

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of Ormet</b>	<b>)</b>	
<b>Primary Aluminum Corporation for</b>	<b>)</b>	
<b>Approval of a Unique Arrangement with</b>	<b>)</b>	<b>Case No. 09-119-EL-AEC</b>
<b>Ohio Power Company</b>	<b>)</b>	

**REPLY OF ORMET PRIMARY ALUMINUM CORPORATION**

**TO THE JULY 5, 2013 MOTIONS, COMMENTS,  
OBJECTIONS AND MEMORANDUM IN OPPOSITION**

**July 12, 2013**

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**REPLY TO THE JULY 5, 2013 MOTIONS, COMMENTS,  
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**I. INTRODUCTION**

The question presented to the Commission in the matter at bar is simple and straightforward. There are only two options – either approve the amendments to the Unique Arrangement sought by Ormet Primary Aluminum Corporation (“Ormet”), or allow Ormet to be liquidated. Unfortunately, Ormet simply does not have the ability to offer the Commission any other outcome from which to choose.

Ormet, whose Hannibal, Ohio smelter is the largest employer in Monroe County is in bankruptcy. The Bankruptcy Court has approved a plan to allow Ormet to come out of bankruptcy as part of a conditioned acquisition by Smelter Acquisition LLC an affiliate of Wayzata Partners (“Wayzata or Buyer”)<sup>1</sup>. There were no offers or plans presented to the bankruptcy court other than Wayzata’s offer. The alternative to the Wayzata offer is liquidation. The Wayzata Purchase Agreement conditions Wayzata’s obligation to acquire Ormet upon receiving from the Public Utilities Commission of Ohio (“Commission”) an order modifying the current Unique Arrangement<sup>2</sup> which provides power cost certainty and efficiently aligns the timing of the receipt of the negotiated economic development discount to the substantially higher

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<sup>1</sup> In Re: Ormet Corporation Case No. 13-10334 (MFW) United States Bankruptcy Court for the District of Delaware

<sup>2</sup> A special arrangement authorized by the Commission under Section 4905.31, Revised Code by Opinion and Order issued July 2009 in Case No. 09-119-EL-AEC.

cost from AEP following the rate increases since the Unique Arrangement was approved. Energy cost stability and certainty are essential to assist in maintaining the continuous operations and employment while Ormet transcends to a stable long term energy supply plan. Ormet would not be requesting a modification to the Unique Arrangement if the GS-4 tariff and applicable riders had not been increased since 2009, thus substantially negating the entire benefit of the economic discount from 2013 forward. As identified in Chart 1 the unforeseen rate increase far exceeds the benefit of the economic development discount and the pull forward request simply assists Ormet in matching the timing of this higher expense with the receipt of the economic development incentive. If emergency relief is granted, Ormet remains committed to maintaining the employment and operations in Hannibal. The consistent communication related to sustainable power cost is exceptionally important for Ormet, as power cost represent approximately 30-35% of the cost of aluminum.<sup>3</sup> Even after applying the economic development incentive, the 57%+ increase in GS-4 rates since the July 2009 Opinion and Order (See exhibit A) applicable to Ormet has escalated energy cost from AEP to be market prices.<sup>4</sup> Ormet has consistently and clearly communicated that it will not emerge from bankruptcy and expect to maintain a long-term sustainable operations at the current power costs.

Ormet as part of its Motion for Amendment offered to file a sustainable business plan which demonstrates the long-term financial viability of Ormet, post emergence from bankruptcy. Ormet has prepared the plan which will be filed on July 15, 2013 as per the schedule in the Motion to Amend. The plan demonstrates the ongoing financial viability, but does assume that the emergency relief requested will be authorized.

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<sup>3</sup> See the Affidavit of James Burns Riley, Exhibit B to the June 14, 2013 Motion to Amend, at ¶5.

<sup>4</sup> Charts 2 and 3

To meet the condition precedent to come out of bankruptcy, Ormet proposed to amend the Unique Arrangement on an emergency basis with four logical amendments. Ormet also needs additional relief to return the Hannibal plant to full production and construct a power plant required for long term viability. The four emergency amendments that are needed for Ormet and the Buyer in order for Ormet to meet the condition precedent for coming out of bankruptcy are: 1) shorten the term from 2018 to 2015; 2) accelerate the previously authorized discounts monthly installments through 2017 to monthly installments through 2014; 3) permit Ormet to shop for power effective with the January 2014 billing cycle and 4) fix the price for 2013 at the rate in place during the 1<sup>st</sup> quarter of 2013<sup>5</sup>.

These four emergency amendments should assure an affordable and competitive price for power for Ormet and the Buyer that will allow the sale to be consummated with a minimal incremental cost to other rate payers. These four amendments to the current Unique Arrangement are required on an emergency basis, for if Ormet does not come out of bankruptcy by July 31<sup>st</sup>, it has no funding source and will simply run out of cash. Lacking funding, beginning in August, Ormet would have no choice but to reduce the level of operations and ultimately liquidate.

Several commentators have indicated that this is not a true emergency since Wayzata could extend the closing date or continue to fund Ormet beyond the July 31<sup>st</sup> date. While that is true (as Ormet acknowledged in its Motion), if the extension is granted by the Buyer, there is no additional funding for Ormet and Ormet will begin curtailing operations immediately. Simply put, the “chosen” date is not what is driving the emergency, it is the lack of operating funds if Ormet does not come out of bankruptcy as scheduled. Businesses cannot operate without liquidity and all other courses of actions have been exhausted. The increase in cost to Ormet under the GS-4 rate will continue to deplete available cash at a more rapid rate than expected. It

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<sup>5</sup> See the June 14, 2013 Motion to Amend, ¶20.

would be an unfortunate review of the facts on the Commission's part to make so critical an economic decision on the "hope" or "hunch" that an extension would be granted by the Court and that the Buyer would fund significant additional monies to Ormet without a resolution of the Unique Arrangement. The Commission either amends the Unique Arrangement so that Ormet can obtain competitively-priced power at a price required by the buyer which enables Ormet to emerge from bankruptcy; or it accepts Ormet going into liquidation and addresses the repercussions to AEP Ohio, and the rate payers, of the loss of the largest customer and its contributions to the RSR, the PIRR and other rate requirements. Ormet's proposal cannot be evaluated as an alternative to continuing with the existing agreement. Rather, the alternatives are to amend the arrangement or deal with the consequences of shut down.

In addition, the Commission must also take into consideration its obligation under Senate Bill 221 which empowered it to adjust energy prices for purposes of economic development. The residents of Monroe County, employees and retirees of Ormet and the thousands of people whose jobs depend on supplying the Hannibal Smelter expect the Commission to prudently use the job retention/job creation authority given to it by the General Assembly<sup>6</sup>.

