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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 Approval)
of a Unique Arrangement with Ohio Power)
Company and Columbus Southern Power)
Company.)

Case No. 09-119-EL-AEC

POST HEARING BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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POST HEARING BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

I. INTRODUCTION

On February 17, 2009, Ormet Primary Aluminum Corporation ("Ormet") filed an application ("Application") for approval of a reasonable arrangement with Ohio Power Company ("OP") and Columbus Southern Power Company ("CSP") (collectively, "American Electric Power" or "AEP"). Ormet filed an Amended Application on April 10, 2009, that seeks an alternate and lower rate to reflect "changing market conditions since Ormet submitted its initial Application" that caused Ormet to curtail its operations.¹ On March 9, 2009, Industrial Energy Users-Ohio ("IEU-Ohio") filed comments on Ormet's Application and on April 28, 2009, IEU-Ohio filed a Motion to Intervene. A hearing on Ormet's Application began on April 30, 2009 and, after several

¹ Ormet stated:

It has become increasingly apparent to Ormet in recent weeks that, because of the very difficult prevailing aluminum market conditions, there is a very real possibility that Ormet will need to curtail the equivalent of at least two of its six potlines, possibly as early as late May. Therefore, Ormet is amending its Application to reflect that very real possibility.... However, in order to retain these 900 jobs with fewer than six potlines in operation, Ormet will need to reduce the rate it pays for power during this curtailment from the \$38/MWh initially proposed in the Application to \$34/MWh.

See Ormet Exhibit 8, Cover Letter at 1.

continuances, concluded on June 17, 2009. Pursuant to the schedule established by the Attorney Examiners in this case, IEU-Ohio respectfully submits its post hearing brief for the Commission's consideration.

II. ARGUMENT

A. The Commission May Approve A Proposed Arrangement If It Is Shown To Be Just, Reasonable And Furthers The Policy Of The State.

Section 4905.31, Revised Code, permits a mercantile customer of an electric distribution utility ("EDU") to establish a reasonable arrangement with that EDU providing for any of the following:

- (A) The division or distribution of its surplus profits;
- (B) A sliding scale of charges, including variations in rates based upon stipulated variations in cost as provided in the schedule or arrangement.
- (C) A minimum charge for service to be rendered unless such minimum charge is made or prohibited by the terms of the franchise, grant, or ordinance under which such public utility is operated;
- (D) A classification of service based upon the quantity used, the time when used, the purpose for which used, the duration of use, and any other reasonable consideration;
- (E) Any other financial device that may be practicable or advantageous to the parties interested.

Rule 4901:1-38-05(B)(1), Ohio Administrative Code, states that a mercantile customer, or a group of mercantile customers, that files for Commission approval of 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."

Moreover, Rule 4901:1-38-05(C), Ohio Administrative Code, requires a showing that such arrangement furthers the policy of the State of Ohio embodied in Section 4928.02, Revised Code, which states, in pertinent part, that it is the policy of Ohio to do the following throughout the State:

(A) Ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably priced retail electric service;

(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

* * *

(I) Ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power;

(J) Provide coherent, transparent means of giving appropriate incentives to technologies that can adapt successfully to potential environmental mandates;

* * *

(L) Protect at-risk populations, including, but not limited to, when considering the implementation of any new advanced energy or renewable energy resource;

* * *

(N) Facilitate the state's effectiveness in the global economy.

Finally, Rule 4901:1-38-05(B)(3), Ohio Administrative Code, states that the Commission may fix a time and place for a hearing if the application appears to be unjust or unreasonable. An Entry issued on April 17, 2009 states, "The Commission finds that this matter should be set for hearing...." Entry at 2.

The substantial electricity requirements of the Ormet facility and the energy-intensive nature of its aluminum smelting process have previously permitted Ormet to

obtain service through a reasonable arrangement submitted to and approved by the Commission pursuant to Section 4905.31, Revised Code.² The questions here are not related to disagreements over Ormet's ability to be served pursuant to a reasonable arrangement going forward but about the prices, terms and conditions that Ormet has asked the Commission to approve in this proceeding. In considering an application for a reasonable arrangement pursuant to Section 4905.31, Revised Code, the Commission must balance the costs and benefits, the sometimes competing interests of stakeholders and strive to advance the objectives in Section 4928.02, Revised Code.

