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FILE

FAX

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals.	Case No. 10-2376-EL-UNC
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143. Revised Code, in the Form of an Electric Security Plan.	Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO
In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.	Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM
In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders.	Case No. 10-343-EL-ATA
In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders.	Case No. 10-344-EL-ATA
In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.	Case No. 10-2929-EL-UNC
In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code.	Case No. 11-4920-EL-RDR

In the Matter of the Application of Ohio Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code.	))))))	**Case No. 11-4921-EL-RDR**
(Consolidated)		

REPLY BRIEF
OF ORMET PRIMARY ALUMINUM CORPORATION

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REPLY BRIEF OF ORMET PRIMARY ALUMINUM CORPORATION

INTRODUCTION

In their Initial Brief, the Signatory Parties conspicuously ignore the Commission's standard for evaluating whether or not a rate design is unduly discriminatory or prejudicial. Rather than attempting to demonstrate that there is an actual and measurable difference in the service that will be furnished to Ormet Primary Aluminum Corporation ("Ormet"), they attempt to distract the Commission with irrelevant and unsubstantiated discussions of Ormet's tax status and its contractual history dating backing to 1957. Lacking any basis in law, this argument amounts to: "Ormet has been treated differently before, so the Commission can justifiably discriminate against Ormet today." Venturing far beyond the record in this proceeding and badly missing the applicable legal standard, the Signatory Parties weave a *post-hoc* justification for discriminating against Ormet. There is simply no legitimate regulatory theory or evidence to support the unlawful discrimination. Because the Signatory Parties have failed to demonstrate that an actual or measurable difference in service furnished to Ormet exists, the rate they propose is unduly prejudicial and discriminatory and the Commission must eliminate or substantially modify the discriminatory 250 MW monthly peak load limitation on the Load Factor Provision ("LFP") proposed in the Stipulation.

ARGUMENT

I. The Signatory Parties Concede in Their Initial Brief, As They Must, that Ormet Is *Being Treated Differently Under the ESP Proposed in the Stipulation.*

The Signatory Parties admit at page 43 of their brief that Ormet is the only AEP Ohio customer that they exclude from the Load Factor Provision with the 250 MW monthly peak demand limit. They admit that Ormet is being treated differently than all other customers in this

respect.[1] Therefore, it is undisputed that Ormet is treated differently than other customers under the Load Factor Provision of the proposed Stipulation. The only issue remaining is whether or not treating Ormet differently is just and reasonable, or whether the differential treatment of Ormet is unduly and unreasonably prejudicial and discriminatory under Ohio law.

II. The Signatory Parties Offer No Evidence that Demonstrates an Actual and Measurable Difference in the Service Furnished to Ormet.

In evaluating whether the different treatment of Ormet under the LFP is unduly discriminatory and prejudicial, Commission and Ohio Supreme Court precedent indicates that the proper test under Ohio law is whether the "differential is based upon some actual and measurable differences in the furnishing of services to the consumer." *Mahoning Cnty. Townships v. Pub. Utils. Comm'n of Ohio*, 388 N.E.2d 739, 742 (Ohio 1979); *Office of Consumers' Counsel v. Pub. Utils. Comm'n of Ohio,* 592 N.E.2d 1370, 1373 (Ohio 1992). Instead of applying this legal test, the Signatory Parties argue that the Commission should approve a rate differential for Ormet because Ormet benefits from a tax exemption and has been treated as a unique customer in the past. Their justification for discrimination does not comport with the law. The Signatory Parties simply have not demonstrated, and cannot demonstrate, that there is an actual and measurable difference in the service that will be furnished to Ormet under the proposed ESP.

A. Ormet's kWh Tax Status is Not Relevant to the Issue of Whether the Service that Will Be Furnished to Ormet by AEP Ohio Will Be Actually and Measurably Different Than the Service Furnished to the Rest of the GS-3 and GS-4 Rate Classes.

The Signatory Parties argue that Ormet is unique because "since the passage of Senate Bill 3, Ormet has been exempt from paying the kilowatt hour tax under R.C. 5727.81."

