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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 No. 09-119-EL-AEC

MEMORANDUM CONTRA AEP-OHIO'S APPLICATION FOR REHEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND THE OHIO ENERGY GROUP

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BY
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The Office of the Ohio Consumers' Counsel ("OCC") represents approximately 1.2 million residential electric consumers of the Ohio Power Company and the Columbus Southern Power Company (collectively "AEP" or "AEP-Ohio"). The Ohio Energy Group ("OEG") represents AK Steel Corporation, Aleris International, Inc., ArcelorMittal, BP-Husky Refining, LLC, Brush Wellman, E.I. dupont de Nemours & Company, Ford Motor Company, GE Aviation, Griffin Wheel, Linde, Inc., Proctor & Gamble Distribution Company, PPG Industries, Inc., Republic Engineered Products, Inc. Severstal Wheeling and Worthington Industries. Together OCC and OEG, in accordance with Ohio Admin. Code 4901-1-35(B), file this Memorandum Contra AEP-Ohio's Application for Rehearing of the July 14, 2009 Opinion and Order ("Order") of the Public Utilities Commission of Ohio ("Commission" or "PUCO").

I. INTRODUCTION

On July 14, the Commission issued an Order approving a ten-year "unique arrangement" for Ormet but modifying certain provisions of the Application. Among other things the Commission found that since AEP would be the exclusive supplier to Ormet, there would be no risk to AEP that Ormet will shop and then return to AEP's provider of last resort ("POLR") service.[1] Accordingly, the Commission determined that AEP should not be compensated for a service it would not be providing. Thus, the Commission found that any POLR charges paid by Ormet should be credited to the economic development rider charged to AEP's customers to reduce the subsidy that customers will have to pay for Ormet's unique arrangement.[2] For 2009, it is expected that the POLR credit will reduce the subsidy that customers will have to pay AEP by approximately $15 million.[3] For 2010, the POLR credit will spare customers from having to pay AEP approximately $11 million.[4] On August 14, 2009, AEP Ohio applied for rehearing citing five assignments of error and seeking clarification of a part of the Opinion and Order.

Applications for rehearing are governed by R.C. 4903.10 and may be sought by any party who has entered an appearance in the proceeding on any matter determined in the proceeding. In considering an application for rehearing, Ohio law provides that the Commission "may grant and hold such rehearing on the matter specified in such

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[1] *See In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Opinion and Order at 13 (July 15, 2009) ("Order").

[2] *See* Id.

[3] *See In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company*, Case No. 09-119-EL-AEC, Post-hearing Brief By the Office of the Consumers' Counsel and the Ohio Energy Group at 26 (July 1, 2009). ("OCC/OEG Post-hearing Brief").

[4] *See* id. at 20-21.

application, if in its judgment sufficient reason therefore is made to appear." Furthermore, if the Commission grants a rehearing and determines that "the original order or any part thereof is in any respect unjust or unwarranted, or should be changed, the Commission may abrogate or modify the same . . . ."[5]

For the reasons discussed in detail below, AEP Ohio has failed to show sufficient cause for the Commission to abrogate or modify its July 14, 2009 Opinion and Order with regard to assignments of error 1-4. Thus, OCC and OEG urge the Commission to reaffirm its Opinion and Order with respect to AEP's assignments of error 1-4. OCC and OEG are not opposing AEP's assignment of error 5.[6]

OCC and OEG believe that the clarification sought by AEP with regard to whether there is a cap for 2009 delta revenues is needed. OCC and OEG had proposed a cap of no more than $32 million in 2009, but the Commission Order appears to have focused its cap discussion on 2010-2018. Unless the Commission chooses to define the cap in the deferral filing required of AEP, it should address the 2009 cap now, taking into

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[5] R.C. 4903.10.

[6] OCC and OEG support Assignment of Error 5, and believe the Commission should permit AEP Ohio to retain the $7 million deposit from Ormet and should continue to require Ormet to make payments in advance. This is merely a continuation of the status quo. This will serve to protect customers (and the Company) from default by Ormet on outstanding electricity bills. Given the WARN notice issued by Ormet that it will be laying off employees and reducing operations, to give back the deposit and bill after the fact puts AEP and its customers at risk of being injured by Ormet defaulting on payment for services rendered. There is no reason to do so.

account arguments made by OCC and OEG in the temporary case[7] (Case No. 08-1338-EL-UNC) and the present case.

