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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ormet Primary)
Aluminum Corporation for Approval of a Unique) Case No. 09-119-EL-AEC
Arrangement with Ohio Power Company and)
Columbus Southern Power Company)

**INDUSTRIAL ENERGY USERS-OHIO'S COMMENTS AND OBJECTIONS TO MOTION
TO AMEND THE 2009 UNIQUE ARRANGEMENT BETWEEN
OHIO POWER COMPANY AND ORMET PRIMARY ALUMINUM CORPORATION
AND REQUEST FOR EMERGENCY RELIEF**

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July 5, 2013

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I. INTRODUCTION

On June 14, 2013, Ormet Primary Aluminum Corporation ("Ormet") submitted a Motion to Amend the 2009 Unique Arrangement and Request for Emergency Relief ("Motion") and an accompanying Memorandum in Support.¹ The Motion explains that the Commission-approved prices have escalated dramatically in the last few years and are now significantly above market.² Ormet, therefore, is seeking relief from the approved rate increases because the cost of electricity represents a substantial portion of its cost to produce aluminum and it needs to reduce its costs to continue to compete in a global market.³

To accomplish its business goals, Ormet is seeking both emergency and non-emergency relief to reduce its cost of electricity through accelerated and increased

¹ Currently, Ormet obtains its retail electric service subject to a reasonable arrangement approved by the Public Utilities Commission of Ohio ("Commission") in this proceeding on July 15, 2009, pursuant to Section 4905.31, Revised Code ("2009 Reasonable Arrangement").

² Motion at 8-9. The above market electricity prices Ormet and other customers face are the result of the Commission's decision to burden all customers with non-bypassable charges that AEP-Ohio collects even if customers obtain generation supply from alternative suppliers.

³ *Id.* at 8.

discounts and shopping credits and to permit it to shop for market-priced generation. If authorized, the discounts and shopping credits will concentrate and increase the risk and cost consequences of Ormet's 2009 Reasonable Arrangement with Ohio Power Company ("AEP-Ohio"). Ormet expects that the increased discounts will be funded by other AEP-Ohio customers by allowing AEP-Ohio to increase the revenues it collects through its Economic Development Rider ("EDR").⁴

On June 27, 2013, the Commission issued an Entry establishing a procedural schedule and directing that Ormet's Motion be treated for procedural purposes as an application for approval of a unique arrangement pursuant to Rule 4901:1-38-05(B), Ohio Administrative Code ("OAC").⁵

Before the Commission can approve any substantive modifications, Ormet must demonstrate that the modifications are reasonable, that the current version of 2009 Reasonable Arrangement is not in the public interest, and that the modifications are an unequivocal public necessity or warranted by extraordinary circumstances. Ormet's Motion fails to do so. Further, Ormet has not presented evidence to demonstrate it is eligible for emergency relief. Accordingly, and for the reasons discussed herein, the Commission must deny Ormet's Motion.

If the Commission does not summarily deny the Motion, it must set the Motion for hearing as required by Commission rules because the modifications Ormet seeks appear unreasonable.

⁴ Motion at 13.

⁵ The Commission's June 27, 2013 Entry specifies that Ormet's Motion should be treated as an application for a unique arrangement. For the purposes of these objections and comments, the more generic term "reasonable arrangement" is used.

Further, if the Commission finds that it is appropriate to consider granting any relief to Ormet, it must do so in a way that will reduce Ormet's overall cost of electricity without saddling other AEP-Ohio customers with additional costs. To avoid additionally burdening other AEP-Ohio customers, the Industrial Energy Users-Ohio ("IEU-Ohio") recommends that the relief should permit Ormet to competitively source its generation supply and thereby access the lower generation supply prices available in the market. These market-based opportunities may provide Ormet with some of the economic relief it is seeking without sacrificing the financial well-being of other customers.

II. OBJECTIONS

IEU-Ohio⁶ submits that the Commission must dismiss or deny the Motion for the reasons discussed below:

1. The proposed modifications of the 2009 Reasonable Arrangement are not reasonable because:
 - a. The request to modify the 2009 Reasonable Arrangement to fix the price Ormet will pay for electricity in 2013 at \$45.89 per megawatt-hour ("MWh") will unlawfully and unreasonably increase the risk and expense of other customers responsible for paying the EDR.⁷
 - b. The request to modify the 2009 Reasonable Arrangement to fix the price Ormet will pay for electricity at less than \$45.89 per MWh in the second half of 2013 so that an average fixed price of \$45.89 per

⁶ On April 17, 2009, the Commission issued an Entry in this proceeding granting IEU-Ohio's motion to intervene.

⁷ Ormet has proposed to pay several riders and tariff distribution fees in addition to the price of \$45.89 per MWh, minus any discounts. Motion at 10.

MWh is achieved for the entire 2013 year will unlawfully and unreasonably increase the risk and cost of other customers responsible for paying the EDR.