The Commission must make the policy, legal, and factual calls to determine whether reasonable arrangements are appropriate. As Ormet has indicated, at full operations, it employs over 1,000 people and is a large contributor to the local economy in southeast Ohio. Ormet indicates that maintaining at least 600 jobs for the term of the arrangement is one of the principal benefits of the Application that the Commission should consider. But, Ormet appears to be asking the Commission to approve a reasonable arrangement containing prices and other terms and conditions that will impose a large dollar cost on other customers without any clear indication or commitment that it will be enough to keep Ormet's doors open. Ormet's history already

² IEU-Ohio strongly supports the use of reasonable arrangements by Ohio as a tool to complement its economic development and retention efforts and has consistently conveyed this long-standing perspective during legislative and regulatory proceedings. IEU-Ohio recognizes that the use of special arrangements is a real-world necessity for larger, energy-intensive customers that have price and service quality needs that cannot be most effectively addressed through standard tariff offerings designed, for the most part, for a "typical" customer. Special arrangements that provide customers with predictability and stability at a reasonable price should be high on the list of Ohio's economic development and retention tools, particularly during a period (like now) when energy costs and availability are of critical importance to Ohio's economy. The General Assembly has also recognized that special arrangements may play an important role in facilitating the development of customer-sited demand response, renewable energy, advanced energy technologies and energy efficiency projects that will lead to economic growth through manufacturing processes that are less energy-intensive per unit of production than might have otherwise been possible.

includes substantial customer-funded efforts to help Ormet transform itself into a going concern. Nonetheless, and for the reasons discussed more fully below, it is IEU-Ohio's position that Ormet's proposal should not, on balance, be approved as a reasonable arrangement.

B. Ormet's Application Should Not Be Approved.

Ormet's Application is a long-term arrangement meant to supersede the temporary reasonable arrangement approved by the Commission on January 7, 2009.³ The proposed contract between Ormet and AEP will provide Ormet, under defined circumstances, generation service priced at a different rate than would otherwise apply under AEP's applicable tariffs.⁴ Under the first year of the contract, Ormet would pay the lower of \$38/MWH (or \$34/MWH depending on the level of operations) or AEP's weighted average tariff price (an average of OP and CSP rates).⁵ For the remaining years of the ten-year contract, the price paid by Ormet would be tied to the London Metal Exchange ("LME") price for aluminum. Prior to the beginning of each remaining year under the contract, Ormet would propose a target LME aluminum price. During the subsequent contract year, if actual aluminum selling prices are equal to the target price,

³ *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), Finding and Order (January 7, 2009). In addition to approving the temporary reasonable arrangement, the Commission also authorized AEP to defer all delta revenues associated with the temporary arrangement that were not offset by the Ohio Franchise Tax regulatory liability on AEP's books. The Commission did not rule upon the issue of cost recovery of deferred delta revenues, including AEP's proposal to recover delta revenues through the kilowatt hour ("kWh")-based fuel adjustment clause ("FAC") mechanism proposed in its electric security plan ("ESP") proceeding.

⁴ Ormet represents in the Application that AEP supports the reasonable arrangement on the condition that AEP be permitted to recover all delta revenues lost by entering into the reasonable arrangement. It is not clear that AEP agrees with Ormet's representation of its position.

⁵ Ormet has requested that the rates to be applied retroactively effective as of January 1, 2009.

Ormet will pay AEP's weighted average tariff rate for generation.⁶ If actual LME aluminum prices are higher than the target price, Ormet will pay 102% or 105% of AEP's otherwise computed weighted average tariff rate, depending on the amount by which the actual LME price exceeds the target LME price. Conversely, if aluminum prices are below the target LME price, Ormet will be provided electricity at a discount relative to AEP's otherwise computed weighted average tariff rate. The discount will be set equal to \$0.049/MWH for each \$1/tonne if the actual aluminum selling price is lower than the target price.

In general terms, the structure of the contract would provide Ormet with a lower price for electricity when aluminum prices are lower and a higher price for electricity when aluminum prices are higher. However, there will be no true-up regardless of how far off the actual aluminum selling price is from the target LME price.⁷

- 1) There are no clear or reliable indications of how the electricity price proposal will produce sufficient beneficial outcomes to make the proposed transfer of revenue responsibility just and reasonable.**

As the record demonstrates, there are a lot of questions about whether the proposed pricing formula, if approved, will be enough to maintain the jobs that Ormet holds out as the principal benefit of its proposed pricing formula.

