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BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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**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)**

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**ORMET PRIMARY ALUMINUM CORPORATION'S  
APPLICATION FOR REHEARING**

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Pursuant to Section 4903.10, Revised Code, and Rule 4901-1-35 of the Ohio Administrative Code, Ormet Primary Aluminum Corporation ("Ormet") applies for rehearing of the Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission") issued in the above-captioned proceeding on December 14, 2011 approving the Stipulation with certain modifications.

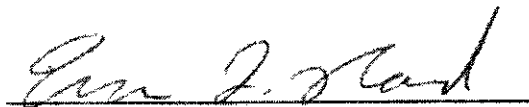
The Commission's Order relied upon the erroneous representations, made under oath, by Columbus Southern Power Company and Ohio Power Company's (collectively "AEP Ohio") expert that the cost to Ormet of exclusion from the Load Factor Provision ("LFP") of the Stipulation would be approximately \$17 million. Just a few weeks, later, however, in its compliance filings, AEP Ohio indicated that the cost to Ormet is drastically higher, approximately \$28 million,<sup>1</sup> a 64.7% increase. This unanticipated and dramatic increase in electricity rates to Ormet in the compliance filing will imperil Ormet's Hannibal operations, especially if the LME price of aluminum stays at its current low rate for an extended period of time.

The Commission's Order is unjust and unlawful for the following reasons:

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<sup>1</sup> Compliance Tariffs of AEP Ohio ("Compliance Filing") at Original Sheet No. 495-1 (Dec. 22, 2011).

1. The Commission relied upon information supplied by AEP Ohio that was subsequently discovered to be erroneous in making its ruling. This error should be corrected now that new information is available.
2. The Commission erred by failing to explain how the elimination of the discount Ormet receives under its Unique Arrangement does not undermine the Unique Arrangement, and its conclusion that Ormet's Unique Arrangement insulates it from AEP Ohio's tariff rates goes against the manifest weight of evidence in the record.
3. The Commission's sole justification for excluding Ormet from the LFP was that because Ormet's has a Unique Arrangement there are no similarly situated customers. However, the record demonstrates that there are three other high load factor customers that are permitted the benefit of the Unique Arrangement. Therefore, the Commission's conclusion is in error because it goes against the manifest weight of the evidence. If the size of Ormet's load was the determining factor in distinguishing it from other customers, then the Commission erred in failing to explain why the first 250 MW of Ormet's load should not be treated similarly to the load of the other high load factor customers who have Unique Arrangements.
4. The Commission erred by failing to address the legal standard requiring that there be a nexus between the "difference" used as the basis for discrimination and the rate differential. If a new standard is being applied, the Commission erred by failing to explain its deviation from the prior legal standard.
5. The Commission erred by failing to address Ormet's arguments that the exclusion of Ormet from the LFP violates the important regulatory principles regarding cost causation and cost shifting.
6. The Commission erred by failing to address Ormet's arguments that exclusion of Ormet from the LFP violates the regulatory principles of promoting economic efficiency and reducing the growth rate of energy consumption.
7. The Commission's ruling that it is just and reasonable to exclude Ormet from the LFP is manifestly against the weight of the evidence and is clearly unsupported by the record.



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**January 13, 2011**

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## MEMORANDUM IN SUPPORT

The Commission's determination in its Order that the 250 MW monthly peak load limitation on the load factor provision of AEP Ohio's SSO rates is just and reasonable erred on several counts. It relied upon information that was subsequently revealed to be incorrect and made several conclusions that are manifestly against the weight of the evidence and are unsupported by the record. Ormet respectfully requests that the Commission reconsider its ruling.

Ohio Revised Code Section 4903.09 provides that "the commission shall file, with the records of [contested] cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact." Section 4903.13 further provides that a PUCO order "shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable." See also *Sunoco, Inc. v. Toledo Edison Co.*, 953 N.E.2d 285, 289 (Ohio 2011) (applying standard and reversing). PUCO orders are unlawful or unreasonable when they are not based upon the record or any specific finding of fact in the record. *Tongren v. PUCO*, 706 N.E.2d 1255, 1257 (Ohio 1999) (reversed and remanded); *Ideal Transportation Co. v. Pub. Util. Comm.*, 326 N.E.2d 861, 863-864 (Ohio 1975) (reversed); *Motor Serv. Co. v. Pub. Utils. Comm'n.*, 313 N.E.2d 803, 810 (Ohio 1974) (affirmed in part and reversed in part). It is well recognized in Ohio that: "when an opinion and order of the Commission fails to state specific findings of fact, supported by the record, and fails to state the reasons upon which the conclusions in the opinion and order were based, such order fails to comply with the statute [4903.09] and is unlawful." Khosla, Samantha, et al., Ohio Jurisprudence, Findings and written opinion -- strict compliance with record requirement, 78 Ohio Jur. 3d Public Utilities § 53 (West 2012) (reiterating and synthesizing the holdings in *Tongren* and *Ideal* cited above).

