

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**APPLICATION FOR REHEARING  
BY  
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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This case presents difficult circumstances for all concerned, including utility customers that AEP Ohio charges for its discount arrangement with Ormet and Ohioans who benefit from Ormet's operations. OCC's recommendations in this application for rehearing provide for a better balance between the customers -- that AEP Ohio has been charging to fully fund its discount to Ormet -- and AEP Ohio -- that should now itself shoulder some of the financial assistance for its customer Ormet.

On behalf of approximately 1.3 million residential consumers of the Ohio Power Company and the Columbus Southern Power Company (collectively "AEP Ohio"), the Office of the Ohio Consumer's Counsel ("OCC") applies for rehearing of the October 2, 2013 Opinion and Order of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in this case involving charges from AEP Ohio for its unique arrangement with Ormet Primary Aluminum Corporation's ("Ormet"). OCC is authorized to file this application for rehearing under R.C. 4903.10 and Ohio Adm. Code 4901-1-35.

The PUCO's Opinion and Order ("Order") was unjust, unreasonable, and unlawful. The PUCO erred in the following respects:

- A. The PUCO erred, under R.C. 4903.09, when it did not address OCC's recommendations for consumer protections against charges from AEP Ohio in the event of Ormet's liquidation.
- B. The PUCO erred when it did not protect customers against charges from AEP Ohio with regard to additional unpaid bills of Ormet.
- C. The PUCO erred when it did not order AEP Ohio to credit, for the benefit of customers, the proceeds from AEP Ohio's sale of generating capacity and energy made available by Ormet terminating its operations.
- D. The PUCO erred by not specifying whether or not other customers will have to pay AEP Ohio more than \$308 million in total delta revenues through 2018 because of delta revenues resulting from the \$50.00/MWh fixed generation and fuel rate cap on AEP Ohio's rates to Ormet. The PUCO should have ruled that there are not delta revenues for customers to pay above the cap.
- E. The PUCO erred in placing the burden of paying for any additional delta revenues (related to AEP Ohio's unique arrangement with Ormet) upon AEP Ohio's customers.
- F. The PUCO erred by not deciding that the first priority of any above-tariff payments by Ormet should be for paying back customers instead of deciding that any above-tariff payments by Ormet are first to be used to reduce or eliminate AEP Ohio's \$7 million deferred payment liability, plus carrying charges.
- G. The PUCO erred in deciding that its objective for reimbursement to customers should be tied to future aluminum prices (which are uncertain and volatile). The PUCO should have decided that reimbursement should be tied to Ormet's pre-tax operating income, the mechanism for which should be determined at a future date should such reimbursement to customers become feasible.

The reasons for granting this Application for Rehearing are set forth in the attached Memorandum in Support.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

In its Opinion and Order of October 2, 2013, the PUCO approved various modifications to AEP Ohio’s unique arrangement with Ormet, some of which will or could affect the electricity bills of AEP Ohio’s customers. Since 2009, AEP Ohio has charged its customers \$232 million regarding its discount arrangement with Ormet, while AEP Ohio has sought at every turn to avoid itself paying for the assistance to Ormet. The PUCO characterized the payments from customers as “unprecedented subsidies.”<sup>1</sup> The PUCO acknowledged that it “must include reasonable protections for the customers that bear the burden of sustaining Ormet through increased rates.”<sup>2</sup> OCC files this Application for Rehearing to seek protections for customers, including primarily protections against additional charges from AEP Ohio.

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<sup>1</sup> See *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company*, Case No. 09-119-EL-AEC, Entry at ¶5 (Oct. 17, 2012).

<sup>2</sup> Id. at 21.

## **II. STATUTORY BASIS FOR APPLICATIONS FOR REHEARING**

Applications for rehearing are governed by R.C. 4903.10 and may be sought by any party who has entered an appearance in the proceeding. The Commission may grant and hold rehearing on matters raised in an application, if “in its judgment sufficient reason therefor is made to appear.” If the Commission grants rehearing and determines that its order is in any respect unjust or unwarranted, the Commission may “abrogate or modify” the Order.<sup>3</sup>

As a party to the proceeding<sup>4</sup> OCC meets the statutory condition necessary to file an application under R.C. 4903.10. OCC respectfully requests that the PUCO modify its Opinion and Order for the reasons discussed below.

