

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ormet)
Primary Aluminum Corporation for)
Approval of a Unique Arrangement with) Case No. 09-119-EL-AEC
Ohio Power Company and Columbus)
Southern Power Company.)

ENTRY

The attorney examiner finds:

- (1) Pursuant to Section 4905.31, Revised Code, the Commission has the authority to approve schedules for electric service upon application of a public utility or to establish reasonable arrangements for electric service upon application of a public utility and/or mercantile customer.
- (2) By opinion and order issued on July 15, 2009, the Commission modified and approved the amended application of Ormet Primary Aluminum Corporation (Ormet) for a unique arrangement with Columbus Southern Power Company and Ohio Power Company (jointly, AEP Ohio) for electric service to Ormet's aluminum-producing facility located in Hannibal, Ohio.¹
- (3) On June 14, 2013, Ormet filed a motion to amend its unique arrangement with AEP Ohio and a request for emergency relief, along with a memorandum in support, pursuant to Sections 4905.31 and 4909.16, Revised Code, and Rules 4901-1-12 and 4901:1-38-05, Ohio Administrative Code (O.A.C.). Ormet seeks four amendments to the unique arrangement in the form of emergency relief, specifically requesting that (a) the duration of the unique arrangement be shortened by three years such that it would terminate at the end of December 2015; (b) payment of the remaining \$92.5 million in economic development discounts be advanced by three years such that

¹ By entry issued on March 7, 2012, the Commission approved and confirmed the merger of Columbus Southern Power Company into Ohio Power Company, effective December 31, 2011. *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC.

the last monthly installments would be fully received by December 2014; (c) the prohibition on Ormet's purchase of power from a third-party supplier be eliminated as of the January 2014 billing cycle; and (d) the price for the generation component of the standard service offer electricity purchased by Ormet from AEP Ohio during 2013 be fixed at \$45.89 per megawatt hour, which was the amount billed to Ormet during the first quarter of 2013. Ormet also requests that the Commission affirm, in the emergency order, the assignment by Ormet of its interest in the amended unique arrangement to Smelter Acquisition LLC pursuant to Section 13.04 of the current unique arrangement. Finally, Ormet seeks approval of a number of other significant modifications to the unique arrangement, on a non-emergency basis, that Ormet believes will ensure sustainable, expanded long-term operations at its facility in Hannibal, Ohio. In its motion, Ormet emphasizes that the requested relief is necessary to enable Ormet to emerge from a recent bankruptcy sale as a going concern and to continue its operations in Ohio.

- (4) Rule 4901:1-38-05(B), O.A.C., provides that a mercantile customer of an electric utility may apply to the Commission for a unique arrangement with the electric utility. In accordance with Rule 4901:1-38-05(F), O.A.C., affected parties may file a motion to intervene, as well as comments and objections to any application filed under the rule, within 20 days of the date of the filing of the application. Additionally, Rule 4901:1-38-05(B)(3), O.A.C., provides that, upon the filing of an application for a unique arrangement, the Commission may fix a time and place for a hearing if the application appears to be unjust or unreasonable.
- (5) By entry issued on June 27, 2013, the attorney examiner found that, although Ormet's June 14, 2013, filing is posed to the Commission as a motion to amend Ormet's unique arrangement with AEP Ohio, Ormet's filing should be construed as an application for a unique arrangement under Rule 4901:1-38-05(B), O.A.C., given the nature and extent of the modifications requested by Ormet to the existing unique arrangement, and that the 20-day intervention and comment period specified in Rule 4901:1-38-05(F), O.A.C., should apply to affected parties. Accordingly, the attorney examiner

determined that motions to intervene, as well as comments and objections from affected parties, should be filed by July 5, 2013.

- (6) On July 3, 2013, comments were filed by United Steelworkers District 1. On July 5, 2013, the Ohio Hospital Association (OHA); AEP Retail Energy Partners LLC d/b/a AEP Energy and AEP Energy, Inc. (collectively, AEP Energy); Industrial Energy Users-Ohio (IEU-Ohio); AEP Ohio; and the Ohio Consumers' Counsel filed comments and/or objections.
- (7) On July 5, 2013, motions to intervene in this proceeding were filed by OHA, OMA Energy Group, and AEP Energy.
- (8) On July 8, 2013, Ormet filed a motion requesting leave to file a consolidated reply to the July 5, 2013, pleadings by July 12, 2013.
- (9) Section 4909.16, Revised Code, provides that, when the 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.
- (10) By entry dated July 11, 2013, the attorney examiner found that Ormet's request for emergency relief pursuant to Section 4909.16, Revised Code, should be denied and that a hearing on this matter should be held, consistent with Rule 4901:1-38-05(B)(3), O.A.C. The entry established a procedural schedule including an evidentiary hearing to commence on August 27, 2013, and granted Ormet's motion for leave to file a consolidated reply to the July 5, 2013, pleadings by July 12, 2013.
- (11) On July 12, 2013, Ormet filed its consolidated reply to the July 5, 2013, pleadings.
- (12) On July 15, 2013, Ormet filed an interlocutory appeal of the presiding examiner's July 11, 2013, entry, pursuant to Rule 4901-1-15(B), O.A.C., requesting that the interlocutory appeal

be certified to the Commission for consideration. Ormet also filed a request for oral argument before the Commission during the week of July 22, 2013, to allow the Commission to determine if an emergency exists and whether Ormet's request for emergency relief should be granted.