The basic theme of the intervenors' comments is their desire to substitute for Ormet's application a plan more to their individualized liking. While that is understandable, it simply is not a viable outcome.

Upon an accurate review of the facts, the right decision is clear. In terms of incremental cost, of the four requested amendments only one adds incremental cost. Shortening the term of the Unique Arrangement and advancing the discount payments do not increase the nominal value of the economic development assistance from the previously authorized levels (See exhibit

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<sup>6</sup> Section 4905.31, Revised Code was amended in SB 221 to provide for the economic development with a delta revenue rider which make up the current Unique Arrangement as well as the requested amendments.

B). Maintaining the Fuel Adjustment Rate (FAC) under the GS-4 rate at the first quarter rate is estimated to add approximately \$3.5 million dollars to the delta revenue amount passed through the economic development rider assuming that the FAC charge does not fall in the fourth quarter. Given the size of the rider however it should have little impact on amount paid by retail customers. More important, the Commission can moderate the impact on other customers by establishing an extended timeframe for recovery through the Economic Development Rider or other accounting conventions. Finally, as a practical matter the difference in stranded fixed costs which AEP Ohio could claim is the same whether Ormet goes out of business or shops. AEP Ohio noted that if Ormet shops it will not be picking up the fixed cost component of the fuel adjustment clause. That is true, but it is equally true that if Ormet is liquidated the result is the same. Thus, no matter what the Commission's decision on emergency relief – all things being equal the fuel adjustment clause for standard service customers will be increased an equal amount. Similarly, whether Ormet is lost as a customer of standard service because it is shopping or liquidated, AEP Ohio has the right to petition the Commission for lost capacity revenue<sup>7</sup>. The amount of the stranded capacity is the same – the amount of capacity that Ormet is not buying minus what AEP Ohio is able to sell the capacity for in the market<sup>8</sup>. If Ormet shops, then Ormet still buys capacity from AEP albeit at a lower (market) rate than the SSO rate. On the other hand, if Ormet is liquidated, Ormet pays \$0 to AEP for capacity.

In sum, the analysis comes down to an incremental cost of a few million dollars in exchange for which Ormet will come out of bankruptcy and provide the Monroe community with

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<sup>7</sup> The Consumers' Counsel has argued that if Ormet shops it will create deferred revenue obligations that AEP Ohio could collect via the deferred capacity rider. At best this issue is not ripe as the Commission has not authorized how those deferrals would be collected or from whom. At a minimum though, one must assume that the Commission when presented with the question of what AEP Ohio is entitled to in lost capacity revenue because Ormet is no longer a standard service customer any deferred capacity charges would be taken into account.

<sup>8</sup> It could be argued that if Ormet shops demand for capacity and energy will still be in the market and that should increase both the ability for AEP Ohio to sell its capacity in the market or to collect a better price as the demand will be increased without affecting the supply of capacity.

\$209 million annually. That incremental cost exists because AEP increased its Fuel Adjustment Surcharge in excess of four dollars per MWh within days after Ormet filed for bankruptcy. If Ormet goes into liquidation the \$209 million annually is lost and a few million dollars in delta revenue is saved. From a cost benefit perspective the Commission should grant the emergency relief and schedule the hearing as to the full relief requested.

## **II. PROCEDURAL BACKGROUND**

In 2009 Ormet filed for a reasonable arrangement under Section 4905.31, Revised Code asking for a special arrangement whereby Ormet the largest customer on the AEP Ohio system with a load factor twice the system average would receive special pricing on account of its unique consumption pattern and to preserve 650 jobs (the Unique Arrangement). In July of 2009 the Commission by Opinion and Order approved the Unique Arrangement conditioned upon several amendments. This was upheld during rehearing, but subjected to multiple appeals to the Ohio Supreme Court. The Supreme Court rejected appeals by AEP Ohio and the intervenors and affirmed the Commission's decision as written<sup>9</sup>. In October of 2012, the Commission *sua sponte* approved an amendment to the Unique Arrangement<sup>10</sup>. On June 14, 2013, Ormet filed the instant Motion to Amend the 2009 Unique Arrangement Between Ohio Power Company and Ormet Primary Aluminum Corporation and Request for Emergency Relief. On July 5, 2013, Comments were filed by AEP Ohio, the Ohio Consumers Counsel ("OCC"), the Industrial Energy Users-Ohio ("IEU-Ohio"). AEP Retail Energy Partners and the Ohio Hospital Association. Ormet filed a Motion for Leave to Reply to the July 5, 2013 Motions, Comments, Objections and Memorandum in Opposition on July 8, 2013, and that motion was granted by Entry on July 11, 2013.

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<sup>9</sup> *In Re Ormet* 129 Ohio St. 3d 9, 2011-Ohio-2377

<sup>10</sup> Case No. 09-119-EL-AEC Entry dated October 17, 2012



### **III. ARGUMENT**

#### **A. Ormet is entitled to emergency relief.<sup>11</sup>**

Contrary to the numerous and varied claims expressed on July 5, 2013, Ormet is entitled to emergency relief. The only two options available to Ormet are gaining the amendments sought or liquidation. In the bankruptcy process, Ormet completed a pre-petition marketing process and identified the buyer as the only party willing to submit a bid for Ormet's assets. Smelter Acquisition LLC a subsidiary of Wayzata Investment Partners, LLC ("Wayzata") and its affiliates, as affiliates of the buyer and Ormet's pre-bankruptcy petition term loan lender, was willing to provide additional significant funding through a debtor-in-possession financing arrangement to fund Ormet through the bankruptcy process. While the bankruptcy process will improve the long-term liabilities related to legacy costs, Ormet still needs resolution by this Commission of certain issues in order to reach a closing upon the sale, and for the emerging company to sustain a viable business post-bankruptcy. It is imperative that Ormet resolve all of these issues as soon as practicable in order to be in a position to close on the sale by July 31, 2013.

