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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of)
Columbus Southern Power Company and) Case No. 08-1338-EL-AAM
Ohio Power Company for Authority to)
Modify their Accounting Procedures.)

In the Matter of the Application of)
Columbus Southern Power Company and) Case No. 08-1339-EL-UNC
Ohio Power Company and Ormet Primary)
Aluminum Mill Products Corporation for)
Approval of a Temporary Amendment to)
their Special Arrangement.)

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

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February 6, 2009

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**APPLICATION FOR REHEARING
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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of approximately 1.2 million electric consumers of Columbus Southern Power Company (CSP) and Ohio Power Company ("OP") (collectively "Companies" or "AEP Ohio"), applies for rehearing of the January 7, 2009 *Finding and Order* ("PUCO Order" or "Commission Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO") in these proceedings, as permitted under R.C. 4903.10 and Ohio Adm. Code 4901-1-35. The Commission's Order approved the Companies' application permitting a temporary arrangement between the Companies and Ormet Primary Aluminum Mill Products Corporation ("Ormet") and allowed the Companies to book deferrals of a "market delta" flowing from the temporary arrangement. The Commission's Order will increase rates to

the Companies' customers by at least \$4 million per month¹ because existing customers will be forced to fund the subsidy created by the discount given to Ormet under the special arrangement.

OCC asserts that the Commission's Order is unjust, unreasonable, and unlawful in the following particulars:

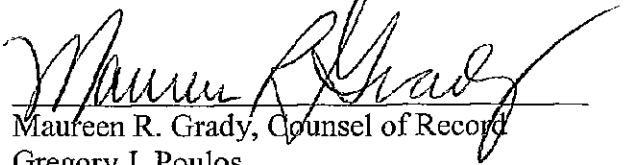
- A. The Commission Erred In Failing To Grant OCC's Motion To Intervene And In Failing To Consider OCC's Comments.
- B. The Commission Erred In Approving The Temporary Special Arrangement Between Ormet And The Companies Without Finding That The Continuation Of The Special Arrangement Is Just And Reasonable.
- C. Because The Commission Did Not Establish A Complete Record And Did Not Set Forth Its Findings Of Fact And The Reasons Prompting Its Decision, The Commission Violated R.C. 4903.09.
- D. The Commission Erred In Compensating AEP Ohio For Power Priced At A Market Rate, Which Increases The Costs Collected From The Remaining Customers, When AEP Ohio Does Not Have To Go To The Market To Supply Ormet's Needs.
- E. The Commission Erred In Requiring Existing Customers Of The Companies To Fund The Entire Discount To Ormet That Is Created By The Temporary Special Arrangement.
- F. The Commission Erred In Approving An Application That Is Discriminatory And Violates R.C. 4905.33, 4905.35, And 4928.02(A).

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

¹ This subsidy is a rough estimate based upon information provided in the context of AEP's filing in Case No. 07-1317-EL-UNC (Dec. 27, 2007) (Attachment A to OCC's Motion to Intervene and Comments filed in this case).

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. PROCEDURAL HISTORY

On December 29, 2008, the Companies and Ormet filed an application requesting that the Commission approve their interim special arrangement. This interim arrangement was to allow the Companies to continue to serve Ormet, despite the fact that their original arrangement, approved by the Commission in 2006², expired on December 31, 2008. Under this proposed interim arrangement, rates charged to Ormet would be even less than the rates previously established in 2006. Instead of paying the previously established discounted \$43 per megawatt hour for generation, Ormet would pay a lower price based on a blend of the Companies' current SSO rates for generation. The

² *In the Matter of the Petition of Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products to Transfer Rights to Furnish Electric Service and/or Reallocate Certified Electric Service Territories and a Complaint against South Central Power Company and Ohio Power Company for Alleged Unjust, Unreasonable, and Discriminatory Proposed Rates*, Case No. 05-1057-EL-CSS, Opinion and Order (Nov. 8, 2006), amended by Opinion and Order (Aug. 27, 2008).

temporary special arrangement is to remain in place until a new special arrangement is approved by the Commission and new tariffs are approved under the pending ESP.

