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	**)**	**Case No. 11-346-EL-SSO**
Establish a Standard Service Offer	**)**	**Case No. 11-348-EL-SSO**
Pursuant to § 4928.143, Ohio Rev. Code,	**)**	
In the Form of an Electric Security Plan	**)**	
	)	
In the Matter of the Application of	**)**	
Columbus Southern Power Company and	**)**	**Case No. 11-349-EL-AAM**
Ohio Power Company for Approval of	**)**	**Case No. 11-350-EL-AAM**
Certain Accounting Authority	**)**	

POST-HEARING BRIEF OF ORMET PRIMARY ALUMINUM CORPORATION

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ORMET PRIMARY ALUMINUM CORPORATION

Ormet Primary Aluminum Corporation ("Ormet"), by its undersigned counsel, respectfully submits this Post-Hearing Brief in support of its recommendations in this proceeding and states as follows:

INTRODUCTORY STATEMENT

One of the alleged benefits of AEP Ohio's[1] pending application is that it would impose only a modest rate increase upon ratepayers. In direct response to questioning by Commissioner Andre Porter himself, however, AEP Ohio's own witness acknowledged that the Company's own projections demonstrate that the current Electric Security Plan ("ESP II") application could increase Ormet's electricity rates by over [BEGIN CONFIDENTIAL INFORMATION [redacted] END CONFIDENTIAL INFORMATION] compared to its 2011

[1] As is custom in this proceeding, "AEP Ohio" or "the Company" is used throughout this brief to refer to what is now, after the merger of Ohio Power Company and Columbus Southern Power Company, known only as the Ohio Power Company (the surviving entity). For the period prior to the merger, "AEP Ohio" or "the Company" refers to both companies.

rates. Hr'g Tr. vol. IV, 1233:24-1236:22, May 22, 2012 (Confidential). The real rate increase for Ormet, as was explained by the uncontroverted testimony of Ormet witness Whitfield A. Russell, will be [BEGIN CONFIDENTIAL INFORMATION [redacted] END CONFIDENTIAL INFORMATION] if the fuel cost increases projected by AEP Ohio witness Oliver J. Sever prove accurate. *See* Hr'g Tr. vol. XIV, 3920:7-12, June 6, 2012 (Confidential). Neither Ormet nor the State of Ohio can afford the dramatic rate increases in AEP Ohio's proposal.

This proposed rate increase comes at a time of global economic uncertainty during which the Public Utilities Commission of Ohio ("Commission" or "PUCO") can ill-afford to push large employers like Ormet out of business, or out of the state. *Id.* AEP Ohio does not need this protection as much as the rest of Ohio needs a break; the Company earned over $1 billion in net income over the 2010-2011 period and another $150 million in the first quarter of 2012. AEP Ohio must share the economic burden faced by Ohioans. Hr'g Tr. vol. II, 363:14-19, May 18, 2012. The following arguments offer the Commission a variety of reasonable ways to do exactly that.

ARGUMENT

I. AEP Ohio's Proposed Rate Increases Have the Potential To Dramatically Harm Ormet and Thereby Impose Upon All Ohio Ratepayers Even Higher Rates.

A. AEP Ohio's Proposal Seeks To Impose A Dramatic Rate Increase on Ormet.

Despite AEP Ohio's assurances that its application will increase rates on average by only five percent, it has become evident over the course of this proceeding that ratepayers will see far greater increases during the ESP term. Hr'g Tr. vol. IV, 1220:1-6, May 22, 2012 (discussing AEP Ex. 111, Attach. DMR-6). For example, according to the evidence presented in the case, it is clear that Ormet very well could experience a rate increase of as much as

[BEGIN CONFIDENTIAL INFORMATION [redacted] END CONFIDENTIAL INFORMATION] over its 2011 rates by 2013. *See* Hr'g Tr. vol. XIV, 3920:7-12, June 6, 2012. This would represent a [BEGIN CONFIDENTIAL INFORMATION [redacted] END CONFIDENTIAL INFORMATION] increase over the 2011 rates. AEP Ohio should not be allowed to implement its proposed rate changes without reference to all of the rate increases that customers are likely to experience. It makes little difference to customers which provision of a tariff imposes the rate increase; what matters to customers is the total bottom line they will have to pay for electricity. Ormet Ex. 104 at 9:6-13. And that is what should matter to the Commission.

The increases proposed in this proceeding would add to other significant recent rate increases. The delivered rate that Ormet pays for power now (before the proposed increase) is already 58 percent higher than in 2010. *See id.* at 10:9-11. Before AEP Ohio's current proposal even becomes effective, Ormet is already paying the same delivered price for power that it paid in 2009, before Ormet's Unique Arrangement went into place.[2] In short, even with its Unique Arrangement in place, Ormet's delivered price for power has increased sharply and steadily over the last four years.

But unlike a typical business, Ormet cannot pass these increased electricity costs on to its customers. *See* Hr'g Tr. vol. XIV, 3943:2-10. The price at which Ormet can sell its product is set on the international market over which Ormet has no control—the London Metal Exchange ("LME"). Ormet cannot simply raise its price to account for increased costs. Ormet

[2] Through continual increases in the GS-4 rate since 2009, AEP Ohio has effectively eliminated the full amount of the discounts that were granted in connection with Ormet's Unique Arrangement. In other words, Ormet's May 2012 net of $39.42 (GS-4 rate of $51.79/MWH less a discount of $12.37/MWH) has reached the level of the GS-4 rate in 2009 ($39.78/MWH undiscounted) and is projected to reach $40.89/MWH in the last seven months of 2012.

Ex. 104 at 4:2-7. Further, Ormet's Unique Arrangement will not protect it from rate increases. Whenever the LME price of aluminum is low enough that Ormet is taking the full discount available to it under the Unique Arrangement, Ormet suffers any rate increase on a dollar-for-dollar basis. *Id.* at 8:17-9:13.

B. Raising Ormet's Rates Could Potentially Cause It To Curtail Operations.

One of the largest principal costs for the production of aluminum products is electricity. The Hannibal aluminum smelter currently utilizes up to 505 megawatts of electricity 24 hours per day, 365 days per year. *Id.* at 3:14-16. When electric rates are excessive, particularly when the retail price of aluminum is low, aluminum reduction facilities simply cannot operate. *Id.* at 3:19-20. The economic viability of an aluminum smelter is essentially determined by the relationship between the retail market price of the aluminum smelter's product, aluminum and the smelter's costs. Of Ormet's costs, electricity is the largest component, consisting of more than 30 percent of production costs during 2011 when taking into consideration the credit received from Ormet's Unique Arrangement with AEP Ohio. *Id.* at 3:5-9.

Although Ormet cannot control price, it has taken significant measures to reduce its costs. For example, it has focused on improving the energy efficiency of the potlines it uses to produce its products. *Id.* at 11:3. Over the last two years, through process improvements, capital investment and other changes, Ormet has reduced the demand level of the potlines by approximately 35 MW. *Id.* at 11:4-7. In addition, the plant has recently achieved historical, 50 plus-year records for reduced voltage, increased metal production, increased pot cell life and labor per metric ton of production. *Id.* at 11:7-9. These measures have increased Ormet's ability to pay for electricity significantly. *Id.* at 11:12-13.

Unfortunately, regardless of these efforts and gains, electricity is such a large component of the Hannibal Facility's costs that it's price alone can determine the viability of

the smelter. The anticipated increases in AEP Ohio's rates over the term of the ESP proposal will strain Ormet's ability to continue operating. The bottom line is that the cost of electricity has been rising rapidly while the LME price of aluminum has been depressed. As a result, Ormet cannot absorb the proposed rate increases and may be forced to curtail all or part of its operations and eliminate jobs. *Id.* at 12:6-12.

C. If Ormet Shuts Down or Curtails Operations, Other Ohio Ratepayers and the Ohio Economy In General Will Be Seriously Harmed

Through the Retail Stability Rider ("RSR"), AEP Ohio proposes that ratepayers guarantee them a specific amount of annual generation revenue —$929 million through 2015. Thus, if Ormet shuts down, AEP Ohio will collect from other ratepayers the generation revenues lost from Ormet. Ormet Ex. 106A at 13:12-17. Even with its discount, Ormet is paying more than AEP Ohio's variable costs to serve it, thereby significantly contributing to AEP Ohio's fixed costs. Under AEP Ohio's proposal, Ormet would contribute a cumulative total of $224,800,000 over three years to AEP Ohio's fixed costs that would otherwise be allocated to all other ratepayers.[3] If Ormet shuts down, AEP Ohio's costs would just be collected from its other customers. *Id.* at 13:12-14:6.

