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BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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 09-119-EL-AEC**

COLUMBUS SOUTHERN POWER COMPANY'S AND OHIO POWER COMPANY'S APPLICATION FOR REHEARING

On February 17, 2009, Ormet Primary Aluminum Corporation (Ormet) filed an application pursuant to §4905.31, Ohio Rev. Code to establish a unique arrangement with Ohio Power Company and Columbus Southern Power Company (AEP Ohio or the Companies) for service to Ormet's Hannibal, Ohio facility. Two of the provisions of Ormet's proposed contract that were approved by the Commission's July 15, 2009, Opinion and Order are that:

1. AEP Ohio would be Ormet's exclusive supplier to Ormet. (Ormet Ex. 8, Attachment A, pp. 8-9; Tr. I, p. 37; Tr. IV, p. 484); and

2. Ormet would not be required to provide a deposit to AEP Ohio and would not be required to make advance payments to AEP Ohio, (Ormet Ex. 8, Attachment A, Section 6.03).

Based on this first provision, the Commission also held that "there is no risk that Ormet will shop for competitive generation and then return to AEP-Ohio's POLR service." (Opinion and Order, p. 13). The Commission went on to modify the proposed contract "such that any POLR charges paid by Ormet are used to reduce the AEP-Ohio's ratepayers' obligations under the unique arrangement. During the term of the unique

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arrangement, AEP-Ohio shall credit any POLR charges paid by Ormet to its economic development rider in order to reduce the impact of the unique arrangement on other ratepayers' bills." (*Id.* at 14). This modified proposal did not represent a "reasonable arrangement with" AEP Ohio. Nonetheless, the Commission ordered that "Ormet and AEP Ohio file an executed power agreement in this docket that conforms to the modifications ordered by the Commission." (*Id.* at 16).

Pursuant to §4903.10, Ohio Rev. Code, and §4901-1-35 (A), Ohio Admin. Code, AEP Ohio seeks rehearing of these findings by the Commission. These aspects of the Commission's Opinion and Order are unlawful and/or unreasonable in the following respects.

1. The Commission's conclusion that during the ten-year term of this unique arrangement there is no risk Ormet will be permitted to shop for competitive generation and then return to AEP Ohio is unreasonable and conflicts with the Commission's orders in AEP Ohio's ESP Cases, Case Nos. 08-917-EL-SSO and 08-918-EL-SSO ("*ESP Cases*").

2. Even assuming there is no risk Ormet will be permitted to shop for competitive generation and then return to AEP Ohio, requiring that POLR charges paid by Ormet must be credited by AEP Ohio to its economic development rider is unlawful. §4905.31 (E), Ohio Rev. Code, does not permit the Commission to offset the amount of revenue foregone by alleged or real expense reductions. Further, the Commission's authority under Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., 4927., 4928., and 4929., Ohio Rev. Code, is not available to the Commission to prohibit AEP Ohio from recovering all revenues foregone as a result of the unique arrangement.

3. The order commits a customer to refrain from acquiring its generation service from a Competitive Retail Electric Service (CRES) provider in violation of the clearly stated public policy of this State. Contract provisions that are contrary to the public interest are unenforceable.

4. The Commission ordered AEP Ohio and Ormet to execute and file a power agreement conforming to the Commission's order even though AEP Ohio did not agree with all the terms of the modified reasonable

arrangement. There is no "reasonable arrangement with" AEP Ohio under §4905.31, Ohio Rev. Code.

5. Eliminating the existing requirement for AEP Ohio to retain a deposit from Ormet and no longer requiring Ormet to make payments in advance to AEP Ohio, is unreasonable in light of the increased possibility of Ormet terminating production, either indefinitely or permanently, along with the related inability to make timely payments for electric service or Ormet's decision not to make such payments.

For these reasons, as more fully explained in the following Memorandum in Support of Rehearing, the Commission should grant rehearing of its July 15, 2009 Opinion and Order in recognition of the lack of factual or legal basis for offsetting AEP Ohio's recovery of the revenue foregone as a result of the unique arrangement. Further, the Commission should provide that, unless AEP Ohio and Ormet both agree, AEP Ohio is permitted to retain the deposit it currently holds from Ormet and Ormet is required to make advance payments.

Finally, AEP Ohio requests clarification that it correctly interprets the order to mean that the Companies' 2009 delta revenue application will be determined in a separate proceeding and the collection of delta revenues authorized by the Commission in that proceeding will not be subject to the $54 million annual cap adopted for the 2010-2018 portion of the unique arrangement.

MEMORANDUM IN SUPPORT OF REHEARING

1. There is a Risk That During the Ten-Year Term of the Unique Arrangement Ormet Will Be Permitted to Shop for Competitive Generation and Then Return to AEP Ohio. (Allegation of Error No. 1).

