



FILE

BEFORE  
THE PUBLIC UTILITIES 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

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 Section  
4928.143, Revised Code, in the Form of  
an Electric Security Plan. )

Case No. 11-346-EL-SSO  
Case No. 11-348-EL-SSO

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

In the Matter of the Application of  
Columbus Southern Power Company  
to Amend its Emergency Curtailment  
Service Riders. )

Case No. 10-343-EL-ATA

In the Matter of the Application of  
Ohio Power Company to Amend its  
Emergency Curtailment Service  
Riders. )

Case No. 10-344-EL-ATA

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

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

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 Section  
4928.144, Ohio Revised Code.

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Case No. 11-4921-EL-RDR

(Consolidated)

**MOTION TO STRIKE  
OF ORMET PRIMARY ALUMINUM CORPORATION**

Ormet Primary Aluminum Corporation (“Ormet”), by its undersigned counsel, respectfully moves the Ohio Public Utilities Commission to strike from the *Joint Reply Brief of the Undersigned Signatory Parties* (1) the last sentence on page 21 beginning with “And, as discussed in detail in the Signatory Parties’ Joint Brief, . . .” through the end of the first full paragraph on page 22, ending with “. . . to be treated differently under the Stipulation in this proceeding.” and (2) the last full sentence on page 24, starting with “And Ormet’s load factor and peak demand . . .” and ending “. . . have not enjoyed.” The reasons supporting this motion are set forth in the attached Memorandum in Support.



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*Attorneys for Ormet Primary Aluminum  
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November 22, 2011



**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.**

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**Case No. 11-4921-EL-RDR**

**(Consolidated)**

**MEMORANDUM IN SUPPORT  
OF ORMET PRIMARY ALUMINUM CORPORATION'S MOTION TO STRIKE**

**INTRODUCTION**

In their November 18, 2011 *Joint Reply Brief of the Undersigned Signatory Parties* ("Signatory Parties' Reply Brief") in this proceeding, the Signatory Parties make several statements that are not supported by the record and attempt to circumvent the bench's ruling regarding the issue of Ormet's kWh tax exemption status. These sections of the Signatory Parties' Reply Brief should be stricken for the same reasons articulated in Ormet's November 15, 2011 motion to strike<sup>1</sup> certain similar sections of the Signatory Parties' Initial Brief.<sup>2</sup>

**ARGUMENT**

It is a bedrock principle of administrative law that allegations must be supported by the record of the case. 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 Signatory Parties should not be permitted to introduce new evidence at this late stage of the

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<sup>1</sup> Motion to Strike and Memorandum in Support of Ormet Primary Aluminum Corporation, filed Nov. 15, 2011 ("First Motion to Strike").

<sup>2</sup> Joint Initial Brief of the Undersigned Signatory Parties, filed Nov. 10, 2011.

proceeding when other parties have no opportunity to test or dispute that evidence through discovery or cross-examination. To give any weight to facts not in the record risks destroying the proper foundation necessary for a decision that can withstand appellate review.

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. At issue in this case is whether the rate to be imposed upon Ormet in the proposed Stipulation is unduly discriminatory and prejudicial. Ohio law forbids AEP Ohio from charging different rates to customers for whom it does "a like and contemporaneous service under substantially the same circumstances and conditions." 49 Ohio Rev. Code § 4905.33 and *Constellation NewEnergy, Inc. v. Pub. Utils. Comm'n of Ohio*, 820 N.E.2d 885, 888 (Ohio 2004).

A "reasonable differential or inequality of rates" can only be justified "where such differential 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) (emphasis added). Any evidence not related to whether the rate differential is based upon some actual and measurable difference in the service furnished to Ormet is not relevant to this proceeding. The Commission should strike the passages in the Signatory Parties' Brief in this proceeding that address Ormet's kilowatt hour ("kWh") tax status and its power arrangement history back to 1952 as irrelevant to the issue of whether imposing a rate differential on Ormet going forward constitutes undue and unreasonable prejudice and discrimination.

The following sections of the Signatory Parties' Reply Brief simply are not supported by the record and are irrelevant to any issue in this case: (1) from the last sentence on page 21

beginning with “And, as discussed in detail in the Signatory Parties’ Joint Brief, . . .” through the end of the first full paragraph on page 22, ending with “. . . to be treated differently under the Stipulation in this proceeding.” and (2) the last full sentence on page 24, starting with “And Ormet’s load factor and peak demand. . .” and ending “. . . have not enjoyed.”

**I. 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.**

As in their Initial Brief, the Signatory Parties argue in their Reply Brief that Ormet’s *contractual* history justifies treating Ormet as unique for the purposes of the prospective *tariff* rate at issue in these proceedings. As explained in Ormet’s initial motion to strike,<sup>3</sup> Ormet’s power contract history is irrelevant to whether the Load Factor Provision (“LFP”) in the proposed tariff is unduly discriminatory under the Commission’s standards for assessing undue discrimination and is largely unsupported by the record. Courts frequently reject antiquated historical observations like that of Ormet’s history as irrelevant to a current analysis of undue discrimination. *Mahoning Cnty. Townships*, 388 N.E.2d at 740, 744(Ohio 1979). Therefore, the Commission should strike the stale, irrelevant argument about the last half-century of Ormet’s history.

