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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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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.)

**COMMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

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The Office of the Ohio Consumers' Counsel ("OCC"), on behalf of the 1.3 million Ohio Power Company ("OPC") and Columbus Southern Power ("CSP") (Collectively "AEP") residential utility consumers, files its comments in the above-captioned case where Ormet Primary Aluminum Corporation ("Ormet" or "the Company") is seeking electricity rates with significant discounts that would be paid by other customers including residential customers.¹

On February 17, 2009, Ormet filed an application ("Original Application") for a "Unique Arrangement" pursuant to R.C. 4905.31 and Ohio Adm. Code 4901:1-38-05. Under the terms of the Original Application Ormet requested approval of an all-in \$38/MWh rate for power for all of 2009 – including a proposal to make the rates retroactive back to January 1, 2009, despite the fact that there are already existing

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

approved rates for Ormet that cover that same time period.² After 2009, Ormet proposed that the Commission approve a rate that indexes the electricity price that Ormet pays to the price of aluminum, as reported on the London Metal Exchange (“LME”). As proposed, Ormet will create a “Target Price” that will be developed by Ormet “at which Ormet could afford to pay the AEP Ohio Tariff Rate and still maintain sufficient cash flow to sustain its operations at the Hannibal Facilities and pay its required legacy pension costs.”³ If the LME price of aluminum is less than or equal to the Target Price, Ormet will pay the Indexed Rate. When the LME price of aluminum is greater than the Target Price by less than \$300, Ormet will pay a small premium of 2% above the AEP Tariff Rate. The premium shall be 5% above the Tariff Rate if the increase is greater than \$300.

Finally, Ormet’s Original Application requested that AEP receive 100% of the revenues it would forgo because of this proposed Unique Arrangement – “Ormet understands that AEP is supporting the proposed Unique Arrangement on the condition that AEP is granted permission by the Commission to recover from other customers through a rider all revenues lost by entering into this Unique Arrangement.”

On April 10, 2009, Ormet filed an Amended Application for a Unique Arrangement (“Amended Application”) that primarily requested an even lower power rate of \$34/MWh in the event that two potlines were shutoff and \$38/MWh in all other

² See In the Matter of the Joint Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify their Accounting Procedures; 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, Finding and Order (Jan. 7, 1009). OCC’s Application for rehearing of this Order was granted on the basis that “sufficient reason has been set forth by OCC to warrant futher consideration of the matters specified in the application for rehearing.” Entry on Rehearing at 4 (Mar. 4, 2009).

³ Direct Testimony of Henry W. Fayne, (April 23, 2009) at 3.

scenarios (as proposed in the Original Application.)⁴ Of course, the lower rate would mean, under Ormet's proposal, that customers would be funding even more of a discount to Ormet. The Amended Application identified the changing market conditions as the reason for the reduced rate.⁵

On April 17, 2009, the PUCO issued an Entry granting intervention to AEP, Ohio Energy Group, The Kroger Company, Industrial Energy Users-Ohio and OCC. In addition, the PUCO advised interested parties that if they desired to intervene and file comments and objections, they must do so by April 28, 2009. Additionally the Commission ruled that a hearing will be held on the matter on April 30, 2009.

OCC's comments will address the fact that Ormet's proposed electricity rates, that will be applicable for the 10-year term of the contract, are unreasonable for a number of reasons and should be disapproved by the Commission. First and foremost, the concept that AEP customers should be partners in the risk that Ormet takes in buying and selling aluminum is unreasonable and unacceptable. This happens under the Ormet proposal because the discount that customers must fund is tied to the price of aluminum. While the investors of Ormet have willingly taken risks on the profitability of Ormet, ratepayers should not be asked to do so. Supporting economic development in the State of Ohio is one thing—taking on the risk of a business failing or succeeding in the marketplace is another. For this reason, OCC opposes the collection of delta revenues tied to the index price of aluminum.

⁴ See 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 (April 10, 2009) at cover letter. ("Amended Application")

⁵ See Id.

Second, under the Ormet arrangement customers must bear great risks related to the price of aluminum, while gaining very little if the price of aluminum rises. This occurs because the risk sharing proposal is asymmetrical. Indeed it is not at all clear from the testimony or the arrangement itself that customers would even receive any upside to the arrangement, as Ormet and AEP have not fully explained how payments above the tariff rate would transfer to customers. Absent such evidence, it cannot be assumed that any “benefit” will be shared with customers of the utility.

Even assuming that some upside to the risk sharing does actually occur, as discussed below, at today’s aluminum prices, Ormet’s proposed risk sharing concept would in some cases result in AEP customers (including the residential class) underwriting *all* of Ormet’s power costs – and more. When aluminum prices are above the target price, the delta revenue “credit”⁶ to customers of AEP are de minimis when compared to their delta revenues collected when prices are lower than the target price. It is noteworthy that a conservative estimate of the Ormet discount that customers will be paying can reach \$179 million dollars -- annually.⁷

Third, Ormet’s proposed arrangement is also not reasonable because the Unique Arrangement requests that the PUCO allow the Company to set rates retroactively – the Unique Arrangement is proposed to be effective as of January 1, 2009.⁸ This is unlawful

⁶ A credit is assumed if the price rises above the target price under the conditions set forth in the arrangement. Again, there presently is not sufficient information in the record to determine that this does in fact occur.

⁷ See Direct Testimony of OCC witness, Amr A. Ibrahim, (April 27, 2009) at 10, footnote 20. (Calculated from multiplying Ormet’s full operation load of 540 MW x .0985 (efficiency) x 8760 (number of hours per year) x \$38.43/MWh.