Based on its finding that Ormet's proposed contract would make AEP Ohio Ormet's exclusive supplier for the 10-year term of the contract, the Commission also concluded that "there is no risk Ormet will shop for competitive generation and then return to AEP-Ohio's POLR service." (Opinion and Order, p. 13). This conclusion is unlawful and unreasonable because it ignores applicable statutory authority granted to the Commission and actual experience. Therefore, the Commission should reverse its conclusion regarding risk.

As a matter of law, a schedule or reasonable arrangement approved by the Commission pursuant to §4905.31, Ohio Rev. Code, "shall be under the supervision and regulation of the commission, and is subject to change, alteration or modification by the commission." The Commission's authority over these matters is continuous in nature. Therefore, as circumstances change, the Commission can order a modification of the Ormet contract. In fact, as discussed elsewhere in this memorandum, less than two weeks after the Commission's Opinion and Order in this case was issued, the future operation of Ormet has been cast into uncertainty. As events continue to unfold it is natural that the Commission would preserve its options regarding the contract terms it previously approved. The modifications the Commission made to Ormet's proposed contract regarding required employee levels and reductions in accumulated deferrals

through payment of above-tariff rates by April 2012 reflect the POLR risk associated with this contract.[1]

As a matter of actual experience, Ohio Power Company experienced once before the situation of Ormet shopping for competitive generation service and then returning to AEP Ohio. The Commission is well-aware of the history of Ormet's not just shopping for electric generation but actually switching to another electric supplier's certified service territory and then switching back to a new combined AEP Ohio certified service territory as the relationship between market prices and regulated prices fluctuated.[2] AEP Ohio will not rehash the trail of its opposition to Ormet's return despite contractual provisions to the contrary. Suffice to say that what previously was thought to be a "no risk" situation of Ormet returning to the AEP Ohio system turned into a request from Ormet for the Commission to require AEP Ohio to again provide generation service for their considerable load. Based on this experience with the same customer and the Commission's continuing jurisdiction over an arrangement whose foundation is shifting just shortly after the Commission's order, the Commission should reverse its conclusion that there is no risk of Ormet shopping and then returning to POLR service from AEP Ohio (at tariff or some other special arrangement rate).

2. The Commission Lacks Authority to Preclude AEP Ohio From Recovering All Revenue Foregone As a Result of the Unique Arrangement and Such a Result Conflicts with its Orders in the Companies' ESP Cases. (Allegation of Error No. 2).

As amended by Am Sub. S.B. No. 221 (SB 221), §4905.31, Ohio Rev. Code,

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[1] Opinion and Order, pp. 11 and 15.

[2] See Case No. 05-1057-EL-CSS

provides, in part, as follows:

> Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., 4927., 4928., and 4929. of the Revised Code do not prohibit a public utility from filing a schedule or establishing or entering into any reasonable arrangement ... with one or more customers ... and do not prohibit a mercantile customer of an electric distribution utility... from establishing a reasonable arrangement with that utility or another public utility electric light company, providing for any of the following:
>
> (E) Any other financial device *that may be practical or advantageous to the parties interested.* In the case of a schedule or arrangement concerning a public utility electric light company, such other financial device may include a device to 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...
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> •••
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> Every such schedule or reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission. (emphasis added).

An analysis of the plain language of this statute reveals that nothing in §4905.31, Ohio Rev. Code, authorizes the Commission to offset the recovery of the revenue foregone by any expenses the Commission believes will not be incurred by the electric utility due to the unique arrangement. Any such reduction in recovery of revenue foregone would not be "advantageous" to both parties to the contract. In addition, such a result conflicts with the Commission's recent orders in the Companies' ESP cases.

The Commission cannot read into the statutory language the authority to offset the recovery of revenues foregone by an actual or perceived avoidance of an expense by the electric utility. While such authority is not found in §4905.31, Ohio Rev. Code, elsewhere in SB 221 the General Assembly provided such offset authority in contexts other than §4905.31, Ohio Rev. Code.

For instance, in §4928.142 (D), Ohio Rev. Code, the General Assembly provided that:

> In making any adjustment to the most recent standard service offer price on the basis of costs described in division (D) of this section, the commission shall include the benefits that may become available to the electric distribution utility as a result of or in connection with the costs included in the adjustment... and accordingly, the *commission may impose such conditions on the adjustment to ensure that any such benefits are properly aligned with the associated cost* responsibility. The commission shall also determine how such adjustments will affect the electric distribution utility's return on common equity that may be achieved by those adjustments. The *commission shall not apply its consideration of the return on common equity to reduce any adjustments authorized under this division unless the adjustments will cause the electric distribution utility to earn a return on common equity that is significantly in excess* of the return on common equity that is earned by publicly traded companies, including utilities, that face comparable business and financial risk, with such adjustments for capital structure as may be appropriate. (emphasis added).