In addition to the negative rate impact on other customers of Ormet curtailing operations, significant harm would occur to the Ohio economy. Ormet maintains over 1,000 direct jobs at its Hannibal Facility, paying annual wages and salaries of $63 million. Considering benefits brings the total compensation package to nearly $118 million. Ormet Ex. 105 at 2:9-10, Attach. PAC-2 at 12; Hr'g Tr. vol. XIV, 3841:10-25. If the broader impact of secondary jobs created by Ormet is taken into consideration, then Ormet creates approximately

[3] If you subtract the amount that Ormet is entitled to receive in discounts under its Unique Arrangement with AEP Ohio over the time period, there is still a net benefit to Ohio ratepayers of $105,596,000.

3,117 jobs in a seven county region of Ohio and West Virginia (roughly a 60/40 split) with a total employee compensation impact of $238 million. Ormet Ex. 105, Attach. PAC-2 at 12. Moreover, Ormet is different from other major employers like Wal-Mart, grocery stores and nursing homes, which mostly redistribute money that was already in the regional economy. Because Ormet serves primarily national and international markets, it brings new dollars into the regional and Ohio economy. Ormet Ex.105 at 3:7-8; Hr'g Tr. vol. XIV, 3850:16-3851:3 and 3852:7 to 3853:5.

According to the uncontroverted evidence submitted in this proceeding, the total impact of Ormet on the Ohio and regional economy is as follows:

Cumulative net rate impact on other ratepayers if Ormet ceases operations (June 2012 through May 2015).	$105.6 million
Jobs at the Hannibal Facility.	1,050
Annual wages and salaries at Hannibal Facility.	$63 million
Other employee compensation, and labor costs at Hannibal Facility.	$39 million
Total jobs in the seven county (OH and WV) region.	3,117
Total annual employee compensation in the seven county region related to the jobs created by Ormet.	$238 million
State and local taxes paid annually in Ohio.	$8.7 million
State and local taxes paid annually in West Virginia.	$6.1 million

See generally Ormet Ex. 105 at PAC-2.

If Ormet is forced to curtail its operations due to electric rate increases, the impact will resonate dramatically throughout Ohio, result in significant job losses, and do significant harm

to the Ohio economy. Moreover, while the impacts on Ormet would be substantial, it is only one business among many in Ohio that will be harmed by the proposed rate increases.

II. The RSR is Fundamentally Flawed and Should Be Rejected, Reduced or at Least Not Applied to Customers Who Cannot Shop and Reap the RSR's Benefits.

The RSR requested by AEP Ohio is flawed and should be rejected or reduced for a number of reasons. First, the RSR seeks to guarantee three years of non-fuel generation revenues and thereby protect AEP Ohio from losses associated with customer shopping. Ormet Ex. 106B at 2:15-17. But some customers, including Ormet, cannot shop. Customers who cannot shop neither contribute to the harms associated with shopping nor enjoy any of the benefits of shopping. Second, the RSR revenue target is too high and seeks to recover for all shopping customers, even those who started shopping long before the existence of any of the pro-competition initiatives associated with the ESP. Third, the credit for shopped load associated with the RSR is too low. Fourth, the RSR should not be pegged to non-fuel generation revenues only, but to overall Company income instead.

A. The Commission Should Not Apply the RSR to Customers Who Cannot Shop, like Ormet.

The Commission should reject application of the RSR to Ormet because Ormet cannot shop and therefore neither causes any of the costs, nor enjoys any of the benefits, related to the RSR. No party disputes that under Ormet's September 16, 2009 Power Agreement, Ormet may not shop. *Id.* at 15:15-18. And no party disputes the RSR's basic stated purpose:

> In exchange for . . . providing capacity to CRES providers at a price well below the Company's cost associated with this capacity and the resultant loss in generation revenues, the Company is proposing a Retail Stability Rider that will replace a portion of this lost revenue.

AEP Ex. 116 at 13:9-13.

AEP's plan would require Ormet, a customer who cannot shop, to subsidize an AEP Ohio non-fuel generation revenue guarantee that everyone agrees is designed to compensate AEP Ohio for revenues lost because of shopping. But a customer who cannot shop cannot possibly cause reductions to AEP Ohio's revenues from shopping. Ormet Ex. 106B at 15:7-13. Likewise, a customer who cannot shop cannot gain any of the benefits of discounted capacity offered by AEP Ohio's plan. *Id.* at 15:15-18. It would be fundamentally unfair to require Ormet to pay the RSR in these circumstances. To do so would violate the regulatory principle of cost causation. *Id.* at 15:18-16:2.

B. The Commission Should Reduce the RSR so It Protects Against Shopping Caused by AEP Ohio's Application.

The RSR's stated purpose is to protect AEP Ohio from non-fuel generation revenue losses resulting from customers shopping due to AEP Ohio's offer of discounted capacity. But, as designed, the RSR would collect revenues lost to customers who shopped for reasons entirely unrelated to anything contained in AEP Ohio's ESP II plan. *Id.* at 16:10-13. AEP Ohio calculates the non-fuel generation revenues it supposedly needs—$929 million—by looking at the non-fuel generation revenues it received in 2011. *See* AEP Ex. 116, Attach. WAA-6. Any reduction to its non-fuel generation revenues, for any reason whatsoever, would be offset by the RSR. *Id.* We know, however, that many of those losses occurred independent of any supposedly pro-competition measures contained in the ESP II plan. Ormet Ex. 106B at 16:10-13.

For example, the Stipulation that purportedly first promoted shopping was not approved by the Commission until December of 2011; it was not even agreed to by the parties until September of 2011. Hr'g Tr. vol. V, 1604:3-6, May 23, 2012. Any customer who shopped or noticed an intent to do so before December 2011, or at least September 2011, could not

possibly have been motivated to shop by the discounted capacity first promised in the Stipulation. *Id.* at 1605:1-6.

As another example, existing ratepayers whose revenue contributions to AEP Ohio were included in the baseline for calculating the RSR may stop taking service from AEP Ohio for myriad reasons unrelated to shopping. Ormet Ex. 106B at 15:10-13. A customer might go out of business, leave Ohio, or decide to engage in energy conservation efforts. *Id.* Under the RSR requested by AEP Ohio, regardless of their reason for leaving, the Company's remaining customers will have to shoulder the burden of making up for that lost non-fuel generating revenue.

As proposed, therefore, the RSR would simply be a revenue guarantee. It would not be pegged to pro-competitive measures. Instead, it would protect AEP Ohio from any and all non-fuel generation losses, regardless of their cause. Rather than moving toward a competitive market, such a guarantee would protect AEP Ohio from competition.

At the least, the RSR should not include non-fuel generation revenues lost because of customers who shopped for reasons *unrelated* to the pro-competition measures contained in the present Application, and first seen in the September 2011 Stipulation. This calculation can easily and reliably be done with AEP Ohio's own numbers. Without considering pending or noticed switches, by December 1, 2011, the month the Stipulation was approved, 17.39 percent of AEP Ohio customers had already switched. Hr'g Tr. vol. V, 1604:2; *see also generally* Ormet Ex. 102. As of September 1, 2011, the month the parties initially agreed to the Stipulation, 11.63 percent of AEP Ohio customers had already switched. Hr'g Tr. vol. V, 1604:9; *see also generally* Ormet Ex. 102. These customers could not have switched because of events that had not yet occurred, as AEP Ohio suggests.

Reducing the revenue target by somewhere between 11 percent and 17 percent would result in a reduction of $108 to $158 million and a new RSR target between $771 million and $821 million. Hr'g Tr. vol. V, 1608:2; 1608:10. Such a reduction is appropriate and would mean AEP Ohio would not need to collect RSR revenues until planning year 2014/2015. Even at that point, AEP Ohio would need no more than $29.2 million of RSR revenues. AEP Ex. 116, Attach. WAA-6.

Under either reduction, however, AEP Ohio will still be compensated for the non-fuel generating revenues that it has lost due to its promotion of shopping—the very purpose AEP Ohio states for the RSR. AEP Ex. 116 at 13:9-21.

C. AEP Ohio Should Provide a Larger Credit for Shopped Load.

In determining whether it has achieved its annual non-fuel generation revenue target of $929 million, AEP Ohio will add four categories of revenue every year: (1) non-fuel generation revenue; (2) revenues received from CRES providers; (3) any auction capacity revenues; and (4) a $3 credit for shopped load. *See generally* AEP Ex. 116, Attach. WAA-6. Any shortfall will be recovered from ratepayers through the RSR. *Id.*. Thus, it is to the ratepayers' benefit if these four categories of revenue are correctly accounted for and are not short-changed in any way.

The fourth category of revenue discussed above—the $3 credit from shopped load—results from off-system sales made of MWH freed up because of customer shopping. Hr'g Tr. vol. XVII, 4902:15-20. The $3 amount represents AEP Ohio's estimate of the margin it earns on every MWH sold off-system. Hr'g Tr. vol. XVII, 4767:2-11. However, AEP Ohio significantly underestimated that margin for several reasons.

