

FILE

December 1, 2011

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Public Utilities Commission of Ohio
Docketing Division
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Case No. 10-2376-EL-UNC
Case No. 11-346-EL-SSO
Case No. 11-348-EL-SSO
Case No. 11-349-EL-AAM
Case No. 11-350-EL-AAM
Case No. 10-343-EL-ATA
Case No. 10-344-EL-ATA
Case No. 10-2929-EL-UNC
Case No. 11-4920-EL-RDR
Case No. 11-4921-EL-RDR

Re: *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 Nos. 11-346-EL-SSO, 11-348-EL-SSO; et al*

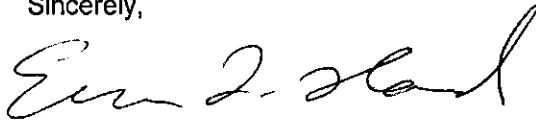
Dear Sir or Madam:

Enclosed please find an original and twenty copies of the *Reply of Ormet Primary Aluminum Corporation to the Joint of the Undersigned Parties in Opposition to Ormet Primary Aluminum Corporation's Motion to Strike* in the referenced proceeding. The document was originally filed by fax on December 1, 2011.

Two additional copies of each document are enclosed to be date-stamped and returned to me in the enclosed, self-addressed Federal Express envelope.

Thank you for your assistance in this matter. If you have any questions please contact me at the telephone number above.

Sincerely,



Emma F. Hand
Partner

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**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

**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)

**REPLY OF ORMET PRIMARY ALUMINUM CORPORATION
TO THE JOINT MEMORANDUM OF THE
UNDERSIGNED SIGNATORY PARTIES IN OPPOSITION TO ORMET PRIMARY
ALUMINUM CORPORATION’S MOTION TO STRIKE**

In their November 18, 2011 *Joint Reply Brief of the Undersigned Signatory Parties* (“Signatory Parties’ Reply Brief”) the Signatory Parties utterly fail to address bedrock precedent of this Commission founded in Ohio statutes and upheld in clear jurisprudence by the Ohio Supreme Court by flagrantly discriminating against Ormet without explaining why their proposed rate differential is based on a difference in service furnished to a consumer. This glaring deficiency is dispositive of their position. The Signatory Parties attempt to sidestep this fundamental failure by inappropriately inserting irrelevant and unsupported arguments for the first time into this proceeding in post-hearing briefs thus violating a second essential requirement of Commission and Ohio precedent, that the Commission’s decision be based on the evidence in the record. The Commission should strike these arguments.

Instead of forthrightly addressing the critical failure of proof, in their *Joint Memorandum of the Undersigned Signatory Parties in Opposition to Ormet Primary Aluminum Corporation’s Motion to Strike* (“Memorandum Contra”) the Signatory Parties concoct a novel regulatory concept, for which they can cite no precedent.¹ Under their theory, they could discriminate against Ormet by simply showing anything unique about Ormet, even if the characteristic they identify has no nexus whatsoever to the proposed rate differential. Compounding their invention

¹ Memorandum Contra at p. 3.

of this extraordinary new standard is the fact that it is presented in post-hearing briefs using irrelevant and non-record evidence.

To allow the Signatory Parties to use this tactic would be an obvious violation of Ormet's due process rights. Their only justification for their non-record, irrelevant post-hoc rationalization of their discrimination is to criticize Ormet's very valid and appropriate motion to strike as a polemical feint.² Ormet's motion is a serious, legitimate approach well accepted in Commission precedent to deal with precisely the type of non-record, irrelevant "evidence" that the Signatory Parties are attempting to insert into the record in their post-hearing brief.

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."³ 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."⁴ The Commission is limited to discerning the reasonableness of such a justification "from the evidence" before it.⁵ The rule does not center around whether the customer has unique characteristics, but rather around whether unique characteristics *of the service being provided to the customer* justify a rate differential.