- c. The request to avoid paying AEP-Ohio's Alternative Energy Rider ("AER") while Ormet continues to receive generation service from AEP-Ohio will unlawfully and unreasonably increase the risk and expense of other customers responsible for paying the EDR.
- d. The request to modify the 2009 Reasonable Arrangement to provide a discount of \$5.5 million per month during calendar year 2013, including the proposal to back load the monthly discount in 2013, and thereby produce a total discount of \$66 million in 2013, is unlawful and unreasonable because the request produces a burden for customers in excess of the upper limit previously approved by the Commission.
- e. The request to modify the 2009 Reasonable Arrangement to provide a discount of \$4.5 million per month during calendar year 2014 and during the first five months of 2015 is unlawful and unreasonable because the request produces a burden for customers in excess of the upper limit previously approved by the Commission.
- f. The request to modify the 2009 Reasonable Arrangement to provide Ormet a \$9 per MWh shopping credit for any incremental load associated with the restart of pot lines 5 and 6 will unlawfully

and unreasonably increase the risk and cost of other customers that pay the EDR.

- g. The request to modify the repayment schedule ordered by the Commission for its deferred November and December 2012 electricity bills will unlawfully and unreasonably increase the risk of other customers that pay the EDR.
 - h. The request to modify the 2009 Reasonable Arrangement to provide Ormet a \$6 per MWh shopping credit for its entire load between June 1, 2015 and December 31, 2015, in the event Ormet experiences a delay in the start-up of an on-site power plant, will unlawfully and unreasonably increase the risk and cost of other customers responsible for paying the EDR.
2. The request to modify the 2009 Reasonable Arrangement fails to demonstrate that the current version of 2009 Reasonable Arrangement is not in the public interest or that the modifications are required by public necessity or warranted by extraordinary circumstances.
3. Based on the allegations of the Motion, Ormet is not entitled to emergency relief pursuant to Section 4909.16, Revised Code, for the following reasons:
 - a. Ormet's allegation that it must secure Commission approval by July 31, 2013 is not an emergency condition because the buyer may agree to extend the closing date beyond July 31, 2013.

- b. Ormet has failed to provide a detailed business plan to demonstrate that a grant of emergency relief will permit it to emerge as a viable entity.
- c. Ormet has failed to engage in other measures that are available to it to mitigate or alleviate the alleged financial emergency.

III. COMMENTS

A. ORMET'S CURRENT REASONABLE ARRANGEMENT AND REQUEST FOR ADDITIONAL RELIEF

1. Ormet's Current Reasonable Arrangement

As authorized by the Commission's Opinion and Order issued on July 15, 2009 ("Opinion and Order"), the 2009 Reasonable Arrangement provides that Ormet's price for electric service is established, among other things, through a formula that contains an index. The index varies Ormet's electric price in relationship to specified changes in the London Metals Exchange ("LME") price for aluminum. The currently effective 2009 Reasonable Arrangement has a term that runs through December 2018.⁸

Beginning with the years 2010 and 2011, the structure of the 2009 Reasonable Arrangement was designed to permit Ormet to obtain positive cash flow and to address legacy costs when LME prices are low. The 2009 Reasonable Arrangement also allowed the 2010-2011 electric price to rise when aluminum market conditions were more favorable to Ormet.⁹ For the years 2012 through 2018, the 2009 Reasonable

⁸ The Opinion and Order also approved discounts over an interim period not relevant here. Opinion and Order at 4-5 (July 15, 2009) ("Opinion and Order").

⁹ The 2009 Reasonable Arrangement formula calls for Ormet's electric price to rise the 102% of the otherwise applicable AEP-Ohio weighted average price (when the LME price of aluminum is greater than the target price but less than \$300 per ton over the target price). If the LME price exceeds the target price by more than \$300 per ton, Ormet's electric price moves to 105% of the otherwise applicable AEP-
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Arrangement's pricing formula operates in a similar fashion, but Ormet's electric price rises slightly higher (104% or 108% of the otherwise applicable price) in relationship to the \$300 LME demarcation point than the rates authorized for the 2010-2011 period.¹⁰

The 2009 Reasonable Arrangement calls for all the revenue provided by prices above the otherwise applicable weighted average tariff rate ("Positive Delta Revenue") to be used as a credit against the accumulated delta revenue balance ("Negative Delta Revenue") caused by electric prices below the otherwise applicable electricity reference price. Any Positive Delta Revenue is first applied to reduce the Negative Delta Revenue and then used to reduce the EDR.¹¹

As approved by the Commission, the 2009 Reasonable Arrangement limits the maximum dollar amount of the Negative Delta Revenue to \$60 million annually in 2010 and 2011¹² and then phases down the maximum amount of Negative Delta Revenue over time. More specifically, the currently effective 2009 Reasonable Arrangement sets the maximum amount of Negative Delta Revenue at \$54 million for 2012 and thereafter reduces this amount by \$10 million each year until the potential for Negative Delta Revenue is eliminated in 2018.¹³ The Commission found that such time differentiated

Ohio weighted average price. Opinion and Order at 6. The GS4 rate schedules for the Ohio Power Company and Columbus Southern Power Company Rate zones are averaged with each zone weighted at 50%.

