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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Eramet Marietta, Inc. to Incorporate Customer's Peak Demand Reduction Capabilities into Columbus Southern Power Company's Demand Reduction Program	))))))	**Case No. 10-188- EL-EEC**

COLUMBUS SOUTHERN POWER COMPANY'S MOTION TO INTERVENE AND INITIAL COMMENTS ON ERAMET MARIETTA, INC.'S APPLICATION

INTRODUCTION

On February 12, 2010, Eramet Marietta, Inc. (Eramet) filed an application as a mercantile customer unilaterally proposing a reasonable arrangement with Columbus Southern Power Company (CSP) for commitment of its demand response load that is also being committed to PJM Demand Response Programs (PJM DRPs) for the 2010-2011 planning year. While there are many aspects of Eramet's proposal that are not clear (especially since the applicant did not even submit a proposed arrangement), CSP is moving for intervention and providing initial comments through this filing. At such time as the details of Eramet's proposal becomes clearer, CSP reserves the right to submit additional comments and/or request an evidentiary hearing.

CSP MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT

CSP respectfully requests that it be permitted to intervene in this proceeding. Section 4901-1-11 (A) (2), Ohio Admin. Code, provides:

> (A) Upon timely motion, any person shall be permitted to intervene in a proceeding upon a showing that:
>
> (2) The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a

practical matter, impair or impede his or her ability to protect that interest, unless the person's interest is adequately represented by existing parties.

Further, §4901-1-11 (B), Ohio Admin. Code provides:

> (B) In deciding whether to permit intervention under paragraph (A) (2) of this rule, the commission, the legal director, the deputy legal director, or an attorney examiner shall consider:
>
> (1) The nature and extent of the prospective intervenor's interest.
>
> (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case.
>
> (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings.
>
> (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.
>
> (5) The extent to which the person's interest is represented by existing parties.[1]

Regarding these criteria, CSP's interest is unique as the other party to the proposed contract. CSP's intervention will not prolong or delay this proceeding. Further, as the other party to this proposed contract CSP will be in a unique position to contribute to the full development and equitable resolution of factual issues that might arise in the proceeding.

INITIAL COMMENTS

I. CSP is opposed to allowing an individual customer such as Eramet participate in the PJM DRPs, absent a comprehensive solution for all customers that addresses CSP's concerns.

Though CSP does not oppose customers participating in the PJM demand response (PJM DR) programs if those customers have switched off of CSP's standard service offer and to generation service at market-based rates from a CRES provider, CSP does not believe it is

[1] Factors (B) (1) – (4) are consistent with §4903.221 (B), Ohio Rev. Code.

appropriate or permissible for retail customers receiving regulated, standard service offer rates to resell utility power at market-based rates through PJM DR programs operated in the wholesale market. A primary concern is that CSP must continue to count the load of PJM demand response participants as firm under the Fixed Resource Requirement (FRR) option and the cost of doing so will be reflected in CSP's retail rates – a cost that could be avoided if the customer participated in a CSP demand response program. Customers receiving service at regulated, standard service offer rates and then reselling utility power at market-based rates through the PJM program, is effectively a "heads you lose, tails you lose" proposition for CSP and its other customers. CSP's retail customers should participate in demand response through CSP-sponsored, Commission-approved programs.

On multiple occasions, CSP has previously explained its concerns with retail participation in the PJM DRPs under SB 221.[2] While the Commission deferred a final resolution of the issue, the March 17, 2009 Opinion and Order in the *CSP ESP Case* contained a detailed discussion (at 53-58) of the arguments and issues, demonstrating that the Commission is already aware of the major considerations and issues that surround this debate. Thus, CSP will not repeat all of those arguments in detail here but, instead, incorporate them by reference. As a brief reminder of those concerns, however, CSP will summarize its general concerns with retail participation in the PJM DRPs again in this pleading.

