

In the Matter of the Application of)
Ohio Power Company for Approval of)
a Mechanism to Recover Deferred) **Case No. 11-4921-EL-RDR**
Fuel Costs Ordered Under Section)
4928.144, Ohio Revised Code.)
(Consolidated))

**MEMORANDUM CONTRA OF ORMET PRIMARY ALUMINUM CORPORATION
TO AEP OHIO'S AND OMA ENERGY GROUP'S MOTIONS TO STRIKE**

The Commission should deny AEP Ohio's and OMA Energy Group's (OMAEG) Motions to Strike Ormet Primary Aluminum Corporation's (Ormet's) Reply to their Memoranda Contra Ormet's Application for Rehearing. When the section of the Ohio Administrative Code ("OAC") providing for applications for rehearing is read in connection with the OAC rule on motions from the very same chapter, as required under Ohio law, the rules plainly intend for any party to have the right to "file a reply memorandum within seven days after the service of a memorandum contra." Ohio Admin. Code §§ 4901-1-12(B)(2) & 35. Ormet therefore filed an appropriate Reply responding to two Memoranda Contra, and its Reply should not be stricken. Even if the Commission were to conclude that Ormet lacks the automatic right to file a reply in the context of an application for rehearing, the Commission in its discretion can decide it wishes to consider Ormet's Reply upon its own motion or for good cause shown. *Id.* at 4901-1-38(B) ("The commission may, upon its own motion or for good cause shown, waive any requirement, standard, or rule set forth in this chapter or prescribe different practices or procedures to be followed in a case."). For either reason, the Commission should deny AEP Ohio's and OMAEG's motions to strike.

The Commission denied a nearly identical motion filed by AEP Ohio, also based upon Rule 4901-1-35, just a few years ago.¹ There, Ormet filed an application for rehearing, AEP Ohio opposed, Ormet replied, and AEP Ohio moved to strike the reply. Granting Ormet's application for rehearing, the Commission denied AEP Ohio's motion to strike.² The Commission should do so again today because the Ohio Administrative Code and statutes allow Ormet to make such filing.

Any party, including Ormet, has the right under the Ohio Administrative Code to reply to a memorandum contra to its application for rehearing. Contrary to the unsupported argument asserted in AEP Ohio's and OMAEG's motions to strike, the rules they cite are silent as to whether a party may file a reply in the context of an application for rehearing. *See* Ohio Rev. Code § 4903.10; Ohio Admin. Code § 4901-1-35. Under Ohio law, where a statute or rule is "silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *State ex rel. Turner v. Eberlin*, 884 N.E.2d 39, 42 (Ohio 2008) (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). The same rules of statutory construction apply equally to the interpretation of rules, for example those in the Administrative Code, adopted under the Ohio Revised Code. *See* Ohio Rev. Code § 1.41 (providing that the rules of statutory construction apply not only to statutes but also to all "rules adopted under them."). Although *Turner* arose in the context of an appeal, it clearly requires the agency to apply the rules of statutory construction

¹ Columbus Southern Power Company's and Ohio Power Company's Motion to Strike Ormet's Reply Memorandum, Case Nos. 07-11-32-EL-UNC, 07-1191-EL-UNC, 07-1278-EL-UNC, 07-1156-EL-UNC, filed Mar. 19, 2008.

² *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of an Additional Generation Service Rate Increase Pursuant to Their Post-Market Development Period Rate Stabilization Plan*, Entry on Rehearing, Case Nos. 07-11-32-EL-UNC, 07-1191-EL-UNC, 07-1278-EL-UNC, 07-1156-EL-UNC, issued Mar. 26, 2008.

where the statute or rule is “silent or ambiguous” on the relevant issue. 884 N.E.2d at 42 (emphasis added).

Here, where the rules do not address the issue, the rules of construction require that the “statutes [or rules] relating to the same subject matter should be construed together . . . [and] harmonized so as to give full application to the statutes [or rules].” *Jones v. Multi-Color Corp.*, 670 N.E.2d 1051, 1056 (Ohio App. Div. 1 Dist. 1995) (quoting *State ex rel Thurn v. Cuyahoga Bd. of Elections*, 649 N.E.2d 1205, 1209 (Ohio 1995)); see also Ohio Rev. Code § 1.41. The rules of construction are applied to carry out the drafter of the procedural rule’s intent. *Id.* at 1057. Applying these harmonization principles to this case necessarily results in the conclusion that under the Commission’s rules, a reply brief is permissible in support of an application for rehearing. Movants point to nothing in the Revised or Administrative Codes to contradict this.