Additionally, OCC supports IEU's Application for Rehearing, agreeing that there are many issues remaining as to what 2009 rate Ormet should be billed and when. Currently, OCC understands that the temporary agreement, approved in January 2009, is in effect between AEP and Ormet, and Ormet is being billed at the pre-ESP GS-4 blended rate (OP/CSP).[8] OCC understands that there is no executed contract between Ormet and CSP that puts into effect the Opinion and Order issue in this case. Given the uncertainty with Ormet's operations at this point,[9] OCC believes IEU's request for rehearing on the 2009 rates for Ormet makes sense. The 2009 rates for Ormet are important because they directly impact the discount being subsidized by AEP-Ohio's customers.

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[7] OCC and OEG continue to recommend that the temporary rate for billing Ormet should have increased to the recently approved ESP rates starting April 1, 2009. See OCC/OEG Motion to Enforce January 7, 2009 Order And to Cease Additional Deferrals and Request for Expedited Ruling, filed May 11, 2009. That Motion has never been ruled on. Had the OCC/OEG Motion been granted, no more delta revenues would have been created starting in April 1, 2009—because Ormet would have had to pay the new ESP rates just like the rest of AEP's customers. Thus any cap on delta revenues would be needed for only the first three months of 2009 and any months following execution of a new contract consistent with the Commission's order herein.

[8] The Order in the temporary case, Case No. 08-1338-EL-UNC, was issued by the PUCO on January 7, 2009. The OCC filed an Application for Rehearing of the Order on February 6, 2009. On March 4, 2009, the Commission found "sufficient reason has been set forth by OCC to warrant further consideration of the matters specified" and granted rehearing. There has been no resolution of OCC's Application, to date.

[9] In a press release dated August 17, 2009, Ormet announced 100 employee lay-offs, but indicated that it would be operating 4 potlines through the end of 2009. See Attachment A. Whether Ormet should receive a discounted rate for 2009 and beyond may be an issue for the Commission to reconsider given the uncertainty of Ormet's current ability to retain jobs beyond 2009 (see attached).

II. ARGUMENT

A. The Commission's Conclusion That There Is No Risk Of Ormet Shopping And Then Returning To AEP-Ohio During The Ten-Year Term Unique Arrangement Was Reasonable And Consistent With The Commission's Order In AEP-Ohio's ESP Cases.

Toward AEP-Ohio's apparent goal of being compensated for a risk that it does not bear, it asserts that there is a risk of Ormet shopping for competitive generation and then returning to AEP-Ohio for electric service. This assertion is not substantiated by the record or the relevant Reasonable Arrangement Statute, R.C. §4905.31. There is no evidence in the record to support AEP-Ohio's assertion that Ormet could shop or that it would shop. The record did establish that Ormet made a decision not to shop. It was Ormet that proposed to commit for ten years of service from AEP-Ohio - as part of its unique arrangement. Ormet's decision was declared in the Application, and supported by Ormet's witnesses.[10] AEP-Ohio, at the time of the hearing, was not opposed to being the exclusive supplier to Ormet. The Commission's order simply ratifies Ormet's decision to make AEP-Ohio the exclusive electric supplier to Ormet for the next ten years.[11]

AEP-Ohio also asserts that the Commission's oversight authority under R.C. §4905.31 establishes a risk that Ormet could shop.[12] Thus, AEP-Ohio argues it should be compensated for the POLR risk, rather than crediting AEP-Ohio customers for POLR. (The credit that AEP-Ohio would deny to customers is what the PUCO ordered to protect

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[10] *See In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company,* Case No. 09-119-EL-AEC, Direct Testimony of Henry W. Fayne on behalf of Ormet Primary Aluminum Corporation at 6, (April 23, 2009.

[11] *See* Order at 13.

[12] *See In the Matter of the Application of Ormet Primary Aluminum Corporation for Approval of a Unique Arrangement with Ohio Power Company and Columbus Southern Power Company,* Case No. 09-119-EL-AEC,Columbus Southern Power Company's And Ohio Power Company's Application for Rehearing at 4 (August 14, 2009) ("AEP-Ohio Application for Rehearing").

customers against paying millions of dollars to AEP-Ohio for a POLR risk that AEP does not bear.) AEP-Ohio alleges that the Commission's ability to modify the arrangement at any time provides an opportunity for Ormet to shop for a different supplier.[13] Yet, AEP-Ohio fails to acknowledge that the Commission concluded that AEP-Ohio would be the exclusive supplier of electricity to Ormet.[14] AEP-Ohio's position that there is a shopping risk because the Commission could overturn its determination and use its oversight authority to reverse its own finding hardly seems credible.

B. The Commission Order Permitting POLR Revenues Paid By Ormet To Be Credited To Customers Paying The Economic Development Rider Is Lawful And Not Prohibited By 4905.31(E).

1. R.C. 4905.31 does not preclude the Commission from requiring that the Provider of Last Resort charge for Ormet be credited to AEP-Ohio's Economic Development Rider.

