

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|--------------------------------------|---|--------------------------------|
| Ormet Primary Aluminum Corp., |) | |
| |) | |
| Complainant, |) | |
| |) | |
| v. |) | |
| |) | Case No. 13-2206-EL-CSS |
| Ohio Power Company, |) | |
| |) | |
| Respondent. |) | |
| |) | |
| |) | |

**MOTION FOR LEAVE TO RESPOND, MEMORANDUM IN SUPPORT, AND
RESPONSE OF ORMET PRIMARY ALUMINUM CORPORATION TO THE
OBJECTIONS TO THE STIPULATION AND RECOMMENDATION BETWEEN OHIO
POWER AND ORMET BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Ormet Primary Aluminum Corporation (“Ormet”) respectfully submits its response to the *Objections to the Stipulation and Recommendation Between Ohio Power and Ormet by the Office of the Ohio Consumers’ Counsel*,¹ and to the extent that its response would not ordinarily be permitted under the Public Utilities Commission of Ohio’s (“Commission”) Rules of Practice and Procedure, moves that the Commission permit the response in light of the extraordinary position in which Ormet finds itself. Ormet lacks the resources to submit testimony in support of the Stipulation and due to this lack of resources, the acceptance of this response will be the only manner in which Ormet’s voice may be heard in this proceeding. The following memorandum in support supports the motion in further detail.

¹ Objections to the Stipulation and Recommendation Between Ohio Power and Ormet by the Office of the Ohio Consumers’ Counsel, Case No. 13-2206-EL-CSS (Mar. 10, 2014) (“OCC Objections”).

I. MEMORANDUM IN SUPPORT

Ormet no longer has the resources to submit testimony to the Commission with respect to this matter. Ormet filed Chapter 11 bankruptcy proceedings on February 25, 2013 before the United States Bankruptcy Court for the District of Delaware in Case No. 13-10334 (“bankruptcy proceeding”).² Although Ormet attempted to find a buyer who would purchase the Hannibal Facilities as a going concern, it was unable to do so without significant modification to its Unique Arrangement with Ohio Power Company (“AEP Ohio”).³ Although Ormet was able to find one potential buyer who would purchase the Hannibal Facilities as a going concern, that buyer would not do so without substantial modification to the Unique Arrangement. Ormet sought the requested modifications from the Commission in Case No. 09-119-EL-AEC,⁴ however, the Commission denied its requested amendment in part and required modification of it in a manner unacceptable to the potential buyer.⁵ The potential buyer informed Ormet that it was no longer willing to consider purchasing the Hannibal Facilities as a going concern in light of the Commission’s ruling, and Ormet has been unable to find another buyer.

Upon the withdrawal of the potential buyer, Ormet announced on October 4, 2013 that it did not intend to pursue the amended unique arrangement and initiated the curtailment of all remaining operations at its smelter facility in Hannibal, Ohio. This put Ormet into a state of default before the bankruptcy court, and in that state Ormet has no funding of its own, all of

² *In re: Ormet Corporation*, No. 13-10334-MFW (Bankr. D. Del., Feb. 25, 2013).

³ *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 (Feb. 17, 2009).

⁴ *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*, 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 (June 14, 2013).

⁵ *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*, Opinion and Order, Case No. 09-119-EL-AEC (Oct. 2, 2013).

Ormet's ongoing activity is funded exclusively by Ormet's lenders under a budget approved by the bankruptcy court. The budget approved by the bankruptcy court permits only minimal legal activities, and does not provide funding for the substantial litigation expense that would be incurred through the submittal of testimony or participation in a hearing in the instant proceeding.

In addition to the lack of the financial resources needed to submit testimony to the Commission, Ormet also lacks the staff to do so. Upon curtailment of the Hannibal Facilities, Ormet's staff was dramatically reduced. Ormet now has only the minimum number of personnel necessary to maintain basic safety, security, and environmental protections at the Hannibal Facilities as the bankruptcy process continues.