The mercantile provisions in SB 221 allow customers to commit alternative energy, energy efficiency or peak demand reduction resources toward an EDU's compliance with the statutory benchmarks for each of these areas, based upon a mutual agreement between CSP and

[2] *See CSP Electric Security Plan Case*, Case Nos. 08-917-EL-SSO: CSP Post-Hearing Brief (December 30, 2008) at 115-126; CSP Reply Brief (January 14, 2009) at 97-115; CSP Memo Contra Integrys Energy's Motion for Order (March 2, 2009) at 2-11; CSP Comments on Integrys Energy's Withdrawal of Motion (March 11, 2009) at 1-3; CSP Application for Rehearing (April 17, 2009) at 23-26.

one of its customers. CSP supports these innovative provisions and is actively working with mercantile customers to explore such options. Under that approach (and the design of SB 221), these "win-win" solutions between mercantile customers and EDUs can mutually be harvested and the benefits used within Ohio and in satisfaction of Ohio law. By contrast, allowing retail participation in the PJM DR programs outside the context of a utility program would encourage mercantile customers to *export* Ohio's limited demand response resources to the East Coast by allowing them to leverage lucrative payments associated with the PJM DR programs against SB 221's design for operation of the innovative mercantile provisions. Moreover, it would be unfair to enforce the aggressive targets found in SB 221 and simultaneously allow major demand response resources to leave the State of Ohio to the detriment of other Ohio ratepayers. CSP submits that SB 221's plan for demand response lies with implementation of programs through the EDU as regulated by the Commission under Ohio law – not with PJM or another Regional Transmission Organization regulated by FERC under federal law.

CSP has raised concerns regarding the ability of retail customers to participate in the PJM demand response programs "from day one" – prior to the first customer attempting to participate and since then in response to multiple other opportunities. Though financially lucrative to participating retail customers and their curtailment service providers (who get a percentage of the proceeds) –even if the customer never curtails – the PJM demand response programs do have a cost to CSP's customers. CSP must continue to count the load of PJM demand response participants as firm under the FRR option and the cost of doing so is and will continue to be reflected in CSP's retail rates. Notably, under Eramet's proposal (and in all instances where a customer participating in the PJM DRPs commits load toward an CSP's compliance, it would nonetheless be carried as firm load by CSP under its FRR obligation to PJM); PJM considers the demand response load as already having being sold into the Reliability Pricing Model (RPM) market and it cannot be used again to reduce CSP's FRR obligation to PJM. In other words, when a demand response customer enrolls with PJM, CSP must continue to include that participating customer as firm load as part of CSP's capacity obligation to PJM – regardless of whether the customer is also permitted to commit the same load toward compliance with CSP's PDR benchmarks.

By contrast, CSP uses its interruptible customer load (for those retail customers on CSP's interruptible tariffs) to meet its capacity obligation under the FRR option under the RPM market. For example, the interruptible capability of customers under Schedule IRP-D is used as a resource to meet CSP's FRR obligation. Thus, interruptible resources that exist under CSP's own programs can be utilized to satisfy capacity obligations as part of the supply portfolio being provided to SSO customers at ESP rates.

Electric utilities such as CSP can and should incorporate participation in PJM programs into their own demand response programs and efforts –this would include passing some of the economic benefits associated with participation in the PJM programs on to retail customers through complementary retail tariff programs. Under Ohio law, CSP can also pursue mercantile customer-sited mutually agreeable arrangements as provided in S.B. 221 to commit demand response resources and achieve compliance with the PDR benchmarks. In that manner, CSP's wholesale participation in the PJM programs and commitment of retail customer-sited resources would be effectively managed as part of the electric utility's supply portfolio and help contribute toward compliance with the benchmarks. That approach would also keep rates lower since it would avoid duplicative supply costs.