AEP-Ohio asserts that the Commission does not have the statutory authority to preclude it from collecting all foregone revenue from its unique arrangement with Ormet.[15] In particular, AEP-Ohio challenges the Commission's order that the POLR charges for Ormet be credited to AEP-Ohio's economic development rider.[16] The Companies' arguments, however, lack merit.

AEP-Ohio raised the issue in its post-hearing brief. There, AEP-Ohio argued that the Commission does not have the statutory authority to offset foregone revenue through expense reductions. AEP-Ohio argued in its Post-hearing Brief that "§4905.31 (E), Ohio Rev. Code, specifies that costs incurred in conjunction with any economic development

[13] *See* Id.

[14] *See* Order at 13.

[15] *See* AEP-Ohio Application for Rehearing at 5-6.

[16] *See* id. at 2.

or job retention program 'including recovery of revenue foregone' are recoverable by the electric light company."[17] AEP-Ohio asserted that "[w]ith 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."[18] The Commission considered this argument in the Order,[19] and rejected it by ordering that POLR charges for Ormet be credited to AEP-Ohio's economic development rider (which results in the credit to customers).[20]

In addition, AEP-Ohio's statutory construction is faulty in several respects. First, the Company asserts that, under R.C. 4905.31(E), the terms of a unique arrangement must be advantageous "to both parties to the contract."[21] But this is only part of the requirement found in the statute. R.C. 4905.31(E) allows special contracts between an electric utility and a customer that includes "[a]ny other financial device that may be practicable or advantageous to the parties interested." Thus, the financial device can be **either** practicable **or** advantageous to the parties interested. It need not be both.

Webster's Dictionary defines "practicable" as "capable of being put into practice or of being done or accomplished: feasible" as in "a practicable plan."[22] The Commission's decision to credit the POLR charges to AEP-Ohio's economic

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[17] *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,Columbus Southern Power Company's and Ohio Power Company's Post Hearing Brief at 8 (July 1, 2009).

[18] Id.

[19] *See* Order at 7-8.

[20] *See* Id. at 14.

[21] AEP-Ohio Application for Rehearing at 6.

[22] http://www.merriam-webster.com/dictionary/practicable.

development rider is certainly practicable. The POLR charges are capable of being credited to the economic development rider.

Second, AEP-Ohio limits the effect of R.C. 4905.31(E) to the parties to the contract. But the statute uses the term "the parties interested." The plain meaning of this term goes beyond just the parties to the contract. As part of its determination that the arrangement is "reasonable" under R.C. 4905.31, the Commission must also take into consideration the effect of the agreement on, e.g., other ratepayers, who have a distinct interest in the how the agreement will affect the rates they must pay for the utility's service.

Third, AEP-Ohio's interpretation of R.C. 4905.31(E) ignores the process that the Commission should undertake to determine "foregone revenues." AEP-Ohio equates the term "foregone revenues" with the difference between the revenues AEP-Ohio would collect under the rates that Ormet would ordinarily be charged and the revenues that will be generated through the rates in the special agreement. Naturally inherent in determining foregone revenues, however, is a consideration of other factors (e.g., costs that a utility would avoid under the arrangement). The POLR charge is one factor that should be taken into consideration. Indeed, because AEP-Ohio is Ormet's *only* provider under the terms of the agreement, the POLR charge should not exist at all, and thus there should be no revenues that would be foregone under the agreement. This makes sense especially given the Commission's conclusion that AEP-Ohio would not be providing any POLR service to Ormet.

R.C. 4905.31(E) is not as restrictive as AEP-Ohio asserts. The Commission should deny the Companies' application for rehearing on this point.

2. The Provider of Last Resort provisions of AEP-Ohio's Electric Security Plan do not apply to Ormet, which is not receiving service under AEP-Ohio's Standard Service Offer.

AEP-Ohio also asserts that crediting Ormet's POLR charge to AEP-Ohio's' economic development rider is contrary to the Commission's order establishing AEP-Ohio's electric security plan ("ESP"). AEP-Ohio argues that the POLR charge in the ESP is bypassable only by customers who agree, at the time they shop, to return at market rates, which is not the case with Ormet.[23] AEP-Ohio also contends that the Order undermines the ESP by reducing their revenue requirements contained in the ESP.[24] AEP-Ohio, however, ignores several key facts that invalidate its arguments.

First, in the Order the Commission determined that the ESP order "is inapplicable to this case because that holding addressed customers receiving service under AEP-Ohio's standard service offer rather than receiving service under a unique arrangement specifically approved by the Commission."[25] Thus, the Commission-approved terms of the arrangement, and not AEP's ESP, govern the application of a POLR charge. This is consistent with R.C. 4905.31 which requires a discrete application by a mercantile customer and separate PUCO approval of the proposed reasonable arrangement, along with separate filing of the schedule of rates conforming to the approved reasonable arrangement.