First, the price of aluminum is unknown and unpredictable.⁸ As the proposed price Ormet will pay is tied to the price of aluminum, other AEP Ohio customer bills will

⁶ The actual aluminum selling prices would be determined by a mathematical average of daily cash LME settlement prices for aluminum.

⁷ Tr. Vol. I at 144.

⁸ *Id.* at 215. Ormet witness Fein agreed that "the LME price swing has been extraordinary over the past six or eight months ranging from 3,500 a metric ton down to 1,000 a metric ton." See also, IEU-Ohio Exhibit 1 at Exhibit A, page 39, which is Ormet's Rule 15c2-11 Information and Disclosure Statement for

be impacted by the volatility in the aluminum market. Second, as the Commission has not yet issued a final order on AEP's ESP, both the tariff rates applicable to Ormet and the treatment of delta revenue is unknown.⁹ Third, as there is pending litigation with Ormet's alumina supplier, the continuation of Ormet's ability to produce aluminum is unknown.¹⁰ Fourth, Ormet's ability to negotiate a new tolling contract similar to its existing tolling agreement is highly unlikely unless the aluminum market significantly and quickly recovers. In fact, Ormet's witness Riley admitted that if the LME curves remain consistent with those that are in OEG Exhibit 6, it is it not likely that any buyer would enter into a tolling agreement that is similar to the current agreement because it would not be profitable.¹¹ Fifth, Ormet's ability to refinance its debt is contingent upon, at a minimum, a favorable and long-term result in this case, which is obviously pending. Sixth, Ormet needs the cash from closure of the sale of the Marine Terminal in Burnside, Louisiana, which has not been completed.¹² Finally, as Ormet has not yet begun negotiations with its labor unions for 2010 and beyond, it is not clear what the minimum cash requirements associated with that labor contract will be.¹³

Even setting aside the fluctuating nature of the burden the Ormet proposal would, if approved, impose on other customers (since it is indexed to the LME target), without resolution of the issues identified above, there are no clear or reliable indications of how

the Fiscal Year Ended December 31, 2008. There, Ormet management states, "Should the market price of aluminum not significantly increase by the end of the 2009 third quarter, it is probable that the Company would not be able to operate profitably in 2010."

⁹ Tr. Vol. I at 38-39.

¹⁰ Tr. Vol. III at 423 (confidential portion of transcript).

¹¹ Tr. Vol. I at 168.

¹² *Id.* at 168; Tr. Vol. III at 447.

¹³ Tr. Vol. I at 131-132.

the electricity price proposal will produce sufficient beneficial outcomes to make the proposed transfer of revenue responsibility just and reasonable.

2) The Application, if approved, would impose an excessive burden on other Ohio customers of AEP.

The pricing formula proposed by Ormet and described above produces large swings in the amount of the burden that other customers must carry and is unreasonably high.¹⁴ Specifically, under the calculation presented by Ormet,¹⁵ at an AEP tariff rate at \$44.24/MWh,¹⁶ Ormet would have to sell aluminum at \$2843/tonne to avoid creating delta revenues. If aluminum prices in 2010 are equal to \$1602/tonne (the forward price as of April 29, 2009)¹⁷ and the Commission does not modify the excessive rate increase AEP received via the Commission's ESP order,¹⁸ the delta revenue burden in just 2010 will hit \$283 million (or over \$471,000 for each job that Ormet says it may maintain).¹⁹ Even if aluminum prices match the forward estimates by Harbor (the

¹⁴ The proposed arrangement may result in a price that is less than the variable cost of production. In this circumstance, Ormet would make no contribution to the fixed costs associated with providing service to all customers. The Commission should seriously scrutinize a proposed reasonable arrangement that may cause prices to be less than variable costs to determine if it properly respects the interests of other customers and works to advance Ohio's policy objectives.

¹⁵ Ormet Exhibit 8, at Schedule A, page 1.

¹⁶ OEG Exhibit 1.

¹⁷ OEG Exhibit 6.

¹⁸ See *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, et al., Opinion and Order (March 18, 2009) (rehearing pending).

¹⁹ Tr. Vol. I at 154.

better forecast according to Ormet),²⁰ the proposed pricing formula would have AEP Ohio customers pay Ormet to use electricity²¹ for the foreseeable future.