Ormet does not have the funds to continue its operations at Hannibal beyond the end of July if an extension of the bankruptcy deadline is granted. The incremental liquidity provided by the Lenders to the Buyer will be substantial and will be needed so that Ormet can continue its operations past July. The Buyer and the Buyers Lenders will not agree to provide the additional funding without specific approval of the items requested under the emergency relief resolution of these issues in place that assures that Ormet can be operated into the future. Based on Ormet's

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<sup>11</sup> On July 11, 2013 the Attorney Examiner issued an Entry which gave Ormet leave to file this Reply. On paragraph 10 of the Entry the Attorney Examiner indicates that the Commission lacks authority to grant emergency relief to non-utilities. Ormet is filing an interlocutory appeal to that portion of the Entry. Ormet would also note that the Attorney Examiner does not have authority to either grant or deny emergency relief. Thus the following section presents the full argument as to why Ormet is entitled to emergency relief.

current Debtor-In-Possession Asset Based Credit Facility, Ormet requires that it maintain several reserves that reduce the availability of the \$60 million facility to approximately \$51.5 million as forecasted by the end of July. Under its current conditions, Ormet will not be able to pay its bills by more than a million dollars at the end of July, with the shortfall increasing to in excess of thirteen million by the end of August.<sup>12</sup> New Ormet (the Buyer) currently has three replacement proposals for a new \$75 million Asset Based Credit Facility with minimal reserves in addition to a commitment for a \$30 million delayed draw term loan from an affiliate of Wayzata. The combination of exiting Bankruptcy, a new \$75 million Asset Based Credit Facility and \$30 million delayed draw term loan will increase New Ormet's liquidity by approximately \$53.5 million. If Ormet is unable to exit bankruptcy by the end of July, it will simply run out of cash and have to drastically curtail operations immediately.

The economic impact to the Monroe County community would be disastrous if Ormet did not survive. When the Hannibal facility is operating at capacity, Ormet employs nearly 1,000 people with wages and salaries totaling approximately \$66 million per year. Ormet provides healthcare benefits for its employees and families which contribute another \$15 million annually into the region. Ormet also pays approximately \$1.6 million annually in local taxes and state taxes and supports approximately 2,000 families indirectly. See paragraph 3 of the June 14, 2013 Motion and Exhibit B at paragraph 4. But the economic impact would go well beyond Monroe County if Ormet's operations were to be liquidated. AEP Ohio and all of the other AEP Ohio ratepayers would be adversely affected by Ormet's demise. As one of the largest

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<sup>12</sup> Based on Ormet's current Debtor-In-Possession Asset Based Credit Facility, Ormet requires that it maintain several reserves that reduce the availability of the \$60 million facility to approximately \$51.5 million as forecasted by the end of June. Ormet currently has three replacement proposals for a new \$75 million Asset Based Credit Facility with minimal reserves in addition to Wayzata's commitment to interject an additional \$30 million in a delayed draw term loan. The combination of existing Bankruptcy, a new \$75 million Asset Based Credit Facility and delayed draw term loan will increase Ormet's liquidity by approximately \$53.5 million.

customers of AEP Ohio, the loss of Ormet would dramatically and adversely affect AEP Ohio and all of its customers. This case is not about a single entity having a financial hardship as was the Board of Education of Cleveland City School District case cited by Ohio Power. The potential injury to the business or interests of the public extend beyond the almost 1,000 Ormet Ohio jobs that will be lost and include the thousands of Ormet retirees, indirect jobs of service providers and the jobs that will be lost as a result of the lost tax revenues.

It is claimed by AEP Ohio that Ormet is not entitled to emergency relief because none of its requests are temporary in nature. This is not accurate. While Ormet is seeking permanent modification of the Unique Arrangement (or a new Unique Arrangement), it is seeking emergency rate relief only through May of 2015 – 23 months which is temporary. It should be noted that Ormet as part of its motion has also asked for non-emergency relief which is not the subject of this Reply Brief.

The Ohio Supreme Court has recognized that the exercise of the Commission's emergency powers could temporarily interfere with contractual obligations over a number of years. In Inland Steel Development Corp. v. Public Utilities Comm. (1977), 49 Ohio St. 2d 284; 361 N.E. 2d 240; 1977 Ohio LEXIS 357; 3 Ohio Op. 3d 435, the Ohio Supreme Court was confronted with the situation where Inland Steel Development Corp., a holder of a right-of-way agreement with Columbia Gas of Ohio, sought an injunction requiring Columbia to construct and install the lines and provide gas service to an apartment development that Inland planned to build. This Commission had issued an emergency order in 1972 that prohibited natural gas companies from taking on or serving any new residential customers. This emergency prohibition lasted several years. The court found that the Commission's emergency order, issued in 1972, which restricted new gas service did bear a reasonable and substantial relationship to the end

which was the prevention of additional gas curtailment. The Court also noted that the Commission's temporary interference with contractual obligations, in light of the present gas emergency, and the inevitable result if new service is compelled, did not appear either unreasonable or arbitrary. Ormet submits that its requested temporary rate relief until 2015 is well within the Commission's exercise of emergency powers.

Others, such as OCC at page 14 of its comments, argue that emergency relief must be the minimum amount required to alleviate the emergency. As explained in ¶8 of its June 14 Motion to Amend, Ormet has successfully restructured significant legacy costs. It has reduced its non-energy operation cost by \$30 million a year over its historical best performance by improving power consumption, cell life carbon usage and other non-capital improvements. Agreements reached with the United Steel Workers Union and Debt Holders will reduce cash costs by approximately \$278 million over the next five to seven years related to the elimination of contributions to defined benefit pensions, reduced contributions to a VEBA trust and debt forgiveness. As demonstrated in the financial plans submitted to the Commission under seal, the emergency relief sought in ¶20 of the June 14 Motion to Amend is the minimum amount of relief that will allow Ormet to emerge from bankruptcy as a going concern.

AEP Ohio alleges that Section 4909.16, Revised Code requires its consent for emergency relief and that it does not grant such consent. See the AEP Ohio Memorandum in Opposition at page 2.

Section 4909.16, Revised Code provides:

When the public utilities commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part

of any public utility in this state. Rates so made by the commission shall apply to one or more of the public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes. (emphasis added)

AEP Ohio has misinterpreted the statute. Consent of the public utility is only required where the Commission seeks to “suspend” any existing rates, schedules or order relating to or affecting any public utility or part of any public utility in this state. No consent is required to “temporarily alter or amend” the Unique Agreement. Ormet is asking to amend the current Unique Arrangement (or create a new Unique Arrangement) so as to permit shopping, and alter the energy rate and discount payment schedule. Thus, the Commission has the statutory authority to grant Ormet’s requested emergency relief without the consent of AEP Ohio.

IEU-Ohio alleges at pages 16 and 19 of its July 5 comments that Ormet has failed to provide a detailed business plan to demonstrate that a grant of emergency relief will permit it to emerge as a viable entity. Emerging from bankruptcy as a viable entity was the task of the bankruptcy court. Further, item 21E of its June 14<sup>th</sup> Motion, Ormet indicated that it would submit to the Commission a business plan addressing its forecasts for a longer period of time. In accordance with the Motion to Amend that plan shall be filed under seal at the Commission thirty days following the filing of the Application. Ormet will be filing that plan on or before July 16, 2013.

IEU-Ohio also alleges that Ormet should be denied emergency relief because it has not shown that other opportunities to reduce electricity costs have been exhausted such as interruptible load, participation in the PJM capacity market, peak demand reduction capability and selling ancillary services. This is simply not true. Ormet has evaluated several of these options in an effort to reduce its electricity costs. However, none of these options are viable.

