

**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)	

**OHIO POWER COMPANY’S MEMORANDUM CONTRA ORMET PRIMARY
ALUMINUM CORPORATION’S MOTION FOR PAYMENT DEFERRAL**

One day after the Commission denied Ormet Primary Aluminum Corporation’s (Ormet) interlocutory appeal of the Attorney Examiner’s denial of Ormet’s request for emergency relief, Ormet turned to the next page in its playbook, which was to file a motion for expedited approval of a payment deferral. Specifically, Ormet seeks to defer payment of its electricity bills for usage beginning in July 2013 until this proceeding is concluded. Ohio Power Company (AEP Ohio) estimates Ormet’s August bill (for July usage) to be approximately \$8.1 million and its September bill (for August usage) to be between \$2.6 - \$4.4 million, depending on how quickly Ormet can ramp down the two potlines as it has indicated it will suspend.¹ Of course, the actual request for relief in Ormet’s motion seeks deferral of “its payment obligations on AEP Ohio bills rendered in August and September (and any others due before the Commission decides the June 14, 2013 Motion).” Thus, the true cost of the requested relief could actually be much higher, depending on the timing of a merit decision in this case. Ormet also fails to provide any details about how the reduced number of employees would otherwise affect their discount (the contract requires Ormet to maintain 600 employees in order to maintain its current discount), though the

¹ These amounts are net of the \$5.5 million monthly discount being received by Ormet under the existing unique arrangement, which discounts would otherwise be depleted for 2013 at the end of August usage (September bill).

requested relief sidesteps that issue by asking for permission to make no further payments to AEP Ohio while the Commission considers the merits of Ormet's larger requests. AEP Ohio submits that the Commission should deny Ormet's attempt to circumvent the Commission's rulings to date; granting the requested relief would foist additional financial exposure on AEP Ohio and financial burden on ratepayers – especially in light of Ormet's admitted impending shut down absent immediate and long-term ratepayer support.

More importantly, the relief requested by Ormet seeks to improperly modify an existing and final bankruptcy court order regarding security in the bankruptcy proceeding, and this Commission has no jurisdiction to modify that order. Specifically, Ormet's promise to pay bills sent by AEP Ohio as they come due is the security Ormet was required to "post" under Federal law in order to proceed in bankruptcy. AEP Ohio and Ormet agreed to this arrangement and it was evidenced by a final Order in the Bankruptcy. There are procedures set forth in the Bankruptcy Code that Ormet must follow in order to change the final Order and only the bankruptcy court judge can order this relief.

I. The PUCO Does Not Have Jurisdiction To Consider Ormet's Request To Modify The Terms Of An Agreement That Ormet Reached With AEP Ohio Pursuant To Section 366 Of The Bankruptcy Code That Is Evidenced By A Bankruptcy Court Final Order.

Ormet's request to the Commission to modify its payment schedule is an improper attempt to change a bankruptcy court order. As stated previous, Ormet's promise to pay AEP Ohio's bills as they come due was the "adequate assurance of payment" required under the Bankruptcy Code in order for Ormet to comply with the requirements of Section 366 of the Bankruptcy Code. As long as Ormet remains in bankruptcy, the bankruptcy court has exclusive jurisdiction over the security Ormet must provide to AEP Ohio, which in this case concerns its payment terms to AEP Ohio.

Section 366 of the Bankruptcy Code governs the post-petition security that a debtor in bankruptcy must provide to its utility companies in order to proceed with any bankruptcy. In deciding the post-petition security that a utility company is entitled to from a debtor in bankruptcy, the bankruptcy judge is governed only by federal bankruptcy law and not by any state proceeding, regulation or tariff. *See In re Adelpia Business Systems Solutions, Inc.*, 280 B.R. 63, 80 (Bankr. S.D.N.Y. 2002); *Lloyd v. Champaign Tel. Co.*, 52 B.R. 653, 656 (Bankr. S.D. Ohio 1985). *In re Marion Steel Co.*, 35 B.R. 188, (Bankr. N.D. Ohio 1983), the bankruptcy court for the Northern District of Ohio stated that it alone had the right to set what it considers to be adequate assurance of payment, without regard to the Public Utilities Commission of Ohio rule regarding deposits (*at 199*). Thus, the payments Ormet seeks to alter cannot be altered in any state proceeding and the Commission has no jurisdiction to do so while Ormet is in bankruptcy.