AEP Ohio has explained that it arrived at the $3 amount by taking the usual margin earned on an off-system sale of MWH, then multiplying it by .4 (because AEP Ohio has to

provide 60 percent of these proceeds to the other members of the AEP Pool). It then multiplied the result by somewhere between .5 - .8, because AEP Ohio claims to be unable to sell somewhere between 20-50 percent of all freed-up load.[4] The result, according to AEP Ohio, approximates $3 per MWH freed up by shopping. AEP Ohio's calculation is set forth in the table below.

Calculus for Credit	Basis for Reduction Through 2015
$11.73[5]	-
* .40	MLR Reduction for portion AEP Ohio must share with rest of AEP Pool.[6]
* .80	Reduction for unsellable load.
~ $3 Credit for Shopped Load	-

First, when he performed this calculation on the stand, based on the margin earned on 2011 sales, and using 2011's resale percentage of 80 percent, AEP Ohio witness Allen acknowledged that the result was $3.75, not $3. *See* Hr'g Tr. vol. XVII, 4905:2-22. The proper credit amount should therefore be at least $78.5 million. *Id*. 4905:14-16.

The second critical error in the $3 calculation is that the AEP Pool ends at the end of 2013. *Id.* 4921:11-12. But the Company continues to reduce the credit by 60 percent for the amount it must share with the Pool after the Pool ends. At that point, AEP Ohio need not share anything with a non-existent Pool. The credit amount, therefore, should not be reduced (by multiplying it by .4) beginning in 2014. In other words, step one of the calculation in the table above should no longer apply in 2014 and

[4] In 2011, AEP sold 80 percent of freed-up load. *See* Hr'g Tr. vol. XVII, 4902:15-20. 2011 is the only year for which AEP Ohio provided evidence of its ability to re-sell. *Id*. 4903:23-4904:4. The Commission has no basis to rely on any figure other than the 80 percent number.

[5] This is the average AEP East physical margin. *See* Hr'g Tr. vol. XVII, 4778:1-5, June 15, 2012.

[6] *Id.* 4778:13-22.

2015. The $3 credit is therefore artificially reduced by 60 percent in 2014 and 2015 and should really be at least $6.50 in those years according to the math of AEP Ohio's own witness.[7]

D. The RSR Should be Pegged to Overall Income, Not a Single Revenue Stream.

Calculating the RSR based on one revenue stream instead of total company income poses significant risk of rate volatility to customers. Because revenues can go up and down, especially a single revenue stream, AEP Ohio's plan exposes ratepayers to the risk of higher rates. But that exposure is unnecessary since AEP Ohio might not even suffer financial harm when one revenue stream shifts downward. Other revenue streams can increase, expenses can decrease, or both; but the RSR ignores each of those possibilities.

Under the structure of the proposed RSR, the Company's overall performance and financial health could improve in a year when its non-fuel generation revenues decline. Hr'g Tr. vol. V, 1597:13-1598:1. For example, AEP Ohio can increase profits by cutting operations and maintenance expenses on its generators and/or refinancing its generation business. Nonetheless, ratepayers would have to pay more RSR revenues to make up for decreased revenue in that one stream even if AEP Ohio's profits were actually up overall. *Id.*

Pegging the RSR to generation revenues leaves AEP Ohio free to benefit from increased distribution revenues, transmission revenues, sales to AEP Ohio affiliates, and other categories without those revenues being tied to a 10.5 percent ROE.

Because the RSR focuses exclusively on a single revenue stream, it provides no upside limit on the amount AEP Ohio could collect from its customers. And the plan has no mechanism to return any extra revenue or unneeded profit to customers. *Id.* 1597:23-1598:1-4.

[7] Using the $11.73 margin and multiplying by by .8 results in a credit of $9.38. But in the particular calculation performed by AEP witness Allen on the stand to reach the $6.50 figure, the witness assumed 50% could be sold, not 80% and assumed a margin of $13 per MWH. *See* Hr'g Tr., vol. V, 1430:9-16.

Of course, AEP Ohio is entitled to the opportunity to earn a reasonable rate of return. But allowing AEP Ohio to isolate and guarantee one revenue stream, no matter what happens with the rest of its business, and no matter the impact on ratepayers, is not just and reasonable ratemaking.

To remedy these problems, if the RSR is approved, it should be recovered only if AEP Ohio's overall net income decreases significantly from prior years. Designing the RSR in this manner will ensure that AEP Ohio's overall financial health is protected but that ratepayers are not exposed to more risk than necessary. That is what the Commission should focus on--overall effects--and the FAC is another critical piece of the overall picture.

III. The Fuel Adjustment Clause Is Driving The Most Dramatic of the Rate Increases.

Ormet agrees with Commissioner Porter that in order to properly address the significant rate impacts that the ESP II application will have, the Commission must mitigate the impact of the Fuel Adjustment Clause ("FAC") increases. In a line of questioning in which Commissioner Porter probed AEP Ohio witness David M. Roush's statements that Ormet's rates could increase by over [BEGIN CONFIDENTIAL INFORMATION [redacted] END CONFIDENTIAL INFORMATION] under the currently proposed ESP plan, Commissioner Porter concluded as follows: "[BEGIN CONFIDENTIAL INFORMATION [redacted] END CONFIDENTIAL INFORMATION]" Hr'g Tr. vol. IV, 1233:24-1236:22, May 22, 2012 (Confidential).

Take, for example, the impact that the FAC has on the GS-4 tariff rate. The FAC component of that rate has increased 60 percent since 2009 and 22 percent since 2011.

FAC Average Cost in 2009	$22.09	100%
FAC Average Cost in 2010	$25.80	117%
FAC Average Cost in 2011	$28.94	131%
FAC Cost for Q2 2012	$35.42	160%
AEP Ohio's Estimated FAC for 2013	[BEGIN CONFIDENTIAL INFORMATION [redacted] END CONFIDENTIAL INFORMATION	[BEGIN CONFIDENTIAL INFORMATION [redacted] END CONFIDENTIAL INFORMATION

Based on AEP Ohio's estimate, the actual impact on Ormet as a result of increased fuel costs will be [BEGIN CONFIDENTIAL INFORMATION [redacted] END CONFIDENTIAL INFORMATION]. These rate increases are simply not sustainable. The Commissioner is correct; the impact of the seemingly ever-increasing FAC must be reduced. There must also be greater transparency in what is causing the continued FAC increases in a period where the market price for coal is declining.

In addition to the problems that result from the FAC's sharp and consistent rise, the FAC's basic design is also flawed. The present FAC design shifts costs from low load factor customers onto high load factor customers like Ormet because it does not consider when energy is used. *See* Ormet Ex. 106B at 19:12-20. By failing to take this into account, the FAC allocates an equal FAC cost to Ormet—a 98.5 percent load factor customer that uses significant amounts of cheaper, off-peak energy—as a customer that uses all its energy on-peak. *Id.* at 19:13-20.

Such a design violates the principle of cost-causation and discriminates against high load factor users like Ormet who employ a significant number of Ohioans. *Id.* A fairer way to deal with the FAC costs would be to separate the FAC into two separate charges, one for on-peak periods and the second for off-peak periods. *Id.* This approach would more fairly and appropriately allocate costs to those who cause them.

There are a number of other solutions available to the Commission to mitigate the rate impacts of the rising FAC costs. AEP Ohio has not suggested one, however. A forecaster need not be able to infallibly predict the future of fuel costs in order to rein in FAC increases. For example, in regulating utilities, the Commission has never known for certain what rate of return a company will earn--only that mechanisms have been put in place to give the utility a fair opportunity to do so. Regulating in that way, the Commission has managed for decades to prospectively regulate upside and downside risk, for ratepayers and utilities alike, without clairvoyant forecasting. But prospective regulation is not the Commission's only tool.

Alternatively, the Significantly Excessive Earnings Test ("SEET") provides an example of the Commission reining in earnings that are actually determined to be excessive. So if the Commission agrees with Mr. Roush that FAC forecasting is problematic, then it can consider alternatives like the SEET. Regardless of the Commission's preferred mechanism, Ormet witness Wilson's testimony on the appropriate Return on Equity for AEP Ohio indicates that the Company can afford for the Commission to mitigate the FAC impact.

IV. The Return on Equity Sought by AEP Ohio For the RSR Is Excessive.

The RSR rider is problematic for the additional reason that it is based on a return on equity ("ROE") that is excessive. AEP Ohio has failed to demonstrate the reasonableness of the 10.5 percent ROE upon which the RSR is based—or any ROE it might seek that is relevant to its ESP II filing. Moreover, Ormet and other parties have presented evidence that the 10.5 percent ROE is unreasonably high, and that evidence has not been effectively rebutted by AEP Ohio. For these same reasons, a 10.2 percent ROE sought by AEP Ohio for other riders is also excessive. In fact, AEP Ohio has projected ROEs for the consolidated companies that are well below the 10.5 percent figure. Ormet has presented evidence, based on methodologies employed by PUCO staff, that a more just and reasonable ROE for the RSR would fall within

the 8-9 percent range. Thus, if the Commission were to approve the RSR, it should reduce the 10.5 percent ROE on which it was allegedly based to a figure between 8-9 percent, which would be generous in a exceedingly low interest rate environment..

