products, Inc. Severstal Wheeling, and Worthington Industries. Together, OCC and OEG, in accordance with Ohio Admin. Code 4901-1-35(B), file this Memorandum Contra CSP's Application for Rehearing.

To a large extent, not once, but twice already, OCC and OEG have responded to the plethora of arguments made by CSP to collect millions of dollars more from customers regarding the arrangement with Eramet for a function (provider of last resort)

that CSP need not provide. CSP has made its redundant arguments in the *Ormet*[1] case, and OCC and OEG have responded in OCC/OEG's Memorandum Contra CSP's Application for Rehearing, and in this case, in OCC/OEG's Joint Reply Brief. Although there may be a few twists on old arguments, the majority of these arguments have been rejected by the Commission several times as well.[2] CSP presents no new reasons that would justify the Commission changing any aspect of its Order. The CSP Application for Rehearing should be denied.

I. ARGUMENT

A. CSP's Assignment of Errors 1, 2 and 3 Should Be Denied.

In its first three assignments of error, CSP focuses on the PUCO's determination that Eramet cannot shop from now until the end of CSP's ESP. It alleges that the PUCO's finding that Eramet cannot shop through 2011 is contrary to the record and violates the public policy provisions of SB 221. This argument should sound familiar to the PUCO by now. CSP made the argument in the *Ormet* case and in its initial brief filed in this case. It is also a part of CSP's appeal to the Ohio Supreme Court.[3] It should be rejected as discussed below.

CSP though, adds a new wrinkle to its arguments by also claiming that the PUCO's limiting its review to just the first three years of the ten-year agreement and the

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[1] *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company,* Case No. 09-119-EL-AEC.

[2] *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company,* Case No. 09-119-EL-AEC, Entry on Rehearing (Sept. 15, 2009); *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, Opinion and Order (Oct. 15, 2009).

[3] See *CSP v. Pub. Util. Comm.*, S.Ct. Case No. 09-2060, which was filed November 12, 2009.

period of time which CSP's current POLR charge has been authorized is unreasonable and unlawful. These new arguments should fail as well.

1. The PUCO's finding that Eramet cannot shop through the end of 2009 is a finding of fact that CSP has failed to show is against the weight of the evidence or unsupported by the record.

Under the Joint Stipulation, Eramet agrees to have CSP as its exclusive provider for its full requirements, over the entire ten-year term of the agreement. The language that conveys this is as follows:

> Unless otherwise agreed by CSP and Eramet, CSP shall supply and deliver to Eramet electric service having the same quality as service that CSP is obligated to provide to Eramet under CSP's GS-4 rate schedule and successors thereto. *CSP shall supply and deliver electricity in such amount as may be sufficient to meet Eramet's full requirements* and *Eramet shall consume and purchase such delivered supply to the same extent as would otherwise be the case if Eramet were served by CSP under the otherwise applicable tariff and did not obtain supply from a competitive retail electric service supplier.*[4]

This language conveys that CSP will be the exclusive supplier of service to Eramet. That service is to be the same quality as provided currently under CSP Schedule GS-4 and is to be sufficient to meet Eramet's "full requirements."

Additionally, the testimony of Eramet's witnesses bear out the fact that it is Eramet's intent that CSP be its exclusive supplier. Mr. Bjorklund testified that the proposal represented a commitment from both parties and is structured to not enable shopping.[5] Indeed, much testimony was given by Eramet that a long-term contract was needed to assure predictability in the price of electricity.[6] Shopping would not lead to

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[4] Joint Ex. 1 at 4 (emphasis added).

[5] Tr. I at 104.

[6] Eramet Ex. 3A at 9 (Flygar); Eramet Ex. 2 at 2 (Bjorklund).

any predictability, and Eramet is willing to forego the right to shop. The long-term contract assumes no shopping. And there is nothing submitted in the record that contradicts this assumption.