Another example of an explicit offset provision is found in §4928.143 (B) (2) (c), Ohio Rev. Code, where the General Assembly provided that:

> Before the commission authorizes any surcharge pursuant to this division, it may consider, as applicable, the effects of any decommissioning, deratings, and retirements.

These provisions demonstrate that in some instances the General Assembly chose to have the Commission offset revenue recovery by cost savings or other considerations such as impact on return on equity. In those instances, the Commission was given explicit authority to make such an offset. The absence of such authorization in §4905.31, Ohio Rev. Code, is particularly telling in light of the presence of such authorization in other provisions in the same piece of legislation. The legislative canon *expressio unius est exclusio alterius* applies, meaning the inclusion of one thing implies exclusion of the

other. *See Crawford-Cole v. Lucas Co.Dept. of Jobs & Family Services*, 121 Ohio St.3d 560, 566, 906 N.E.2d 409, 414 (2009).

The Commission's order that the Companies' recovery of revenue foregone should be offset by POLR charges also is contrary to the Commission's order in the Companies' Electric Security Plan (ESP) proceeding. That order specifically rejected arguments that POLR charges can be avoided if a customer agrees not to shop. That conclusion was affirmed on rehearing on July 29, 2008, two weeks after the Commission's order in this case.

In particular, the Commission's entry on rehearing in the ESP cases explicitly referenced OEG's position that the POLR rider should be "avoidable by those customers who agree not to shop during the ESP through a legally binding commitment." (*ESP Cases*, Entry on Rehearing, p. 25). The Entry on Rehearing's discussion of OEG's request referenced OEG's application for rehearing at page 6. (*Id.*) OEG's application for rehearing in the ESP cases argued (at p. 6):

> [T]here is no cost or risk to the Companies of being the POLR if a customer makes a legally binding commitment not to shop during the ESP. *** If a customer elects to waive its rights to shop during the three-year ESP term, then there is no risk or cost to the Companies and no basis for the Companies to impose the POLR option charge. Therefore, customers who agree not to shop during the ESP should not pay the POLR charge.

OEG's position in the *ESP Cases* was based on the testimony of its witness Mr. Baron, who presented specific proposals for customers to "opt out" of POLR by entering into a legally binding agreement not to shop during the ESP – proposals that were discussed in detail in prefiled testimony and during cross examination. (*ESP Cases*, OEG Ex. 2 at pp. 10-12; Transcript II, pp. 133-160). Notwithstanding the extensive development of

OEG's proposals in the record and the Commission's explicit consideration of those proposals in its orders in the *ESP Cases*, the Commission did not accept the invitation to allow customers to avoid the POLR charge by agreeing that AEP Ohio would be the customer's exclusive provider.

On the contrary, the Commission adopted a nonbypassable POLR charge reflecting 90 percent of the estimated POLR costs presented by the Companies and found that only customers who agreed to return at a market price at the time they decide to shop will avoid the POLR charge during the time they are served by a CRES provider. (*ESP Cases*, Opinion and Order, p.40.) In other words, regardless of whether a customer promised not to shop during the ESP term, all customers would pay the POLR charge for the entire time they are served under AEP Ohio's SSO and would only avoid POLR charges during the period they are actually served by a CRES provider if they promised to return at a market price. Thus, the Commission explicitly wrestled this issue to the ground in the *ESP Cases* and only allowed the POLR charge to be bypassed under narrow circumstances – rejecting OEG's broader proposal to avoid POLR charges anytime a customer promised not to shop. The Commission's Entry on Rehearing (at p. 26) stated that "the Commission carefully considered all of the arguments, testimony, and evidence in the proceeding and determined that the Companies should be compensated for the cost of carrying the risk associated with being the POLR provider, including the migration risk." The result reached in the Opinion and Order in the instant case squarely conflicts with the decision in the *ESP Cases* to reject OEG's proposal to avoid the POLR charge by promising not to shop. That proposal is no different in substance than the

"exclusive supplier" provision presented by Ormet in this case and the decision to reach a different result here should be reconsidered on that basis and reversed.

