BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

INDUSTRIAL ENERGY USERS-OHIO'S MEMORANDUM CONTRA TO ORMET PRIMARY ALUMINUM CORPORATION'S INTERLOCUTORY APPEAL AND REQUEST FOR OTHER RELIEF

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

INDUSTRIAL ENERGY USERS-OHIO'S MOTION TO DISMISS AND MEMORANDUM CONTRA TO ORMET PRIMARY ALUMINUM CORPORATION'S INTERLOCUTORY APPEAL AND REQUEST FOR OTHER RELIEF

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] Through the Motion, Ormet sought both emergency and non-emergency relief.[3]

By Entry issued on June 27, 2013, the Attorney Examiner found that, although Ormet's June 14, 2013 filing was posed as a motion to amend Ormet's unique arrangement with Ohio Power Company ("AEP-Ohio"), Ormet's Motion would be, for

[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 9.

procedural purposes, treated as an application for a unique arrangement. The June 27, 2013 Entry also addressed the procedural schedule for intervention and comments.[4]

On July 3 and 5, 2013, interested persons and parties filed various pleadings including objections and comments Among other things, the filed comments and objections raised issues regarding and otherwise contested the requested emergency relief. For example, in its comments, AEP-Ohio asserted that:

> R.C. 4909.16 does not provide a valid legal basis for granting Ormet's request for emergency relief because the requested relief is not temporary in nature and is otherwise inappropriate under R.C. 4909.16 (and R.C. 4905.31), and the statute requires consent by the affected utility (and AEP Ohio does not consent to Ormet's proposed relief).[5]

On July 8, 2013, Ormet filed a motion seeking permission to file a consolidated reply to the comments which was granted by the Attorney Examiner's Entry issued July 11, 2013. On July 12, 2013, Ormet filed its reply.

Through the Entry issued July 11, 2013, the Attorney Examiner also denied the requested emergency relief. More specifically, the July 11, 2013 Entry states:

> With respect to Ormet's request for emergency relief pursuant to Section 4909.16, Revised Code, the attorney examiner notes that the Supreme Court of Ohio has cautioned the Commission that its power to grant emergency relief is extraordinary in nature. (citation omitted) Additionally, the Commission has historically exercised its emergency powers under the statute only in situations in which the financial integrity of a public utility is such that its ongoing ability to provide service is threatened, or where utility service is otherwise jeopardized. (citation omitted) Indeed, in reviewing emergency rate applications pursuant to Section 4909.16,

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[4] Rule 4901:1-38-05(B), Ohio Administrative Code ("O.A.C."), provides that a mercantile customer of an electric utility may apply to the Commission for a unique arrangement with the electric utility. Additionally, Rule 4901:1-38-05(F), O.A.C., provides that affected parties may file a motion to intervene, as well as comments and objections to any application filed under the rule, within 20 days of the date of the filing of the application.

[5] Ohio Power Company's Memorandum in Opposition to Ormet Primary Aluminum Corporation's Motion to Amend and Request For Emergency Relief at 2 (July 5, 2013).

> Revised Code, the Commission has often explained that the ultimate question for its consideration is whether, absent emergency relief, the public utility will be financially imperiled or its ability to render service will be impaired. (citation omitted) Such circumstances are not present in this case. The attorney examiner finds, therefore, that Ormet's request for emergency relief pursuant to Section 4909.16, Revised Code, should be denied.[6]

The July 11, 2013 Entry also finds, based on the comments and objections, that "… serious questions exist as to whether Ormet's application is just and reasonable…"[7] and directed that a hearing be held in accordance with a specified procedural schedule.

On July 15, 2013, Ormet filed an Interlocutory Appeal and Request For Oral Argument Before the Commission ("Appeal"). Asserting that the determination made in the July 11, 2013 Entry was not procedural,[8] the Appeal requests the legal director, deputy legal director, attorney examiner, or presiding hearing officer certify the appeal to the full Commission. In the Appeal, Ormet also requests that the Commission override the procedural determinations in the July 11, 2013 Entry and set an oral argument during the week of July 22, 2013 to allow the Commission to fully consider and resolve whether an emergency exists and whether Ormet's request for emergency relief should be granted.

The Appeal extracts one statement out of the July 11, 2013 Entry and then wrongly states that the extracted statement presents the novel or new question of law or policy that must exist before a party can maintain an interlocutory appeal. The extracted sentence (from a 5-page Entry) describes the historical limitation on relief

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[6] Entry at 3-4 (July 11, 2013).

[7] *Id*. at 4.