- (13) On July 16, 2013, IEU-Ohio filed a memorandum contra the interlocutory appeal. AEP Ohio filed a memorandum contra on July 19, 2013.
- (14) Rule 4901-1-15, O.A.C., sets forth the substantive standards for interlocutory appeals. The rule provides that no party may take an interlocutory appeal from a ruling by an attorney examiner unless that ruling is one of four specific rulings enumerated in paragraph (A) of the rule or unless the appeal is certified to the Commission pursuant to paragraph (B) of the rule. The ruling that is the subject of Ormet's interlocutory appeal is not one of the four specific rulings enumerated in paragraph (A) of Rule 4901-1-15, O.A.C. Therefore, Ormet's interlocutory appeal may only be certified to the Commission if it meets the requirements of paragraph (B) of Rule 4901-1-15, O.A.C.
- (15) Paragraph (B) of Rule 4901-1-15, O.A.C., specifies that an attorney examiner shall not certify an interlocutory appeal unless the attorney examiner finds that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent, and that an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the Commission ultimately reverse the ruling in question. In order to certify an interlocutory appeal to the Commission, both requirements must be met.
- (16) Ormet contends that the interlocutory appeal should be certified to the Commission under Rule 4901-1-15(B), O.A.C., because the denial of Ormet's request for emergency relief in the July 11, 2013, entry reflects a new and novel interpretation of the Commission's emergency powers and departs from past precedent. Specifically, Ormet points to the statement in the entry that the Commission has historically exercised its emergency powers under Section 4909.16, Revised Code, only

in situations in which the financial integrity of a public utility is such that its ongoing ability to provide service is threatened, or where utility service is otherwise jeopardized. Ormet asserts that the entry is focused solely on the Commission's authority to protect public utilities and disregards the Commission's additional authority, under Section 4909.16, Revised Code, to take emergency action to prevent injury to the business or interests of the public. Ormet notes that the Supreme Court of Ohio has made clear that the Commission's duty under the statute extends to protecting the public,² and has also upheld the Commission's consideration of emergency measures upon its own motion.³ Further, Ormet argues that an immediate determination by the Commission is necessary to prevent undue prejudice to Ormet, because failure to grant its request for emergency relief will result in substantial harm to Ormet and the public, in the form of several thousand lost jobs and hundreds of millions of dollars in lost wages, worker benefits, tax payments, and contributions to AEP Ohio's rate base.

As another matter, Ormet adds that the attorney examiner's denial of its request for emergency relief goes beyond the authority of an attorney examiner to establish a record upon which the Commission can make a ruling. Ormet contends that the attorney examiner has rendered a substantive ruling that can only be made by the Commission.

- (17) Upon consideration of Ormet's interlocutory appeal and the memoranda contra, the attorney examiner finds that an immediate determination by the Commission regarding the July 11, 2013, entry is needed to prevent the likelihood of undue prejudice to Ormet. Further, the attorney examiner finds that whether a non-utility company such as Ormet may seek emergency rate relief pursuant to Section 4909.16, Revised Code, on the grounds that it is necessary to protect the interests of the public, presents a new or novel question of interpretation, law, or policy. Therefore, the attorney examiner finds that Ormet's interlocutory appeal should be certified to the Commission pursuant to Rule 4901-1-15(B),

² *Cincinnati v. Pub. Util. Comm.*, 149 Ohio St. 570, 80 N.E.2d 150 (1948).

³ *Montgomery County Board of Comm'rs v. Pub. Util. Comm.*, 28 Ohio St. 3d 171, 503 N.E.2d 167 (1986); *Duff v. Pub. Util. Comm.*, 56 Ohio St. 2d 367, 384 N.E.2d 264 (1978).

O.A.C. With respect to Ormet's request for oral argument, the attorney examiner finds that, in light of the fact that extensive comments and reply comments have already been filed for the Commission's consideration, Ormet's request is unnecessary and should be denied.

ORDERED, That Ormet's request for certification to the Commission of its interlocutory appeal be granted. It is, further,

ORDERED, That Ormet's request for oral argument be denied. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

s/Sarah Parrot

By: Sarah J. Parrot
Attorney Examiner

GAP/sc

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in

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

Summary: Attorney Examiner Entry grants Ormet's request for certification to the Commission of its interlocutory appeal and denies Ormet's request for oral argument. - electronically filed by Sandra Coffey on behalf of Sarah Parrot, Attorney Examiner, Public Utilities Commission of Ohio