

FAX

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

FILE

In the Matter of the Application of)	
Ohio Power Company and Columbus)	
Southern Power Company for)	Case No. 10-2376-EL-UNC
Authority to Merge and Related)	
Approvals.)	
In the Matter of the Application of)	
Columbus Southern Power Company)	
and Ohio Power Company for)	Case No. 11-346-EL-SSO
Authority to Establish a Standard)	Case No. 11-348-EL-SSO
Service Offer Pursuant to Section)	
4928.143. Revised Code, in the Form of)	
an Electric Security Plan.)	
In the Matter of the Application of)	
Columbus Southern Power Company)	
and Ohio Power Company for)	Case No. 11-349-EL-AAM
Approval of Certain Accounting)	Case No. 11-350-EL-AAM
Authority.)	
In the Matter of the Application of)	
Columbus Southern Power Company)	
to Amend its Emergency Curtailment)	Case No. 10-343-EL-ATA
Service Riders.)	
In the Matter of the Application of)	
Ohio Power Company to Amend its)	
Emergency Curtailment Service)	Case No. 10-344-EL-ATA
Riders.)	
In the Matter of the Commission)	
Review of the Capacity Charges of)	
Ohio Power Company and Columbus)	Case No. 10-2929-EL-UNC
Southern Power Company.)	
In the Matter of the Application of)	
Columbus Southern Power Company)	
for Approval of a Mechanism to)	
Recover Deferred Fuel Costs Ordered)	Case No. 11-4920-EL-RDR
Under Section 4928.144, Ohio Revised)	
Code.)	

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**In the Matter of the Application of
Ohio Power Company for Approval of
a Mechanism to Recover Deferred
Fuel Costs Ordered Under Section
4928.144, Ohio Revised Code.**

Case No. 11-4921-EL-RDR

(Consolidated)

MEMORANDUM IN SUPPORT OF ORMET PRIMARY ALUMINUM CORPORATION

INTRODUCTION

In their November 10, 2011 *Joint Initial Brief of the Undersigned Signatory Parties* ("Signatory Parties' Brief") in this proceeding, the Signatory Parties make several statements that are utterly unsupported by the record and attempt to circumvent the bench's ruling regarding the issue of Ormet's kWh tax exemption status. They also attempt to burden the record further with a discussion of Ormet's contractual history with AEP Ohio and others dating back to 1957 that is irrelevant to whether or not there will be an actual and measurable difference in the service AEP Ohio will provide to Ormet under the proposed ESP that warrants treating Ormet differently from all other customers in its rate class. These two sections of the Signatory Parties' Brief should be stricken.

ARGUMENT

Two sections of the Signatory Parties Brief should be stricken: (1) the kWh tax exemption discussion that starts in the first full paragraph on page 47 with "As the above history reflects, . . ." and continues through the second full paragraph on page 48, ending with ". . . as reflected in the Stipulation" and (2) the discussion of Ormet's contractual history with AEP Ohio and others dating back to 1957, which begins on page 43 with the heading "i. The LFP's 250 MW monthly peak demand limit is reasonable, as Ormet has frequently been treated as a unique

customer and it is not unduly discriminatory to treat them differently in this case” and continues through the end of the first partial paragraph on page 46 which ends “. . . on January 7, 2009.” These two sections are unsupported by evidence in the record and are not relevant to any issue before the Commission in this proceeding.

The Commission regularly strikes evidence that was not a part of the record when a party seeks to introduce it in post-hearing briefing as the Signatory Parties have here. *Re United Telephone Co. of Ohio*, No. 07-760, 2008 WL 449797, *15 (Ohio P.U.C. Feb. 13, 2008) (striking section of post-hearing brief referencing facts not in record); *see OhioTelnet.Com, Inc. v. Ameritech Ohio*, No. 01-2444, 2002 WL 31319425, *1 (Ohio P.U.C. Aug. 8, 2002) (same). The Commission also regularly strikes irrelevant evidence pursuant to its statutory authority. *See, e.g., In re Application of Columbus Southern Power Co.*, No. 08-917, 2011 WL 3202942, *3 (Ohio P.U.C. July 9, 2011) (granting AEP Ohio’s motion to strike based on relevance); *City of Reynoldsburg v. Ohio PUC*, No. 08-846, 2011 WL 1428237, *21 (Ohio P.U.C. April 5, 2011); *see also* Ohio Rev. Code § 4901-1-27. It should similarly strike the aforementioned passages in the Signatory Parties’ Brief in this proceeding.