In light of Ormet's inability to submit testimony in the hearing in the instant proceeding, Ormet requests that, to the extent that the response Ormet submits here would otherwise not be permitted under the Commission's rules or the procedural schedule established by the Commission, the Commission grant Ormet leave to file this response. Good cause exists to permit this response because the record before the Commission will be more complete with the addition of Ormet's perspective, and the attorney advisor and the Commission will be able to accord it the appropriate weight in rendering a decision.

II. ORMET RESPONSE TO THE OCC'S OBJECTIONS TO THE STIPULATION

The Ohio Consumers' Counsel ("OCC") intervened in this docket nearly three months after Ormet filed its Complaint⁶ against AEP Ohio and after the parties had negotiated a settlement and submitted a Stipulation⁷ resolving all issues in the case for the purpose of

⁶ Complaint of Ormet Primary Aluminum Corporation against Ohio Power Company, Case No. 13-2206-EL-CSS (Nov. 13, 2013) ("Complaint").

⁷ *Ormet Primary Aluminum Corp. v. Ohio Power Co.*, Stipulation and Recommendation, Case No. 13-2206-EL-CSS (Feb. 3, 2014) ("Stipulation").

disrupting the Stipulation. The OCC argues that AEP Ohio should not be permitted to recover \$4.983 million in remaining billed unpaid charges related to its service to Ormet through the Stipulation and that the Stipulation does not meet the Commission's three-part test. The OCC is incorrect. The Stipulation filed by Ormet and AEP Ohio is consistent with multiple prior Commission rulings regarding the Unique Arrangement between Ormet and AEP Ohio, was the result of serious bargaining among knowledgeable, capable parties, benefits ratepayers and the public interest, does not violate any important regulatory principle or practice, and should be approved. The Stipulation was negotiated between AEP Ohio and Ormet -- the only parties to the case at the time of the settlement negotiations -- and it resolves all issues between them, including certain issues related to the related bankruptcy proceeding. The bankruptcy court has now approved the elements of the Stipulation subject to its jurisdiction and should the Commission decline to approve the Stipulation, as submitted by AEP Ohio and Ormet, it will result not only in further litigation in the instant complaint case, but also potential disruption of the bankruptcy proceeding. It is in the interest of all parties to have the issues resolved as expeditiously as possible.

A. The Proposed Treatment of the \$4.983 Million in Remaining Billed, Unpaid Amounts From 2013 is Consistent With Prior Commission Orders Regarding the Unique Arrangement

Although the Commission has not yet directly addressed the treatment of billed, unpaid amounts under the Unique Arrangement,⁸ Ormet notes that the Unique Arrangement itself, as approved by the Commission, defines "Delta Revenues" as including "all revenue which would be recoverable from Ormet under the AEP Ohio Tariff Rate, but for this Power Agreement,

⁸ Ormet notes that with respect to AEP Ohio's recovery of costs associated with a default by Ormet under the Unique Arrangement the Commission has stated they would be addressed upon proper request to the Commission. *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 at P 17 (Oct. 30, 2013).

foregone by AEP Ohio as a result of the provisions of the Power Agreement, *including as a result of an Event of Default by Ormet of this Power Agreement.*”⁹ Furthermore, in granting deferrals of certain Ormet bills in 2012 and 2013, the Commission routinely held that amounts not timely paid by Ormet would be considered as foregone revenue under Section 4905.31, Revised Code, and should be recovered through the economic development rider (“EDR”). For example, in both its Entry approving deferral of payment of certain 2012 bills and its Entry approving deferral of payment of certain 2013 bills, the Commission held that any portion of those deferrals that is not timely paid by Ormet shall be considered as foregone revenue under Section 4905.31, Revised Code, and shall be recovered through the EDR.¹⁰

In addition, in its Opinion and Order approving the Unique Arrangement, the Commission allowed deferral of the \$6 million differential between the \$54 million maximum in Delta Revenues that ratepayers would be expected to pay in 2010 and 2011, and the \$60 million discount permitted to Ormet in those years, and held that any portion of those deferrals that remained unpaid at the end of the term of the Unique Arrangement would be recoverable by AEP Ohio through its EDR.¹¹ The Commission has consistently ruled that any unpaid amounts related to bills issued to Ormet under the Unique Arrangement should be treated as Delta Revenues and recovered through the EDR. The treatment of the \$4.983 million in billed, unpaid amounts from 2013 in the Stipulation is consistent with this precedent.