In *Martin Marietta v. PUCO*, 954 N.E. 2d 104,109 (Ohio 2011) the Court explained that “R.C. 4903.13 provides that a PUCO order shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable.” *Constellation NewEnergy, Inc. v. Pub. Utils. Comm’n.*, 820 N.E.2d 885, ¶ 50. The Court “will not reverse or modify a PUCO decision as to questions of fact when the record contains sufficient probative evidence to show that the PUCO’s determination is not manifestly against the weight of the evidence and is not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty.” *Monongahela Power Co. v. Pub. Utils. Comm’n.*, 820 N.E.2d 921, 927 (Ohio 2004).

#### Argument

1. **The Commission relied upon information that was subsequently discovered to be erroneous in making its ruling. This error should be corrected now that new information is available.**

AEP Ohio’s witness testified under oath at the hearing that the impact of being excluded from the Load Factor Provision (“LFP”) was approximately \$17 million per year (See TR at 125:10-25) and the Commission relied upon this fact in reaching its conclusion that excluding Ormet from the LFP was just and reasonable. Order at p. 37. However, AEP Ohio’s compliance filing indicates that the impact upon Ormet will not be \$17 million, but rather \$28 million<sup>2</sup> – a 64.7% increase. The discount that Ormet receives or the premium it pays will now be based on a tariff rate that is \$28 million higher than the standard tariff rate. This dramatic increase in costs imperils the operations at Ormet’s Hannibal Facilities if the current, low LME price of aluminum persists.

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<sup>2</sup> Compliance Tariffs of AEP Ohio (“Compliance Filing”) at Original Sheet No. 495-1 (Dec. 22, 2011).

Ohio precedent is clear that “courts interpreting this statutory provision state that the Commission’s duties *require* it to have all relevant information necessary to make an informed decision in the case before it.” 78 Ohio Jur. 3d Public Utilities § 58 (West 2012) (citing *Elyria Tel. Co. v. Pub. Utils. Comm’n*, 110 N.E.2d 59 (Ohio 1953)) (emphasis added). Accordingly, “receiving evidence that could have been offered at the first hearing is not always error.” *Id.*

Despite Ormet’s and the other parties’ reasonable diligence, this figure was not reasonably available until after the hearing had concluded. Thus, on rehearing, the Commission has the statutory authority to take new evidence on this topic. Ohio Rev. Code § 4903.10(B). The information in the record underlying the Commission’s decision is wrong and the Commission would err to rely upon it in the face of new evidence that was not reasonably available to the parties with diligence until after the hearing.

2. **The Commission erred by failing to explain how the elimination of the discount Ormet receives under its Unique Arrangement does not undermine the Unique Arrangement, and its conclusion that Ormet’s Unique Arrangement insulates it from AEP Ohio’s tariff rates goes against the manifest weight of evidence in the record.**

The Signatory Parties, by their own evidence, made it clear that by placing the 250 MW monthly peak load limitation on the LFP, the Stipulation requires Ormet to subsidize the use of generation assets by other customers in an unjust and unreasonable manner at a rate of approximately \$17 million per year. See TR at 125:10-25; Exhibit Nos. ORM-5, ORM-9 and ORM-13 at pp. 5 and 6 (Signatory Party witnesses admitting that AEP Ohio’s rate design would unjustly and unreasonably shift costs from lower load factor customers to higher load factor customers, including high load factor customers with monthly peak loads over 250 MW, and that the impact on Ormet is approximately \$17 million). This testimony was undisputed in the record. AEP Ohio’s compliance filing now indicates, without explanation as to why the number



it presented to the Commission was incorrect, that the impact is in reality \$28 million.<sup>3</sup> The adverse effect of the Commission's order on Ormet's Unique Arrangement is further highlighted by the increased impact.