¹⁰ *Id.* at 12.

¹¹ *Id.*

¹² *Id.* at 9.

¹³ *Id.* at 9-10. The as-approved 2009 Reasonable Arrangement contains other provisions designed to limit Negative Delta Revenue potential. The amount of Negative Delta Revenue recoverable through the EDR is capped at \$54 million in any year. For 2010 and 2011, the Commission authorized AEP-Ohio to defer, for future collection, Negative Delta Revenue between the \$60 and \$54 million (with the addition of a carrying cost allowance computed at a relatively high long term debt rate. Negative Delta Revenue below the maximum amount could be carried over for use in a subsequent year. The maximum amount {C40958:13 }

limits on the maximum amount of Negative Delta Revenue were necessary to protect customers from the delta revenue effects of the 2009 Reasonable Arrangement.¹⁴ The Commission agreed with its Staff that the ability of AEP-Ohio customers to fund the recovery of delta revenue is not unlimited and determined that AEP-Ohio's other customers would pay no more than \$54 million annually in delta revenue associated with the 2009 Reasonable Arrangement.¹⁵

In addition, the as-approved 2009 Reasonable Arrangement allows it to be terminated by the Commission in the event Ormet did not begin to reduce the accumulated deferrals: "The Commission will modify the proposed unique arrangement to allow the Commission to terminate, by order, the unique arrangement if Ormet does not begin to reduce the amount of the accumulated deferrals, and carrying charges, through the payment of above-tariff rates, pursuant to the terms of the unique arrangement, by April 1, 2012."¹⁶

By April 1, 2012, Ormet's financial performance had not moved into the "zone" specified by the Commission, yet the Commission did not terminate the 2009 Reasonable Arrangement. Meanwhile, AEP-Ohio commenced its application for a new electric security plan ("ESP") on January 27, 2011.¹⁷ On August 8, 2012, the

of Negative Delta Revenue could also be reduced in the event Ormet did not maintain a full-time employment level of 650 people. As an additional means of mitigating the Negative Delta Revenue potential of the 2009 Reasonable Arrangement, the Commission also required that the provider of last resort ("POLR") charges paid by Ormet be treated as Positive Delta Revenue. *Id.* at 10-14.

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 15.

¹⁷ *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 {C40958:13}*

Commission substantially increased AEP-Ohio's electric prices through the approval of an ESP strongly opposed by Ormet, all other consumers, and many competitive retail electric service ("CRES") providers.¹⁸ During the *AEP-Ohio ESP II* litigation, Ormet repeatedly warned that the significant rate increases sought by AEP-Ohio (and for the most part obtained) would have a dramatic negative impact on Ormet's significantly challenged efforts to turn things around. Then, in October 2012, Ormet sought additional relief from the Commission (Ormet's first request to modify the 2009 Reasonable Arrangement), claiming it could not pay its expected November and December 2012 electric bills (now significantly higher as a result of the *AEP-Ohio ESP II* Opinion and Order). Ormet asked the Commission to allow Ormet to modify the 2009 Reasonable Arrangement so that Ormet could delay payment of its November and December 2012 electricity bills to a later date.¹⁹ While the Commission granted Ormet's payment modification request, it stated that that it would not further modify the 2009 Reasonable Arrangement unless Ormet provided "a detailed business plan confirming its long-term ability to exist without ratepayer support."²⁰

2. Ormet's Second Request to Modify to the 2009 Reasonable Arrangement

Shortly after the Commission approved Ormet's first modification request and before paying the November and December 2012 electricity bills, Ormet sought

of an Electric Security Plan, PUCO Case Nos. 11-346-EL-SSO, *et al.*, Application (Jan. 27, 2011) ("*AEP-Ohio ESP II*").

¹⁸ *AEP-Ohio ESP II*, Opinion and Order (Aug. 8, 2012).

¹⁹ Motion for Expedited Approval of Payment Deferral and Memorandum in Support (Oct. 12, 2012).

²⁰ Entry at 4 (Oct. 17, 2012).

bankruptcy protection for the second time since 2004.²¹ On June 4, 2013, the bankruptcy court approved a sale of Ormet's assets to Wayzata Investment Partners, LLC ("Wayzata").²² According to Ormet's Motion, the contract for the sale of assets is conditioned on modifications of the 2009 Reasonable Arrangement and may be terminated if the sale does not close by July 31, 2013.²³

Ormet seeks both emergency and non-emergency relief. With regard to its requests for emergency relief, the Motion first seeks authorization to modify and terminate the 2009 Reasonable Arrangement in December 2015, rather than in December 2018.²⁴ Second, Ormet seeks permission to obtain supply from a CRES provider after January 1, 2014.²⁵ Third, Ormet requests that its generation price be fixed so as to produce an average annual price \$45.89 per MWh.²⁶ Lastly, Ormet requests that it receive a discount of \$5.5 million each month in 2013 with the discount back loaded in the second half of 2013 to produce Negative Delta Revenue of \$66 million in 2013, and \$4.5 million in Negative Delta Revenue during 2014.²⁷

With regard to its requests for non-emergency relief, Ormet's Motion seeks several additional modifications of the 2009 Reasonable Arrangement. It proposes to modify the 2009 Reasonable Arrangement to allow Ormet to pay the November and

²¹ Motion at 3.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 10.