⁸ See Amended Application (April 10, 2009) at 1.

under Ohio statutes and Ohio Supreme Court precedent and exacerbates the risks to the customers, adding millions of dollars to the customer subsidized discount.

Fourth, Ormet's request for a release from terms and conditions of its service requirements, including the requirements that Ormet make advanced payment of its monthly electricity bill and pay a deposit – in amounts that are unknown -- puts AEP customers immediately at risk of having to pay substantially more if the Company closes its doors. As part of the agreement if Ormet closes its doors, AEP customers will be responsible to reimburse AEP for the advanced payments and deposit that Ormet should have paid. Ormet has already raised additional concerns that it may soon have to close its doors. On April 16, 2009, Ormet commenced a lawsuit against Glencore Ltd. to enforce Ormet's contract rights under a tolling agreement with Glencore.⁹ As part of the lawsuit Ormet filed a preliminary injunction against Glencore Ltd. to prevent the interruption of alumina deliveries as required under the two parties tolling agreement. Ormet made the preliminary injunction filing to prevent Glencore from breaking its contractual obligations that could force Ormet to shut down operations.¹⁰

Finally, Ormet has provided no facts to support its position that customers should have to pay 100% of the delta revenues. It is not reasonable for the Commission to deviate from past precedent without any analysis from either AEP or Ormet establishing the reasonableness of the discount the amount of the delta revenue created, and why the Commission precedent on sharing of delta revenues should be overridden. While OCC recognizes the difficult conditions through which companies like Ormet must navigate

⁹ See Ormet press announcement, (April 16, 2009) *Ormet Commences Legal Actions Against Glencore to Enforce Rights Under Tolling Agreement*, www.ornet.com, (Attachment A)

¹⁰ See Id.

with the poor economic climate that exists today, Ohio's residential customers are also struggling to deal with the same conditions. At a time when many Ohioans have to make choices about which bills to pay with the little money they have, adding more costs onto their utility bills to cover discounts of this magnitude is unreasonable.

OCC moved to intervene in the above-captioned docket in order to represent the interests of approximately 1.3 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 Amended Application is approved.

I. ARGUMENT

Although Senate Bill 221 explicitly permits reasonable arrangements based on unique circumstances, if the arrangement is filed with and approved by the PUCO. Ormet bears the burden of proving that its Application should be approved. OCC bears no burden of proof in this case.¹¹ The Company must establish that the proposal is reasonable and does not violate the provisions of R.C. 4905.31, 4905.33 and 4905.35. Moreover, such arrangements are to be under the supervision and regulation of the Commission and subject to "change, alteration, or modification" by the Commission.¹²

¹¹ R.C. 4909.18 provides that, in the circumstance where a proposal "may be unjust or unreasonable, the commission shall set the matter for hearing" and "the burden of proof to show that the proposals in the application are just and reasonable shall be upon the public utility." As part of the Commission's recently adopted rules for Unique Arrangements: A mercantile customer apply to the commission for a unique arrangement. Each customer applying for a unique arrangement bears the burden of proof that the proposed arrangement is reasonable and does not violate the provisions of sections 4905.33 and 4905.35 of the Revised Code, and shall submit to the commission and the electric utility verifiable information detailing the rationale for the arrangement." Ohio Adm. Code 4901:1-38-05(B)(1) (emphasis added).

¹² R.C. 4905.31(E).

The PUCO recently adopted rules specifically addressing Reasonable Arrangements.¹³ Ormet's Original Application and Amended Application appear to be "unique" arrangements and thus are governed by Ohio Adm. Code 4901:1-38-05 of the PUCO's adopted rules. Under subsection (B)(1) of that provision, Ormet has the burden of proving that the "proposed arrangement is reasonable." The rules further provide that customers seeking service under a unique arrangement must reflect terms and conditions for circumstances for which the electric utility's tariffs have not already provided.¹⁴

Under the rules, if it appears to the Commission that the application is unjust or unreasonable, the Commission may order a hearing.¹⁵ Indeed the Commission's April 17, 2009 Entry establishes a date for preliminary hearing. In this case, a hearing is necessary because Ormet proposes an arrangement that will result in AEP customers, including residential customers, underwriting potentially hundreds of millions of dollars in Ormet's power costs. Part of the Commission's decision in this case should be to address the issues of how much of a discount should be provided to Ormet, should the discount be limited to no more than the Company's variable costs, or maybe the salaries it pays to its employees, when should the discount begin, how long should the discount last, who should bear the cost of the discount, and what portion of the discount should be borne by customers vs. the electric utility. Finally, as discussed below, the Commission should consider how Ormet's recent lawsuit against Glencore could result in an

¹³ Ohio Adm. Code Chapter 4901:1-38. (adopted on September 17, 2008, Case No. 07-888), and subsequently modified and adopted by Entry on Rehearing (Feb. 11, 2009). These rules have not been submitted to the Joint Committee on Agency Rule Review for final review and approval.

¹⁴ See Ohio Adm. Code 4901:1-38-05(D).

¹⁵ See Ohio Adm. Code 4901:1-38-05(B)(3).

immediate default and leave customers paying millions of dollars for a deposit and advanced payment that were waived.

A. Ormet's Proposed Unique Arrangement Is Unreasonable Because It Seeks To Have Customers Bear The Financial Risk When The Price Of Aluminum Is Low, Yet, Refuses To Share The Rewards When Prices Are High.

