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

ENTRY ON REHEARING

The Commission finds:

(1) On February 17, 2009, Ormet Primary Aluminum Corporation (Ormet) filed an application to establish a unique arrangement with the Ohio Power Company and Columbus Southern Power Company (AEP-Ohio) for electric service to its aluminum-producing facility located in Hannibal, Ohio. Ormet is requesting that the Commission establish a unique arrangement for electric service with AEP-Ohio that links the price of electricity for its facility with the price of aluminum as reported on the London Metal Exchange. Ormet filed an amended application on April 10, 2009, to reflect the possible curtailment of the equivalent of at least two of its six potlines.

(2) On July 15, 2009, the Commission issued its Opinion and Order, approving the amended application as modified by the Commission.

(3) Section 4903.10, Revised Code, states that any party to a Commission proceeding may apply for rehearing with respect to any matters determined by the Commission within 30 days of the entry of the order upon the Commission's journal.

(4) On August 14, 2009, Industrial Energy Users-Ohio (IEU-Ohio) filed an application for rehearing, alleging that the Opinion and Order was unreasonable and unlawful on the following grounds:

(a) The Commission should grant rehearing to clarify the rate that will apply to Ormet during 2009.

(b) The Commission's failure to include a provision to terminate the reasonable arrangement automatically

if Ormet fails to maintain operations is unreasonable.

(c) The Commission's failure to require Ormet to maintain deposit and advance payment provisions is unreasonable.

(5) Moreover, the Ohio Consumers Counsel and the Ohio Energy Group (OCC and OEG) filed an application for rehearing on August 14, 2009, alleging that the Opinion and Order was unreasonable and unlawful on the following grounds:

(a) The Commission erred in failing to specify and ensure how AEP-Ohio will apply the credit for the full amount of provider of last resort (POLR) charges that will reduce what customers will have to pay for Ormet's unique arrangement.

(b) The Commission erred by failing to specify that AEP-Ohio and Ormet shall not be permitted to reduce the delta revenue credit, for example by negotiating a discount for the POLR charge, that is intended by the Commission to reduce what customers will have to pay for Ormet's unique arrangement.

(6) Further, on August 14, 2009, AEP-Ohio filed an application for rehearing, alleging that the Opinion and Order was unreasonable and unlawful on the following grounds:

(a) 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 electric security plan cases, *In re Columbus Southern Power Co. and Ohio Power Co.*, Case No. 08-917-EL-SSO, et al.

(b) 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. Section 4905.31(E), Revised Code, does not permit the Commission to offset the amount of revenue forgone by alleged or real expense reductions. Further, the Commission's authority under Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., 4927., 4928., and 4929., Revised Code, is not available to the Commission to prohibit AEP-Ohio from recovering all revenues forgone as a result of the unique arrangement.

(c) The Opinion and Order commits a customer to refrain from acquiring its generation service from a competitive retail electric service provider in violation of the clearly stated public policy of this State. Contract provisions that are contrary to the public interest are unenforceable.

(d) The Commission ordered AEP-Ohio and Ormet to execute and file a power agreement conforming to the Commission's Opinion and 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 Section 4905.31, Revised Code.

(e) 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 services or Ormet's decision not to make such payments.

(7) On August 24, 2009, IEU-Ohio, and Ormet each filed memoranda contra AEP-Ohio's application for rehearing. OCC and OEG also filed a joint memorandum contra AEP-Ohio's application for rehearing on August 24, 2009. Further, on August 24, 2009, AEP-Ohio filed a memorandum contra the application for rehearing filed by OCC and OEG.

(8) In its first assignment of error, IEU-Ohio requests that the Commission clarify the rate for electric service which Ormet will pay in 2009. IEU-Ohio notes that, after the Commission issued its Opinion and Order in this proceeding, Ormet issued a notice of layoff and closure pursuant to the Federal Worker Adjustment and Retraining Notification Act (WARN). IEU-Ohio also cites to a recent press release issued by Ormet regarding a decision in its arbitration proceeding with its alumina supplier. IEU-Ohio claims that, because the 2009 rates approved by the Commission in the Opinion and Order were expressly contingent upon Ormet maintaining at least 900 employees at its Hannibal facility, these developments require the Commission to clarify the rates that Ormet should pay in 2009.