²⁵ *Id.*

²⁶ Ormet has proposed to pay several riders and tariff distribution fees in addition to the price of \$45.89 per MWh, minus any Negative Delta Revenue benefit. Ormet did not include AEP-Ohio's AER in the list of riders it will continue to pay while it continues to obtain generation service from AEP-Ohio. *Id.*

²⁷ *Id.* at 10-11.

December 2012 electric bills over 24 months beginning in January 2014 rather than the 17 installments the Commission specified in October 2012.²⁸ Ormet's Motion also requests a modification to the 2009 Reasonable Agreement to allow Negative Delta Revenue at the pace of \$4.5 million per month during the first five months of 2015.²⁹ Ormet's Motion proposes to modify the 2009 Reasonable Arrangement to provide Ormet with a shopping credit of \$9 per MWh through May 31, 2015 for any incremental load associated with the restart of its fifth or sixth pot line.³⁰ In the event a new on-site generation facility is not operational by June 2015,³¹ Ormet's Motion also proposes to modify the 2009 Reasonable Arrangement and include a shopping credit of \$6 per MWh for its entire load for the remainder of 2015.³² Finally, Ormet's Motion also proposes to reduce the 2009 Reasonable Arrangement's LME prices for purposes of computing Positive Delta Revenue.³³

B. THE PROPOSED MODIFICATIONS TO THE 2009 REASONABLE ARRANGEMENT WHICH ARE CONTAINED IN ORMET'S MOTION ARE UNLAWFUL, UNREASONABLE, CONTRARY TO THE PUBLIC INTEREST AND ARE ADVANCED WITHOUT FIRST SATISFYING THE REQUIREMENTS PREVIOUSLY ESTABLISHED BY THE COMMISSION

- 1. Ormet's requested modifications are unreasonable because they substantially concentrate and increase the Negative Delta Revenue burden**

²⁸ *Id.* at 11.

²⁹ *Id.*

³⁰ *Id.*

³¹ Ormet suggests it plans to actively pursue building a natural gas-fired power plant to meet its electricity supply needs. *Id.* at 14.

³² *Id.* at 12.

³³ *Id.* at 11.

As discussed above, the Motion proposes to substantially revise the terms of the 2009 Reasonable Arrangement. Because of the scope of the changes Ormet is seeking, the Commission has determined that, for procedural purposes, it will treat the Motion as an application for a unique arrangement.³⁴ Under the Commission's rules, a mercantile customer applying for a unique arrangement bears the burden of proof to demonstrate the proposed arrangement is reasonable.³⁵ Because Ormet's request fails to demonstrate that the proposed modified 2009 Reasonable Arrangement would be reasonable, the Motion must be denied.

Ormet's Motion asserts that part of the requested emergency relief will "*maintain*" the current monthly average Negative Delta Revenue amount of \$5.5 million in calendar year 2013, with the annual amount back loaded into the latter months of 2013 in order to produce total annual Negative Delta Revenue of \$66 million.³⁶ Ormet's Motion suggests the monthly Negative Delta Revenue would then be reduced to \$4.5 million per month in 2014 (\$54 million per year).³⁷ Contrary to the assertions and suggestions in Ormet's Motion, however, the 2009 Reasonable Arrangement does not permit Negative Delta Revenue of \$66 million in 2013 or \$54 million in 2014.

As previously discussed, the 2009 Reasonable Arrangement establishes Ormet's electricity price through the use of a formula that indexes the price to LME aluminum prices, and the 2009 Reasonable Arrangement contains limits on the timing and amount

³⁴ Entry at 2 (June 27, 2013).

³⁵ Rule 4901:1-38-05(B)(1), OAC.

³⁶ Motion at 10 (emphasis added).

³⁷ *Id.* at 10-11. Ormet requests the monthly discount of \$4.5 million per month continue for the first five months of 2015, but classifies this as a non-emergency request. *Id.* at 11.

of Negative Delta Revenue that can flow through the EDR.³⁸ The Commission imposed a cap on the maximum annual Negative Delta Revenue of \$60 million for 2010 and 2011. Thereafter, the maximum annual Negative Delta Revenue amount declined to \$54 million for 2012 and declines further in the future by \$10 million each year thereafter until eliminated completely in 2018.³⁹

Therefore, the proposal to “maintain” the monthly Negative Delta Revenue amount at a level sufficient to produce annual Negative Delta Revenue of \$66 million in calendar year 2013 is actually a proposal to increase, by 50%, the maximum Negative Delta Revenue allowed under the 2009 Reasonable Arrangement for calendar year 2013. The relief requested in Ormet’s Motion would, if approved, increase the maximum annual Negative Delta Revenue by 59% for calendar year 2014 without considering the other Negative Delta Revenue enhancing elements of the relief requested by Ormet’s Motion (such as the proposed shopping credits). Rather than maintaining the current limits on maximum Negative Delta Revenue, Ormet’s Motion seeks to significantly increase the 2009 Reasonable Arrangement’s maximum amounts of Negative Delta Revenue to the detriment of all customers.