For example, because of its operational requirements and the need for twenty-four hour a day, 365 day a year electricity, Ormet could not meet the requirements or operate under AEP Ohio's interruptible load tariff. AEP has been unwilling to review any other market based rate options.

In summary, Ormet has demonstrated that this Commission must act before July 31, 2013 in order to prevent injury to the business or interests of the public. Emergency relief is needed to prevent injury to Ormet, its employees, Monroe County, AEP Ohio and other ratepayers. The emergency rate relief requested is temporary until 2015. It represents the minimum amount of relief that will allow it to emerge from bankruptcy as a going concern. No consent from AEP Ohio is required for the Commission to exercise its emergency powers. Ormet will be submitting a business plan under seal and has exhausted all other options and opportunities to reduce electricity costs. Ormet is entitled to emergency relief.

**B. Modification of the Unique Arrangement is warranted and within the Commission's authority.**

Several parties argue that the Unique Arrangement cannot be modified either because Ormet has not met the threshold for modifying a contract, or because the Commission does not have the authority to modify a contract.<sup>13</sup> The critical error that all of these parties make is that they categorize the Unique Arrangement as a contract when the Commission and the Supreme Court of Ohio have both held that it is not a contract at all. The Commission retains ongoing and final authority to change, alter or modify its terms and impose them on the parties.<sup>14</sup>

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<sup>13</sup> Ohio Power Company's Memorandum in Opposition to Ormet Primary Aluminum Corporation's Motion to Amend and Request for Emergency Relief, Case No. 09-119-EL-AEC, at 6-7 (July 5, 2013) ("AEP Ohio Comments"); Industrial Energy Users-Ohio's Comments and Objections to Motion to Amend the 2009 Unique Arrangement Between Ohio Power Company and Ormet Primary Aluminum Corporation and Request for Emergency Relief, Case No. 09-119-EL-AEC at 6, 16-18 (July 5, 2013) ("IEU-Ohio Comments"); Comments on Ormet's Application for a Unique Arrangement by the Office of the Ohio Consumer's Counsel, Case No. 09-119-EL-AEC at 16 (July 5, 2013) ("OCC Comments").

<sup>14</sup> *In re Application of Ormet Primary Aluminum Corp.*, 129 Ohio St. 3d 9, 2011-Ohio-2377 (May 24, 2011) at ¶ 36 ("Ohio Supreme Court Order").

**1. The Commission has the authority to modify the Unique Arrangement without AEP Ohio's consent.**

AEP Ohio argues that “under the existing contract as well as bankruptcy law, Ormet cannot amend the contract without AEP Ohio’s consent -- which it does not have.”<sup>15</sup> But it has previously made that argument to the Ohio Supreme Court, which flatly rejected it. The Commission retains the ongoing right to modify the terms and conditions of special arrangements. Although AEP may desire to control the exercise of the Commission’s discretion, the General Assembly did not give a veto power to the utility over the regulator.

Both the Commission and the Supreme Court of Ohio have determined that AEP Ohio’s consent is not necessary to the Unique Arrangement, and that the Commission retains ongoing supervisory authority over the Unique Arrangement.<sup>16</sup> The Supreme Court of Ohio was not persuaded by AEP Ohio’s argument that the term “arrangement” in the reasonable arrangement statute denotes a contract to which both parties must assent.<sup>17</sup> In fact, the Court held that the term “arrangement” could also plausibly mean to put a rate schedule in a desired order, a definition that contains no element of mutual assent.<sup>18</sup> Most importantly, the Court wrote:

Finally, the statute affirmatively gives the commission--not utilities--final say over arrangements. The final sentence of R.C. 4905.31 states, “Every \* \* \* reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission.” Thus, the commission may supervise, regulate, change, alter, and modify arrangements. No comparable power is vested in the utility, ***and the power to modify is not conditioned on the agreement of the utility.***<sup>19</sup> (emphasis added)

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<sup>15</sup> AEP Ohio Comments at 1.

<sup>16</sup> Ohio Supreme Court Order ¶¶33-37; Entry on Rehearing, Case No. 09-119-EL-AEC at 17-18 (Sept. 15, 2009) (“Entry on Rehearing”).

<sup>17</sup> Ohio Supreme Court Order ¶¶30-31.

<sup>18</sup> *Id.* ¶31.

<sup>19</sup> *Id.* ¶ 36 (emphasis added).

Taking that factor along with (1) the lack of an express requirement of utility consent in the statute, (2) the express requirement of utility compliance in the statute, and (3) the ability of the customer to propose an arrangement, the Supreme Court held that “we cannot read the word ‘arrangement’ to impose a utility-consent requirement.”<sup>20</sup>

AEP Ohio also incorrectly argues that “both the Commission and, ultimately, the Supreme Court of Ohio determined that the contract was airtight, fully binding and ensured there was “no risk” of Ormet leaving AEP Ohio during the contract term.”<sup>21</sup> To the contrary, the Commission held in its September 15, 2009 Entry on Rehearing that there “is no risk that Ormet will shop for a competitive supplier during AEP-Ohio’s current approved ESP.”<sup>22</sup> The Commission clarified in the Entry on Rehearing that the relevant period when Ormet cannot shop is the duration of AEP-Ohio’s approved electric security plan (ESP I).<sup>23</sup> Although AEP Ohio is correct that the Commission held that AEP Ohio would be the exclusive provider to Ormet for the term of the Unique Arrangement, the Commission also wrote:

Although AEP-Ohio argues that there is a risk of Ormet shopping and then returning to AEP-Ohio’s standard service offer because the unique arrangement remains under the Commission continuing jurisdiction, the Commission notes that any modification to the unique arrangement would take place only after notice and opportunity for hearing for any party affected by such modification, including AEP-Ohio.<sup>24</sup>

Furthermore, on appeal of the Commission’s holding, the Supreme Court of Ohio wrote:

Finally, AEP argues that the commission unreasonably “narrow[ed] the scope of its review” of the risk that manufactures would shop “to only three years of the 10-year contract.” AEP did not apply for rehearing on this ground in the *Ormet* case, so we lack jurisdiction to consider the issue. *Consumers’ Counsel v.*

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<sup>20</sup> *Id.* ¶¶33-37.

<sup>21</sup> AEP Ohio Comments at 1.

<sup>22</sup> Entry on Rehearing at 11 (emphasis added).

<sup>23</sup> *Id.* at 8.

<sup>24</sup> *Id.* .