Ormet's proposed indexed rate structure for its power expense is designed to reduce the Company's exposure – or the financial risks -- inherent with its traded commodity, aluminum. However, Ormet's proposed indexed rate structure exponentially allocates a much higher percentage of the risk created by low aluminum prices to customers while not allocated a comparable percentage of the financial gain when the aluminum prices are high.

Ormet has proposed a variable rate for power that attempts to have customers, including residential customers, underwrite all of the Company's power needs when the price of aluminum hits a certain point. For example, in year 2010, Ormet's electricity rate shall be equal to the AEP Tariff Rate (\$38.43/MWh)¹⁶ minus \$0.0490 for each \$1/ton less than Ormet's Target London Metal Exchange Price ("LME") which is set at \$2725 per ton.¹⁷ Accordingly, any price in LME less than \$1941 per ton shall result in zero price/MWh for Ormet,¹⁸ and Ormet would be, in such case, passing the entire cost of its electricity use to all the other customers of AEP, including residential customers. The total annual cost of the proposed Unique Arrangement in such eventuality at full operation would be a staggering \$179 million annually. Over the period January 1, 2000 through

¹⁶ Ormet proposes a rate of \$38.43/MWh unless two potlines are curtailed then the rate proposed by the Company is \$34/MWh.

¹⁷ See Amended Application (April 10, 2009) at Attachment A, Schedule A, p. 1.

¹⁸ $[(\$1941 - \$38.43) / 0.049] + \$38.43 = \text{zero}$. Id., at Attachment A, Schedule A, p. 1, Notes: 2.

March 31, 2009, LME prices were never above this level of \$2,725 per ton in 2000, 2001, 2002, 2003, 2004 and most of 2005.¹⁹ LME prices have also been well below \$1941 per ton since the last quarter of 2008.²⁰ Furthermore, if this formula is to be applied to observe an average LME price similar to those of the three months of January – March 2009,²¹ the Ormet Aluminum Electricity Rates for 2010 would be a negative \$28.46/MWh. It is inconceivable that Ormet should be allowed to pass the cost of its entire electricity use onto other customers, let alone at negative rates. In addition, the proposed indexed rate is not reasonable because it creates confusion on whether there is a price floor below which the Ormet electricity price cannot go. As filed, the request allows for the different customer classes, including residential customers to pay for Ormet's consumption at negative rates.²²

Finally, the proposed indexed rate is asymmetrical and extremely disadvantageous to the customers. When the LME aluminum price is greater than the Target LME price but not by more than \$300 per ton, Ormet shall pay 102% of the AEP Ohio Tariff Rate.²³ Further, Ormet shall pay 105% of the AEP Ohio Tariff rate when the LME alumni price is greater than the Target LME price by more that \$300 per ton.²⁴ Taking the proposed Schedule A for 2010 as an example,²⁵ an increase in LME of 10% over the Target LME Price of \$2725 (i.e., \$2997.5) will result in an electricity rate for Ormet of \$39.198/MWh.

¹⁹ See http://www.lme.com/dataprices_historical.asp

²⁰ See Id.

²¹ Average Cash Seller and Settlement prices for Primary Aluminum were \$1413.12, 1330.20, and \$1335.84 for January, February, and March, 2009, respectively. Their average is \$1,359.72 per tone. See http://www.lme.com/dataprices_historical.asp

²² See Direct Testimony of Ormet Witness Michael Tanchuk, exhibit Ormet-1, (April 23, 2009) at 7.

²³ See Amended Application (April 10, 2009) at Attachment A, Schedule A, p.1.

²⁴ See Id.

²⁵ See Id.

At full operations, the possible annual benefits to AEP customers at the higher indexed electricity price shall be $(\$39.198 - \$38.43)$ times the annual consumption of 4,659,444 MWh, or \$3.6 million. Similarly, if LME Price becomes 20% over the Target LME Price of \$2725 (i.e., \$3270/ton), the electricity rate for Ormet shall be \$40.351/MWh (reflecting 5% increase over the AEP tariff rate). In such event, the possible benefits to the AEP customers shall be \$8.9 million annually.²⁶ On the other hand, if the LME price is 10% less than the target price of \$2725 (i.e., \$2452/ton), that will result in an indexed electricity rate of \$25.06/MWh. At full operations, AEP customers classes will be paying delta revenue equal to \$62.2 million annually.²⁷

The upside to AEP customer classes resulting from a 10% increase in the aluminum prices of \$3.6 million is dwarfed by the downside of \$62.2 million of delta revenue from an identical 10% decrease in aluminum price. Again, this downside is more than Ormet's current wage bill of \$56 million. This asymmetry is even more startling when the upside resulting from a 20% increase in LME aluminum price is compared to the delta revenue resulting from 20% decrease in price; a possible benefit of \$8.9 million for the upside vs. \$124.4 million for the downside.²⁸ The business risks faced by Ormet should not be transferred to other customers of AEP.

²⁶ Calculated from $(\$40.351 - \$38.43)$ times the annual consumption of 4,659,444 MWh,

²⁷ This is the result of multiplying \$38.43 minus \$25.06 times the annual consumption of 4,659,444 MWh.

²⁸ A 20% reduction in LME aluminum price will result in \$2180/ton. The associated indexed price for electricity is \$11.725/MWh. At this price level, delta revenue at full operation shall be $\$38.43 - \11.725 times 4,659,444 MWh.

B. Ormet's Proposed Unique Arrangement Is Unreasonable Because It Fails To Establish A Maximum Amount Of Discount That Ormet May Receive.