I. The Commission Should Strike the Signatory Parties’ kWh Tax Exemption Argument Because it Has Neither Basis in the Record Nor Relevance to the Any Issue Before the Commission in This Proceeding.

A. The Signatory Parties’ Argument Regarding Ormet’s Status in Relation to the kWh Tax is Unsupported By the Record.

The Signatory Parties at page 47 of their Initial Brief begin a discussion of Ormet’s status in relation to the kWh tax that is utterly unsupported by the record and must be stricken. Counsel for the Ohio Energy Group (“OEG”) attempted to improperly introduce such evidence in re-direct, and was properly prohibited from doing so by the bench.¹ The Signatory Parties are here again attempting to introduce evidence which is irrelevant and which they failed to

¹ TR at 267:22-268:15.

introduce properly in their testimony. They should not be permitted to introduce new evidence at this late stage of the proceeding when other parties have no opportunity to test or dispute that evidence through discovery and cross-examination.

The Signatory Parties make a number of statements regarding Ormet's tax status in this discussion that are unsupported by any evidence whatsoever. For example at page 48, they claim that Ormet "has avoided paying state and local governments tens of millions of dollars of revenue" without citing to any source for that sum or offering any explanation of how the Signatory Parties determined the dollar amount that Ormet saves through the exemption. They further assert that "[o]n a going forward basis, Ormet will continue to avoid payment of tens of millions of dollars" without any factual support or any explanation of the assumptions underlying that statement. *Id.* Injecting such unsupported arguments into the proceeding at this late stage makes it impossible for the Commission to reasonably understand the exemption's impact upon Ormet or other consumers on the AEP Ohio system. There is simply no evidence in the record as to what Ormet does or does not pay in taxes and what it will or will not pay in the future, and the Commission cannot rely upon such utterly unsupported statements in making its determination. The discussion of Ormet's tax status must be stricken as unsupported by evidence in the record. In the event that it is not stricken, then the Commission should give the argument no weight in making its determination in this proceeding.

B. The Signatory Parties' Discussion of Ormet's Tax Status with Relation to the kWh Tax is Not Relevant to Any Issue in this Proceeding.

In addition to being unsupported by the record, Ormet's kWh tax status is not relevant to any issue in this proceeding. The Signatory Parties appear to be offering it in support of imposing a discriminatory rate upon Ormet. However, the Commission's standard for determining whether a discriminatory rate is a reasonable differential or whether it is unduly discriminatory is whether the discrimination in the rate design is "based upon some actual and

measurable differences in the furnishing of services to the consumer.” *Mahoning Cnty. Townships v. Pub. Utils. Comm’n of Ohio*, 388 N.E.2d 739, 742 (Ohio 1979). Whether or not Ormet is eligible for a statutorily created tax exemption from the kWh tax is simply unrelated to whether or not there is a difference in the furnishing of services to Ormet. The Signatory Parties’ post-hearing unsupported arguments regarding Ormet’s eligibility for a tax exemption distract from the relevant inquiry of whether there exist actual and measurable differences between services furnished to Ormet and services furnished to the Load Factor Provision (“LFP”) beneficiaries and should be stricken.

II. The Signatory Parties’ Argument Regarding Ormet’s Past Contractual Arrangements with AEP Ohio Is Not Relevant to Any Issue Before the Commission in this Proceeding and Is Largely Unsupported By the Record.