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[23] *See* AEP-Ohio Application for Rehearing at 8-10.

[24] *See* Id. at 11-12. AEP-Ohio also asserts that the Order undermines the ESP by impeding competition. Id. at 11. OCC will address that issue in Section C, infra.

[25] Order at 14.

AEP's attempts to dismiss the Commission's ruling as "a distinction without difference [sic]."[26] AEP-Ohio claims that "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."[27] But going "back and forth" between AEP-Ohio's rates is not the same as shopping to a competitor. Instead of supply that is truly set by the market, the supply of electricity is dictated by the agreement.

AEP-Ohio also cites to provisions in the agreement that allow it to be modified during the term of the contract.[28] This is irrelevant to the issue of whether the POLR charge for Ormet should be credited to the economic development rider *at this time*.

AEP-Ohio's arguments that the ESP applies to the Ormet contract are not compelling. The Commission was right in determining that the ESP is inapplicable to this proceeding.

Second, the "revenue requirement" established in the ESP case was based on POLR revenues from those customers who receive service under AEP-Ohio's standard service offer. AEP-Ohio did not seek rehearing to include POLR revenues from those customers who receive service through special contracts. The time for raising that issue has passed.

AEP-Ohio's assertions about the relationship between the Order and the ESP decision are flawed. The Commission should deny AEP-Ohio's application for rehearing on this point.

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[26] AEP-Ohio Application for Rehearing at 10.

[27] Id.

[28] Id.

C. The Commission Order Permitting A Customer To Choose To Seek Service From AEP-Ohio As An Exclusive Provider Does Not Violate Any Public Policy Of The State, But Rather Furthers The Policy Of The State In Facilitating Reasonable Rates And Customer Choice.

AEP-Ohio argues that the PUCO's approval of an "exclusive supplier" provision is contrary to the basic premise of SB 3 and SB 221.[29] AEP-Ohio defines the premise as the "development of competitive electric generation markets for retail customers in Ohio."[30] AEP-Ohio alleges that a contract under which its largest customer agrees not to pursue competitive options for ten years "stifles the development of a competitive retail electric generation market." Thus, according to AEP-Ohio, the PUCO should not approve such a provision. [31]

Further AEP-Ohio asserts that "customer choice" could have been preserved in the reasonable arrangement by Ormet not forfeiting its right to choice, but remaining as a SSO customer of AEP, albeit under terms of a special arrangement.[32] Alternatively, AEP-Ohio posits that Ormet could have, consistent with "customer choice," switched to a competitive retail electric service provider ("CRES").

While OCC and OEG agree with AEP-Ohio that one of the main premises of SB 221 was to assist the development of competitive electric generation for retail customers, AEP-Ohio overlooks the fact that competition, in and of itself, is not the end-all purpose

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[29] AEP-Ohio Application for Rehearing at 13.

[30] Id.

[31] Id.

[32] Id. at 13-14. AEP does not explain how it could offer variable rates to Ormet under the SSO schedule with different terms amounting to a special arrangement, and yet still comply with the SSO rate schedule. It would appear that this cannot be done. The reasonable arrangement statute requires a separate filing for variable rates, including a schedule with the cost data or factors upon which the rates are based. See 4905.31(E). This would have to occur outside the SSO rate schedule.

of SB 221. Rather SB 221 is intended to ensure "reasonably priced electric retail service" by providing customers with tools and opportunities to achieve such reasonably priced rates.[33] Competition should be a means toward that end. Customer choice is another means to that end.[34]

Customer choice means that a customer who agrees to contract provisions, including a long-term exclusive supplier provision, should not be second-guessed by AEP-Ohio. But AEP-Ohio would have the PUCO allow it to second-guess Ormet and in so doing require other customers to pay millions of dollars in unwarranted subsidies to AEP-Ohio. Tellingly, when other AEP-Ohio customers -- Globe and Solsil--sought to enter into ten-year exclusive agreements with AEP-Ohio, AEP-Ohio alleged that "the parties' decisions to agree to contract provisions should not be second-guessed by OCC."[35] And yet eleven months later AEP-Ohio is doing the second-guessing that it earlier criticized, now that Ormet's exercise of choice would reduce AEP-Ohio's collections from customers.

Evidently, in September 2008, when AEP-Ohio sought approval of these two ten-year exclusive arrangements with Solsil and Globe Metallurgical, AEP-Ohio did not deem it to be inconsistent with SB 221 to enter into long-term exclusive arrangements. Similarly, it was not problematic for AEP-Ohio to be a sole provider of service to Ormet

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[33] *See* R.C. 4928.02—" It is the policy of the state to do the following throughout the state: (A) Ensure the availability to consumers of adequate, reliable, safe, efficient, non-discriminatory, and reasonably priced retail electric service."