⁹ *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*, Amended 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, Attachment A, Unique Arrangement, Section 1.07 (Apr. 10, 2009) (emphasis added) (“Unique Arrangement”).

¹⁰ *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 at P 20 (Aug. 21, 2013) (regarding the 2013 deferrals); Entry at P 5 (Oct. 17, 2012) (regarding the 2012 deferrals).

¹¹ *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, Opinion and Order at 10 (July 15, 2009).

B. The Stipulation Meets the Commission’s Three-Part Test

1. The Settlement is the Product of Serious Bargaining Among Capable, Knowledgeable Parties with Diverse Interest

OCC argues that the settlement was not the product of serious bargaining among parties of diverse interest, pointing to the fact that no representative of any customer other than Ormet participated in the settlement negotiations.¹² OCC argues that entire customer classes were excluded from the settlement negotiations, which should give rise to concern, as in *Time Warner*, regarding a partial stipulation arising from settlement talks “from which an entire customer class was intentionally excluded.”¹³ OCC fails to mention, however, that the settlement negotiations included all parties to the case at the time – AEP Ohio and Ormet. No other party intervened in the case until after the Stipulation was submitted to the Commission, despite the fact that OCC (like IEU-Ohio) is a sophisticated litigant routinely appearing before the Commission represented by counsel with knowledge of the Unique Arrangement between AEP Ohio and Ormet. The OCC, having been an active litigant in the proceeding establishing and modifying the Unique Arrangement, should certainly have been aware that there was potential for the outcome of a complaint involving the appropriateness of charges under the Unique Arrangement to impact the dollar amount of Delta Revenues created by the Unique Arrangement, and could have intervened at any point in the 11 weeks between Ormet’s November 13, 2013 Complaint and the February 3, 2014 Stipulation. AEP Ohio and Ormet did not “exclude” any party from the settlement negotiations, there simply were no other parties to the case until February 10, 2014, a week after the Stipulation was filed. The Stipulation was the result of negotiations between the complainant, Ormet, and the respondent, AEP Ohio and resolves the complaint that

¹² OCC Objections at 9.

¹³ *Id.* at 10 citing *Time Warner AxS v. Pub. Utils. Comm’n of Ohio*, 661 N.E. 2d 1097 n.2 (1996).

Ormet brought against AEP Ohio. The Stipulation was the result of negotiation between capable, knowledgeable parties with diverse interest.

2. The Settlement, as a Package, Benefits Ratepayers and the Public Interest

The OCC further argues that because Ormet has shut down the Hannibal Facility the subsidy provided under the Unique Arrangement no longer provides economic benefits to employees and the community, and therefore customers should not be charged any additional revenues.¹⁴ This logic fails to recognize that the vast majority of the funds to be recovered through the EDR by AEP Ohio under the Stipulation relate to charges incurred for service to Ormet prior to the curtailment of the Ormet facility in early October 2013, when benefits were being provided to ratepayers, and that with respect to the amounts related to the 2012 and 2013 deferrals and the unrecovered discounts that exceeded the \$54 million cap in 2010 and 2011, the Commission has already ruled that any such amounts unpaid by Ormet should be treated as revenue foregone under Section 4905.31, Revised Code, and should be recovered through the EDR rider.¹⁵ Ratepayers are benefitted by the clarification provided by the Stipulation as to the level of charges that will be passed through the EDR rider, and by the reduction in carrying charges that will occur through earlier recovery of the Delta Revenues than might occur had the charges continued to be deferred through 2018 before a resolution occurred. In addition, the Stipulation benefits ratepayers and the public interest by reducing litigation costs for AEP Ohio, the Commission, the other parties, and Ormet. The Stipulation, as a package, benefits ratepayers and the public interest.

