

FILE

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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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

In the Matter of the Joint Application of)
Columbus Southern Power Company and)
Ohio Power Company and Ormet Primary)
Aluminum Mill Products Corporation for)
Approval of a Temporary Amendment to)
their Special Arrangement)

Case No. 08-1339-EL-UNC

**COLUMBUS SOUTHERN POWER COMPANY'S
AND OHIO POWER COMPANY'S MEMORANDUM CONTRA
OCC'S APPLICATION FOR REHEARING**

Ohio Consumer's Counsel (OCC) filed an Application for Rehearing of the Commission's January 7, 2009 Finding and Order in this proceeding. In its Finding and Order, the Commission granted the joint application of Columbus Southern Power Company and Ohio Power Company (the Companies) and Ormet Aluminum Mill Products Corporation (Ormet) for approval of a temporary arrangement and granted the Companies' request for accounting deferrals. OCC's Application for Rehearing was filed on February 6, 2009. Pursuant to §4901-1-35 (B), Ohio Admin. Code, the Companies file this Memorandum Contra OCC's Application for Rehearing. For the reasons stated below, the Commission should deny each of the claims raised in OCC's application for rehearing.

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ARGUMENT

The Commission Did Not Err By Not Ruling on OCC's Intervention

OCC first claims that the Commission improperly failed to address OCC's motion for intervention. Application for Rehearing at 3-6. Although the joint application was filed as an urgent request to address a temporary issue, OCC waited nine days to file its intervention request. Given that OCC did not file its intervention request until the same day that the Finding and Order was issued, it is no surprise that the decision did not reference the filing. Contrary to OCC's assertions, this does not constitute legal error by the Commission.

Through the public release of its meeting agenda, the Commission had previously announced its intention to decide this case on January 7 and OCC's decision to file a pleading two hours before the Commission's meeting cannot prevent the Commission from deciding the case as announced. The result of OCC's logic is that the Commission would have to pull the case from its meeting agenda in order to consider and address any pleading filed before a decision is reached; that approach would empower any person to manipulate or control the Commission's meeting agenda through last minute filings and, in addition to being unwise, has no basis in law. In reality, the Commission has no obligation to await responses from OCC prior to going forward with disposition of its dockets. Rather, the Commission controls its own docket and OCC has no right to a certain time delay in processing applications.

In further support of its intervention claim, OCC essentially claims that it has an absolute right to intervene in accounting applications where no hearing is held, relying on *Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006 Ohio 5853, 856

N.E.2d 940. Application for Rehearing at 5. That is incorrect. Although the 2006 *Consumers' Counsel* decision did conclude that the Commission abused its discretion in denying OCC intervention under the circumstances presented in that case, the Court did not establish any general rule that OCC has a right to intervene. Indeed, the Court distinguished a prior case where timing and delay were relevant factors and did justify denial of intervention. Moreover, the Court found that there was no prejudice to OCC since the Commission took into account OCC's filings when finalizing its decision. Thus, OCC is wrong in claiming that they have an unqualified right to intervene. Notwithstanding the foregoing, the Companies note that they did not file in opposition to OCC's intervention request and the Commission's entry on rehearing could still grant OCC intervention and consider its claims prior to issuing its rehearing order in this case.

The Temporary Amendment was Properly Approved

OCC claims that 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." Application for Rehearing at 7. On the contrary, the Companies and Ormet did satisfy their burden of proof in support of the Temporary Amendment through the detailed information and representations made in the Joint Application. The Temporary Amendment was properly approved and OCC's second argument, too, should be rejected.

First, OCC's suggestion that the application must conform to the Commission's recently-adopted rules in Chapter 4901:1-38 of the Ohio Administrative Code is misguided. These rules were not even adopted until February 11, 2009 – this is not only

after the joint application was filed and after the Finding and Order was issued but was after OCC filed its application for rehearing. More importantly, the rules have not been through the JCARR process and, therefore, are simply not effective. Thus, it is patently unreasonable to suggest the rules apply in this case.

Regarding satisfaction of the Joint Applicants' burden of proof, the Commission found the Temporary Amendment reasonable and concluded that interim rates were needed due to the pending ESP case and the expiration of the existing arrangement that was designed to coincide with a new rate plan. Although not acknowledged by the OCC, the transitory nature of the Temporary Amendment is unique and itself justifies a streamlined and expeditious process for approval. The need for interim rates was created by the gap in time from the scheduled expiration of the existing special arrangement and the Commission's decision in the Companies' ESP case.

