

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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) **Case No. 10-344-EL-ATA**
Emergency Curtailment Service)
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) **Case No. 11-4920-EL-RDR**
Recover Deferred Fuel Costs Ordered)
Under Section 4928.144, Ohio Revised)
Code.)

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.

(Consolidated)

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Case No. 11-4921-EL-RDR

**REPLY OF ORMET PRIMARY ALUMINUM CORPORATION
TO AEP OHIO'S AND OMAEG'S MEMORANDA CONTRA
ORMET'S APPLICATION FOR REHEARING**

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**REPLY OF ORMET PRIMARY ALUMINUM CORPORATION
TO AEP OHIO'S AND OMAEG'S MEMORANDA CONTRA
ORMET'S APPLICATION FOR REHEARING**

INTRODUCTION

The Commission erred by adopting the Stipulation and Recommendation ("Stipulation") filed by certain parties¹ without modification of the Load Factor Provision ("LFP"), which discriminates against Ormet and subjects Ormet to unjust and unreasonable rates. The Commission's Order unlawfully and unreasonably adopts the Stipulation based on incorrect facts and unreasoned decision-making. Accordingly, the Commission should grant rehearing of the Order, and nothing in the Memoranda Contra of AEP Ohio or OMAEG indicate otherwise.

Through the Stipulation, the Commission has required Ormet to subsidize the fixed costs of lower load factor entities on the AEP Ohio system. It did so in reliance upon AEP Ohio's mistaken representation that Ormet will subsidize the low load factor customers at a rate of **\$17 million per-year** when in reality, according to AEP Ohio's own compliance filing,² the subsidy is approximately **\$28 million per-year**. Imposing such a burden upon Ormet without proper factual and legal considerations prejudices Ormet and justifies rehearing.

The Memoranda Contra filed by AEP Ohio and by OMAEG do not dispel the need for rehearing. Although AEP Ohio asserts that Ormet is seeking a windfall, this is simply not true.

¹ Parties that submitted the Stipulation include: Columbus Southern Power Company and Ohio Power Company (together "AEP Ohio"), Staff of the Public Utilities Commission of Ohio ("Staff"), the Ohio Energy Group ("OEG"), Constellation NewEnergy Inc., Constellation Energy Commodities Group, Inc., the Ohio Hospital Association, OMA Energy Group ("OMAEG"), the Kroger Co., the City of Hilliard, the City of Grove City, the Association of Independent Colleges and Universities of Ohio, Exelon Generation Company, LLC, Duke Energy Retail Sales, LLC, AEP Retail Energy Partners, LLC, Wal-Mart Stores East, LLP and Sam's East, Inc., Paulding Wind Farm II, LLC, Ohio Environmental Council, Environmental Law and Policy Center, EnerNOC, and the Natural Resources Defense Council (collectively "Signatory Parties"). Only AEP Ohio and OMAEG filed memoranda contra Ormet's Application for Rehearing that demand the instant Reply.

² Compliance Tariffs of AEP Ohio, Original Sheet Nos. 324-1 - 324-3 (Dec. 21, 2011).

Requesting that Ormet only be required to pay for the costs it imposes upon the system is not a "windfall." AEP Ohio asserts that Ormet already receives sufficient economic stability through its Unique Arrangement, but the Order requiring Ormet to subsidize lower load factor customers at \$28 million per year guts the rate stability and economic development benefits provided by that Unique Arrangement. Nothing that AEP Ohio or OMAEG now argue can undo the fact that the Commission committed reversible error in failing to properly explain why excluding Ormet, and only Ormet, from the LFP is not unduly discriminatory. In fact, the Commission's decision went against the manifest weight of the evidence and was unsupported by the record due in large part to AEP Ohio's material misstatements of fact.