As discussed above, Ormet has proposed a variable rate for power that attempts to have all other customers underwrite all of the Company's power needs when the price of aluminum falls to a certain point. OCC agrees with the Ohio Energy Group's comments that the proposed Unique Arrangement is not reasonable without out an appropriate "hard floor."²⁹

It is not reasonable to expect the customers to underwrite the entire power needs of Ormet. The Ohio Energy Group proposes a hard floor on the amount of discount Ormet may receive, either: (1) the payment of all out-of-pocket variable costs to produce the power consumed by Ormet; or (2) some known discount to the tariff rate.³⁰ OCC agrees with the concept of a limitation on the amount of the discount but would include an additional limitation that would not allow the discount to be greater than the Company's payroll expense to Ohio employees.

OCC recognizes the importance of protecting the economic livelihood of the region, however subsidizing the Company for more than the amount of money that the Company will pay its employees seems a bit excessive and an inappropriate burden to be placing on the shoulders of all of AEP's customers. OCC is not trying to downplay the economic impact that Ormet has on the surrounding communities, however, it is important to note that almost half of the identified employees and retirees identified by Ormet in its Amended Application reside in West Virginia³¹ and a substantial amount of

²⁹ See Ohio Energy Group's Comments (March 3, 2009) at 4.

³⁰ See Id.

³¹ See Amended Application, Attachment D.

the economic impacts established by Ormet in its Application are directed toward West Virginia.³²

C. Ormet's Proposed Unique Arrangement Is Unreasonable Because The Target Price Proposed As Part Of The Indexed Rate Structure Has Not Been Substantiated And Is Discriminatory.

Under Ohio Adm. Code 4901:1-38-05(B)(1), Ormet has the burden of proving that all aspects of the proposed Unique Arrangement are reasonable – including the development of a “Target Price.” The Company’s proposed “Target Price” has no specific parameters except to meet Ormet’s expectations and guarantee that Ormet makes a profit. The “Target Price” mechanism – and its assurance that the Company will be able maintain its operations -- is not available to other similarly situated customers and thus is discriminatory.

The Company’s reliance on the “Target Price” establishes a subjective evaluation process that will inevitably allow the Company to set its own price for electricity. The Company’s Amended Application describes the “Target Price” as

The price of aluminum as reported on the LME at which Ormet would be able to pay the AEP Ohio Tariff Rate and *still maintain the minimum cash flow necessary to maintain its operations* and pay its required legacy pensions costs.³³

Ormet’s proposal does not set any parameters regarding the necessary minimum cash flow to sustain its operations. For example, appropriate strings must be attached to funds so that funds earmarked for specific items – like operation of potlines, do not later get moved to pay for bonuses to executives.

³² See Amended Application, Attachment E, *The Estimated Economic and Fiscal Impacts of the Ormet Aluminum Smelter Operation in Hannibal, Ohio*, Paul A. Coomes (For example “I estimate that Ohio state government is receiving about \$6.8 million annually in individual income taxes, sales tax, and electricity taxes from Ormet-related activity. West Virginia state government receives about \$4.2 million.” at 11).

³³ Amended Application (April 10, 2009) at 6. (emphasis added)

By requesting a “Target Price” that protects the minimum cash flow necessary for the Company to maintain its operations, the Amended Application also violates both R.C. 4905.33 and R.C. 4905.35 by providing subsidies that in effect create a “regulated” floor to one select customer. R.C. 4905.33(A) states:

No public utility shall *directly or indirectly*, or by any special rate, rebate, drawback, or other device or method, *charge, demand, collect, or receive from any person, firm, or corporation a greater or lesser compensation for any services rendered, or to be rendered*, except as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., and 4923. of the Revised Code, than it charges, demands, collects, or receives from any other person, firm, or corporation *for doing a like and contemporaneous service under substantially the same circumstances and conditions.*³⁴

R.C. 4905.35 prohibits utilities from giving “undue or unreasonable preference or advantage to any ... corporation” Specifically with regard to the electric industry, it is the policy of the State of Ohio to “[e]nsure the availability to consumers . . . *nondiscriminatory* retail electric service.”³⁵ By requesting a “Target Price” that protects the minimum cash flow necessary for the Company to maintain its operations the Commission would be creating an arrangement, a subsidy - through AEP’s customers, that is not available to other mercantile customers.

Ormet’s Application requesting an indexing discounted rate discriminates against other customers. Ormet requests approval for a Reasonable Arrangement that discriminates between similarly situated SSO generation customers, favoring Ormet over similarly situated customers.³⁶ The “Target Price” in the Amended Application is therefore on its face discriminatory, violating R.C. 4905.33, 4905.35, and 4928.02(A).

³⁴ Emphasis added.

³⁵ R.C. 4928.02(A) (emphasis added).

³⁶ See Amended Application, Exhibit A, Original Sheet No. D37, Page 1 of 2.

This is an additional reason for the Commission to conclude that the Amended Application is unjust and unreasonable.

D. The Commission Should Apply PUCO Policy And Precedent Regarding Delta Revenues Generated From Economic Development Riders And Order AEP To Identify All The Benefits Attributable To The Reasonable Arrangement.

The PUCO policy regarding economic development and the subsequent delta revenues (resulting from revenues the utility forgoes by offering the rate discount) has been in place for over 25 years.³⁷ The PUCO policy provides that the Application must provide for a reasonable split of the delta revenue costs that takes into consideration that both AEP and its customers will receive benefits from the Reasonable Arrangement and accordingly should share the associated costs. In the past the Commission has held “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 certain customers to attract new business in the utility’s service territory.”³⁸ Furthermore, this 50/50 sharing of the delta revenue is consistent with other decisions which addressed the issue.³⁹

AEP will receive tangible benefits from offering mercantile customers – like Ormet -- discounts through Reasonable Arrangements that encourage customers to expand their operations. For example some of the benefits that AEP will receive from offering discounted distribution rates include:

³⁷ See *Ohio Electric Innovative Rates Program*, page 5 of 11 (June 28, 1983). (Attachment A).