Whatever the final answer on these issues is by the Commission, CSP would like to reach a comprehensive solution for all of its customers whereby all available demand response capability, whether based on utility programs for its customers or based on customer-sited resources, is committed toward CSP's compliance and any associated costs are recovered through CSP's EE/PDR Rider. CSP submits that it is neither reasonable nor justified (and was not the intention of the Eramet special contract decision) to create a special paradigm just for one customer – especially given that the customer, Eramet, already has a special rates for electricity service from CSP. While Eramet may complain that CSP has not acted swiftly enough to develop a workable framework for all of its customers to achieve a result comparable to the PJM DRPs, the Green Rules were only finalized and effective in December 2009 and AEP Ohio has been working actively with stakeholders toward developing a filing to resolve these issues for all customers in a manner that at least partially addresses CSP's concerns. But that is not achievable in the context of Eramet's application. As discussed below, the Commission has currently placed a restriction on CSP customers such as Eramet that already have reasonable arrangements and the Commission needs to address and resolve those issues for all customers rather than adopting a piecemeal approach such as being suggested by Eramet.

II. Eramet did not seek permission from the Commission prior to registering with the PJM Load Response Program for 2010-2011 Planning Year, as it was required to do, and should not be given after-the-fact permission.

There is no question that this Commission has the authority to restrict retail participation in the PJM DRPs. The FERC rules concerning the PJM demand response programs clarify that State commissions (such as the PUCO) get to decide whether their retail customers should participate in the programs. *Wholesale Competition in Regions with Organized Electric Markets* (Docket Nos. RM07-19-000 and AD07-7-000), 125 FERC ¶ 61,071 (October 17, 2008) ("Final

Rule"). The Final Rule is contained in 18 CFR Part 35. The FERC's Final Rule explicitly only permitted participation by retail customers "unless the laws or regulations of the relevant electric retail regulatory authority do not permit a retail customer to participate." Final Rule at ¶ 154. *See also* 18 CFR 35.28(g)(1)(B)(3)(iii). While the Commission's decision in the *CSP ESP Case* did not fully resolve the questions related to retail participation, the Commission did exercise its authority to impose an interim restriction on retail participation in the PJM DRPs for certain CSP customers:

> In further consideration of the need to balance the potential benefits to PJM DRP participants and the costs to AEP-Ohio ratepayers, the Commission clarifies that *AEP-Ohio customers under reasonable arrangements with AEP-Ohio*, including, but not limited to, EE/EDR, economic development arrangements, unique arrangements, and other special tariff schedules that offer service discounts from the applicable tariff rates, *are prohibited from also participating in PJM DRP, unless and until the Commission decides otherwise in a subsequent proceeding.*

CSP ESP Case, Entry on Rehearing (July 23, 2009) at ¶ 108 (emphasis added). Eramet has an approved reasonable arrangement as a result of the Commission's decision in Case No. 09-516-EL-AEC, *In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta, Inc. and Columbus Southern Power Company* (*Eramet Special Contract Case*). Thus, the Commission's proscribed restriction is clear as it applies to Eramet: due to its reasonable arrangement, Eramet is prohibited from participating in the PJM DRPs "unless and until the Commission decides otherwise in a separate proceeding."

By approving a reasonable arrangement, the Commission's decision in the *Eramet Special Contract Case* triggered the restriction set forth in Paragraph 108 of the July 23, 2009 Entry on Rehearing in Case No. 08-917-EL-SSO. In this regard, the Commission's key finding in its Opinion and Order in the *Eramet Special Contract Case* (at 10) was that "Eramet must make its demand response capabilities available to CSP in order to reduce peak demand reduction compliance costs." More specifically, the Commission Order (at 10) requires that "Eramet and CSP shall work in good faith to determine how and to what extent Eramet's customer-sited capabilities, as referenced by Eramet witness Flygar, can be committed to CSP." The service agreement, signed by Eramet and CSP in compliance with the Opinion and Order in the *Eramet Special Contract Case*, also provides (in paragraph 5) as follows: "After the PJM 2009-2010 planning year, and in accordance with the Commission's rules and Ohio law, the Customer shall make its demand response capabilities available to the Company in order to reduce the Company's peak demand reduction compliance costs."

