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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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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 and Columbus Southern Power)
Company)

COLUMBUS SOUTHERN POWER COMPANY'S
AND OHIO POWER COMPANY'S
POST HEARING BRIEF

BACKGROUND

On February 17, 2009 Ormet Primary Aluminum Corporation (Ormet) filed an application for approval of a unique arrangement with Columbus Southern Power Company (CSP) and Ohio Power Company (OP), collectively AEP Ohio.¹ Ormet's application was filed under authority of §4905.31, Ohio Rev. Code, and §4901:1-38-05, Ohio Admin. Code.² AEP Ohio did not join Ormet in filing the application, but did move to intervene on February 27, 2009.³

Ormet, as a "mercantile customer" of an electric distribution utility is permitted to establish a reasonable arrangement with the utility providing for a "financial device that may be practicable or advantageous to the parties interested." (§4905.31 (E), Ohio Rev.

¹ Ormet receives service from CSP and OP as a result of a settlement in Case No. 05-1057-EL-CSS, *In the Matter of Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation v. South Central Power Company and Ohio Power Company*. (The Ormet Complaint case).

² At the time of Ormet's application being filed, that rule had been adopted by the Commission but was not yet effective.

³ AEP Ohio's intervention was permitted by Entry dated April 17, 2009.

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Code).⁴ That division also provides that electric light companies “recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, **including recovery of revenue foregone as a result of any such program....**”⁵ (emphasis added).

While Ormet’s application initiated this proceeding in February of this year, there is a broader history surrounding this proceeding that the Commission should consider as part of its deliberations on issues presented for Commission decision in this case.

Ormet had been a customer of OP for several decades. Effective midnight on December 31, 1999, however, Ormet’s load center became part of the certified territory of South Central Power Company (SCP). Ormet’s desire to switch to service from SCP was motivated by its desire to access the generation market prior to the enactment of Am. Sub. S.B. No. 3 which provided customers with the choice of generation providers. With the departure of Ormet from OP’s service territory, OP no longer had any generation service obligation to Ormet and no longer included Ormet’s load in its planning process.

In Ormet’s August 25, 2005 complaint in the *Ormet Complaint* case, Ormet petitioned to return to OP’s certified service territory. OP repeatedly opposed that petition.⁶ Nonetheless, the Commission ultimately approved a settlement which provided for, among other things, Ormet’s departure from SCP’s service territory to a service

⁴ A “mercantile customer” as defined in §4928.01 (A) (19), Ohio Rev. Code, and for Chapter 4901:1-38, Ohio Admin. Code, is a commercial or industrial customer that consumes more than 700,000 kWh of electricity per year, for nonresidential use, or is part of a national account involving multiple facilities in one or more states.

⁵ The notion of “revenue foregone” is captured by the definition of “delta revenue” as “the deviation resulting from the difference in rate levels between the otherwise applicable rate schedule and the result of any reasonable arrangement approved by the commission.” (§4901:1-38-01 (C), Ohio Admin. Code).

⁶ See OP’s Motion to Dismiss (September 20, 2005); Post-Hearing Brief (March 7, 2006); Post-Hearing Reply Brief (March 28, 2006); Request for Clarification or Alternatively, Motion to Join Indispensable Parties (July 10, 2006); Application for Rehearing (July 14, 2006); and Direct Testimony and Supplemental Testimony of J. Craig Baker (September 22, 2006 and October 4, 2006, respectively).

territory served by OP and CSP, each at a 50 percent share. As part of that agreement, Ormet paid \$43 per MWh for its generation service in 2007 and 2008. The amount of the difference between the \$43 and administratively determined market prices for each of those years was set as additional compensation to AEP Ohio.⁷

CSP and OP filed their Electric Security Plans (ESPs) on the date Am. Sub. S.B. No. 221 became effective. Among the issues presented in the ESP application, CSP and OP proposed to include in their Fuel Adjustment Clause the cost of purchasing power to serve a portion of their total load approximating the amount of the Ormet and Mon Power loads. This proposal would have reflected the market impacts of serving those loads.

It was expected that the Companies' ESP would be in place prior to the expiration of the 2007-2008 settlement rate from the *Ormet Complaint* case. However, as the close of 2008 approached, and the point for issuing a timely order in the ESP proceeding had passed, AEP Ohio and Ormet jointly filed an application to temporarily amend their 2007-2008 special arrangement.⁸ The Commission approved the temporary amendment in its January 7, 2009 Finding and Order in Case Nos. 08-1338-EL-AAM and 08-1339-EL-UNC.