In its Ormet order the Commission attempted to distinguish its ESP ruling from its Ormet ruling on the basis that the ESP ruling applies to Standard Service Offer while the Ormet ruling applies to a reasonable arrangement under §4905.31, Ohio Rev. Code. This rationale is a classic example of there being a distinction without difference. The same POLR risk that formed the basis for the POLR charge adopted in the *ESP Cases* is present with Ormet. As discussed above, Ormet has gone back and forth between market and regulated rates when conditions suit its business needs, even where its prior decision not to switch again was supposed to be permanent. Further, both the Commission and Ormet are permitted to reopen the agreement during the term of the contract and order or request modifications. *See* Amended Application, Attachment A at § 2.03 and Article 3. Moreover, as noted elsewhere in this memorandum "an exclusive supplier" provision would violate the state policy of promoting competition (thus leading to the same conclusion that Ormet could shop in the future). When these considerations are combined with the proposed agreement's provisions regarding the level of firm/full requirements service, it is evident that the effect of the proposed agreement is to receive SSO service based on a different pricing method. Notwithstanding the Commission's bare statement that the SSO POLR risks do not apply to Ormet's proposed unique arrangement, the above—discussed findings and conclusions reached in the *ESP Cases* suggest that the POLR risks do apply to the proposed Ormet agreement.

As a related matter, the Companies' ESP, as modified by the Commission, reflects a total package that the Commission held to be more favorable, in the aggregate,

than a Market Rate Offer. The position taken by the Commission in this case, results in a further modification of the Companies' ESP – even after those aspects of the *ESP Cases* have been finalized. It is inappropriate to make rulings which modify the Companies' ESP without a record-based conclusion that such a modification was necessary in order to ensure that the modified ESP "is more favorable in the aggregate as compared to the expected results that would otherwise apply" under a market rate offer. *See* § 143(C)(1), Ohio Rev. Code. Further, AEP Ohio also submits that any such changes are especially inappropriate without also changing other ESP provisions which would restore the balance of the Commission's ESP order.

As it stands now, the overall package and balancing of interests reached in the *ESP Cases* is undermined by the order in this case. If the Ormet order is extended to other customers and every mercantile customer could avoid paying the POLR charge by agreeing to make their electric utility their exclusive supplier,[3] the potential for competition in Ohio would be significantly impaired. That result would substantially undermine the Commission's orders in the *ESP Cases*. In the *ESP Cases*, the Commission plainly stated that "[t]he POLR charge was proposed to collect a POLR *revenue requirement* of $108.2 million for CSP and $60.9 million for OP." (*ESP Cases*, Opinion and Order, p.38) (emphasis added). Similarly, when deciding to grant 90% of

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[3] In this regard, a proposal already been brought before the Commission in Case No. 09-516-EL-AEC by a large customer of CSP that also proposes to make CSP its exclusive supplier for the term of the agreement – over CSP's objection. In that case, the POLR offset position is being advanced by some parties based on this Ormet order. The Staff's testimony (filed July 31, 2009) suggests that the Ormet decision has formulated the guidelines for which future applications for reasonable arrangements are reviewed. Thus, absent a distinction between Ormet and other cases to follow, it would appear that this decision opens the floodgates for other mercantile customers to join the chorus of promising not to shop and thereby increase AEP Ohio's exposure to significant revenue loss

the Companies' proposal, the Commission ordered that "the POLR rider shall be established to collect a POLR *revenue requirement* of $97.4 million for CSP and $54.8 million for OP." (*Id.*, p. 40) (emphasis added). This demonstrates that the Commission's intention was to increase the Companies' revenue requirements and create a nonbypassable revenue stream as part of the overall ESP decision – not just create a charge that can simply be avoided by a promise not to shop. It is unreasonable and unlawful for the Commission to issue an order only a few days later that undermines that result.[4]

The facts and the applicable law provide for recovery of all revenues foregone under the Ormet contract. There is no statutory authority for the Commission to offset these revenues foregone by an amount of expense reductions, whether actual or not. The revenues foregone should equal the difference between what Ormet would pay under the Companies' applicable rate schedules and what it would pay under the unique arrangement rate – no more and no less. If the Commission's intent was to "reduce the impact of the unique arrangement on other ratepayers' bills," the proper course of action would have been to reduce further the amount of the maximum discount to which Ormet would be entitled.

[4] The orders in the *ESP Cases* were issued pursuant to § 4928.143, Ohio Rev. Code. That statute specifies the parameters for setting standard service offer rates by establishing an electric security plan. Alternatively, an EDU can set its standard service offer rates by establishing a market rate offer under § 4928.142, Ohio Rev. Code. Whereas, § 4905.31, Ohio Rev. Code, is the purported basis for approving the Ormet unique arrangement. AEP Ohio submits that the Commission lacks authority under § 4905.31, Ohio Rev. Code, to approve the proposed Ormet arrangement without providing for full recovery of foregone revenues and that argument is presented in greater detail below. But in this context of discussing the the orders in the *ESP Cases*, AEP Ohio submits that it is unlawful for the Commission to approve SSO rates under either the ESP or the MRO statute only to proceed to undermine those rates (and in the case of the POLR charge, an explicit revenue requirement) by approving a unique arrangement in a separate case.