The Commission concludes in its order that the exclusion of Ormet from the LFP is not discriminatory because Ormet's "rates are set pursuant to its Unique Arrangement Case, not AEP-Ohio's SSO rates that other high load industrial and commercial customers fall under." Order at p. 38. This conclusion however, fails to acknowledge that Ormet's discount is tied to the tariff rate and therefore, under most scenarios under the Unique Arrangement, the price Ormet pays for electricity is directly impacted by any shifts in the tariff rate. As Ormet explained on brief, the maximum discount from the tariff rate that Ormet receives under its Unique Arrangement with AEP Ohio is capped at \$54 million for calendar year 2012, \$44 million for 2013, \$34 million for 2014, \$24 million for 2015 and \$14 million for 2016.<sup>4</sup> Within this structure, even if Ormet uses the full \$24 million discount in calendar year 2015<sup>5</sup>, Ormet will still be paying a rate that is \$4 million higher than the tariff rate. Nonetheless, AEP Ohio would collect \$24 million in lost revenues from its other ratepayers through the Economic Development Rider ("EDR"). Such a perverse result undermines the intention of Ormet's Unique Arrangement -- it results in Ormet paying an above-tariff rate for power while still requiring other ratepayers to pay lost revenues to AEP Ohio. This result will simultaneously penalize Ormet for having a Unique Arrangement and require the consumers paying the EDR to subsidize the recipients of the LFP. The Commission's Order not only fails to address why it is satisfied with this outcome that is unreasonable on its face, but further holds as the primary basis for its decision to exclude Ormet from the LFP that Ormet has a Unique Arrangement.

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<sup>3</sup> Compliance Filing at Original Sheet 495-1.

<sup>4</sup> See Ormet Unique Arrangement Order at p. 10.

<sup>5</sup> Ormet notes that the ESP term does not expire until May 31, 2016. [cite]

In addition, the Commission has ruled that under certain circumstances, Ormet must pay a premium of up to 8% over AEP Ohio's tariff rates under the Unique Arrangement with AEP Ohio.<sup>6</sup> The Commission found that this created a potential benefit to other ratepayers in the form of a contribution by Ormet to delta revenue credits of approximately \$17.48 million per year. *Id.* Thus, if the flat 250 MW limitation is sustained, Ormet could find itself in a position of having to pay a premium over AEP Ohio's tariff rate of roughly \$17.48 million per year, plus a subsidization of other customers of approximately \$28 million per year by virtue of being excluded from the LFP. This result more than doubles the potential benefits to ratepayers that the Commission found necessary to offset the risk created in Ormet's Unique Arrangement, and places an unreasonable burden on Ormet. The Commission's failure or refusal to consider this strange result indicates an unreasoned decision. It is not enough for the Commission to cursorily hold that excluding Ormet promotes economic development and rate stability; it must explain why, based on specific facts, its decision does so.

It is clear that under Ormet's Unique Arrangement, if the LME price is low enough that Ormet is receiving the full discount, its rate is directly increased or decreased by any change in the AEP Ohio tariff rate, and if the LME rate is high enough for Ormet to be paying a premium, the rate Ormet will pay is also directly impacted by any shift in the AEP Ohio tariff rate. Thus, although Ormet may not at any given moment be paying exactly the AEP Ohio tariff rate, the conclusion that its rates are not set "pursuant to" the tariff rate is erroneous.

As demonstrated above, the order of magnitude of the newly- increased \$28 million impact on Ormet is sufficient to destroy the rate stability benefits that the Commission referenced in its Order. Order at p. 38. Therefore, due to the new information provided in AEP

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<sup>6</sup> See Ormet Unique Arrangement Order at p. 12.

Ohio's compliance filing, it is now apparent that the Commission's statement that Ormet is already a beneficiary of the rate stability benefits the LFP is designed to create is incorrect.

In its order approving Ormet's Unique Arrangement, the Commission very carefully balanced the risks to ratepayers arising from the Unique Arrangement with the potential benefits to ratepayers. The Commission modified the proposed arrangement to satisfy it that there were sufficient potential benefits in relation to the risks that ratepayers bear. *Id.* at p. 12. This is exactly the result that the Legislature intended when it enacted the statute permitting Unique Arrangements, but the Commission's Order in this case undoes the desired result. The Commission may not undo a previous order without explaining reasonable grounds for its action. *See, e.g., Util. Serv. Partners, Inc. v. Pub. Util. Comm'n*, 921 N.E.2d 1038, 1043 (Ohio 2009). Here, beyond failing to explain its reasoning, the Commission's Order gives no indication that the Commission understands the full implications of its Order. This is especially likely since the Commission expressly relied upon AEP's presentation of the erroneous \$17 million impact figure. The Commission did not know at the time it issued its order that this figure is really \$28 million.