The half-century of Ormet’s power contract history recounted by the Signatory Parties is irrelevant to whether the LFP in the proposed tariff is unduly discriminatory going forward under the Commission’s standards for assessing undue discrimination and is largely unsupported by the record in this proceeding. As such, it must be stricken, or in the event it is not stricken, given no weight by the Commission.

To support their argument that it is reasonable to discriminate against Ormet in this proceeding, the Signatory Parties selectively recount the history of Ormet’s contract rates in blocks from 1957 to 1997; 1998 to 2005; 2006 to 2009; and 2010 to 2018. Signatory Parties’ Brief at pp. 43-48. In each section, the Signatory Parties assert that Ormet was treated uniquely under the relevant contract. Much of the discussion cites to petitions and applications in other cases for which the Signatory Parties have not sought administrative notice (see footnotes 19, 20, 21, 22, 24, 26, 29, 30, 37, 38 and 43), and for one fact they cite to the website of South Central Power Company (see footnote 23). There was ample opportunity to introduce this evidence in

their testimony in this proceeding; they should not be permitted to burden the record with it at this late date.

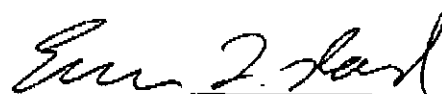
Moreover, courts frequently reject antiquated historical observations like that of Ormet's history as irrelevant to a current analysis of undue discrimination. In *Mahoning*, for example, the Commission rejected the use of decades-old historical population data offered in defense of a rate design charging higher rates to lower-density unincorporated areas than it did to municipalities. *Mahoning*, 388 N.E.2d at 740. The Commission held that such historical data could not be used to show actual and measurable differences that justify current discrimination. On appeal, the Ohio Supreme Court held that "[e]ven though the classifications may have been valid when inaugurated in 1952, the political or governmental units have varied so greatly in composition and population that at this time such classifications have little touch with reality, and are not meaningful." *Id.* at 744. Applying this precedent, the Commission should strike the stale, irrelevant argument about the last half-century of Ormet's history because it has "little touch with [the] reality" of tariff rates today and is simply "not meaningful" to whether *prospective* discrimination against Ormet is justified. *Id.*

Furthermore, the Signatory Parties fail to explain how the negotiated, bilateral power agreements they discuss in the brief are relevant to the issue of what *tariff* rate should be applied to Ormet. The fact that Ormet has in the past entered into bilateral power agreements rather than taking service under the tariff does not explain how there would be an actual, measurable difference in service furnished to Ormet by AEP Ohio under the proposed ESP that warrants treating Ormet differently than the rest of its rate class. The data offered for the first time on brief by the Signatory Parties regarding Ormet's power arrangement history prior to the effective date of the proposed ESP is simply irrelevant to the issue of whether or not there will be an actual and measurable difference in service furnished to Ormet under the proposed ESP, and thus

is irrelevant to the issue of whether the discrimination against Ormet incorporated in the Stipulation is "undue." Because it is irrelevant and largely unsupported in the record, it must be stricken.

CONCLUSION

WHEREFORE, for the reasons stated above, Ormet respectfully moves that (1) the kWh tax exemption discussion in the Signatory Parties' Brief that starts in the first full paragraph on page 47 with "As the above history reflects, . . ." and continues through the second full paragraph on page 48, ending with ". . . as reflected in the Stipulation" and (2) the discussion of Ormet's contractual history with AEP Ohio and others dating back to 1957, which begins on page 43 with the heading "i. The LFP's 250 MW monthly peak demand limit is reasonable, as Ormet has frequently been treated as a unique customer and it is not unduly discriminatory to treat them differently in this case" and continues through the end of the first partial paragraph on page 46 which ends ". . . on January 7, 2009" be stricken.




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November 15, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Motion to Strike and Memorandum in Support of Ormet Primary Aluminum Corporation* was served by U.S. Mail and email upon counsel identified below for all parties of record this 15th day of November, 2011.


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