

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) Case No. 09-119-EL-AEC
Ohio Power Company and Columbus)
Southern Power Company.)

ENTRY

The Commission finds:

- (1) Pursuant to Section 4905.31, Revised Code, the Commission has the authority to approve schedules for electric service upon application of a public utility or to establish reasonable arrangements for electric service upon application of a public utility and/or mercantile customer.
- (2) By opinion and order issued on July 15, 2009, the Commission modified and approved the amended application of Ormet Primary Aluminum Corporation (Ormet) for a unique arrangement with Columbus Southern Power Company and Ohio Power Company (jointly, AEP Ohio) for electric service to Ormet's aluminum-producing facility located in Hannibal, Ohio.¹
- (3) On October 12, 2012, Ormet filed a motion for expedited approval of payment deferral, pursuant to Section 4905.31, Revised Code, and Rules 4901-1-12(C) and 4901:1-38-05(B), Ohio Administrative Code (O.A.C). Specifically, Ormet sought approval of a modification to its unique arrangement with AEP Ohio, such that Ormet would be authorized to defer payment of its billed amounts for October and November 2012, which would otherwise be due in November and December 2012, respectively. Ormet proposed to pay the

¹ By entry issued on March 7, 2012, the Commission approved and confirmed the merger of Columbus Southern Power Company into Ohio Power Company, effective December 31, 2011. *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC.

deferred amounts over the 12 months of 2014 and the first five months of 2015 in equal monthly installment payments that are equal to 1/17, or 5.88235 percent, of the cumulative amount of the two bills.

- (4) By entry issued on October 17, 2012, the Commission granted Ormet's request for a deferred payment arrangement to the extent set forth in the entry, although the Commission also noted its concern regarding the financial risk being incurred by AEP Ohio's ratepayers and directed that any further relief requested by Ormet should be accompanied by a detailed business plan confirming Ormet's long-term ability to exist without ratepayer support.
- (5) On June 14, 2013, Ormet filed a motion to amend its unique arrangement with AEP Ohio and a request for emergency relief, along with a memorandum in support, pursuant to Sections 4905.31 and 4909.16, Revised Code, and Rules 4901-1-12 and 4901:1-38-05, O.A.C. Ormet seeks four amendments to the unique arrangement in the form of emergency relief, specifically requesting that (a) the duration of the unique arrangement be shortened by three years such that it would terminate at the end of December 2015; (b) payment of the remaining \$92.5 million in economic development discounts be advanced by three years such that the last monthly installments would be fully received by December 2014; (c) the prohibition on Ormet's purchase of power from a third-party supplier be eliminated as of the January 2014 billing cycle; and (d) the price for the generation component of the standard service offer electricity purchased by Ormet from AEP Ohio during 2013 be fixed at \$45.89 per megawatt hour, which was the amount billed to Ormet during the first quarter of 2013. Ormet also requests that the Commission affirm, in the emergency order, the assignment by Ormet of its interest in the amended unique arrangement to Smelter Acquisition LLC pursuant to Section 13.04 of the current unique arrangement. Finally, Ormet seeks approval of a number of other significant modifications to the unique arrangement, on a non-emergency basis, that Ormet believes will ensure sustainable, expanded long-term operations at its facility in Hannibal, Ohio. In its motion, Ormet emphasizes that the

requested relief is necessary to enable Ormet to emerge from a recent bankruptcy sale as a going concern and to continue its operations in Ohio.