## **III. RECOMMENDATIONS FOR CUSTOMER PROTECTION**

### **A. The PUCO Erred, Under R.C. 4903.09, When It Did Not Address OCC’s Recommendations For Consumer Protections Against Charges From AEP Ohio In The Event Of Ormet’s Liquidation.**

R.C. 4903.09 requires that, in all contested cases, “the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.” The Ohio Supreme Court has recognized that the Commission must comply with this statute so that the Court can fulfill its responsibility to review the order being appealed.<sup>5</sup>

In the PUCO’s Order, however, the Commission merely referred to OCC’s recommendations without making any findings as to whether the recommendations were

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<sup>3</sup> R.C. 4903.10.

<sup>4</sup> The PUCO granted OCC’s Motion to Intervene on April 17, 2009. Entry at ¶4 (Apr.17, 2009).

<sup>5</sup> See, e.g., *Allnet Communications v. Pub. Util. Comm.* (1994), 70 Ohio St.3d 202, 209.

reasonable or should be adopted. By not explaining why it did not adopt OCC's recommendations, the PUCO violated R.C. 4903.09. The Commission should therefore grant rehearing and approve OCC's recommendations that customers be provided specific protections against charges from AEP Ohio in the wake of an Ormet liquidation.

**B. The PUCO Erred When It Did Not Protect Customers Against Charges From AEP Ohio With Regard To Additional Unpaid Bills Of Ormet.**

OCC recommended in its Brief that, if Ormet shuts down before its deferred payments are fully paid back to AEP Ohio, customers should be protected from having to pay AEP Ohio for Ormet's bills beyond the \$30.5 million already approved by the PUCO.<sup>6</sup> Instead, since unpaid bills are a normal risk of AEP Ohio's business, any additional unpaid bills should fall on AEP Ohio's shoulders. At this far point in AEP Ohio's collections of Ormet-related charges from customers, AEP Ohio should not be permitted to treat customers as guarantors of payment beyond the \$30.5 million of deferred billings that the PUCO has approved to date.

**C. The PUCO Erred When It Did Not Order AEP Ohio To Credit, For The Benefit Of Customers, The Proceeds From AEP Ohio's Sale Of Generating Capacity And Energy Made Available By Ormet Terminating Its Operations.**

If Ormet terminates its operations, AEP Ohio will have 540 MW of capacity and the associated energy available for sale into the wholesale market that was previously being used to serve Ormet's load. The capacity used to serve Ormet's load has been paid for by other customers over many years through customers' payments of delta revenues. Consequently, the PUCO should recognize fairness and customer's contribution to this

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<sup>6</sup> Entry of October 17, 2012 at 3 (¶5); Entry of August 21, 2013 at 7 (¶20).



capacity by ordering AEP Ohio to reimburse customers with 50% of the proceeds from wholesale sales of energy and capacity associated with the capacity previously used to serve Ormet. This reimbursement may appropriately be limited to the amounts contributed by customers since the original approval date of Ormet's unique arrangements, plus carrying costs.

In both electric and natural gas proceedings, the PUCO has recognized that where jurisdictional customers pay for the resources to facilitate non-jurisdictional sales, customers should receive the proceeds of such sales, or at least a large portion of such proceeds.<sup>7</sup> In the electric context, the PUCO has previously credited Net Non-Jurisdictional Interconnection Revenue to jurisdictional customers because the facilities used to provide such service were paid for by jurisdictional customers.<sup>8</sup>

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<sup>7</sup> See *infra* footnotes 20 and 21.