*Pub. Util. Comm.* (1994), 70 Ohio St. 3d 244, 247, 638 N.E.2d 550. AEP preserved this challenge in *Eramet*, but it lacks merit. Limiting the review of shopping risk to three years was reasonable.<sup>25</sup>

Thus, the Commission and the Supreme Court of Ohio only held that Ormet could not shop for the first three years of the Unique Arrangement, not for the entire ten-year term. After three years, any desire to shop would first require notice and a hearing -- exactly what is happening here. The Supreme Court of Ohio even expressly contemplated that there might be a circumstance under which Ormet could shop during the term of the Unique Arrangement, writing:

AEP maintains that there is some risk that Ormet or Eramet could shop despite the orders, given the commission's continuing supervisory power over reasonable arrangements. We consider this issue unripe. If the commission allows Ormet or Eramet to shop, if that harms AEP, and if the commission fails to make AEP whole, AEP may protest before the commission and then appeal to this court if it remains dissatisfied.<sup>26</sup>

Therefore, rather than holding that the Unique Arrangement was "airtight" in its prohibition of shopping, the Supreme Court of Ohio contemplated that a situation might arise under Ormet's current Unique Arrangement where the commission could use its supervisory power over reasonable arrangements to consider whether Ormet should be allowed to shop.

AEP Ohio also argues that the Commission lacks the power to cancel a contract under R.C. 4905.31, citing in support a case from 1976, which was decided under the prior version of R.C. 4905.31,<sup>27</sup> which was revised most recently in 2008. Importantly, the prior version of the statute gave utilities final veto authority over the terms of unique arrangements. As the Supreme Court of Ohio wrote:

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<sup>25</sup> Ohio Supreme Court Order ¶28.

<sup>26</sup> *Id.* ¶27.

<sup>27</sup> AEP Ohio Comments at 5.

Before recent amendments to R.C. 4905.31, see 2008 Am. Sub.S.B. No. 221, only utilities could file reasonable arrangements for commission approval. This meant that utilities possessed a de facto veto power. If they did not like the terms of the arrangement, they could refuse to file. That the statute was amended to allow nonutilities to file arrangements further suggests that AEP's consent is not required.<sup>28</sup>

Furthermore, AEP Ohio's argument centers around the Commission's ability to "cancel" the Unique Arrangement. Ormet has not proposed to cancel the Unique Arrangement *in toto* as was discussed in the 1976 case, rather it is proposing to amend the Unique Arrangement. One of the amendments sought would shorten the term of the Unique Arrangement, but the statute does not exclude the length of a reasonable arrangement from the Commission's power to supervise, regulate, change, alter or modify the arrangement.<sup>29</sup> Moreover, if the Commission would have the power to extend the term of the Unique Arrangement, it must also surely have the corresponding power to shorten the term. The Commission's power to supervise, regulate, change, alter, and modify reasonable arrangements is not limited under the statute.

AEP Ohio argues that the criteria for termination of the Unique Arrangement under Sections 2.03 and 3.01 of the Unique Arrangement have not been met, and therefore the language of the Unique Arrangement itself prohibits its modification.<sup>30</sup> However, this argument fails to consider that the Commission has the power to modify the terms of the unique arrangement, including these provisions. Moreover, Section 3.04 of the Unique Arrangement expressly states that:

In the event that Ormet does not begin to reduce the amount of the accumulated deferrals and carrying charges resulting from this Power Agreement, through the payment of above-tariff rates, pursuant to the terms of this Power Agreement, by April 1, 2012, the Commission may modify this Power Agreement, up to and

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<sup>28</sup> Ohio Supreme Court Order ¶35.

<sup>29</sup> R.C. 4905.31.

<sup>30</sup> AEP Ohio Comments at 13.

including termination of this Power Agreement. The crediting of any POLR charges by AEP Ohio in the form of delta revenue credits shall not constitute the payment of above-tariff rates by Ormet for purposes of this provision.

Ormet did not begin to reduce the amount of the accumulated deferrals and carrying charges resulting from the Power Agreement by April 1, 2012. Therefore, even if the other two provisions relating to early termination have not been satisfied, Section 3.04's requirements have been. Thus AEP Ohio's argument fails.

**2. The *Mobile-Sierra* Doctrine does not apply to the Unique Arrangement, and even if it does, the *Mobile-Sierra* standard has been met.**

IEU-Ohio argues that Ormet has not satisfied the requirements of the *Mobile-Sierra* doctrine to justify modification of the Unique Arrangement. However, the *Mobile-Sierra* doctrine is inapplicable here.

Under the *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission ("FERC") must presume that the rate established in a freely-negotiated wholesale-energy contract meets the "just and reasonable" requirement imposed by the Federal Power Act ("FPA").<sup>31</sup> The presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.<sup>32</sup> The U.S. Supreme Court has held that "[t]he regulatory system created by the [FPA] is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity."<sup>33</sup> However, the Unique Arrangement at issue in this case is not analogous to a freely-negotiated wholesale energy contract under the FPA. As is discussed above, the Commission and the Ohio Supreme Court have held that the Unique Arrangement is not a contract at all, and

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<sup>31</sup> *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. of Snohomish Co.*, 554 U.S. 527, 530 (2008).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 563 (quoting *Permian Basin Area Rate Cases* 390 U.S. 747, 822, 88 S. Ct. 1344, 20 L. Ed. 2d 312 (1968)).

the Commission -- by statute -- retains ongoing supervisory authority over it, including the power to modify it.<sup>34</sup> The FPA has no similar requirement that arrangements filed with FERC remain under the supervision and regulation of the commission, and be subject to change, alteration, or modification by the commission.<sup>35</sup> Therefore, the *Mobile-Sierra* doctrine is inapplicable to reasonable arrangements entered into under R.C. 4905.31.

Even if the Commission were to determine that the *Mobile-Sierra* doctrine is applicable in this instance, the language of the Unique Arrangement itself in Section 3.04 provides explicit authority for the Commission to modify the Unique Arrangement, as discussed above.

Moreover, modification of the Unique Arrangement is warranted, even under *Mobile-Sierra's* public interest standard. The Unique Arrangement in its current form is no longer tenable and the rates produced under it have helped drive Ormet into bankruptcy. If the Unique Arrangement is not amended, the most likely outcome is that Ormet will not be able to emerge from bankruptcy as a going concern and its assets will be liquidated. This will result in the permanent loss of approximately 1000 high-paying jobs in an economically depressed region of Ohio, as well as the loss of millions of dollars of tax revenue, and nearly 2000 more secondary jobs in the region. Such significant losses of employment and revenue create the type of unequivocal public necessity and extraordinary circumstances required to satisfy the *Mobile-Sierra* standard.

### **3. Ormet is in the process of filing a detailed business plan with the Commission.**

The OCC and IEU-Ohio both argue that an amendment is improper because Ormet has not filed a detailed business plan as required by a previous Commission order.<sup>36</sup> While Ormet

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<sup>34</sup> Ohio Supreme Court Order ¶¶33-37; Entry on Rehearing at 17-18.