Although Ormet’s Motion is silent on how the proposed shopping credits will be funded,⁴⁰ the proposed shopping credits can only result in additional electric bill reductions for Ormet, a fact recognized in Ormet’s Motion.⁴¹ The proposed \$9 per MWh

³⁸ Opinion and Order at 9-10.

³⁹ \$44 million in 2013, \$34 million in 2014, \$24 million in 2015, \$14 million in 2016, and \$4 million in 2017. *Id.* at 10.

⁴⁰ There are only two sources of such funding. The funding is to be provided out of either AEP-Ohio’s earnings or by customers.

⁴¹ Motion at 14-15.

shopping for the incremental load associated with the potential restart of the pot lines 5 and 6 would produce an estimated electric bill reduction of \$12.4 million.⁴² If Ormet's "plans" to pursue construction of a natural gas-fired generating facility and place it into service by June 2015 are delayed or do not materialize, the proposed \$6 per MWh shopping credit applicable to Ormet's entire load will produce an additional estimated electric bill reduction of \$2.2 million per month between June and December 2015 (a total reduction of \$15.4 million).⁴³ Further, the proposal in Ormet's Motion to freeze the generation price for 2013 at \$45.89 per MWh is estimated to produce an electric bill reduction of \$3.5 million.⁴⁴

Ormet has the burden to demonstrate that its proposed modifications to the 2009 Reasonable Arrangement are "reasonable."⁴⁵ When viewed in totality, the consequences of the modifications proposed by Ormet's Motion are substantial. The currently effective limits on Negative Delta Revenue for June 2013 and December 2018 would potentially result in Negative Delta Revenue of \$92.5 million.⁴⁶ In contrast, the relief requested in Ormet's Motion pushes the potential Negative Delta Revenue amount to \$157 million:

⁴² *Id.* at 15.

⁴³ *Id.* at 14-15.

⁴⁴ *Id.* at 13. Here again, Ormet's Motion is silent as to the expected source of funding of the benefit it will receive by freezing its generation price at \$45.89 per MWh. It is also unclear whether Ormet's claimed savings of \$3.5 million associated with freezing its generation price at \$45.89 per MWh includes the savings it will enjoy (and others will pay for) if Ormet is able to avoid AEP-Ohio's AER as a non-shopping customer.

⁴⁵ Rule 4901:1-38-05(B)(1),OAC.

⁴⁶ \$44 million in 2013, \$34 million in 2014, \$24 million in 2015, \$14 million in 2016 and \$4 million in 2017. Opinion and Order at 10.

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| | Proposed Contract Modifications | Estimated Delta Revenues |
|------|---|---------------------------------|
| 2013 | Base Discount (June-Dec.) | \$49,500,000 |
| 2013 | Fixed Generation Price | \$3,500,000 |
| 2014 | Base Discount | \$54,000,000 |
| 2014 | \$9 per MWh Shopping Credit (June-Dec.) | \$7,233,000 |
| 2015 | Base Discount | \$22,500,000 |
| 2015 | \$9 per MWh Shopping Credit (Jan-May) | \$5,167,000 |
| 2015 | \$6 per MWh Shopping Credit (June-Dec.) | \$15,400,000 |
| | Total | \$157,300,000 |

Ormet's claim to the full amount of the potential discount through the end of the 2009 Reasonable Arrangement further ignores the Commission's prior decision to modify the arrangement to allow the Commission to terminate it "if Ormet does not begin to reduce the amount of accumulated deferrals, and carrying charges, through the payment of above-tariff rates ... by April 1, 2012."⁴⁷ Ormet has not made the expected payments. Because the Commission can terminate the 2009 Reasonable Arrangement under the existing conditions, Ormet cannot legitimately claim any right to the remaining \$92.5 million in potential discounts.

Approval of the Motion also will increase the risk of other customers in less direct ways. For example, Ormet proposes to spread the repayment of its November and December 2012 electricity bills over an additional seven months. Delay increases the risk of nonpayment. That risk of nonpayment will fall squarely on other customers.

⁴⁷ Opinion and Order at 15.

Additionally, Ormet appears to be seeking relief from paying the AER.⁴⁸ Without an adjustment to AEP-Ohio's baseline for compliance with alternative energy requirements to remove Ormet's total kilowatt hours sold, exempting Ormet from paying the AER will shift the costs of compliance to other customers.