CSP however ignores this testimony and the actual contract language and proclaims that "[t]here is no meaning in the words of the Stipulation on which the Commission relies, nor by reading in between the lines of the Stipulation, that suggest whether Eramet was expressing its intent to forfeit the right to shop."[7] CSP seems to believe that the contract must contain the magic words "exclusive" and "sole source" and since they are not found, there is no exclusive service arrangement. It need not, and to suggest there is no exclusive arrangement because particular words such as exclusive and sole source are not used is nonsensical. CSP fails to acknowledge the exclusive provider relationship established under the stipulation, much like an ostrich that puts its head in the sand when it is in danger. Its position on this issue is untenable and should be rejected.

2. Other provisions of the contract do not establish that Eramet will have the ability to shop.

CSP argues that two provisions of the contract provide the Commission with the ability to change the contract during the term of the contract. These provisions, allege CSP, evince Eramet's right to shop for generation. They are: (1) the Commission's ability to amend, modify or terminate the reasonable arrangement if Eramet fails to live up to its commitments, and (2) Eramet's ability to seek to reopen and modify the rates in order to obtain corporate approval for an additional $100 million investment.[8]

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[7] CSP Application for Rehearing at 7.

[8] CSP Application for Rehearing at 5.

CSP's arguments should be rejected. As a practical matter, the risks of either of these conditions occurring are minimal. For instance, in the event that the Commission determines to amend or modify the reasonable arrangement because Eramet has not lived up to its commitments, the PUCO would likely increase the rates Eramet would pay under the reasonable arrangement. One would expect that, as well, the PUCO would look to impose additional conditions on Eramet that could protect CSP in the event that Eramet determines to end the exclusive arrangement. Certainly CSP could weigh in on the amendment or modification as well to insure it is protected in a revised or modified arrangement.

Indeed the Commission in its Opinion and Order noted that any modification to the reasonable arrangement not explicitly set forth in the Stipulation would take place "only after notice and an opportunity to be heard for any party affected by such modification, which would also require our approval."[9] Similarly if the PUCO determines to terminate the reasonable arrangement, the PUCO could impose termination provisions on Eramet that could protect CSP in the event that CSP would have to serve Eramet at SSO rates—i.e. a condition that Eramet be charged the higher of market rates or SSO tariffs upon termination of the reasonable arrangement.

Eramet's ability to reopen and modify the arrangement on the basis of increasing its investment in Ohio implies that Eramet intends, on a long-term basis, to be served by CSP under the favorable rates of a reasonable arrangement contract. To assume that the provision will be exercised to allow Eramet to shop is inconsistent with the intended purpose of the provision—to renegotiate favorable rates so that Eramet is incented to go

[9] Eramet Opinion and Order at 7.

forward with more capital investment in Ohio. This means extending the reasonable arrangement, not providing the opportunity to shop.

Moreover, even assuming *arguendo* that the language of the stipulation regarding reopening and modifying the stipulation contradicts the existence of an exclusive supplier agreement, such a view ignores the prefatory language under the exclusive supply provision which begins with "*Unless otherwise agreed by CSP and Eramet.*" This phrase means that CSP will be the exclusive supplier of Eramet's full requirements, unless both CSP and Eramet agree otherwise-and get the Commission to approve it. Thus, even if Eramet wants to shop, it will nonetheless be held to CSP serving it as the exclusive supplier unless CSP relinquishes the right and the PUCO approves such action.

3. Permitting Eramet to choose exclusive service from CSP does not violate any public policy of the state, but rather furthers state policies of facilitating reasonable rates and customer choice.

CSP contends that the PUCO's approval of an "exclusive supplier" provision is contrary to the basic premise of SB 3 and SB 221.[10] CSP characterizes the premise as the "development of competitive electric generation markets for retail customers in Ohio."[11] A contract under which its largest customer agrees not to pursue competitive options for ten-years will "stifle the development of a competitive retail electric generation market," posits CSP. Thus, according to CSP, the PUCO's adoption of a contractual provision "which is contrary to public policy and casts uncertainty over the enforceability of the contract is unreasonable and unlawful and should be reversed on rehearing."[12]

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[10] CSP Application for Rehearing at 8.

[11] Id.

[12] Id. at 9.