- (6) Rule 4901:1-38-05(B), 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. In accordance with Rule 4901:1-38-05(F), O.A.C., 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. Additionally, Rule 4901:1-38-05(B)(3), O.A.C., provides that, upon the filing of an application for a unique arrangement, the Commission may fix a time and place for a hearing if the application appears to be unjust or unreasonable.
- (7) By entry issued on June 27, 2013, the attorney examiner found that, although Ormet's June 14, 2013, filing is posed to the Commission as a motion to amend Ormet's unique arrangement with AEP Ohio, Ormet's filing should be construed as an application for a unique arrangement under Rule 4901:1-38-05(B), O.A.C., given the nature and extent of the modifications requested by Ormet to the existing unique arrangement, and that the 20-day intervention and comment period specified in Rule 4901:1-38-05(F), O.A.C., should apply to affected parties. Accordingly, the attorney examiner determined that motions to intervene, as well as comments and objections from affected parties, should be filed by July 5, 2013.
- (8) On July 3, 2013, comments were filed by United Steelworkers District 1 (USW). On July 5, 2013, the Ohio Hospital Association (OHA); AEP Retail Energy Partners LLC d/b/a AEP Energy and AEP Energy, Inc. (collectively, AEP Energy); Industrial Energy Users-Ohio (IEU-Ohio); AEP Ohio; and the Ohio Consumers' Counsel (OCC) filed comments and/or objections.
- (9) In its comments, USW urges the Commission to approve Ormet's request for emergency relief so that Ormet can emerge from bankruptcy and avoid the severe financial

consequences that would otherwise result for Ormet's employees and retirees, as well as the surrounding community. OHA, however, argues that the Commission should deny Ormet's request, in light of the collective impact on all of AEP Ohio's customers, and adds that providing more ratepayer funds to Ormet may not enable it to achieve financial stability in the end. OHA points out that Ormet's current unique arrangement with AEP Ohio has been in place for nearly four years at a cost of hundreds of millions of dollars to AEP Ohio's other customers. Similarly, OCC emphasizes that Ormet's existing unique arrangement has resulted in unprecedented subsidies, with residential customers currently paying approximately \$3.00 per month in economic development subsidies, most of which flows to Ormet. OCC believes that Ormet has failed to demonstrate that its requested relief appropriately balances the interests of all customers.

- (10) Further, IEU-Ohio contends that Ormet's request for emergency relief is unlawful and unreasonable for several reasons, primarily because, if granted, it would increase the risk and expense to AEP Ohio's other customers by substantially increasing their delta revenue burden. IEU-Ohio adds that Ormet has failed to demonstrate that its current unique arrangement with AEP Ohio is not in the public interest or that modifications are warranted by extraordinary circumstances. AEP Ohio and IEU-Ohio both contend that Ormet is not entitled to emergency relief pursuant to Section 4909.16, Revised Code, because Ormet fails to meet the requirements of the statute, as well as the Commission's established criteria for awarding emergency rate relief. AEP Ohio also asserts that, because it does not consent to Ormet's requested relief, the request cannot be granted under the emergency statute, or consistent with bankruptcy law or the terms of the current unique arrangement. Additionally, AEP Ohio and IEU-Ohio encourage the Commission to undertake an evidentiary hearing process so that the Commission may carefully consider Ormet's request with the strict scrutiny that it requires.

- (11) On July 5, 2013, motions to intervene in this proceeding were filed by OHA, OMA Energy Group, and AEP Energy. No memoranda contra were filed. The Commission finds that the motions to intervene are reasonable and should be granted.
- (12) Section 4909.16, Revised Code, provides that, when the 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 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.
- (13) By entry dated July 11, 2013, the attorney examiner found that Ormet's request for emergency relief pursuant to Section 4909.16, Revised Code, should be denied and that a hearing on this matter should be held, consistent with Rule 4901:1-38-05(B)(3), O.A.C. The entry established a procedural schedule including an evidentiary hearing to commence on August 27, 2013.
- (14) On July 15, 2013, Ormet filed an interlocutory appeal of the attorney examiner's July 11, 2013, entry, pursuant to Rule 4901-1-15(B), O.A.C., requesting that the interlocutory appeal be certified to the Commission for consideration. Ormet also filed a request for oral argument before the Commission during the week of July 22, 2013, to allow the Commission to determine if an emergency exists and whether Ormet's request for emergency relief should be granted.
- (15) In its interlocutory appeal, Ormet requests that the Commission reverse the attorney examiner's July 11, 2013, entry denying Ormet's request for emergency relief. Ormet asserts that the entry is focused solely on the Commission's authority to protect public utilities and disregards the Commission's additional authority, under Section 4909.16, Revised Code, to take emergency action to prevent injury to the business or interests of the public. Ormet notes that the Supreme Court of Ohio has made clear that the Commission's