There is nothing in the Commission's order in the *Eramet Special Contract Case* or the agreement approved in that case supporting the notion that Eramet's participation in the PJM DRPs would be allowed after the 2009-2010 planning year. If the Commission or the parties had intended to create an exception to the clear prohibition contained in Paragraph 108 of the July 23, 2009 Entry on Rehearing in the *CSP ESP Case*, there would have been an explicit reference to support such an intention. Moreover, participating in PJM DRPs is, by no means, the only available way to commit Eramet's demand response resources to CSP. CSP's IRP-D Tariff is available. In addition, CSP's custom program for commitment of a demand response resource through a reasonable arrangement is available. In short, there is no basis to conclude that Eramet had no other way to comply with the Commission's directive in the *Eramet Special Contract Case* decision but to register with the PJM DRPs.

The reality is that Eramet is now attempting to "have its cake and eat it too" by unilaterally deciding the register with PJM DRPs after having obtained the Commission's approval of a special discount for electric service. If Eramet committed its customer-sited demand response resources to CSP without further payment from CSP, Eramet would not get any additional financial benefit beyond its substantial discount for electric service – that tradeoff supports the underlying logic of the *Eramet Special Contract Case* decision. Whereas, by committing to CSP its demand response load that is already committed to PJM, Eramet will receive lucrative payments from PJM while imposing additional costs on CSP's other customers – relative to both its participation in the PJM DRPs and its special rate discount being funded by other customers.

Thus, through its current application, Eramet attempts an "end run" around Paragraph 108 of the July 23, 2009 Entry on Rehearing in the *CSP ESP Case*, which simply prohibits registration and participation in the PJM DRPs "unless and until the Commission decides otherwise in a separate proceeding." Likewise, Eramet's current request undermines the Order in the *Eramet Special Contract Case* which clearly indicates (at 10) that after the 2009-2010 planning year Eramet "must make its demand response capabilities available to CSP in order to reduce peak demand reduction compliance costs." Under the terms of the Order in the *Eramet Special Contract Case,* Eramet is explicitly required to switch its demand response load from the PJM DRPs after the 2009-2010 planning year to committing resources directly to CSP. Through its current application, Eramet chose to unilaterally proceed and register with PJM DRPs for the 2010-2011 without obtaining Commission approval.[3]

III. Eramet's application fails to demonstrate compliance with applicable requirements in the ORC and the OAC.

Per OAC 4901:1-38-05(G), Eramet's unilateral application must do all of the following:

[3] Eramet states in its application that it tried unsuccessfully to reach an agreement with CSP regarding Eramet's commitment of demand response resources. (Application at 4.) In response to Eramet's proposal, CSP reminded Eramet of the restrictions imposed by the Entry on Rehearing in the *CSP ESP Case* and the Order in the *Eramet Special Contract Case*, indicating that CSP was not willing to enter into such an agreement or support that proposed course of action. Eramet's response was to unilaterally proceed and register for 2010-2011 without obtaining Commission's approval.

(1) Address coordination requirements between the electric utility and the mercantile customer with regard to voluntary reductions in load by the mercantile customer, which are not part of an electric utility program, including specific communication procedures.

(2) Grant permission to the electric utility and staff to measure and verify energy savings and/or peak-demand reductions resulting from customer-sited projects and resources.

(3) Identify all consequences of noncompliance by the customer with the terms of the commitment.

(4) Include a copy of the formal declaration or agreement that commits the mercantile customer's programs for integration, including any requirement that the electric utility will treat the customer's information as confidential and will not disclose such information except under an appropriate protective agreement or a protective order issued by the commission pursuant to rule 4901-1-24 of the Administrative Code.

(5) Include a description of all methodologies, protocols, and practices used or proposed to be used in measuring and verifying program results, and identify and explain all deviations from any program measurement and verification guidelines that may be published by the commission.