[1] Joint Initial Brief of the Undersigned Signatory Parties ("Signatory Parties' Brief") at p. 43.

Signatory Parties' Brief at p. 47.[2] Notwithstanding that this argument is unsupported by the evidence in this proceeding,[3] whether Ormet is eligible for a statutory tax exemption is irrelevant to the issue of whether there is an actual and measurable difference in the service that will be furnished to Ormet under the proposed ESP.

The Signatory Parties make a number of statements regarding Ormet's tax status in this discussion that are unsupported by any evidence whatsoever. For example at page 48, they claim that Ormet "has avoided paying state and local governments tens of millions of dollars of revenue" without citing to any source for that sum or offering any explanation of how the Signatory Parties determined the dollar amount that Ormet saves through the exemption. They further assert that "[o]n a going forward basis, Ormet will continue to avoid payment of tens of millions of dollars" without any factual support or any explanation of the assumptions underlying that statement. *Id.* Failing to raise these arguments in their testimony makes it impossible for the Commission to develop a complete and comprehensive record to reasonably understand the exemption's impact upon Ormet or other consumers on the AEP Ohio system. The Ohio Supreme Court must be able to determine from the Commission's decision "whether the evidence presented to the commission *as found in the record* supported the essential findings of fact so made by the commission." *See Tongren v. Pub. Utils. Comm'n of Ohio*, 706 N.E.2d 1255, 1256-57 (Ohio 1999) (emphasis added) (explaining Ohio Revised Code section 4903.13). There is simply no evidence in the record as to what Ormet does or does not actually pay in taxes or what it will or will not pay in the future, and the Commission cannot rely upon such utterly

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[2] On November 15, 2011, Ormet filed a motion to strike the referenced section from the Signatory Parties' Brief. That motion is currently pending before the Commission, however, because the motion may not be ruled upon by the deadline for this reply brief, Ormet has included a response to the Signatory Parties' arguments in this brief.

[3] TR at 267:22-268:15 (sustaining Ormet's relevance objection to introduction of the kWh tax exemption as outside the scope of the cross examination).

unsupported statements in making its determination. Because the Signatory Parties' argument is completely unsupported by the record in this proceeding, the Commission can give the argument no weight in making its determination.

The Signatory Parties appear to be of the opinion that because Ormet is eligible for a statutory tax exemption, it should be charged different rates than all other customers in its rate class. However, they have neither demonstrated that the tax exemption causes a difference in the service provided to Ormet, nor even that Ormet is the only AEP Ohio customer eligible for the tax exemption. Rather, they attempt to imply that Ormet is somehow behaving improperly by being eligible for the statutorily created tax exemption. Signatory Parties' Brief at p.48. They have not explained why the Commission should "remedy" the decision of the Ohio legislature to exempt entities such as Ormet from the kWh tax by requiring such customers to pay a higher rate for electric service.

The Commission must exercise especially great caution not to undo the legislature's intent with respect to the tax exemption without any basis in the record with which to make a reasoned decision. If the Signatory Parties believed that a consideration of the Parties' tax liabilities was relevant to an assessment of the LFP's discriminatory nature, they had ample opportunity in their testimony to raise that issue. They did not. Without the evidence available to assess "actual and measurable" differences between Ormet and the other GS-3/GS-4 customers, the Commission has no basis to review the kWh tax exemption that the legislature made available to benefit Ohio. Most importantly, however, the fact that Ormet may be eligible to receive a tax exemption under a statute is wholly irrelevant to the Commission's determination of undue discrimination under the appropriate legal standard.

B. Ormet's History of Power Contracts Similarly is Not Relevant to the Issue of Whether the Service that Will Be Furnished to Ormet by AEP Ohio Will Be Actually and Measurably Different Than the Service Furnished to the Rest of the GS-3 and GS-4 Rate Classes.