While one of the main premises of SB 221 was to assist the development of competitive electric generation for retail customers, CSP overlooks the fact that competition, in and of itself, is not the end-all purpose of SB 221. Rather SB 221 is intended to ensure "reasonably priced electric retail service" by providing customers with tools and opportunities to achieve such reasonably priced rates.[13] Competition should be a means toward that end. Customer choice is another means to that end.[14]

Customer choice means that a customer, who agrees to contract provisions, including a long-term exclusive supplier provision, should not be second-guessed by CSP. But CSP would have the PUCO allow it to second-guess Eramet and in so doing require other customers to pay millions of dollars in unwarranted subsidies to CSP. Tellingly, when other CSP customers—Globe and Solsil—sought to enter into ten-year exclusive agreements with CSP, CSP alleged that "the parties' decisions to agree to contract provisions should not be second-guessed by OCC."[15] And yet eleven months later CSP is doing the second-guessing that it earlier criticized, now that Eramet's exercise of choice would reduce CSP's revenues.

Evidently, in September 2008, when CSP sought approval of the two ten-year exclusive arrangements with Solsil and Globe Metallurgical, CSP did not deem it to be inconsistent with SB 221 to enter into long-term exclusive arrangements. Similarly, it

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[13] See R.C. 4928.02—"It is the policy of the state to do the following throughout the state: (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, non-discriminatory, and reasonably priced retail electric service."

[14] Customer choice is mentioned frequently, as one of the state policies underlying SB 221. See for example R.C.4928.02 (C), (E).

[15] *See In the Matter of the Application for Approval of a Contract for Electric Service Between Columbus Southern Power Company and Solsil, Inc.* and *In the Matter of the Application for Approval of a Contract for Electric Service between Ohio Power and Globe Metallurgical, Inc.*, Case Nos. 08-883-EL-AEC, 08-884-EL-AEC, Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra Application for Rehearing at 4 (Sept. 12, 2008).

was not problematic for CSP to be a sole provider of service to Ormet (for ten years) up until the Commission required CSP to credit the rest of its customers for POLR revenues received from Ormet. Suddenly, CSP has reversed course and has manufactured the argument that any sole source contract with a large customer would stifle competition under SB 221. CSP's change of heart is not surprising and weighs upon the earnestness of such arguments now presented.

4. The PUCO's focus on the first three years of the agreement is appropriate since that is the only period during which CSP's POLR rates are in effect.

CSP states that the Commission unreasonably and unlawfully based its determination on whether Eramet can (or cannot) shop under the terms of a ten-year contract on only three of those ten years: "whether a contract permits a party to take a particular action, such as shop for generation service from a competitive supplier, must necessarily be analyzed over the entirety of the contract, not just the first quarter of the term of the contract."[16] CSP also asserts that the Commission's decision to confine its analysis to the length of the current ESP is "contrary to any notion of reasonable contractual interpretation"[17] – though CSP does not identify any contractual notions that would apply.

First, CSP does not present any legal analysis to support its assertion that the Commission's ruling on this issue is unlawful and therefore that ground for rehearing should be denied. Second, as recognized in the Commission's Order,[18] Eramet's ability

[16] CSP Application for Rehearing at 3.

[17] CSP Application for Rehearing at 5.

[18] Order at 7.

to shop is only relevant to this case in the context of establishing a POLR charge – something that may no longer be applicable to CSP after the current ESP.

If a competitive market for supplying generation develops in the next couple of years then CSP may not receive a POLR charge in the next ESP case. In that scenario, any question regarding Eramet's ability to shop becomes moot in the context of determining its reasonable arrangement rate. The Commission's decision to only evaluate Eramet's ability to shop for the time period that is pertinent for POLR charges is reasonable and appropriate. CSP's assignment of error should be rejected.

B. CSP Assignment of Error 4 Should be Denied

CSP disputes the PUCO's conclusion that CSP will be Eramet's exclusive supplier, and that CSP will not be subject to POLR risk. It claims that the PUCO's determination in this regard is unlawful and unreasonable.[19] CSP alleges that the PUCO's finding ignores its statutory authority under 4905.31.[20] That authority establishes that reasonable arrangements are under the supervision and regulation of the PUCO and are subject to change, alteration, or modification at any time. Because the Commission retains such jurisdiction, CSP infers there is a POLR risk associated with this contract.[21] In other words, the Commission could alter, amend, or terminate the contract, forcing Eramet to shop, and causing the POLR expenses to be incurred by CSP.

