BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

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**

COLUMBUS SOUTHERN POWER COMPANY'S
REPLY BRIEF

On August 24, 2009 post-hearing briefs were filed in this case by Eramet Marietta, Inc. (Eramet), Ohio Consumers' Counsel and Ohio Energy Group (OCC/OEG), the Commission's Staff (Staff) and Columbus Southern Power Company (CSP).

While there are a couple of arguments made by Eramet, OCC/OEG and Staff with which CSP will take issue in this brief, it is worth initially noting certain portions of their briefs which support the arguments made by CSP in its brief.

CSP's initial brief made the point that there are substantive differences between Eramet's proposed contract and the contract to be executed in the *Ormet Case*[1] (CSP Brief, pp. 17-19). Consistent with CSP's argument, Eramet argues that "the pricing structures proposed by Ormet and Eramet are significantly different and warrant different treatment." (Eramet Brief, p. 13). The difference in the pricing structures is one of the factors that may cause the Ormet delta revenues to vastly exceed the delta revenues related to the proposed Eramet contract. The Commission specifically indicated in the Ormet Opinion and Order (at page 14) that the POLR revenues should be used to reduce

[1] Case No. 09-119-EL-AEC.

the ratepayers' obligations under the unique arrangement. By contrast, as pointed out by CSP in the portion of its brief concerning, the amount of delta revenues associated with the Eramet proposed contract, "if there is a need to reduce impacts on ratepayers' bills there is less need in the case of Eramet-related delta revenues." (CSP Brief, p. 19).

Eramet also confirmed CSP's position that the proposed contract does not contemplate an exclusive supplier relationship between Eramet and CSP. (See CSP Brief, pp. 4-9). In discussing Mr. Baker's testimony, Eramet states that he "acknowledged that Eramet has not proposed in its application or pre-filed testimony to rely on CSP as its exclusive supplier of generation service for the term of its proposed arrangement with CSP." (Eramet Brief, p. 17).

The other party to the Joint Stipulation and Recommendation (Stipulation – Joint Ex. 1), the Staff, does not explicitly address the "exclusive supplier" issue. Staff does note, however, that "the Commission and Applicant can take steps to alter the agreement early .... This alteration could take many forms including even termination." (Staff Brief, p. 5).[2]

OCC/OEG do not overcome the abundant demonstration in CSP's brief (at pages 6-9) that the proposed arrangement does not create an exclusive supplier covenant. On the contrary, the OCC/OEG brief supports CSP's position that provisions of the Stipulation which provide for alteration of the ultimate Eramet/CSP contract, including termination of the contract, conflict with an exclusive supplier concept. As OCC/OEG note, provisions to reopen and modify the rates and conditions of the agreement "may be

[2] At pages 3 and 18 of their brief, OCC/OEG assert that the Stipulation provides that CSP will be the exclusive supplier to Eramet. In both instances OCC/OEG refer to page 3 of the Stipulation as support for that assertion. (OCC/OEG Brief, fn. 10 and 62. Nothing on page 3 of the Stipulation, or elsewhere in the Stipulation, support their assertion.

interpreted to allow for a wide range of modifications to the Joint Stipulation" (OCC/OEG Brief, p. 12) or "may be interpreted by some to also mean the ability to terminate – which some may view as a first step to enabling Eramet to shop...." (*Id.* at 13).

OCC/OEG recognize that these "reopen and modification" provisions may be used to support an argument that CSP is entitled to full recovery of its Provider of Last Resort (POLR) charges from Eramet. While it is clear that OCC/OEG would not explicitly agree with such a conclusion, their suggestion that Eramet should not be permitted "to modify the rates and terms of agreement *at any time*" (OCC/OEG Brief, p. 14, emphasis added), so as to defeat the full POLR recovery position speaks volumes for their true understanding of the POLR-related consequences of those provisions.[3] Stated more precisely, these arguments directly undermine OCC/OEG's flawed claims that the proposed arrangement would make CSP the exclusive supplier and remove all POLR risk.

THE STAFF BRIEF

There are, of course, those portions of the briefs filed by Staff, Eramet and OCC/OEG with which CSP cannot agree. For instance, Staff asserts that the Stipulation is reasonable simply because it resolves Staff's concern. (Staff Brief, p. 6). This assertion is not sustainable. As the OCC/OEG brief recognizes, the utility plays a significant role in the development of reasonable arrangements. OCC/OEG argue that issues which are not resolved by the Stipulation (such as POLR recovery and participation in PJM Demand Response Programs) "are the very issues that should be

[3] OCC/OEG also argue that "if Eramet is not able to seek to reopen and modify the rates and conditions of the arrangement until 2015, it will diminish likely arguments from CSP that POLR risk currently exists under Eramet's unique arrangement. (OCC/OEG Brief, pp. 14, 15).

part of the utility/mercantile customer negotiations for a reasonable arrangement that is to be filed before the PUCO." (OCC/OEG Brief, p. 17). Just because Staff's concerns are resolved does not mean that CSP's concerns can be cast aside.