In its memorandum contra, Ormet claims that it issued its initial WARN notices in order to preserve all of its available options in light of the arbitration decision and the Commission's Opinion and Order in this proceeding. Further, Ormet represents that it has issued a supplemental WARN notice stating its intention to shutdown two of its six potlines and reduce its workforce by 100 employees and that it has issued a subsequent press release regarding its intention to operate four of its six potlines through the balance of 2009. With respect to its 2009 rate under the unique arrangement, Ormet argues that, if it is not able to maintain an employment level of 900 employees, it will not be entitled to the 2009 rate set forth in the Opinion and Order; and AEP-Ohio will charge Ormet the default rate set forth in the power agreement, which is an average of $38.00 per MWh for 2009 until such time as Ormet resumes employment of 900 employees.

As a preliminary matter, the Commission notes that none of the WARN notices and press releases cited by both IEU-Ohio and Ormet have been admitted into the evidentiary record in this proceeding. Further, no witnesses have testified regarding the nature or the implications of the WARN notices. Therefore, the WARN notices and press releases will not be considered by the Commission in this Entry on Rehearing. The Opinion and Order provided that, if Ormet maintained an employment level of 900 employees for calendar year 2009, AEP-Ohio would bill Ormet, for the balance of 2009, at a rate which averages $38.00 per MWh for the periods when Ormet was in full production

(i.e., six potlines), $35.00 per MWh for the periods when Ormet curtailed production to 4.6 potlines, and $34.00 per MWh for the periods when Ormet curtailed production to 4 potlines. Further, the Commission ordered Ormet to provide AEP-Ohio and Staff with monthly reports detailing its employment levels. The Commission agrees with Ormet that, to the extent that Ormet fails to maintain the required employment level in 2009, AEP-Ohio should charge Ormet $38.00 per MWh, which is the default rate in the power agreement, irrespective of Ormet's production levels. Moreover, the Commission will clarify that the termination provision contained in Section 2.03 of the proposed power agreement shall not apply for 2009 billing periods (Ormet Ex. 8, Attachment A at 9). Although the Commission does not believe that any further clarification is necessary, we will direct Staff to review Ormet's monthly billing records for 2009 and the submitted monthly employment reports to ensure that Ormet was billed in accordance with the unique arrangement. Rehearing on this assignment of error should be denied.

(9) In its second assignment of error, IEU-Ohio claims that the Commission's failure to include a provision to terminate the reasonable arrangement automatically if Ormet fails to maintain operations is unreasonable. IEU-Ohio notes that, because the unique arrangement is for a ten-year period, once AEP-Ohio and Ormet file an executed power agreement, it is possible that Ormet may cease operations and, at some point in the future, resume operations and attempt to claim it is entitled to receive electric service pursuant to the contract for the balance of the term. Therefore, IEU-Ohio contends that the termination provisions of the unique arrangement, as modified by the Commission in the Opinion and Order, do not sufficiently protect ratepayers from undue risks.

Rehearing on this assignment of error should be denied. The Commission finds that the provisions of the unique arrangement, as modified by the Commission, adequately protect ratepayers in the event that Ormet ceases operations. The power agreement introduced into the record of this proceeding provides that the power agreement shall terminate 24 months after any shutdown, unless Ormet begins ramping up production (Ormet Ex. 8, Attachment A at 10). Further, in the Opinion and Order, the Commission modified the unique

arrangement such that Ormet is required to maintain an employment level of 650 full-time employees. In the event that Ormet does not maintain this employment level, the maximum rate discount, or floor, would be reduced by $10 million for every 50 employees below 650 full-time employees that were employed for the previous month. This modification ensures that the maximum rate discount funded by ratepayers is directly linked to continued employment at the Hannibal facility. Therefore, we find that the provisions of the power agreement, as modified, provide sufficient protection to ratepayers from any risk of curtailment of production or shutdown of the Hannibal facility by Ormet.

