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Case Nos. 11-346-EL-SSO
11-348-EL-SSO
11-349-EL-AAM
11-350-EL-AAM
11-4920-EL-RDR
11-4921-EL-RDR

Public Utilities Commission of Ohio
Docketing Division
180 East Broad Street
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Re: *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 Nos.* 11-346-EL-SSO, 11-348-EL-SSO, 11-349-EL-AAM, 11-350-EL-AAM, 1-4920-EL-RDR *and* 11-4921-EL-RDR

Dear Sir or Madam:

Enclosed please find for filing an original and twenty (20) copies of the *Memorandum Contra of Ormet Primary Aluminum Corporation to Ohio Power Company's Application for Rehearing of the March 7, 2012 Entry.*

Two additional copies are enclosed to be date-stamped and returned to me in the enclosed, self-addressed Federal Express envelope.

Sincerely,

Emma F. Hand
Partner

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician ____ **Date Processed** 3-21-12

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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 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**

MEMORANDUM CONTRA OF ORMET PRIMARY ALUMINUM CORPORATION TO OHIO POWER COMPANY'S APPLICATION FOR REHEARING OF THE MARCH 7, 2012 ENTRY

The Commission should reject Ohio Power Company's ("OPC's") Application for Rehearing of the March 7, 2012 Entry ("Application"). OPC's Application rests upon two fatal flaws that apply equally to each of its assignments of error and justify rejection of the Application. First, each of OPC's assignments of error relies upon the incorrect assumption that the Commission's order in the prior SSO rate plan, case numbers 08-917 *et al.* ("ESP I"), which

authorized the deferral of costs and the time period for recovery of the deferrals, also authorized a specific mechanism for that recovery. This assumption is incorrect. In fact, even if the Commission had wanted to approve a specific cost recovery mechanism in ESP I, it could not have done so. The record lacked sufficient evidence upon which to base such an approval. Second, OPC's assignments of error also incorrectly assume that the Commission's March 7, 2012 rejection of the Phase in Recovery Rider ("PIRR") somehow precludes OPC from collecting the deferred fuel costs between 2012 and 2018. It does not.

These two incorrect assumptions infect each of OPC's assignments of error, but each assignment has its own unique failings as well. Most importantly, the record lacks sufficient evidence for the Commission to evaluate whether the PIRR mechanism proposed by OPC results in just and reasonable rates. Given the lack of record support for addressing the PIRR, the Commission correctly ruled that the PIRR could not be approved as part of the Compliance Filing. Instead, the Commission held, the PIRR shall be considered in the appropriate Deferred Fuel Costs proceeding. For these reasons, as more fully explained below, the Commission should reject OPC's Application and deny rehearing.

BRIEF PROCEDURAL HISTORY

In its February 23, 2012 Entry on Rehearing rejecting the September 7, 2011 Stipulation and Recommendation ("Stipulation") in the ESP II case, the Commission directed OPC to file a new set of interim proposed tariffs. As directed, OPC filed the new set of tariffs on February 28, 2012. Among the tariffs it filed, however, OPC introduced a new PIRR, which it recalculated based on its January and February 2012 collections and carrying costs based on the long term debt rate. The PIRR that OPC submitted was to serve as the mechanism by which OPC would collect deferred fuel costs that arose as a result of the ESP I case.

In its March 7, 2012 Entry, the Commission held *inter alia* that the tariffs for the PIRR and two others did not appear just and reasonable and disallowed their inclusion in AEP Ohio's February 28, 2012 Compliance Filing. Specifically with respect to the PIRR, the Commission directed AEP Ohio to file, "in final form, new tariffs removing the PIRR *at this time*." March 7, 2012 Entry at ¶ 14 (emphasis added). The Commission held that it would "address AEP-Ohio's application to establish the PIRR by subsequent entry in the Deferred Fuel Cost Cases." *Id.* Accordingly, the Commission also deconsolidated the cases and directed that "all future filings should be made in the appropriate case docket." *Id.* at ¶ 16.

It is this March 7, 2012 Entry from which OPC's Application for Rehearing arises. The Application, however, raises many of the same arguments that OPC raised in its reply to the objections to its compliance filing, and consequently have already been considered and rejected by the Commission. The Commission should also reject them on rehearing.