In this case, where section 4901-1-35 is entirely silent on the issue, its silence creates ambiguity. That rule calls the opposition to an application for rehearing a “memorandum contra.” Identical language used in section 4901-1-12 of the same chapter of the Ohio Administrative Code provides the unequivocal opportunity to reply to every “memorandum contra.” If the Commission intended to preclude the filing of a reply in the context of an application for rehearing, it could have easily done so in section 4901-1-35 by adding seven words: “the applicant shall not file a reply.” Alternatively, the Commission could have used a phrase other than “memorandum contra” in 4901-1-35 or redefined that phrase or created an exception. Neither the Commission nor the Legislature took any of these steps to bar the filing of a reply in support of an application for rehearing.

Because the filing opposing an application for rehearing is a “memorandum contra” under section 4901-1-35(E), just as in section 4901-1-12, these sections of the chapter pertain “to the same subject matter and should be construed together.” *Jones*, 670 N.E.2d at 1056. In

construing the sections, the Commission must ensure that each section is “harmonized so as to give full application to the statutes.” *Id.* Obeying this rule leads to only one permissible reading of the rules cited by the movants: a party must be allowed to reply to a memorandum contra their application for rehearing. Reading section 4901-1-35 on applications for rehearing to preclude such a filing merely because of its silence on the issue would eviscerate the language of the sister rule in the same chapter requiring that “[a]ny party may file a reply memorandum . . . after the service of a memorandum contra.” Ohio Admin Code § 4901-1-12(B)(2). Since the rules must be read together and in harmony, this cannot be the proper interpretation. Conversely, reading the rule on applications for rehearing *not to preclude* filing a reply where it is silent on that issue effectuates the language of the sister rule thereby harmonizing the sections, as the rules of statutory construction require. And allowing Ormet’s Reply is consistent with the Commission’s recent practice in its consideration of an application for rehearing.³ For these reasons and because the movants cite no law to the contrary, the Commission should deny each party’s motion to strike.

In the alternative, even if the Commission determines that its rules do not permit filing a reply in support of an application for rehearing, the Commission should exercise its broad discretion to consider Ormet’s Reply. “The commission may, upon its own motion or for good cause shown, waive any requirement, standard, or rule set forth in this chapter or prescribe different practices or procedures to be followed in a case.” *Id.* at 4901-1-38; *see In re Application of Columbia Gas of Ohio, Inc.*, No. 08-1344, 2010 WL 2021057, *3 (Ohio P.U.C. May 13, 2010) (exercising liberal power under section 4901-1-38 to waive certain provisions of the Commission’s Order because the request was “reasonable and in the public interest”).

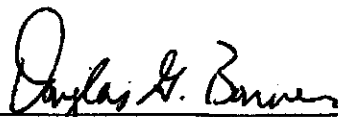
³ *See supra* at 2 & nn. 1-2.

Finally, notwithstanding the Commission's authority to accept Ormet's Reply on its own motion or for good cause shown, if the Commission should find that as a matter of general practice parties may not file a reply to memoranda contra applications for rehearing, Ormet requests a waiver of that rule in this case. To waive such a holding would be "reasonable and in the public interest." *Id.* Through the Stipulation, the Commission has required Ormet to subsidize the fixed costs of lower load factor entities on the AEP Ohio system based upon AEP Ohio's mistaken representation that Ormet will subsidize the low load factor customers at a rate of \$17 million per-year. In reality, according to AEP Ohio's own compliance filing,⁴ the Ormet subsidy will instead amount to approximately \$28 million per-year. Imposing such a burden upon Ormet without proper factual and legal considerations significantly prejudices Ormet and justifies rehearing. It also enhances the importance of the application for rehearing process. In this case, the importance of this process is not merely preserving all rights to appeal, but to provide the Commission with the appropriate information to make as informed a decision as possible where the record before it is both deficient and incomplete.

Accordingly, for the foregoing reasons, the Commission should reject the movants' unsupported argument and deny the motions to strike as it has done under similar circumstances.

⁴ Compliance Tariffs of AEP Ohio, Original Sheet Nos. 324-1 - 324-3, filed Dec. 21, 2011.

Respectfully submitted,



Emma F. Hand (PHV-1353-2012)
Douglas G. Bonner (PHV-1363-2012)
SNR Denton US LLP
1301 K Street, NW
Suite 600, East Tower
Washington, DC 20005
Tel: 202-408-6400
Fax: 202-408-6399
emma.hand@snrdenton.com
doug.bonner@snrdenton.com

*Attorneys for Ormet Primary Aluminum
Corporation*

February 8, 2012

Certificate of Service

I hereby certify that a copy of the *Memorandum Contra of Ormet Primary Aluminum Corporation to AEP Ohio's and OMA Energy Group's Motions to Strike* was served by U.S. Mail and email upon counsel identified below for all parties of record this 8th day of February, 2012.