Fundamental conditions in the aluminum sector and Ormet's own performance history add emphasis to concerns about the latest set of modifications sought by Ormet's Motion. Worldwide aluminum prices have shown no sign of recovering to the levels that Ormet has previously forecasted, and the electricity prices that Ormet has paid to date under the 2009 Reasonable Arrangement have yet to produce Positive Delta Revenue (even if Ormet had timely paid all electric bills). Further, as discussed later in these comments, Ormet's Motion omits any showing that it or its successor has a viable going concern plan.

2. Ormet Has Not Satisfied the Requirement of the *Mobile-Sierra* Doctrine to Justify Modification of the 2009 Reasonable Arrangement

The Commission retains jurisdiction to alter, modify, or terminate the 2009 Reasonable Arrangement.⁴⁹ Based on the Commission's prior rulings, however, Ormet must satisfy a high standard of proof before the Commission might modify the 2009 Reasonable Arrangement.⁵⁰ As the Commission stated in the Ormet Contract Modification Order, "The condition precedent to an exercise of the power to modify an

⁴⁸ According to its Motion, the AER is not a rider that Ormet proposes to continue paying while it continues to take generation service from AEP-Ohio. Motion at 10.

⁴⁹ Section 4905.31(E), Revised Code; Opinion and Order at 15.

⁵⁰ *In the Matter of the Application of Ohio Power Company to cancel certain special power agreements and for other relief*, Case No. 75-161-EL-SLF, Opinion and Order at 6 (Aug. 4, 1976) ("Ormet Contract Modification Order").

existing contract is a showing that the contract adversely affects the public interest to the extent that it impairs the financial ability of the utility to continue to render service, creates an excessive burden on other customers of the company, or results in unjust discrimination.”⁵¹ As the United States Supreme Court more recently held, “Under the *Mobile-Sierra* presumption, setting aside a contract rate requires a finding of unequivocal public necessity or extraordinary circumstances.”⁵² This standard of proof applies whether the moving party is the utility or the customer. “The standard for a buyer’s challenge must be the same, generally speaking, as the standard for a seller’s challenge: the contract rate must seriously harm the public interest.”⁵³

Ormet’s Motion does not allege facts or otherwise attempt to show that its proposed modifications to the 2009 Reasonable Arrangement may be approved by the Commission based upon the applicable standard of proof. Ormet has offered nothing to show that the 2009 Reasonable Arrangement is not in the public interest or to show that modification is a public necessity.

Instead of doing what is required under the applicable standard of proof, Ormet’s Motion speaks about the same preservation of Ohio jobs, Ohio tax payments, and the economic multiplier effect of Ormet’s continued operation in Monroe⁵⁴ that Ormet held out previously for purposes of securing approval of the 2009 Reasonable

⁵¹ *Id.* at 6.

⁵² *Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1*, 128 S.Ct. 2733, 2748 (2008) (internal quotes omitted).

⁵³ *Id.* at 2747.

⁵⁴ Motion at 8.

Arrangement.⁵⁵ Based on the proposals and limited information contained in the Motion, however, it appears that the requested relief would do further harm to the public interest by significantly increasing the Negative Delta Revenue and doing so with no clear and convincing demonstration that modifications will result in the long-promised business turnaround. As discussed above, the 2009 Reasonable Arrangement creates a maximum Negative Delta Revenue potential of \$92.5 million between now and the end of 2018.⁵⁶ Ormet's Motion proposes to move the Negative Delta Revenue potential to \$157.3 million in delta revenue between now and the end of 2015, significantly concentrating and increasing the Negative Delta Revenue burden distributed through the EDR.

Based on the standard of proof applicable to a request to modify an approved reasonable arrangement, Ormet's Motion must be dismissed or rejected.

C. BASED ON THE APPLICABLE CRITERIA, ORMET'S REQUEST FOR EMERGENCY RELIEF IS DEFECTIVE AND WITHOUT MERIT

Ormet' Motion also seeks much of the requested relief on an emergency basis. However, a grant of emergency relief under Section 4909.16, Revised Code, involves the use of an "extraordinary" power.⁵⁷ Accordingly, the Commission requires the applicant to carry a heavy burden to demonstrate its right to relief in proceedings seeking emergency relief.⁵⁸ Ormet's Motion fails to allege or show facts and

⁵⁵ Opinion and Order at 2.

⁵⁶ The Commission has previously determined that customers should be exposed to no more than \$54 million of delta revenue in any year and that amount should decline over time. *Id.* at 10.

⁵⁷ Ormet Contract Modification Order at 5.

⁵⁸ *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Rates and Charges for Steam and Hot Water Service*, Case No. 09-453-HT-AEM, Opinion and Order at 6 (Sept. 2, 2009) ("*Akron Thermal*").

circumstances that might permit the Commission to lawfully grant the emergency relief requested.