ARGUMENT

The Commission should reject the Application, which consists of arguments that the Commission has already rejected, for numerous reasons. First, each of the asserted errors relies upon the incorrect assumption that the Commission's approval of the deferred costs and the recovery time period approved in ESP I also somehow created a requirement that the Commission approve the PIRR mechanism as proposed by OPC. In fact, the Commission did not approve the PIRR mechanism in ESP I, did not have occasion to consider the PIRR mechanism in ESP I, and lacked a sufficient record to approve the PIRR mechanism even if the Commission wanted to. For these reasons, each of the assignments of error fail.

OPC's assignments of error that sections 4928.144 and 4928.143(C)(2)(b) require the Commission to "permit the PIRR to go into effect" rely on infusing these statutes with words they do not contain. Without the OPC-provided additions, the statutes simply do not require

what OPC would like them to. In interpreting a statute, the Commission must first look to the plain language of the statute. If the meaning is plain, then the Commission should not go beyond the plain meaning, as OPC advocates.

Finally, in the remaining two assignments of error, OPC asserts that the March 7, 2012 Entry failed to affirm the weighted average cost of capital carrying charge ("WACC") and the calculation of deferred fuel expenses on a gross-of-tax basis. OPC offers no basis for its belief that the Commission must have readdressed these issues. Further, the Order explicitly stated that the Commission would address the PIRR in docket numbers 11-4920-EL-RDR and 11-4921-EL-RDR. OPC offers no explanation why addressing the issues in those proceedings, once the Commission has had opportunity to build a sufficient record upon which to base a decision, will be insufficient to protect OPC's interests.

I. The Commission Should Reject the Application Because Each Assignment of Error Has Already Been Rejected and Each Relies Upon Incorrect Assumptions.

A. Each Assignment of Error Has Already Been Raised, Which Justifies Rejection of the Application.

The Commission should reject the Application outright because each of the issues raised in it has been previously considered and rejected by the Commission. Where an application for rehearing does not raise new arguments, the Commission denies it. *In re United Telephone Co. of Ohio*, No. 07-760, 2008 WL 449797, at *2-3, 5 (Ohio P.U.C. Feb. 13, 2008). The Commission did exactly this in *United Telephone*: "We find that the [applicant], in its application for rehearing, has raised no new arguments for the Commission's consideration. Therefore, the [applicant's] application for rehearing . . . is denied." *Id.* at *5. Accordingly, the Commission should deny the Application here as well.

B. The Commission's Previous Order in the ESP I Case Does Not Require Approval of any Specific Cost Recovery Mechanism.

Each of OPC's assignments of error rests upon the fatally mistaken premise that the ESP I case (08-917-EL-SSO, *et al.*) authorized the *mechanism* by which AEP Ohio may recover deferred fuel costs and therefore requires the Commission to approve the PIRR. Contrary to OPC's claim, the Commission did not approve in ESP I a mechanism by which deferred costs would be recovered. Indeed, it could not have done so on the record before it, which did not include the PIRR rejected by the Commission on March 7, 2012, nor the amount of deferred costs that would have accrued by 2012. Consistent with the interpretation of ESP I case as not approving any particular cost recovery mechanism, the Commission referred in the challenged March 7th Entry to AEP Ohio's "*application* to establish the PIRR" as the deferred cost recovery mechanism (¶ 14; emphasis added). This phrasing comports with ESP I since ESP I is silent as to the structure of a recovery mechanism.

Nonetheless, AEP Ohio argues that the Commission, apparently unknowingly, abdicated its authority to review the justness and reasonableness of AEP Ohio's tariffs and reduced itself to only a "ministerial" role in approving whatever mechanism of recovery AEP Ohio put forth. Application at p. 7. Under AEP Ohio's reading of ESP I, the Commission has no power to reject a PIRR tariff that, for example, would propose to collect 90% of the deferred costs in 2012 and the remaining 10% from 2013 to 2018, so long as AEP Ohio did their math correctly. *See id.* (AEP Ohio explaining that under its reading of ESP I, the Commission could exercise its limited, "ministerial" role to amend AEP Ohio's proposed tariff to fix a mathematical error).