Not only has Ormet placed all responsibility for costs associated with the electricity Ormet uses on other Ohio AEP ratepayers, Ormet has shifted to other customers all risk associated with a potential default by Ormet. Specifically, under the payment terms in Ormet's Application, "Ormet shall not be required to provide a deposit or pay in advance."²² However, the 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."²³ In other words, the proposed arrangement relieves Ormet of any obligation to provide a deposit²⁴ as assurance towards payment of its invoices for electricity, at least so long as AEP is permitted to treat any actual default amounts as delta revenue and recover such amounts from other customers.²⁵ Although the proposed arrangement suggests this provision is intended to permit Ormet to increase the otherwise applicable index rate used to fix its power supply price, Ormet is afforded substantial latitude to define what LME aluminum price would be sufficient to provide adequate cash flow to cover ongoing operations and fund legacy costs.²⁶ Thus, there is no real offset to the costs as a result of accepting the default risks that other customers will be responsible for if the arrangement is approved. In reality, this

²⁰ Ormet Exhibit 9 at 15; Tr. Vol. I at 182-185.

²¹ Tr. Vol. I at 154-155.

²² Ormet Exhibit 8 at Attachment A, page 14.

²³ *Id.*

²⁴ *Id.* at 14, Section 6.03.

²⁵ *Id.* at 6, Section 1.07.

²⁶ *Id.* at 6.

provision shifts the payment and default risk of Ormet onto Ohio customers rather than upon Ormet or AEP.²⁷

Finally, the proposed arrangement would, if approved, prohibit stakeholders, including customers and the Commission, from seeking to modify the arrangement except in very limited circumstances while allowing Ormet to request modifications that would further benefit Ormet. Specifically, Section 2.03 of the arrangement states:

Section 2.02 notwithstanding, the Parties agree that the Commission may, upon petition or *sua sponte*, require modification of this Power Agreement upon a finding that the rates produced under this Power Agreement are no longer just and reasonable. The Parties further agree that, subject to Section 3.01, such modification (i) may not be effective earlier than January 1, 2016 unless the cumulative net discount from the AEP Ohio Tariff Rate exceeds 50 percent of the amount Ormet would have been required to pay under the AEP Ohio Tariff Rate, and (ii) shall not go into effect between the Parties until the later of the beginning of the next calendar year or 120 days.²⁸

As explained by Ormet's witnesses, this provision permits, but does not require, the Commission to modify the reasonable arrangement if the burden placed on other customers exceeds 50 percent of the otherwise applicable AEP tariff rate. However, once the burden exceeds 50 percent, this provision prohibits the Commission from adjusting the reasonable arrangement until either 120 days after the Commission makes a determination or the next calendar year. Thus, the burden placed on other AEP Ohio customers could exceed the 50 percent mark, even resulting in a credit to Ormet for using electricity, for an unknown period of time.²⁹

²⁷ Tr. Vol. I at 22-23.

²⁸ Ormet Exhibit 8 at 9.

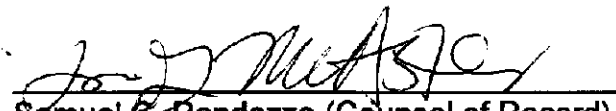
²⁹ Tr. Vol. I at 181, 212-213.

Additionally, Ormet has indicated that it may request a modification to its proposed rates for 2009 to move the rates lower than \$34/MWh depending on a number of factors.³⁰ Thus, Ormet may seek a modification to the reasonable arrangement it proposed at least for the balance of 2009, but should customers or the Commission seek a modification for the last nine years of the contract, it may not take effect for at least four months.

III. CONCLUSION

For the reasons stated herein, IEU-Ohio urges the Commission to find that Ormet has failed to meet its burden of proof, deny Ormet's Application and direct Ormet to submit a new Application that strikes a more reasonable balance between its interests and those of the other Ohio customers that would be burdened as a result of any approved reasonable arrangement.

Respectfully submitted,


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³⁰ Tr. Vol. III at 413-418 (confidential portion of transcript).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Post Hearing Brief of Industrial Energy Users-Ohio* was served upon the following parties of record this 1st day of July 2009, via first class mail, postage prepaid, hand-delivery or electronic transmission.


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