[34] Customer choice is mentioned frequently, as one of the state policies underlying SB 221. See for example R.C.4928.02 (C), (E).

[35] *See In the Matter of the Application for Approval of a Contract for Electric Service Between Columbus Southern Power Company and Solsil, Inc.* and *In the Matter of the Application for Approval of a Contract for Electric Service between Ohio Power and Globe Metallurgical, Inc.*, Case Nos. 08-883-EL-AEC, 08-884-EL-AEC, Columbus Southern Power Company's and Ohio Power Company's Memorandum Contra Application for Rehearing at 4 (Sept. 12, 2008).

(for ten years) up until the Commission required AEP-Ohio to credit the rest of its customers for POLR revenues received from Ormet. Suddenly, AEP-Ohio has reversed course and with it the argument that any sole source contract with a large customer would stifle the development of competition under SB 221. AEP-Ohio's change of heart and bears upon the earnestness of such arguments now presented.

AEP-Ohio defines "customer choice" under SB 221 to mean that Ormet and other similarly situated customers cannot choose to name AEP-Ohio as their exclusive provider for any length of time, but can exercise choice to remain as an AEP-Ohio's SSO customer or switch to a CRES.[36] OEG and OCC submit that this is not the "choice" envisioned under S.B. 221, nor is it likely to be a choice that can result in achieving lower rates. This is because of the lack of CRES providers willing or able to meet or beat an economic development discount funded by the other customers of AEP-Ohio. Theoretical competition will not ensure the availability to customers of reasonably priced retail electric service.

For AEP-Ohio to argue that the policy of competition is undermined by a customer choosing to accept service from AEP-Ohio above all others, suggests that customer choice is secondary to the goal of competition and that the two cannot be reconciled. This was surely not the intention of the Legislature when it enacted SB 221. Rather the General Assembly believed that customer choice would enable competition and vice versa. OCC and OEG believe that stifling customer choice, or limiting customer choice to something that cannot be exercised, as AEP-Ohio seeks to do here, is not in

[36] *See* AEP-Ohio Application for Rehearing at 13-14.

what was intended when the Legislature enacted S.B. 221, and enhanced provisions of the law relating to reasonable arrangements. .

D. The Commission May Order AEP-Ohio And Ormet To Enter Into A Reasonable Arrangement Conforming To The Commission's Order Without Mutual Agreement By The Electric Utility.

AEP, in its fourth assignment of error, erroneously claims that the "Commission's order reads the statute as not 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."[37] AEP-Ohio unfortunately does not cite where or how the Commission has done so. A review of the order reveals no language that could be interpreted in this way.

Rather than disagreeing with the Commission, AEP-Ohio appears to be "throwing down the gauntlet" in this argument, essentially denying that the Commission has authority to approve or modify any special arrangement in ways that would dissatisfy a utility. This view is premised upon AEP-Ohio's belief that there can be no reasonable arrangement approved by the Commission if the public utility to be bound by the arrangement does not agree to its terms.[38] AEP-Ohio comes to this conclusion by providing its interpretation of R.C. 4905.31 bit by bit. First AEP-Ohio interprets the terms of "establishing" an "arrangement" to mean that a mercantile customer must work with the utility to mutually establish an arrangement but cannot independently do so.[39] Next AEP-Ohio claims that the statute envisions that the mutually established

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[37] AEP-Ohio Application for Rehearing at 15.

[38] *See* Id.

[39] AEP-Ohio Application for Rehearing at 17.

arrangement must be already in existence and becomes lawful upon PUCO approval.[40] AEP-Ohio then argues that the amendments to R.C. 4905.31 under SB 221 were intended to address only circumstances which require mutual agreement between the mercantile customer and the utility. In furtherance of its theory, AEP-Ohio argues that the amendment was intended to allow AEP-Ohio to generically offer to enter into a special contract with some subset of customers.[41] Additionally, AEP-Ohio expresses its belief that the amendment was also needed to establish an option for a mercantile customer to establish a special contract not only with its electric distribution utility ("EDU") but also with some other public utility electric light company.[42] AEP-Ohio then characterizes the mercantile customer's option to submit an application as one linked to mutual agreement to support economic development or further energy efficiency.

As discussed below, AEP-Ohio's interpretation of the amendments to R.C. 4905.31 is faulty in suggesting that all applications require mutual agreement of the mercantile customer and a utility before an arrangement may be submitted or approved. The law does not suggest that the mercantile customers should have unbridled discretion to impose unilateral terms upon the utility under R.C. 4905.31. Rather, it establishes that no arrangement is lawful unless it is filed with and approved by the PUCO. It is the Commission then that has the ultimate say in whether the arrangement is reasonable under the terms and conditions presented.