Under that temporary amendment, beginning January 1, 2009, Ormet is paying AEP Ohio's applicable tariff rates and riders that preceded the ESP rates for generation service, instead of the higher \$43 per MWh rate or the new ESP rates. The temporary amendment, as approved by the Commission, does not expire until "the effective date of

⁷ Per the special arrangement approved by the Commission, AEP Ohio was permitted to amortize to income, in the amount of such differential, without reducing rates, their Ohio Franchise Tax phase-out regulatory liability. In the event that the amortization of the Ohio Franchise Tax phase-out regulatory liability did not fully compensate AEP Ohio for the differential between service at the market rate and the \$43 per megawatt-hour charge for generation service provided for under the Stipulation, AEP Ohio was permitted to recover that differential under the "Additional 4%" provision of the rate stabilization plan. Case No. 05-1057-EL-CSS, Supplemental Opinion and Order (November 8, 2006), pp. 5-6.

⁸ Case Nos. 08-1338-EL-AAM and 08-1339-EL-UNC.

new AEP Ohio approved tariffs based on a Commission ruling on the Companies' ESP application (i.e., if the Commission adopts the ESP as proposed or if the Companies accept any modifications made to the ESP by the Commission) *and* the effective date of a new special arrangement subsequently approved by the Commission.⁹

The Commission's approval of the temporary amendment also authorized the Companies to defer as a regulatory asset beginning in 2009 the difference between the 2008 market price approved by the Commission under the 2007-2008 special arrangement and the CSP/OP blend of the pre-ESP generation rate for generation service to Ormet. The regulatory accounting deferral "...will continue to accrue until the temporary amendment is superseded through either a new special arrangement approved by the Commission or through the approval of final tariffs effectuating the Commission's ESP ruling, as described in paragraph 8.¹⁰ The new special arrangement has not been approved and the ESP order did not speak to the temporary amendment, let alone supersede it.

AEP did not present any witnesses in this proceeding. However, two individuals from the American Electric Power Service Corporation were subpoenaed by the Ohio Consumers' Counsel to testify.

The first of these two witnesses was Mr. J. Craig Baker. Mr. Baker's testimony made clear that Ormet's proposed contract was not the product of negotiations between Ormet and AEP Ohio. Regarding both the original proposed contract and Ormet's proposed amendments to that proposal, Mr. Baker stated: "I would not characterize

⁹ Joint Application, ¶8, pp. 4, 5; Finding and Order (January 7, 2009), p. 3.

¹⁰ Joint Application, ¶9, p. 5

anything that dealt with the original filing or the amended as negotiations. We had discussions.” (Tr. I, p. 15). See also Tr. I, p. 17.¹¹

Mr. Baker also testified that AEP Ohio does not take a position regarding the merits of Ormet’s rate discount request. That question is for the Commission to decide. As Mr. Baker explained:

The Senate Bill 221, as we understand it, provides the ability for customers to come forward and ask for special arrangements in front of the Commission.

We think that the number that the customer asked for in this case is their decision and it’s for the Commission to determine whether that’s an appropriate number or not.

(Tr. I, p. 16)

Although AEP Ohio’s motion to intervene expressed general support for Ormet’s initial proposal in this proceeding, Mr. Baker pointed out that the motion conditioned that support “upon satisfactory outcomes in Case No. 08-917-EL-SSO and 08-918-EL-SSO.” (Tr. I, p. 33). In this regard, it must be noted that the Commission rejected the specific proposal related to future service to Ormet – AEP Ohio’s purchase power proposal.¹² AEP Ohio’s motion to intervene filed in this case also conditioned its support upon cost recovery of tariff delta revenues.¹³

Mr. Baker also was cross-examined regarding a provision in Ormet’s proposed contract that would preclude Ormet from switching to a generation supplier other than AEP Ohio. Mr. Baker testified that he believed such a

¹¹ Based on this testimony it appears that at page 13 of the transcript the word “not” was mistakenly omitted at line 9. That testimony should read “would probably not characterize as negotiations.”

¹² See the March 18, 2009 Opinion and Order in the Companies’ ESP proceeding, pp. 15, 16.

¹³ See , February 27, 2009 Motion of CSP and OP to Intervene, p. 2.

provision was in the contract. He went on, however, to express his concern with that provision.