3. The Provision of the Unique Arrangement Committing Ormet to Rely on AEP Ohio as its Exclusive Supplier Throughout the Term of the Unique Arrangement Violates Ohio's Public Policy and is Unenforceable. (Allegation of Error No. 3)

The Commission found that under the terms of Ormet's proposed contract AEP Ohio will be the exclusive supplier to Ormet. (Opinion and Order, p. 13). The approval of an "exclusive supplier" provision is contrary to the basic premise of SB 3 and SB 221. That is, the development of competitive electric generation markets for retail customers in Ohio. In fact, the preamble to SB 3 indicates that one of its purposes is "to provide for competition in retail electric service." SB 3 together with amendments made in SB 221 set forth the State's policy to ensure diversity of electricity supplies and suppliers,[5] to recognize the continuing emergence of competitive electricity markets through the development and implementation of flexible regulatory treatment,[6] and to ensure effective competition in the provision of retail electric service.[7] From these policy pronouncements it is clear that a contract by which AEP Ohio's largest customer states a commitment not to pursue competitive options for 10 years stifles the development of a competitive retail electric generation market. Therefore, the Commission should not approve such a provision.

AEP Ohio believes that the concept of "customer choice" should be honored in a manner consistent with the policies set out by Ohio's General Assembly. In this instance, Ormet's proposed contract, as modified by the Commission could have been ordered by the Commission in a manner which best preserves customer choice. There is no reason that Ormet needed to forfeit its right to exercise choice over the ten-year life of the

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[5] §4928.02 (C), Ohio Rev. Code
[6] §4928.02 (G), Ohio Rev. Code
[7] §4928.02 (H), Ohio Rev. Code

contract. Even without the "exclusive supplier" provision Ormet could have chosen to remain a Standard Service Offer customer of AEP Ohio, albeit served under terms of a special arrangement, or to switch to a Competitive Retail Electric Service (CRES) provider.

The Commission should recognize this ability and refuse to accept the "exclusive supplier" provision in Ormet's proposed contract. "[W]here there is a strong public policy against a particular practice, a contract or clause inimical to that policy will likely be declared unconscionable and unenforceable unless the policy is clearly outweighed by some legitimate interest in favor of the individual benefited by the provision." 8 Williston on Contracts (4th Ed.1998) 43, Section 18:7. The Supreme Court of Ohio has declared contracts unconscionable and void where the contract purports to violate important public policies, including policies articulated by the General Assembly in statutes. *See e.g. Taylor Building Corp. of America v. Benfield,* 117 Ohio St.3d 352, 884 N.E.2d 12 (2008). An "exclusive supplier" provision that contradicts the public interest as expressed in Ohio's policy adopted in SB 3 and SB 221 should be considered void as against public policy and unenforceable. The Commission's adoption of a contractual provision which is contrary to public policy and casts uncertainty over the enforceability of the contract is unreasonable and unlawful and should be reversed on rehearing. Consequently, the Commission should reverse its decision to adopt the provision. Even if it is adopted, however, the legally suspect status of such a provision confirms AEP Ohio's position that the Commission erred in concluding that no shopping risk is present with the Ormet arrangement.

4. A Reasonable Arrangement Proposed by an Electric Utility's Mercantile Customer Cannot be Approved by the Commission Under §4905.31, Ohio Rev. Code, Unless the Electric Utility Agrees to be Bound by the Arrangement. (Allegation of Error No. 4).

Prior to the enactment of SB 221, §4905.31, Ohio Rev. Code, allowed a "public utility" to file a schedule or enter into "any reasonable arrangement" with another public utility or with "its customers, consumers or employees" providing for certain enumerated outcomes, including variable rates and different classifications of service. The statute provided that no "such arrangement" is lawful until it was filed with and approved by the Commission.

SB 221 amended §4905.31, Ohio Rev. Code, in three significant respects:

1) It now provides that a public utility is allowed to file a schedule or "establish or" enter into any reasonable arrangement with another public utility or with "one or more of" its customers, consumers or employees.

2) It now also provides that "a mercantile customer of an electric distribution utility" or a group of such customers may establish a reasonable arrangement with "that utility (the EDU serving the service territory in which the customer is located) or another public utility electric light company."

3) The application for approval of an arrangement may be filed with the Commission by either the public utility or the mercantile customer(s).

The Commission's order reads the statute as now allowing mercantile customers to establish an arrangement without the agreement of the electric distribution utility by unilaterally submitting a proposed arrangement for approval by the Commission. An analysis of the statute as modified shows there can be no arrangement approved by the Commission if the public utility to be bound by the arrangement does not agree to its terms.

a. Common usage interpretation of the statute, as amended.