(10) In its third assignment of error, IEU-Oho contends that the Commission's failure to require Ormet to maintain deposit and advance payment provisions is unreasonable. Likewise, in its fifth assignment of error, AEP-Ohio claims that the Commission's failure to maintain the existing requirements for a deposit and advance payments from Ormet is unreasonable.

IEU-Ohio argues that ratepayer exposure to the risk of default by Ormet has increased due to the issuance of the WARN notice, discussed above, by Ormet. Similarly, AEP-Ohio argues that it may be unreasonable to release Ormet from the requirement that it provide a deposit and advance payments due to Ormet's recent issuance of the WARN notice.

Ormet claims that the absence of deposit and advance payment provisions actually benefits ratepayers. Ormet notes that the annual calculation of the rate that Ormet can afford to pay is currently based upon the assumption that the cash deposit currently held by AEP-Ohio will be returned to Ormet, thereby increasing its cash flow (Tr. I at 19-21, 22-23). However, Ormet contends that, if it is required to keep a deposit with AEP-Ohio and to continue paying in advance for power, then its cash flow will be reduced and the magnitude of the discount required by Ormet to continue in operation would increase.

The Commission finds that IEU-Ohio and AEP-Ohio have not raised any new arguments, based upon evidence in the record in this proceeding, in support of their assignments of error. IEU-Ohio's argument relies solely on the issuance by Ormet of the WARN notice, an event which the Commission has already

determined was not part of the evidentiary record in this proceeding and will not be considered on rehearing. The evidence in the record in this case demonstrates that payment provisions contained in the power agreement, as proposed by Ormet, reflect the same terms available to customers receiving service under AEP-Ohio's standard service offer (Tr. I at 124, 227). Moreover, the record demonstrates that such terms are necessary for Ormet to continue operations under the unique arrangement (Ormet Ex. 6 at 7, Ormet Ex. 11A at 3, 4). Rehearing on this assignment of error is denied.

(11) In support of its first assignment of error, AEP-Ohio argues that 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. AEP-Ohio argues that the Commission's authority over the unique arrangement is continuous and that, as circumstances change, the Commission can order a modification of the unique arrangement. AEP-Ohio specifically notes that the Commission modified the proposed unique arrangement to provide provisions related to employment levels and the requirement that any accumulated deferrals be reduced through payment of above-tariff rates no later than April 2012. Further, AEP-Ohio notes that Ormet has not just shopped for competitive generation in the past but has also sought and been granted permission to switch to another electric supplier's certified territory. *See Ormet Primary Aluminum Corporation et al., v. South Central Power Co. and Columbus Southern Power Co.*, Case No. 05-1057-EL-CSS. Therefore, based upon the Commission's continuing jurisdiction over the special arrangement and upon its experience with this customer, AEP-Ohio argues that the Commission should reverse its conclusion that there is no risk of Ormet shopping and then returning to POLR service.

In their joint memorandum contra AEP-Ohio's application for rehearing, OCC and OEG argue that the Commission's conclusion that there is no risk of Ormet shopping and returning to AEP-Ohio during the ten-year term of the unique arrangement was reasonable and consistent with the Commission's order in AEP-Ohio's ESP case. OCC and OEG claim that the record established that Ormet made the decision that it would not shop and that the Opinion and Order simply ratifies Ormet's decision to make AEP-Ohio its exclusive electric

supplier for the next ten years. Further, OCC and OEG dispute AEP-Ohio's assertion that the Commission's ability to modify the arrangement at any time provides an opportunity for Ormet to shop for a different supplier.