The Commission's rationale must be set forth "in sufficient detail [that] the facts in the record upon which the order is based, and the reasoning followed by the PUCO in reaching its conclusion," are clear from the text of the opinion. *Ohio Consumers' Counsel v. Pub. Utils. Comm'n*, 856 N.E.2d 213, 222 (Ohio 2006). The Commission is well within its power to hear new evidence on rehearing to correct an inaccurate or incomplete record. *Cincinnati Bell Tel. Co. v. Pub. Utils. Comm'n of Ohio*, 466 N.E.2d 848, 853-54 (Ohio 1984) (affirming Commission's decision to hear new evidence on rehearing); *Elyria Tel. Co. v. Pub. Utils. Comm'n*, 110 N.E.2d 59, 61 (Ohio 1953) (upholding rehearing that took evidence that "might have been produced at the original hearing"). It is unlawful and unreasonable reversible error to decide an issue based upon incorrect evidence, against the manifest weight of the evidence, or without sufficiently explaining the reasoning used to arrive at the conclusion. See Ohio Rev. Code § 4903.09; see also *Consumers' Counsel*, 856 N.E.2d at 222. The Commission's Order commits all three errors and rehearing should therefore be granted..

First, the Commission's determination that Ormet's Unique Arrangement would adequately insulate it from the cost of the \$17 million per year subsidy has no basis in the record. It is also undermined by the fact, not reasonably available at hearing, that the actual cost to Ormet is approximately \$28 million per-year, not the \$17 million figure testified to at the hearing. Second, the Commission's determination that Ormet could not have been unduly discriminated against because it has no similarly situated peers goes against the manifest weight of the record. The record shows that there are three other high load factor customers who benefit from the LFP and have unique arrangements. Exhibit Nos. ORM-2, ORM-3. Third, the Commission failed to adequately explain its reasoning both for denying Ormet's request that the first 250 MW of its load be treated comparably with that of other high load factor customers and for declining to follow its precedent with respect to the principle of cost causation. For each of these reasons, AEP Ohio's arguments against granting rehearing on the LFP issue fail.

ARGUMENT

I. The Commission's Decision is Unreasonable and Unlawful Because it Relied Upon Incorrect Evidence, Leading to a Dramatically Incorrect, Unsupported Conclusion.

The Commission's Order plainly relies upon AEP Ohio's inaccurate figure of a \$17 million impact upon Ormet resulting from its exclusion from the LFP. Nothing in the Commission's decision, however, indicates how the Commission would have decided if it had accurate evidence. AEP Ohio does not deny that the true economic impact upon Ormet is \$28 million per-year, it merely tries to explain why its Compliance Filing contained that number rather than the incorrect \$17 million figure it offered at the hearing. Each of these failures constitutes reversible error.

A. The Commission's Decision Relies Upon The Erroneous \$17 Million Per-Year Economic Impact Upon Ormet.

AEP Ohio's speculation that the Commission's decision "did not turn on any specific quantification of the impact of the LFP" is wrong and ignores the proper legal standard and common sense. AEP Ohio's Mem. Contra at 15. The Commission appears to have reasoned that Ormet's Unique Arrangement would mitigate the \$17 million per-year impact. *Id.* Because of AEP Ohio's misstatement on the record, however, the Commission was unable to consider the proper balance, knowing the true \$28 million per-year impact on Ormet. This dramatically higher figure calls the entirety of the Commission's reasoning into question and must be readdressed -- a course the Ohio Supreme Court has endorsed. *See Elyria*, 110 N.E.2d at 61-62. Accordingly, the Commission should grant rehearing so that it may take evidence on the true economic impact to Ormet and remedy the other defects in its Order.

B. AEP Ohio Does Not Deny That the True Economic Impact on Ormet From the Discrimination is \$28 Million, \$11 Million More than it Previously Claimed.

Although AEP Ohio's Memorandum Contra explains why the impact of the exclusion from the LFP upon Ormet is so much higher than was indicated in their testimony, this does not change the fact that the Commission relied upon incorrect information in reaching its decision. The reason that the information in the record was incorrect is irrelevant; the Commission should still base its decision on correct information. *See id.*

The hearing transcript is quite clear that AEP Ohio's position was that the going-forward impact upon Ormet would be \$17 million dollars per-year:

Q. Okay. Do you agree that the impact on Ormet of being excluded from the load factor provision is roughly \$18 million per year?

A. I'm having flashbacks to my deposition so let me just double-check the arithmetic. One moment.

Q. If it helps, you might want to look at page 62.

A. I don't think I had a calculator with me at that time so I'm going to double check.

Having the advantage of having a calculator I think the number is actually closer to 17 million, but that is the impact of applying the load factor rider as is to Ormet [sic].