As a general rule the words in a statute must be read in accordance with the common usage of the terms.[8] Therefore, the terms "establish" and "arrangement" should be given their ordinary meaning. The term "establish" is not ambiguous; it is commonly used as a synonym for "create, originate or bring into existence."[9] "Arrangement" is ambiguous; it may mean either a "mutual agreement or understanding" or "a preliminary step or measure."[10] To ascertain which meaning of "arrangement" is intended in this instance, it is necessary to look at the context in which the words appear. The statute states that a "mercantile customer of an electric distribution utility" is not prohibited "from establishing a reasonable arrangement with that utility or another public utility electric light company." Since "establishing" means "creating or bringing into existence," then the ambiguity of "arrangement" suggests that the statute means either that:

> a mercantile customer is not prohibited from creating or bringing into existence a reasonable [*mutual agreement or understanding*] with its EDU or other public utility electric light company; or

> a mercantile customer is not prohibited from creating or bringing into existence a reasonable [*preliminary step or measure*] with its EDU or other public utility.

The former is a fair and reasonable interpretation of the statute; the latter is not.

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[8] §1.42, Ohio Rev. Code, provides: "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." See also *Weiss v. Pub. Util. Comm.*, 90 Ohio St.3d 15, 17 (2000).

[9] Webster's Third New International Dictionary at 778; Black's Law Dictionary (8th ed.) at 568.

[10] Webster's at 120.

In common usage one would not speak of creating a preliminary measure with another. "Creating" connotes that the object created has a sense of finality or permanence; it has come into existence. A preliminary step or measure lacks this quality of permanence and instead implies that something more needs to happen before the object is established. On the other hand, one would speak of creating a mutual agreement or understanding with another, and in such instances permanence and finality are implied. Thus, a mercantile customer can work with a utility to mutually establish an arrangement but cannot independently do so.

It also is significant that the statute provides that the mercantile customer may establish "a reasonable arrangement *with* [its EDU] or another public utility electric light company." The clear indication is that the customer is working cooperatively *with* the utility to jointly establish the arrangement.

b. <u>The context of the statute</u>.

The paragraph of the statute requiring Commission approval also confirms that the mutual agreement interpretation is the better reading of the statute. It states that "no such . . . arrangement is lawful unless it is filed with and approved by the commission." The statute goes on to provide that the public utility "is required to conform its schedules of rates, tolls, and charges to such arrangement." The statute thus envisions that the arrangement submitted to the Commission is an arrangement already in existence [i.e. established] which becomes lawful and immediately enforceable upon approval. As a matter of common usage and basic contract law, a preliminary step or measure lacks the requisite finality to become a lawful and enforceable arrangement upon approval by the

Commission.[11] Indeed it is difficult to imagine how the Commission could "approve" a mere preliminary measure or how a public utility could be "required to conform its schedules of rates, tolls and charges to [a preliminary measure]" that had not evolved into an agreement or understanding.

c. Giving effect to the amendment.

1. *the amendment to allow a utility to "establish" an arrangement.*

Another equally important rule of statutory interpretation applicable here is that all portions of the statute must be given effect.[12] Applied in this context, the rule requires that there be some reason for the General Assembly to have amended §4905.31, Ohio Rev. Code, to allow a public utility to "establish" a reasonable arrangement with "one or more" of its customers, when the statute already provided that a public utility could "enter into" an arrangement with its customers. Such reason exists.

In an early case interpreting the statute, an Ohio appellate court had held that a public utility could not enforce a special contract with one of its customer because the utility had filed only a generic arrangement with the Commission and had not submitted for approval the actual contract signed by the customer.[13] Yet, as we now know, at times a public utility may want to offer a general arrangement to all its customers or to customers in a specific class and leave it to the individual customer to decide whether to

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[11] *Extracorporeal Alliance LLC v. Rosteck*, 285 F. Supp. 2d 1028 (N.D. Ohio 2003); *Kostelnik v. Helper*, 96 Ohio St. 3d 1, 2002-Ohio-2985; Motorist *Mut. Ins. Co. v. Columbus Fin. Inc.*, 168 Ohio App.3d 691, 2006-Ohio-5090.

[12] §1.47(B), Ohio Rev. Code, provides: That in enacting statutes, it is presumed that . . . the entire statute is intended to be effective.

[13] *Lake Erie Power & Light Co. v. The Telling-Belle Vernon Co.*, 57 Ohio App. 467 (Cuyahoga, 1937).

actually "enter into" the offered arrangement.[14] SB 221's amendment to the statute clarifies that this type of arrangement - a generic offer to enter into a particular special contract with customers - can be submitted to the Commission for approval even though the utility and any particular customer have not yet formally entered into such arrangement. The amendment also expressly clarifies that a special arrangement need not be offered to all customers and may be established or entered into with "one or more customers" but less than all.

