

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)

**REPLY OF ORMET PRIMARY ALUMINUM CORPORATION
TO THE JOINT MEMORANDUM CONTRA ORMET PRIMARY
ALUMINUM CORPORATION'S MOTION TO STRIKE OF THE
UNDERSIGNED SIGNATORY PARTIES**

INTRODUCTION

In their November 21, 2011 *Joint Memorandum Contra Ormet Primary Aluminum Corporation's Motion to Strike of the Undersigned Signatory Parties* ("Signatory Parties' Memo Contra") in this proceeding, the Signatory Parties continue to ignore precedent that requires a rate differential to be based on a difference in service furnished to a consumer. The Signatory Parties would have the Commission find that any distinguishing characteristic is enough to justify any form of discrimination. Such a loosely applied standard for differential rate treatment cannot hold. Indeed, each and every customer of a utility could be considered inherently unique. Taken to its logical conclusion, such an interpretation would allow a utility to justify a discriminatory rate against any specific customer simply by seizing upon some unique characteristic of that customer, regardless of whether that characteristic has any reasonable nexus to the proposed rate differential. Accordingly, Ohio law requires that there be a reasonable nexus between the rate differential and the services furnished to the customer, and the Signatory Parties have simply failed to demonstrate any nexus between Ormet's history of power agreements or its kilowatt hour tax status and the 250 MW monthly peak load limitation

designed to exclude Ormet from the Load Factor Provision ("LFP") proposed in the Stipulation. Therefore, those discussions should be stricken.

ARGUMENT

The Signatory Parties would have the Commission abandon the legal standard for determining discrimination by ruling that any difference between customers is sufficient to determine that they are not "similarly situated" regardless of whether there is any nexus between the difference and the rate differential the utility seeks to impose. 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; *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). The Commission is limited to discerning the reasonableness of such a justification "from the evidence" before it. See *Office of Consumers' Counsel v. Public Utils. Comm'n of Ohio*, 592 N.E.2d 1370, 1373 (Ohio 1992). The rule does not center around whether the customer has unique characteristics, but rather around whether there are unique characteristics *of the service being provided to the customer* that justify the discrimination. Neither Ormet's kilowatt hour tax status nor its history of power arrangements are relevant to the resolution of this issue. In fact, there is no evidence in the record to support any arguments regarding Ormet's kilowatt hour tax status.

I. Both the Discussion of Ormet's History of Power Arrangements and the Kilowatt Hour Tax Exemption are Irrelevant to Any Issue in This Proceeding and Should Be Stricken.

It is clear that the Signatory Parties' position is that the reasons justifying discrimination do not need to cause, or even be related to, the rate differential in question. This is directly contrary to the precedent that 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*, 388 N.E.2d at 742 (emphasis added). Moreover, the Signatory Parties' position that any unique characteristic can warrant a rate differential would open a Pandora's box of discrimination.

The Signatory Parties state in their Reply Brief that "[t]he fact that Ormet has operated under a series of unique arrangements over the last half century is not the reason that Ormet is effectively excluded from the LFP, although it does reinforce the point that it is not unduly discriminatory to treat Ormet as unique in this proceeding." Joint Reply Brief of the Undersigned Signatory Parties ("Signatory Parties' Reply Brief"), filed November 18, 2011, at pp. 23-24. This sentence makes it clear that the Signatory Parties do not believe it is necessary to find a nexus between the setting of a rate differential and the "differences" that justify the differential -- any "difference" will do to support discrimination, even if it is not a reason for the rate differential. Under the interpretation they advocate, a different rate could be set for any customer a utility could demonstrate was different from other customers in any way. Rate differentials could be imposed upon any "undesirable" characteristic not shared by all customers equally, such as any customers who receive local tax benefits or grants, or who have left the utility system and returned, or had reasonable arrangements in the past -- without regard to whether those customers are causing costs that differ from costs caused by other customers. The Signatory Parties admit that Ormet's history of power arrangements is not the reason for the rate

differential. Therefore, they should not be permitted to insert Ormet's history of power arrangements into this proceeding at this late date.

Similarly, Ormet's kilowatt hour tax exemption is not relevant to the issue of whether there is an actual and measurable difference in service furnished to Ormet. The Signatory Parties do not even attempt to show in their Memorandum Contra how the kilowatt hour tax is relevant to this issue. Rather, they try to change the legal standard to be applied by the Commission in evaluating discrimination to include the historical treatment of the customer to be discriminated against and any other utility-related laws that may distinguish a customer -- regardless of whether either of these factors are in any way related to the specific rate differential sought to be imposed. Because neither Ormet's history of power arrangements nor its kilowatt hour tax status have any relation to the rate differential sought for Ormet by the Signatory Parties, the Signatory Parties' discussions of these issues should be stricken.

II. The Entire Kilowatt Hour Discussion is Unsupported by the Record

The Signatory Parties' *entire* kilowatt hour tax discussion is unsupported by the record in this case, particularly their discussion of how the kilowatt hour tax applies to Ormet. Although Ormet only described in detail the two most egregious examples of their failure to rely on record evidence in its Motion to Strike, it did argue that the entire discussion is unsupported by the record in this case.¹ The Signatory Parties cite only to the statute granting the exception itself. They offer no record evidence to support any of their assertions in that discussion regarding Ormet's eligibility for the tax, the dollar amounts that Ormet does or does not pay under the tax, or the impact they allege it has on local governments. To introduce such a discussion for the first time in briefing, when affected parties such as Ormet are unable to probe any of the Signatory


¹ Motion to Strike and Memorandum in Support of Ormet Primary Aluminum Corporation, filed Nov. 15, 2011 ("Motion to Strike"), at pp. 3-4.

Parties' assertions or offer any countervailing evidence of their own regarding the impact that the kilowatt hour tax exemption may or may not have on the electric service to be provided to Ormet by AEP Ohio under the proposed Stipulation would be a serious denial of due process and should not be permitted.

CONCLUSION

WHEREFORE, for the reasons stated above, Ormet respectfully moves the Commission to strike (1) the kWh tax exemption discussion in the Signatory Parties' Brief that begins 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."

Respectfully submitted,



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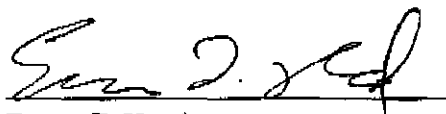
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November 23, 2011

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 23rd day of November, 2011.



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