A. AEP Ohio Has Failed to Demonstrate the Reasonableness of the ROE Upon Which It Bases Its RSR.

AEP Ohio has not established the reasonableness of any ROE it either seeks or has assumed in its ESP filing. Indeed, it has failed to provide a basis for any ROE in this proceeding. As an initial matter, it has not been entirely clear what ROE AEP Ohio actually seeks to achieve through its ESP filing. AEP Ohio stated in discovery that it has not sought an overall rate of return in this proceeding. *See* Ohio Power Company's Responses to Ormet Primary Aluminum Corporation Discovery Requests, Second Set, Response to Interrogatory ORMET-2-006 ("AEP Resp. to Ormet").

Rather, it has used an ROE of 10.5 percent as a "benchmark" for determining the amount it would seek for its RSR over the years of the plan. Hr'g Tr. vol. XVII, 4698:24-4699:6. *See* AEP Ex. 116 at 14:8-11, Attach. WAA-6. Further, AEP Ohio's counsel stated at the hearing that AEP Ohio did not in fact seek a specific ROE arising from its RSR. Hr'g Tr. vol. XVII, 4698:13-16. AEP Ohio also stated in discovery and testimony that it is seeking an ROE of 10.2 percent for other riders or for transmission revenues, an amount to which the parties stipulated in resolving the Case Nos. 11-351-EL-AIR/11-352-EL-AIR, *et al*. (consolidated) ("Distribution Case"). AEP Resp. to Ormet RPD-2-001; AEP Ex. 116 at 9:20-23; Allen Dep. 16119-24, Sept. 29, 2011. Finally, in its Projected Financial Statement filed with its ESP, AEP Ohio projected ROEs of 9.5 and 7.5 percent for the "Integrated Utility" in 2012 and 2013 respectively, and 10.5 percent for the "Wires Only" company in 2014 and 2015. AEP Ex. 108, Attach. OJS-2.

Regardless of which ROE it seeks to achieve in this matter, AEP Ohio has not met its burden of proof to demonstrate that any ROE it seeks is reasonable. *See* Ohio Rev. Code Ann. § 4928.143(C)(1) (West 2011) (the burden of proof in an ESP proceeding shall be on the electric distribution utility). AEP Ohio presented no evidence or analysis to support its use of a 10.5 percent "benchmark" ROE for the RSR or for any of the ROEs that it cites in its Projected Financial Statement or in its discovery responses. Rather, to establish the ROE it uses for the RSR, AEP Ohio witness Allen testified that he simply used his experience and knowledge of ROEs that were awarded to other AEP Ohio affiliates to arrive at a reasonable figure. Hr'g Tr. vol. V, 1616:15-1618:7, 1619:9-14.

Notably, even in this method, Mr. Allen left out or sought to distinguish AEP Ohio affiliates that were awarded ROEs below 10.5 percent. Hr'g Tr. vol. V, 1622:15-1627:10; *see generally* Ormet Ex. 103 (Response to INT-ORMET-1-035, listing 12 approved ROEs for AEP Ohio affiliates, including AEP Ohio, nine of which are below 10.5 percent). Mr. Allen further acknowledged that neither he nor anyone else at AEP Ohio undertook any kind of modeling to determine an appropriate ROE or considered the capital structure, long term debt, retained earnings, ratios of common equity to retained earnings or other relevant financial data of AEP Ohio or any of the affiliates he used for comparable figures. Hr'g Tr. vol. V, 1617:3-1619:8. AEP Ohio, through Mr. Allen, effectively "eye-balled" a figure and plugged it into the RSR as a self-adjudged reasonable ROE. Such an effort does not demonstrate reasonableness, let alone support AEP Ohio's burden of proof.[8]

[8] Similarly, it is not sufficient for AEP to rely on an ROE that was agreed to by parties in stipulation in the resolution of the Distribution Case. That 10.2 percent figure represented a compromise between a range recommended by PUCO staff (8.59-9.60 percent) and that sought by AEP (11.15 percent), and was itself unsupported by analysis.

Finally, the rebuttal testimony offered by AEP Ohio on a reasonable ROE was just that—rebuttal testimony. AEP Ohio's expert, Dr. William E. Avera, was not asked to opine in direct testimony as to a reasonable ROE for either use in the RSR or for the consolidated companies, and he did not conduct his own ROE analysis. Rather, he inserted his preferred methodologies into the analysis conducted by Ormet's witness, Dr. John W. Wilson, to come out with a range he claims Dr. Wilson should have reached. Dr. Avera did not play a direct role in setting the 10.5 percent ROE for the RSR nor for any of the ROEs projected by AEP Ohio in its *pro forma* filings. Hr'g Tr. vol. XVII, 4698:3-4699:16; 4701:5-4702:21. In his words, Dr. Avera "didn't sponsor an ROE." *Id*. 4715:10-18.

B. Ormet and Others Have Presented Evidence that the ROE Used by AEP Ohio Is Excessive.

Ormet presented evidence through an experienced expert, Dr. Wilson, that the 10.5 percent ROE used by AEP Ohio for its RSR was neither reasonable nor just. Ormet Ex. 107 at 30:18-20. Dr. Wilson's testimony is supported by several other witnesses in the case who agree that the 10.5 percent ROE figure is too high.[9] Dr. Wilson reached his conclusion by utilizing the same models and procedures employed by PUCO staff, which included long-accepted models for determining ROE—the Discounted Cash Flow ("DCF") model and the Capital Asset Pricing Model ("CAPM"). Ormet Ex. 107 at 8:6-14. He followed the same methodology utilized by PUCO staff in the Distribution Case, which he considered

[9] For example, Wal-Mart witness Steve Chriss testified that the ROE for the RSR should be set no higher than 10.2 percent and, as set forth, is unsupported by any analysis. Hr'g Tr. vol. V, 1704:12-19, 1709:14-1710:10. Kroger Company witness Kevin Higgins also stated the ROE was too high, and given the favorable position of AEP revenue, should be authorized at the low range of ROEs. Kroger Ex. 101 at 9:22-10:15. First Energy witness Jonathan Lesser cited to the high actual ROEs AEP had been enjoying and noted that the company provided no support for its ROE figures. FES Ex. 102A at 79:1-80:2. Finally, Ohio Energy Group witness Lane Kollen proposed an ROE for the RSR of 7 percent. Hr'g Tr. vol. X, 2877:10-2878:22, 2880:8-23, May 31, 2012; OEG Ex. 101 at 5:1-6:2.

representative of calculations presented in most public utility cases, but he updated the numbers to reflect current economic factors, such as the further reduction in money costs and updated financial figures for AEP Ohio and other utilities. *Id*. at 18:10-19; 22:5-11. Ultimately, Dr. Wilson estimated a more reasonable range for an ROE of between 8-9 percent. *Id*. at 5:4-9.[10] Notably, Dr. Wilson suggested that AEP Ohio would have less reason to set a high ROE to address generation risk in the RSR context, where the company is in fact seeking to minimize that risk by ensuring a guaranteed return on its generation revenues. Hr'g Tr. vol. XIV, 3899:10-14.

Dr. Wilson's testimony has not been effectively rebutted. Dr. Avera, who has testified on behalf of AEP Ohio nearly 20 times in the past, Hr'g Tr. vol. XVII, 4737:21-4738:4, merely provided the same critique of Dr. Wilson that he did of the PUCO staff in the Distribution Case, often times only making minimal or no changes to his prior testimony. *Id*. at 4707:21-4712:10. He took issue with several different methodologies employed by Dr. Wilson and PUCO staff without showing that these methodologies were unreasonable, unreliable or not widely used. Rather, he emphasized that the Commission should use an expected earnings test by looking at ROEs allowed to other utilities and even to non-utilities that, in reality, face very different risk scenarios. *See generally* AEP Ex. 150 at 17:1-21:1; *see also* Hr'g Tr. vol. XVII, 4709:8-19; 4734:7-4735:4.

