

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<p>In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals.</p>	<p>))))))</p>	<p>Case No. 10-2376-EL-UNC</p>
<p>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.</p>	<p>))))))))))</p>	<p>Case No. 11-346-EL-SSO Case No. 11-348-EL-SSO</p>
<p>In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of Certain Accounting Authority.</p>	<p>)))))))))</p>	<p>Case No. 11-349-EL-AAM Case No. 11-350-EL-AAM</p>
<p>In the Matter of the Application of Columbus Southern Power Company to Amend its Emergency Curtailment Service Riders.</p>	<p>))))))))</p>	<p>Case No. 10-343-EL-ATA</p>
<p>In the Matter of the Application of Ohio Power Company to Amend its Emergency Curtailment Service Riders.</p>	<p>))))))))</p>	<p>Case No. 10-344-EL-ATA</p>
<p>In the Matter of the Commission Review of the Capacity Charges of Ohio Power Company and Columbus Southern Power Company.</p>	<p>))))))))</p>	<p>Case No. 10-2929-EL-UNC</p>
<p>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.</p>	<p>))))))))</p>	<p>Case No. 11-4920-EL-RDR</p>

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”).

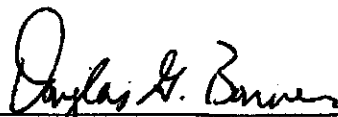
³ *See supra* at 2 & nn. 1-2.

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.

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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.



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