The Commission finds that rehearing on this assignment of error should be granted in order to clarify that the relevant period when Ormet cannot shop is the duration of AEP-Ohio's current approved electric security plan (ESP). It is not necessary to reach the question of whether Ormet can shop beyond the duration of the current ESP because no determination has been made whether future standard services offers will include a comparable POLR charge. Under the terms of the unique arrangement as approved by the Commission, AEP-Ohio will be the exclusive supplier to Ormet for ten years, commencing January 1, 2009 (Tr. I at 37-38; Tr. IV at 484). Accordingly, in the Opinion and Order the Commission determined that AEP-Ohio would not be subject to POLR risk (i.e., the risk that Ormet may shop and subsequently seek to return to AEP-Ohio's standard service offer) and, therefore, that AEP-Ohio should not be compensated for bearing this risk. Although AEP-Ohio argues that there is a risk of Ormet shopping and then returning to AEP-Ohio's standard service offer because the unique arrangement remains under the Commission continuing jurisdiction, the Commission notes that any modification to the unique arrangement would take place only after notice and an opportunity for hearing for any party affected by such modification, including AEP-Ohio.

Moreover, the unique arrangement provides that the Commission may modify the unique arrangement only after January 1, 2016, unless the cumulative net discount under the unique arrangement exceeds 50 percent of the amount that Ormet would have been required to pay under AEP-Ohio's applicable tariff rates (Ormet Ex. 8, Attachment A at 9). Although the Commission modified the unique arrangement to provide an additional independent termination provision, this termination provision, by its terms, cannot be effective before April 1, 2012. However, AEP's electric security plan, and its authority to assess POLR charges to its standard service offer customers, expires on December 31, 2011. Therefore, under the terms of the unique arraignment as modified by the Commission, there is no risk that Ormet will shop and return to

AEP-Ohio's standard service offer during its current electric security plan.

With respect to AEP-Ohio's argument there is a risk of Ormet shopping based upon AEP-Ohio's experience with this customer, specifically the repeated transfer of Ormet's Hannibal facilities pursuant to Section 4933.83, Revised Code, the Commission notes that both the initial transfer and the return of Ormet's Hannibal facilities were approved with AEP-Ohio's consent and that AEP-Ohio was fully compensated for the return of Ormet to its service territory. *Ormet Primary Aluminum Corporation*, Case No. 05-1057-EL-CSS, Supplemental Opinion and Order (November 8, 2006) at 2, 4, 5-6, 8, 10. This experience, therefore, has no bearing upon whether there is any risk of Ormet shopping for a competitive retail electric supplier.

(12) In support of its second assignment of error, AEP-Ohio argues that the Commission lacks authority to preclude AEP-Ohio from recovering all revenue foregone as a result of the unique arrangement and that the failure to permit AEP-Ohio to recover all revenue foregone conflicts with AEP-Ohio's approved electric security plan. AEP-Ohio contends that the plain language of Section 4905.31, Revised Code, provides the Commission with no statutory authority to offset the recovery of the revenue foregone by any expense the Commission believes will not be incurred by the electric utility due to the unique arrangement. AEP-Ohio claims that any such reduction in the recovery of revenue foregone would not be "advantageous" to both parties to the contract, as required by Section 4905.31, Revised Code. AEP-Ohio claims that, in other contexts, the General Assembly provided explicit offset authority to the Commission and that the absence of such explicit authority is particularly telling in light of the presence of explicit offset authority in other provisions amended by Am. Sub. Bill 221. AEP-Ohio also contends that the Opinion and Order is contrary to the Commission's order approving AEP-Ohio's ESP. AEP alleges that the Commission determined in the ESP proceeding that all customers would pay the POLR charge for the entire time they are served under AEP-Ohio's standard service offer and that customers would avoid POLR charges during the period they are actually served by a CRES provider if they agreed to return at a market price. Further, AEP-Ohio contends that the Commission cannot distinguish its decision in

the ESP proceeding from this case because the same POLR risk that formed the basis for the POLR charge adopted in the ESP proceeding is present with Ormet.