The Temporary Amendment's relationship to the ESP case was extensively discussed in the Joint Application. For example, the Joint Applicants stated that the Companies' slice of system proposal in the ESP cases was based, in part, on addressing the Companies' acceptance in Case No. 05-1057-EL-CSS of the Ormet load obligation and, if adopted, could result in Ormet taking service under the standard service offer for generation. Joint Application at 3. The Joint Applicants also stated that the requested amendment is temporary in nature and is not intended to create any precedent, binding or otherwise, concerning an appropriate generation rate for Ormet. *Id.* at 4. Finally, Joint Applicants stated that the temporary solution is intended solely as a placeholder to allow the Commission the time needed to rule on the ESP application without undoing previously-approved Commission decisions. *Id.* at 6.

The Finding and Order recognized these points in making its key findings and conclusions:

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. The Commission's approval of this interim arrangement should not be considered precedent for further consideration of a long-term arrangement in either AEP Ohio's ESP proceeding or any application for a reasonable arrangement.

Finding and Order at 3. In short, the temporary arrangement came about based on a unique set of circumstances and is likely to only be in place for a matter of weeks, not years. Notwithstanding OCC's characterization that the Commission "hurriedly approved" the temporary special arrangement and the request for accounting deferrals, the exigent and short-term nature of the arrangement provides ample justification for a streamlined process and abbreviated period of deliberation by the Commission. OCC's claim that the decision lacks adequate support should be rejected.

It is also telling that OCC readily admits that a hearing was not required in order to consider and approve the special arrangement. Application for Rehearing at 7. Consequently, there is no right to have evidence presented or to challenge the proposal through testimony or factual assertions. Yet, OCC makes factual assertions based on information obtained through the Internet in an attempt to rebut statements made in the application. *Id.* While OCC is entitled to make its arguments and advance claims, it should not be permitted to force a discretionary hearing when the Commission has not chosen to conduct a hearing.

The Commission can, and routinely does, consider and adopt special arrangements based on a “paper proceeding” and reliance on the application and any supporting pleadings or information. Given that the Commission is not required to conduct a hearing in this case and OCC is not entitled to present evidence, it was reasonable for the Commission to rely for this purpose upon Ormet’s representation in the application, which was signed on behalf of its duly authorized legal counsel, that continuing to charge Ormet the \$43/MHW generation rate “could result in a breach of certain covenants in its Bank Agreement which, in turn, would jeopardize the continued operation of the Hannibal facilities.” Joint Application at 4. Moreover, the Commission is already familiar with Ormet’s economic struggles, including its Chapter 11 bankruptcy filing and its economic plant operation curtailments, by adjudicating prior cases. *In the Matter of the Complaint of Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation v. South Central Power Co. and Ohio Power Co.* (“Ormet Complaint Case”), Case No. 05-1057-EL-CSS, Supplemental Opinion and Order (November 8, 2006) at 3. OCC should not be permitted to block a reasonable application simply by raising unsubstantiated factual assertions or by merely challenging factual statements in an application. If the Commission thought a hearing was needed to resolve critical factual issues, it could have conducted a hearing to do so. The Commission explicitly found that “the temporary arrangement proposed in the joint application and AEP Ohio’s request for deferrals is reasonable and should be approved.” Finding and Order at 3. The Commission’s finding of reasonableness is sufficient to support the decision to approve the Temporary Amendment.

The Finding and Order Satisfies Sec. 4903.09, Ohio Rev. Code

Similarly, OCC alleges that the Commission “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.” Application for Rehearing at 9. This argument also merely reflects OCC second-guessing the Commission’s reasons for approving the Temporary Amendment. As the Supreme Court has held, it is not an appropriate role for OCC to second-guess the Commission’s judgment and reweigh the record and the pursuit of such efforts does not form the basis for a valid legal challenge to a Commission decision. *Consumers’ Counsel v. Pub. Util. Comm.*, 114 Ohio St.3d 340, 2007 Ohio 4276, 872 N.E.2d 269, at ¶ 29 (and cases cited therein). Specifically with regard to Sec. 4903.09, Ohio Rev. Code, the Supreme Court has held that strict compliance is not required and that the Court just needs to understand the reasons for the Commission’s decision and the order must have record support. *Industrial Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St.3d 486, 2008 Ohio 990, 885 N.E.2d 195, at ¶ 30 (2008). Accordingly, the claim should be rejected.

OCC’s Collateral Attack on Full Recovery of the Market Delta is Without Merit

Next, OCC argues that the Commission erred in approving the Temporary Amendment because it allows full recovery of the market delta. Application for Rehearing at 9-12. First, OCC challenges the use of a market rate to calculate the delta revenue associated with the Temporary Amendment. Application for Rehearing at 9-10. Second, with respect to allowance of 100% of the market delta, OCC argues that the Commission has generally held that there should be a 50/50 split between the utility and

its customers. Application for Rehearing at 10-12. Both of these arguments amount to a collateral attack on the Commission's prior orders in the *Ormet Complaint Case* and should be rejected for the same reasons relied upon in that case.

