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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

**INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA
COLUMBUS SOUTHERN POWER COMPANY'S AND
OHIO POWER COMPANY'S APPLICATION FOR REHEARING**

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**MEMORANDUM CONTRA COLUMBUS SOUTHERN POWER
COMPANY'S AND OHIO POWER COMPANY'S
APPLICATION FOR REHEARING**

I. INTRODUCTION

On February 17, 2009, Ormet Primary Aluminum Corporation ("Ormet") filed an 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, for an alternate and lower rate to reflect "changing market conditions since Ormet submitted its initial Application" that caused Ormet to curtail its operations.¹ After a hearing that began on April 30, 2009 and, after several continuances, concluded on June 17, 2009,

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.

the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order ("Order") on July 15, 2009 that significantly modified and approved the Application.

Several parties, including Industrial Energy Users-Ohio ("IEU-Ohio"), filed Applications for Rehearing of the Commission's Order. AEP's Application for Rehearing includes an argument that the Commission does not have the authority to approve a reasonable arrangement proposed by a mercantile customer under Section 4905.31, Revised Code, unless the electric distribution utility ("EDU") agrees to be bound by the arrangement. AEP Application for Rehearing at 15. For the reasons set forth below, the Commission should deny AEP's request for rehearing on this basis.

II. ARGUMENT

AEP is correct that prior to the enactment of Amended Substitute Senate Bill 221 ("SB 221"), Section 4905.31, Revised Code, allowed only 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. AEP Application for Rehearing at 15. The statute also provided that no "such arrangement" or "schedule" is lawful until it was filed with and approved by the Commission and that the public utility was required to conform its rates to the arrangement upon Commission approval. Section 4905.31, Revised Code. AEP is also correct that SB 221 amended Section 4905.31, Revised Code, to permit mercantile customers to seek approval of a reasonable arrangement or schedule where only the EDUs were permitted to do so before. *Id.*

However and even though the meaning of Section 4905.31, Revised Code, is not ambiguous, AEP spends a significant portion of its Application for Rehearing to concoct a statutory interpretation that would have the Commission conclude that no reasonable arrangement or schedule can be enabled without the EDU's consent and acceptance. *Id.* In other words, AEP urges the Commission to find that AEP has an absolute veto over the authority delegated to the Commission by Section 4905.31, Revised Code, to enable a reasonable arrangement or schedule that is filed by a mercantile customer or group of such customers. The relief AEP seeks on rehearing is unlawful and it does not take an exercise in statutory interpretation to conclude as much.

SB 221 added mercantile customers to the category of entities that are entitled to submit a proposed reasonable arrangement or schedule to the Commission for its consideration and approval. SB 221 did not modify the requirement that the Commission must review and approve any such submission, regardless of by whom it was filed, before it becomes lawful and effective. Section 4905.31(E), Revised Code. However, SB 221 did explicitly expand the persons eligible to submit such an arrangement or schedule for the Commission's consideration and approval. Specifically, as a result of SB 221, Section 4905.31(E), Revised Code, now states:

No such schedule or arrangement is lawful unless it is filed with and approved by the commission pursuant to an application that is submitted by the public utility ***or the mercantile customer or group of mercantile customers of an electric distribution utility*** and is posted on the commission's docketing information system and is accessible through the internet. (Emphasis added.)

Finally, and most telling, despite expanding the scope of persons eligible to submit a proposed reasonable arrangement or schedule to the Commission, the General Assembly did not modify the requirement that upon Commission approval of

such a reasonable arrangement, "[e]very such public utility is required to conform its schedules of rates, tolls, and charges to such arrangement, sliding scale, classification, or other device, and where variable rates are provided for in any such schedule or arrangement, the cost data or factors upon which such rates are based and fixed shall be filed with the commission in such form and at such times as the commission directs." Section 4905.31(E), Revised Code. There is no new language that says, "***upon the agreement of the public utility with the Commission-approved reasonable arrangement***, the public utility is required to conform its rates to the arrangement." The General Assembly could have included such a requirement and it did provide, effectively that is, an EDU with a regulator-disabling veto where the Commission modifies (acting under Section 4928.143, Revised Code) a proposed electric security plan. But, the General Assembly did not delegate authority to AEP or any other electric utility the right to trump a Commission determination rendered pursuant to Section 4905.31, Revised Code.

The clear and plain language in Section 4905.31, Revised Code states that: (1) either an electric utility, mercantile customer or group of mercantile customers may submit a proposed reasonable arrangement or schedule to the Commission for the Commission's consideration and approval; (2) the proposed reasonable arrangement may become lawful and effective only upon Commission approval; and, (3) the utility must then conform its rates to the Commission-approved reasonable arrangement.

Every public utility has an obligation to furnish necessary and adequate service and facilities to the public. All charges made or demanded by a public utility for any service rendered must be just and reasonable and not more than the charges allowed

by law or order of the Commission. A public utility is specifically prohibited from charging or demanding any unjust or unreasonable charge or a charge in excess of the charge authorized by the Commission. See Sections 4905.22 and 4909.17, Revised Code. Before a public utility can bill and collect charges for the services it provides, it must have the required regulatory approvals to impose such rates and charges and it must publish the rates and charges in a schedule that is on file with the Commission. Section 4905.30, Revised Code. Only the Ohio Supreme Court has the power to review, suspend or delay any order made by the Commission. Section 4903.12, Revised Code. Thus, AEP's request – first communicated at the rehearing phase of this proceeding – that the Commission rewrite Section 4905.31, Revised Code, to equip AEP with an absolute veto over the Commission's authority to determine, in accordance with the law, the rates and charges that a utility must use for billing purposes is also in direct conflict with the clear and plain requirements of other Sections of the Revised Code.

III. CONCLUSION

For the reasons explained herein, IEU-Ohio urges the Commission to reject AEP's request that the Commission find that Section 4905.31, Revised Code, prohibits the establishment of reasonable arrangements and schedules unless and until AEP consents to the Commission's determination.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra Ohio Power Company's and Columbus Southern Power Company's Application for Rehearing* was served upon the following parties of record this 24th day of August 2009, via first class mail, postage prepaid, hand-delivery or electronic transmission.



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