OCC and OEG argue that Section 4905.31, Revised Code, does not preclude the Commission from requiring that the POLR charge for Ormet be credited to the economic development rider. OCC and OEG contend that Section 4905.31, Revised Code, allows for reasonable arrangements which are either "practicable" or "advantageous" to the "parties interested." Thus, according to OCC and OEG, the reasonable arrangement can be either practicable *or* advantageous; but it need not be both. Further, OCC and OEG argue that the plain meaning of the term "parties interested" goes beyond just the parties to the contract and includes other ratepayers, who have a distinct interest in how the agreement will affect the rates they must pay. Finally, OCC and OEG claim that the POLR provisions of AEP-Ohio's ESP do not apply to Ormet, which is not receiving service under AEP-Ohio's standard service offer.

The Commission finds that rehearing on this assignment of error should be denied. Contrary to AEP-Ohio's analysis, the plain language of Section 4905.31, Revised Code, does not require the Commission to approve the full recovery of all delta revenue resulting from the unique arrangement. Section 4905.31, Revised Code, states that a unique arrangement "*may include* a device to recover *costs incurred* in conjunction with any economic development and job retention program . . . including recovery of revenue foregone." The Commission finds that the use by the General Assembly of "may" in this context authorizes, but does not require, the recovery of delta revenues. If the General Assembly had intended to require the recovery of delta revenues, the General Assembly would have used "shall" or "must" rather than "may." Moreover, Section 4905.31, Revised Code, states that "[e]very . . . reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission." This provision provides the Commission with broad statutory authority to change, alter, or modify proposed unique arrangements and includes no exception to that authority with respect to the recovery of delta revenues. Thus, the Commission finds that, according to the plain

language of the statute, the recovery of delta revenues is a matter for the Commission's discretion.

In addition, Section 4905.31, Revised Code, provides for the recovery of "costs incurred." In this Entry on Rehearing, the Commission has determined that there is no risk that Ormet will shop for a competitive supplier during AEP-Ohio's current approved ESP. Therefore, if there is no risk of Ormet shopping and returning to standard offer service during its ESP, AEP-Ohio will incur no costs for providing POLR service which can be recovered under Section 4905.31, Revised Code. Accordingly, the Commission determined in the Opinion and Order that AEP-Ohio should credit any POLR charges paid by Ormet to its economic development rider in order to reduce the recovery of delta revenues from other ratepayers.

Finally, the Commission finds that AEP-Ohio's reliance upon our orders approving its ESP to be misplaced. Under the unique arrangement, Ormet will *not* be receiving service under AEP-Ohio's standard service offer; instead, Ormet will be receiving service under a unique arrangement. Although AEP-Ohio posits that this is a distinction without a difference, the Commission notes that service under a unique arrangement is authorized by a different statute, Section 4905.31, Revised Code, than service under a standard service offer, Section 4928.141, Revised Code. By its very nature, service under a unique arrangement provides for service under different prices, terms, and conditions than service under a standard service offer. In fact, in this proceeding, AEP-Ohio, enumerating several factors that it believes distinguishes Ormet from customers who are on the standard service offer, has argued that Ormet should not receive standard service offer terms for security deposits and advance payments. The Commission agrees that Ormet is different from customers on the standard service offer, and one of those differences is that Ormet has committed to AEP-Ohio to be its exclusive supplier (Tr. I at 37-38; Tr. IV at 484). Therefore, since there is no risk that Ormet will shop during AEP-Ohio's ESP, Ormet does not present the same POLR risk as customers on the standard service offer as claimed by AEP-Ohio. Moreover, the Commission's decision that AEP-Ohio's ESP was more favorable in the aggregate than the expected results that would otherwise apply under Section 4928.142, Revised Code, does not imply that the electric utility's ESP is the only basis for

setting rates. The rates established by a reasonable arrangement under Section 4905.31, Revised Code, will frequently differ from the rates established under an ESP.

(13) In its third assignment of error, AEP-Ohio argues that the Opinion and Order commits a customer to refrain from acquiring its generation service from a competitive retail electric service provider in violation of the clearly stated public policy of this state, as codified in Section 4928.02, Revised Code. Specifically, AEP-Ohio claims that the statute sets forth the state's policy to ensure diversity of electric supplies and suppliers, to recognize the continuing emergence of competitive electric markets through the development and implementation of flexible regulatory treatment, and to ensure effective competition in the provision of retail electric service. AEP-Ohio claims that it is clear from these policy pronouncements that a contract by which a customer states a commitment not to pursue competitive options for 10 years stifles the development of a competitive retail electric market. Therefore, AEP-Ohio concludes that the Commission should not approve this provision.