OPC's reading cannot be correct for myriad reasons, not least of which is that such an order would be unlawful. The Commission must assess the justness and reasonableness of proposed rates based on the evidence before it. *In re Application of Columbus S. Power Co.*, 950

N.E.2d 164, 168 (Ohio 2011) (the Commission "must determine, *from the evidence*, what is just and reasonable." (citation omitted, emphasis in original)). The Commission always must ensure that "[a]ll charges made or demanded for any service rendered . . . [are] just, reasonable, and not more than the charges allowed by law or by order of the public utilities commission." Oh. Rev. Code § 4905.22. And without the PIRR before it in ESP I, the Commission could not have speculated that a 2012-2018 recovery mechanism that had not yet been proposed would be just and reasonable. *C.f. Elyria Foundy Co. v. PUCO*, 871 N.E.2d 1176, 1185 (Ohio 2007) (finding prejudice alleged to have resulted from the future impact of recovery of deferred rates that had not yet had a mechanism for their recovery approved to be overly "speculative."). Thus, the record in the ESP I case simply was not sufficient to support a determination by the Commission regarding a PIRR mechanism, even if the Commission had desired to do so at that time.[1]

No specific recovery mechanism was approved in ESP I -- not the PIRR, nor any other. Consistent with that reading, the Commission held that "[s]ection 4928.144, Revised Code, provides the Commission with discretion regarding the *creation* and duration of the phase-in of a rate or price established pursuant to Sections 4928.141 through 4928.143, Revised Code." (ESP

[1] Even if the Commission did approve the PIRR in ESP I, it is entirely within its authority to delay implementation of a prior decision if it justifies the change. The importance of the Commission's precedent "does not mean that the commission may never revisit a particular decision, only that if it does change course, it must explain why." *In re Application of Columbus S. Power Co.*, 947 N.E.2d 655, 667 (Ohio 2011) (explaining that "[a] few simple sentences in the commission's order" could meet this requirement). In ESP I, the Commission did not know, and could not have known, what the amount of deferred costs would be. Conversely, the Commission did have that information before it when it denied the PIRR in the March 7, 2012 Entry. With that information before it, the Commission explained that it could not find the particular PIRR to be just and reasonable and decided to make that decision within the context of the Deferred Fuel Cost Cases (11-4920-EL-RDR and 11-4921-EL-RDR) instead. Such constitutes an adequate distinction of the ESP I case to justify the Commission changing course. The relevance of the Commission's ability to change its mind, however, is purely hypothetical given that the Commission did not approve any particular cost recovery mechanism in ESP I.

I at 23; emphasis added). In apparent contemplation of its ability to exercise this discretion in the future creation of the phase-in recovery mechanism, the Commission couched its general approval of the future recovery of deferred fuel costs in consideration of future events that could demand adjustment: "we find that the collection of any deferrals, with carrying costs, created by the phase-in that are remaining at the end of the ESP term shall occur from 2012 to 2018 *as necessary* to recover the actual fuel expenses incurred plus carrying costs." *Id.* (emphasis added).

Therefore, the March 7, 2012 Entry's denial of the PIRR as the particular mechanism of recovery does not conflict with ESP I. ESP I cannot be read as OPC suggests because the Commission lacked the record in ESP I to approve the PIRR. Accordingly, each assignment of error fails because each relies on the false assumption that ESP I approved the PIRR.

C. The Commission's Rejection of the PIRR as Proposed Does Not Conflict with ESP I because Deferrals May Still be Collected "from 2012 to 2018," As Necessary.

In its first assignment of error, OPC manipulates even the most favorable reading of ESP I by importing language that does not exist in the decision. OPC argues that "[t]he Entry's refusal to allow the PIRR to go into effect immediately is in conflict with, and violates, the Commission's decision in *ESP I*." (Application at 2.) To support this argument, OPC quotes the relevant section of the ESP I decision:

> Therefore, we find that the collection of the deferrals with carrying costs created by the phase-in that are remaining at the end of the ESP term shall occur from 2012 to 2018 as necessary to recover the actual fuel expenses incurred plus carrying costs.

Id. at 6 (quoting ESP I). OPC's position that the PIRR must go into effect "immediately" simply does not exist in or logically flow from the ESP I decision. Rather, OPC has added this word to the Commission's decision to bolster its argument without explanation why the ESP I decision must implement the cost recovery mechanism "immediately." The Commission's March 7, 2012

Entry is entirely consistent with the actual language of the ESP I decision. There is no language requiring that a specific mechanism be implemented immediately on a specific date.

Accordingly, the Commission should reject OPC's application for rehearing because the March 7, 2012 Entry does not conflict with the ESP I decision under even the most favorable readings to OPC.

II. Contrary to OPC Assignments of Error Two and Three, Nothing in the Ohio Revised Code Requires the Commission to Implement a Cost Recovery Mechanism That Has Never Before Been Approved.