- 1. The applicant for emergency relief must establish by clear and convincing evidence an emergency and seek temporary relief at the minimum level necessary to relieve the emergency and so that it will result in a viable business plan**

The Commission has held that the ultimate question for it to decide is whether, absent the emergency relief, there will be an injury to the interests of the public.⁵⁹ "If the applicant fails to sustain its [heavy] burden of proof on this issue, the Commission's inquiry is at an end."⁶⁰

To review the "ultimate question," the Commission has developed a multi-step process:

First, the existence of an emergency is a condition precedent to any grant of temporary rate relief. Second, the applicant's supporting evidence will be reviewed with strict scrutiny, and that evidence must clearly and convincingly demonstrate the presence of extraordinary circumstances that constitute a genuine emergency situation. ... Finally, the Commission will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency.⁶¹

Additionally, the Commission will not authorize relief if the applicant cannot demonstrate that the relief is part of a viable business plan.⁶² Further, the applicant must exhaust reasonable opportunities to alleviate the emergency without Commission assistance.⁶³

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* In an application in which a utility seeks emergency relief, the Commission will not grant the relief if the application is filed to circumvent permanent rate relief. *Id.*

⁶² *Id.* at 25.

⁶³ *In the Matter of the Application of The Cleveland Electric Illuminating Company and The Toledo Edison Company for Emergency Rate Relief*, Case No. 88-170-EL-AIR, Opinion and Order at 15-16 (Aug. 23, 1988) ("CEI Emergency Case").

2. Ormet has not alleged or shown sufficient facts to enable the Commission's emergency authority

Before the Commission may act on Ormet's request, the Commission must determine that it faces an emergency.⁶⁴ Here, Ormet's Motion alleges only that a provision in the bankruptcy court-approved asset purchase agreement permits the buyer to terminate the agreement if the sale has not closed by July 31, 2013.⁶⁵ As the Motion explains, however, the buyer can extend the closing date.⁶⁶ Further, there is no indication in Ormet's Motion that granting the requested emergency relief, a grant that must be temporary in any event,⁶⁷ will be sufficient to allow the closing to occur on or before July 31, 2013. The emergency relief requested in Ormet's Motion is, therefore, without merit.

3. Ormet's Motion does not allege or show that the requested emergency relief will result in a viable business

The Commission will not grant emergency relief unless the applicant can show that the grant of relief will result in a viable business plan even if the applicant has alleged and demonstrated an emergency condition.⁶⁸ Ormet's Motion, however, does not allege or show that the emergency relief requested will result in a financially viable business. Accordingly, the request for emergency relief is improperly made and otherwise without merit.

⁶⁴ *Akron Thermal* at 6.

⁶⁵ Motion at 3.

⁶⁶ *Id.* at 3 n.6.

⁶⁷ Section 4909.16, Revised Code.

⁶⁸ *Akron Thermal* at 25.

4. The emergency relief requested in Ormet's Motion may not be entertained or granted unless it is shown that other opportunities to reduce electricity costs have been exhausted

An applicant seeking emergency relief must show that other options to mitigate or eliminate the emergency condition have been exhausted.⁶⁹ Ormet has failed to make such a demonstration despite several available opportunities.

For example, it appears that Ormet could reduce its electric costs by electing an interruptible service. As demonstrated by Exhibit C to Ormet's Motion, other aluminum smelters are relying on interruptible electric service to meet their electricity needs and reduce their cost of electricity.⁷⁰

It also appears that Ormet could utilize the operational flexibility of its multiple pot line aluminum smelters to participate in the capacity market. Ormet's facility is located within the region served by PJM Interconnection, L.L.C. ("PJM"). Within the PJM area, customers with the capability to interrupt some or all of their electric service can qualify this capability as a capacity resource and use the capacity compensation available from the operation of PJM's Reliability Pricing Model ("RPM") as an offset to their cost of purchased electricity.

Additionally, by committing its peak demand reduction capabilities to AEP-Ohio for purposes of meeting the mandates in Section 4928.66, Revised Code, Ormet could seek and obtain an exemption from related cost recovery mechanism to reduce its electric bill and the potential for delta revenue associated with the 2009 Reasonable Arrangement.

⁶⁹ *CEI Emergency Case* at 15-16 (Aug. 23, 1988).

⁷⁰ Motion, Exhibit C at 3.

Also, some aluminum smelters are using their substantial operational flexibility to secure compensation for ancillary services provided to regional power markets. For example, it is a matter of public record that Alcoa's aluminum smelter in Warrick, Indiana, sells ancillary services in the market operated by the Midcontinent Independent System Operator, Inc.⁷¹

Ormet's Motion fails to allege or show that Ormet has exhausted other reasonably available means of addressing impact of electricity costs on its business. Based on Commission precedent, Ormet's Motion must be dismissed or rejected.

