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

ENTRY ON REHEARING

The Commission finds:

(1) On June 19, 2009, Eramet Marietta, Inc. (Eramet) filed an application (Application) pursuant to Section 4905.31, Revised Code, to establish a reasonable arrangement with Columbus Southern Power Company (CSP) for electric service to its manganese alloy-producing facility in Marietta, Ohio. In its Application, Eramet requests that the Commission establish a reasonable arrangement for electric service with CSP that will permit Eramet to secure a reliable supply of electricity with a reasonable, predictable price over a term that will allow for the investment of approximately $40 million in capital investments to upgrade the Marietta facility.

(2) A hearing on the matter commenced on August 4, 2009. During the course of the hearing, on August 5, 2009, Eramet and Staff filed a Joint Stipulation and Recommendation (Stipulation), which addressed several of the issues and concerns related to Eramet's Application.

(3) On October 15, 2009, the Commission issued its Opinion and Order (Order), approving the Stipulation, with modifications.

(4) 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.

(5) On November 13, 2009, CSP filed an application for rehearing, alleging that the Opinion and Order was unreasonable and unlawful based on eight assignments of error. Moreover, on November 16, 2009, the Office of the Ohio Consumers' Counsel (OCC) and the Ohio Energy Group (OEG) jointly filed an

application for rehearing, setting forth six assignments of error. Eramet also filed an application for rehearing on November 16, 2009.

(6) On November 23, 2009, Eramet filed a memorandum contra the applications for rehearing of CSP and OCC and OEG. On the same day, OCC and OEG jointly filed a memorandum contra CSP's application for rehearing. Additionally, on November 25, 2009, CSP filed memorandum contra Eramet's application for rehearing and the application for rehearing filed by OCC and OEG.

(7) In its first assignment of error, CSP argues that the Commission's finding that Eramet cannot shop through the period ending with the expiration of CSP's electric security plan (ESP) is contrary to the evidence in the record and public policy, as codified in Ohio law. CSP also argues in its second assignment of error that basing the determination of whether Eramet can shop under the terms of a ten-year contract on only three of those ten years is unreasonable and unlawful. Further, CSP contends in its third assignment of error that basing the determination of whether Eramet can shop under the terms of a ten-year contract on the limited period of time for which CSP's current provider of last resort (POLR) charge has been authorized is unreasonable and unlawful.

(8) In their memorandum contra CSP's application for rehearing, OCC and OEG argue that CSP has not shown that the Commission's finding that Eramet cannot shop through the end of the ESP is against the weight of the evidence or unsupported by the record. Further, OCC and OEG argue that permitting Eramet to choose exclusive service from CSP does not violate any public policy of the state, but rather furthers state policies of facilitating reasonable rates and customer choice. OCC and OEG additionally argue that the Commission's focus on the first three years of the reasonable arrangement is appropriate because that is the only period during which CSP's POLR rates are currently in effect.

(9) As an initial matter, the Commission finds that its decision of whether Eramet can shop to the period ending with the expiration of CSP's ESP is reasonable and appropriate. CSP's argument in support of its second and third assignments of error disregards the circumstances surrounding the arrangement. CSP's ESP, and thus, its authority to assess POLR charges to its standard service offer (SSO) customers, expires on December 31, 2011. The Commission

narrowly focused upon the first 26 months of the contract, or the term of the current ESP, specifically because no determination has been made as to whether future SSOs will include POLR charges. Because no determination regarding POLR charges in future ESPs has been made, at this point, the Commission would be forced to speculate in order to determine whether Eramet has the right to shop after the expiration of the current ESP. CSP's second and third assignments of error should be denied.

(10) With regard to record support for the Commission's determination that Eramet cannot shop for the term of its current ESP, CSP references Eramet witness Bjorklund, who testified that, with the discounted rates proposed in the ESP, "Eramet will not need to shop" to argue that his testimony did not amount to a renunciation of Eramet's right to shop, as construed by the Commission. (Tr. I at 104.) CSP also notes that the Commission relied upon a statement in the Stipulation that Eramet sought "a reliable supply of electricity pursuant to terms and conditions that will provide it with a reasonable and predictable price over a permissible term." (Joint Ex. 1 at 1.) CSP argues, however, that, similar to witness Bjorklund's testimony, this statement does not support the Commission's conclusion that Eramet cannot shop for the term of the ESP. CSP additionally argues that Eramet's desire for a reliable supply of electricity pursuant to terms and conditions that provide a reasonable and predictable price over a permissible term may not be something that can be satisfied strictly by CSP.