Furthermore, the Signatory Parties fail to explain how the negotiated, bilateral power agreements they discuss in their brief are relevant to the issue of what *tariff* rate should be applied prospectively to Ormet. Bilateral power agreements are not established through the same procedures as tariffs. Ormet’s history of bilateral power agreements is not relevant to any issue in this proceeding. For these reasons and the reasons explained in Ormet’s initial motion to strike,<sup>4</sup> the last sentence on page 21 of the Signatory Parties’ Reply Brief beginning “And, as

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<sup>3</sup> First Motion to Strike at pp. 5-7.

<sup>4</sup> *Id.* at pp. 6-7.

discussed in detail. . .” through the first full sentence on page 22 ending “. . . to other customers” should be stricken or, alternatively, given no weight by the Commission.

**II. The Commission Should Strike the Unsupported Factual Assertions that the Signatory Parties’ Make to Support their Argument that Ormet is Not Similarly Situated to Other High Load Factor Customers.**

There is no support in the record for the first full paragraph on page 22 of the Signatory Parties’ Reply Brief, so it must be stricken. In this paragraph, the Signatory Parties argue that Ormet is not similarly situated to other customers because of its kWh tax status and because of its large size. There is no evidence in the record regarding Ormet’s tax status or the amount that Ormet pays or does not pay under the kWh tax.<sup>5</sup> There is also no evidence in the record that Ormet’s tax status and any benefits it receives thereunder actually distinguish it from parties that benefit from the LFP. Accordingly, the discussion of Ormet’s tax status must be stricken as unsupported by evidence in the record. If it is not stricken, then the Commission should not give the argument or its supporting facts any weight in making its determination in this proceeding.

As to the second assertion contained in the paragraph, that Ormet’s size makes it unique, the Signatory Parties also cite no record evidence. In support of their assertion, they write “And Ormet itself states that it “has a peak demand of approximately 520 MW, and that its very large size makes Ormet unique.” They have, however, grossly misrepresented the statement in Ormet’s brief. The complete sentence on page 17 of Ormet’s brief reads as follows: “*OEG argues that Ormet* has a peak demand of approximately 520 MW, and that its very large size makes Ormet unique.” (emphasis added). The Signatory Parties’ reliance on this misrepresentation underscores their lack of record evidence to support their position. Rather than supporting their argument with record evidence, they creatively crop a sentence from

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<sup>5</sup> 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. TR at 267:22-268:15.



Ormet's brief that paraphrased an argument made by one of the Signatory Parties and outrageously call it an admission by Ormet. They cite no record evidence in support of any assertion made in the first full paragraph on page 22. Accordingly, the Commission should strike the entire paragraph, beginning with "Further, Ormet . . ." and ending with "in this proceeding."

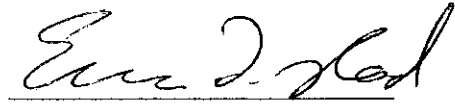
The same problems plague the last full sentence on page 24, which reads "And Ormet's load factor and peak demand have assisted it in securing unique arrangements for its electric service and exemption from the kilowatt hour tax that other customers have not enjoyed." No record evidence addresses whether Ormet's load factor and peak demand assisted in securing unique arrangements for its electric service. Similarly, no evidence in the record relates to Ormet's kilowatt hour tax status or whether any other parties enjoy similar status. Without record support, these statements should all be stricken or, alternatively, given no weight.

In addition to being unsupported by the record, Ormet's kWh tax status is not relevant to any issue in this proceeding. Whether or not Ormet is eligible for a statutorily created tax exemption from the kWh tax is simply unrelated to the relevant issue of whether or not there is a difference in the furnishing of services to Ormet. The Signatory Parties' unsupported post-hearing 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 LFP beneficiaries and should be stricken.

### **CONCLUSION**

WHEREFORE, for the reasons stated above, Ormet respectfully moves the Commission to strike the following sections of the Signatory Parties' Reply Brief: (1) from the last sentence on page 21 beginning with "And, as discussed in detail in the Signatory Parties' Joint Brief, . . ." through the end of the first full paragraph on page 22, ending with ". . . to be treated differently

under the Stipulation in this proceeding.” and (2) the last full sentence on page 24, starting with “And Ormet’s load factor and peak demand. . .” and ending “. . . have not enjoyed.”



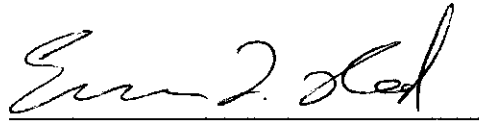
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**November 22, 2011**

**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 22nd day of November, 2011.



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