

FILE

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

RECEIVED-DOCKETING DIV
2009 MAR 13 PM 3:53
PUCO

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.)

**MOTION TO INTERVENE
AND
MOTION TO SHORTEN THE DISCOVERY RESPONSE TIME
AND
REQUEST FOR EXPEDITED RULING ON MOTION TO SHORTEN THE
DISCOVERY RESPONSE TIME
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of residential utility consumers, moves the Public Utilities Commission of Ohio ("PUCO" or "Commission") to grant the OCC's intervention in the above-captioned case where Ormet Primary Aluminum Corporation ("Ormet") is seeking discounted rates from Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP") (collectively "AEP") that would be paid by other customers including residential customers.¹ Ormet filed its Application ("Application") in this case on February 17, 2009, as a request for a "unique arrangement."² The Ohio Energy Group and the Industrial Energy Users - Ohio

¹ This motion to intervene is supported by R.C. Chapter 4911, R.C. 4903.221, Ohio Adm. Code 4901-1-11 and 4901-1-12.


² Application at 1.

have already intervened and commented that Ormet's proposed unique arrangement is – or may be – unjust or unreasonable.³

In addition, OCC supports the Industrial Energy Users-Ohio's position that further investigation of the Application is needed.⁴ In order to assure that the parties have an opportunity to review Ormet's proposal using, among other things, discovery as provided under R.C. 4903.082, OCC requests a shortened discovery response schedule, as permitted under Ohio Adm. Code 4901-1-17(G). OCC recently made a similar request in a case before the Commission that pertained to a reasonable arrangement and it was granted.⁵ The reasons for granting OCC's motions and request are set forth in the attached Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Gregory J. Poulos, Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574
poulos@occ.state.oh.us

³ Motion to Intervene of the Ohio Energy Group (March 3, 2009) at 8; Comments of Industrial Energy Users-Ohio (March 9, 2009) at 8.

⁴ Comments of Industrial Energy-Ohio (March 9, 2009) at 7.

⁵ In the Matter of the Application of National Aeronautics and Space Administration at Glenn Research Center to Establish a Reasonable Arrangement with The Cleveland Electric Illuminating Company and FirstEnergy Corporation for Electric Service, Case No. 09-91-EL-AEC, Entry (March 12, 2009) at 3.

**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. |) | |

MEMORANDUM IN SUPPORT

I. INTRODUCTION

Ormet is requesting that its discounted rate be applied to its *full* electricity needs and that the price Ormet pays for electricity should be indexed to the price of aluminum as reported on the London Metal Exchange ("LME").⁶ Ormet states in its Application that AEP will not support the proposed unique arrangement unless AEP is permitted to recover 100% of all revenues lost by entering into this unique arrangement with Ormet.⁷ Yet Ormet does not identify or estimate the amount of delta revenues or revenues lost by AEP that will be created by this agreement.

While OCC recognizes the value and importance of Ormet's presence in the State of Ohio, the PUCO must consider, as part of its review of Ormet's proposed discount and unique arrangement, the rate increase that AEP will expect other customers including residential customers to pay as reimbursement for the proposed discount. At a time when many Ohioans have to make choices about which bills to pay, it is critically important to

⁶ Application at 5.

⁷ Application at 7.

evaluate the reasonableness of every rate increase that is proposed for residential customers' utility bills – in particular when those requests are to increase consumers' rates to cover discounts for other customers. Indeed, the Ohio General Assembly mandated, as a matter of state policy, that the PUCO must “[e]nsure the availability to consumers of ... nondiscriminatory, and reasonably priced retail electric service.”⁸

While this arrangement is one of the first filed in 2009 in the AEP service territory, it will likely be one of many requests for discounted rates that will soon be filed with the Commission, especially if potential applicants see others obtaining discounts from the PUCO. As the United States Supreme Court wrote with regard to a different issue but in a matter where the Court was concerned about the proliferating impact of a decision—what “is today a trickling stream may all too soon become a raging torrent.”⁹

OCC moves to intervene in the above-captioned docket in order to represent the interests of approximately 1.27 million residential electric customers of AEP who will be required to subsidize, in whole or part, the discount given to Ormet. These customers are the very ones whose rates will be increased – to an extent that is not defined – to cover the discount to Ormet, if the Application is approved.

⁸ R.C. 4928.02(A).

⁹ School District of Abington Township, Pennsylvania et al. v. Schempp, 374 U.S. 203, 225 (1963).