In their application, the Companies also sought the Commission's approval of certain deferral accounting. The Companies requested that the Commission allow them to create regulatory assets to recognize the difference between the blended SSO rate proposed to be charged to Ormet and the 2008 market price of \$53.03 MWH. This difference is characterized by the Companies as the "market delta." The Companies application also sought approval to collect 100% of the market delta from its customers through the fuel adjustment clause mechanism proposed in the Companies' pending Electric Security Plan cases, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO.³

A scant nine days later, on January 7, 2009, the Commission issued its Finding and Order in this case. Although OCC did file a motion to intervene and comments on the morning of January 7, 2009, immediately prior to the PUCO's public meeting, the Commission declined to address either OCC's motion or OCC's comments. Instead, in its Finding and Order the Commission hurriedly approved the temporary special arrangement and the request for accounting deferrals. The Commission summarily concluded that since the Companies' ESP application is still pending, and there is a need for interim rates for Ormet, the temporary arrangement and request for deferrals is reasonable and should be approved.⁴

³ Application at 5(Dec. 29, 2008).

⁴ *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify their Accounting Procedures*, Case No. 08-1338-EL-AAM, Finding and Order at 3.

II. STANDARD OF REVIEW

Applications for rehearing are governed by R.C. 4903.10. This statute provides that within thirty (30) days after an order is issued by the Commission “any party who has entered an appearance in person or by counsel in the proceeding may apply for rehearing in respect to any matters determined in the proceeding.” Furthermore, the application for rehearing must be “in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful.” *Id.*

In considering an application for rehearing, Ohio law provides that the Commission “may grant and hold such rehearing on the matter specified in such application, if in its judgment sufficient reason therefore is made to appear.” *Id.* If the Commission grants a rehearing and determines that “the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the commission may abrogate or modify the same***.” *Id.*

OCC filed its motion to intervene on January 7, 2009, under R.C. 4903.221. That motion also contained detailed comments on the merits of the temporary arrangement and the accounting requested. OCC thus meets the statutory conditions that apply to an applicant for rehearing under R.C. 4903.10. Accordingly, OCC respectfully requests that the Commission hold a rehearing on the matters specified below.

III. ARGUMENT

A. The Commission Erred In Failing To Grant OCC’s Motion To Intervene And In Failing To Consider OCC’s Comments.

On January 7, 2009, OCC timely filed its Motion to Intervene and Comments in this proceeding. OCC, in its Memorandum accompanying its motion to intervene, argued

against the PUCO approving the interim agreement and accounting changes because they would adversely affect customers (by unreasonably increasing their rates) and would violate Ohio law. Later that very same day, scarcely nine days after the application was filed, the Commission issued an order approving the application and the accounting treatment. In that Finding and Order the Commission failed to address OCC's Motion to Intervene. Moreover, the Commission neglected to mention, much less consider, any of the issues raised by OCC in its Comments.

The PUCO's failure to grant OCC intervention and consider its comments was unreasonable, unlawful, and contrary to numerous provisions of the Ohio Revised Code, Ohio Administrative Code, and Supreme Court of Ohio precedent. The Commission should grant rehearing on this matter, and should permit OCC to intervene and duly consider its comments before rubber stamping the Companies' special arrangement and accounting application.

Intervention in PUCO matters is governed by R.C. 4903.221. This statute provides that any person "who is adversely affected" by a PUCO proceeding is entitled to seek intervention in that proceeding. In ruling upon motions to intervene under the statute, the PUCO is to consider "(1) The nature and extent of the prospective intervenor's interest; (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case; (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings; [and,] (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues." Ohio Adm. Code 4901-1-11 provides similar, albeit subordinate guidance on intervention. That rule explains that intervention *shall* be

allowed if the intervenor has a real and substantial interest and the disposition of the matter will impair or impede the intervenor's ability to protect that interest if the interest is not adequately represented by existing parties.

OCC is the statutory representative of the Companies' residential customers under Revised Code Chapter 4911. It should have been permitted to intervene in this proceeding to protect its customers interests—interests that were unrepresented by either the Companies or Ornet, the two other parties to the proceeding.⁵ Additionally, OCC satisfied the General Assembly's criteria under R.C. 4903.221(B), as fully explained in its Motion to Intervene. OCC also met the intervention criteria of Ohio Admin. Code 4901-1-11(A) and (B), which are nonetheless subordinate to the criteria OCC satisfies under the Ohio Revised Code.

The Ohio Supreme Court has held that in cases of this nature—accounting applications where no hearing is held before the PUCO, OCC has a right to intervene.⁶ “Intervention ought to be liberally allowed so that the positions of all persons with a real and substantial interest in the proceedings can be considered by the PUCO.”⁷ In that case, the Court found that denying OCC's motion to intervene was an abuse of discretion by the PUCO. The Court, nonetheless found there was no prejudice to OCC because the Commission considered OCC's arguments when it made its decision.⁸

Here not only has the Commission abused its discretion in not ruling upon OCC's motion to intervene, but the Commission has prejudiced OCC because it failed to

⁵ Since January 7, 2009, other parties have moved to intervene including IEU, OEG, and Kroger.