TR. 125:10-25. The time-frame contemplated by the question is clearly forward looking as it deals with the LFP's impact upon Ormet. Since the LFP is only in effect from 2012 onward, it was clear from the question that the time frame of 2012-forward was being considered in both the question and the answer. With this testimony, neither the Commission, the questioner, nor the parties could have reasonably known the true facts before AEP Ohio made its Compliance Filing.

AEP Ohio's quantification of the financial impact that Ormet will suffer as a result of its exclusion from the LFP was not only off target, but it significantly understated the annual financial impact by \$11 million (a 64% increase from the amount that AEP Ohio testified to at the hearing). This is a critically meaningful difference to, among other things, the viability of Ormet's Hannibal Facilities in Southeast Ohio. AEP Ohio's mistaken but severe understatement of the financial impact has tainted the record such that the Commission was unable to engage in well-informed decision-making in its consideration of the issues raised by Ormet. Accordingly, the Commission should grant rehearing and take new evidence sufficient to reach a reasoned decision.

C. The Commission Erred to the Extent It Held that the Economic Harm Inflicted on Ormet Would Be Offset By Ormet's Unique Arrangement.

In determining that it was reasonable to require Ormet to subsidize lower load factor customers by \$17 million per-year, the Commission appears to have relied upon the fact that Ormet has a Unique Arrangement in place which would protect it from the harm of the unjust and unreasonable rates throughout the term of the ESP. Order at 16, 37-38. Similarly, in

apparent support of this argument, AEP Ohio sets forth its unsubstantiated opinion that “Ormet’s unique arrangement still permits Ormet to receive substantial discounts” even if excluded from the LFP. AEP Ohio Mem. Contra at 20. Especially in light of the revelation that the impact on Ormet is approximately \$28 million per-year, this conclusion is inaccurate. As explained in Ormet’s Briefs, Ormet’s Unique Arrangement does not guarantee a discount. Ormet Application for Rehearing at 9; Ormet’s Initial Brief at 4-5. To the extent it *permits* a discount, the permitted discount is reduced by \$10 million each year. Ormet Unique Arrangement Order³ at 10-11. In 2015, for example, the discount is only \$24 million – \$4 million less than the subsidy Ormet is required to pay to the low load factor customers under Stipulation. *Id.* Based upon new information of the impact of being excluded from the low load factor provision upon Ormet, it is apparent that the exclusion dramatically erodes the economic stability provided by Ormet’s Unique Arrangement.

The proper question is whether the Commission had the information before it to make a reasoned decision and whether it adequately explained its conclusion based on the substantial evidence of the record. Here, the Commission unmistakably explained that its decision seeks to promote “economic development” and relied at least in part on an assumption that Ormet will continue to receive benefit from its Unique Arrangement to meet that goal. Order at 38. Given that the true impact to Ormet is drastically more grave than the Commission believed when it issued its Order, the Commission’s reasoning cannot be relied upon to reach the same result. The damage the Commission’s Order causes Ormet imperils Ormet’s operations at its Hannibal

³ *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, Case No. 09-119-EL-AEC, issued July 15, 2009, (“Unique Arrangement Order”), *aff’d*, *In re: Application of Ormet Primary Aluminum Corp.*, 129 Ohio St. 3d 9, 2011-Ohio-2377, 949 N.E.2d 991 (Ohio 2011).

Facilities and calls into question Ormet's ability to maintain the employment levels required by its Unique Arrangement. Unique Arrangement Order at 11. For these reasons, the Commission's decision is unlawful and unreasonable and not based on substantial evidence. Accordingly, the Commission should grant Ormet's application for rehearing to take further evidence as necessary to analyze these material issues.

II. The Commission's Decision is Unreasonable and Unlawful Because Its Determinations That There Are No Customers Similarly-Situated to Ormet Is Against the Manifest Weight of the Record

The Commission committed reversible error when it distinguished Ormet based solely on the fact that Ormet has a Unique Arrangement and failed to explain why Ormet is different from the other GS-3/GS-4 customers who have their own unique arrangements. See Exhibit Nos. ORM-2, ORM-3; *see also* Order at 16, 38. AEP Ohio speculates, without record or Order support, that the specific details of Ormet's Unique Arrangement are what the Commission believes make Ormet different. AEP Ohio Mem. Contra at 19. This fact cannot distinguish Ormet, however, because the record contains no evidence regarding the specific details of the other reasonable arrangements enjoyed by parties that benefit from the LFP. Accordingly, the Commission has no basis to compare Ormet's Unique Arrangement to any other unique arrangement.