OCC and OEG argue that allowing a customer to choose 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. OCC and OEG claim that competition is not the end-all purpose of Am. Sub. Senate Bill 221; rather, Am. Sub. Senate Bill 221 is intended to ensure "reasonably priced electric retail service" by providing customers with tools and opportunities to achieve such reasonably priced rates. OCC and OEG also claim that 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.

The Commission finds that rehearing on this assignment of error should be denied. AEP-Ohio does not cite to any evidence in the record of this proceeding to support its claim that the exclusive supplier provision of the proposed unique arrangement violates state policy as codified in Section 4928.02, Revised Code. There is no testimony in the record that the exclusive supplier provision will adversely impact the diversity of electric suppliers and supplies. There is no evidence that the

proposed unique arrangement fails to recognize the continuing emergence of competitive markets or adversely impacts the development and implementation of flexible regulatory treatment. There is no testimony cited by AEP-Ohio regarding the impact of the exclusive supplier provision upon competition in the provision of retail electric service. The exclusive supplier provision may, or may not, adversely affect competition in this state, but there is no evidence in the record to support that *determination.*

In the absence of evidence to support its assignment of error, AEP-Ohio argues that, as a matter of law, the unique arrangement violates Section 4928.02, Revised Code. However, Section 4905.31, Revised Code, states, in relevant part:

> 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 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 . . . [emphasis added].

Therefore, nothing in Chapter 4928, Revised Code, including the policy provisions of Section 4928.02, Revised Code, should be construed as prohibiting a reasonable arrangement for the supply of retail electric service. Accordingly, the Commission cannot find, as a matter of law, that the proposed unique arrangement, which includes an exclusive supplier provision violates Section 4928.02, Revised Code.

Further, AEP-Ohio's concern is misplaced in this case. This is not an instance in which the electric utility is seeking to become a customer's exclusive electric supplier as a condition of a unique arrangement. Rather, it is Ormet who is committing to AEP-Ohio to be its exclusive electric supplier. In a competitive retail market, a consumer has the right to choose to enter into a long-term forward contract for generation service.

(14) With respect to its fourth assignment of error, AEP-Ohio argues that a reasonable arrangement proposed by an electric utility's mercantile customer cannot be approved by the Commission under Section 4905.31, Revised Code, unless the electric utility agrees to be bound by the proposed reasonable arrangement. Although AEP-Ohio acknowledges that the term "arrangement" in the statute is ambiguous, AEP-Ohio claims that a fair and reasonable interpretation of the term, is "mutual agreement or understanding." Further, AEP-Ohio contends that the context of the statute confirms that "arrangement" should be interpreted as "mutual agreement" because the statute envisions that a reasonable arrangement submitted to the Commission is an arrangement already in existence which becomes lawful and immediately enforceable upon approval by the Commission.

In addition, AEP-Ohio contends that the amendment to Section 4905.31, Revised Code, contained in Am. Sub. Senate Bill 221, which allows mercantile customers to submit a reasonable arrangement to the Commission for approval, merely clarified that an electric utility may offer a general arrangement to all of its customers or to customers in a specific class and allow the individual customers to decide whether to actually "enter into" the offered arrangement. Moreover, AEP-Ohio posits that the amendment recognizes that a mercantile customer has the option of establishing a reasonable arrangement not only with its electric utility but also with some other public utility electric light company. AEP-Ohio claims that this language suggests mutual agreement because it would be strange for the Commission to force a CRES provider or an electric utility serving another territory to enter into an arrangement. Moreover, AEP-Ohio argues that the mercantile customer may apply for a proposed reasonable arrangement because the mercantile customer has a key role to play in persuading the Commission that the reasonable arrangement furthers its intended purpose.