³⁸ *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).

³⁹ See *Ohio Edison Company*, Case No. 89-1001-EL-AIR, Opinion and Order at 40-41. (August 16, 1990), at 40-41 and *Cleveland Electric Illuminating Co.*, Case No. 88-170-EL-AIR, Opinion and Order at 18-19 (January 31, 1989).

1. Indirectly, economic growth leads to more distribution sales from the customer's employees and from the local suppliers of inputs to the contracting customer. Second and third level multiplier impacts can be important.⁴⁰
2. Situations where the expansion takes place in an area with excess transmission and distribution capacity revenue resulting in the additional revenue exceeding the cost of providing that service.
3. Staff policy has historically recognized that "as long as the company does not provide this service at a loss, it is better off with some revenue than it is with no revenue."⁴¹

Without any analysis from either AEP or Ormet establishing the reasonableness of the discount and the amount of the delta revenue created under this proposal, the Commission should maintain the current 50/50 split of delta revenues or in the alternative, quantify the benefit and accord an appropriate percentage. Allocating 100% of the delta revenue to customers, and none to AEP would be the equivalent to finding that there is absolutely no benefit whatsoever to AEP.

Sharing of the discount between customer and the utility will ensure that the utility has an incentive to negotiate a fair arrangement. At the very minimum, the utility negotiating the discount should have a stake in the interest to bring accountability and good faith into the bargaining process. Requiring the utility to pay a percentage of the discount establishes that additional incentive for AEP to negotiate a fair, competitive deal. If AEP is permitted to pass 100% of the cost of the discount to remaining

⁴⁰ OCC Witness Wilson Gonzalez (direct pre-filed testimony), 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 R.C. 4928.143 in the Form of an Electric Security Plan., PUCO Case No. 08-935-EL-SSO (September 29, 2008) at 25.

⁴¹ See *Ohio Electric Innovative Rates Program*, page 5 of 11 (June 28, 1983). (Attachment B).

customers, there is no incentive for it to negotiate a fair rate as part of a Reasonable Arrangement.

E. Ormet's Proposed Unique Arrangement Is Unreasonable Because It Seeks Retroactive Recovery Of Discounted Rates And Waiver Of The Deposit And Advanced Payments.

Ormet's proposed Unique Arrangement requests that the PUCO allow the Company to retroactively make the Unique Arrangement effective from January 1, 2009.⁴² Ormet's request to make the Unique Arrangement effective retroactively would result in the Company recovering rate discounts that were not approved at the time the service was delivered. The Company's request is unlawful and unreasonable because the parties must abide by the rate that was in place at the time.

On December 31, 2008, Ormet and AEP filed a joint application requesting approval of a temporary amendment to their Reasonable Arrangement.⁴³ On January 7, 2009 the Commission approved the application of the Companies permitting a temporary arrangement between AEP and Ormet and allowed AEP to book deferrals of a "market delta" flowing from the temporary arrangement.⁴⁴ In addition, the temporary arrangement replaced the previously established discounted \$43 per megawatt hour with a lower price based on a blend of the Companies' current SSO rates for generation.⁴⁵ The temporary Reasonable Arrangement was to remain in place until a new Reasonable Arrangement is approved by the Commission or through the AEP ESP proceeding.⁴⁶ On

⁴² See Amended Application (April 10, 2009) at 1.

⁴³ See 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. 08-1338-El-UNC.

⁴⁴ See Id. at 3.

⁴⁵ See Id.

⁴⁶ See Id.

March 30, 2009, the Commission approved AEP's revised tariffs with new rates and charges for electric service filed by AEP. Now Ormet is asking the Commission to re-write the rates it paid from January 1, 2009 to present – something the PUCO cannot lawfully do.

The Company's request for retroactive treatment of the proposed Unique Arrangement would violate the fundamental principle of rate regulation that rates are set on a prospective basis and would place an unfair burden on AEP's other customers. The Ohio Supreme Court has clearly established that retroactive ratemaking is prohibited.⁴⁷ Revised Code 4905.22 requires that "[a]ll charges made or demanded for any service rendered, or to be rendered, shall be just [and] reasonable..." Because Ormet's request is unlawful, the PUCO should amend Ormet's proposed Amended Application to comply with the law and not permit Ormet to recover discounts that were not available during the time period requested.

Finally, the Commission should also find Ormet's request for a waiver of the advanced payment and deposit request to be unreasonable. The waiver request along with the side agreement that AEP will be able to recover all of these costs if there is a default would leave customers with millions of additional dollars to pay. Section 6.03 of the proposed arrangement states:

6.03 Payment Ormet shall pay its monthly bill in accordance with the Terms and Conditions of Service. **Ormet shall not be required to provide a deposit or pay in advance.** This provision is intended to increase Ormet's cash flow and thereby allow Ormet to increase the Indexed Rate reflected in Ormet's schedule, thus reducing the Delta Revenue. **The Parties agree that these**

⁴⁷ *Lucas County v. Public Util. Comm.* (1997), 80 Ohio St. 3d. 344, 348-349. ("[W]ere the commission to order either a refund or a credit, the commission would be ordering Columbus Gas to balance a past rate with a different future rate, and would thereby be engaging in retroactive ratemaking, prohibited by *Keco Industries Inc. v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St., 254, 257.")

payment terms are conditioned upon a Commission order that provides AEP Ohio recovery of Delta Revenue should there be an Event of Default by Ormet.⁴⁸

Ormet's request for a waiver of these two "fees" is new – it was not a part of the January, 2009 special arrangement. Ormet has not identified the specific cost identified with the waiver of the deposit and advance payment request and these waivers have the potential to become immediate liabilities to customers if the Company closes due to the Glencore Ltd. lawsuit.