Despite CSP's argument that it is not the only competitive retail electric service provider that can provide Eramet with service, Eramet specifically chose CSP as its electric service provider for its reasonable arrangement application. This choice further evidences Eramet's desire not to shop. The Commission believes that the evidence in the record, including witness Bjorklund's statement that Eramet will not need to shop under the reasonable arrangement, and Eramet's stated goal in seeking the reasonable arrangement, as advanced in the Stipulation, strongly supports the conclusion that Eramet should not be allowed to shop for the term of CSP's current ESP.

(11) CSP further argues that approval of the Stipulation is contrary to Ohio's public policy to promote competitive markets for electric generation service. CSP notes that the basic premise of Am. Sub. S.B. 3 (SB 3) and Am. Sub. S.B. 221 (SB 221) is the development of

competitive electric generation markets for retail customers in Ohio. CSP argues that a contract by which one of CSP's largest customers commits not to pursue competitive options for an extended period of time serves to stifle the development of a competitive retail electric generation market, in contravention of the goals of SB 3 and SB 221. In support of its argument, CSP cites the following provision:

> "[W]here there is a strong public policy against a particular practice, a contract or clause inimical to that policy will likely be declared unconscionable and unenforceable unless the policy is clearly outweighed by some legitimate interest in favor of the individual benefited by the provision." 8 Williston on Contracts (4th Ed. 1998) 43, Section 18:7.

While CSP advances this non-binding tenet in support of its position, the Commission finds that the concept of customer choice functions as a "legitimate interest," as outlined in the above passage, that outweighs the public policy considerations upon which CSP focuses. OCC and OEG argue in their memorandum contra that competition, in and of itself, is not the end-all purpose of SB 221. Along this line of reasoning, one of the policies of the state, as set forth in Section 4928.02(A), Revised Code, is to "[e]nsure the availability to consumers of adequate, reliable, safe, efficient, non-discriminatory, and reasonably priced retail electric service." Here, Eramet has chosen to take service from CSP pursuant to the reasonable arrangement in order to secure reliable electric service at a reasonable, predictable price. Accordingly, rehearing on CSP's first assignment of error is not merited, and should be denied.

(12) In its fourth assignment of error, CSP argues that finding that there is not a risk that Eramet will be permitted, at some point during the term of the reasonable arrangement, to shop for competitive generation and then return to generation service under CSP's SSO, is unreasonable and unlawful. CSP contends that, because the Commission retains jurisdiction over the reasonable arrangement, and can change, alter, or modify the arrangement, there is a risk of Eramet shopping and then returning to POLR service from CSP. In their memorandum contra, OCC and OEG note that the likelihood of the Commission altering the contract and allowing Eramet to

shop, causing POLR expenses to be incurred by CSP, as CSP submits, is extremely unlikely.

(13) The Commission finds that CSP has not raised any new arguments under this assignment of error. Our continued jurisdiction over the matter does not create a risk of shopping that necessitates a POLR charge, as CSP suggests. Therefore, rehearing should be denied on CSP's fourth assignment of error.

(14) In its fifth and sixth assignments of error, CSP contends that the Commission's decision requiring it to reduce its recovery of delta revenues resulting from the contract with Eramet and to credit any POLR charges paid by Eramet to CSP's economic development rider (EDR) is unreasonable and unlawful. CSP argues that the plain language of Section 4905.31, Revised Code, does not authorize the Commission to offset the revenue of recovery foregone by any expenses the Commission believes will not be incurred by the electric utility due to the unique arrangement. CSP additionally argues that the Commission's continued application of its *Ormet* precedent on POLR credits could result in every mercantile customer avoiding paying the POLR charge by agreeing to make their electric utility their exclusive supplier. OCC and OEG respond that Section 4095.31, Revised Code, is unambiguous, and provides the Commission with the discretion to approve or disapprove a device within a special arrangement seeking to recover revenue foregone under an economic development program. OCC and OEG further argue that the POLR offset ordered by the Commission is not contrary to CSP's ESP order, and that modifications of the ESP were contemplated for economic development arrangements such as Eramet's reasonable arrangement.