⁶ *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio 5853, par. 18-20.

⁷ *Id.* at 388.

⁸ *Id.*

consider OCC's arguments when it made its quick rush to judgment. When the Commission failed to consider OCC's arguments, it adversely affected OCC's rights to advocate for the outcome OCC requested—rejection of the application. Nor was there any other way in which OCC could have raised its concerns over the accounting changes sought.⁹ Rehearing should be granted.

B. The Commission Erred In Approving The Temporary Special Arrangement Between Ormet And The Companies Without Finding That The Continuation Of The Special Arrangement Is Just And Reasonable.

When the Commission approved the temporary special arrangement between Ormet and the Companies, the Commission focused solely on the need to establish interim rates and found the arrangement reasonable, considering that need.¹⁰ There is nothing in the Order that suggests the Commission engaged in the analysis that is required in cases where special arrangements are entered into or continued—in particular where the requested interim rates do not merely continue an approved discount but seek to increase the discounted rate.

The Commission's authority to approve special arrangements comes specifically from R.C. 4905.31. Under that statute, the Commission may permit "reasonable" arrangements between utilities and their customers. However, all such arrangements must be reviewed and approved by the Commission. *Id.*

⁹ In *OCC v. Pub. Util. Comm.*, the Court noted that the fact that OCC could not raise its concerns in any other way than filing comments, weighed in favor of finding that intervention should be granted. That reasoning applies with equal force here.

¹⁰Finding and Order at 3 (Jan. 7, 2009).

The ultimate issue in special arrangement cases is whether the proposed contract terms and conditions for service are lawful, just, and reasonable.¹¹ The burden of proof in this matter rested solely on the Companies. *Id.* at 29. Yet the Commission relieved the Companies from their burden of proof by not requiring them to submit information detailing the rationale for continuing the arrangement, along with other information required under the recently enacted rules of Ohio Adm. Code Chapter 4901:1:38.

As a result, the Companies produced little evidence, rationale, or reason to support the continued special arrangement. The “reasonableness” of a reduced rate for Ormet was addressed in passing with an allegation that Ormet represents that it cannot afford to continue to pay the rate (\$43 MWH) it currently pays for electric service. While Ormet may have indeed represented that to the Companies, Ormet’s financial statements on its website belie such representations. For instance for the nine-month period ended September 30 2008, the Company reported an \$8.7 million operating profit compared to an operating loss of \$33.7 million in the same period of 2007.¹² Net loss for the 2008 nine-month period was \$3.3 million compared to a net loss for the same period in 2007 of \$47.5 million.¹³ Such a significant turn around suggests that Ormet’s representations should be thoroughly probed, especially if such representations are the basis for discounting an already discounted rate.

While R.C. 4905.31 does not require that a public hearing be held, the Commission must nonetheless consider whether the arrangement is lawful, just and

¹¹ See for example, *In the Matter of the Application of Northeast Ohio Natural Gas Corp. for Approval and Authority to File A Reasonable Arrangement for the Sale of Natural Gas to its Customers*, Case No. 85-1974-GA-AEC, Opinion and Order at 5 (July 22, 1986); 1986 Ohio PUC LEXIS 769.

¹² <http://www.ormet.com/Investors/PDF/2008%203q%20Press%20Release%20Final.pdf>.

¹³ *Id.*

reasonable. There is no evidence that the Commission followed R.C. 4905.31 in this respect. It had no evidence before it but the paltry six page application of the Companies. No affidavits, no workpapers, no back-up. The passage of a mere nine days between the filing of the application and its approval moreover, suggests no analysis could have been completed either. Rehearing should be granted, and the Commission should be required to apply the standards of R.C. 4905.31 to the case at hand, and render a decision consistent with those standards.

C. Because The Commission Did Not Publish Its Findings Of Fact And The Reasons Prompting Its Decision, The Commission Violated R.C. 4903.09.