Without agreeing that Eramet's application meet the other requirements, CSP submits that Eramet has clearly failed to satisfy the third and fourth requirements.

Regarding the consequences of noncompliance, Eramet's application obliquely states that "[t]he consequences of noncompliance by Eramet with the terms of its demand response commitment are governed by a contract, under which Eramet will be subject to financial penalties imposed by PJM for failure to comply with its curtailment obligations when called upon to curtail load." (Eramet Application at 5.) While this statement is not at all clear, it apparently refers to a contract that exists in connection with Eramet's participation in the PJM DRPs. But this vague statement without an indication of the specific contents of the referenced contract clearly cannot satisfy any reasonable interpretation of the third requirement to identify all consequences of noncompliance by the customer with the terms of the commitment. Eramet identifies no consequences and includes no specificity whatever, improperly referring to being accountable to PJM, not CSP or this Commission, for noncompliance. Any meaningful commitment to CSP for purposes of compliance with Ohio benchmarks should include real consequences accountable directly to CSP and the Commission, not PJM. Since Eramet does not include the referenced contract and does not describe any specific consequences, it is not possible to know what is being referred to, let alone evaluate it.

The most glaring omission is applicant's failure to follow the clear and unequivocal requirement that a copy of the formal commitment declaration or agreement be attached. Eramet's application contains no such attachment and, consequently, also fails to satisfy the fourth criterion. This is not a mere filing requirement but is an extremely important and substantive component of any unilateral mercantile filing. CSP, as the proposed counterparty to the phantom agreement, needs to know every detail of the proposed agreement before it can meaningfully comment on the proposal. Even leaving aside the other statutory and legal concerns with a compulsory agreement ordered by the Commission, basic due process could require no less. As a related matter, for unilateral filings by mercantile customers under OAC 4901:1-39-05(G), the affected EDU should get advance notice and be able to reasonably incorporate into its compliance plan after the Commission reviews and approves a reasonable arrangement.

If the Commission does entertain Eramet's proposal to commit resources without payment on the theory that Eramet already "owes" CSP's customers commitment of the resources based on the Commission's approval of the special arrangement, other customers without such rate discounts might imply – absent a clear explanation of its rationale and potential distinctions – that they would be able to extract a second payment for that customer's participation in the PJM DRPs (since they do not "owe" CSP their demand response resources). Because of CSP's concerns about retail participation and in light of the Commission's discretion and authority to restrict retail participation, CSP submits that any decision permitting retail participation in the PJM DRPs (*i.e.*, including this case and all future cases) should be conditioned upon the customer committing the related demand response resources toward CSP's compliance without any additional payment to that customer by CSP.

Finally regarding costs, Eramet's application also states (at 5-6) that "there are no costs to CSP resulting from the Agreement that would otherwise be reflected as part of the EE/PDR Rider." CSP disagrees. Eramet itself acknowledges elsewhere (at 6) there will be documentation and reporting activity as well as measurement and verification activity. In particular, CSP has to review and respond to every application to register for the PJM DRPs. Then CSP personnel have to create customer baseline load calculations for each registering customer and analyze variances from customer baseline load during "events" and customer claimed "Price Responsive" curtailments. That ends up being a significant amount of work all together and these activities cause real costs for CSP and should be addressed by the Commission if it considers granting the application. Thus, any Commission decision permitting retail participation in the PJM DRPs (*i.e.*, including this case and all future cases) should also be conditioned upon any resulting cost to CSP being recoverable from other ratepayers as a compliance cost.

CONCLUSION

For the foregoing reasons, CSP urges the Commission to deny Eramet's application.

Respectfully submitted,

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PROOF OF SERVICE

I certify that Columbus Southern Power Company's Motion to Intervene and Initial Comments was served by First Class U.S. Mail upon counsel identified below for all parties of record this 3rd day of March, 2010.

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