Whatever merit there may have been to a "50/50 policy" under a different statutory scheme, it is of no relevance for "continuation" under Am. Sub. Senate Bill No. 221 (S.B. 221). Sec. 4905.31, Ohio Rev. Code, as amended by S.B. 221 now explicitly allows recovery of foregone revenue resulting from a reasonable arrangement based on economic development. In approving any special arrangement under Sec. 4905.31, Ohio Rev. Code, prior to becoming effective; a public interest determination is made by the Commission, either explicitly or implicitly, as part and parcel of any such approval. If it is truly an appropriate economic development special arrangement, the value of the discount will be far outweighed by the public benefit and is appropriate for full recovery by the Companies. Thus, the structure and ostensible intention of S.B. 221 is to reduce existing disincentives that may discourage companies from pursuing economic development by allowing full recovery of delta revenue – not merely half of the discount.

In any case, this approach of 100% market delta recovery is certainly consistent with the prior determinations made by the Commission prior to passage of S.B. 221 in the *Ormet Complaint Case*. In approving the existing Ormet special arrangement, the Commission found that the Stipulation, including recovery of all of the delta revenues based on a market price, "benefits ratepayers and the public interest." *Ormet Complaint Case*, Supplemental Opinion and Order (November 8, 2006) at 9. The continuation of full market delta recovery in this context also continues to benefit ratepayers and the public interest.

Although not expressly repeated again within the Finding and Order, another important factor supporting the Commission's adoption of the Temporary Amendment is undoubtedly the continued economic development value to the region of Ormet's continued business operations. As the Commission has previously recognized in adopting the existing Ormet special arrangement, there are extensive economic benefits resulting from the transfer of service responsibility to the Companies, including the employment of about 1,000 people and the payment of substantial taxes. *Id.* at 7. The Commission concluded that "[t]hese extensive economic benefits can only be obtained through the resumption of operations at [Ormet's] Hannibal Facilities, and the Stipulation will facilitate the resumption of those operations." *Id.* Ultimately, the Commission determined that the Ormet special arrangement was a reasonable economic development agreement.

More to the point, the Commission's prior decision authorized recovery of the full market delta. *Id.* at 9. In the current Finding and Order, the Commission explicitly recognized its prior decision involving the permitted full market delta recovery and decided to continue the same approach. Finding and Order at 2. Thus, it was reasonable and lawful for the Commission to approve the Temporary Amendment providing for deferral and subsequent recovery of the full market delta and OCC's present collateral attack should be rejected.

The Temporary Amendment is Not Unduly Discriminatory

Finally, OCC briefly raises a discrimination claim, arguing that the Temporary Amendment is prohibited by Sec. 4905.33, 4905.35 and 4928.02(A), Ohio Rev. Code. Application for Rehearing at 12. OCC explained its theory that “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.” *Id.* OCC’s discrimination claim lacks any support and should be rejected.

As a threshold matter, it is undisputed that OCC’s factual premise for the discrimination claim is invalid. The Temporary Amendment charges Ormet GS-4 tariff rates for generation service. Joint Application at 5. That rate is the same rate paid by other members of that customer class and cannot provide the basis for an undue discrimination claim.

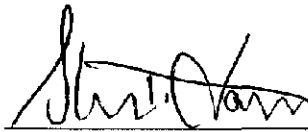
In any case, OCC lacks standing to assert such claims on behalf of other industrial customers. OCC has no statutory authority to represent the interests of industrial customers and cannot raise claims based on the interests of such customers. If there were a basis to conclude that the Companies unduly discriminated against other similarly situated industrial customers in favor of Ormet (which there is not), the aggrieved parties would be other industrial customers. The Supreme Court of Ohio has long recognized that parties cannot raise abstract challenges to Commission orders but must raise concrete issues that have inflicted prejudice directly on the challenging party. *Ohio Contract Carriers v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, 42 N.E.2d 758.

Far from undue discrimination, the Companies' provision of electric services to Ormet involves unique circumstances. Indeed, Ormet epitomizes the concept of unique circumstances, an obvious fact that is overlooked by the OCC. Ormet has a peak demand of approximately 520 MW at a 99 percent load factor. *Ormet Complaint Case*, Supplemental Opinion and Order (November 8, 2006) at 4. A customer with a peak demand that is equivalent to the load of a large city while having a load factor of 99 percent is not only unique, but places Ormet in a customer class by itself. OCC's discrimination claim based on lack of similar rates for other customers "who receive similar service and have service characteristics not unlike Ormet's" [Application for Rehearing at 13] is without basis. The Commission has already determined that Ormet is unique and that prior determination fully supports the continuation of the special agreement with the Temporary Amendment.

CONCLUSION

For the foregoing reasons, OCC's Application for Rehearing should be denied.

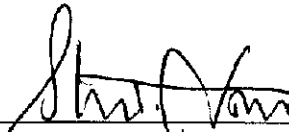
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra OCC's Application for Rehearing was served by U.S. Mail upon the individuals listed below this 17th day of February, 2009.



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