2. *the amendment to allow a customer to establish an arrangement.*

In order to read the SB 221 amendment as authorizing only mutually agreeable arrangements between a utility and one or more customers, there also has to be a reason why the General Assembly would have authorized the mercantile customer, as well as the utility, to establish an arrangement and to submit it to the Commission for approval. Such reason also exists.

Prior to the amendment, the statute authorized a public utility to enter into a special contract only with its own customers. A utility could not enter into a special contract with a party not already a customer nor could a customer enter into a special contract with a different utility operating outside the certified territory. SB 221 fills in this gap for mercantile customers of EDUs, consistent with the overall goal of the act of fostering competition in the electric industry. The new language recognizes that a mercantile customer has the option of establishing a special contract not only with its

[14] See e.g., *In the matter of the application of The Cleveland Electric Illuminating Company for authority to expand its Competitive Pilot Program,* Case No. 93-0142; *Weiss v. Pub. Util. Comm.* (discussing lawfulness of CEI's Competitive Pilot Program).

EDU but also with some other public utility electric light company.[15] This language also suggests mutual agreement – it would be strange for the Commission to force a CRES provider or an EDU serving another territory to enter into an arrangement – yet the serving EDU and the non-serving EDU/CRES provider are on equal footing under the language used in the statute.

SB 221 also gives the mercantile customer and its EDU or another public utility electric light company the option of having the customer submit the application for approval of the mutual arrangement. There is an obvious reason for this change too. Two likely reasons for proposing a special contract are to have the arrangement support economic development or to further energy efficiency. In both of these situations, the customer has the key role to play in persuading the Commission that the arrangement furthers the intended purpose. For example, to justify an economic development arrangement, the customer has to provide the documentation to establish, among other things, the number of jobs that will be created, the customer's financial viability and the secondary and tertiary benefits of the project. §4901:1-38-03(A) (2), Ohio Admin. Code. In the case of an energy efficiency arrangement, the customer must describe its status in the community and how the arrangement furthers state policy and must submit verifiable information to establish that it meets the criteria for an energy efficiency arrangement. §4901:1-38-04(A) (1) & (2), Ohio Admin. Code. The fact that in some instances the customer logically bears the burden of establishing the reasonableness of the arrangement is a good reason for allowing the customer, instead of the public utility, to submit the application for approval.

[15] In this connection, see §4928.146, Ohio Rev. Code, which provides that §4928.141 to 4928.145, Ohio Rev. Code, do not prohibit electric distribution utilities from providing competitive retail electric service to electric load centers within the certified territory of another such utility.

Another good reason for allowing the customer, in lieu of the public utility, to submit the arrangement to the Commission is that the utility may not want to actively support or bear the burden of persuasion regarding the amount of discount being requested by the mercantile customer, leaving that determination to the Commission. This consideration is applicable not only in reasonable arrangements for economic development and energy efficiency, but also for unique arrangements under §4901:1-38-05, Ohio Admin. Code.

Thus, §4905.31, Ohio Rev. Code, as amended, is properly read, according to common usage, as continuing to allow only arrangements agreed to by the public utility and its customer(s), as opposed to opening the door to unilateral arrangements proposed by the customer and not supported by the public utility. In fact, this is the reading given to the statute by the Commission itself. In its September 17, 2008, Finding and Order adopting Chapter 4901:1-38, Ohio Admin. Code, the Commission "determined that it is necessary to approve all reasonable arrangements *entered into between the utility and one or more of its customers.*" (emphasis added).[16]

On rehearing, the Commission should reverse the POLR adjustment provision of its order and reaffirm its earlier recognition that §4905.31, Ohio Rev. Code, pertains to reasonable arrangements entered into between the utility and one or more of its customers. Unilateral agreements cannot be imposed on the utility.

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[16] *In the Matter of the Adoption of Rules for Standard Service Offer, Corporate Separation, Reasonable Arrangements, and Transmission Riders for Electric Utilities Pursuant to Sections 4928.14, 4928.17 and 4905.31, Revised Code, as amended by Amended Substitute Senate Bill No. 221*, Case No. 08-777-EL-ORD.Finding and Order (Sept. 17, 2008), p. 7.

5. **Due to Ormet's Recent Issuance of a WARN Notice, It May Be Unreasonable to Release Ormet From Existing Requirements For a Deposit and Advance Payments. (Allegation of Error No. 5).**

At the hearing in this proceeding Mr. Baker testified regarding the content of Section 6.03 of Ormet's proposed contract dealing with the waiver of a deposit requirement and waiver of Ormet making advance payments. He testified that Ormet had indicated that with these provisions Ormet would be able to pay a higher rate than it could if a deposit and payment in advance were required. (Tr. I, p. 19, 23). At that time it appeared that customers likely would be better off under the Ormet proposal even if Ormet defaulted on paying its electric bill and the defaulted amount was passed through to customers as part of delta revenues. (Id. at 19-26).