<sup>8</sup> *In the Matter of the Application of Ohio Edison Company for Authority to Change Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, PUCO Case No. 89-1000-EL-AIR, Opinion and Order at 24 (Aug. 16, 1990) (100% of mark-up on sales to other utilities to be included in utility's cost-of-service in setting rates); *In the Matter of the Application of the Cleveland Electric Illuminating Company for Authority to Amend and Increase Certain of Its Filed Schedules Fixing Rates and charges for Electric Service*, PUCO Case No. 86-2025-EL-AIR, Opinion and Order at 23-24 (December 16, 1987) (crediting 100% of Net Non-Jurisdictional revenues to jurisdictional customers in setting rates) *In the Matter of the Application of the Cleveland Electric Illuminating Company for Authority to Amend and Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, PUCO Case No. 85-675-EL-AIR Opinion and Order at 20 (June 24, 1986) (crediting customers with 100% of Net Non-Jurisdictional revenues to jurisdictional customers in setting rates); *In the Matter of the Application of Cleveland Electric Illuminating Company for Authority to Amend and to Increase Certain of its Filed Schedules Fixing Rates and Charges for Electric Service*; *In the Matter of the Application of The Cleveland Electric Illuminating company for Authority to Revise its Book Depreciation Accrual Rates for Electric Property and Plant*, PUCO Case No. 84-188-EL-AIR, Opinion and Order (Mar. 7, 1985) ¶¶61-65; *In the Matter of the Application of Ohio Edison Company to change certain of its Filed Schedules Fixing Rates and Charges for Electric Service*, Case No. 84-1359-EL-AIR, Entry on Rehearing (December 15, 1985) (crediting non-jurisdictional sales to AMP-Ohio to jurisdictional customers in cost-of-service).

In the natural gas context, the PUCO has long held that natural gas utilities are required to pass back the benefit (revenue) of pipeline capacity to GCR customers.<sup>9</sup> In some instances, the PUCO has allowed natural gas utilities to retain a small portion of such revenue as an incentive to make non-jurisdictional sales.<sup>10</sup>

The principle at issue here is the same. Customers have paid for Ormet's capacity for years through the delta revenues. Charges to customers should therefore be adjusted (for the benefit of customers) to reflect AEP Ohio's proceeds from capacity and energy sales regarding its use of the Ormet capacity to make such sales.

**D. The PUCO Erred By Not Specifying Whether Or Not Other Customers Will Have To Pay AEP Ohio More Than \$308 Million In Total Delta Revenues Through 2018 Because Of Delta Revenues Resulting From The \$50.00/Mwh Fixed Generation And Fuel Rate Cap On AEP Ohio's Rates To Ormet. The PUCO Should Have Ruled That There Are Not Delta Revenues For Customers To Pay Above The Cap.**

In its Order, the PUCO established a "fixed generation and fuel rate cap of \$50.00/MWh" for Ormet, finding that such a cap "should bring Ormet's bills more in line with similar large customers, while also providing Ormet some relief from its increased bills."<sup>11</sup> The PUCO further found that AEP Ohio "should be authorized to recover through the EDR any delta revenue that may result from this amendment of the unique arrangement."<sup>12</sup> But the PUCO did not specifically state whether delta revenues resulting

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<sup>9</sup> *In the Matter of the Regulation of the Purchased Gas Adjustment Clause contained within the Rate schedules of the East Ohio Gas Company; In the Matter of the Long-term Forecast Report of the East Ohio Gas Co.* Case No. 03-219-GA-GCR, 03-119-GA-FOR Opinion and Order at 8-9 (March 2, 2005); *In the Matter of the Regulation of the purchased gas adjustment Clause contained within the rate schedules of Vectren Energy Delivery of Ohio* Case No. 00-220-GA-GCR. Opinion and Order Sept. 25, 2001).

<sup>10</sup> *Re Columbia Gas of Ohio Inc.* Case No. 94-487-GA-AIR Order (March 11, 2004).

<sup>11</sup> Opinion and Order at 22.

<sup>12</sup> *Id.*

from the \$50.00/MWh rate cap would be in addition to the total delta revenues (\$308 million) previously authorized for customers to pay or whether they would only be permitted to the extent of the \$308 million.

