

**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
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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 OF
THE UNDERSIGNED SIGNATORY PARTIES
IN OPPOSITION TO
ORMET PRIMARY ALUMINUM CORPORATION'S MOTION TO STRIKE**

MEMORANDUM IN OPPOSITION

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 22, 2011 (“Motion to Strike”). Ormet’s latest motion to strike is without merit and is used an improper procedural vehicle for Ormet to continue arguing the merits outside of the established briefing process. The reasons in support of this Memorandum Contra are discussed below.

In its Motion to Strike, Ormet alleges that portions of the Joint Reply Brief of the Undersigned Signatory Parties filed Nov. 18, 2011 (“Signatory Parties’ Reply Brief”) should be stricken from the record because, according to Ormet, those portions are unsupported by the record or irrelevant to this proceeding.¹ 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, portions of Signatory Parties’ Brief that Ormet moves to strike are supported by the record and can be given appropriate weight by the Commission in their decision-making. Ormet’s latest motion to strike is without merit and is improperly used as a procedural device for Ormet to continue arguing the merits of the Load Factor Provision (LFP) outside of the established briefing schedule. Accordingly, the Commission should deny Ormet’s Motion to Strike.

Ormet argues that “[a]ny 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.”² Ormet again 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

¹ Motion to Strike at 3-4.

² Motion to Strike at 3.

customers. But Ormet also states that “[a]t issue in this case is whether the rate to be imposed upon Ormet in the proposed Stipulation is unduly discriminatory and prejudicial.”³ This is a broader inquiry that necessitates Commission examination of how Ormet is situated in comparison to other AEP Ohio customers. 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’ Reply Brief related to Ormet’s history and its kilowatt hour tax exemption are highly relevant to the question of whether the rates established under the Stipulation are unduly discriminatory or prejudicial to Ormet.

As in Ormet’s Motion to Strike portions of Signatory Parties’ Initial Brief in this case (“First Motion to Strike”), Ormet pushes the Commission to “strike the stale, irrelevant argument about the last half-century of Ormet’s history....”⁴ Citing only one case, Ormet again argues that “[c]ourts frequently reject antiquated historical observations like that of Ormet’s history as irrelevant to a current analysis of undue discrimination.”⁵ As noted in Signatory Parties’ Memorandum Contra Ormet’s First Motion to Strike, it is disingenuous for Ormet to characterize its prior unique arrangements, particularly the unique arrangements since 1998, as “antiquated.” Further, unlike the population data in the case Ormet cites,⁶ 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, whether the rates established under the Stipulation are unduly discriminatory or prejudicial to Ormet.

³ Motion to Strike at 3.

⁴ Motion to Strike at 4.

⁵ Motion to Strike at 4.

⁶ Motion to Strike at 4 (citing *Mahoning Cnty. Townships v. Pub. Utils. Comm’n of Ohio*, 388 N.E. 2d 730 (Ohio 1979)).

Ormet seems to argue that, because “[b]ilateral power agreements are not established through the same procedures as tariffs,” Ormet’s history of bilateral power agreements is irrelevant to this proceeding.⁷ The Commission should examine the complete picture in this case, and should not strike evidence on the basis of such unnecessary distinctions. In determining whether the rate to be imposed upon Ormet in the proposed Stipulation is unduly discriminatory and prejudicial, the Commission should consider the overall electric rates that Ormet pays and has historically paid compared to the electric rates charged to other AEP Ohio customers.

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 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 again 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.⁸ But as noted in Signatory Parties’ Memorandum Contra Ormet’s First Motion to Strike, in making that ruling, the attorney examiner stated that the question on re-direct was not “within the scope of direct.”⁹ 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. Additionally, Signatory Parties’ general discussion of Ormet’s kilowatt hour tax exemption is supported by statutory language in R.C. 5727.81 and therefore, can appropriately be considered by the Commission in this case.

⁷ Motion to Strike at 4.

⁸ Motion to Strike at 5 (citing TR at 267:22-268:15).

⁹ TR at 268:13-14.

Ormet also points to a sentence in Signatory Parties' Reply Brief that references Ormet's peak demand of 520 MW.¹⁰ In addition to appearing in Ormet's Brief, this fact was testified to by witness Stephen Baron at the hearing in this case while under cross-examination by counsel for Ormet.¹¹ Accordingly, Ormet's peak demand of 520 MW is sufficiently supported by the record in this case and therefore could appropriately be cited in Signatory Parties' Reply Brief. Additionally, the fact that Ormet's unique peak demand and high load factor have assisted it in securing unique arrangements is supported by the fact that Ormet has operated under a series of unique arrangements over the last half-century as discussed in Signatory Parties' Initial Brief in this proceeding.

The Commission is not strictly bound by the rules of evidence.¹² The Commission can give the disputed portions of the Signatory Parties' Reply 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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¹⁰ Motion to Strike at 5.

¹¹ TR at 263:20-22 ("...Ormet is a unique customer. It's unique because of its very, very large size, 520 megawatts.").

¹² *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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CERTIFICATE OF SERVICE

I hereby certify that a copy of Joint Memorandum in Opposition was served by electronic mail upon the individuals listed below this 28th day of November, 2011.

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Summary: Reply /Joint Memorandum of the Undersigned Signatory Parties in Opposition to Ormet's Motion to Strike electronically filed by Mr. Steven T Nourse on behalf of Columbus Southern Power Company and Ohio Power Company