

**BEFORE THE  
PUBLIC UTILITY COMMISSION OF OHIO**

In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals.	:	Case No. 10-2376-EL-UNC
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In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to §4928.143, Ohio Rev. Code, in the Form of an Electric Security Plan.	:	Case No. 11-346-EL-SSO
	:	Case No. 11-348-EL-SSO
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In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority	:	Case No. 11-349-EL-AAM
	:	Case No. 11-350-EL-AAM
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In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders	:	Case No. 10-343-EL-ATA
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In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders	:	Case No. 10-344-EL-ATA
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In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company	:	Case No. 10-2929-EL-UNC
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In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Ohio Revised Code 4928.144	:	Case No. 11-4920-EL-RDR
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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 Ohio Revised Code 4928.144	:	Case No. 11-4921-EL-RDR
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**JOINT MEMORANDUM CONTRA  
ORMET PRIMARY ALUMINUM CORPORATION'S MOTION TO STRIKE  
OF  
THE UNDERSIGNED SIGNATORY PARTIES**

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Pursuant to §4901-1-12 of the Ohio Administrative Code, the undersigned Signatory Parties hereby submit this Memorandum Contra the Motion to Strike filed by Ormet Primary Aluminum Corporation (“Ormet”) on November 15, 2011 (“Motion to Strike”). The reasons in support of this Memorandum Contra are discussed below.

Respectfully Submitted,

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November 21, 2011

## **MEMORANDUM IN SUPPORT**

In its Motion to Strike, Ormet alleges that portions of the Joint Initial Brief of the Undersigned Signatory Parties filed Nov. 10, 2011 (“Signatory Parties’ Brief”) should be stricken from the record because, according to Ormet, those portions are unsupported by the record or irrelevant to this proceeding.<sup>1</sup> But Ormet’s history as an AEP Ohio customer as well as its exemption from the kilowatt hour tax are both relevant to this proceeding, affording the Commission a complete picture with which it can determine whether the Stipulation filed in this case unduly discriminates against Ormet. Further, the portions of Signatory Parties’ Brief that Ormet moves to strike are sufficiently supported by statutes or legal precedent as well as pleadings that Ormet itself filed at the Commission. The Commission should deny Ormet’s Motion to Strike.

Ormet argues that “[w]hether 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.”<sup>2</sup> Ormet makes the same argument against the portions of the Signatory Parties’ Brief related to Ormet’s history as an AEP Ohio customer.<sup>3</sup> In making these arguments, Ormet attempts to narrow the issue in this case in order to push for the selective exclusion of information that demonstrates that Ormet has frequently been treated as unique from other AEP Ohio customers. But the issue in this proceeding is broader than merely whether there is a difference in furnishing services to Ormet, as Ormet alleges. The issue is whether the Load Factor Provision (“LFP”) of the Stipulation is unduly discriminatory to Ormet.

In its Initial Brief, Ormet itself alleges that the result of the LFP is “overtly discriminatory against Ormet....”<sup>4</sup> Ormet argues that “similarly situated” customers should be charged the same rates.<sup>5</sup> Accordingly, information that addresses whether Ormet is “similarly situated” to other AEP Ohio

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<sup>1</sup> Motion to Strike at 2.

<sup>2</sup> Motion to Strike at 5.

<sup>3</sup> Motion to Strike at 6-7.

<sup>4</sup> Initial Brief of Ormet (Nov. 10, 2011) (“Ormet Brief”) at 7.

<sup>5</sup> Ormet Brief at 8-9.

customers is relevant to this proceeding, including Ormet's historical treatment as an AEP Ohio customer and Ormet's kilowatt hour tax exemption (which other AEP Ohio customers must pay). When answering whether the LFP is unduly discriminatory to Ormet, the Commission should not look at this proceeding in isolation. Rather, to develop a complete picture of whether the LFP is discriminatory against Ormet, the Commission must examine its historical treatment of Ormet as well as utility-related laws that may distinguish Ormet from other AEP Ohio customers. Accordingly, the discussions in the Signatory Parties' Brief related to Ormet's history and its kilowatt hour tax exemption are highly relevant to the question of whether Ormet is "similarly situated" to other AEP Ohio customers as well as the broader issue of whether the LFP is unduly discriminatory to Ormet.

Regarding Ormet's historical treatment as an AEP Ohio customer, Ormet pushes the Commission to "strike the stale, irrelevant argument about the last half-century of Ormet's history...."<sup>6</sup> Citing only one case, Ormet argues that "[c]ourts frequently reject antiquated historical observations like that of Ormet's history as irrelevant to a current analysis of undue discrimination."<sup>7</sup> It is disingenuous to characterize Ormet's prior unique arrangements, particularly the unique arrangements since 1998, as "antiquated." Further, unlike the population data in the case Ormet cites,<sup>8</sup> Ormet's prior unique arrangements are very meaningful for the purpose that the information is being offered in this case. Although the actual electric service prices set under those prior unique arrangements may no longer be applicable, Ormet's prior unique arrangements are meaningful evidence that Ormet has historically been treated as a unique AEP Ohio customer. Accordingly, Ormet's past unique arrangements are relevant to the issue of whether Ormet is "similarly situated" to other customers and, therefore, whether the LFP is unduly discriminatory.