Dr. Wilson took issue with the idea that the Commission could merely look at what other public utility commissions were approving as a "circular" exercise that he would not

[10] The specific range presented by Dr. Wilson was 7.94-8.96 percent. Ormet Ex. at 30:7-10. Dr. Wilson did disagree with some aspects of the PUCO staff approach, which he described in his testimony: *e.g.*, use of historic gross national product growth as a proxy for investors' long term dividend growth expectations and use of longer term Treasury interest rates as "risk free." *Id*. at 18:18-l9-4; 22:11-15. He concluded that using his corrected figures, the ROE range would be even lower, in the range of 7.25-8.26 percent. *Id*. at 30:11-17.

recommend. Hr'g Tr. vol. XIV, 3913:19-3914:3. Rather, the Commission has the ability and responsibility to conduct its own ROE analysis to determine what is reasonable given the facts and circumstances of the present case, as it had done in the Distribution Case, and Dr. Wilson followed this same methodology. Dr. Avera even suggested that the Commission should authorize a higher ROE to account for the uncertainty it itself has created by rescinding the prior Stipulation, which would bring even more circularity to the exercise. AEP Ex. 150 at 15:12-21.

It bears noting that even Dr. Avera testified that he would consider reasonable the 7.5 percent and 9.5 percent ROEs projected in AEP Ohio's Projected Financial Statement in light of the certainty provided by a Commission order on the ESP filing and because AEP could always raise its ROE by taking other actions to cut costs. Hr'g Tr. vol. XVII, 4702:22-4704:7. This acknowledgement undercuts his conclusion that the ROE range recommended by Dr. Wilson would not be sufficient to allow the company to raise capital.

C. The Commission Should Reduce the ROE AEP Ohio Seeks for Its RSR

To the extent that PUCO accepts AEP Ohio's RSR, it should not do so based on a 10.5 percent ROE benchmark. Using Dr. Wilson's well-documented and more reasonable range, Ormet witness Russell estimated that the revenues AEP Ohio would receive in the RSR would be between $754 million and $824 million, with a midrange (at 8.45 percent) of $789 million. Ormet Ex. 106B at 18:20-19:4. While Ormet does not believe the RSR is proper for the reasons stated above, if the Commission decides it is appropriate, then the revenue stream sought by AEP Ohio should at least reflect a more reasonable ROE in the range of 7.5 to 9.5 percent.

V. Interruptible Load Is a Valuable Service for Which Customers Must be Compensated.

AEP Ohio's proposed Rider Interruptible Power-Discretionary ("IRP-D") is reasonable and should be approved by the Commission. Willingness to take interruptible load is a valuable service provided to the AEP Ohio System by customers, for which they must be compensated. AEP Ohio has proposed to properly compensate customers taking service under its IRP-D tariff, and Ormet supports AEP Ohio's proposal. Staff witnesses recommended that AEP Ohio's formula for calculating the appropriate credit be used, but that the calculation be based on the capacity price recommended by Staff in the Capacity Charges case. Ormet supports using AEP Ohio's proposed formula, as AEP Ohio and Staff did, but basing the calculation upon the embedded cost of capacity paid by the Standard Service Offer ("SSO") customers eligible for IRP-D service. It would be illogical to reduce the IRP-D credit for SSO customers based on a reduction in capacity prices seen only by shopping customers.

Both AEP Ohio and Staff agree that interruptible load is a form of demand response. *See* Hr'g Tr. vol. IV, 1189:20-24 and Hr'g Tr. vol. XV, 4112:19-22, June 7, 2012. Ohio's policy is to encourage demand response. *See* Ohio Rev. Code Ann § 4928.02(D) (providing that it is the policy of the state to encourage demand-side management). It is also clear that AEP Ohio uses interruptible load as part of its FRR plan to meet its capacity needs. Hr'g Tr. vol. IV, 1189:25-1190:9 and 4112:23-4113:2. This reduces capacity costs for all customers. As AEP Ohio witness Roush explained, customers participating in AEP-Ohio's interruptible program receive a "lower quality" power. *Id.* 1126:6-10. Staff witness Gregory C. Scheck admits that customers would not be willing to take interruptible load at the same price they would pay for firm service. Hr'g Tr. vol. XV, 4113:22-4114:1. If the Commission wants to assure that customers will be willing to support the system by taking interruptible load, then it

must allow customers to be properly compensated for the service they are providing to the system.

AEP Ohio's method of compensating customers for their willingness to take interruptible load is reasonable and should be approved. Staff witness Scheck utilized the Rider IRP-D credit derivation method that AEP witness Roush provided in his testimony. The only change he made was to modify the value of AEP's Ohio FRR generation to that recommended by Staff witness Emily S. Medine. Staff Ex. 110 at 6:25-7:1. Mr. Scheck, however, was apparently unaware that the FRR generation price is not necessarily the price paid by customers eligible for the IRP-D service. Hr'g Tr. vol. XV, 4138:15-4139:2. Instead, Mr. Scheck's recommendation was based on the assumption that shoppers and non-shoppers would both pay the same price for capacity, and that this price would be based on Staff witness Medine's recommendation. *Id.* 4138:25-4140:3. Mr. Scheck did agree, however, that his calculation is based on whatever the Commission ultimately approves as to cost of capacity -- that if the Commission approves AEP Ohio's proposed capacity price, then it should also use AEP Ohio's proposed IRP-D credit. *Id.* 4111:21-4112:6.

It is reasonable to calculate the IRP-D price based on the capacity costs since interruptible load reduces the Company's capacity costs. However, the calculation should be based upon the price paid for capacity by the customers eligible for IRP-D or else the proper incentives to encourage those customers will not result. The IRP-D credit should be calculated using AEP Ohio's methodology, based on the cost of capacity embedded in the base generation rates paid by SSO customers, not upon the price of capacity AEP Ohio is allowed to charge shopping customers. Such a method would properly compensate interruptible load customers for the service they provide to the system by allowing their load to be interrupted.

VI. Securitization of the PIRR Is Appropriate, But More Must Be Done to Minimize the Rate Impacts on Customers in the Period Leading to Securitization.

The Commission should modify AEP Ohio's proposal to delay implementation of the PIRR to June 2013. The proposal seeks to continue to collect exorbitant carrying costs on the balance at a pre-tax interest rate of 11.26 percent, resulting in a cost of $71 million to ratepayers in a single year. Hr'g Tr. vol. XVI, 4542:14-4543:5. That is too expensive for a number of reasons, both legal and pragmatic. To begin with, the customer rate impact of the PIRR is dramatic and will be exacerbated by allowing AEP Ohio to accrue such carrying costs on the deferred balances. For example, unless it is modified by the Commission, the Phase in Recovery Rider ("PIRR") proposal will increase Ormet's actual cost of power by $1.1 million per month ($3.041/MWH) beginning in June of 2013. Ormet Ex. 106B at 9:23-24.

As explained below, to mitigate the dramatic customer rate-impact of AEP Ohio's proposal, the carrying costs should be reduced to the Short Term Cost of Debt, and PIRR implementation should be delayed until securitization is complete—or at least until June 2013. As explained in detail below, AEP Ohio cannot now argue that the PIRR balances may not be securitized immediately because there is no final, non-appealable order because it has already taken a contradictory position in this case. The Commission should therefore ignore any such arguments. Finally, the Commission should preclude AEP Ohio from blending the PIRR rate zones because to do so would violate the prohibition on retroactive ratemaking. This prohibition does not prevent blending the FAC, however.

For these reasons, as stated below, the Commission should delay implementation of the PIRR until securitization is complete and suspend or reduce the associated carrying costs.

A. AEP Ohio's PIRR Proposal Would Result in Significant Costs to Ratepayers.

AEP Ohio proposes delaying implementation of the PIRR until June of 2013. Hr'g Tr. vol. IV 1074, 17-23. In the deferral period, however, AEP Ohio proposes to continue to accrue carrying charges on the outstanding balances at the pre-tax Weighted Average Cost of Capital ("WACC"). *Id.* 1137:9-13. As a result, the interest rate AEP Ohio proposes to continue to charge is 11.26 percent, which is more than double AEP Ohio's Long-Term Cost of Debt of 5.46 percent -- 5.8 percent higher.[11] Ormet Ex. 107, Attach. Schedule JW-1a. Even the Long-Term Cost of Debt figure would be overly generous since it is more than double the Short Term Cost of Debt that Ormet Witness Wilson believes is the more appropriate figure. *See* Ormet Ex. 107 at 15:14-16, 22:11-15.

AEP Ohio has acknowledged that if it is allowed to continue to collect WACC carrying charges during the proposed deferral period, customers will face a higher overall cost than if the PIRR were implemented today. Hr'g Tr. vol. XVI, 4548:2-4, June 8, 2012. In fact, during the proposed deferral period alone, AEP Ohio would accrue another $71 million dollars in interest charges under its current proposal. *Id.* 4542:14-4543:5.