Subsequent to the Commission's Opinion and Order in this case, Ormet has issued WARN (Worker Adjustment and Retraining Notification) notices to 833 hourly and 149 salaried employees.[17] The extent of actual layoffs and the impact on continued operations by Ormet is not known to AEP Ohio.

What is apparent, however, is that the potential for a previously unanticipated adverse customer impact has materialized as a result of the WARN notices. This is because the potential that AEP Ohio customers will be responsible for additional delta revenues resulting from a payment default associated with a shut down of Ormet's facilities has increased. In light of the recent WARN notices issued by Ormet, the Commission should grant rehearing to consider whether its adoption of Section 6.03 of Ormet's proposed contract should be reversed.

[17] WARN notices of plant closings and large-scale layoffs are required of covered companies. Ormet's Press Release acknowledging the WARN Notices is attached to this Application for Rehearing.

6. The Commission Should Clarify That its Consideration of 2009 Delta Revenue Recovery is Not Constrained by the Ratepayer Cap Imposed for the 2010-2018 Terms of the Arrangement (Request for Clarification No. 1).

The Companies also request clarification concerning the maximum amount ratepayers should be expected to pay in a given year. Consistent with the record and the procedural development of this case, the order contains separate sections for the 2009 issues (pages 4-5) and the 2010-2018 issues (pages 6-15) and made separate determinations for those two periods. As part of the 2009 issues discussion, the Commission directed AEP Ohio (at page 5) to file an application to recover the appropriate amounts of the deferrals authorized by the Commission in Case No. 08-1338-EL-AAM and the delta revenues for calendar year 2009. As part of the 2010-2018 issues discussion, the Commission indicated (at page 10) that $54 million should be the maximum amount of delta revenue paid by ratepayers in a given year. AEP Ohio requests clarification that it correctly interprets these provisions together to mean that the 2009 delta revenue application will be determined in a separate proceeding and the collection of delta revenues authorized by the Commission in that proceeding will not be subject to the $54 million annual cap relating to the 2010-2018 portion of the unique arrangement.

It was through no fault of AEP Ohio that the 2009 proceedings were not resolved and collection of the 2009 delta revenues has not already commenced. The alternative of requiring a long-term deferral of the 2009 delta revenues would impose an unreasonable regulatory lag for revenue recovery and, in addition to being unwise regulatory policy, would be unfair to AEP Ohio. Requiring such a large deferral would also conflict with the Commission's order (at page 10) where it stated that the annual ratepayer ceiling

would "result in a potential differential of up to $6 million per year" which would be deferred with carrying costs. This matter should be clarified.

CONCLUSION

Based on the foregoing, AEP Ohio requests that the Commission grant the requested rehearing and clarification outlined above.

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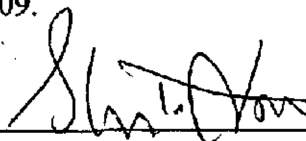
CERTIFICATE OF SERVICE

I hereby certify that a copy of Columbus Southern Power Company's and Ohio Power Company's Application for Rehearing was served by U.S. Mail and electronic mail upon the individuals listed below this 14th day of August 2009.



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FOR IMMEDIATE RELEASE

July 30, 2009

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Ormet Confirms WARN Notices

Hannibal, OH – Ormet Corporation, an independent U.S. producer of aluminum, issued the following statement today. Ormet CEO Mike Tanchuk confirms that the company has issued a WARN notice to 833 hourly and 149 salaried employees as is required by law. However, at this time no definitive decisions have been made as to the extent of the layoffs. The number of employees that will be affected is, as of yet, undetermined. We recognize the challenging conditions we are facing and the difficult economic environment in which we are operating, and we want to assure everyone that we are doing everything in our power to protect the company, our workforce, and the communities in which we operate.

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 Ormet's business is subject to numerous significant risks and uncertainties, including those discussed in Ormet's 15c2-11 information and disclosure statements for the year ended December 31, 2008 and the quarter ended March 31, 2009 (copies of which are available at Ormet's website at www.ormet. com).

Headquartered in Hannibal, Ohio, Ormet Corporation is a major U.S. producer of aluminum. Ormet employs approximately 1,000 people. Its aluminum smelter based in Hannibal, Ohio has an annual aluminum production capacity of approximately 266,000 metric tons. For more information, visit Ormet's website at www.ormet.com.