The Commission correctly interpreted its obligations under sections 4928.144 and 4928.143(C)(2)(b) of the Ohio Revised Code, and OPC's arguments to the contrary are unpersuasive. OPC asserts that these sections of the Code "require the Commission to ensure the recovery of the cost deferrals authorized in ESP I." Application at 6. OPC quotes the entirety of section 4928.144 to make the point that the Commission must "simultaneously provide for and authorize the recovery of the cost deferrals through the same order that established them." Application at 7. From this, OPC inexplicably leaps to the conclusion that ESP I must have empowered OPC with the "authority to collect cost deferrals" in whatever manner it chooses. Nothing in the law or in ESP I vests in OPC this so-called "authority." In fact, neither section 4928.144 nor ESP I suggests that OPC has been granted authority to choose the mechanism for collection of cost deferrals.

Even assuming OPC's inaccurate reading of 4928.144 is correct, however, the Commission's March 7, 2012 Entry does not run afoul of the statute. The Commission did simultaneously approve the recovery of cost deferrals through the ESP I order that established them. It approved recovery of those deferrals by a to-be-determined mechanism. Then, in its March 7, 2012 Entry, the Commission rejected only one proposed mechanism to achieve such a recovery, the PIRR, in favor of addressing that issue in a separate docket. Thus, the Commission

has placed itself in a posture that is entirely consistent with the requirements of 4928.144 as characterized by OPC.

OPC also argues that section 4928.143(C)(2)(b) authorizes the PIRR cost recovery mechanism because that section requires the Commission to issue any order "necessary to continue the provisions of the prior ESP." Application at 8. That is exactly what the Commission did. In rejecting the Stipulation in ESP II, the Commission ordered OPC to file new tariffs to continue the provisions of ESP I. But OPC went one step further by including in its Compliance Filings an application for approval of something that was not part of ESP I -- the PIRR mechanism to recover the deferred costs addressed in ESP I. Including such a new proposal in a compliance tariff was improper; OPC should have raised that proposal in an appropriate proceeding. The Commission's order therefore correctly required that the PIRR be addressed in the Deferred Fuel Costs docket.

Because of its mistaken understanding of ESP I, OPC argues that continuing the provisions, terms and conditions of its most recent SSO means the Commission must allow it to implement the PIRR in any form it chooses. Properly understood, however, continuing ESP I in the 2012 to 2018 period means putting the cost-recovery mechanism application before the Commission for an analysis of its justness and reasonableness, while otherwise continuing the December 2011 rates. That is exactly the course that the Commission has taken, which is entirely consistent with the requirements of section 4928.143(C)(2)(b), 4928.144, the rest of the Revised Code and the Commission's prior decisions.

OPC also threatens the Commission with a mandamus petition "if it becomes evident that the Commission does not intend to swiftly reinstitute the PIRR." Application at 6 (citing *State, ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 105 Ohio St.3d 177, 180 (Ohio 2005)). OPC's threat should not concern the Commission. OPC cannot meet any of the three required

elements to justify a writ of mandamus. First, OPC cannot show a clear legal right to the proposed PIRR mechanism now being sought where it cannot even show that the PIRR mechanism was considered or accepted by the Commission in ESP I. *Id.* Second, the Commission has no clear legal duty to approve the PIRR itself as opposed to some other cost recovery mechanism. *Id.* The Commission has a legal duty to ensure just and reasonable rates and enjoys substantial discretion to accomplish that end.

Third, OPC does not lack an adequate remedy in the normal course of law. *Id.* This case, where the Deferred Fuel Cost cases are ongoing and the Commission has promised to address the PIRR issue therein, is unlike *Cincinnati Bell* where a writ of mandamus was granted. There, in order to effectuate its appeal, respondent needed the Commission to transmit a transcript, which the Commission refused to send. *Cincinnati Bell*, 105 Ohio St.3d at 180. The respondent was stuck, without the ability to appeal, without the Commission's delivery of the transcript. In that unique circumstance, where the respondent had nowhere to turn for legal relief, the Court granted a writ. Here, the OPC has an adequate remedy and proceeding in which to pursue it: the Commission has an open docket, in its early stages, in which OPC's PIRR *application* currently is pending.