The last half-century of Ormet's power contract history recounted by the Signatory Parties is irrelevant to whether the LFP in the proposed tariff is unduly discriminatory going forward; it has no relevance to the Commission's standards for assessing undue discrimination and is largely unsupported by the record in this proceeding. As such, it should be given no weight by the Commission.[4]

To support their argument that it is reasonable to discriminate against Ormet, the Signatory Parties selectively recount the history of Ormet's contract rates in blocks from 1957 to 1997; 1998 to 2005; 2006 to 2009; and 2010 to 2018. Signatory Parties' Brief at pp. 43-48. Courts frequently reject antiquated historical observations like that of Ormet's history as irrelevant to a current analysis of undue discrimination and the Commission should do the same here. In *Mahoning*, for example, the Commission rejected the use of decades-old historical population data offered in defense of a rate design charging higher rates to lower-density unincorporated areas than it did to municipalities. *Mahoning*, 388 N.E.2d at 740. The Commission in that case held that such historical data could not be used to show actual and measurable differences that justify current discrimination. *Id.* On appeal, the Ohio Supreme Court held that "[e]ven though the classifications may have been valid when inaugurated in 1952, the political or governmental units have varied so greatly in composition and population that at this time such classifications have little touch with reality, and are not meaningful." *Id. at* 744. Applying this precedent, the Commission should not give any weight to the stale, irrelevant

[4] As noted above, Ormet has an outstanding motion to strike this and other sections of the Signatory Parties' Brief. Because that motion is pending, Ormet responds to that section of their brief here.

argument about the last half-century of Ormet's history because it has "little touch with [the] reality" of tariff rates today and is simply "not meaningful" to whether *prospective* discrimination against Ormet is justified. *Id.*

Furthermore, the Signatory Parties fail to explain how the negotiated, bilateral power agreements they discuss in their Initial Brief are relevant to the issue of what *tariff* rate should be applied to Ormet. The fact that Ormet has in the past entered into bilateral power agreements rather than taking service under the tariff does not explain how there would be an actual, measurable difference in service furnished to Ormet by AEP Ohio under the proposed ESP tariff that warrants treating Ormet differently than the rest of its rate class. The data offered by the Signatory Parties regarding Ormet's power arrangement history prior to the effective date of the proposed ESP is simply irrelevant to the issue of whether there will be an actual and measurable difference in service furnished to Ormet under the proposed ESP. Thus it is irrelevant to whether the discrimination against Ormet incorporated in the Stipulation is "undue."

Moreover, to the extent that the Signatory Parties seek to argue that Ormet's past rate discounts justify its subsidization of other ratepayers to "settle the score" or "level the playing field," this is not the appropriate forum for such a collateral attack on prior rate determinations that are not before the Commission. If the Signatory Parties believe Ormet's reasonable arrangements were unfair, the forum to challenge those arrangements was in the Commission proceedings considering each arrangement. If the Signatory Parties, many of whom as GS-3/GS-4 customers opposed Ormet's reasonable arrangement, believe that they are entitled to similar benefits, then it is their responsibility to file the appropriate petitions, not to seek a backdoor or *de facto* benefit through a discriminatory LFP. Furthermore, the Signatory Parties' argument fails to consider that the Commission weighed the costs and benefits of Ormet's interests against

the interests of the other ratepayers on the AEP Ohio system in endorsing each of Ormet's past arrangements. The Commission concluded that those arrangements were in the public interest.

Most recently, for example, in the Commission's 2009 order approving Ormet's reasonable arrangement, the Commission determined that the reasonable arrangement, as proposed by Ormet, did not contain sufficient potential benefits to ratepayers to fully offset the associated risks. As a result, the Commission modified the agreement to limit the risks to ratepayers and require a greater potential benefit.[5] Thus, the Commission has already ruled on what is needed to offset the risks posed to ratepayers by Ormet's reasonable arrangement. Any further "correction" of the impact that Ormet's current reasonable arrangement has on ratepayers constitutes an impermissible "collateral attack . . . on a judgment in a proceeding other than a direct appeal" -- the Order approving Ormet's reasonable arrangement. *See, e.g., Ohio Pyro, Inc. v. Ohio Dep't of Commerce,* 875 N.E.2d 550, 555-56 (Ohio 2007) (explaining that "collateral or indirect attacks [on a final judgment or order] are disfavored").