The PUCO erred in not addressing whether the establishment of the \$50.00 per MWh rate cap would increase the total amount customers will pay for delta revenues. And the PUCO should have ruled that there are not delta revenues for customers to pay above the cap.

**E. The PUCO Erred In Placing The Burden Of Paying For Any Additional Delta Revenues (Related To AEP Ohio's Unique Arrangement With Ormet) Upon AEP Ohio's Customers.**

The PUCO also erred in assigning the entire burden of any additional delta revenues to customers rather than requiring that AEP Ohio share the burden of increased delta revenues. As discussed in OCC's Post-Hearing Brief, the burden of delta revenues should be a shared one.<sup>13</sup>

As the PUCO has recognized, the plain language of R.C. 4905.31 does not require the Commission to approve the full recovery of all delta revenue (revenues the utility no longer collects) resulting from a unique arrangement.<sup>14</sup> Instead, it is for the PUCO's discretion to determine if the utility will be allowed the recovery of delta revenues. The Ohio Supreme Court, in the appeal of the PUCO's decision, affirmed the PUCO.<sup>15</sup> The

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<sup>13</sup> Post-hearing Brief of OCC at 28-33.

<sup>14</sup> *In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Entry on Rehearing at ¶12 (ruling that the POLR charge paid for by Ormet could be credited to the economic development rider); Affirmed by the Ohio Supreme Court in *In re: Ormet Primary Aluminum Corp.*, 129 Ohio St.3d 9, 2011 Ohio 2477, 949 N.E.2d 991.

<sup>15</sup> *In re: Ormet Primary Aluminum Corp.*, 129 Ohio St.3d at 129.

Court found that R.C. 4905.31 does not require full recovery of delta revenues but is “permissive.”<sup>16</sup>

The PUCO has held in the past that “a 50/50 split properly recognizes that both the company and its customers benefit from the company’s policy of providing economic incentive rates to retain customers to attract new business in the utility’s service territory.”<sup>17</sup> While the PUCO has noted the existence of this 50/50 policy as recently as 2009,<sup>18</sup> it has not previously applied this policy to the Ormet arrangement. As a result, customers alone have funded \$232 million in electricity discounts for Ormet and may be called upon for \$76 million more in discounts.<sup>19</sup> AEP Ohio has not contributed anything toward the discounts for assisting Ormet.

But the addition of any delta revenues as a result of the PUCO’s fixed generation and fuel rate cap should cause the PUCO to revisit the issue of sharing the burden of the discounts for assisting Ormet. AEP Ohio receives significant revenues from Ormet’s operations. AEP Ohio, thus, is a primary beneficiary of Ormet’s continued operations. Consequently, AEP Ohio should share in the assistance (subsidizing any incremental discounts) that is approved by the PUCO.

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<sup>16</sup> Id. at 12.

<sup>17</sup> *In the Matter of the Application of Columbus Southern Power Company for Authority to Amend its Filed Tariffs to increase the Rates and Charges for Electric Service*, Case No. 91-418-EL-AIR, Opinion and Order at 110 (May 12, 1992).

<sup>18</sup> See *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*, Case No. 08-917-EL-SSO, Opinion and Order at 48 (Mar. 18, 2009).

<sup>19</sup> Opinion and Order of October 2, 2013, p. 2.

**F. The PUCO Erred By Not Deciding That The First Priority Of Any Above-Tariff Payments By Ormet Should Be For Paying Back Customers Instead Of Deciding That Any Above-Tariff Payments By Ormet Are First To Be Used To Reduce Or Eliminate AEP Ohio's \$7 Million Deferred Payment Liability, Plus Carrying Charges.**