duty under the statute extends to protecting the public,² and has also upheld the Commission's consideration of emergency measures upon its own motion.³ Further, Ormet argues that an immediate determination by the Commission is necessary to prevent undue prejudice to Ormet, because failure to grant its request for emergency relief will result in substantial harm to Ormet and the public, in the form of several thousand lost jobs and hundreds of millions of dollars in lost wages, worker benefits, tax payments, and contributions to AEP Ohio's rate base.

- (16) IEU-Ohio and AEP Ohio filed memoranda contra Ormet's interlocutory appeal on July 16, 2013, and July 19, 2013, respectively.⁴ In its memorandum contra, AEP Ohio argues that, when the public injury alleged by Ormet is balanced against several millions of dollars in additional costs that would be shifted to AEP Ohio's other ratepayers as a direct result of granting the requested relief, the Commission may ultimately conclude that Ormet's requested relief would cause injury to the business or interests of the public. AEP Ohio adds that the Commission has already 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.⁵ AEP Ohio also points out that the Commission can only provide temporary emergency relief, assuming that it finds that an emergency exists. AEP Ohio contends that Ormet's request to shorten the term of its unique arrangement and to shop for a competitive supplier exceeds the interim emergency relief that the Commission is authorized to provide. For its part, IEU-Ohio points out that Ormet does not contest the attorney examiner's findings that Ormet's application raises serious questions as to whether it is

² *Cincinnati v. Pub. Util. Comm.*, 149 Ohio St. 570, 80 N.E.2d 150 (1948).

³ *Montgomery County Board of Comm'rs v. Pub. Util. Comm.*, 28 Ohio St. 3d 171, 503 N.E.2d 167 (1986); *Duff v. Pub. Util. Comm.*, 56 Ohio St. 2d 367, 384 N.E.2d 264 (1978).

⁴ On July 19, 2013, OCC filed a letter indicating that, although OCC would not be submitting a memorandum contra Ormet's interlocutory appeal, OCC does not concede or agree with Ormet's position.

⁵ *In the Matter of the Complaint of the Board of Education of the Cleveland City School District v. The Cleveland Electric Illuminating Company*, Case No. 91-2308-EL-CSS, *et al.*, Entry, at 8 (July 2, 1992).

just and reasonable and that an evidentiary hearing process is, therefore, necessary. IEU-Ohio also notes that Ormet has acknowledged that its requested emergency relief would impose additional costs on AEP Ohio or its other customers. IEU-Ohio concludes that the Commission should reject Ormet's appeal and its unreasonable request to increase the delta revenue burden of AEP Ohio's customers.

- (17) By entry issued on July 25, 2013, the attorney examiner certified Ormet's interlocutory appeal to the Commission pursuant to Rule 4901-1-15(B), O.A.C., and denied Ormet's request for oral argument.
- (18) The Commission finds that the attorney examiner's July 11, 2013, entry, which denied Ormet's request for emergency relief pursuant to Section 4909.16, Revised Code, should be affirmed. As the attorney examiner properly found, the Commission has historically relied upon its emergency powers under Section 4909.16, Revised Code, only in situations in which the financial integrity of a public utility, or the service of a public utility, is threatened. The Commission has often stated that the ultimate question for consideration, in deciding whether emergency relief is warranted, is whether the public utility will be financially imperiled, or whether the ability of the public utility to render service will be impaired,⁶ and we have been mindful of the fact that our power to grant emergency relief is extraordinary in nature.⁷ Although the Commission has traditionally exercised its emergency powers in cases initiated at the request of a public utility, we recognize that Section 4909.16, Revised Code, also authorizes the Commission to act where we deem it necessary to prevent injury to the business or interests of the public. Ormet asserts in its interlocutory appeal that failure to grant its request for emergency relief will result in substantial harm to the public. However, the financial distress of a single non-utility

⁶ See, e.g., *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, et al., Opinion and Order, at 6 (September 2, 2009); *In the Matter of the Application of Akron Thermal, Limited Partnership for an Emergency Increase in its Steam and Hot Water Rates and Charges*, Case No. 00-2260-HT-AEM, Opinion and Order, at 3 (January 25, 2001).

