

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

<b>In the Matter of the Application of Ormet</b>	)	
<b>Primary Aluminum Corporation for</b>	)	
<b>Approval of a Unique Arrangement with</b>	)	<b>Case No. 09-119-EL-AEC</b>
<b>Ohio Power Company</b>	)	

**MEMORANDUM IN SUPPORT OF MOTION TO AMEND**

Ormet Primary Aluminum Corporation (“Ormet”) respectfully submits this memorandum to the Commission in support of its Motion to Amend the 2009 Unique Arrangement between Ohio Power<sup>1</sup> Company and Ormet Primary Aluminum Corporation and Request for Emergency Relief. On July 15, 2009 the Commission in an Opinion and Order in this docket approved a unique arrangement for Ormet whereby Ormet would receive a discount off the GS-4 rate. From the time the discount was awarded in 2009 until 2013 the price per MWh of GS-4 tariff power increased by some 46%. That coupled with historically low aluminum prices, high labor and pension costs forced Ormet to file for bankruptcy in February of this year. As noted in greater detail in Ormet’s foregoing Motion, the major cost components have all been substantially reduced as part of the bankruptcy process. The remaining cost component that still must be addressed to allow Ormet to emerge from bankruptcy however is the price of power.

The bankruptcy court approved the one offer which would bring Ormet out of bankruptcy as a going concern thus preserving Ohio jobs, Ohio tax payments and the economic multiplier effect of Ormet on Monroe County. That bankruptcy court approved offer, though, requires amendments to the current Unique Arrangement. The purpose of the foregoing Motion is to fulfill this last gating issue and permit Ormet to come out of bankruptcy. Since the deadline for

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<sup>1</sup> Ormet’s power purchases are divided so that 50% are billed at the Columbus Southern Power division rates and 50% are billed at the Ohio Power division rates.

Ormet to emerge from bankruptcy is July 31, 2013, the amendments to the Unique Arrangement are divided into two parts: Emergency Relief – needed to be issued by July 31, 2013 deadline, and equally important but not as temporal sensitive – Non Emergency Relief.

In its Motion, Ormet seeks several amendments to the Unique Arrangement on an emergency basis<sup>2</sup>. First, it seeks to shorten the duration of the Unique Arrangement by three years so that the Unique Arrangement will terminate on December of 2015 instead of the currently Commission established term of December of 2018. Second, Ormet requests an advancement of the payment of the remaining \$92.5 million dollars in economic development discounts previously authorized in this proceeding by three years so that the discounts would be fully received by December 2014 instead of December 2017. Ormet also requests that the prohibition in the Unique Arrangement which forbids Ormet to purchase its power only from Standard Service tariffs be lifted as of the January 2014 billing cycle. Finally, Ormet seeks to fix the price per MWh of the standard service electricity it purchases for the five billing months remaining in calendar year 2013 to be established at \$45.89 per MWh. Such amount was the amount charged Ormet by Ohio Power during the first quarter of 2013.

The Commission had been given by the General Assembly broad emergency powers.

Section 4909.16, Revised Code provides:

**4909.16 Power to Amend, Alter, or Suspend Schedule of Rates**

When the Public Utilities Commission deems it necessary to prevent injury to the business or interests of the public or of any public utility of this state in case of any emergency to be judged by the commission, it may temporary alter, amend, or, with the consent of the public utility concerned, suspend any existing rates, schedules, or order relating to or affecting any public utility or part of any public utility in this state. Rates so made by the

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<sup>2</sup> In order to come out of bankruptcy the prepetition owner must be able to assign the amended Unique Arrangement to the post-petition owner. Ormet asks for affirmation of that as part of the emergency relief, but such an affirmation does not require an amendment to the Unique Arrangement.

commission shall apply to one or more public utilities in this state, or to any portion thereof, as is directed by the commission, and shall take effect at such time and remain in force for such length of time as the commission prescribes.

The case law of Ohio clearly indicates that the requested emergency relief by Ormet is within the Commission's emergency authority. For example, where a holder of a right-of-way tap agreement with a natural gas utility was affected by the Commission's emergency order prohibiting gas utilities from supplying new or additional volumes of gas to either present or prospective customers and authorizing gas utilities to curtail delivery to existing customers, the Ohio Supreme Court recognized that the Commission's emergency powers must prevail. In Inland Steel Development Corp. v. Public Utilities Comm., 49 Ohio St. 2d 284, 36 N.E. 2d 240, 1977 Ohio Lexis 357, 3 Ohio Op. 3d 435, the Ohio Supreme Court recognized that

Individual contracts between a public utility and its customers may be affected where such action is reasonably necessary to protect the public health, safety and welfare. As stated by this court in paragraph 4 in the syllabus in Akron v. Pub. Util. Comm. (1948), 149 Ohio St. 347:

The provisions of the state and federal constitutions, inhibiting laws impairing the obligation of contract, do not affect the power of the state to protect the public health or the public safety. The rights and privileges arising from contract are subject to regulations for the purposes stated in the same sense and to the same extent as is property owned by natural persons or by corporations.