The Commission's Order nevertheless held that Ormet is not similarly situated to other customers exclusively because of its Unique Arrangement: "The fact that Ormet is currently provided service pursuant to a unique arrangement effectively puts Ormet in a service class by itself." Order at 16. From there, the Commission justified excluding Ormet from the LFP because "as a result of Ormet's Unique Arrangement Case, Ormet is already a beneficiary of the rate stability benefits the LFP is designed to create." *Id.* at 38. Nothing in the record, however,

indicates that the reasonable arrangements enjoyed by the other high load factor customers that benefit from the LFP do not also provide them rate stability.

The other record evidence does not support the Commission's decision either. For example, OEG witness Baron testified that it was not his position that, as a rule, "customers with special arrangements should be excluded from the load factor provision." TR at 262:24-263:2. Such was not a reasonable basis to exclude a party from benefit of the LFP. The Signatory Party witnesses supporting the LFP admitted that they had not examined any contracts, including unique arrangements, other than Ormet's. TR at 264:6-11; *see* ORM-13 at 5 (witness Claytor stating that she had not reviewed Ormet's Unique Arrangement to prepare her testimony). The record contains nothing to support meaningfully distinguishing between Ormet's Unique Arrangement and that of the three other high load factor customers that gain the benefit of the LFP, and AEP Ohio and OMAEG cannot point to one because the record contains no details of other unique arrangements. Therefore, the Commission's logic is unlawful and unreasonable and unsupported by the substantial weight of the evidence. *Consumers' Counsel*, 856 N.E.2d at 222.

AEP Ohio argues that including Ormet in the LFP "would serve to partially off-set [sic] the \$10 million per year added benefit to the GS 2 customers which the Commission ordered when it increased the \$10/MWh GS 2 shopping incentive." AEP Ohio Mem. Contra at 21. AEP Ohio completely ignores, however, that excluding Ormet from the LFP provision offsets a very significant portion of the benefits that the Commission ordered in approving Ormet's Unique Arrangement in the first place.

III. The Commission's Decision is Unreasonable and Unlawful Because It Fails to Adequately Explain Both Its Reasons for Denying Ormet's Request That The First 250 MW Of Its Load Be Treated Comparably to That Of Other High Load Factor Customers and Its Reasons for Departing from Its Prior Precedent with Regard to Cost-Causation.

AEP Ohio's suggestion that the Commission's Order adequately addressed Ormet's arguments, AEP Ohio Mem. Contra at 17-18, is unsupported by the law. It also betrays AEP Ohio's fundamental misunderstanding of Ormet's argument. AEP Ohio's suggestion that the Commission's conclusion is sound because "[t]he Commission's rationale in determining that the LFP is not discriminatory towards Ormet is based on the fact that Ormet is not similarly situated to other customers" rests on precisely the type of unsupported legal conclusion that Ohio law does not allow. AEP Ohio Mem. Contra at 18-19.

The Ohio Supreme Court rejects the mere assertion of a legal conclusion as inadequate legal reasoning. *See, e.g., Consumers' Counsel*, 856 N.E.2d at 223. That is exactly what the Commission offered in its decision. The Commission concluded that because Ormet has a reasonable arrangement, there are no other similarly situated customers. It did so without addressing the record evidence that three other high load factor customers on the AEP Ohio system have reasonable arrangements. Order at 16. The Commission also failed to provide any rationale for its denial of Ormet's request that, at a minimum, the first 250 MW of its load be eligible for the LFP.

The conclusory reasoning that the Ohio Supreme Court rejected in *Consumer's Counsel* is nearly identical in form to the Commission's reasoning here. 856 N.E.2d at 223. The faults identified by the Supreme Court's analysis in that case apply equally to the Commission's decision here as well:

The portion of the commission's first rehearing entry approving CG & E's

alternative proposal is devoid of evidentiary support. There are no citations to the record supporting the commission's modifications on rehearing. In addition, the commission did not sufficiently set forth its reasoning for the changes on rehearing. Instead, it merely asserted, without further justification, that the modifications would provide rate certainty for consumers, ensure financial stability for CG & E, and further encourage the development of competitive markets.