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[40] *See* Id.

[41] *See* Id. at 19.

[42] See Id. at 20.

1. AEP's "Common usage interpretation of the statute" is faulty.

The issue is not as simple as AEP-Ohio would make it to be. The statute does not require a contract between AEP-Ohio and the mercantile customer. Instead, R.C. 4905.31(E) allows a mercantile customer to file an application with or without a utility:

> 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** * * *.

Additionally, the introduction of R.C. 4905.31 states:

> * * * the Revised Code do not prohibit a public utility from filing a schedule or establishing or entering into any reasonable arrangement with another public utility or with one or more of its customers, consumers or employees, **and do not prohibit a mercantile customer of an electric distribution utility as those terms are defined in section 4928.01 of the Revised Code or a group of those customers from establishing a reasonable arrangement with that utility or another public utility electric light company** * * *.

The introduction of the statute lists the public utility options and the mercantile options that are relevant to the statute. In those listings, the statute distinguishes between the public utilities' options and the mercantile customers' options. The statute provides that the public utility can file a schedule, can establish any reasonable arrangement or can enter into a reasonable arrangement. The introduction states only that the mercantile customers can establish a reasonable arrangement with the utility. The statute does not state that the mercantile customers can file a schedule nor does it state that mercantile customers can enter into a reasonable arrangement.

Moreover, AEP-Ohio's own actions in filing this application make it clear that the Commission can approve and establish a reasonable arrangement without either the

utility or the mercantile customers entering into an arrangement. Both this application and the Eramet's application[43] were filed before the AEP-Ohio entered into a contract with their customers.

AEP-Ohio's application of statutory interpretation rules[44] concludes essentially that "the establishment of an arrangement with the utility" is the same thing as "entering into a reasonable arrangement with the utility."[45] But AEP's construction does not make sense because the introduction of R.C. 4905.31 separately lists "establishing" and "entering into" as two separate acts. Under R.C. 1.47(B) "the entire statute is intended to be effective." Accordingly, arguments AEP-Ohio has made -- that the two provisions mean the same -- cannot be upheld.

Contrary to AEP-Ohio's claims "establishing a reasonable arrangement" can be completed through a filed design or plan[46] without mutual understanding. Whereas, "**entering into** a reasonable arrangement" specifically means to reach an agreement with someone and cannot be completed without mutual agreement.

Filing a finalized service and rate plan by the mercantile customer is "establishing a reasonable arrangement." The arrangement then is subject to PUCO approval, according to R.C. 4905.31.

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[43] *See* In the Matter of the Application for Establishment of a Reasonable Arrangement Between Eramet Marietta Inc. and Columbus Southern Power Company, Case No. 09-516-EL-AEC, Application (June 19, 2009).

[44] *See* AEP-Ohio Application for Rehearing at 16-21. The discussion on the meaning of the word "arrangement" identifies definitions that are very different from those found by OCC, as noted in footnote 4, below.

[45] Id. at 16-17.

[46] The word "establish" is defined first, as "to make stable; make firm; settle" and only second, as "to order, ordain, or enact permanently." Webster's New World Dictionary, Second College Addition, 1978 at 479.

The word "arrangement" is defined as 1. "an arranging or being arranged" ("arrange" is defined as 1. "to put in the correct, proper, or suitable order 2. to sort systematically; classify 3. to make ready; prepare or plan") 2. the way in which something is arranged 3. something made by arranging parts in a particular way. 4. [usually plural] a preparation; plan".

2. AEP-Ohio's interpretation of "establishing a reasonable arrangement" within the context of R.C. 4905.31 is faulty.

AEP-Ohio discusses the context of R.C. 4905.31 as emphasizing the need for Commission approval as set forth under R.C. 4905.31(E). AEP-Ohio argues that because the Commission must approve the arrangement and because the statute requires the public utility to "conform its schedules of rates, tolls, and charges to such arrangement, "the statute envisions that the arrangement submitted to the Commission is an arrangement already in existence which becomes lawful and immediately enforceable upon approval. But in assuming that the arrangement becomes immediately enforceable upon approval, AEP-Ohio neglects to recognize the last paragraph of that section:

> 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.

That provision means that the "establishment of a reasonable arrangement" by either the utility, the customer, or by mutual consent of the utility and the customers, is not at all final. Rather the arrangement submitted to the Commission is a preparation or a plan for Commission consideration. The Commission then must find the arrangement to be reasonable and in the public interest before it is approved.

3. AEP-Ohio's interpretation of R.C. 4905.31 fails to recognize that a major reason that the General Assembly amended R.C. 4905.31 was to encourage economic development contracts.