F. Ormet's Proposed Unique Arrangement Is Unreasonable Because It Violates An Important Regulatory Principle By Attempting To Limit The Commission's Authority To Review Ormet's Performance.

Paragraph 2.03 in Article Two, "Scope and Term" of the Power Agreement attempts to define and limit the Commission's jurisdiction to review and modify the Power Agreement. In accordance with Ohio law "Every such schedule or reasonable arrangement shall be under the supervision and regulation of the commission and is subject to change, alteration, or modification but the commission." Ormet's Power Agreement proposes to suspend and place limits on the Commission's statutory authority, something the Commission cannot approve.

Paragraph 2.03 of the Power Agreement strips the Commission of any authority to change, alter, or modify the Power Agreement for almost seven years unless certain conditions are met, "such [Commission] modification (i) may not be effective earlier than January 1, 2016 unless the cumulative net discount from the AEP Tariff Rate exceeds 50 percent of the amount Ormet would have been required to pay under the AEP Tariff Rate". In addition to placing terms and conditions on the Commission's oversight

⁴⁸ Amended Application, Power Agreement (Attachment A), (April 10, 2009) at 14.

authority for seven years, Ormet's Power Agreement also places the burden on the Commission to establish that the proposed rates are no longer just or reasonable before it can make any changes to the Power Agreement. The impact of the language in Section 2.03 is to limit the Commission's statutory oversight authority.

OCC requests that the Commission review section 2.03 of the Power Agreement and modify it to the extent it attempts to limit the statutory authority of the Commission. Parties cannot limit the statutory responsibilities of the Commission, nor can the Commission voluntarily abdicate them.

II. CONCLUSION


Ormet has failed to sustain its burden of proving through verifiable information that the Amended Application is reasonable. OCC seeks to ensure that the approximately 1.3 million residential customers will not be asked to pay rates that are unjust or unreasonable or be the only party that is asked to make sacrifices. As stated above, the Commission should find that Ormet's request for a Unique Arrangement in Accordance with Ohio Adm. Code 4091:1-35-05 is unreasonable because: (1) AEP customers should not be partners in the risk that Ormet takes in buying and selling aluminum; (2) Ormet's indexing rate is asymmetrical to the great detriment of AEP customers; (3) the Company is requesting that its rates be unlawfully set retroactively back to January 1, 2009; (4) Ormet's request for a release from terms and conditions of its service requirements including the requirements that Ormet must make an advanced payment of its monthly electricity bill and pay a deposit puts AEP customers immediately at risk of having to pay substantially more if the Company closes its door; (6) Ormet has provided no facts to

support its position that customers should have to pay 100% of the delta revenues; and
(7) Ormet unlawfully attempts to limit the Commission's ability to supervise, regulate
and review Ormet's actions under the arrangement.

Economic development clearly provides some benefit to society – including but
not limited to AEP's residential customers. Nonetheless, AEP's customers should not be
required to underwrite the *entire* cost of the Company's power. Both Ormet and AEP
also receive some benefits from the proposed Unique Arrangement and the risks and
rewards should be properly, and appropriately, shouldered by all parties.

Respectfully submitted,

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CONSUMERS' COUNSEL




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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments by the Office of the Ohio Consumers' Counsel were served electronically and by regular U.S. Mail on the 28th day of April, 2009.



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April 16, 2009**Contact Info:****Linda King
412-428-0060 or 412-296-2284****Ormet Commences Legal Actions Against Glencore to Enforce Rights Under Tolling Agreement**

Hannibal, OH – Ormet Corporation ("Ormet") announced today that it has commenced legal action against Glencore Ltd. ("Glencore") to enforce Ormet's contract rights under its tolling agreement with Glencore. Ormet filed an action with the United States District Court for the Southern District of Ohio seeking a preliminary injunction against Glencore to prevent the interruption of alumina deliveries as required under the tolling agreement.

In its filing with the Court, Ormet argues that the failure to prevent Glencore from breaking its contractual obligations to deliver all of the alumina as provided for in the tolling agreement could force Ormet to shut down operations, threatening the jobs of approximately 1,000 active employees and retiree benefits for approximately 3,000 former employees. At the same time, Ormet has made a demand for arbitration against Glencore in accordance with the dispute resolution provisions of the tolling agreement.

Alumina is the principal component in the manufacture of aluminum. All of Ormet's aluminum production capacity is currently dedicated to the production of aluminum for Glencore under the tolling agreement. If Glencore does not continue shipping alumina and otherwise performing its obligations under the tolling agreement, Ormet's operations will be seriously affected. Prior to taking the actions announced today, Ormet had sought to resolve the dispute with Glencore amicably.

Commented Mike Tanchuk, Chief Executive Officer of Ormet, "Unfortunately, notwithstanding our long and positive relationship with Glencore and significant efforts on our part to resolve this issue without resorting to legal action, Glencore has decided not to honor its contractual obligations to Ormet. Glencore's position is without merit. Having enjoyed the substantial benefit of pricing terms under the tolling agreement for many months, Glencore no longer wishes to fulfill its contractual obligations now that aluminum prices have declined. Rather than honoring its obligations, Glencore is attempting to use

its size, market position and significant financial resources relative to Ormet to force upon Ormet unjustified material changes to Glencore's obligations under the tolling agreement. Glencore's wrongful use of force majeure is nothing more than a way to try to escape a binding contract that it no longer finds desirable."