CSP's contention suggests that the Commission would reverse its own finding establishing discounted rates for a ten-year period. This is hardly credible. To suggest that the Commission would arbitrarily permit Eramet to obtain discounted rates and then

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[19] CSP Application for Rehearing at 9.

[20] Id.

[21] Id.

when the market gets soft, allow Eramet to leave, is highly unlikely. This argument also ignores the language, referred to supra, that establishes CSP as the exclusive supplier "unless otherwise agreed by CSP and Eramet."[22] Additionally, as noted by the Commission in its Opinion and Order, any modification not explicitly set forth in the Stipulation would take place only after notice and an opportunity to be heard for any party affected by such modification. This modification would require PUCO approval.

C. CSP Assignments of Error 5, 6 Should Be Denied

In assignments of error 5 and 6, CSP claims that requiring CSP to reduce its "recovery" of delta revenues—by crediting customers for POLR payments—results in a contract with Eramet that is unreasonable and unlawful.[23] CSP engages in statutory construction of R.C. 4905.31 and surmises that nothing in the statute authorizes the PUCO to "offset the recovery of revenues foregone."[24] It then emphasizes that the General Assembly provided for offset authority when it desired (i.e. R.C. 4928.142(D), 4928.143(B)(2)(c)) and so its failure to provide such offset authority in R.C. 4905.31 means that the General Assembly did not intend to give offset authority. CSP cites to the legislative canon "expressio unius est exclusio alterius" for this principle of statutory construction.

CSP also disputes the PUCO's conclusion that a device to recover "revenue foregone" is permissive, as evidenced by the words of subsection (E) "may include." According to CSP, that interpretation of the R.C. 4905.31 clause is "faulty"[25] for two reasons. First, CSP argues that the "may include" words of subsection (E) are contained

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[22] Joint Stipulation at 4.

[23] CSP Application for Rehearing at 10.

[24] Id. at 11.

[25] Application for Rehearing at 12.

as an example of a category of "any of the following" reasonable arrangements that customers can enter into. As an element permissible under the "any of the following" language, the words are not "an invitation to the Commission to disallow recovery of costs and particularly costs that are not incurred in conjunction with any economic development and job retention program." Secondly, CSP argues that the PUCO's interpretation would allow the PUCO to disallow recovery of all revenues foregone under a contract filed unilaterally by a mercantile customer. Thus, according to CSP, requiring a utility to enter into a contract with a mercantile customer and then denying recovery of revenues foregone cannot logically be permitted under 4905.31.

CSP also argues that allowing the POLR offset is contrary to the CSP ESP Order.[26] It argues that the PUCO did not allow SSO customers to avoid a POLR charge by agreeing that AEP Ohio would be the customer's exclusive supplier and so to allow special arrangement customers to do so is inconsistent. Once again, CSP also characterizes the difference between SSO and reasonable arrangement customers as a "distinction without difference."[27]

Finally, CSP argues that the overall package and balancing of interests reached in the ESP cases is undermined by the order in this case.[28] Thus, CSP believes that changes modifying aspects of the ESP are inappropriate "without a record based conclusion that such a modification was necessary in order to insure 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.

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[26] Id. at 13.

[27] Id. at 16.

[28] Id.