Finally, OPC claims that "arguments that an accounting order authorizing deferrals is not equivalent to a ratemaking order permitting the recovery in rates of previously authorized deferrals . . . miss the point." Application at 10. To the contrary, this difference is critical because Ohio Supreme Court precedent indicates that ESP I could not have lawfully approved the PIRR. In *Elyria*, the Ohio Supreme Court cited the Commission's responsibility to prevent the imposition of unjust, unreasonable and unlawful rates. 871 N.E.2d at 1190-91. It then explained in a slightly different context that "claims about future rates are speculative because the ultimate effect of the accounting order is not known." *Id.* Nonetheless, the case highlights

the importance of taking into account the actual impact of deferred costs that result from an accounting order in a later order that would set rates. Applying the *Elyria* concept to this case, the specific rate impact of the cost recovery mechanism for the deferred costs that were generally approved in ESP I required review that would have been unduly speculative to undertake in ESP I. Thus, ESP I could not lawfully have prospectively approved the PIRR, so OPC's arguments to the contrary must fail.

For these reasons, OPC's second and third assignments of error are unpersuasive and the Commission should deny the Application.

III. The March 7, 2012 Entry Did Not Err with Respect to the Weighted Average Cost of Capital Charge, Nor with Respect to the Deferred Fuel Expense Recovery on a Gross of Tax Basis Because the Commission Had No Responsibility to Reaffirm, or Not Reaffirm, These Alleged Features of the PIRR in the March 7, 2012 Entry.

OPC also argues -- without citation to any case, proceeding, statute or rule -- that the Commission erred because it did not provide in its March 7, 2012 Entry that the cost recovery mechanism would calculate the deferred fuel costs based on the WACC. Similarly, again without citation, OPC asserts that it was error for the Commission not to have provided that the recovery mechanism shall calculate the recovery on a gross-of-tax basis. Nothing requires the Commission to have addressed these issues and OPC's assertion is therefore understandably unsupported.

Regardless whether OPC is correct that these features of the cost recovery mechanism were decided in the ESP I case, OPC provides no reason why the March 7, 2012 Entry must have provided for these elements of a recovery mechanism. Rather, because the Commission decided to address AEP Ohio's application for a cost recovery mechanism separately, in the Deferred Fuel Costs dockets, the Commission had no basis or reason to address the WACC or gross-of-tax issues in the March 7, 2012 Entry.

When the Commission does address these issues, however, a review of the justness and reasonableness of the application would require consideration of the WACC and gross-of-tax the overall impact of 2012-2018 rates. As Ormet has explained in previous filings, the rejected PIRR mechanism reflects a continuation of the 11.26% carrying charges on the deferred costs based on AEP Ohio's WACC. As it considers whether and how to allow AEP Ohio to begin collections of the deferred balances, the Commission should also reconsider the reasonableness of continuing to allow AEP Ohio to collect 11.26% in light of the Commission's precedent requiring that carrying costs on a deferral be limited to the utility's long-term cost of debt once amortization of a deferred asset begins.[2]

Likewise, Ormet urges the Commission to consider whether the balance of the deferral should be adjusted to reflect accumulated deferred income taxes ("ADIT"). The timing difference between the tax deduction and the book accounting treatment reduces AEP's federal income tax liability creating tax savings realized by AEP Ohio related to the deferral balances that should be passed on to customers. Because of the tax savings, AEP Ohio is not financing 100% of the deferral, and the amortization of the deferral balance should be reduced by the effects of the ADIT.

CONCLUSION

For the foregoing reasons, OPC's Application for Rehearing fails to raise any issues that the Commission should address on rehearing. Accordingly, the Commission should reject the Application as to each of the five assignments of error.

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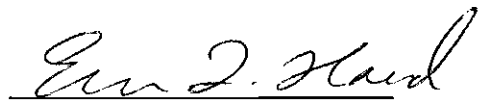
[2] *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider,* Case No. 10-176-EL-ATA, Opinion and Order at 24 May 25, 2011), *see also In re Application of Duke Energy Ohio, Inc. for an Increase in Rates*, No. 07-589-GA-AIR, 2008 WL 2390285, at *5 (Ohio P.U.C. May 28, 2008).

Respectfully submitted,



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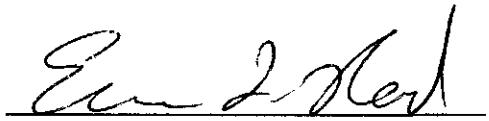
March 20, 2012

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Memorandum Contra of Ormet Primary Aluminum Corporation to Ohio Power Company's Application for Rehearing of the March 7, 2012 Entry* served by U.S. Mail upon counsel identified below for all parties of record this 20th day of March, 2012.



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