[8] Under Rule 4901-1-15(B), O.A.C., the legal director, deputy legal director, attorney examiner or presiding hearing officer can certify an interlocutory appeal regarding a procedural ruling.

under Section 4909.16, Revised Code, to situations in which the financial integrity of a public utility is severely threatened or public utility service is otherwise jeopardized. The Appeal asserts that it is this sentence that contains "… a novel and new interpretation of the Commission's emergency powers and departs from past precedent".[9]

From Ormet's precarious perch in Bankruptcy Court where AEP-Ohio is protesting Ormet's proposal to assign its current "unique arrangement," the Appeal also boldly and wrongly asserts that the July 11, 2013 Entry stands in the way of Ormet's (or its successor's) ability to resume full operations and maintain employment.[10]

The Appeal does not contest the July 11, 2013 Entry's finding, based on the objections and comments, that there are "… serious questions … as to whether Ormet's application is just and reasonable."[11] As observed above and not contested by the Appeal, Ormet's application (referred to herein as the Motion) requests both emergency and non-emergency relief. And, the comments and objections demonstrated that both branches of the requested relief raise serious questions about whether the emergency and non-emergency relief requested in Ormet's Motion are just and reasonable.

The Appeal does not contest the July 11, 2013 Entry's finding that it is necessary to file testimony, provide parties with opportunities to engage in discovery and hold a hearing in accordance with a specified procedural schedule to address the "serious questions" raised by Ormet's Motion as viewed from the perspective of the comments

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[9] Appeal at 1.

[10] The Appeal asserts that the July 11, 2013 Entry "… has the very real effect of, at a minimum, significantly reducing Ormet's operations to two operating lines within the next 30 days, or potentially forcing a complete shutdown of Ormet's operations before the results of the hearing are final." Appeal at 2.

[11] Entry (July 11, 2013) at 4.

and objections. Nonetheless, the Appeal asks the Commission to bypass the entire process set out in the July 11, 2013 Entry, determine that an emergency exists, determine that the emergency relief requested by the Motion is just and reasonable, and do all of this through an oral argument to be held next week.

For the reasons stated below, the Appeal is without legal and practical merit.

THE JULY 31, 2013 "DEADLINE" CHUTZPAH

Even if the one sentence in the July 11, 2013 Entry over which the Appeal obsesses did present a novel question of law or policy, the Appeal's claim that the Entry is responsible for the problems described in the Appeal is a false claim.

Since any emergency relief which the Commission might authorize would, based on Commission precedent,[12] be temporary and be granted only after a hearing in which the party seeking emergency relief satisfies high burdens of proof and persuasion, the July 11, 2013 Entry never had the potential of authorizing the requested emergency relief. In any event, no prudent successor to Ormet's operations would close an asset purchase deal contingent on permanent modifications to Ormet's unique arrangement as a result of the Commission temporarily modifying the unique arrangement (particularly where there is an uncontested finding that there are serious questions regarding the justness and reasonableness of such modifications). And, if as asserted in the Appeal, only the Commission can grant or deny emergency relief, the July 11, 2103 Entry's denial of emergency relief had no effect as a matter of law. If the Appeal

[12] The Commission's precedent related to the application of Section 4909.16, Revised Code, also suggests that any emergency relief that might be awarded must be subject to refund or reconciliation in the event the Commission ultimately determines that the level of relief granted on an emergency basis is unwarranted.

advances a correct proposition of law, Ormet is, as a matter of law, right where it was when it filed the Motion except that there is now a procedural schedule.

In the present context and given the narrow issue raised by the Appeal, granting the Appeal to determine if the July 11, 2013 Entry correctly describes the historical scope of the Commission's use of its authority under Section 4909.16, Revised Code, would be a meaningless concession to the Appeal's one-sentence obsession.

SINCE ORMET'S MOTION SEEKS RELIEF THAT MAY BE UNJUST OR UNREASONABLE, THE COMMISSION CANNOT RESOLVE CONTESTED ISSUES AND GRANT THE REQUESTED EMERGENCY RELIEF BY MEANS OF AN ORAL ARGUMENT

As explained above, the Appeal does not contest the July 11, 2013 Entry's finding, based on the objections and comments, that there are serious questions as to whether the emergency and non-emergency relief requests contained in Ormet's Motion are just and reasonable.

The Appeal does not contest the July 11, 2013 Entry's finding that it is necessary to file testimony, provide parties with opportunities to engage in discovery and hold a hearing in accordance with a specified procedural schedule to address the "serious questions" raised by Ormet's Motion. Indeed, the Appeal acknowledges that the requested "… emergency relief would impose additional costs upon AEP's other ratepayers or upon AEP itself."[13]

Nonetheless, the Appeal also contains an expedited relief request that challenges the Commission to bypass the procedural determinations made in the July 11, 2013 Entry and rule on the Motion's request for emergency relief. More

[13] Appeal at 7.

specifically, the Appeal asks the "… Commission to set an oral argument during the week of July 22, 2013 to allow the Commission to fully consider and resolve whether an emergency exists and whether Ormet's request for emergency relief should be granted."[14]