I'm not confident, though, that the contract will always be in place. There are provisions in here if the delta revenues were to change, that it could be terminated.

There are a few ways that this could be terminated, so I don't know that it will always be in place.

Further, we have some history here of the Commission making decisions or pushing, maybe not making decisions, but pushing special treatment for Ormet based on market conditions. So I can't have assurances that it will always be in place.

(Tr. I, p. 37).

Mr. Baker's comment about a history of special treatment for Ormet is an obvious reference to the *Ormet Complaint* case and the settlement that was "pushed" by the Commission.

Mr. Baker addressed provisions in Ormet's proposed contract that would relieve Ormet of the obligation to provide a deposit and to make payment in a time frame that would be sooner than the normal payment terms in AEP Ohio's tariffs. Related to those provisions is a proposed provision that would include in the delta revenue associated with the contract any amounts owing by Ormet to AEP Ohio if Ormet defaulted on its payments. (Tr. I, pp. 19-23, 41). As Mr. Baker explained, Ormet's proposed contract addresses AEP Ohio's security concerns associated with not holding a deposit from Ormet and not receiving advance payments from Ormet, by including amounts Ormet owes AEP Ohio in delta revenues, if Ormet defaults on its contract. (Tr. I, pp. 20, 21).

Finally, Mr. Baker testified that AEP Ohio has not collected any of the delta revenue associated with the temporary amendment to the 2007-2008 special arrangement. (Tr. I, pp. 42, 43).¹⁴

David M. Roush also was subpoenaed by OCC to testify. Mr. Roush testified that for the first three months of 2009, AEP Ohio had deferred approximately \$25 million pursuant to the terms of the Commission-approved temporary amendment. (Tr. I, p. 46). Mr. Roush also testified regarding estimates of delta revenue in 2009 associated with Ormet's proposed unique arrangement. For June through December, assuming a \$38 per MWh price and Ormet operating at full load, the delta revenue would be between \$16 million and \$17 million. (Tr. I, p. 54). At a rate of \$34 per MWh and with lower usage, the delta revenues for the same period would be between \$18 million and \$19 million. (*Id.*) This testimony did not discuss delta revenue associated with the temporary arrangement.

ARGUMENT

AEP Ohio's financial interests in the proposed special arrangement are as follows: (1) recovery of the full amount of delta revenue produced by the special arrangement, (2) no reduction in the authorized POLR charge to be paid by Ormet, (3) no reopening of the previously-approved temporary amendment, and (4) no modification of the proposed provisions regarding deposit waiver.

¹⁴ When OCC's counsel asked Mr. Roush how much Ormet delta revenue AEP Ohio had collected in 2009, the Hearing Examiner sustained AEP Ohio's objection to the question on the basis that "Mr. Baker's already testified that no delta revenues have been collected." (Tr. I, pp. 45, 46).

Only Full Recovery of Delta Revenues is Reasonable and Lawful

As noted in Mr. Baker's testimony, AEP Ohio believes that the issue of the extent to which Ormet should receive a special rate that provides a discount from the otherwise applicable ESP rates of CSP and OP is a matter for the Commission's judgment. But with respect to AEP Ohio's recovery of the delta revenues produced by an approved special arrangement, AEP Ohio believes the law is clear. §4905.31 (E), Ohio Rev. Code, specifies that costs incurred in conjunction with any economic development or job retention program "including recovery of revenue foregone" are recoverable by the electric light company. The statute does not say "some of" the revenue foregone is a cost. If the "revenue foregone" is \$1 million, then every dollar of that amount is "revenue foregone."

AEP Ohio is aware that in the Commission's Entry on Rehearing in the rulemaking proceeding promulgating Chapter 4901:1-38, Ohio Admin. Code, the Commission indicated that it can exercise its discretion regarding the extent of cost recovery to be permitted. With respect to at least the "revenue foregone" portion of the costs, the Commission does not have the authority to set the level of "revenue foregone" and then disallow recovery of some of that amount. A Commission order authorizing recovery of an amount less than the amount of revenue foregone also set by the Commission would unlawfully take revenues from the utility that it had been authorized to collect.