Under R.C. 4903.09, the Commission must issue an Order with findings of fact and must identify the facts in the record upon which the order is based and the reasoning followed in reaching the conclusion. Here, however, the Commission failed to do so. The conclusion that interim rates need to be approved and that they are reasonable is unfounded. There is no discussion of the rates, their reasonableness, or any basis noted by the Commission upon which one could infer how the Commission made such a summary determination. Nor is there any discussion of the appropriateness of the accounting such as the need for it, the appropriateness of establishing a market delta, etc.

What the Finding and Order does is merely restate the history of the prior Ormet special arrangement (paragraphs 1-5), and repeat and synopsize the AEP filing (paragraphs 6-7). There is but one paragraph devoted to the holding –paragraph 8, which states:

The Commission finds that, inasmuch as AEP Ohio's ESP application is still pending before the Commission and there is a need to establish interim rates for electric service for Ormet pending current ongoing negotiations between the parties, the

temporary arrangement proposed in the joint application and AEP Ohio's request for deferrals is reasonable and should be approved.

While there may be a need to establish interim rates,¹⁴ the appropriateness of the interim rates cannot be assumed. Nor can requests for deferrals be assumed to be reasonable on their face. The Commission in its rush to get this decision out, has side-stepped its duties to review the application and make specific determinations as to whether continuation of the special arrangement is just, reasonable, and lawful.

The Commission should on rehearing issue an Entry which details the findings of fact and the reasons prompting its decision on the special arrangement. Otherwise the Commission will have failed to comply with R.C. 4903.09.

D. The Commission Erred In Compensating AEP Ohio For Power Priced At A Market Rate, Which Increases The Costs Collected From The Remaining Customers, When AEP Ohio Does Not Have To Go To The Market To Supply Ormet's Needs.

In approving the special arrangement the Commission also sanctioned the continuation of a subsidy through a "market delta." Under the Commission's approval, the Companies will be able to book the difference between the rate charged to Ormet (less than \$43 MWH) and the 2008 Market Rate. The difference or "market delta" will begin to be deferred once the Ohio Franchise Tax liability is fully depleted.¹⁵ The deferrals create a regulatory asset that will permit the Companies to collect the market delta from customers through increased rates. The market delta represents a subsidy provided by the Companies' customers that funds the special discounted rate to Ormet.

¹⁴ The Companies did not address why Ormet could not receive service under current tariffs that Ormet would qualify for. Temporary Service under tariffed rates could replace the need to approve a special arrangement with Ormet.

¹⁵ The Companies estimate that the Ohio Franchise Tax liability will be depleted at the end of 2008.

The creation of a market delta (with rates higher than those associated with internally supplied power) suggests that the Companies need to go to the market to meet the needs of Ormet. They do not, as the testimony in the ESP case bears out.¹⁶ The Ormet power needs can be met internally or through the AEP system at a price much lower than the \$53 per MWH sought to be established here. Thus, a market delta is not appropriate. Providing a market delta to the Companies will significantly increase the rates the remaining customers of the Companies will pay and the Companies have failed to justify the reasonableness or need for continuing the special rate. Rehearing should be granted on this issue as well.

E. The Commission Erred In Requiring Existing Customers Of The Companies To Fund The Entire Discount To Ormet That Is Created By The Temporary Special Arrangement.

The Commission appears to require existing customers to fund 100% of the market delta created by the temporary special arrangement. This results because the Commission has continued to allow the Company to amortize the Ohio Franchise Tax Liability until fully depleted. Once the liability is depleted, the Companies will be able to accrue deferrals until the temporary special amendment is superseded by a new arrangement or by approved final ESP tariffs. The Companies then would be permitted to collect the deferred market delta revenues from customers. Under the Companies ESP proposal, customers would be responsible for 100% of the delta revenues created under special arrangements such as the Ormet contract.

Permitting 100% collection of the delta revenues is unjust and unreasonable and is inconsistent with Commission policy and precedent on this issue. The Commission has

¹⁶ See for example testimony of IEU Witness Kollen at 3; OEG Ex. 3 in Case No. 08-917-EL-SSO.

generally held that there should be a 50/50 split between the utility and its customers since both parties benefit from the utility providing special rates to certain customers to retain or attract new business in the utility's territory.¹⁷ For example, utilities benefit from distribution revenue directly from the retained customer, and from economic growth in the region (leading to more distribution sales from the customers' employees and from the local suppliers of inputs to the contracting customer). In addition, by retaining such loads the efficiency of the existing facilities can be maintained thereby contributing to stabilizing customer class rate levels.¹⁸ In other words, special reduced rates may be appropriate where granting such rates is necessary to maintain existing customers and load which otherwise would be lost. With both the utility and its customers receiving benefits, it seems only equitable that both the utility and its customers share the expenses.