⁷ *Cincinnati v. Pub. Util. Comm.*, 149 Ohio St. 570, 80 N.E.2d 150 (1948).

company such as Ormet does not rise to the level of an emergency under Section 4909.16, Revised Code, necessitating Commission action to protect the business or interests of the public.⁸ The Commission must consider and balance the interests of AEP Ohio and all of its ratepayers, and cannot elevate the interests of one party without first prudently and precisely considering the impact on the others.

- (19) Further, Section 4909.16, Revised Code, does not provide a means for a non-utility company to seek emergency relief, on its own behalf, by invoking the business or interests of the public, and, in any event, we are concerned that Ormet's interpretation would open the door for any non-utility company experiencing financial hardship to seek emergency rate relief under the statute. Rather, the proper course of action is for Ormet to apply to the Commission for approval of a reasonable arrangement with AEP Ohio, and for the Commission to proceed, in accordance with Section 4905.31, Revised Code, and Rule 4901:1-38-05(B), O.A.C. Rule 4901:1-38-05(B)(3), O.A.C., provides that the Commission may fix a time and place for a hearing if the application for a unique arrangement appears to be unjust or unreasonable. As stated in the attorney examiner's July 11, 2013, entry, the other parties to the proceeding have raised serious questions as to whether Ormet's application is just and reasonable. Accordingly, the Commission finds that a hearing on this matter should be held in accordance with the procedural schedule established in the attorney examiner's July 11, 2013, entry, and that Ormet's interlocutory appeal should be denied.

It is, therefore,

ORDERED, That the motions to intervene filed by OHA, OMA Energy Group, and AEP Energy be granted. It is, further,

⁸ *In the Matter of the Complaint of the Board of Education of the Cleveland City School District v. The Cleveland Electric Illuminating Company*, Case No. 91-2308-EL-CSS, *et al.*, Entry (July 2, 1992) ("The Board's assertion that it has financial problems and that [the utility] 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 [the utility's] rates.").

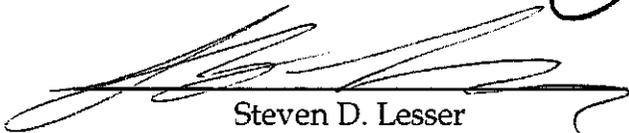
ORDERED, That Ormet's interlocutory appeal of the July 11, 2013, entry be denied. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

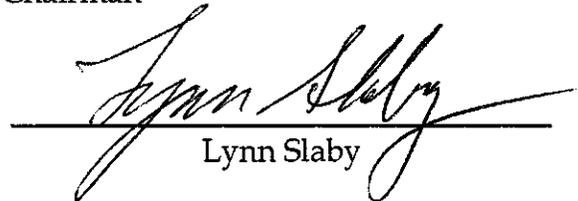
THE PUBLIC UTILITIES COMMISSION OF OHIO



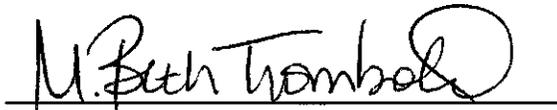
Todd A. Spitchler, Chairman



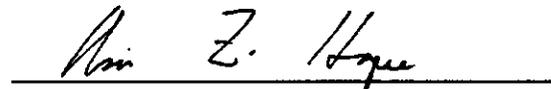
Steven D. Lesser



Lynn Slaby



M. Beth Trombold

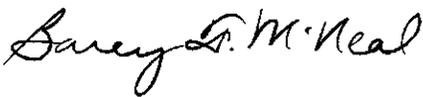


Asim Z. Haque

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JUL 31 2013



Barry F. McNeal
Secretary