

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**OHIO POWER COMPANY’S MEMORANDUM CONTRA ORMET PRIMARY
ALUMINUM CORPORATION’S APPLICATION FOR INTERLOCUTORY APPEAL**

On July 15, 2013, Ormet Primary Aluminum Corporation (Ormet) filed an Application for Interlocutory Appeal asking the Commission to reverse the Attorney Examiner’s July 11, 2013 Entry, which denied Ormet’s request for emergency relief under Section 4909.16. Ormet alleges that denial of its request for emergency relief presents a novel and new interpretation of the Commission’s emergency powers and departs from past precedent. For the reasons set forth below, Ohio Power Company (AEP Ohio) supports the Attorney Examiner’s decision that emergency relief is not appropriate in this instance, and the Commission should affirm the Attorney Examiner’s ruling.

- 1. 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).**

Ormet’s request for emergency relief relies upon R.C. 4909.16, which states in relevant part as follows:

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 cases of any emergency to be judged by the commission, it may temporarily 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.

(Emphasis added).

The Ohio Supreme Court has construed R.C. 4909.16 as vesting the Commission with broad discretionary powers in determining when an emergency exists and in tailoring an appropriate temporary remedy to meet the emergency. *See Cambridge v. Pub. Util. Comm.* (1953), 159 Ohio St. 88. But the court has also cautioned the Commission that its power to grant emergency relief is extraordinary in nature. *See Cincinnati v. Pub. Util. Comm.* (1948), 149 Ohio St. 570. Thus, in connection with Ormet's motion, the Commission must first address the threshold issue of whether the potential injury alleged by Ormet requires emergency relief to prevent injury to the public. Specifically, when the public injury alleged by Ormet is balanced against several millions of dollars of additional costs that are shifted to AEP Ohio ratepayers as a direct result of the relief Ormet seeks, the Commission may conclude granting the requested relief will cause – not prevent – “injury to the business or interests of the public.” Further, while Ormet claims (Motion at 3; Reply at 3; Application at 2, 6) that this entire set of issues needs to be resolved by July 31, 2013 and uses that as the basis for an emergency, the reality is that this is a self-imposed deadline and the proposed new owner can grant multiple 30-day extensions beyond this date under the terms of the “stalking horse” agreement filed with the bankruptcy court.¹

Even if the Commission determines that the alleged injury requires it to exercise its discretionary emergency power, Ormet will have the burden of proving an emergency exists and that action is necessary to protect the health, safety, and welfare of the public. *See Akron v. Pub.*

¹ The purchase agreement is attached as Exhibit A to AEP Ohio's July 5, 2013 Memorandum in Opposition. Section 4.03(h) in that agreement permits up to six 30-day extensions.

Util. Comm. (1948), 149 Ohio St. 347. The Commission has determined that economic hardship in a community does not necessarily equate to the level of an existing emergency requiring action necessary to protect the public. *See In the Matter of the Complaint of the Board of Education of the Cleveland City School District v. The Cleveland Electric Illuminating Company*, Case Nos. 91-2308-EL-CSS and 92-504-EL-CSS, Entry at p. 8 (July 2, 1992) (“The Board’s assertion that it has financial problems and that CEI is threatening to charge the schools under its tariffs do not provide sufficient grounds to find that an emergency situation exists to alter or amend CEI’s rates.”) Further, the Commission has stated that when exercising its discretion under the statute, “the existence of an emergency is a condition precedent to any grant of temporary rate relief [and] the applicant’s supporting evidence will be reviewed with strict scrutiny, and that evidence must clearly and convincingly demonstrate the presence of extraordinary circumstances which constitute a genuine emergency situation” to the public or the subject public utility. *See In the Matter of the Application of Akron Thermal, LP for an Emergency Increase in its Steam and Hot Water Rates and Charges*, Case No. 00-2260-HT-AEM, Opinion and Order at p. 3 (Jan. 25, 2001) (citing *Toledo Edison Co.*, Case No. 84-1286-EL-AEM (Feb. 19, 1985).

If the Commission considers invoking R.C. 4909.16 and examines that statute as a basis for authority, it should recognize that the relief Ormet requests exceeds what the Commission is authorized under the statute to grant. The Commission “may temporarily alter, amend, or, with the consent of the public utility concerned, suspend any existing rates.” R.C. 4909.16. The authorized relief is interim in nature and only for so long as needed to address the emergency. *See Akron Thermal* at 3 (“Finally, the Commission will grant temporary rate relief only at the minimum level necessary to avert or relieve the emergency.”) Ormet asks the Commission to act

on an emergency basis to shorten the term of its contract by three years and allow it to shop effective January 1, 2014. *See* Motion at 10. These are both very permanent forms of relief, and the Commission – as a creature of statute – is without statutory authority to grant this relief using R.C. 4909.16. Further, even a temporary suspension of rates requires consent of the public utility concerned, and the Company objects and does not consent on a temporary basis, let alone does it consent to the permanent effects of either permitting Ormet to shop or terminate the contract early. Contrary to Ormet’s argument (Reply at 11) that AEP Ohio has misinterpreted the consent provision of the statute, which is not the case, Ormet misses the point that the very permanent relief it seeks — to shorten the term of its contract by three years and allow it to shop effective January 1, 2014 on an emergency basis — is neither appropriate nor within the Commission’s power to grant, regardless of AEP Ohio withholding its consent as required under R.C. 4909.16.