1. Expressio unius est exclusio should not be applied where the statute is unambiguous.

In the Companies' Application for Rehearing it engages in a tortuous exercise of statutory interpretation in order to arrive at the conclusion that the PUCO has no authority to offset the "recovery of revenues foregone." CSP ignores, however, the basic tenet that statutes that are plain and unambiguous must be applied as written without interpretation.[29]

R.C. 4905.31 is a statute that is plain and unambiguous. Prior to S.B. 221, the statute allowed for a public utility to enter into "any reasonable arrangement" with another public utility or with its customers that include arrangements providing for certain enumerated conditions, listed as subsections (A) through (E). Under the SB 221 revisions, the reasonable arrangement was extended to permit mercantile customers or a group of customers to establish a reasonable arrangement with a utility. R.C. 4905.31 also requires the reasonable arrangement be filed with and approved by the Commission and mandates that the utility must conform its schedules to the approved arrangement and file the cost data underlying the arrangement with the Commission. Finally the statute establishes that the PUCO, in supervising and regulating the reasonable arrangement, may change, alter, or modify it.

Because this statute is plain and unambiguous the rules of statutory construction, including expressio unius est exclusio should not be employed.[30] The Commission should merely apply the statute, not engage in statutory interpretation.

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[29] See *Lake Hosp. Sys. v. Ohio Ins. Guar.Assn.* (1994), 69 Ohio St.3d 521, 524.

[30] *State v. Porterfield* (2005), 106 Ohio St.3d 5.

Even assuming arguendo that the Commission determined the statute was ambiguous in certain respects, and seek to construe the statute, the PUCO should apply the maxim of expressio unius est exclusio with caution. It is not a rule of law. It is a rule of construction "used as a tool to cut through ambiguities to lay bare the intendment of a provision."[31] The rule itself is also subject to exceptions.[32] It is only an aid in ascertaining the meaning of law and must yield whenever a contrary intention of the lawmaker is apparent, as is the case here.

In R.C. 4905.31 the language in subsection (E) is clearly permissive—a public utility "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." Then ultimately under the statute, the schedule or arrangement must be approved by the commission. Clearly, the PUCO was not precluded in any sense from determining the lawfulness or reasonableness of the arrangement, including part of an agreement seeking recovery of revenue foregone, a permissive part of an economic development arrangement in the first place.

Hence, the application of expression unius est exclusio must yield here where the intent of the lawmaker is apparent--that intent is that the PUCO has discretion in approving reasonable arrangements, including the discretion to approve or disapprove a device within a special arrangement seeking to recover "revenue foregone" under an

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[31] *The State ex rel. Jackman et al. v. Court of Common Pleas of Cuyahoga County et al* (1967), 9 Ohio St.2d 159, 164, citing *State ex rel Curtis v. DeCorps Dir. Of Pub. Serv* (1938), 134 Ohio St. 295.

[32] *State ex rel Curtis v. DeCorps Dir. Of Pub. Serv.* (1938), 134 Ohio St. 295, 299, citing *Springer v. Government of Phillipine Islands*, (1928), 277 U.S. 189, 72 L.Ed. 845, 48 S.Ct. 480.

economic development program. The discretion allows the Commission to define "revenue foregone" as revenue that excludes POLR revenues, where the utility is not providing POLR services.

2. The statutory interpretation rendered by CSP is unpersuasive.

No matter what CSP says, it cannot get over the hurdle that the key word used in R.C. 4905.31 is "may." R.C. 4905.31 provides that a special arrangement may include certain financial devices which then "may" include collection of foregone revenues. "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 such program***." It argues that "may" means "shall," and that the Commission has no choice but to allow the utility to recover "revenue foregone" and in particular, "revenue foregone" as CSP defines it, including POLR avoided costs for service not provided by CSP.

The word "may" is not ambiguous. Under Ohio's rules of statutory construction, words and phrases are to be construed according to the rules of grammar and common usage.[33] "May" is permissive, not mandatory. It does not lend itself to the need for statutory construction as urged by CSP. The Commission should apply the statute, not interpret it. The only ambiguous part of the statute is arguably defining "revenue foregone." Otherwise the statute makes clear the Commission, in its ultimate authority to

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[33] R.C. 1.42.

approve and regulate and supervise reasonable arrangements, may consider and rule upon whether a utility may recover "revenues foregone."