Id. Likewise, the Commission here, without citation to the record, held that:

[T]he LFP does not violate any regulatory principle or practice. . . . The record sufficiently establishes that the proposed 250 MW peak threshold was created to ensure that rates would be stable enough to retain existing high load customers and promote economic development.

Order at 38. The Commission "merely asserted, without further justification, that the [LFP] would provide" rate stability and economic development. Such is unlawful and unreasonable decision-making according to the Ohio Supreme Court. *Id.*

A. The Commission Failed to Adequately Explain its Reasons for Denying Ormet's Request that the First 250 MW of Its Load Be Treated Comparably to the Loads of Other High Load Factor Customers.

AEP Ohio further suggests that the size of Ormet's load justifies excluding Ormet from the LFP. AEP Ohio's basis for this position is that including Ormet in the LFP would dramatically skew the calculations. Exhibit No. ORM-8. However, the Commission did not have the proper evidence before it to have made such a balancing determination. Furthermore, the record contains not a scintilla of evidence that including the first 250 MW of Ormet's load skews the calculations to any greater or different degree than allowing 250 MW of any other high load factor customer's load. In fact, one company's megawatts are completely fungible with another's. Certainly nothing in the record contradicts this fact.

To sidestep this difficulty, AEP Ohio argues that the Commission was correct not to address Ormet's argument that if it cannot be included entirely in the LFP, then its first 250 MWs of load should be included, just like the other eligible customers. AEP Ohio Mem. Contra

at 21-22. AEP Ohio's basis for this position is its opinion that Ormet's partial eligibility "would still be a significant windfall to Ormet shareholders, and a corresponding detriment to the Ohio economy as a whole." *Id.* at 22. AEP Ohio's speculation is neither supported by the record nor responsive to the relevant legal standard, which requires that the Commission explain its reasoning. *Consumers' Counsel*, 856 N.E.2d at 222. Here, the Commission failed to offer any reasoning explaining why Ormet's first 250 MW of load should not be treated comparably to the 250 MW loads of other high load factor customers. The Commission failed to address or explain why discriminating against Ormet is justified when a simple, non-discriminatory way to address the size of Ormet's load exists -- allow Ormet to benefit only to the extent of its first 250 MWs. For this reason, the Commission's Order is unlawful and unreasonable.

B. The Commission Failed to Adequately Explain its Reasons for Departing from Its Precedent Regarding Cost-Causation.

The Commission also failed entirely to explain why it departed from its legal precedent regarding cost-causation principles. Ohio precedent provides that 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." *Mahoning Cnty. Townships v. Pub. Utils. Comm'n of Ohio*, 388 N.E.2d 739, 742 (Ohio 1979); *see also In re MCI WorldCom Comms.*, slip copy, no. 04-1901, 2005 WL 407346, *1 (Ohio P.U.C. Feb. 9, 2005) (finding 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.").

The Commission also failed to base its decision on, or even address, the substantial evidence in the record with regard to cost-causation. Both OEG witness Baron and OMAEG

witness Claytor agree 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. 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. The rates applied to Ormet under the Commission's order are not mitigated by the LFP, and thus result in Ormet overpaying for demand-related costs. The Commission erred in failing to address why its decision, which violates the principle of cost-causation and otherwise departs from Ohio precedent, is warranted. Because the Commission disregarded Ohio precedent with regard to cost-causation and failed to explain its departure from that precedent, rehearing is appropriate.

IV. Conclusion.

For each of the foregoing reasons, none of AEP Ohio's or OMAEG's arguments in their Memoranda Contra can remedy the critical and fundamental errors of fact, law, and reasoning relied upon by the Commission in its Order. For the reasons stated herein and in Ormet's Memorandum in Support of its Application for Rehearing, Ormet respectfully requests that the Commission grant Ormet's Application for Rehearing.



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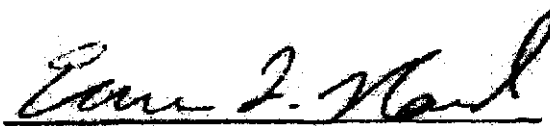
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Reply to AEP Ohio's and OMAEG's Memoranda Contra Ormet's Application for Rehearing* was served by US mail and email upon counsel identified below for all parties of record this 30th day of January, 2012.



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