(15) The Commission notes that CSP repeats in its application for rehearing the arguments it presented on this topic in its hearing briefs. Consequently, we find that CSP has not raised any new arguments under this assignment of error. We reiterate the analysis set forth in our Order, wherein we conclude that "the recovery of delta revenues is a matter for the Commission's discretion," and that because CSP will incur no costs for providing POLR service that can be recovered under Section 4905.31, Revised Code, "CSP should credit any POLR charges paid by Eramet to its economic development rider in order to reduce the amount of delta

revenues recovered from other ratepayers." Order at 8-9. Rehearing should be denied on these assignments of error.

(16) In its seventh and eighth assignments of error, CSP argues that requiring it to enter into a contract with Eramet that conforms to the Commission's order and results in a reduction in CSP's revenues is unreasonable and unlawful. CSP contends that the Commission's order is based on two improper conclusions of law: (1) that the Commission can deny recovery of revenues foregone under an arrangement made pursuant to Section 4905.31, Revised Code; and (2) that the Commission can require an electric utility to enter into a special arrangement with a customer, even if the utility objects to the contract. In its memorandum contra CSP's application for rehearing, Eramet responds that the General Assembly would not have amended Section 4905.31, Revised Code, to authorize the filing of an application for a reasonable arrangement by a mercantile customer, if the General Assembly intended on retaining the requirement that an electric utility agree to a proposed reasonable arrangement.

(17) The arguments CSP advances in support of these assignments of error simply repeat the arguments it made in its hearing briefs. The Commission has already rejected these arguments. As we noted in *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 11 (July 15, 2009); Entry on Rehearing at 17 (September 15, 2009) (*Ormet*): 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 * * * to amend Section 4905.31, Revised Code, to authorize the filing of an application by a mercantile customer." We find that rehearing should be denied on CSP's seventh and eighth assignments of error.

(18) Turning to OCC and OEG's joint application for rehearing, in their first assignment of error, OCC and OEG argue that the Commission failed to specify how CSP will apply the credit for the full amount of POLR charges that will reduce what all customers will have to pay for the reasonable arrangement through the economic development rider (EDR). In their second assignment of error, OCC and OEG likewise argue that the Commission erred by failing to specify that CSP and Eramet shall not be permitted to reduce the

delta revenue credit that is intended to reduce the amount all customers will have to pay for the reasonable arrangement through the EDR. OCC and OEG request that the Commission clarify its Order and adopt the precedent set forth in *Ormet* by precluding CSP and Eramet from negotiating a discount to the POLR charge as part of Eramet's discounted rate under the reasonable arrangement. In its memorandum contra, CSP recognizes that the Commission addressed this issue in the *Ormet* Entry on Rehearing, but requests that the Commission reconsider its *Ormet* precedent.

(19) The Commission finds that rehearing should be granted on these two assignments of error in order to clarify the manner in which POLR charges paid by Eramet should be credited to the EDR. Despite CSP's request that the Commission reconsider its *Ormet* precedent on this issue, we find that it is sound precedent that is directly on point. Therefore, consistent with our decision in *Ormet*, we find that CSP should credit the full amount of the POLR component of the tariff rate that would otherwise apply, on a per MWh basis, to the EDR. Additionally, Eramet and CSP shall not take action to reduce the delta revenue credit arising from the reasonable arrangement, such that the amount all customers will have to pay for the reasonable arrangement will increase.

(20) In their third assignment of error, OCC and OEG contend that the Stipulation does not benefit the public and is not in the public interest because it does not set a hard cap or ceiling on the subsidy that all customers could be asked to pay. OCC and OEG also argue that the Commission's failure to establish a hard cap on delta revenues violates the regulatory precedent set forth in *Ormet*, which stated that a reasonable arrangement should set a maximum amount of delta revenues that the ratepayers should be expected to pay. In their fourth assignment of error, OCC and OEG argue that the Commission erred by failing to meet the requirements of Section 4903.09, Revised Code, to set forth reasons prompting its decision, based upon findings of fact, with regard to the arguments of OCC and OEG on a hard cap or ceiling. Eramet responds that OCC and OEG have failed to demonstrate that the Stipulation is not in the public interest or violates any important regulatory principle by not including a hard cap on delta revenue. Eramet further contends that although OCC and OEG assert that the Commission failed to comply with the regulatory principle of setting a maximum amount of delta revenues that may be

recovered, as advanced in *Ormet*, OCC and OEG do not explain how the regulatory principle was violated.