The Commission has considered similar arguments in the past and rejected them. For instance, in its rulemaking docket related to R.C. 4905.31, the Commission noted that the prefatory language in R.C. 4905.31 is permissive, not mandatory: "We also note that pursuant to Section 4905.31(E), Revised Code, that a schedule or arrangement 'may include a device to recover costs incurred in conjunction with any economic development or job retention program of the utility . . ., including recovery of revenue foregone,' but the statute does not require the inclusion of such a device."[34] The Commission also considered this argument in the *Ormet* Order,[35] and rejected it by ordering that POLR charges for Ormet be credited to CSP's economic development rider (which results in the credit to customers).[36] CSP presents nothing new here to change the Commission's decision in *Ormet*. That decision was sound and should be followed.

CSP's interpretation of R.C. 4905.31(E)—that the Commission has no choice but to permit the utility to recover "revenues foregone" –supersedes and renders superfluous Commission review of "foregone revenues." CSP equates the term "foregone revenues" with the difference between the revenues CSP would collect under the tariff rates that Eramet would be charged and the revenues that will be generated through the rates in the reasonable arrangement. Naturally inherent in determining foregone revenues, however, is a consideration of other factors (e.g., costs that a utility would avoid under the

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[34] *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 Entry on Rehearing at 44 (Feb. 11, 2009); Opinion and Order at 18 (Sept. 17, 2008).

[35] See Ormet Order at 7-8.

[36] See Id. at 14.

arrangement). Indeed under Ohio Adm. Code 4901:1-38-08(A)(3), cost savings to the electric utility are to be an offset to the recovery of delta revenues. The POLR charge is essentially a cost savings to the electric utility—CSP is Eramet's *only* provider under the terms of the agreement and the POLR expenses do not exist at all for this customer. Thus, there should be no POLR revenues that would be foregone under the agreement; instead these POLR costs would be costs avoided for CSP as a result of the agreement. They should be offset against the permissible delta revenues recovered from CSP customers.

In summary, R.C. 4905.31(E) should not be subjected to the contorted interpretation that CSP urges in its application for rehearing. It is a statute that is remarkably unambiguous in almost all respects, but for defining "revenue foregone." It should be applied, not interpreted. The Commission should reject the Companies' arguments, and affirm its Opinion and Order with respect to the issues raised by CSP in its Assignments of Error 5 and 6.

3. The POLR offset is not contrary to the AEP ESP Order.

CSP argues that its ESP Order determined that SSO customers could not avoid POLR, and that the ruling should be extended here to Eramet, a reasonable arrangement customer.[37] It takes issue with the PUCO's differentiation in *Ormet* between SSO customers and reasonable arrangement customers claiming that the *Ormet* order is a "classic example of there being a difference without a distinction."

In the *Ormet* Order the Commission, after determining that AEP would be the exclusive supplier, found no risk that Ormet would shop for competitive generation and

[37] Application for Rehearing at 13-14.

then return to AEP-Ohio's POLR service.[38] The Commission then determined that if AEP were to retain POLR charges, it would be compensated for a service it would not be providing. Additionally, the Commission noted that the CSP ESP findings were "inapplicable" to Ormet "because that holding addressed customers receiving service under CSP's standard service offer rather than receiving service under a unique arrangement specifically approved by the Commission."[39]

Thus, in *Ormet* the Commission focused on the application before it –one which sought approval of a reasonable arrangement—and determined that the statute and rules governing a reasonable arrangement are the relevant guidelines, not what may have occurred in an ESP filing. This approach is appropriate and consistent with R.C. 4905.31 which addresses a discrete application being filed by a mercantile customer. R.C. 4905.31 also delineates a separate PUCO approval process for a proposed reasonable arrangement along with discrete filing of the schedule of rates conforming to the approved reasonable arrangement.

A reasonable arrangement is a distinct category of service that is not a standard service offer. It is controlled by its own statute, and judged by the statutory standards that have been developed to address reasonable arrangements. Those standards are not necessarily the same standards that apply to SSO rates established in CSP's ESP. SSO rates are controlled by tariffs filed in accordance with a Commission-approved ESP plan. Reasonable arrangements, on the other hand, are rates approved under R.C. 4905.31. There can be no mixing of the two. The Commission was correct in determining that the

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[38] *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company,* Case No. 09-119-EL-AEC, Opinion and Order at 13 (July 15, 2009).