<sup>35</sup> 16 U.S.C. 824d.

<sup>36</sup> OCC Comments at 15-16; IEU-Ohio Comments at 6.

does not agree that the prior order requires a business plan for the amendments sought, Ormet will in fact be filing a business plan on July 15<sup>th</sup> in accordance with its Motion to Amend.<sup>37</sup> The plan clearly demonstrates that the financial viability for Ormet is the result of a multi-focused approach of cost reduction and recapitalization as a result of a focused, collaborative approach by Ormet, the unions, pensions, suppliers, lenders and other stakeholders. The approval of the emergency relief is not the sole remedy and focus, but rather the final open item to complement all of the other items that have accomplished and allow for Ormet to emerge from bankruptcy.

**C. Ormet has supported the specific modifications requested.**

**1. Ormet's proposed emergency amendments will not unreasonably increase the cost to other ratepayers.<sup>38</sup>**

When the General Assembly empowered the Public Utilities Commission to grant economic development discounts for certain mercantile type customers and permit the utility to collect the foregone revenue from other customers, it specifically empowered the Commission to in fact make such rate adjustments. Thus the only question left is whether the proposed increase created by the proposal made by Ormet is reasonable. From a simple cost benefit analysis it is clear that the benefits of the emergency relief vastly outweigh the costs. If the relief is not given, then both the employees of Ormet as well as the retirees who depend on the corporation will lose their incomes. This seems particularly harsh treatment for these working employees and retirees considering that they have already as part of the bankruptcy process agreed to significant reductions in order to take Ormet out of bankruptcy. Similarly, if Ormet goes into liquidation, then those 2,000 jobholders who are dependent upon Ormet<sup>39</sup> will lose or have their income

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<sup>37</sup> Motion to Amend the 2009 Unique Arrangement Between Ohio Power Company and Ormet Primary Aluminum Corporation and Request for Emergency Relief, Case No. 09-119-EL-AEC, at 12 (June 14, 2013) ("Ormet Motion to Amend").

<sup>38</sup> IEU Ohio at p. 3-5 allege that Ormet's modifications will unreasonably increase the cost to other ratepayers.

<sup>39</sup> See Economic Report as Exhibit B of the Motion to Amend.

reduced. Finally, Monroe County and the governmental agencies directly affected by the Hannibal Facility will lose their tax revenues associated with Ormet's property. On the other hand, the incremental increase by granting the emergency relief consists solely of the cost of freezing the current power costs to the first quarter levels for quarters two, three and four. AEP has estimated this impact to be roughly \$3.5 million. In sum, given the high stakes in terms of the local economy for Monroe County, hundreds of millions of dollars that the Commission has already authorized for Ormet and the fact that the business plan filed today with the Commission shows that Ormet can be viable for years to come if the full requested relief is granted it seems imprudent to block Ormet from coming out of bankruptcy for what may just be several millions of dollars in incremental emergency relief.

Certain parties have argued that Ormet has understated the costs that its requested modifications will impose on other ratepayers. (OCC at 10-13, AEP Ohio at 10). However, these parties compare the cost of Ormet's proposal to the cost of the current Unique Arrangement, which is an invalid comparison – the current Unique Arrangement will not continue to exist. It will either be amended or Ormet will be liquidated and AEP Ohio will lose its largest industrial customer.

AEP Ohio acknowledges that if Ormet goes out of business, it will likely seek to recover its lost revenues related to Ormet from its other ratepayers. (AEP Ohio at 11). Therefore, the cost to other ratepayers of the proposed amendments must be compared to the cost to other ratepayers and the Ohio economy of Ormet going out of business.

- 2. The Public Utilities Commission by statute and by its decision in the matter at bar have preserved its right to amend the Unique Arrangement when in the public interest.**

AEP's claim that the Commission lacks this authority has no legal merit, and its cited provisions to the Supreme Court decision in the first appeal of this matter supports the Commission's authority to amend the Unique Arrangement without AEP's expressed approval.<sup>40</sup> Section 4905.31(e), Revised Code states specifically "every such schedule or reasonable arrangement shall be under the supervision and regulation of the Commission, and is subject to change, alteration, or modification by the Commission (emphasis added). Thus, as a matter of statutory law it is clear that a Commission established unique arrangement remains within the Commission's authority to amend as it deems necessary within the best interest of the public. On October 17, 2012 the Commission exercised this authority when on its own issued an Entry amending the payment schedule by Ormet *sua sponte*.

In order to get around the obvious statutory authority granted to the Commission to amend not only the Ormet special arrangements but all special arrangements and rate schedules for utilities – with or without the utilities approval – AEP resorts to a interpretation of the Supreme Court's decision in Ohio Power Company v. the Public Utilities Commission, 201-Ohio-2377 at paragraphs 22, 26 and 27 that it should be held harmless in any financial risk due to Ormet's shopping. In the Supreme Court appeal, AEP was taking the side that Ormet could shop under the special agreement and that AEP was entitled to collect a provider of last resort (POLR) charge for its load. That was opposed by the appellant and some of the other appellees who believed that since Ormet could not shop without Commission leave, it should not be permitted to charge a POLR fee.<sup>41</sup> The Supreme Court ruled as follows:

“Paragraph 27. AEP maintains that there is some risk that Ormet or Eramet could shop despite the orders given the Commission's continuing supervisory power over reasonable arrangements. We

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<sup>40</sup> AEP comments, pp. 7-14.

<sup>41</sup> The argument about POLR is now more or less settled by the Commission's decision in the Ohio Power ESP I decision, Case No. 08-918-EL-SSO in which the POLR fee was more or less done away with.

consider this issue unripe. If the Commission allows Ormet or Eramet to shop, if that harms AEP, and if the Commission fails to make AEP whole, AEP may protest before the Commission and then appeal to this Court if it remains dissatisfied.” (emphasis added)

What is clear from the Supreme Court decision is that the Court certainly anticipated that the Commission could permit Ormet to shop upon request. Further, if Ormet did shop, AEP could petition the Commission for restitution. The Commission has always been well aware of this fact, and in the ESP II decision<sup>42</sup> the Commission permits AEP to come back and file for relief if AEP does lose a major standard service customer.

For purposes of the Commission’s decision on the emergency relief requested by AEP, the Supreme Court’s words in the prior appeal still apply, “we consider this issue unripe”.