Ormet responds that the Commission has already rejected the arguments raised by AEP-Ohio. Ormet notes that, in adopting the rules governing reasonable arrangements, the Commission specifically rejected a claim that a reasonable arrangement required the electric utility's agreement, holding that:

> FirstEnergy argues that the Commission should make it clear that such applications require the electric utility's consent before they can be approved by the Commission. We believe FirstEnergy's position is not consistent with Section 4905.31, Revised Code, as modified by [Am. Sub. Senate Bill 221]. This section provides that a mercantile customer may apply to the Commission to establish a reasonable arrangement with an electric utility. *Although such arrangement requires Commission approval, there is no requirement that the electric utility must consent to the arrangement before the Commission approves it.*
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> *In the Matter of the Adoption of Rules for Reasonable Arrangements*, Case No. 08-777-EL-ORD, Entry on Rehearing (February 11, 2009) at 21 [emphasis added].

OCC and OEG also contend that the Commission may order AEP-Ohio and Ormet to enter into a reasonable arrangement without mutual agreement by the electric utility. OEG and OCC claim that AEP-Ohio's assumption that "establishing" a reasonable arrangement and "entering into a reasonable arrangement" mean the same thing violates the rule of statutory interpretation that the entire statute is intended to be effective. *See* Section 1.47(B), Revised Code. Instead, OCC and OEG argue that "establishing" a reasonable arrangement and "entering into a reasonable arrangement" are listed separately under Section 4905.31, Revised Code, and constitute two separate acts. Thus, OCC and OEG posit that "establishing a reasonable arrangement" can be completed through a filed design or plan *without mutual agreement* while "entering into a reasonable arrangement" specifically means to reach an agreement and cannot be completed without mutual consent. Moreover, OCC and OEG argue that AEP-Ohio's interpretation of "establishing a reasonable arrangement" within the context of Section 4905.31, Revised Code, is faulty. OCC and OEG claim that, in assuming that the arrangement becomes immediately enforceable upon approval, AEP-Ohio neglects to recognize the last paragraph of the statute, which states that "[e]very such . . . reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration, or modification by the commission." OCC and OEG contend that this provision means that the "establishment of a

reasonable arrangement" is not final until the Commission finds that the arrangement is reasonable and in the public interest.

Finally, OCC and OEG allege that AEP-Ohio's interpretation of Section 4905.31, Revised Code, fails to recognize that a major reason that the General Assembly amended Section 4905.31, Revised Code, was to encourage economic development contracts. OCC and OEG claim that the General Assembly wanted to ensure that mercantile customers have the opportunity to propose reasonable arrangements to the Commission even if the electric utility was unwilling to "enter into an agreement" with the mercantile customer. OCC and OEG argue that, irrespective of whether an arrangement is filed by the utility or a mercantile customer, an arrangement should be approved only if it is "reasonable," which OCC and OEG define as an arrangement which does not impose economic burdens on the customers paying any subsidies.

IEU-Ohio argues that AEP-Ohio seeks an absolute veto over authority delegated to the Commission by Section 4905.31, Revised Code, to enable a reasonable arrangement that is filed by a mercantile customer or group of such customers. IEU-Ohio claims that Am. Sub. Senate Bill 221 did not modify the requirement that the Commission review and approve any reasonable arrangement before it becomes lawful and effective; however, Am. Sub. Senate Bill 221 did explicitly expand the persons eligible to submit a reasonable arrangement for the Commission's consideration and approval. Moreover, IEU-Ohio notes that, despite expanding the scope of persons eligible to submit a proposed reasonable arrangement to the Commission, the General Assembly did not modify the requirement that, upon Commission approval of a reasonable arrangement, the electric utility is required to conform its schedule of rates, tolls, and charges to the arrangement. IEU-Ohio also notes that there is no new language requiring the agreement of the electric utility with the Commission-approved reasonable arrangement even though, in Am. Sub. Senate Bill 221, the General Assembly did provide such a provision where the Commission modifies a proposed ESP.