Shortening the term of the contract by three years and allowing Ormet to shop effective January 1, 2014 also impairs AEP Ohio contract rights. Such permanent relief violates constitutional restraints against impairment of the obligations of contract and constitutional guarantees of due process. *See* U.S. Const. Art. I, § 10; U.S. Const. Amend. XIV, § 1; Ohio Const. Art. I, § 16; and Ohio Const. Art. II, § 28. In addition to lacking the authority to provide permanent relief under R.C. 4909.16, the Commission does not have the power to cancel a contract under R.C. 4905.31 either. When AEP sought to cancel a prior special arrangement with Ormet in the 1970s, Ormet successfully argued that the Commission lacked authority to cancel the special arrangement. The Commission stated, “The Commission must agree on this point. It is axiomatic that this Commission, as a creature of statute, has no powers beyond those conferred by statute.” *Akron v. Barberton Belt Rd. v. Pub. Util. Comm.* (1956), 165 Ohio St. 316

(1956). Considering this constraint in conjunction with that maxim of statutory construction, *expressio unius est exclusio alterius*, compels the conclusion that the absence of specific legislative reference to the remedy of cancellation in Section 4905.31 precludes this Commission from authorizing cancellation *in toto*.” *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 14-15 (Aug. 4, 1976).

Finally, because Ormet’s filing is a request for a unique arrangement request under O.A.C. Chapter 4901:1-38 (See June 27, 2013 Entry), there is no opportunity for emergency relief envisioned under those rules — which govern this proceeding. If the Commission had envisioned the potential exercise of R.C. 4909.16 in the context of O.A.C. Chapter 4901:1-38, it would have included some reference or process to accommodate such a request. But it did not and cannot now alter the operation of those governing procedural rules.

In sum, although the Commission has broad discretion when invoking its emergency powers and how it fashions temporary relief to address an emergency, it is unclear whether it is appropriate in this instance. It is clear, however, that the Commission can only provide temporary relief, assuming it finds there is an immediate emergency to address. Ormet’s request that the Commission shorten the term of its contract and allow it to shop exceeds the interim relief the Commission is authorized to provide. Moreover, AEP Ohio does not consent to such relief, thus, it cannot be granted under R.C. 4909.19. Nor can the Commission cancel the contract under R.C. 4905.31. Thus, the permanent relief Ormet seeks can only be obtained through mutual resolution of the issue, which will require that AEP Ohio’s financial concerns be addressed, or under Rule 4901:1-38-05(B)’s unique arrangement process outlined in the Attorney Examiner’s July 11 Entry.

2. The Attorney Examiner’s denial of Ormet’s request for emergency relief does not present a novel and new interpretation of the Commission’s emergency powers and a departure from past precedent.

In its effort to seek certification of this appeal, Ormet misrepresents the Attorney Examiner’s July 11 Entry. Ormet argues (pp. 7-10 of its Application) that the Attorney Examiner reads “prevent injury to the business or interests of the public” out of the statute by stating that the Commission has “historically exercised its emergency powers under Section 4909.16 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.” Entry at ¶ 10. The Attorney Examiner also notes that “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.” *Id.* Contrary to Ormet’s advocacy, these are accurate statements and the Attorney Examiner neither reads the public clause out of the statute nor creates a new interpretation of the Commission’s powers, which deviates from Commission precedent. Just the opposite. The Attorney Examiner is accurately describing what the Commission has “historically” and “often” done when faced with its power to grant this extraordinary relief. *See Cincinnati v. Pub. Util. Comm.* (1948), 149 Ohio St. 570.

CONCLUSION

For the reasons set forth above, AEP Ohio supports the Attorney Examiner's decision that emergency relief is not appropriate in this instance, and the Commission should affirm the Attorney Examiner's ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing document was served this 19th day of July, 2013 by electronic mail upon counsel listed below.

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Summary: Memorandum Ohio Power Company's Memorandum Contra Ormet Primary Aluminum Corporation's Application for Interlocutory Appeal electronically filed by Ms. Christen M. Blend on behalf of Mr. Steven T. Nourse and Ohio Power Company