OCC's reliance on the pre-customer choice 50-50 split is not compelling. First, SB 221 has amended §4905.31, Ohio Rev. Code, to

specifically provide for the recovery of revenue foregone. OCC's reliance on the distant past cannot be reconciled with this statutory change. Second, whatever merit there might have been in a 50-50 split must be understood in the context of a temporary (typically three years) discount of the demand charge. That is a far cry from the potential revenue foregone under Ormet's proposed contract. In approving economic development special arrangements, the Commission will presumably determine that the value of the discount will be outweighed by the public benefit and, consequently, it follows that full recovery of the discount should be recovered by the Companies. In short, the structure and ostensible intention of S.B. 221 is to incent companies to pursue economic development by allowing full recovery of delta revenue – not merely half of the discount.

The Commission Should Not Reduce the Authorized POLR Charge

Another issue, related to the recovery of revenue foregone, is the suggestion that since Ormet has proposed to preclude itself from accessing the competitive market during the term of the contract, AEP Ohio should not be permitted to include its Provider of Last Resort (POLR) charges in the calculation of revenue foregone. There are compelling reasons for rejecting this suggestion.

The policy of the State of Ohio, as set out in §4928.02, Ohio Rev. Code, is to promote competitive generation markets and customer choice. For instance, Division (C) of that statute refers to ensuring diversity of electricity supplies and suppliers. Division (G) sets forth the policy of recognizing the

continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment. Division (H) reflects the General Assembly's intention to "[e]nsure effective competition in the provision of retail electric service...." A Commission order that would have the effect of keeping hundreds of megawatts of load out of the competitive market for up to ten years would be an irreconcilable conflict with these policy statements.

Even if the Commission were to approve such a provision in the proposed contract there still should be no POLR-related adjustment to the delta revenue recovery. The apparent theory offered to support the POLR reduction is that a customer should be able to give up its statutory right to switch to service from a competitive generation provider, and thus avoid paying the POLR charge. This theory already has been rejected by the Commission in AEP Ohio's ESP proceeding. In fact, the only opportunity for a customer to avoid the POLR charge is to make a switch and agree to pay market rates for generation if it returns to generation service from AEP Ohio.¹⁵

Finally, as Mr. Baker testified, history has taught AEP Ohio that despite contractual provisions and/or prior Commission orders, the State's interest in keeping Ormet a going concern by permitting Ormet to access the lowest possible cost of electricity may well result in Ormet being released from its contract entirely or, on a more limited basis, find ways to allow Ormet to access market generation.

¹⁵ March 18, 2009 Opinion and Order, p. 40, Case Nos. 08-917 and 08-918-EL-SSO.

The Commission Should Not Re-open Its Prior Approval of the Temporary Amendment

There also is an issue with Ormet's proposal to make the new contract effective back to January 1, 2009. As discussed earlier in this brief, Ormet and AEP Ohio jointly filed a temporary amendment to the 2007-2008 contract that had resulted from the *Ormet Complaint* case. The temporary amendment, which the Commission has approved, became effective January 1, 2009 and remains effective. Pursuant to the terms of the temporary amendment, AEP Ohio continues to defer for future recovery the delta revenues associated with the temporary agreement. If the Commission approves Ormet's proposed contract, in any form, it only should be made effective on a prospective basis. Prospective effectiveness will give meaning to and will honor the temporary amendment. An earlier effective date will violate the terms of the temporary amendment to which Ormet already has agreed and the Commission approved.

The Proposed Provisions Regarding Waiver of Deposit and Advanced Payment Should Not Be Modified

As discussed earlier in this brief, Ormet's proposed contract does not impose deposit or advance payment provisions. It does provide, however, that if Ormet defaults on the contract and AEP Ohio is not paid for the service it has provided pursuant to the contract, the unpaid amount will be treated as recoverable delta revenues.

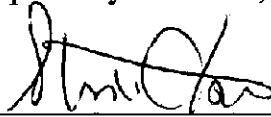
While AEP Ohio does not take issue with Ormet's proposal in this regard it would object to any modification which would jeopardize AEP Ohio's ability to recover any such unpaid amounts. If the Commission were to

determine that some or all of the unpaid amounts would not be recovered, then the current deposit requirement and an advance payment requirement should be included in the contract.

CONCLUSION

The Commission should adopt AEP Ohio's positions in deciding this case.

Respectfully submitted,

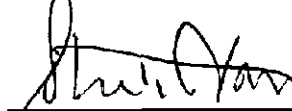


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CERTIFICATE OF SERVICE

I hereby certify that a copy of Columbus Southern Power Company's and Ohio Power Company's Post Hearing Brief was served by U.S. Mail upon counsel identified below for all parties of record this first day of July, 2009.



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