Further, if it were true that each party could assert the reasonableness of the Stipulation simply because it resolves its concerns then the converse must also be true. That is, because the Stipulation does not resolve, let alone discuss, CSP's concerns, it must be unreasonable. In fact, since CSP is to be the other party to the contract, it is all the more imperative that CSP's concerns be resolved. Indeed, as demonstrated by CSP in its brief (at pages 19-26), the governing statute contemplates and requires that the serving utility support such an arrangement.

Staff also argues that the Stipulation is reasonable "because it *addresses* OCC's concerns." (Staff Brief, p. 7, emphasis added). Addressing a party's concerns in the Stipulation is not the litmus test for judging the reasonableness of the Stipulation. Even if it were, the converse would also be true. The failure to address a party's concerns, particularly the party which would be executing the resulting contract, must mean that the Stipulation is unreasonable. CSP does not suggest that every concern of every party must be addressed in a settlement, let alone in a manner which satisfies every party. The Commission, however, cannot accept Staff's argument that the Stipulation is reasonable because it addressed OCC's concerns.

In its brief, CSP demonstrated (at pages 7, 15) that CSP faced POLR risk, in part, because the proposed arrangement contained several "off ramps" where it could be modified and terminated. While the Staff made it perfectly clear that it is taking no position on whether the proposed arrangement impacts CSP's POLR risk, the Staff did address the "off ramp" issues raised by CSP. Regarding the term of the agreement, Staff set forth its frank appraisal (at page 7) that the agreement "seems unlikely to last more than six years without alteration." Staff explains (in footnote 3) that its assessment is based on the likelihood of Eramet requesting to alter the terms to obtain the additional $100 million investment and that other scenarios are also possible for modification. Similarly, Staff indicates (at page 5) that if Eramet's proposed $100 million investment for a new furnace is not forthcoming, "the Staff is **very** likely to seek the termination of the agreement itself." (Emphasis in original). As demonstrated in its brief, CSP agrees that the contract may be modified or terminated well before the 10-year term runs and CSP submits, as further discussed below, that its POLR risk continues under the proposed arrangement.

THE OCC/OEG BRIEF

The OCC/OEG brief promotes the idea that CSP's POLR revenues should be placed at risk so that CSP would be "more likely to negotiate contract terms that are less one-sided and may indirectly and ultimately protect customers as well as their own interests." *(OCC/OEG Brief, p. 16). Similarly, OCC/OEG submit (at page 21) that* CSP should not "escape contributing to delta revenues." In an attempt to make their point, OCC/OEG contend that "[w]ithout the POLR issue, CSP would have no incentive to negotiate, it would simply accept the terms offered by Eramet, as it did with the terms offered by Ormet in the *Ormet* case." (*Id.* at 17).

The record in the *Ormet Case* does not support their contention. As noted in the brief filed on behalf of AEP Ohio in that case, Mr. Baker did testify regarding his concerns with the "exclusive supplier" nature of Ormet's proposed contract. (AEP

Ohio's Brief, pp. 5, 6). AEP Ohio also argued that an "exclusive supplier" provision was contrary to state policy (*Id.* at 9, 10). Finally, on rehearing AEP Ohio has continued to argue against an "exclusive supplier" arrangement. (AEP Ohio Application for Rehearing, pp. 13, 14). Accordingly, the statement in footnote 70 (p. 19) of the OCC/OEG brief that AEP Ohio's opposition to the Ormet "exclusive supplier" provision arose after the Commission ruled that AEP Ohio must use POLR revenues paid by Ormet to offset delta revenue recoveries is simply false.[4]

CSP, in this case, and as part of AEP Ohio in the *Ormet Case*, made reasonable efforts in both cases to identify potential issues and to find mutually acceptable solutions to those issues. OCC's/OEG's dissatisfaction concerning AEP Ohio's decision to not raise all the same issues in the *Ormet Case* that CSP has raised in this case is misguided and fails to consider the difference between Ormet and Eramet. For instance, Ormet's unusually high load factor minimizes the concern raised in the Eramet case regarding the all-in rate and the absence of charges associated with spikes or drops in Eramet's demand. Likewise the nature of the Ormet pricing structure minimized the concern with avoiding nonby-passable charges since increases in such charges would not result in a different price level paid by Ormet.

The suggestion that POLR revenues should be withheld to be used as a club to encourage CSP's opposition to a reasonable arrangement is repugnant to sound

[4] At the hearing in this matter, OCC requested that the Commission take administrative notice of certain documents regarding proposed contracts between CSP and Solsil, Inc. and between Ohio Power Company and Globe Metalurgical, Inc. (Case Nos. 08-883-EL-AEC and 08-884-EL-AEC, respectively). OCC made no reference to this material in its initial brief. CSP cannot predict whether OCC will make any arguments in its reply brief in reliance on those materials. CSP does note, however, that both of those contracts are for a period of "up to 10 years ... ending December 31, 2018 or until terminated upon a minimum 12 months' written notice given by the Customer of its intention to terminate the contract, with such termination to become effective at the end of the applicable RFP period." Clearly this language is contrary to an "exclusive supplier" arrangement.

regulatory and due process principles. Further, it suggests that the utility involved in the reasonable arrangement should be subjected to this not-so-subtle form of regulatory extortion even if to do so runs contrary to Ohio's efforts to promote economic development. That an agency of the State of Ohio would make such a suggestion is disappointing.