AEP-Ohio seeks to constrict the underlying reasons for amending R.C. 4905.31. First, AEP-Ohio claims that the amendments were enacted to provide a utility the ability to "establish" an arrangement without actually having a contract with a specific

customer.[47] AEP-Ohio then also alleges the amendment was permitted to enable a mercantile customer to "establish" an arrangement, providing for the possibility that the mercantile customer would want such an arrangement with a different utility than its distribution utility.[48] But AEP-Ohio's explanation is deficient because it only partially explains the reasons for the amendment of R.C. 4905.31.

The reason the General Assembly amended R.C. 4905.31 to allow mercantile customers to "establish an arrangement" was to ensure that a reasonable opportunity was made available to provide for special rates when those rates would be beneficial to all parties – the utility, the customers paying the discounts, and the mercantile customer. The General Assembly added the provision allowing a mercantile customer to establish a reasonable arrangement, subject to the Commission's approval.

The General Assembly wanted to ensure that mercantile customers have the opportunity to propose reasonable arrangements to the public utilities commission, even if the utility was unwilling to "enter into an agreement" with the mercantile customer. The Commission could then balance the request of the mercantile customer with the impact on the customers who would pay the corporate subsidy to determine what was in the public interest.

Whether that arrangement filed either by filed by a mercantile customer, such as Ormet, should be approved then hinges upon whether it is "reasonable." "Reasonableness" must be viewed in totality with all other subsidies for reasonable arrangements. A reasonable amount must be defined as one which does not impose economic burdens on the customers paying the subsidies. As this Commission

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[47] *See* AEP-Ohio Application for Rehearing at 18.

[48] *See* AEP-Ohio Application for Rehearing at 19-21.

recognized, the ability of ratepayers to fund the recovery of delta revenues is not unlimited.[49] The Commission thus, has a responsibility to wisely allocate Ohio customers' limited pool of economic development dollars.

The Commission in large measure, determined to limit customer funding by capping the discount for time periods related to the reasonable arrangement. In doing so, the Commission approved a POLR offset. That POLR offset should be upheld.

E. Any Clarification Of The Companies' 2009 Delta Revenue Application Should Include Recognition That An Annual Cap Must Be Adopted To Ensure That There Is Not An Additional Economic Burden On Customers Associated With The Ormet Unique Arrangement.

AEP-Ohio's assertion that there is no limit to the amount of delta revenues AEP-Ohio is authorized to collect for 2009 runs contrary to the principles stated in the Commission's Order.[50] AEP-Ohio correctly points out that the Commission did not establish a cap on the amount of delta revenues AEP-Ohio is authorized to collect for 2009. However, one of the Commission's criteria for determining if an arrangement is reasonable is whether there is a limit to the delta revenues customers must fund. In this case, the Commission established that a maximum amount of money that customers could pay – or ceiling – was necessary to find the arrangement was reasonable in 2010 and beyond, "The Commission agrees that the ability of ratepayers to fund the recovery of delta revenues is not unlimited."[51] Likewise the Commission must also determine a maximum amount of delta revenues that customers should pay for 2009.

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[49] *See* Order at 10.

[50] *See* AEP-Ohio Application for Rehearing at 23.

[51] Order at 10.

Based on the facts established in the record regarding Ormet's Ohio Payroll, the Commission should find that $32 million is the maximum amount of money customers should pay. The Commission ruled that $54 million is the maximum amount of delta revenues that customers should be required to pay in 2010 to support Ormet's unique arrangement proposal, yet this number is too high for 2009. [52]

The $54 million figure is too high for 2009 because AEP-Ohio should be deferring delta revenues for only a few months in 2009 – not a full year like the potential situation in 2010. Ormet has been on the pre-ESP standard tariff rate for almost five months of 2009 -- since January 1 , 2009 -- when the Commission retroactively approved (on January 7, 2009) the temporary arrangement filed by AEP Ohio and Ormet. The temporary rate application allowed AEP-Ohio, beginning January 1, 2009, to serve Ormet at its pre-ESP tariff rate for delivered electric service of approximately $38.43/MWh. Along with the joint application, AEP-Ohio had requested Commission approval to create regulatory assets to recognize the difference between the proposed temporary rate of $38.43/MWh for Ormet and the 2008 administratively determined market price for generation of $53.03/MWh. The difference between the AEP-Ohio tariff rate and the administratively determined market price for generation is approximately $8.2 million per month.[53] That is $8.2 million per month that customers could be asked to pay, when AEP-Ohio files its deferral case, as ordered by the Commission in this proceeding.

OCC applied for rehearing of the Commission's January 7, 2009 Order, and that rehearing was granted for purposes of allowing the Commission more time to consider

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[52] *See* Id.