(21) OCC and OEG advance the same argument they presented at hearing and in their briefs with regard to the absence of a hard cap on delta revenues in support of their third assignment of error. They raise no new arguments. As such, we find that rehearing on their third assignment of error should be denied.

(22) With regard to OCC and OEG's fourth assignment of error, the Commission noted in the Order that Staff witness Fortney testified that "the structure of the stipulation, which bases Eramet's discount for electric service on a descending percentage off the applicable tariff rate, year by year, effectively imposes a ceiling or cap on delta revenues." Order at 10. Notwithstanding our reliance on that language, we will grant rehearing to clarify that, although the Stipulation does not explicitly include an absolute dollar ceiling on the amount of delta revenues created by the reasonable arrangement, the Stipulation is structured in such a manner as to safely cap delta revenues at reasonable levels. Therefore, we find that the regulatory principle regarding delta revenue limitations set forth in *Ormet* has not been violated.

(23) In their fifth assignment of error, OCC and OEG argue that the Stipulation is not in the public interest because it requires customers to fund an electric rate discount to Eramet before Eramet has obtained corporate approval for its capital investments, which are the basis for granting Eramet the discount. OCC and OEG argue that allowing the discounts pursuant to the reasonable arrangement only upon Eramet's corporate commitment to the investment would provide a safeguard that Eramet will fulfill its capital investment commitment. Eramet asserts that OCC and OEG have failed to demonstrate that the Commission's decision not to require corporate approvals prior to approving the reasonable arrangement is unreasonable or unlawful. Further, Eramet contends that if the Commission were to impose a requirement that Eramet obtain corporate approval for its capital investment prior to the effectiveness of the reasonable arrangement, the arrangement would be rendered incapable of being used for its intended purpose.

(24) As we opined in the Order, Eramet's ability to secure the parental approvals required to obtain capital to implement its investment

plan depends on Eramet's ability "to get predictable electricity prices at a reasonable level over a period of time that is judged to be sufficient to rationalize the capital investment." Order at 11. OCC and OEG merely reiterate the arguments they made at the hearing and in their briefs in support of this issue. As such, the Commission finds that rehearing on OCC and OEG's fifth assignment of error should be denied.

(25) In their sixth assignment of error, OCC and OEG contend that the Commission erred in concluding that the Stipulation reflects diverse interests. In support of their argument, OCC and OEG contend that the only interests in the proceeding that were diverse were the interests of customers and the interests of CSP, neither of which signed the Stipulation. Eramet explained that all parties were invited to and participated in extensive settlement negotiations. Eramet further contends that the Supreme Court of Ohio has never held that stipulations approved by the Commission must be supported by all parties or all customer classes in order to reflect diverse interests.

(26) The Commission finds that OCC and OEG have again replicated the arguments they made at the hearing and in their briefs in support of their sixth assignment of error. Because no new arguments have been raised, we find that rehearing on OCC and OEG's sixth assignment of error should be denied.

(27) Turning to Eramet's application for rehearing, Eramet requests that the Commission grant rehearing for the purpose of confirming that it approved the Stipulation, including, without modification, the provision in which Eramet committed to work in good faith with CSP to determine how and to what extent Eramet's customer-sited capabilities might be committed to CSP to assist in meeting CSP's statutory energy efficiency requirements. In connection with its customer-sited capabilities, Eramet specifically references its willingness to participate in a CSP demand response program that would provide Eramet with an opportunity equal to the opportunities available under the PJM demand response programs in which it has participated in the past.