OCC/OEG also argue that the alleged "exclusive supplier" provision of the reasonable arrangement would make Eramet a more attractive investment option for its corporate parent. (OCC/OEG Brief, p. 18). While a long-term power contract might make Eramet a more attractive investment option, also having the ability to switch to a Competitive Retail Electric Service (CRES) provider if market prices lower than the 10-year contract prices were available during the term of the contract, would make Eramet an even more attractive investment option.

OCC/OEG further argue that any POLR risk CSP would face would arise only if Eramet actually shops in a lower-priced market. This argument is false and was fully addressed in CSP's brief at pages 13-15. They go on, however, to speculate that it is "very *unlikely that the PUCO, after approving the unique arrangement* would permit Eramet to terminate the arrangement for the purpose of allowing Eramet to take advantage of the market to the detriment of CSP. (OCC/OEG Brief, p. 20). The concern for CSP shown by OCC/OEG is surprising in light of the position they have taken regarding the treatment of POLR revenues. In any event, CSP believes that the Commission would not and should not hold Eramet to a higher price for electricity than otherwise would be available in the market. Hence, the POLR risk is real.

The OCC/OEG assertion that Eramet would not want to "throw away the security of long-term rates for a hypothetical opportunity to do better in the market over the same long-term period" (*Id.*, at 21) also misses the point. If the market offers a lower price over the same period of time there would be nothing hypothetical about such an offer. The "predictability" and "price stability" to which OCC/OEG refer would be provided by contract – in the same manner that any other customer relies upon the standard service offer until such time that a better price comes along in the market.

Finally, OCC/OEG argue that if "CSP obtains or retains capacity under the financial need for a POLR charge," it can sell that capacity in the market and retain the revenues. (*Id.*) This argument makes no sense. The POLR rate was based on energy market impacts, not on the capacity market. Capacity/energy is used to meet CSP's POLR *obligation*. Moreover, the point missed by OCC/OEG is that such sales would be made when the market price is low relative to prices available from CSP.

The Commission-approved POLR charge compensates CSP for the risk associated with meeting that obligation. Recovery of POLR revenue has been authorized in CSP's Electric Security Plan proceeding. Making system sales, and whether the margins associated with such sales are shared has nothing to do with CSP's retention of POLR revenues.

<u>THE ERAMET BRIEF</u>

Eramet contends "there is no competitive market in place to offer alternatives to customers." (Eramet Brief, p. 17). Eramet's definition of "competitive market," however, is quite unusual. Eramet believes that even if there are a variety of offers for selling power to Eramet, if the prices from such offers were significantly above what

Eramet currently pays, the market is not competitive. (Tr. II, p. 192). In other words, in Eramet's opinion, the market is competitive only if it produces prices below a regulated price. In fact, Eramet has not issued a Request for Proposals because it assumed that there would be no offers below CSP's current GS-4 rate schedule. (*Id.* at 195).

The existence of a competitive market for electricity cannot be in doubt. Competitive barriers have been removed by law in Ohio and the continuous opportunity for competition exists regardless of whether current market prices are above or below a utility's regulated price. The results of the FirstEnergy companies' recent auction reflects that reality. Moreover, while there are not a great deal of CSP customers receiving power from CRES providers, there are some such transactions in place.

Finally, there is the gun Eramet would hold to CSP's head: CSP had better capitulate to Eramet's interpretation of the Commission's order and to Eramet's proposed wording to implement that interpretation – within five business days of the Commission's order – or Eramet should be permitted to file with the Commission its own version of the reasonable arrangement. (Eramet Brief, pp. 18, 19). Eramet's overreaction to CSP's legitimate belief that contracts typically take a reasonable amount of time to draft, even when they are being based on a Commission order. This is particularly true if there is language in that order that can be interpreted and/or implemented in more than one way. Can this be done in five business days? Perhaps. But it seems unlikely when one of the parties appears ready to come to the table with an attitude of "do it my way, or else." This attitude is particularly troubling since it is Eramet that is requesting millions of dollars of rate relief, to be paid for by its fellow-customers.

Over the years, AEP Ohio has been involved in many Commission proceedings and many contract negotiations. Whatever breakdowns in communications that might occur in those processes, there usually is enough fault to go around to all parties involved. The tone Eramet has set for the exercise of converting a Commission order into a contract is counterproductive to its goal of a five-day turnaround. CSP will honor the Commission's order in this case and expects Eramet to honor CSP's right to disagree with whatever edicts Eramet might propose.

CONCLUSION

CSP stands ready to implement a reasonable arrangement in accordance with the Commission's order in this case. That order should provide CSP with full recovery of its revenues foregone, without any offset related to POLR charges.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of Columbus Southern Power Company's Post-Hearing Brief was served by U.S. Mail upon the individuals listed below this 8th day of September 2009.

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