The Commission is a creature of statute and only has the authority delegated to it by the General Assembly (no citation necessary). In all contested proceedings, the Commission must make a complete record of the proceedings, including a transcript of all testimony and exhibits, and issue written opinions setting forth findings of fact and the reasons prompting the decisions.[15] All parties and intervenors shall be granted ample rights of discovery.[16]

An oral argument is just an argument. Holding an oral argument will not allow evidence to be introduced or allow cross-examination to be conducted. An oral argument cannot supply the complete record on which the Commission must rely to resolve contested issues. It is not a process by which parties can conduct discovery and holding an oral argument next week will effectively preclude any meaningful use of discovery tools. An oral argument during the week of July 22, 2013 or at any other time cannot satisfy generally applicable due process requirements or the specific statutory requirements that the Commission must satisfy to resolve contested issues in a proceeding in which the applicant is advancing proposals that may be unjust and unreasonable.

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[14] Appeal at 2.

[15] Section 4903.09, Revised Code.

[16] Section 4903.082, Revised Code.

Thus, even if the request for certification of an interlocutory appeal could be sustained, the other relief requested in the Appeal is unreasonable and unlawful.

CONCLUSION

IEU-Ohio is mindful of the effect of the large Commission-approved rate increases on customers of AEP-Ohio, including Ormet. Unlike Ormet, however, IEU-Ohio is continuing to contest the Commission's approval of these large unreasonable and unlawful increases. While IEU-Ohio is mindful of the root cause of the significant increase in Ormet's electric bill, it also appreciates the real effect of Ormet's Motion and the relief requested in the Appeal. The real effect of the relief requested in Ormet's Motion and Appeal is to further tax AEP-Ohio's customers with the rate increase burden that Ormet seeks, right or wrong, to avoid. It is ironic that not so long ago, Ormet successfully prosecuted a complaint which resulted in the Commission authorizing prodigal-Ormet's return to AEP-Ohio's service area. Ormet then claimed that it would be unable to resume operations absent a return to AEP-Ohio's service area (paying for electricity at the prices specified in the GS-4 standard service offer rate) and that continued closure of Ormet's plant would prolong the adverse effect on Ohio's economy.[17] In the end, Ormet is collaterally attacking the Commission's rate increase awards to AEP-Ohio as they may affect Ormet by the terms of the current unique arrangement. The relief that Ormet seeks would transfer the burden of AEP-Ohio's

[17] *In the Matter of Ormet Primary Aluminum Corporation and Ormet Aluminum Mill Products Corporation v. South Central Power Company and Ohio Power Company*, Case No. 05-1057-EL-CSS, Petition to Transfer Rights to Furnish Electric Service and/or Reallocate Certified Electric Service Territories; Complaint for Inadequate Service; Complaint for Unjust, Unreasonable and Discriminatory Proposed Rates at 8-9,13 (August 25, 2005).

higher electric prices from Ormet to the customers of AEP-Ohio. In this context, IEU-Ohio is compelled to protest Ormet's Motion and Appeal.

The assertion in Ormet's Appeal that Ormet's current unique arrangement does not preclude shopping beyond the now-concluded term of AEP-Ohio's first electric security plan ("ESP") appears to be correct. And, but for the large and non-bypassable increases that the Commission has allowed AEP-Ohio to flow into all electric bills, Ormet's present ability to shop might help Ormet solve its challenging puzzle while promoting the policies in Section 4928.02, Revised Code; policies that the Commission is obligated [pursuant to Section 4928.06(A), Revised Code] to effectuate. Among other reasons, the relief requested by the Motion and the Appeal may be unjust and unreasonable because it increases the delta revenue burden of customers,[18] ignores the opportunities available to Ormet to competitively source generation and transmission supply, and ignores the Commission's obligation to lawfully effectuate Ohio's pro-competitive policies.

[18] To the extent the Commission might wrongly grant any of the relief requested by Ormet on an emergency basis, the Commission must also make provision for reconciling the delta revenue burden imposed on AEP-Ohio's customers in the event the Ohio Supreme Court finds that the Commission acted unreasonably and unlawfully when it approved the large rate increases and non-bypassable charges that are embedded in AEP-Ohio's current ESP. Refunds and reconciliation provisions are common to the Commission's use of its emergency authority to adjust rates and charges.

For the reasons stated above and in IEU-Ohio's comments, it is IEU-Ohio's position that Ormet's Appeal, including the other relief requested therein, should be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Industrial Energy Users-Ohio's Memorandum Contra to Ormet Primary Aluminum Corporation's Interlocutory Appeal and Request for Other Relief* was served upon the following parties of record this 16th day of July 2013, *via* electronic transmission, hand-delivery or first class mail, postage prepaid.

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