AEP Ohio also takes the position in its current filing that the PIRR regulatory assets may be securitized. AEP Ex. 102 at 7:19. In her direct testimony in AEP Exhibit 102, Ms. Hawkins testifies that "securitization of the PIRR regulatory assets would both reduce customer costs through the reduction of the carrying cost and provide AEP Ohio with needed capital to assist with its efforts to transition to competition." *Id.* at 8:5-7. AEP Ohio witness Turkenton similarly agreed that "if the PIRR were delayed as proposed by AEP Ohio, and if AEP Ohio

[11] We note that the 11.26 percent that AEP collects for doing nothing other than not collecting fuel costs is an even higher return than AEP proposes is reasonable as its RSR ROE target of 10.5 percent. There is no basis in the record that this 11.26 percent continues to be reasonable in light of AEP present ESP II application.

were able to securitize the deferred balances in the PIRR prior to June of 2013, that would substantially mitigate the impact on ratepayers by the PIRR." Hr'g Tr. vol. XVI, 4541:1-7. While Ormet supports securitization of the deferred balances, more must be done to mitigate the impact on ratepayers in the period leading to securitization.

B. The Commission Should Delay Implementation of the PIRR Until Securitization Is Complete and Eliminate the Carrying Costs, or Reduce Them to AEP Ohio's Short Term Cost of Debt.

AEP Ohio proposes in its application to defer collection of the PIRR balance until June, 2013, but desires to continue to apply carrying charges based on the WACC during the deferral period. Although the Commission did approve carrying charges based on the WACC in the ESP I cases, approval was for the ESP I time period of 2009-2011.[12] The Commission has not yet resolved the issue of what to do about carrying charges moving forward, but it has broad discretion under Ohio Revised Code section 4928.144 regarding the implementation and duration of the PIRR.[13] As the Ohio Supreme Court has explained, "[the Commission] undoubtedly may change course, provided that the new regulatory course is permissible."[14] A course-change is permissible when the Commission explains the reasons it "*believes* [the new policy] to be better."[15]

Here, circumstances for ratepayers have changed significantly since the Commission issued its ESP I order in early 2009. The expiration of the rate caps on the FAC has already

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[12] Opinion and Order, *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Nos. 08-917, *et al.* (Mar. 18, 2009).

[13] *See* Ohio Rev. Code Ann. §§ 4928.141 through 4928.144 (West 2011) (providing broad discretion to craft the details of the phase-in of a rate increase like the PIRR).

[14] *Util. Serv. Partners, Inc. v. Pub. Utils. Comm'n of Ohio*, 921 N.E. 2d 1038, 1043 (Ohio 2009).

[15] *Id.*

subjected customers to a significant rate increase -- in Ormet's case an increase of eight percent over the average GS-4 tariff rates applicable to Ormet in 2011. But the rate increases are just getting started. It is clear that AEP Ohio will be seeking dramatic rate increases into 2013 and beyond. In fact, if ESP II is approved as filed, GS-4 rates will have increased 50 percent since 2007. Ormet Ex. 106B at 2:12. These proposed rate increases pose an existential threat to large industrial customers like Ormet and will deter any new customers from entering Ohio in AEP Ohio's service area.

Changed circumstances therefore justify eliminating the carrying charges on the PIRR balances where AEP Ohio is on pace for another year of huge profits. In 2010-2011, AEP Ohio had a net income of over $1 billion. Hr'g Tr. vol. II, 363:14-19, May 18, 2012. AEP Ohio's witness testified that the Company's first quarter 2012 profits were approximately $150 million, and that there was reason to believe first quarter profits would be lower than the remaining quarters. *Id.* 364:7-24. Accordingly, despite first quarter net income being lower than is expected for the remaining quarters, AEP Ohio is already on pace to make at least $600 million dollars in net income in 2012. *Id.* By contrast, deferring the PIRR balance without carrying costs will reduce the rate impacts to customers when the PIRR is implemented by $71 million dollars by June 2013 if AEP Ohio's proposal is adopted. Hr'g Tr. vol. XVI, 4542:14-4543:5.

The significant rate increases proposed by AEP Ohio, AEP Ohio's recent net income, and the uncertainty of the economy constitute sufficient changed circumstances to justify deferring implementation of the PIRR, and suspending associated carrying costs, until it is securitized. Alternatively, at the very least, the Commission should delay PIRR

implementation until June 2013, as proposed by AEP Ohio, and carrying charges should be eliminated or reduced to the Short Term Cost of Debt.

AEP Ohio may argue, as it suggested at the hearing, that suspending implementation pending securitization is not the right course because there is no telling how long it will be before securitization may take place. The reason, AEP Ohio suggests, is that securitization requires a final, non-appealable order that it does not yet have. But where, as here, AEP Ohio has already represented the opposite in this case, Ohio law precludes AEP Ohio from taking a contradictory position. *See Nationwide Ins. Co. v. Hall*, No. 1258, 1978 WL 214906, at *3 (Ohio App. 7 Dist. Mar. 23, 1978).[16]

C. AEP Ohio Is Collaterally Estopped From Arguing that It Cannot Securitize the PIRR Immediately Because It Has No Final, Non-Appealable Order Approving Recovery of the PIRR Assets Because It Has Already Taken a Contradictory Position in This Case.

The Commission should not consider AEP Ohio's claims that securitization might take a significant amount of time to complete because AEP Ohio has already taken a contradictory position. Ohio courts bar testimony where it represents a position that is inconsistent with a prior position taken by the same party in the same case. *See, e.g.*, *Nationwide Ins. Co. v. Hall*, No. 1258, 1978 WL 214906 at *3 (Ohio App. 7 Dist. Mar. 23, 1978). In *Hall*, the court explained that "[i]t is fundamental that a party can not take inconsistent positions such as plaintiffs are attempting to do in this case." *Id.* at *3. The *Hall* court therefore rejected the plaintiffs' subsequent, contradictory legal position as waived by its prior assertion of the contradictory fact. *Id.*

[16] A copy of this case is attached as Exhibit A, pursuant the requirements in Ohio Administrative Code section 4901-1-31(C).

On March 6, 2012, AEP Ohio asserted to the Commission in this case that there is a final, non-appealable order related to the recovery of the assets underlying the PIRR.[17] In its Reply to the Tariff Objections filed by Ormet and others filed on March 6, 2012 in this case, AEP Ohio stated that the nature of the PIRR recovery "cannot presently be lawfully challenged or modified" because such would be an "untimely attack on the ESP I decision which [] fully adjudicated [this] issue and is a final non-appealable order." *Id.*; *see also* Hr'g Tr. vol. II, 493:19-494:12. Contradictorily, in her testimony on behalf of AEP Ohio Ms. Hawkins testified that for securitization to proceed "requires a final non-appealable order [that AEP Ohio does not yet have] relating to the approval of the recovery of the underlying assets before they are eligible for securitization." AEP Ex. 102 at 8:15-17.

It cannot be true both that AEP Ohio must await a final non-appealable order to securitize and simultaneously that the ESP I decision constitutes a "final non-appealable order" on the PIRR recovery. As such, the proper result under *Hall* is for the Commission to ignore AEP Ohio's testimony that securitization could take longer than nine months. *Id.* 102 at 8:15-17. The Commission should also ignore AEP Ohio's claims that it could not have the balances securitized before collection of the assets begins. Hr'g Tr. vol. II, 494:17-24. Such is not a justifiable basis to argue against the Commission suspending PIRR implementation pending securitization because it directly contradicts AEP Ohio's prior position.

D. The Commission Cannot Allow AEP Ohio to Blend the PIRR Across Rate Zones Because Doing So Violates the Prohibition on Retroactive Ratemaking; Blending the FAC, on the Other Hand, Would Not.

AEP Ohio has not offered the Commission any basis in this proceeding to retroactively change the rates that the Columbus Southern Power and Ohio Power rate zone customers must

[17] *In re Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to § 4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan,* Case No. 11-346, *et al.* at 5 (Mar. 6, 2012).

pay for fuel costs already incurred. But that is what the Commission would do if it blended the PIRR rate zones in June of 2013 as requested by AEP Ohio. No party disputes that blending the zones will effectively increase the rates that customers in the Columbus Southern Power rate zone will pay for already-incurred energy usage by shifting actual fuel costs from Ohio Power rate zone customers onto them. And no party disputes that at the time the fuel costs in the PIRR were actually incurred, Columbus Southern Power and Ohio Power were not merged. In fact, AEP Ohio's own witnesses admitted each of these facts on the stand.

AEP Ohio witness Roush testified that "the overwhelming majority of the PIRR balance arises from the Ohio Power rate zone," not the Columbus Southern Power rate zone. Hr'g Tr. vol. IV, 1187:3-6; *see also* Hr'g Tr. vol. XVI, 4536:24-4537:5 (AEP Ohio witness Tamara S. Turkenton agreeing with same point). He further testified that $148 million is attributable to the Ohio Power rate zone while only $1.9 million is the result of energy usage in the Columbus Southern Power zone. *Id.* 1186:23-1187:2. Thus, he recognized that blending these rates would mean that Columbus Southern rate zone customers would pay higher rates and Ohio Power rate zone customers would get a discount. *Id.* AEP Ohio witness Turkenton agreed that "at the time the balances that are in the PIRR account were incurred, the companies were not merged." Hr'g Tr. vol. XVI, 4540:21-25.