Douglas G. Bonner

SERVICE LIST

Steven T. Nourse
Matthew J. Satterwhite
American Electric Power Corp.
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
stnourse@aep.com
mjsatterwhite@aep.com

Daniel R. Conway
Porter Wright Morris & Arthur
41 South High Street
Columbus, Ohio 43215
dconway@porterwright.com

Dorothy K. Corbett
Duke Energy Retail Sales
139 East Fourth Street
1303-Main
Cincinnati, Ohio 45202
Dorothy.Corbett@duke-energy.com

David F. Boehm
Kurt Boehm
Michael L. Kurtz
Boehm, Kurtz & Lowry
36 East Seventh Street. Suite 1510
Cincinnati, Ohio 45202
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com

Samuel C. Randazzo
Joseph E. Olikier
Frank P. Darr
Vicki L. Leach-Payne
Joseph M. Clark
McNees Wallace & Nurick
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
joliker@mwncmh.com
fdarr@mwncmh.com

Richard L. Sites
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, Ohio 43215-3620
ricks@ohanet.org

Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45840
cmooney2@columbus.rr.com

John W. Bentine
Mark S. Yurick
Zachary D. Kravitz
Matthew S. White
Chester Willcox & Saxbe, LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215
jbentine@cwslaw.com
myurick@cwslaw.com
zkravitz@cwslaw.com

Terry L. Etter
Maureen R. Grady
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
etter@occ.state.oh.us
grady@occ.state.oh.us

Thomas J. O'Brien
Teresa Orahood
Bricker & Eckler
100 South Third Street
Columbus, Ohio 43215-4291
tobrien@bricker.com
torahood@bricker.com

Jay E. Jadwin
American Electric Power Service Corporation
1 Riverside Plaza, 29th Floor
Columbus, Ohio 43215
jejadwin@aep.com

Michael R. Smalz
Ohio Poverty Law Center
555 Buttles Avenue
Columbus, Ohio 43215
msmalz@ohiopoverlylaw.org
jmaskovyak@ohiopoverlylaw.org

Terrence O'Donnell
Christopher Montgomery
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
todonnell@bricker.com
cmontgomery@bricker.com

Jesse A. Rodriguez
Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, Pennsylvania 19348
jesse.rodriguez@exeloncorp.com

Glen Thomas
1060 First Avenue, Ste. 400
King of Prussia, Pennsylvania 19406
gthomas@gtpowergroup.com

Henry W. Eckhart
2100 Chambers Road, Suite 106
Columbus, Ohio 43212
henryeckhart@aol.com

Christopher L. Miller
Gregory H. Dunn
Asim Z. Haque
Stephen J. Smith
C. Todd Jones
Schottenstein Zox & Dunn Co., LPA
250 West Street
Columbus, Ohio 43215
cmiller@szd.com
gdunn@szd.com
ahaque@szd.com
sjsmith@szd.com

Lisa G. McAlister
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215-4291
lmcaster@bricker.com
mwarnock@bricker.com

William L. Massey
Covington & Burling, LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
wmassey@cov.com

Laura Chappelle
4218 Jacob Meadows
Okemos, Michigan 48864
laurac@chappelleconsulting.net

Pamela A. Fox
Law Director
The City of Hilliard, Ohio
pfox@hilliardohio.gov

United Way of Jefferson County
501 Washington Street
P.O. Box 1463
Steubenville, OH 43952

Sandy I-ru Grace
Marianne M. Alvarez
Exelon Business Services Company
101 Constitution Avenue N.W., Suite 400 East
Washington, DC 20001
sandy.grace@exeloncorp.com

Kenneth P. Kreider
David A. Meyer
Keating Muething & Klekamp PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
kpkreider@kkmklaw.com

Holly Rachel Smith
Holly Rachel Smith, PLLC
Hitt Business Center
3803 Rectortown Road
Marshall, Virginia 20115
holly@raysmithlaw.com

John H. Jones
Vern Margard
Public Utilities Section
Ohio Attorney General Mike DeWine
180 East Broad Street, 6th Floor
Columbus, Ohio 43215
john.jones@puc.state.oh.us
werner.margard@puc.state.oh.us

Carolyn S. Flahive
Terrance A. Mebane
Thompson Hine LLP
41 S. High Street, Suite 1700
Columbus, Ohio 43215
Carolyn.Flahive@ThompsonHine.com
Terrance.Mebane@ThompsonHine.com

Gary A. Jeffries
Dominion Resources Services, Inc.
501 Martindale Street, Suite 400
Pittsburgh, PA 15212-5817
gary.a.jeffries@dom.com