Finally, in granting approval for Ormet's Unique Arrangement, the Commission made several findings specific to Ormet that were essential to the Commission's determination that Ormet's arrangement was reasonable and AEP Ohio should be allowed to collect delta revenues from other customers. The Commission found that Ormet had demonstrated that it provides \$195 million in total employee compensation and benefits to the regional economy and approximately 1,000 direct jobs and 2,400 indirect jobs would be preserved as a result of the Unique Arrangement.<sup>7</sup> The Commission's Order on the Stipulation undoes the benefits to Ohio

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<sup>7</sup> *See, 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,*

from the Unique Arrangement, and specifically, by substantially and materially increasing Ormet's electricity costs, imperils Ormet's ability to sustain its operations at the Hannibal Facility and all of the benefits associated therewith.

3. **The Commission's sole justification for excluding Ormet from the LFP was that because Ormet's has a Unique Arrangement there are no similarly situated customers. However, the record demonstrates that there are three other high load factor customers that are permitted the benefit of the Unique Arrangement. Therefore, the Commission's conclusion is in error because it goes against the manifest weight of the evidence. If the size of Ormet's load was the determining factor in distinguishing it from other customers, then the Commission erred in failing to explain why the first 250 MW of Ormet's load should not be treated similarly to the load of the other high load factor customers who have Unique Arrangements.**

The Commission's ruling that because Ormet has a Unique Arrangement there are no other similarly situated customers is in error. Order at p. 38. The Commission erred by failing to explain its reasons for determining that Ormet is not similarly situated to the other three high load factor customers whose rates are set by their own Unique Arrangements, not AEP-Ohio's SSO rates. The Commission's Order must contain sufficient details to understand the reasoning behind how the Commission reached its decision. *MCI Telecoms. Corp. v. Pub. Util. Comm'n*, 513 N.E.2d 337, 344 (Ohio 2004). At least three other high load factor GS-2, GS-3, and GS-4 customers of AEP Ohio also receive electricity discounts under Unique Arrangements. Exhibit Nos. ORM-2, ORM-3. Despite being similarly situated to Ormet and receiving like or contemporaneous service to Ormet, the Commission's Order allows these three customers to benefit from the LFP of the ESP rates without any explanation as to why they receive the benefit but Ormet does not.

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Opinion and Order, at p. 3, Case No. 09-119-EL-AEC, issued July 15, 2009, ("Ormet Unique Arrangement Order"), *affirmed In re: Application of Ormet Primary Aluminum Corp.*, 129 Ohio St. 3d 9, 2011-Ohio-2377, 949 N.E. 2<sup>nd</sup> 991 (Ohio 2011).

If the Commission distinguished the other three customers based on size and failed to explain its determination fully in the Order, then it erred. Furthermore, the Commission failed to explain why it did not grant Ormet's request to have the first 250 MW of its load made eligible for the LFP. Although no witness supporting the Stipulation could explain why 250 MW was chosen as the threshold for the LFP, *see* TR at 126:6-9; 262:9-15 and 655:19-656:4, the Signatory Parties presumably made a determination that loads of 250 MW or less would not impermissibly skew the LFP in a manner that defeats its purpose. There is no evidence that the first 250 MW of Ormet's load would have any different impact on the system than the first 250 MW of all of the other customers' loads. Therefore, the Commission erred by not treating Ormet comparably to the other high load factor customers with Unique Arrangements and allowing the first 250 MW of its load to be eligible for the LFP.

4. **The Commission erred by failing to address the legal standard requiring that there be a nexus between the "difference" used as the basis for discrimination and the rate differential. If a new standard is being applied, the Commission erred by failing to explain its deviation from the existing legal standard.**

The Commission committed reversible error by failing to apply the legal standard required by the Ohio Supreme Court to justify discriminatory rates between customers for whom the utility provides "like and contemporaneous service" based on the cost of service rendered. *Mahoning Cnty. Townships v. Pub. Utils. Comm'n of Ohio*, 388 N.E.2d 739, 742 (Ohio 1979). As Ormet explained in its briefs, Ohio precedent is clear: a "*reasonable* differential or inequality of rates" can only be justified "where such differential is based upon some actual and measurable differences in the furnishing of services to the consumer." *Id.* (emphasis added). *Mahoning* requires that customers receiving "like and contemporaneous service" must receive the same rates unless the rate difference is reasonable, based upon actual and measurable differences in the cost of serving the customers. The Commission's complete failure to apply this standard

constitutes reversible error and nothing in the Commission's reasoning can salvage its conclusion that the LFP is not unduly discriminatory.