II. ARGUMENT

A. Intervention

OCC moves to intervene under its legislative authority to represent residential utility consumers in Ohio, pursuant to R.C. Chapter 4911. R.C. 4903.221 provides, in part, that any person “who may be adversely affected” by a PUCO proceeding is entitled to seek intervention in that proceeding. The interests of Ohio’s residential consumers may be “adversely affected” by this case, especially if the consumers are unrepresented here. This Application seeks approval of a unique arrangement that incorporates a discounted rate for one customer, Ormet, with the potential and likelihood that other customers, including residential customers, will pay for that unspecified discount. Thus, this element of the intervention standard in R.C. 4903.221 is satisfied.

R.C. 4903.221(B) requires the Commission to consider the following criteria in ruling on motions to intervene:

- (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 proceeding; and
- (4) Whether the prospective intervenor will significantly contribute to the full development and equitable resolution of the factual issues.

First, the nature and extent of OCC’s interest includes ensuring that AEP’s residential customers have the opportunity to review the facts -- all of the facts -- of this unique arrangement. With such a review and other due process, OCC will be given its opportunity to argue for changes, alterations, or modifications to the arrangement that will protect customers from bearing the costs of discounted service, costs that may be

shown to be inappropriate, unjust, or unreasonable. This interest is different than that of any other party, and is especially different than that of Ormet or AEP whose advocacy includes their own financial interests.

Second, OCC's advocacy for consumers will include advancing the position that residential customers should only pay for discounts to Ormet, to the extent such payments are reasonable and permissible under Ohio law. Under Ormet's Application, the effect of the arrangement on residential customers cannot even be ascertained. OCC's position is therefore directly related to the merits of Ormet's proposal in this case.

Third, OCC's intervention will not unduly prolong or delay the proceeding. OCC, with its longstanding expertise and experience in PUCO proceedings, will duly allow for the efficient processing of the case with consideration of the public interest.

Fourth, OCC's intervention will significantly contribute to fully developing and equitably resolving the factual issues. OCC will develop and present lawful and reasonable recommendations for resolving the case.

OCC also satisfies the intervention criteria in the Ohio Administrative Code, which are subordinate to the criteria that OCC satisfies in the Ohio Revised Code. To intervene, a party should have a "real and substantial interest" according to Ohio Adm. Code 4901-1-11(A)(2). As the residential utility consumer advocate, OCC has a real and substantial interest in this case where the outcome could have the effect of increasing rates paid by residential customers.

In addition, OCC meets the criteria of Ohio Adm. Code 4901-1-11(B)(1)-(4). These criteria mirror the statutory criteria in R.C. 4903.221(B) that OCC has already addressed, and that OCC satisfies.

Ohio Adm. Code 4901-1-11(B)(5) states that the Commission shall consider the “extent to which the person’s interest is represented by existing parties.” While OCC does not concede the lawfulness of this criterion, OCC satisfies this criterion because OCC has been uniquely designated as the statutory representative of the interests of Ohio’s residential utility consumers.¹⁰ That interest is different from, and not represented by, any other entity in Ohio.

Three years ago the Supreme Court of Ohio confirmed OCC’s right to intervene in PUCO proceedings, in ruling on an appeal in which OCC claimed the PUCO erred by denying its intervention. The Court found that the PUCO abused its discretion in denying OCC’s intervention and that OCC should have been granted intervention.¹¹

OCC meets the criteria set forth in R.C. 4903.221, Ohio Adm. Code 4901-1-11, and the precedent established by the Supreme Court of Ohio for intervention. On behalf of AEP’s residential consumers, the Commission should grant the OCC’s Motion to Intervene.

B. MOTION TO SHORTEN THE RESPONSE TIME FOR DISCOVERY

OCC is seeking an order requiring all discovery responses to be tendered within seven (7) days of the request. OCC needs adequate time for case preparation, as provided by R.C. 4903.082 and Ohio Adm. Code 4901-1-16(A), including review of the specific requests that Ormet has made in its Application. Ohio Adm. Code 4901-1-17(G) allows for a motion to shorten the discovery time periods for responses.

¹⁰ R.C. Chapter 4911.

¹¹ *Ohio Consumers’ Counsel v. Public Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, ¶18-20.