According to IEU-Ohio, the clear and plain language in Section 4905.31, Revised Code, states that: (1) an electric utility, a mercantile customer, or group of mercantile customers may

submit a proposed reasonable arrangement 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 electric utility must then conform its rates to the Commission-approved reasonable arrangement.

The Commission notes that, although AEP-Ohio argues that a reasonable arrangement proposed by an electric utility's mercantile customer cannot be approved by the Commission unless the electric utility agrees to be bound by the proposed reasonable arrangement, the record in this case demonstrates that AEP-Ohio did not engage in negotiations with Ormet in order to reach such an agreement (Tr. I at 13, 15, 17). Thus, AEP-Ohio appears to believe that it can effectively veto reasonable arrangements simply by declining to negotiate with mercantile customers. However, AEP-Ohio ignores the language of Section 4905.31, Revised Code, as amended by Am. Sub. Senate Bill 221, which provides that a mercantile customer may submit an application for a reasonable arrangement to the Commission. Prior to the enactment of Am. Sub. Senate Bill 221, a reasonable arrangement required the electric utility's agreement because only the electric utility was authorized to file an application for a reasonable arrangement. In Am. Sub. Senate Bill 221, the General Assembly expressly authorized mercantile customers to file applications with the Commission for reasonable arrangements. If the General Assembly had intended on retaining the requirement that an electric utility agree to a proposed reasonable arrangement, there would have been no need for the General Assembly to amend Section 4905.31, Revised Code, to authorize the filing of an application by a mercantile customer.

Moreover, AEP-Ohio does not address the plain language of Section 4905.31, Revised Code, which provides that the proposed reasonable arrangement is subject to "change, alteration, or modification" by the Commission but does not provide for the opportunity for the electric utility to reject such modifications. If the General Assembly had intended to provide the electric utility with the opportunity to reject modifications by the Commission, the General Assembly would have expressly provided that opportunity as it did in a similar situation in Section 4928.143(C)(2)(a), Revised Code. Instead,

the General Assembly enacted a statutory framework under which an electric utility or mercantile customer (or a group of mercantile customers) may file an application with the Commission for a proposed reasonable arrangement. The Commission may approve or change, alter, or modify the proposed reasonable arrangement. After the Commission has approved, or modified and approved, a reasonable arrangement, the electric utility must conform its rates to the reasonable arrangement. There is no provision in this statutory framework for an electric utility to reject the modifications ordered by the Commission. Accordingly, the Commission finds that rehearing on this assignment of error should be denied.

(15) In support of their two assignments of error, OCC and OEG contend that the Opinion and Order failed to address the mechanics of how POLR credits would be applied to AEP-Ohio's economic development rider. Specifically, OCC and OEG request that the Commission clarify the Opinion and Order to preclude AEP-Ohio and Ormet from negotiating a discount to the POLR charge as part of Ormet's discounted rate.

AEP-Ohio argues that OCC and OEG erroneously assume that the percentage discount to which Ormet might be entitled applies to all rate components except the POLR rider. AEP-Ohio, on the other hand, contends that all components of the tariff, including all riders, should be discounted by the percentage amount of the discount.

The Commission finds that rehearing should be granted in order to clarify the manner in which POLR charges paid by Ormet should be credited to the economic development rider. AEP-Ohio argues that the amount of the credit should be discounted by the same percentage of the maximum rate discount provided to Ormet. This interpretation is not consistent with the Opinion and Order in this case. The rate discount provided to Ormet has no impact whatsoever on the amount of the credit to be applied to the economic development rider. Instead, AEP-Ohio should credit the full amount of the POLR component of the tariff rate which would otherwise apply, on a per MWh basis.

It is, therefore,

ORDERED, That the application for rehearing filed by IEU-Ohio be denied and that the applications for rehearing filed by OCC and OEG and AEP-Ohio be granted, in part, and denied, in part. It is, further,

ORDERED, That a copy of this Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Cheryl L. Roberto

GAP:ct

Entered in the Journal

SEP 15 2009

Reneé J. Jenkins
Secretary