D. ANY MODIFICATIONS MADE TO THE 2009 REASONABLE ARRANGEMENT MUST LEVERAGE THE NEGATIVE DELTA REVENUE REDUCTION OPPORTUNITIES THAT ARE READILY AVAILABLE IN THE MARKET, OPPORTUNITIES THAT WOULD BE MUCH GREATER BUT FOR THE MARKET BARRIERS ERECTED BY THE AEP ESP II ORDER

According to Ormet's Motion, the electric bill produced by the 2009 Reasonable Arrangement is substantially higher than the bill that Ormet would otherwise pay if it had unencumbered access to the electricity market. The policy set forth in Section 4928.02, Revised Code, among other things, is designed to ensure that customers have access to the suppliers, prices, terms, and conditions that they prefer, ensure effective competition by avoiding anticompetitive subsidies, and facilitate Ohio's effectiveness in the global economy. Section 4928.06, Revised Code, requires the Commission to ensure the policy in Section 4928.02, Revised Code, is effectuated.

⁷¹ *Midwest Independent Transmission System Operator, Inc.*, Federal Energy Regulatory Commission Docket No. ER09-1049-000, Motion to Intervene and Protest of Alcoa, Inc. and Alcoa Power Generating Inc. at 6-9 (May 26, 2009). The Midcontinent Independent System Operator, Inc. was formerly named the Midwest Independent Transmission System Operator, Inc.

The context for Ormet's Motion includes Commission decisions that have authorized AEP-Ohio to significantly increase its electricity prices and uniquely collect non-bypassable and above-market generation-related charges. In some cases, the Commission's rate-increasing actions have already been ruled to be illegal, but the Commission has nonetheless strained to allow the illegally authorized increases to continue to flow through to AEP-Ohio customers.⁷² These Commission decisions work to substantially deprive shopping customers of the benefits of their "customer choice" rights under Ohio law and have combined to move AEP-Ohio's electric bills above the bills rendered by most other electric distribution utilities ("EDU"). Accordingly, these decisions are being contested through appeals to the Ohio Supreme Court based on claims that the decisions fundamentally offend requirements of Ohio law. During the pendency of these appeals, the anticompetitive and above-market consequences of the Commission's decisions remain embedded in the electric bills of all AEP-Ohio customers regardless of whether the customers are shopping, non-shopping, or reasonable arrangement customers.⁷³

While IEU-Ohio's Comments and Objections are generally critical of Ormet's Motion, IEU-Ohio nonetheless understands how: (1) The Commission's decisions in favor of much higher and much more non-bypassable AEP-Ohio electric prices have added to Ormet's already considerable challenges; and, (2) The market-based

⁷² *In the Matter of the Application of Columbus Southern Power Company for Approval of an Electric Security Plan; an Amendment to its Corporate Separation Plan; and the Sale or Transfer of Certain Generating Assets*, Case Nos. 08-917-EL-SSO, *et al.*, Order on Remand (Oct. 3, 2011); *In the Matter of the Application of Columbus Southern Power Company of Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Case Nos. 11-4920-EL-RDR, *et al.*, Finding and Order (Aug. 1, 2012).

⁷³ Motion at 8-9.

approach enabled and favored by Ohio law could have and should have made things much better for Ormet and all other AEP-Ohio customers. In many respects, the root cause of Ormet's Motion is the predictable and predicted consequence of the Commission's significant efforts to allow AEP-Ohio to secure an above-market margin from its competitive generation business even though Ohio law requires AEP-Ohio's competitive generation business to be fully on its own in the competitive market.⁷⁴

If, as suggested in Ormet's Motion, it is possible to reduce Ormet's electric bill by recourse to the electric market, Ormet is obligated by Commission precedent to exhaust this opportunity prior to seeking emergency relief. As importantly, the Commission is obligated to proactively facilitate reliance on the market-based approach for the reasons briefly mentioned above. Therefore and if the Commission authorizes any modification to the 2009 Reasonable Arrangement, IEU-Ohio urges the Commission to favor modifications that permit Ormet to access the competitive market in ways that may be beneficial to Ormet while reducing (rather than increasing) the potential for Negative Delta Revenue.

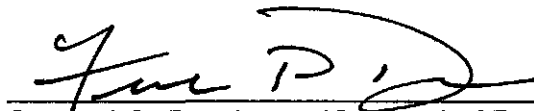
IV. CONCLUSION

For the reasons discussed herein, IEU-Ohio respectfully requests that the Commission make a determination that the Motion is unjust and unreasonable, and deny Ormet's request to concentrate and increase the amount of discounts and for the provision of shopping credits. Additionally, Ormet has failed to support its request for emergency relief and that request should be denied. If the Commission does not deny the Motion summarily, the Commission should set the matter for hearing because the

⁷⁴ Section 4928.38, Revised Code.

Motion appears unjust and unreasonable.⁷⁵ Further, if the Commission does find a basis for modifying the 2009 Reasonable Arrangement, it should favor modifications that permit Ormet to access the competitive market in ways that benefit Ormet while reducing the potential for Negative Delta Revenue.

Respectfully submitted,



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⁷⁵ Rule 4901:1-38-05(B)(3), OAC.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Comments and Objections to Motion to Amend the 2009 Unique Arrangement Between Ohio Power Company and Ormet Primary Aluminum Corporation and Request for Emergency Relief* was served upon the following parties of record this 5th day of July 2013, via electronic transmission, hand-delivery or first class mail, postage prepaid.


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