The Signatory Parties may not penalize Ormet for discounts it received under its existing or prior reasonable arrangements by making Ormet pay a subsidy during the ESP period intended to offset those discounts. To do so constitutes improper retroactive ratemaking in violation of the filed rate doctrine. The Ohio Supreme Court has held that retroactive refunds are simply not permitted in Ohio, even when they are collected through a prospective rate. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 947 N.E.2d 655 (Ohio 2011). In *Columbus Southern*, the Ohio Supreme Court found that the Commission had engaged in improper retroactive ratemaking even where it did not authorize the utility to rebill customers for the prior

[5] 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, Opinion and Order*, at p. 12, Case No. 09-119-EL-AEC, issued July 15, 2009, *affirmed In re: Application of Ormet Primary Aluminum Corp.*, 129 Ohio St. 3d 9, 2011-Ohio-2377, N.W.2d 991 (Ohio 2011).

period where it "reached the same financial result" by setting rates in the prospective period at a level sufficient to recover the funds that would have been refunded for the prior period. *Id.* at 660. Therefore, any attempt by the Signatory Parties to offset past Ormet rate discounts through the LFP by effectively requiring Ormet to repay such discounts by imposing a new $17 million annual subsidy on Ormet is effectively retroactive ratemaking impermissible under Ohio law.

C. Ormet's Size Relative to Its Competitors Supports Its Inclusion in the LFP, Will not Frustrate the LFP's Purpose, and in Any Case Is Irrelevant to Whether There is an Actual, Measurable Difference in the Furnishing of Service to Ormet.

The Signatory Parties' argument that including Ormet would defeat the LFP's purpose distracts from the real issue before the Commission. The question is not whether including Ormet in the LFP would frustrate what the Signatory Parties *claim* are the goals of the LFP. According to Commission precedent and the Ohio Supreme Court, the relevant question is whether actual and measurable differences between the services furnished to Ormet and those furnished to the rest of the rate class justify discriminating against Ormet. *Ohio Edison Co. v. Pub. Utils. Comm'n of Ohio,* 678 N.E.2d 922, 926 (Ohio 1997); *Mahoning Cnty. Townships v. Pub. Utils. Comm'n of Ohio*, 388 N.E.2d 739, 742 (Ohio 1979). Furthermore, the purpose of the LFP is not, as Ormet's competitors state, to promote general economic development and rate stability; rather, it is to require Ormet to subsidize their costs. That is not a justifiable basis for discrimination, and the record cannot support such an outcome.

Even if the goals of the LFP of promoting economic development and stability of rates were a standard that justifies discrimination, the record does not support excluding Ormet from the LFP as a means to reach those goals. Nothing in the record indicates that excluding Ormet from the benefits of the LFP would promote economic development or certainty of rates for Ohio any more than if Ormet also benefited. Conversely, the record evidence indicates that each of

the Signatory Parties' justifications for including themselves in the benefit of the LFP apply equally to Ormet.

The Signatory Parties admit that a key factor *supporting* the use of the LFP is that the higher a customer's load factor, the more efficiently they use fixed generation assets, and the cheaper they are to serve. Exhibit No. ORM-9. Witness Baron testified that "[t]he LFP recognizes the lower relative cost of serving high load factor customers (***whether they are large or small***; industrial or commercial) compared to lower load factor customers." *See* Exhibit No. OEG-1 at p. 6:13-14 (emphasis added); *Cleveland Elec. Illuminating Co. v. Pub. Utils. Comm'n of Ohio*, 330 N.E.2d 1, 19 (Ohio 1975) (recognizing "the long established and acknowledged fact[]" that "the cost of rendering service to the customer declines as the volume of service increases"). Higher load factor customers like Ormet also typically provide a large number of well-paying, household sustaining jobs, and their employees spend their wages on local goods and services. *See* Exhibit No. OEG-1 at p. 10:12-19, 11. The Signatory Parties offer no reason why their high load factors promote economic development in Ohio, but Ormet's higher load factor does not. The Signatory Parties also fail to provide support or citation to the record for their speculation that if Ormet were included in the LFP, large customers might leave Ohio; the same could be said about Ormet which is also an export industry customer with the option to move production out of state. *See* Exhibit No. ORM-11.