Thus, in order to protect the public health or public safety, the Commission may enact its emergency powers which may have an impact on contracts between Ormet and Ohio Power. The Ohio Supreme Court has previously noted that the impairment of a contract right must be viewed within the context the interest of the public-at-large. See e.g. Ranft v. Columbia Gas of Ohio, (1984) 12 Ohio St. 3d 18, 465 N.E. 2d 384; 1984 Ohio LEXIS 1152; 12 Ohio B. Rep. 16.

In Manufacturers Light & Heat Co. v. Pub. Util. Comm. (1955), 163 Ohio St. 78; 125 N.E. 2d 183; 1955 Ohio Lexis 523; and 56 Ohio Op. 62, the Ohio Supreme Court stated that “the determination of whether an emergency exists, warranting a temporary alteration of rates, and the length of time such altered rates shall remain in effect are within the judgment and sound discretion of the Public Utilities Commission citing City of Cambridge v. Public Utilities Commission, 159 Ohio St. 88, 111 N.E. 2d 1. Thus, in the case before the Commission, there can be no doubt that the Commission has the authority to exercise its judgment and sound discretion in the determination of whether an emergency exists, whether that emergency warrants the temporary alteration of rates, and the length of time that such altered rates should remain in effect.

The Ohio Supreme Court has upheld the Commission’s exercise of its emergency powers in various situations. For example, the Ohio Supreme Court stated that it was clearly within the PUCO’s emergency powers under R.C. 4909.16 to fashion relief as that provided by the Percentage of Income Payment plan and that the plan of the Commission was manifestly fair and reasonable as a solution to the crisis of disconnection of a number of residential electric customers for non-payment of bills because of the economic recession. See Montgomery County Bd. of Commissioners v. Public Utilities Comm. (1986) 28 Ohio St. 3d 171; 503 N.E. 2d 167; 1986 Ohio LEXIS 818; and 28 Ohio B. Rep. 262. Section 4909.16, Revised Code allows the Commission, in response to a natural gas shortage, to authorize and approve gas curtailment plans and to update the base period allocations for the benefit of grain-dryers’ base periods in recognition that the production of food is a vital function which is traditionally given a high priority. See General Motors Corp. v. Public Utilities Comm. (1978), 54 Ohio St. 2d 357; 376 N.E. 2d 1435; 1978 Ohio LEXIS 572; 8 Ohio Op. 3d 360. The Court has also approved the

Commission considering emergency measures upon its own motion and without a hearing to grant emergency rate relief in order to rectify a previous oversight as to the mailing of Staff Reports in a telephone rate increase case. See Duff v. Public Utilities Comm. (1978), 56 Ohio 2d 367; 384 N.E. 2d 264; 1978 Ohio LEXIS 704; and 10 Ohio Op. 3d 493.

Finally, it must be noted that the emergency rate relief requested by Ormet is not contrary to any statutory provision but rather is consistent with the policy of this state. All four aspects of the emergency relief sought by Ormet are within the Commission's emergency powers as set forth in Section 4909.16, Revised Code.

With respect to the Commission's authority under Section 4905.31, Revised Code, it must be remembered that the Ohio Supreme Court approved the current reasonable arrangement between Ormet and Ohio Power Company in In re Ormet Primary Aluminum Corp., 129 Ohio St. 3d 9; 2011 Ohio 2377; 949 N.E. 2d 991; and 2011 Ohio Lexis 1243. In its decision the Ohio Supreme Court analyzed all of the arguments made by Ohio Power Company and rejected them, affirming the Commission's opinion and order in Case No. 09-119-EL-AEC. More importantly, the general assembly has vested the Commission with continuing supervisory power over the reasonable arrangement between Ormet and Ohio Power Company. The last sentence of Section 4905.31, Revised Code provides:

Every such schedule or reasonable arrangement shall be under the supervision and regulation of the commission, and is subject to change, alteration or modification by the commission.

Just as the Commission approved a reasonable arrangement on July 15, 2009, it has continuing supervision over that arrangement and can change, alter or modify it.

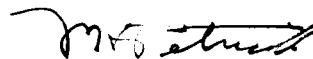
While the Emergency Relief is focused on the remainder of calendar year 2013 and calendar year 2014, the non emergency relief permits Ormet to address its power needs long term. Ormet plans to construct an onsite power plant. Once constructed the onsite plant should

resolve Ormet's power needs long term. A power plant cannot be certificated and built before June 2015 at the earliest. The non emergency relief addresses the need for competitively priced power until the earlier of the commercial operation of the power plant or December 31, 2015. December 31, 2015 is the self imposed deadline for Ormet.

The non emergency relief also provides for the reopening of pot lines 5 and 6, no sooner than July 2014. Reopening pot lines 5 and 6 would bring the full time work force back to 1,000 employees at Hannibal. Finally, as an offset to the increased costs of the non emergency relief, the Motion provides for lowering the trigger price on the payment of premiums should (when) metal prices rise. While the non emergency relief is not as temporal sensitive as the emergency relief, it is equally important as part of the viability of the Hannibal facility.

In conclusion, the Public Utilities Commission of Ohio has statutory authority under Section 4909.16 and 4905.31, Revised Code to amend and alter the current Unique Arrangement between Ormet and Ohio Power Company and should grant the relief requested by Ormet.

Respectfully submitted,



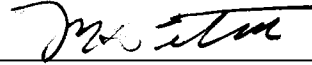
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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing document was served on this 14<sup>th</sup> day of June, 2013 upon the persons listed below.



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