OCC recently made the same request in a case before the Commission that pertained to a unique arrangement for the National Aeronautics and Space Administration at Glenn Research Center and it was granted.¹² OCC's request is also consistent with other Commission Entries in which the discovery process was shortened. The Commission stated:

Due to the abbreviated period for the start of the hearing, response time for discovery should be shortened to seven days. Discovery requests and replies shall be made by hand delivery, email or telefax. An attorney serving a discovery request shall attempt to contact the attorney upon whom the discovery request will be served in advance to advise him or her that the request will be forthcoming. To the extent a party has difficulty responding to a discovery request within the seven-day day period, counsel for the parties can discuss the problem and work out a mutually satisfactory solution.¹³

The Motion is also consistent with the precedent of the Supreme Court of Ohio. In a case involving OCC and Duke Energy, the Court ruled that the PUCO had erred in denying OCC discovery of certain information related to contracts.¹⁴

Granting this Motion will allow the parties an opportunity to investigate the important issues involved in this proceeding by providing an adequate mechanism for the parties to serve discovery and prepare their cases for presentation to the PUCO – in a

¹² In the Matter of the Application of National Aeronautics and Space Administration at Glenn Research Center to Establish a Reasonable Arrangement with The Cleveland Electric Illuminating Company and FirstEnergy Corporation for Electric Service, Case No. 09-91-EL-AEC, Entry (March 12, 2009) at 3.

¹³ In the Matter of the Applications of Ohio Edison Company, The Cleveland Electric Illuminating Company, and the Toledo Edison Company for Authority to Continue and Modify Certain Regulatory Accounting Practices and Procedures, for Tariff Approvals and to Establish Rates and Other Charges Including Regulatory Transition Charges Following the Market Development Period, Case No. 03-2144-EL-ATA, et al. Entry at 5. (October 28, 2003). The Commission established a seven (7) day response period. In the Matter of the Continuation of the rate Freeze and Extension of the Market Development Period for the Dayton Power and Light Company, Case No. 02-2779-EL-ATA, et al. Entry at 2. (April 1, 2003). The Commission established a ten (10) day response.

¹⁴ *Ohio Consumers' Counsel v. Public Utilities Comm.*, 111 Ohio St. 3d. 300, 2006 Ohio 5789, ¶86.

reasonably short timeframe. OCC also expects to work with Ormet through informal means to endeavor to obtain some of the pertinent information.

C. REQUEST FOR EXPEDITED RULING ON MOTION TO SHORTEN THE DISCOVERY RESPONSE TIME

OCC seeks an expedited ruling, under Ohio Adm. Code 4901-1-12(C). An expedited ruling is warranted on the motion to shorten the discovery response time, due to the short timelines the PUCO has employed to process cases similar to this one. In accordance with Ohio Adm. Code 4901-1-12(C), OCC contacted counsel for Ormet and AEP to obtain consent for the hearing examiner to make a quick ruling on this motion without the filing of a memoranda and without waiting for the other parties to file a memorandum contra, however, the parties would not agree to OCC's request.¹⁵ In any event, the PUCO should rule as expeditiously as possible. In addition, OCC asks that the Commission set the hearing date out far enough to allow the parties time for "full and reasonable discovery" under R.C. 4903.082 and time to otherwise complete case preparation and review. The Industrial Energy Users-Ohio similarly stated that the proposed arrangement may be unjust or unreasonable and [urges the Commission to] subject the Application to further investigation."¹⁶

III. CONCLUSION

For the reasons stated above, the Commission should grant OCC's Motion to Intervene on behalf of the approximately 1.27 million residential customers who have an interest in the outcome of this case. In addition, OCC requests a fair and reasonable


¹⁵ Ormet and AEP stated they could not agree to OCC's request without a longer time to discuss the request and without seeing the motion first.

¹⁶ Comments of Industrial Energy Users-Ohio (March 9, 2009) at 7.

amount of time to review Ormet's request before filing comments and potentially participating in a hearing on the matter. The Commission should establish an expedited discovery response timeline of seven days to permit the parties the opportunity to complete a thorough and adequate review of Ormet's proposal.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL




Gregory J. Poulos, Counsel of Record
Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: 614-466-8574
poulos@occ.state.oh.us

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion to Intervene and Motion to Shorten the Discovery Response Time has been served upon the below-named persons via regular U.S. Mail Service, postage prepaid, this 13th day of March, 2009.



Gregory J. Poulos
Assistant Consumers' Counsel

SERVICE LIST

Marvin Resnik
Steve Nourse
AEP Service Corp.
1 Riverside Plaza, 29th Floor
Columbus, OH 43215

Duane Luckey
Attorney General's Office
Public Utilities Commission of Ohio
180 E. Broad St., 9th Fl.
Columbus, OH 43215

Clinton A. Vince
William D. Booth
Emma F. Hand
Scott Richardson
Sonnenschein Nath & Rosenthal LLP
1301 K Street NW
Suite 600, East Tower
Washington, DC 20005

David F. Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 1510
Cincinnati, OH 45202

John W. Bentine
Mark S. Yurick
Matthew S. White
Chester, Willcox & Saxbe LLP
65 East State St., Ste. 1000
Columbus, OH 43215-4213