Neither Ormet's kilowatt hour tax status nor its history of power arrangements are relevant to the resolution of this issue. In fact, no evidence in the record supports any argument regarding Ormet's kilowatt hour tax status. The Signatory Parties have not demonstrated any nexus between Ormet's history of power agreements or its kilowatt hour tax status and the 250

² Memorandum Contra at p. 2.

³ 49 Ohio Rev. Code § 4905.33; *Constellation NewEnergy, Inc. v. Pub. Utils. Comm'n of Ohio*, 820 N.E.2d 885, 888 (Ohio 2004).

⁴ *Mahoning Cnty. Townships v. Pub. Utils. Comm'n of Ohio*, 388 N.E.2d 739, 742 (Ohio 1979) (emphasis added).

⁵ *See Office of Consumers' Counsel v. Public Utils. Comm'n of Ohio*, 592 N.E.2d 1370, 1373 (Ohio 1992) (quoting *Duff v. Pub. Utils. Comm'n of Ohio*, 384 N.E. 2d 264, 273 (Ohio 1978)).

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.

The Commission must use the appropriate legal standard to make its determination of whether evidence is relevant to the case. In asking the Commission not to strike their arguments on the basis of relevance, the Signatory Parties would have the Commission abandon the legal standard for determining discrimination and rule 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. Under such a loosely applied standard for differential rate treatment, 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 any unique characteristic of that customer, regardless of whether that characteristic has any reasonable nexus to the proposed rate differential - discrimination could be allowed for almost any reason. Accordingly, Ohio law requires that there be a reasonable nexus between the rate differential and the services furnished to the customer.

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.”⁶ 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.

⁶ Signatory Parties’ Reply Brief at pp. 23-24.

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 have had reasonable arrangements in the past, without regard to whether those customers cause 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.⁷ Therefore, they should not be permitted to insert Ormet’s history of power arrangements into this proceeding at this late date.

Similarly, the Signatory Parties do not even attempt to show in their Memorandum Contra how the kilowatt hour tax is relevant to the issue of whether there is an actual and measurable difference in service furnished to Ormet. 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.

The Signatory Parties’ kilowatt hour tax discussion is also completely unsupported by the record in this case, particularly their discussion of how the kilowatt hour tax applies to Ormet. The Signatory Parties cite only to the statute granting the exemption itself. They offer no record evidence to support any of their assertions in that discussion regarding Ormet’s eligibility for the exemption, the dollar amounts that Ormet does or does not pay under the tax, or the impact they

⁷ *Id.*

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 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.

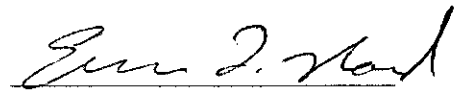
Finally, Ormet did not use its Motion to Strike as an improper vehicle for arguing the merits of this case. The Commission regularly strikes evidence that is not a part of the record when a party seeks to introduce it in post-hearing briefing as the Signatory Parties have here. *Re United Telephone Co. 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 routinely 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 19, 2011) (granting AEP Ohio's motion to strike based on relevance); *City of Reynoldsburg v. Pub. Utils. Comm'n of Ohio*, No. 08-846, 2011 WL 1428237, *21 (Ohio P.U.C. April 5, 2011); *see also* Ohio Rev. Code § 4901-1-27. Therefore, argument that a passage is unsupported in the record or is irrelevant to the issues in the case is appropriate for a motion to strike. Further, the Signatory Parties included evidence in their Reply Brief that Ormet had moved to strike from their Initial Brief. Therefore, moving to strike the same information from the Reply Brief is appropriate, consistent, and necessary to protect Ormet's rights.

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.”

Respectfully submitted,



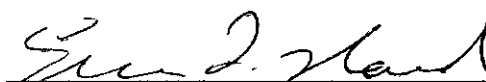
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Attorneys for Ormet Primary Aluminum Corporation

December 1, 2011

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Reply of Ormet Primary Aluminum Corporation to the Joint Memorandum of the Undersigned Parties in Opposition to Ormet Primary Aluminum Corporation's Motion to Strike* was served by U.S. Mail and email upon counsel identified below for all parties of record this 1st day of December, 2011.



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