¹⁴*Id.*

¹⁵ *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 at P 20 (Aug. 21, 2013) (regarding the 2013 deferrals); Entry at P 5 (Oct. 17, 2012) (regarding the 2012 deferrals); *see also* Opinion and Order at 10 (July 15, 2009) (regarding 2010 and 2011 discounts).

3. The Settlement Package does not Violate any Important Regulatory Principle or Practice

The OCC argues that the settlement violates the Commission's policy on bad debts. However, the treatment of unpaid amounts as Delta Revenues under the Unique Arrangement is consistent with prior Commission rulings regarding unpaid amounts under the Unique Arrangement. As noted above, the Commission has already held that any amounts related to the 2010 and 2011 discounts over the \$54 million cap, the 2012 deferrals and the 2013 deferrals that are not timely paid by Ormet shall be considered as foregone revenue under Section 4905.31, Revised Code, and shall be recovered through the EDR.¹⁶ Moreover, the definition of "Delta Revenues" under the Unique Arrangement approved by the Commission includes "all revenue which would be recoverable from Ormet under the AEP Ohio Tariff Rate, but for this Power Agreement, foregone by AEP Ohio as a result of the provisions of the Power Agreement, *including as a result of an Event of Default by Ormet of this Power Agreement.*"¹⁷ Treating further unpaid amounts under the Unique Arrangement as Delta Revenues to be recovered under the EDR would be consistent with the Commission's prior orders and with the terms of the Unique Arrangement.¹⁸ Therefore, the Stipulation does not violate any important regulatory principles or practices.

¹⁶ *Id.*

¹⁷ Unique Arrangement, Section 1.07 (emphasis added).

¹⁸ Ormet notes that with respect to AEP Ohio's recovery of costs associated with a default by Ormet under the Unique Arrangement the Commission has stated they would be addressed upon proper request to the Commission. *See supra* n. 8.

III. CONCLUSION

WHEREFORE, Ormet respectfully requests that the Commission approve the Stipulation and Recommendation submitted by AEP Ohio and Ormet without modification.

Respectfully submitted,

/s/ Emma F. Hand

Emma F. Hand (0089989)

Dentons US LLP

1301 K Street, N.W.

Suite 600, East Tower

Washington, D.C. 20005

202-408-6400 (phone)

202-408-6399 (fax)

emma.hand@dentons.com

Attorney for Ormet Aluminum Primary Corporation

April 8, 2014

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via email and regular mail upon the persons listed below this 8th day of April, 2014.

/s/ Emma F. Hand

Emma F. Hand (0089989)

Deb. J. Bingham
Office of the Ohio Consumer's Counsel
10 W. Broad St., 18th Fl.
Columbus, OH 43215
bingham@occ.state.oh.us

Maureen R. Grady
Office of the Ohio Consumers' Counsel
10 W. Broad St., Suite 1800
Columbus, OH 43215
grady@occ.state.oh.us

Matthew R. Pritchard
McNees Wallace & Nurick LLC
21 East State Street #1700
Columbus, OH 43215
mpritchard@mwncmh.com

Samuel C. Randazzo
McNees Wallace & Nurick LLC
21 East State Street #1700
Columbus, OH 43215
sam@mwncmh.com

Yazen Alami
American Electric Power Company
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
yalami@aep.com

Steven Nourse
American Electric Power Service Corp.
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
stnourse@aep.com

Sandra Coffey
Public Utilities Commission of Ohio
180 E. Broad St.
Columbus, OH 43215
sandra.coffey@puc.state.oh.us

Larry Sauer
Office of the Ohio Consumers' Counsel
10 W. Broad St., Suite 1800
Columbus, OH 43215
sauer@occ.state.oh.us

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

4/8/2014 2:22:55 PM

in

Case No(s). 13-2206-EL-CSS

Summary: Response Motion for Leave to Respond, Memorandum in Support, and Response to the Objections to the Stipulation and Recommendation Between Ohio Power and Ormet by the Office of the Ohio Consumers' Counsel electronically filed by Ms. Emma F Hand on behalf of Ormet Primary Aluminum Corporation