AEP Ohio's witnesses also admitted that the rate changes that occur from blending the PIRR are materially different from the changes that occur from blending the FAC: "the FAC is an ongoing look at current and future costs, and the PIRR is a collection of previously incurred and deferred costs." Hr'g Tr. vol. IV, 1189:16-18; *see also* Hr'g Tr. vol. XVI, 4536:24-4537:11 (AEP Ohio witness Turkenton agreeing with same). As such, blending the PIRR would reallocate already-accrued rate amounts set by a past tariff, already booked by AEP Ohio

as a regulatory asset, for customers' actual past energy use during the first ESP period of 2009 to 2011. *Id.* Conversely, the FAC blend would constitute changes to the rates that will be charged, prospectively, for customers' future energy use, for which AEP Ohio has no current claim to a regulatory asset. *Id.*

The Commission has addressed this issue before and concluded that Ohio law sees this undisputed retrospective-prospective distinction as the key to whether a course of action constitutes retroactive ratemaking. *See Re Columbus S. Power Co.*, Case No. 08-917-EL-SSO, 2011 WL 4840747, at * 21 (Ohio PUC Oct. 3, 2011). In *Columbus Southern*, OCC, IEU, and others argued that "AEP-Ohio should adjust the FAC deferral balance associated with the phase-in to address, on a prospective basis, the unjustified POLR and environmental carrying charges collected from April 2009 through May 2011." *Id.* In response, AEP Ohio successfully argued that such a course was merely an attempt "to adjust previously approved rates on a retroactive basis by providing a future credit to customers and that the Commission lacks the authority to order such a credit." *Id.*

Agreeing with AEP Ohio in that instance, the Commission found that "the proposed adjustment to the FAC deferral balance . . . would be tantamount to unlawful retroactive ratemaking." *Id.* The Commission did not agree with the OCC and others' characterization of the deferred fuel charges as prospective because although they would be paid in the future, they were incurred in the past. *Id.* Accordingly, the Commission held the proposal constituted retroactive ratemaking because the previously-approved rates were for "<u>actual fuel expenses incurred</u> plus carrying costs;" they were not "a prospective offset to <u>future amounts deferred for future collection</u>." *Id.* (emphases added).

The same reasoning, when applied to the instant case, precludes the Commission from blending the PIRR (as AEP Ohio says, "previously incurred and deferred costs") but allows it to blend the FAC (as AEP Ohio says, "current and future costs"). Hr'g Tr. vol. IV, 1189:16-18. Thus, blending the PIRR would retroactively change the rates charged to the members of the different zones for "actual fuel expenses," the very sort of already-incurred charge the Commission said in *Columbus Southern* it could not retroactively change. Accordingly, the Commission would violate the rule against retroactive ratemaking if it were to blend the PIRR rates in June of 2013, as AEP Ohio requests; but it need not fear violating that doctrine by blending the FAC going forward.

VII. Conclusion

AEP Ohio's present application is seriously flawed and should not be approved. When considered along with the forecasted FAC increases that will shortly be coming, the application will impose exorbitant rate increases on many Ohio ratepayers and will cause significant harm to many Ohio businesses and the resulting loss of jobs.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing Post-Hearing Brief of Ormet Primary Aluminum Corporation's to AEP Ohio was served this 29th day of June, 2012, via the PUCO electronic filing system and by U.S. mail, on the parties listed below.

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EXHIBIT A

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Seventh District, Jefferson County.
NATIONWIDE INSURANCE CO. and CARL D. ATHEY, PLAINTIFFS-APPELLANTS,
v.
WILLIAM T. HALL, DEFENDANT-APPELLEE.

CASE NO. 1258.
March 23, 1978.

Milton A. Hayman, Steubenville, Ohio, for Plaintiffs-Appellants.

R. Peterson Chalfant, Steubenville, Ohio, for Defendant-Appellee.

OPINION.

Before Hon. Joseph E. O'Neill, Hon. Joseph Donofrio, Hon. John J. Lynch, JJ.

LYNCH, J.

TOPIC INDEX

***1** Pleading - Special Damages - Definition - Civil Rule 9(G) - Evidence of physicians bills, hospital charges and other medical expenses - Admission prejudicial where recovery not pleaded - Amendment to petition - Additional items of medical expense not a new or different cause of action - Evidence - Death of passenger - Admissible for severity of accident.

SYLLABUS.

1. Special damages are such damages as do not necessarily result from the injury complained of, though they are the natural result thereof - damages which, though actually resulting from an injury, are not implied by law.

2. In order to warrant a recovery, in a personal injury case, for physicians bills, hospital charges, and other medical expenses, etc., there must be a special averment that such expenses were incurred.

3. It is prejudicial error to admit evidence of special damages not pleaded.

4. In negligence cases, an amendment to the petition does not cause it to state a new and different cause of action where the allegations as to additional items of suffering, medical expense, etc. are added.

Plaintiffs are appealing the judgment of the trial court which overruled their motion for Judgment Notwithstanding Verdict for defendant for Five Thousand Dollars ($5,000.00) on his cross-complaint and their motion for a new trial.

On the morning of March 17, 1970, defendant was driving his automobile north on Dean Martin Boulevard (State Route 7) in Steubenville. As defendant approached the intersection of Dean Martin and South Street, plaintiff, Carl Athey, was approaching the same intersection in his automobile from the opposite direction, heading south. Defendant attempted to turn left onto South Street and collided with plaintiff who was attempting to turn right onto the same street.

Plaintiff, heading south on Dean Martin, testified that he had the green light which allowed him to make his right turn (Tr. 46-47). Defendant claimed that the left turn arrow of the traffic light was green and that he had the right of way to proceed through the intersection (Tr. 142-143, 161-162, 171, 175-176). Neither party saw the other coming through the intersection. A large tractor trailer was traveling south on Dean Martin in the left hand lane, the same direction as plaintiff who was turning from the right hand lane onto South

Street. The tractor trailer obstructed the view of both parties (Tr. 65, 131-132, 142-143). The driver of the trailer stated that the light was green in his favor, and that he had to slam on his brakes to avoid hitting the defendant (Tr. 119-120).

Nationwide Insurance Company paid the car repairs, towing and medical expenses to Carl Athey that resulted from the accident and then through its subrogation right filed this negligence complaint jointly with Carl Athey against defendant on July 13, 1971 for damages to plaintiff Athey's automobile and personal injuries suffered by Mr. Athey's wife resulting from subject accident. The total damages prayed for was $878.65.

***2** On July 28, 1971, defendant filed an answer and cross-complaint for his personal injuries for which he prayed for $1,000.00. On February 27, 1976, he amended his cross-complaint by increasing his claim for money to $20,000.00.

On February 9, 1977, which was the first day of the trial, plaintiffs filed a motion to restrain the defendant from introducing evidence as to the death of a passenger in his vehicle at the time of the accident because said decedent passenger was not a party to the law suit and such testimony would prejudice and likely influence the decision of the jurors, thus preventing an impartial, fair and just verdict by the jury. This motion was heard out of the hearing of the jury and was overruled by the trial court on the basis that the death of the passenger was relevant to the severity of the accident and damages as to injuries (Tr. 9-17).

Plaintiffs' first assignment of error is that the trial court erred in overruling their motion to restrain defendant, defendant's counsel or witnesses from testifying about the death of a passenger in defendant's vehicle.

No authority has been cited by either side concerning this assignment of error.

Defendant's cross-complaint alleged that subject accident was caused by the negligence of plaintiff Athey. The trial of the case indicated that part of this alleged negligence was excessive speed on the part of plaintiff Athey.

In Barnett v. State, 104 Ohio St. 298, the court stated as follows at pages 306-307:

"It is fundamental in reason and logic that when any fact has a causal connection or logical relation to another fact, so as to make the other fact either more or less probable, the first fact is competent, or is relevant, to prove the second; * * * Any fact that makes more probable or less probable, where the probabilities are in question, renders such fact relevant as evidence, unless there be some positive, arbitrary rule declared by competent authority, such as a statute, or a long line of judicial decisions, based upon reason, to the contrary."

The trial court indicated that it would restrict the testimony on the death of defendant's passenger to the relevancy of the severity of the accident and would not allow such testimony to influence the jury (Tr. 13-14).

For the foregoing reasons we overrule plaintiffs' first assignment of error.

Plaintiffs' second assignment of error is that the trial court erred in permitting testimony over objection, pertaining to the death of defendant's sister, a passenger, and serious injuries to defendant's wife, another passenger in defendant's vehicle, who were not parties to this action.