Instead of applying this standard or explaining why *Mahoning* does not apply, the Commission held that Ormet is not "similarly situated" because Ormet has a Unique Arrangement. Order at 38. First, this reasoning fails to reasonably distinguish between Ormet and the other industrial user LFP beneficiaries that have their own Unique Arrangements. This is error because the Commission is statutorily bound to explain its reasoning based on findings of fact. *See* Ohio Rev. Code § 4903.09. Second, this observation is not responsive to the *Mahoning* standard. The proper question, which the Commission erred in neglecting to address, is whether Ormet receives "like and contemporaneous service" to those that benefit from the LFP. The Commission fails to articulate any basis that Ormet does not receive such service. Even if the Commission were to assert that Ormet's service is not "like or contemporaneous," it could not support such a conclusion with substantial facts in the record. The evidence in the record indicates that the industrial users in Ormet's class receive like or contemporaneous service to Ormet.

Similarly, the Commission fails to apply and is silent upon the second *Mahoning* prong which inquires as to cost of service. In fact, Ormet pointed the Commission to evidence that Ormet is actually cheaper to serve, and the Commission is limited to discerning the reasonableness different rates "from the evidence" before it. Exhibit No. OEG-1 at p. 6:13-16; *see Office of Consumers' Counsel v. Public Utils. Comm'n of Ohio*, 592 N.E.2d 1370, 1373 (Ohio 1992). The Commission simply made no attempt to identify the required, reasoned nexus between the difference in rates and actual and measurable differences in furnishing of services to the consumer. There is no relationship between Ormet's Unique Arrangement and its exclusion from the LFP and neither does the Commission address such a relationship nor the record

support one. The Commission failed to address the proper issue before it: 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* 388 N.E.2d at 742.

**5. The Commission erred by failing to address Ormet's arguments that the exclusion of Ormet from the LFP violates the important regulatory principles regarding cost causation and cost shifting and by deviating from those principles without explanation.**

In its Initial Brief, Ormet argued that the exclusion of Ormet from the LFP violated the important regulatory principle of cost causation and the prohibition on cost shifting. Ormet Initial Brief at pp. 7-8 and 22. The Commission erred by failing to address these arguments in its Order, and failing to explain its determination that it is appropriate to deviate from the principle of cost causation and to allow cost shifting by excluding Ormet from the LFP.

The principle of cost causation, that customers should only be asked to pay for the costs that they cause, is the "basic underlying consideration" in establishing reasonable rates, and the Commission erred by failing even to address it. *Mahoning*, 388 N.E.2d at 742. Both OEG witness Baron and OMAEG witness Claytor agreed with the following statement regarding the rate design AEP Ohio proposed in this case:

Collecting revenues related to fixed costs, which are customer-related or demand-related, on a variable energy charge violates cost causation principles and fails to produce rates that send proper price signals and minimize price distortions. Additionally, the shift of these costs from per KW demand charges to per KWh variable energy charges results in a shift in demand cost responsibility from lower load factor customers to higher load factor customers. This results in misallocation of cost responsibility as higher load factor customers overpay for the demand-related costs incurred by the Company to serve them.

See Exhibit Nos. ORM-5 and ORM-13 at p. 5. Thus, both parties admit that the proposed rate design, if not mitigated by the LFP, results in higher load factor customers overpaying for

demand-related costs in violation of the regulatory principle of cost causation. Because it is excluded from the LFP, Ormet overpays for demand-related costs in this manner, and the principle of cost causation is violated for Ormet. Ormet is the largest customer on the system, and will end up overpaying dramatically for demand-related costs -- by approximately \$28 million per year<sup>8</sup> -- effectively subsidizing other ratepayers in violation of the principle of cost causation.