On page 25 of its Opinion and Order, the PUCO determined that Ormet should pay a rate that is higher than AEP Ohio's tariff rate if the price of aluminum rises about specified target prices. The PUCO established new target prices of \$2,650/tonne for 2013, \$2,490/tonne through May 31, 2015, and \$2,200/tonne for June 1, 2015 through December 31, 2018. To the extent that aluminum prices are above the target prices by an amount of up to \$300/tonne, the PUCO requires Ormet to pay 104 percent of AEP Ohio's tariff rate. To the extent the price of aluminum is more than \$300/tonne above the target price, the PUCO requires Ormet to pay 108 percent of AEP Ohio's tariff rate. The PUCO then stated that "[a]ny delta revenue credits attributable to above-tariff payments by Ormet should first be applied to reduce or eliminate any deferred amounts and carrying costs before being applied to the EDR for the benefit of ratepayers."<sup>20</sup>

To the extent that Ormet is able to continue its operations and the unique arrangement continues, the PUCO erred in applying any above-tariff payments to reducing or eliminating any deferred amounts and carrying costs. Rather, the PUCO should have credited such amounts first to the Economic Development Rider ("EDR") for the benefit of customers. Customers have carried a heavy burden through the EDR and should first be reimbursed before AEP Ohio is credited for the limited amount of dollars

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<sup>20</sup> Opinion and Order at 25.

(\$7 million<sup>21</sup>) that AEP Ohio is out-of-pocket. As the PUCO itself states, the “exceptionally generous treatment afforded Ormet under its unique arrangement with AEP Ohio necessitates an enhanced level of fairness to the thousands of ratepayers that are being asked to again carry the load for a company that once more asserts that it has found a formula for long-term success.”<sup>22</sup> Given this history, customers should benefit before AEP Ohio if Ormet is able to make above-tariff payments.

**G. The PUCO Erred In Deciding That Its Objective For Reimbursement To Customers Should Be Tied To Future Aluminum Prices (Which Are Uncertain And Volatile). The PUCO Should Have Decided That Reimbursement Should Be Tied To Ormet’s Pre-Tax Operating Income, The Mechanism For Which Should Be Determined At A Future Date Should Such Reimbursement To Customers Become Feasible.**

The PUCO found that, under certain circumstances, Ormet should reimburse AEP Ohio and customers for delta revenues given the magnitude of the assistance provided to Ormet by customers.<sup>23</sup> But the PUCO’s proposal to tie the reimbursement obligation and amount of the reimbursement to aluminum prices does not appropriately serve the interests of Ormet or AEP Ohio’s customers. The PUCO proposal for reimbursement does not account for the uncertain and volatile nature of the aluminum market or the substantial influence of other factors on the success of Ormet’s operations. In other words, world aluminum prices are a very inexact measure of Ormet’s ability to pay electric rates that are in excess of the tariffed amount. Additionally, the proposed level of the above-tariff payments (104% and 108%) is a very inexact measure of the cash that may be available to make above-tariff payments.

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<sup>21</sup> Tr. II at 401(Roush).

<sup>22</sup> Opinion and Order at 50.

<sup>23</sup> Opinion and Order of October 2, 2013, p. 25.

For these reasons, the PUCO should accomplish its intention for Ormet to reimburse customers, in the event circumstances turn around in the future, by adopting a mechanism that has a more predictable result for Ormet and AEP Ohio customers. The mechanism should be adjusting the future electricity rate charged to Ormet by an amount keyed to an appropriate percentage of Ormet's net operating income, before income taxes. The details of this approach for implementing the PUCO's objective for reimbursement to customers should be determined at a future date, should such reimbursement to customers become feasible.

#### **IV. CONCLUSION**

This case presents difficult circumstances for all concerned, including utility customers that AEP Ohio charges for its discount arrangement with Ormet and Ohioans who benefit from Ormet's operations. OCC's recommendations in this application for rehearing provide for a better balance between the customers -- that AEP Ohio has been charging to fully fund its discount to Ormet -- and AEP Ohio -- that should now itself shoulder some of the financial assistance for its customer Ormet.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Application for Rehearing was served upon the following parties via electronic transmission this 1<sup>st</sup> day of November, 2013.

/s/ Edmund "Tad" Berger

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Summary: App for Rehearing Application for Rehearing by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Deb J. Bingham on behalf of Berger, Tad Mr.