[53] Ormet's monthly usage was approximately 379,099 MWh. Delta revenue being booked is $53.03 for generation plus approximately $7/MWh for transmission and distribution versus a pre-ESP delivered price of $38.43/MWh.

the matters OCC raised at hearing, including issues related to the propriety of deferring delta revenues at market rates. To date, no Entry on Rehearing has been granted.

On May 7, 2009, OCC and OEG filed a Motion to Enforce the January 7, 2009 Order and to Cease additional deferrals, on the basis that, with the approval of the ESP rates (on March 30, 2009), the temporary arrangement rates to Ormet should cease, as well as any more delta revenue deferrals.[54] This position is based upon the Commission's January 7, 2009 Order which allowed deferrals 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."[55] This Motion has not been ruled upon.

AEP-Ohio's newly approved ESP rates and charges should apply to Ormet, just as they apply to all other customers, and should continue to apply to Ormet unless the Company files a unique arrangement contract with the Commission, as ordered on July 15, 2009. Thus, from April 1 until today Ormet should have been under AEP-Ohio's standard rates and charges for GS-4 customers, as the Commission ruled in its January 7, 2009 Ormet Temporary Arrangement Order . Additionally, AEP-Ohio should have ceased deferring delta revenues. To allow Ormet to remain on the temporary rate while AEP-Ohio has established new ESP rates contradicts the Commission's Temporary Arrangement Order and is not reasonable – particularly when Ormet's initial application

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[54] *See In the Matter of the Joint Application of Columbus Southern Power Company and Ohio Power Company and Ormet Primary Aluminum Mill Products for Approval of a Temporary Amendment to their Special Arrangement,* Case No. 08-1338-EL-UNC, Motion to Enforce the January 7, 2009 Order and to Cease Additional Deferrals And Request for Expedited Ruling by the Office of the Consumers' Counsel and the Ohio Energy Group (May 11, 2009).

[55] In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Modify their Accounting Procedures, et al., Case No. 08-1338-EL-AAM, Finding and Order at 3 (January 7, 2009). (Emphasis added)

for a permanent unique arrangement was filed on February 2, 2009 and six months later the parties still have no timetable for getting a permanent contract filed.

III. CONCLUSION

For the reasons stated herein, OCC and OEG respectfully request that the Commission affirm its July 14, 2009 Opinion and Order stating that AEP-Ohio should not be compensated for a service it would not be providing. Thus, the Commission found that any POLR charges paid by Ormet should be credited to the economic development rider charged to AEP-Ohio's customers to reduce the subsidy that customers will have to pay for Ormet's unique arrangement and deny AEP-Ohio's application for rehearing in respect to its Assignments of Errors 1-4. OCC supports AEP-Ohio's Application for Rehearing Assignment 5, and believe clarification is needed on the 2009 delta revenue cap (for the purpose of establishing a maximum discount to be funded by CSP customers). Moreover, OCC and OEG support IEU's assignment of error seeking a determination of the 2009 rates to be charged Ormet in light of Ormet's notice that it is laying off 100 employees and will be running only 4 potlines through the end of 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Memorandum Contra AEP-Ohio's Application for Rehearing was served by regular U.S. Mail Service, postage prepaid, and a courtesy copy was sent via electronic mail service, to the following parties of record, this 24th day of August, 2009.

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FOR IMMEDIATE RELEASE

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Ormet to Run Four Potlines Through 2009

Hannibal, OH – Ormet Corporation ("Ormet") announced today it plans to continue to operate four potlines through the balance of 2009 as it has secured fixed price metal sales contracts for September, October and part of November of this year and continues to explore securing fixed metal price arrangements for the remaining 2009 metal volume.

Since the company made an announcement at the end of July stating they had issued WARN notices to 982 employees, Ormet officials have been working hard to maintain operations and protect jobs at its Hannibal, Ohio facility. The company has already acquired a majority of raw materials necessary to operate at the four-line level for the balance of the year and anticipates layoffs of no more than 100 people through the remainder of 2009.

"This has been a tough situation but we moved quickly to take advantage of the rising prices on the London Metal Exchange," said Mike Tanchuk, Ormet's CEO. "I appreciate the continued support from Governor Strickland, the PUCO, the USWA, our legislators, our suppliers and most of all, our employees. We look forward to finalizing the power supply contract by Labor Day."

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, and the forward looking statements contained in this press release are, subject to numerous significant risks and uncertainties. These risks and uncertainties include, among others, 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), and risks associated with Ormet's ability to secure fixed metal price arrangements for remaining 2009 metal volume, to enter into arrangements relating to aluminum output for future periods, to acquire raw materials and to finalize the power arrangement.

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.