(28) On page ten of our Order, the Commission states the following with regard to Eramet's commitment of its customer-sited capabilities to CSP:

> The Commission urges Eramet to commit, to the fullest extent possible, its customer sited-capabilities to CSP for integration into CSP's portfolio. Accordingly, Eramet and CSP shall work in good faith to determine how and to what extent Eramet's customer-sited capabilities, as referenced by Eramet witness Flygar, can be committed to CSP. With regard to Eramet's participation in PJM's [Interruptible Load for Reliability] Program, Eramet is authorized to continue its participation in PJM demand response programs for the 2009-2010 planning year. Thereafter, however, Eramet must make its demand response capabilities available to CSP in order to reduce peak demand reduction compliance costs.

(29) Our Order encouraged Eramet to commit its customer-sited capabilities to CSP, and urged CSP and Eramet to work in good faith in order to determine how to facilitate such a circumstance. The Order additionally directed Eramet to make its demand response capabilities available to CSP in order to reduce peak-demand reduction compliance costs after the PJM 2009-2010 planning year.

(30) On December 10, 2009, subsequent to the issuance of our Order, Rule 4901:1-39-05, O.A.C., was adopted. Rule 4901:1-39-05(E)(2), O.A.C., states:

> (E) An electric utility may satisfy its peak-demand reduction benchmarks through a combination of energy efficiency and peak-demand response programs implemented by electric utilities and/or programs implemented on mercantile customer sites where the mercantile program is committed to the electric utility.
>
> (2) For demand response programs, an electric utility may count demand reductions towards satisfying some or all of the peak-demand reduction benchmarks by demonstrating that either the electric utility has reduced its actual peak demand, or has the capability to

reduce its peak demand and such capability is created under either of the following circumstances:

(a) A peak-demand reduc-tion program meets the requirements to be counted as a capacity resource under the tariff of a regional trans-mission organization approved by the Federal Energy Regulatory Commission.

(b) A peak-demand reduc-tion program equivalent to a regional trans-mission organization program, which has been approved by [the Commission].

(31) Rule 4901:1-39-05(G), O.A.C., additionally provides that a mercantile customer may file, either individually or jointly with an electric utility, an application to commit the customer's demand reduction, demand response, or energy efficiency programs for integration with the electric utility's demand reduction, demand response, and energy efficiency programs, pursuant to Section 4928.66(A)(2)(d), Revised Code. Rule 4901:1-39-05(G), O.A.C., also identifies five requirements that each such application must fulfill.

(32) On February 12, 2010, Eramet filed an individual application, pursuant to Rule 4901:1-39-05, O.A.C., to commit its peak-demand reduction capabilities to CSP, through Eramet's participation in the FERC-approved PJM Reliability Pricing Model – Interruptible Load for Reliability (PJM-ILR) program. Eramet asserts that it filed the application in order to comply with our Order, and to allow CSP to integrate Eramet's demand reduction with any of its other demand reduction initiatives, and, therefore, count Eramet's participation in the PJM-ILR toward CSP's compliance with yearly statutory demand reduction targets, as required by Section 4928.66(A)(2), Revised Code. See *In the Matter of the Application of Eramet Marietta, Inc. to Incorporate Customer's Peak Demand Reduction Capabilities into*

Columbus Southern Power Company's Demand Reduction Program, Case No. 10-188-EL-EEC, Application at 4 (February 12, 2010).

(33) The Commission finds that rehearing should be granted pursuant to Eramet's request, in order to clarify that Eramet's commitment to CSP of its demand response capabilities rendered through participation in the PJM-ILR program satisfies our requirement that Eramet make its demand response capabilities available to CSP in order to reduce CSP's peak demand reduction compliance costs and is consistent with Rule 4901:1-39-05(E)(2)(a). Accordingly, we grant Eramet's request for rehearing. While we recognize that AEP-Ohio recently filed, on March 19, 2010, in Case Nos. 10-343-EL-ATA and 10-344-EL-ATA, an application to amend its emergency curtailment service riders and establish a second demand response program, we find that it is not necessary to reach a decision at this time regarding the reasonableness of that application in order for us to determine, in this case, that Eramet's reasonable arrangement and commitment to integrate are consistent with our Order and our rules.

It is, therefore,

ORDERED, That the application for rehearing filed by Eramet be granted, that the application for rehearing filed by CSP be denied, and that the application for rehearing filed by OCC and OEG 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

RLH/dah

Entered in the Journal

MAR 2 4 2010

Reneé J. Jenkins
Secretary