Ignoring the proper standard, the Signatory Parties argue that discriminating against Ormet is justified because Ormet's size means that including Ormet in the LFP would "increas[e] the net charges and reduc[e] the net credits" of other AEP Ohio customers. Signatory Parties' Brief at p. 48. They also argue that including Ormet would "skew the intended results," resulting in rates that would be higher for commercial and industrial customers than if Ormet were discriminated against. *Id.* But that is merely because, absent discrimination, the benefits of

the LFP would be more equitably spread out among AEP Ohio's commercial and industrial customers. That entities competing with Ormet for electric service[6] desire to impose costs on Ormet to promote their *own* economic development is not a legitimate justification to discriminate against Ormet. It is the economic development of *Ohio*, not that of a sub-set of Ohio ratepayers seeking to impose discriminatory rates, that is to be supported. *See* Ohio Rev. Code § 4928.02 (explaining the policy of the state is to "ensure the availability to consumers of . . . *nondiscriminatory* . . . retail electric service." (emphasis added)). That the Signatory Parties' witnesses testifying in support of the LFP did not consider non-discriminatory alternatives to excluding Ormet further indicates their true intent to benefit themselves at Ormet's expense. *See, e.g.*, TR at 126:6-9; 264:6-11; 656:2-4.

The Signatory Parties have further failed to offer any evidence that a monthly peak load of 250 MW is a reasonable limitation for the LFP. The Commission has no information indicating why the 250 MW threshold was chosen on which to base its analysis of whether the LFP's discrimination is undue. No witness addressing the LFP knew why 250 MW was selected as the proper threshold and no explanation is offered in the Signatory Parties' Brief. *See* TR at 126:6-9; 262:9-15 and 655:19-656:4. Without a basis in the record to understand why the 250 MW threshold was chosen, neither the Commission nor the Signatory Parties can speculate whether including Ormet in the LFP would frustrate Ohio's economic development and stability of electric rates more or less than if a different type of limitation on the LFP were chosen. Furthermore, the record reflects that the higher a customer's load factor, the cheaper it is to deliver service to it. *See* Exhibit No. OEG-1 at p. 6:13-18. As the Court in Ohio concluded in *Mahoning*, where there is no evidence before the Commission to justify a difference in cost of service, there is no reasonable basis for imposing discriminatory rates. 388 N.E.2d at 744-45.

[6] Exhibit No. ORM-7.

Because no such evidence has been presented to the Commission, it cannot impose discriminatory rates.

Finally, in addition to the fact that the Signatory Parties' arguments are irrelevant to the proper standard and the record contains no support for their position, their argument is illogical. As explained, the Signatory Parties argue that if Ormet benefited from the LFP, then the LFP would not accomplish its purported goals of economic development and rate stability. But the Signatory Parties designed the LFP, within the context of the settlement, to reach those purported goals precisely by discriminating against Ormet.

Whether discrimination in Ohio is undue is not resolved by asking whether a provision designed to discriminate would not work without that discrimination. Rather, the Commission analyzes undue discrimination by reference to whether the cost of serving similarly situated customers justifies discrimination because "*public utilities must charge all similarly situated customers the same rates.*" *Ohio Edison Co. v. Pub. Utils. Comm'n of Ohio,* 678 N.E.2d at 926 (emphasis added). In this case, the Signatory Parties have conceded that Ormet is singled out for unique treatment under the Stipulation and they have put forth no valid regulatory theory or evidence to justify this discrimination. This is a textbook case of undue prejudice and discrimination in violation of Ohio law and Commission precedent. For these reasons, the 250 MW monthly peak load limit on the LFP must be eliminated or significantly modified.

CONCLUSION

WHEREFORE, for all the reasons stated above, the 250 MW monthly peak load limitation on the Load Factor Provision in the Stipulation must be eliminated or significantly modified.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Reply Brief of Ormet Primary Aluminum Corporation* was served by U.S. Mail and email upon counsel identified below for all parties of record this 18th day of November, 2011.

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