As a practical matter, whether the relief is given that allows Ormet to shop and remain viable, or the relief is not given which results in Ormet’s liquidation, AEP can make the application to this Commission for additional relief because of the loss of Ormet. Note that the Supreme Court and the Commission’s Order only permits AEP to make the request; it does not assure that it is going to get any additional dollars. Whether AEP is entitled to additional money is something that remains to be seen. It will be based on the effects that AEP presents to the Commission in its petition showing its overall inability to sell capacity and energy, after taking all prudent steps to reduce costs entitle it to additional funds. Ormet takes no position on the future merits of such a claim by AEP, but it is clear when looking at the procedural history, the Supreme Court’s decision, and the Commission’s decision in the ESP II case that whether or not AEP is “risk free” from the effects of Ormet’s purchasing standard service power is not a decision required to rule on the emergency relief. Once again, the issue that the Commission

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<sup>42</sup> Case No. 11-348-EL-SSO (p. 27).

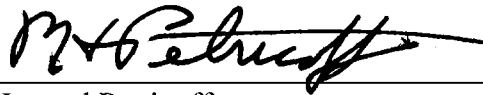


should be addressing is whether allowing Ormet to go to market in order to get market prices and thus come out of bankruptcy is the most efficient, and effective way to maintain the economic development for which the Commission originally authorized the Unique Arrangement.

#### **IV. CONCLUSION**

For the reasons presented above Ormet requests that the Commission find an emergency exists and grant its four amendments to the Unique Arrangement on an emergency basis.

Respectfully submitted,



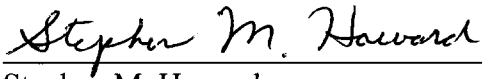
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**CERTIFICATE OF SERVICE**

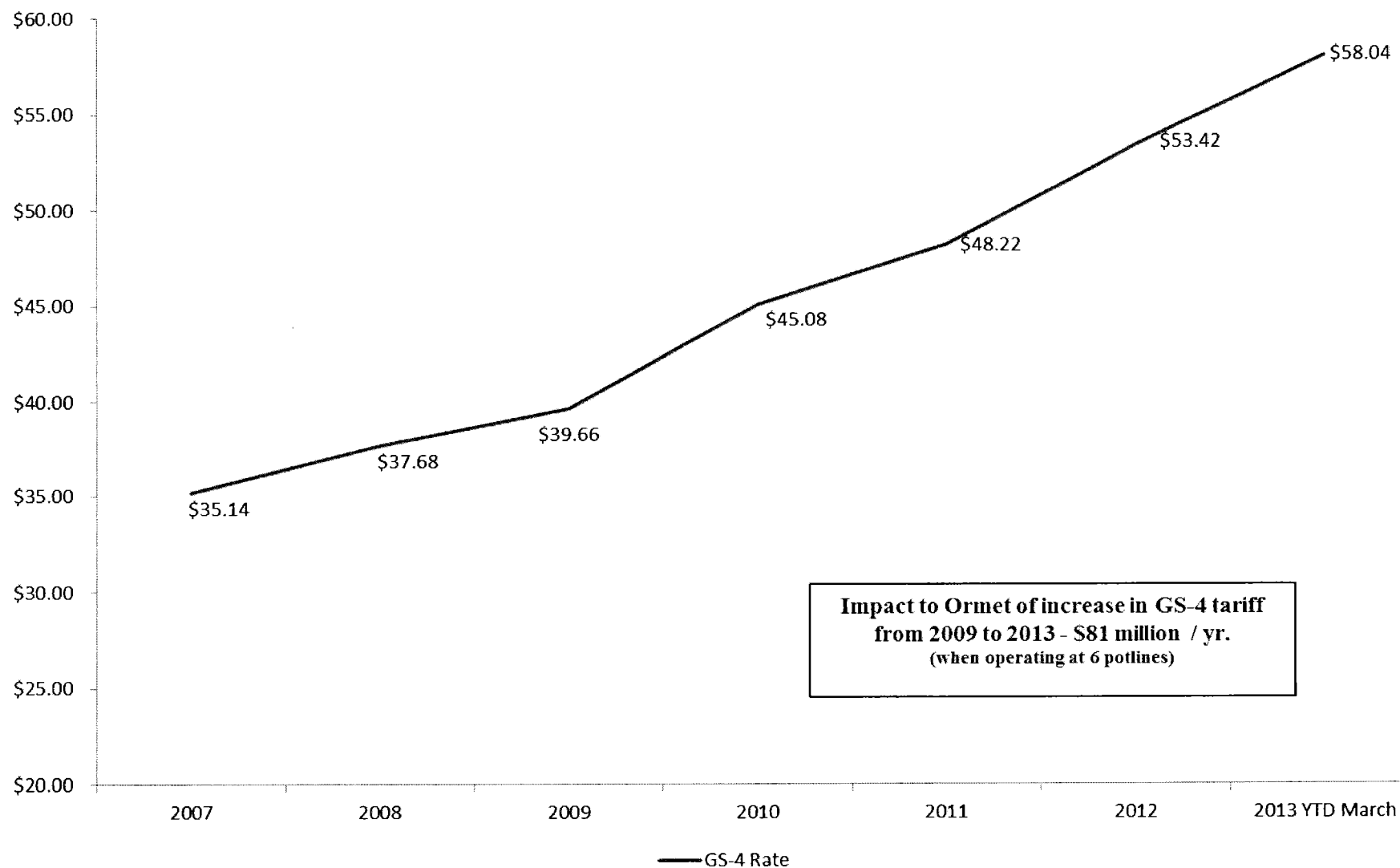
The undersigned certifies that a copy of the foregoing document has been served upon the persons below via electronic mail this 12<sup>th</sup> day of July, 2013.