The Commission disfavors shifting costs from the party who incurred the costs to another party who did not. For example, in *MCI WorldCom Communications*, the Commission found a particular fee "unjust and unreasonable . . . because [the fee] is a flat-rate fee . . . [that] will allow MCI to over-recover its costs from some customers and shift costs to other customers who do not cause those costs." Slip copy, No. 04-1901, 2005 WL 407346, \*1 (Ohio P.U.C. Feb. 9, 2005). The Commission may not break with its precedent without providing a reasoned explanation as to why, and it erred in this case by doing so.

**6. The Commission erred by failing to address Ormet's arguments that exclusion of Ormet from the LFP violates the regulatory principles of promoting economic efficiency and reducing the growth rate of energy consumption.**

The Commission is legally bound to address the arguments of the parties and explain its reasoning based upon specific facts in the record before it. If it does not, section 4903.13 provides that the Commission's order "shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable." *See also Sunoco* 953 N.E.2d at 289 (applying standard and reversing). "PUCO orders which merely made summary rulings and conclusions without developing the supporting rationale or record have been reversed and remanded." *MCI Telecommunications*, 513 N.E.2d at 343-44. Here, the Commission failed to address Ormet's

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<sup>8</sup> See Compliance filing at Original Sheet No. 495-1.



argument. Furthermore, the Commission's unreasoned decision is against the manifest weight of the evidence.

As Ormet argued in its brief, Ormet Opening Br. at 23, Ohio statutes encourage regulators to make regulatory decisions which encourage economic development. Ohio Revised Code section 4905.31 illustrates the importance of this principle in Ohio by authorizing the Commission to approve reasonable arrangements for the purpose of encouraging economic development. It is undisputed that the LFP of the Stipulation will not promote economic development for any demand-metered customer with a load factor provision of over 250 MW. The Commission had before it no evidence as to why the economic development incentives should not apply to customers like Ormet with a monthly peak load over 250 MW.

The Commission failed to address the tension within OMAEG witness Claytor and OEG witness Baron's testimony. Both praise the LFP as encouraging economic development. *See* Exhibit No. OMAEG-1 at p. 4:1-8 and Exhibit No. OEG-1 at pp. 6:23-7:2. However, both also admit that the LFP will not encourage economic development for any customer with a monthly peak load over 250 MW. Further, Ms. Claytor stated that "[b]y producing a balanced and known rate design, the [LFP] helps provide rates that are reasonable and predictable during the transition to market, which helps retain and attract the larger manufacturing and industrial customers that are critical to Ohio's economy." Similarly, Mr. Baron states that "[t]he LFP provides rate certainty and stability to high load factor industrial and commercial customers during the transition to market rates contemplated by the Stipulation. This further promotes economic development." Mr. Baron also admits, however, that the LFP will provide no rate certainty or stability to any customer with a monthly peak load of greater than 250 MW and will not encourage any such customer to locate in the state of Ohio. *See* Exhibit No. ORM-10.

The Commission fails entirely to harmonize and explain the facts before it with its statutory mandate and its exclusion of Ormet from the LFP. The Commission's unsupported assertion that excluding Ormet from the LFP will promote economic development runs afoul of the manifest weight of the evidence and is therefore unreasoned decision-making constituting clear error. "PUCO orders which merely made summary rulings and conclusions without developing the supporting rationale or record have been reversed and remanded." *MCI Telecommunications*, 513 N.E.2d at 343-44.

The Commission further failed as a matter of law to address Ormet's argument that excluding Ormet from the LFP violates the regulatory principles of promoting economic efficiency and reducing the growth rate of energy consumption. The Commission did not even explain why it does not need to address this argument. The facts before the Commission indicate that including Ormet in the LFP promotes economic efficiency. Economic efficiency and a reduction in the growth rate of energy consumption is unarguably an important regulatory principle in Ohio, as can be seen in Ohio Revised Code Section 4905.70. That section of the Code requires the Commission, among other things, to initiate programs that promote and encourage a reduction in the growth rate of energy consumption and promote economic efficiencies. 49 Ohio Rev. Code § 4905.70.

The Commission failed to address or explain Mr. Baron's testimony (1) that there is a "lower relative cost of serving high load factor customers (whether they are large or small; industrial or commercial) compared to lower load factor customers"; (2) that "high load factor customers use fixed generation assets more efficiently than lower load factor customers"; and (3) that "high load factor customers are less costly to serve." See Exhibit No. OEG-1 at p. 6:13-16. Each of these points justify including Ormet in the LFP and the Commission failed to address them. Neither did the Commission address that the largest customers on the system will

be excluded from the LFP and thereby not encouraged to efficiently use generation resources. See Exhibit No. ORM-10. As a result, the Commission was presented with a circumstance in which the very largest customers and potential customers on AEP Ohio's system will not be encouraged to become more efficient in their usage of generation resources because they are excluded from the LFP. Nonetheless, contrary to the manifest weight of the evidence, the Commission asserted that excluding Ormet from the LFP promotes economic development. Such conclusory reasoning has been rejected by the Ohio Supreme Court because it constitutes reversible error. *MCI Telecommunications* 513 N.E.2d at 343-44.