Steve W. Chriss
Wal-Mart Stores, Inc.
2001 SE 10th Street
Bentonville, Arkansas 72716
stephen.chriss@wal-mart.com

Barth E. Royer
Bell & Royer Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3927
barthroyer@aol.com

Greg Poulos
EnerNOC, Inc.
101 Federal St.
Boston, Massachusetts 02110
gpoulos@enemoc.com

Leo Antons
1237 Cisler Dr.
Marietta, OH 45750
leoantons@suddenlink.net

E. Camille Yancey
Nolan Moser
Trent A. Dougherty
Ohio Environmental Council
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212-3449
camille@theoec.org
nolan@theoec.org
trent@theoec.org

Mark A. Hayden
FirstEnergy Service Company
76 South Main Street
Akron, OH 44308
haydenm@firstenergycorp.com

David A. Kutik
Jones Day
901 Lakeside Avenue
Cleveland, OH 44114
dakutik@jonesday.com

Christopher J. Allwein
1373 Grandview Ave.
Suite 212
Columbus, OH 43212
wein@williamsandmoser.com

Tara C. Santarelli
Environmental Law & Policy Center
1207 Grandview Ave., Suite 201
Columbus, Ohio 43212
tsantarelli@elpc.org

James F. Lang
Laura C. McBride
N. Trevor Alexander
Calfee, Halter & Griswold LLP
1400 KeyBank Center
800 Superior Ave.
Cleveland, OH 44114
jlang@calfee.com
lmcbride@calfee.com
talexander@calfee.com

Allison E. Haedt
Grant W. Garber
Jones Day
P.O. Box 165017
325 John H. McConnell Boulevard
Suite 600
Columbus, Ohio 43216-5017

J. Kennedy And Associates
570 Colonial Park Drive
Suite 305
Roswell, GA 30075

Jennifer Duffer
Armstrong & Okey, Inc.
222 East Town Street
2nd Floor
Columbus, OH 43215
jduffer@ameritech.net

Lija K. Kaieps-Clark
M. Howard Petricoff
Vorys, Sater, Seymour and Pease
52 E. Gay St.
PO Box 1008
Columbus, OH 43216
lkalepsclark@vorys.com
mhpetricoff@vssp.com

Bill Dingus
Lawrence Economic Development Corporation
P.O. Box 488
South Point, OH 45680-0488

Constellation NewEnergy Inc
Cynthia Fonner Brady
550 W Washington Street
Suite 300
Chicago, IL 60661
Cynthia.Brady@constellation.com

Denis George
Kroger Company
1014 Vine Street-G07
Cincinnati, OH 45202-1100

Shannon Fisk
2 North Riverside Plaza Suite 2250
Chicago, IL 60606
sfisk@nrdc.org

Canton Chamber Of Commerce
229 Wells Ave N.W.
Canton, OH 44703-1044

Amy Spiller
Duke Energy Ohio
139 E. Fourth Street, 1303-Main
P.O. Box 961
Cincinnati, OH 45201-0960
Amy.Spiller@Duke-Energy.com

FirstEnergy Solutions Corp
Louis M. D'Alessandris
341 White Pond Drive
Akron, OH 44320
ldAlessandris@firstenergy.com

Ohio Partners For Affordable Energy
David C. Rinebolt
231 West Lima St.
P.O. Box 1793
Findlay, OH 45839-1793
drinelbolt@aol.com

Steve Howard
52 East Gay St.
P.O. Box 1008
Columbus, OH 43215
smhoward@vorys.com

AEP Retail Energy Partners LLC
Anne M. Vogel
1 Riverside Plaza, 29th Floor
Columbus, OH 43215
amvogel@aep.com

Shawnee State University
940 Second Street
Portsmouth, OH 45662

Mark A. Whitt
Carpenter, Lipps & Leleand LLP
280 Plaza, Suite 1300
280 North High Street
Columbus OH 43215

Jeffrey Small
Jody M. Kyler
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
small@occ.state.oh.us
kyler@occ.state.oh.us

Jacqueline Lake Roberts
EnerNOC, Inc.
13212 Haves Corner Road SW
Pataskala OH 43062

The Sierra Club
50 West Broad Street #2117
Columbus, OH 43215

Meigs County Commissioners
Michael Davenport, President
100 East Second Street
Pomeroy, OH 45769

Tuscarawas County
330 University Drive NE
New Philadelphia, OH 44663

Paul F. Wight
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, N.W.
Washington, DC 20005

Deb J. Bingaham
Patti Mallarnee
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

Philip B. Sineneng
Thompson Hine LLP
41 S. High Street, Suite 1700
Columbus, Ohio 43215
Philip.Sineneng@ThompsonHine.com