ABOUT ORMET: Headquartered in Hannibal, Ohio, Ormet Corporation is a major U.S. producer of aluminum. Ormet employs approximately 1,000 people from across Monroe County, Southeastern Ohio, and parts of West Virginia. Its aluminum smelter has an annual aluminum production capacity of approximately 266,000 metric tons.

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This press release contains forward-looking statements within the meaning of the federal securities laws. Such statements are based on current expectations, and the actual results and the timing of certain events could differ materially from those projected in or contemplated by these forward-looking statements due to a number of factors. Readers are cautioned that litigation is highly uncertain, and Ormet may or may not prevail in its legal actions against Glencore. Ormet's tolling agreement with Glencore currently accounts for substantially all of Ormet's aluminum production and revenue, and is on pricing terms more favorable than Ormet believes could be currently obtained by it in light of current market prices for aluminum and significantly reduced global aluminum demand given current worldwide economic conditions. In addition, current market prices for aluminum are such that Ormet believes it would be unable to profitably operate its business currently if the tolling agreement were terminated and Ormet were to begin producing aluminum for customers at current market prices. Readers are cautioned that Ormet's business is subject to numerous significant risks and uncertainties in addition to those discussed above.

For more information, visit Ormet's website at www.ormet.com.

POLICY PRECEDENT FILE

TITLE Ohio Electric Innovative Rates Program Page 6 of 11Ohio Economic Recovery Initiatives Approved by J. D. Borrows, D. R. MaysElectric Rate Incentives Date Effective 6 / 28 / 83

<u>1.0 Staff Treatment</u>	<u>2.0 Legal Authority</u>	<u>3.0 Applied Treatment</u>
1.1 Current	2.1 Statute	3.1 Methodology
1.2 Alternative Approaches - Not Current Treatment	2.2 PUCO Rule	3.2 Adjustments
1.3 Rationale	2.3 Commission Orders	3.3 Staff Report Language
1.4 Background	2.4 Appellate Decisions	

Special attention is directed towards treatment of the revenue difference between that actually recovered under the Economic Recovery Rate and what would have been recovered had the sales been made at the applicable standard rate. This difference is the "Delta Revenue".

If not recovered, this "Delta Revenue" would constitute a shortfall, or deficiency, in the utility's proposed or Commission authorized revenue. There are a number of methods by which the deficiency could be recovered.

Staff recommends that the Economic Recovery Rate Program contract revenue deficiency be recovered on a shared or "split" basis; a portion to be recovered by the general customers and the remainder contributed by the utility. In the Staff's opinion, it is equitable that both the benefits and the costs of economic recovery be distributed to both customers and the company. The short run marginal sales in revenue from the Economic Recovery Rate Program contracts are a benefit to both the general ratepayers and the utility. The additional sales and revenue help to utilize the system more efficiently, provide increased coverage of fixed costs, incrementally improve the utility's operating income and result in a lesser cost of service by reducing the level of capacity which otherwise would be allocated to all customer classes.

The following chart is a hypothetical example to show the magnitude of Revenue and deficiency under the Economic Recovery Rate Program contracts compared to the otherwise applicable tariffed rate revenue.

ECONOMIC RECOVERY RATE PROGRAM CONTRACT COMPARISONS*

	<u>Average Tariffed Rates</u>	<u>Average Contract Rates</u>	<u>Contract Revenue Deficiency</u>
Revenue	\$ 600	\$ 500	\$ 100
Rate Base	\$1,000	\$1,000	N.A.
Operating Income	\$ 138	\$ 38	\$ 100
Rate of Return	13.8%	3.8%	10%

* This example is not reflective of any tax effects.

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Ohio Electric Innovative Rates Program Page 7 of 11

Ohio Economic Recovery Initiatives Approved by J. D. Borrows, D. R. Haag

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The Economic Recovery Rate Program contracts earned a 3.8% rate of return compared with the tariffed schedule rates (13.8%), resulting in a revenue deficiency of \$100 in the form of operating income. The operating income deficiency should be distributed among the individual class rates and the utility as a contribution to the economic recovery effort. Staff recommends that half of the deficiency be borne by the utility as its contribution and half of the revenue deficiency be distributed to customers in accordance with the Staff recommended interclass revenue distribution. The following chart shows a hypothetical example of the manner in which the Economic Recovery Rate Program contract revenue deficiency should be recovered.

ECONOMIC RECOVERY RATE PROGRAM DEFICIENCY RECOVERY

	<u>Residential</u>	<u>General Service</u>	<u>Other</u>	<u>Utility</u>	<u>Total</u>
Revenue	\$ 4,000	\$3,000	\$3,000	N.A.	\$10,000
Percent Revenue	40%	30%	30%	N.A.	100%
Economic Recovery Rate Program Contributions	\$ 20.00	\$15.00	\$15.00	\$50.00	\$ 100

3.3 Staff Report Language

The Economic Recovery Rate Program is designed such that each contract is evaluated separately. The individual utilities are providing information on a contract by contract basis. The review process by the Staff is evolutionary. The following is an excerpt from a recent Staff Report. This information must be looked upon as specifically tailored to Ohio Edison Company and its contract customers. Subsequent Staff Report language may be modified to appropriately address existing circumstances.