While S.B. 221 may, in the Commission's perspective, warrant an increase in the revenue that electric utilities collect from customers,¹⁹ 100% recovery of the delta revenues from customers is not warranted. By accepting, without question, that 100% of the delta revenues should be collected from the Companies' customers, the Commission has failed to examine the facts presented by the Companies' application. The Commission should have looked at the special arrangement to determine whether

¹⁷See for example, 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, 91-418-EL-AIR, Opinion and Order at 110 (May 12, 1992).

¹⁸ Ohio Electric Innovative Rates Program Policy, Attachment A.

¹⁹ In the Matter of the Application of Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company for authority to Establish a standard Service offer Pursuant to Section 4928.143, Revised Code in the form of a an Electric Security Plan, Case No. 08-935-EL-SSO, Opinion and Order at 55 (Dec. 19, 2008)

the special arrangement should continue, and whether the Companies customers should continue to subsidize the discount.²⁰ Part of the analysis should also have been to look at the benefits, direct and indirect, from continuing the arrangement. On the other hand, the detriments, direct and indirect, to each specific customer class, should also have been reviewed. There is no evidence that this was done by the Commission. Rehearing should be granted and the Commission should fulfill its statutory duties to review the justness and reasonableness of continuing the special arrangement.

F. The Commission Erred In Approving An Application That Is Discriminatory And Violates R.C. 4905.33, 4905.35, And 4928.02(A).

The Companies' application proposes to discount rates in favor of one select customer, Ormet. The Companies seek to discriminate against the rest of the Companies' customers and intend to increase charges to recover the cost of the Ormet discount, through the establishment of a "market delta."

The application violates both R.C. 4905.33 and R.C. 4905.35 by providing reduced charges to a select individual customer. Under R.C. 4905.33, public utilities cannot directly or indirectly through a charge or rate, seek a greater or lesser charge for services than it demands of others for like services under substantially the same circumstances and conditions. By providing a discount to one specific SSO generation service customer, the Companies discriminate against others that are receiving like services and whose service characteristics are similar to Ormet. R.C. 4905.35 prohibits utilities from giving "undue or unreasonable preference" to any corporation. The Ormet special arrangement gives such unreasonable or undue preference.

²⁰ See for example the Ohio Electric Innovative Rates Program Policy, Attachment A which sets forth the analysis that should be conducted when a special arrangement is being reviewed by the Commission.

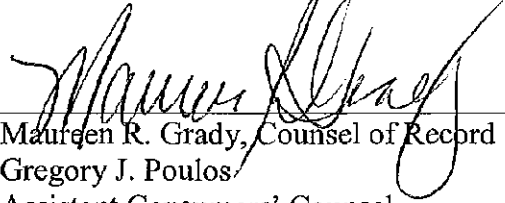
Moreover, this arrangement runs afoul of the provisions of the state policy under R.C. 4928.02(A) which prohibits an electric utility from unduly discriminating in offering its products or services. The undue discrimination is caused by permitting Ormet to receive service at discounted rates, rates not available to others who receive similar service and have service characteristics not unlike Ormet's.

IV. CONCLUSION

For the reasons set forth herein, the Commission should issue an Entry on Rehearing that reverses the Finding and Order approving the interim special arrangement under the rates and conditions found in the application. The Commission should then proceed to conduct an analysis of the proposal, as is required under the Revised Code, taking into account OCC's comments. The Commission should further reverse its approval of the deferral accounting. Otherwise the Companies' customers will be saddled with yet another rate increase (when the Companies seek to collect the deferrals in future rates) that is unlawful, unreasonable, and unjust. In the meantime, Ormet should be billed service under tariffed rates, pending the Commission's rehearing on the justness and reasonableness of continuing the special arrangement.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

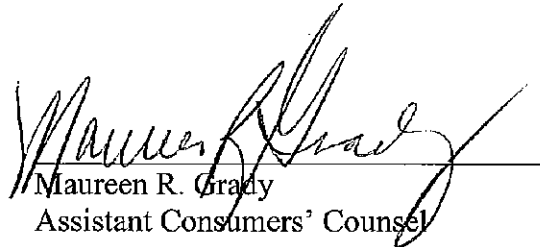


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Application for Rehearing has been served upon the below-named persons via electronic transmission and by regular U.S. Mail Service, postage prepaid, this 6th day of February, 2009.


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