[39] *Ormet* Order at 14.

POLR ESP ruling that was related to SSO customers was inapplicable to reasonable arrangement customers. It should stand by its decision in *Ormet.*

The *Ormet* ruling was a sound ruling, in this respect, and acknowledged the statutory distinction between standard service offer customers and reasonable arrangement customers.[40] Moreover, the Commission's ruling implicitly recognizes that any POLR risk that would come from reasonable arrangement customers migrating—purchasing their generation from a competitive supplier when the price is lower than the reasonable arrangement price—is quite different from migration risks associated with SSO customers. If a reasonable arrangement customer were to switch to a competitive retail electric service provider, AEP would be left with power to sell, but that power would likely be sold at higher, not lower rates, than that being provided under an economic development discount. Hence the risk of having to sell the power at a market rate, below existing tariff rates, and incurring a loss, is vastly reduced. Instead, the power could come back to tariff customers, and displace higher priced tariff power. Alternatively, in the case of an SSO customer, the migration could arguably cause AEP to sell the shopping customer's power in the market at below tariff prices, thereby arguably causing POLR costs to be incurred.

4. Modifications of CSP's ESP were contemplated for economic development arrangements.

In CSP's ESP proceeding, CSP proposed an economic development cost recovery rider to collect costs, incentives, and foregone revenues associated with new or expanding

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[40] As the Ohio Supreme Court has noted, a utility's provider of last resort risks are different for different customer groups. *OCC v. Pub. Util. Comm.* (2006), 109 Ohio St.3d 328, 337-338(upholding enhanced shopping credits against the POLR charge (collected via a rate stabilization charge) for residential aggregation groups and commercial and industrial customers who agree not to return to the utility's generation service during the rate plan and agree to pay market price if they return).

special arrangements for economic development and job retention.[41] CSP set the rider at zero.

OCC argued, among other things, that the Commission should continue its policy of dividing delta revenues equally between AEP-Ohio's shareholders and customers. The Commission, however, concluded that OCC's concerns were "unfounded and unnecessary at this stage. The Commission is vested with the authority to review and determine whether or not economic development arrangements are in the public interest."

This Commission ruling reinforced the case by case approach to economic development arrangements, which is consistent with prior Commission practice and the PUCO's enabling rules of R.C. 4905.31. Additionally, the pronouncement was consistent with setting AEP's initial economic development cost recovery rider at zero, with adjustments as the Commission approves special arrangements. In such a case by case approach, delta revenues are identified for each arrangement and allocated between customers and shareholders. Thus, "modifications" to the ESP, by virtue of economic development cases, were anticipated and entirely consistent with the Commission's ESP Order. CSP should not be heard to complain now that such modifications are not permitted. CSP would have the PUCO shift the balance of the ESP even further in favor of investors and against customers who are paying AEP million of dollars in subsidies even with the current crediting of POLR charges. This is neither reasonable or lawful. AEP's assignment of error should be rejected.

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[41] See *In the Matter of the Application of Columbus Southern Power Company for Approval of its Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of certain Generation Assets*, Case No. 08-917-EL-SSO et al., Testimony of Dave Rausch at 12, Company Ex. 1.

II. CONCLUSION

For the reasons stated herein--which include protecting Ohio customers from paying millions of dollars more to AEP for a function (POLR) it does not provide for Eramet-- OCC and OEG respectfully request that the Commission deny CSP's Application for Rehearing in all respects.

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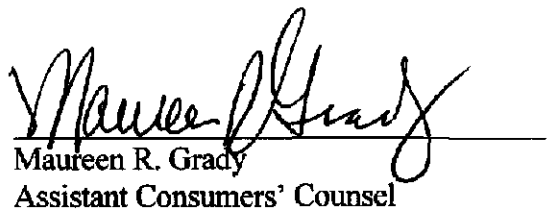
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum Contra CSP's Application for Rehearing was served by regular U.S. Mail Service, postage prepaid, and a courtesy copy was sent via electronic mail service, to the following parties of record, this 23rd day of November, 2009.



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