In the cross-examination of the district claims manager of plaintiff Nationwide Insurance Company, defense counsel asked when he became aware that one of defendant's passengers had died. We do not feel that this had any relevancy to the severity of the accident and was a needless reference to such fact; but no objection by plaintiffs' counsel was made (Tr. 95).

***3** In the deposition of Charles Fazio, defense

counsel on cross-examination asked about the death of defendant's passenger when it apparently had no relevancy to the severity of the accident. The deposition was taken prior to the trial court's ruling on subject motion, and no objection by plaintiff's counsel was made to such testimony at the trial (Tr. 130).

Plaintiffs introduced into evidence P.X. 1 which is the report of the Steubenville Police Department as to subject accident and which indicates that Emma Fleming, who was a passenger in defendant's automobile, was injured in subject accident and expired at 2:30 P. M. on the day of the accident (Tr. 28) (P.X. 1). The police officer, who investigated this accident, testified that he remembered this accident because there it resulted in a fatality (Tr. 36).

It is fundamental that a party can not take inconsistent positions such as plaintiffs are attempting to do in this case by introducing evidence as to the death of defendant's sister and then objecting to defendant's doing the same thing. We hold that plaintiffs' introduction into evidence of P.X. 1 as well as their failure to object constituted a waiver of the testimony introduced by defendant as to the death of his sister.

As to the testimony of the injuries of defendant's wife, we will discuss this on the basis that this assignment of error is restricted to the nature of such injuries. Plaintiffs' fourth assignment of error is directed to the medical expenses of defendant's wife.

P. X. 1 indicates that defendant's wife, who was a passenger in defendant's automobile, was injured in subject accident and was taken by ambulance to the Ohio Valley Hospital where she was held for x-rays.

Defendant testified that his wife was injured because of subject accident and had a fractured collar bone and several ribs and that her leg was injured. No objection to such testimony was made by plaintiffs' counsel (Tr. 143-145). Therefore, we hold plaintiffs waived the right to object on appeal as to the introduction of such testimony.

Even if plaintiffs' counsel had objected to such testimony, we would overrule this assignment of error for the reasons given in plaintiffs' first assignment.

For the foregoing reasons we overrule plaintiffs' second assignment of error.

Plaintiffs' third assignment of error is that the trial court erred, after permitting testimony about defendant's passengers' death and injuries, in preventing plaintiffs' counsel to inquire further for the purpose of clarification.

In the cross-examination of defendant, plaintiffs' counsel brought out that no action was filed either by defendant's wife for personal injuries or on behalf of defendant's sister. The following sequence occurred:

“Q. Can you tell this jury why you made that decision?

“MR. CHALFANT:- I will object to that.

“THE COURT: - The court will sustain that objection.

“Q. O.K. If you have knowledge, do you know why there was never any complaint filed--

***4** “MR. CHALFANT:- Object.

“THE COURT:- The court will sustain that objection.

“Q. Do you have any knowledge to that extent?

“MR. CHALFANT:-Your Honor, I object. And I request that Counsel be instructed to quit this line of questioning.

“THE COURT:- The Court will sustain the objection. I don't think it is relevant to this case.* * *”

Tr. 176

In the cross-examination of defendant's wife by plaintiffs' counsel, the following occurred:

"Q. You've never filed any action for personal injuries, have you?

"MR. CHALFANT:- Your Honor, I object to that.

"THE COURT:- The Court will sustain the objection." (Tr. 176-177)

We hold that the question of whether a wrongful death action was filed on behalf of defendant's sister is irrelevant in this case and that the trial court acted properly in excluding such testimony.

We further hold that the question of whether any action for personal injuries of defendant's wife resulting from subject accident was filed was also irrelevant on the issue of the severity of such accident which was the sole basis on which the trial court was permitting such testimony.

For the foregoing reasons we overrule plaintiffs' third assignment of error.

Plaintiffs' fourth assignment of error is that the trial court erred in permitting testimony regarding defendant's automobile damages and defendant's wife's medical expenses and admitting exhibits in support thereof, neither of which were prayed for in defendant's counterclaim.

Defendant's amended complaint was that he sustained personal injuries caused by the negligence of plaintiff Athey and by reason of said injuries has been damaged in the sum of $20,000.00. There was no mention of physicians bills, hospital bills or other medical expenses.

Over the objection of plaintiffs because it was not alleged in the cross-complaint, defendant introduced evidence as to the cost of the damage to his automobile resulting from this accident (Tr. 151-152, 181-182).

We hold that defendant's automobile damages are general damages which naturally and necessarily result from an automobile accident caused by the alleged negligence of plaintiff Athey, therefore, we overrule the part of plaintiffs' fourth assignment of error pertaining to defendant's automobile damages.

Over the objection of plaintiffs, defendant introduced into evidence D.X. B, the hospital bill of defendant's wife for $668.90; D.X. C, the ambulance bill for defendant's wife for $35.00; and D.X. E, defendant's doctor bill for $6.00 (Tr. 145-149, 183, 185).

Civil Rule 9(G) provides as follows:

"When items of special damages are claimed, they shall be specifically stated."

Special damages are such damages as do not necessarily result from the injury complained of, though they are the natural result thereof - damages which, though actually resulting from an injury, are not implied by law. Wilcox v. McCoy, 21 Ohio St. 655; Cincinnati Traction Co. v. Smith, 14 Ohio App. 389, m.c.o. 19 O.L.R. 103, 16 Ohio Jurisprudence 2d Rev. 28, Damages, Section 10.

***5** In order to warrant a recovery, in a personal injury case, for physicians bills, hospital charges, and other medical expenses, etc., there must be a special averment that such expenses were incurred. Smythe v. Harsh, 24 Ohio App. 391; Cincinnati Traction Co. v. Smith, 14 Ohio App. 389; 16 Ohio Jurisprudence 2d Rev. 202, Damages, Section 177.

It is prejudicial error to admit evidence of special damages not pleaded. Smythe v. Harsh, 24 Ohio App. 391; Cincinnati Traction Co. v. Smith, 14 Ohio App. 389, m.c.o. 19 O.L.R. 103; 4 Ohio Jurisprudence 2d 90, Appellate Review, Section 874.

For the foregoing reasons, we hold that the trial

court erred in permitting testimony and exhibits pertaining to defendant's wife's medical expenses and that such error was prejudicial. Therefore, we sustain defendant's fourth assignment of error pertaining to defendant's wife's medical expenses.

To clarify our decision on this assignment of error, no amendment was made to defendant's complaint as to medical expenses for either defendant or his wife.

Civil Rule 13(A) provides, in pertinent part, as follows:

"A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction."

Since defendant paid the medical expenses of his wife, it was compulsory for him to include such claim as part of his counterclaim in order to recover. Plaintiffs claim that defendant cannot do this because the statute of limitations bars such claim.

In negligence cases, an amendment to the petition does not cause it to state a new and different cause of action where the allegations as to additional items of suffering, medical expense, etc. are added. Cincinnati Traction Co. v. Smith, 14 Ohio App. 389, m.c.o. 19 O.L.R. 103; House v. Moomaw, 120 Ohio App. 23, 34; 43 Ohio Jurisprudence 2d 339, Pleading, Section 319.

Civil Rule 15(B) provides, in pertinent part, as follows:

"If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

***6** Plaintiffs' fifth assignment of error is that the trial court erred in overruling plaintiffs' motion for Judgment Notwithstanding the Verdict, in that:

a. Said verdict was *not* supported by one scintilla of evidence of negligence on the part of plaintiff.

b. Said verdict was rendered with complete disregard to the evidence and the court's charge as to law to be applied.

c. Said verdict was rendered by the jury solely upon the consideration of the serious personal injuries sustained by defendant's wife and death of defendant's sister.

d. Defendant's own testimony established his negligence as a matter of law.

A review of the entire record reveals that there was evidence introduced by defendant which the jury obviously believed that would establish that plaintiff Athey was negligent; therefore, we overrule plaintiffs' fifth assignment of error.

Plaintiffs' sixth assignment of error is that the trial court erred in overruling plaintiffs' motion for a new trial in that:

a. The judgment of the jury is not sustained by the weight of the evidence and the testimony of the witnesses.

b. The jury awarded excessive damages to defendant, which appears to have been awarded under the influence of passion or prejudice.

We hold that the grounds stated by plaintiffs in this assignment of error as a basis for a new trial are not supported by the record of this case; there-

fore, we overrule plaintiffs' sixth assignment of error. However, we hold that plaintiffs are entitled to a new trial on the basis of their fourth assignment of error.

Judgment reversed. Case remanded for a new trial in accordance with this opinion.

O'Neill, J., Concurs.
Donofrio, J., Concurs.

Ohio App. 7 Dist.,1978.
Nationwide Insurance Co. v. Hall
Not Reported in N.E.2d, 1978 WL 214906 (Ohio App. 7 Dist.)

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