**7. The Commission's ruling that it is just and reasonable is manifestly against the weight of the evidence and is clearly unsupported by the record.**

A commission order must provide "in sufficient detail, the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion." *Id.* At 344.. PUCO orders are unlawful or unreasonable when they are not based upon the record or any specific finding of fact in the record. *Tongren v. PUCO*, 706 N.E.2d 1255, 1257 (Ohio 1999) (reversed and remanded); *Ideal Transportation Co. v. Pub. Util. Comm.*, 326 N.E.2d 861, 863-64 (Ohio 1975) (reversed); *Motor Serv. Co. v. Pub. Utils. Comm'n.*, 313 N.E.2d 803, 810 (Ohio 1974) (affirmed in part and reversed in part). Further, the Commission commits reversible error when the Commission's decision goes against the manifest weight of the evidence and is clearly unsupported by the record. *Monongahela*, 820 N.E.2d 921. Here, the Commission reversibly failed in its duty to weigh the evidence -- there is no indication in the Commission's Order that it considered or addressed most of the evidence highlighted in Ormet's briefing -- resulting in an opinion that runs contrary to the manifest weight of the evidence before it.

For example, the Signatory Parties make it plain that one of the key factors *supporting* the use of the LFP, in the first instance 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. OEG witness Baron stated in his testimony:

The 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. By definition, high load factor customers use fixed generation assets more efficiently than lower load factor customers. Consequently, high load factor customers are less costly to serve. As a result, utility rates have traditionally been designed in order to recognize this difference in the cost of service for high load factor customers versus lower load factor customers.

See Exhibit No. OEG-1 at p. 6:13-18. The Commission simply does not address or explain this evidence. The Signatory Parties provide no reason why their high load factors justify their benefit from the LFP while Ormet's higher load factor justifies its exclusion from the same benefit. The Commission makes no mention of this evidence either. Without considering and meaningfully addressing this evidence, the Commission could not have reasonably concluded that Ormet's 98% load factor is a distinguishing characteristic that warrants exclusion from the LFP. Rather, this evidence demonstrates that Ormet satisfies the rationale for the LFP to an even greater extent than the other industrial customers and favors including Ormet in the LFP.

The Commission also failed to address the reasonableness of the LFP's exclusion of Ormet based on the evidence before it. For example, no evidence before the Commission indicated that high monthly peak load equals a high load factor. Specifically, the Commission had no evidence before it that all potential customers with a monthly peak load of over 250 MW have particularly high load factors. Without such evidence the manifest weight tilted towards including Ormet in the LFP. For example, should a customer with a low load factor, but a monthly peak load higher than 250 MW, join the AEP Ohio system, that customer would still be excluded from the LFP. Such an outcome, based on the evidence before the Commission, is unreasonable.

Furthermore, the Commission did not address the efficiency of the high load factor users, which again supports including Ormet in the LFP. Multiple high load factor Signatory Parties benefit from the LFP, so Ormet should as well, since it is also an especially efficient, high load factor user. This is especially so given the Signatory Party witnesses' admission that without the LFP, the Stipulation's overall rates are unjust and unreasonable towards high load factor customers like Ormet. TR at 649:4-8; Exhibit No. ORM-13 at p. 4-6.

The Commission did not rely upon Ormet's size as a distinguishing characteristic because it could not. The Commission has before it no evidence that Ormet's size imposes additional costs on the system that merit charging Ormet a higher rate. For example, in his own testimony, OEG 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). Conversely, the Commission did have before it OEG's admission that none of the other Ohio utility tariffs to which they point as examples of load factor provisions contain restrictions on applicability based on a customer's monthly peak load factor. See Exhibit No. ORM-6. Moreover, the Commission was constricted by the irrefutable truth that Ohio recognizes "the long established and acknowledged fact[]" that "the cost of rendering service to the customer declines as the volume of service increases." *Cleveland Elec. Illuminating Co. v. Pub. Utils. Comm'n of Ohio*, 330 N.E.2d 1, 19 (Ohio 1975).