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TITLE Ohio Electric Innovative Rates Program Page 0 of 11

Ohio Economic Recovery Initiatives Approved by J. W. Worrows, D. H. Pugh

Electric Rate Incentives Date Effective 6 / 28 / 83

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Ohio Electric Innovative Rate Programs - Ohio Edison Company
Case No. 84-1359-EL-AIR

On September 25, 1981, Staff issued its document entitled "Ohio Electric Innovative Rate Programs". The document represents an effort on the part of the Commission to separate the topics of rate levels from rate design in order to better understand utility pricing policies, philosophies and related operations. The study was prepared by the Staff and representatives of the state's investor-owned electric utilities. The participants met regularly over the course of fifteen months during 1980 and 1981 with the intention of elaborating on specific rate design objectives and activities which are conducted to support and encourage innovations. The resulting report was directed at initiating a better structure for identifying innovative rate opportunities.

Staff finds that the individual electric utility submittals to the Innovative Rate Program are beneficial to the Staff and Commission. Utility statements of rate design philosophy, policies, objectives and corresponding implementation activities provide an additional basis for better evaluating specific utility rates and rate schedule proposals. In the Staff's opinion, utility rationale of this nature should be relatively consistent with respect to desired longer term achievements and may add elements of integrity and credibility to rate proposals beyond that which may exist in case specific applications. Such a presentation by the utility may help to minimize the resources required by the Staff and Commission to evaluate rate proposals. And, Staff finds that the Innovative Rate Document could provide a basis for establishing an additional level of utility accountability, particularly with respect to authorized innovations.

Continued emphasis should be placed on promoting economic efficiencies. This can be achieved by promoting the use of the product (electricity) which will create increases in revenues and lessen the need for continual rate increase requests. It must be stressed that the goal is to more efficiently utilize existing facilities rather than creating a worse situation whereby additional facilities will need to be built to overcome a deteriorating system load factor.

Staff recommended in Case No. 83-1130-EL-AIR that within forty-five days subsequent to the issuance of the Commission's Opinion and Order, the Applicant submit to the Staff a document updating and revising the contents of its

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TITLE Ohio Electric Innovative Rates Program Page 4 of 11

Ohio Economic Recovery Initiatives Approved by J. D. Harrows, D. R. Nease

Electric Rate Incentives Date Effective 6 / 28/ 83

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Electric Innovative Rate Program. Applicant submitted the requested information after the filing of the above case, in the format requested. Applicant also appropriately filed the up-date to incorporate any additions or revisions which included the Special Arrangements for Economic Development Program (SAED).

The SAED Program incorporates limited term billing demand discounts, as an incentive to new industrial customers to locate in Applicant's service area, and also encourages existing customers to expand their operations. In both instances exist the possibility for new or retained jobs in addition to increased revenue from sales.

Applicant has filed with the Commission, on a case by case basis, applications for Special Arrangements for Economic Development approval. Applicant is actively encouraging industrial load growth by this program to better utilize the capital investment in plant facilities and to add jobs in its service territory.

Staff believes that Applicant, prudently, is attempting to better its financial position and also the economic well-being of its customers by offering programs that will encourage the recovery of revenue from investment in plant, thereby bringing stability to its service area.

Staff finds that in each SAED filing, Applicant represented to the Commission that the approval would not operate to the detriment of any of its customers. In the instant case, Applicant did not consider the annualized impact of the loads of the customers (SAED) coming on line nor did Applicant introduce the revenue effect experienced by Applicant through the demand discount incentive. Staff has found in its investigation that, to date, the SAED customers coming on Applicant's system represent a load addition of less than 2/10 or 1% related to total system load.

In answer to Staff's Data Request, Applicant stated that "all demand and kWh data in the [instant] case has been projected without regard to these programs". Applicant will propose a methodology to adjust for and appropriately split benefits when they experience a significant impact.

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TITLE Ohio Electric Innovative Rates Program Page 10 of 11

Ohio Economic Recovery Initiatives Approved by J. O. Borrows, D. R. May

Electric Rate Incentives Date Effective 6 / 26 / 83

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1.4 Background	2.4 Appellate Decisions	

Staff recommends that, within 60 days subsequent to the issuance of the Commission's Opinion and Order, the Commission order Applicant to submit to the Staff a report demonstrating the following:

- (1) All probable benefits, direct and indirect, to each specific customer class.
- (2) All possible detriments, direct and indirect, to each specific customer class.
- (3) A case study of an actual SAEU customer, measuring and detailing, with specificity, the revenue and expense differences between the regular rate and SAEU rate and the effect it has on the following:
 - (a) Applicant's corporate structure
 - (i) Financial
 - (ii) Production and reserve balances
 - (iii) Transmission and distribution systems
 - (b) Inter class effect
 - (c) Intra class effect
 - (d) Jurisdictional service area economic impact study demonstrating the effect on, but not limited to, the following:
 - (i) Company revenue and expense
 - (ii) Property tax base
 - (iii) New Jobs
 - (iv) New housing starts

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Ohio Economic Recovery Initiatives Approved by J. D. Borrows, D. R. Haag

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(v) Support systems (i.e., new commercial development)

(vi) Other

- (4) Case studies of various load levels (i.e., 25MW, 50MW, 100MW, 200MW) employing the average load factor for the GS-Large Customer Class, and, where appropriate, using the data developed in No. 3 above as a model.
- (5) Specifically detail the criteria upon which Applicant will determine if the revenue and expense effect is significant enough to apply a methodology of treatment.
- (6) Applicant's methodology(ies) for treatment of the revenue and expense effect, caused by the program, in future rates cases.