Ormet also moves the Commission to strike portions of the Signatory Parties' Brief that demonstrate that Ormet is a unique AEP Ohio customer because Ormet alleges that information in those

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<sup>6</sup> Motion to Strike at 6.

<sup>7</sup> Motion to Strike at 6.

<sup>8</sup> Motion to Strike at 6 (citing *Mahoning Cnty. Townships v. Pub. Utils. Comm'n of Ohio*, 388 N.E. 2d 730 (Ohio 1979)).

portions is unsupported by the record. The Commission should reject Ormet's arguments. Regarding the discussion of the Signatory Parties' Brief related to Ormet's kilowatt hour tax exemption, Ormet only raises specific arguments about two sentences on page 48 of the Signatory Parties' Brief. Those sentences discuss how Ormet has avoided paying tens of millions of dollars to state and local governments because Ormet qualifies for an exemption from the kilowatt hour tax.<sup>9</sup> The quantification in these sentences was based upon the kilowatt hour tax rate specifically set forth in R.C. 5727.81 as applied to Ormet's peak demand of 520 MW. Ormet itself includes its 520 MW peak demand in its own brief in this proceeding.<sup>10</sup> Accordingly, Signatory Parties' quantification is based on statute, which may be cited without being specifically admitted by the Commission, as well a fact included in Ormet's own Brief. Thus, the quantification is sufficiently supported by the record. Ormet's specific concerns about two sentences of the discussion related to Ormet's kilowatt hour tax exemption does not justify striking the entire kilowatt hour tax exemption discussion from Signatory Parties' Brief.

Additionally, Ormet points to a ruling by an attorney examiner in this case who sustained an objection to a question posed on re-direct examination regarding Ormet's kilowatt hour tax exemption.<sup>11</sup> In making that ruling, the attorney examiner stated that the question on re-direct was not "within the scope of direct."<sup>12</sup> The attorney examiner did not speak to whether evidence regarding Ormet's kilowatt hour tax exemption was either irrelevant or unsupported by the record in this proceeding. Thus, Ormet's argument regarding the attorney examiner's ruling is inapplicable to its arguments regarding why the Commission should strike portions of the Signatory Parties' Brief.

Ormet claims that much of the discussion related to Ormet's unique historical treatment cites to facts that have not been administratively noticed in this case.<sup>13</sup> But each of the historical periods discussed (1957-1997, 1998-2005, and 2006-2009) includes a citation to prior Commission orders,

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<sup>9</sup> Motion to Strike at 4.

<sup>10</sup> Ormet Brief at 17.

<sup>11</sup> Motion to Strike at 3 (citing TR at 267:22-268:15).

<sup>12</sup> TR at 268:13-14.

<sup>13</sup> Motion to Strike at 5.



which are appropriately cited without administrative notice. Further, although Ormet takes issue with the citations to petitions and applications in the Signatory Parties' Brief,<sup>14</sup> both the petition as well as one of the applications cited in the disputed portion of the Brief were actually filed by Ormet.<sup>15</sup> Thus, Ormet would presumably view this information as accurate and reliable. Should Ormet wish to comment on past information it has provided to the Commission or any other information cited in Signatory Parties' Brief, Ormet had an opportunity to do so in its Reply Brief in this proceeding.

Moreover, the Commission is not strictly bound by the rules of evidence.<sup>16</sup> The Commission can give the disputed portions of the Signatory Parties' Brief appropriate weight without resorting to the extreme approach of striking entire portions. The Commission should reject Ormet's extreme suggestion and should rely upon Signatory Parties' arguments to the extent the Commission deems appropriate. For these reasons, the Commission should deny Ormet's Motion to Strike.

Respectfully Submitted,

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<sup>14</sup> Motion to Strike at 5.

<sup>15</sup> *In the Matter of the Complaint of Ormet Primary Aluminum corp. and Ormet Aluminum Mill Products Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CCS, Petition (Aug. 25, 2005); *In the Matter of the Joint Application for Columbus Southern Power Co. and Ohio Power Co. and Ormet Primary Aluminum Mill Products Co. for Approval of a Temporary Amendment to their Special Arrangement*, Case No. 08-1339-EL-UNC, Application (Dec. 29, 2008).

<sup>16</sup> *S.G. Foods v. FirstEnergy Corp.*, Case Nos. 04-28-EL-CSS et al., Entry (March 7, 2006) at 29 (citing *Greater Cleveland Welfare Rights Org, Inv. v. Pub. Util. Comm.*, 2 Ohio St. 3d 62 (1982)).

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November 21, 2011

## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served by electronic mail upon the individuals listed below this 21st day of November, 2011.

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Summary: Memorandum Joint Memorandum Contra Ormet Primary Aluminum Corporation's Motion To Strike of the Undersigned Signatory Parties electronically filed by Ms. Christen M Moore on behalf of Columbus Southern Power Company and Ohio Power Company and Ohio Energy Group and The OMA Energy Group and Duke Energy Retail Sales, LLC and AEP Retail Energy Partners LLC and Ohio Hospital Association and Environmental Law and Policy Center and Association of Independent Colleges and Universities of Ohio and City of Grove City, Ohio and City of Hilliard, Ohio and EnerNOC, Inc. and Ohio Environmental Council and Paulding Wind Farm, LLC and Natural Resources Defense Council and The Kroger Company