The vast bulk of the other relevant facts in the record before the Commission also support including Ormet in the LFP. For example, Ormet shares all of the characteristics of large industrial customers that warrant the implementation of the LFP. OEG witness Baron argues that the load factor provision is justified because higher load factor customers are "export industries" and typically provide a large number of well-paying, household sustaining jobs and

whose employees spend their wages on local goods and services. *See* Exhibit No. OEG-1 at p. 10:12-19. He admits that Ormet is such an “export industry.” *See* Exhibit No. ORM-11. In light of these facts, the Commission could not and did not demonstrate any actual or measurable difference in the furnishing of services to Ormet, or any other potential customer with a monthly peak load greater than 250 MW, by AEP Ohio that justify excluding such customers from the LFP. *Mahoning*, 388 N.E.2d at 742. The Commission’s determination that Ormet is not similarly situated to other customers entitled to LFP benefits -- particularly other customers with Unique Arrangements -- goes manifestly against the weight of the evidence and is unsupported by the record.

The Commission ignored the fact that OMAEG’s witness Claytor admitted that without benefit of the LFP, the Stipulation imposes “unfair” rates upon high load factor customers. TR at 649:4-8; Exhibit No. ORM-13 at p. 4-6. She first explained that the purpose of the LFP was to address the unfair disparity that arises when you “shift [costs] from low-load factor to high-load factor customers as a consequence” of the allocation of “fixed generating costs on a variable energy use basis.” TR at 648:12-22. Because this cost disparity is not fully addressed under the Stipulation absent the benefit of the LFP, she concluded the proposed rate design is unfair without it. *Id.* at 649:6-8. The Commission did not address these facts in any way, instead arguing that Ormet is not similarly situated because it has a Unique Arrangement. Such is not a reasoned decision; the Commission may not sweep facts under the rug to avoid addressing them.

OMAEG witness Claytor’s reasoning comports with other Signatory Party evidence. For example, Mr. Baron’s observation that “[b]y definition, high load factor customers use fixed generation assets more efficiently than lower load factor customers.” Exhibit No. ORM-7. It also comports with OEG’s admission that the proposed rate punishes customers with good load factors while benefiting customers with poor load factors. Exhibit No. ORM-4. Of course, the

Commission addressed none of this either, which is a critical error because this testimony, like the great weight of the evidence before the Commission, supports **including** high load factor customers like Ormet among those ratepayers who are entitled to receive the LFP benefit.

The Commission disregarded evidence that at least two of the Signatory Parties, OEG and OMAEG, admit that without the Load Factor Provision, the rate imposed upon high load factor customers, such as Ormet, is unjust and unreasonable. TR at 649:4-8; Exhibit Nos. ORM-13 at p. 4-6, ORM-4. Nonetheless, the Commission found that the Signatory Parties lawfully could deliberately exclude Ormet, and Ormet alone, from the LFP, leaving Ormet as the only customer in its rate class to suffer unjust and unreasonable rates. The Commission has no explanation for this overtly discriminatory result except that Ormet has a Unique Arrangement. Neither the law nor the evidence in the record supports such reasoning.

The Commission also disregarded that a key factor *supporting* the use of the LFP is that the higher a customer's load factor, the more efficiently it uses fixed generation assets, and the cheaper it is 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 Commission offered no legal or factual argument to explain why including some high load factor customers in the LFP's benefit promotes economic development in Ohio, but Ormet's higher load factor does not.

The only evidence relevant to Ormet's exclusion from the LFP that the Commission does acknowledge actually supports Ormet's inclusion in the LFP. The Commission acknowledges that Ormet is the only AEP Ohio customer that is excluded from the Load Factor Provision by the 250 MW monthly peak demand limit. The Commission admits that Ormet is being treated differently than all other customers in this respect. Nonetheless, against the great weight of the evidence, the Commission found, without explaining why as a matter of law or fact, that the LFP's exclusion of Ormet was just and reasonable and not violative of any important regulatory principle. Even if 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. Therefore, the Commission's ruling that it is just and reasonable to exclude Ormet entirely from the LFP is manifestly against the weight of the evidence and unsupported by the record.




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**January 13, 2011**



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the *Application for Rehearing of Ormet Primary Aluminum Corporation* was served by US mail and email upon counsel identified below for all parties of record this 13th day of January, 2012.

  
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