  
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## CHARTS

### AEP GS-4 Rate History



## ORMET Unique Arrangement Pull Forward vs Rate Increase Impact

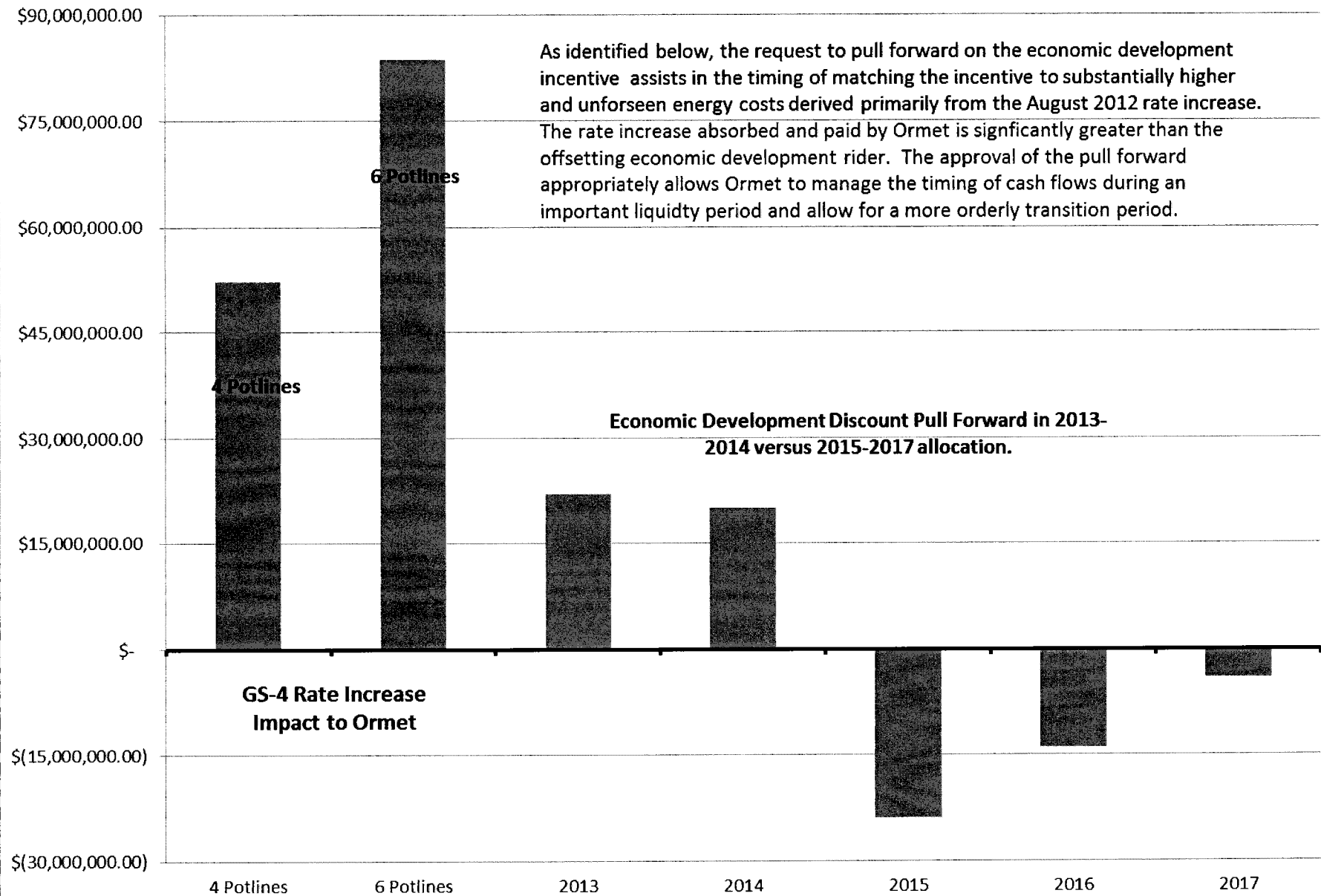
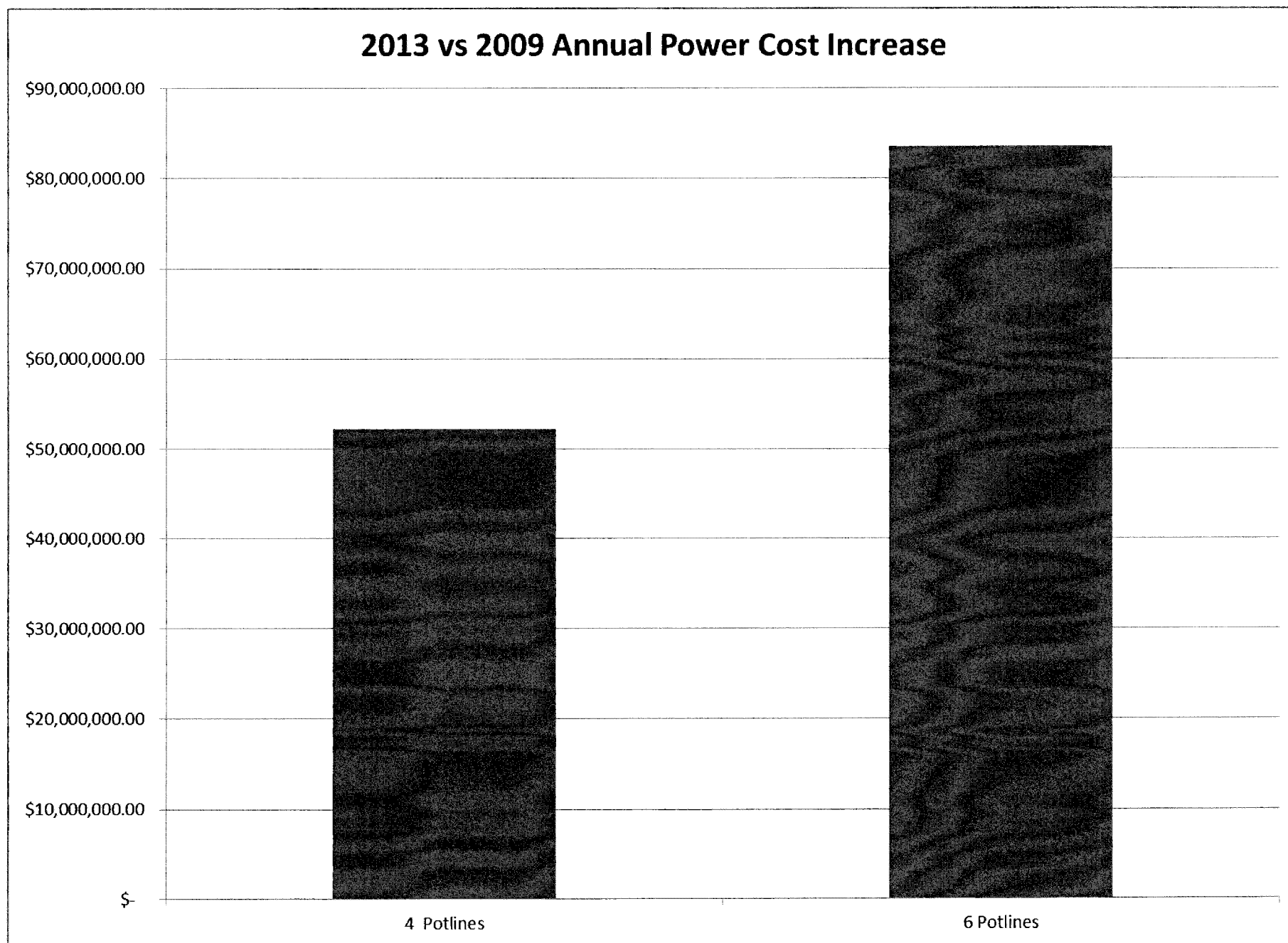


Chart 3



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**Case No(s). 09-0119-EL-AEC**

Summary: Reply Reply of Ormet Primary Aluminum Corporation to the July 5, 2013 Motions, Comments, Objections and Memorandum in Opposition electronically filed by M HOWARD PETRICOFF on behalf of Ormet Primary Aluminum Corporation