Ormet was the one who proposed that its timely payments to AEP Ohio constitute its adequate assurance in the bankruptcy. On February 26, 2013, Ormet filed *Debtors' Motion For Authority Pursuant To Sections 363, 366 and 105(a) Of The Bankruptcy Code (I) Prohibiting Utility Services Providers From Altering, Refusing, Or Discontinuing Service; (II) Authorizing Payment Of Certain Pre-Petition Claims Of Certain Utility Providers As Part Of Adequate Assurance Payments; (III) Deeming Utilities Adequately Assured Of Payment; And (IV) Establishing Procedures For Determining Adequate Assurance Of Payment* (the "Utility Motion") with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") seeking to avoid providing AEP Ohio with post-petition cash security deposit during Ormet's bankruptcy proceeding. AEP Ohio and Ormet reached an agreement with respect to the Utility Motion, which was evidenced by a *Final Order For Authority Pursuant To Sections 363,*

366 and 105(a) Of The Bankruptcy Code (I) Prohibiting Utility Services Providers From Altering, Refusing, Or Discontinuing Service; (II) Authorizing Payment Of Certain Pre-Petition Claims Of Certain Utility Providers As Part Of Adequate Assurance Payments; (III) Deeming Utilities Adequately Assured Of Payment; And (IV) Establishing Procedures For Determining Adequate Assurance Of Payment entered by the Bankruptcy Court on March 20, 2013 (the “Final Utility Order”) [Docket No. 135], attached as Exhibit A. In the Final Utility Order, Ormet agreed to provide AEP Ohio with the following as adequate assurance of payment under Section 366 of the Bankruptcy Code:

- A. Tender payment to AEP Ohio in the amount of \$6,403,598.98, which was the final prepetition balance owed by Ormet to AEP Ohio, aside from the prior deferral amount;
- B. Tender payment to AEP Ohio in the amount of \$797,709.47, which was the post-petition balance of the invoices for February 2013 charges;
- C. Pay AEP Ohio’s post-petition utility charges on or before the applicable due date of the invoice; and
- D. Ormet agreed to waive certain bankruptcy claims against AEP Ohio.

(emphasis added)

Ormet’s agreement to pay AEP Ohio’s post-petition utility charges on or before the applicable due date was a material part of the agreement between AEP Ohio and Ormet. It constitutes Ormet’s security in the bankruptcy, and can only be altered by application to the bankruptcy court, not the Commission. If Ormet wants to modify the adequate assurance of payment agreement that it reached with AEP Ohio, which is evidenced by the Final Utility Order, Ormet must file a motion pursuant to Section 366(c)(3) of the Bankruptcy Code in the bankruptcy court, not with the Commission.

Accordingly, the Commission should deny Ormet's motion for a payment deferral because the Bankruptcy Court has exclusive jurisdiction over this matter pursuant to Section 366 of the Bankruptcy Code.

II. Even if Ormet were not in bankruptcy and the Commission had jurisdiction, Ormet's "Motion" Is Procedurally Deficient And Should Be Denied.

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 sought four amendments to the contract in the form of emergency relief and other significant modifications on a non-emergency basis, including a request that the Commission approve the assignment by Ormet of its interest in the amended unique arrangement to Smelter Acquisition LLC under Section 13.04 of the contract. Ormet stressed in its filings that it needed the amendments immediately to emerge from a recent bankruptcy sale as a going concern and to continue its operations in Ohio.

By entry dated June 27, 2013, the Attorney Examiner found that, although Ormet's June 14, 2013 filing was 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 a comment period was conducted in accordance with the rule.

AEP Ohio, IEU-Ohio, and OHA filed comments highlighting that Ormet's request for emergency relief (among other relief) is unlawful and unreasonable for multiple reasons. By

entry dated July 11, 2013, the Attorney Examiner denied Ormet's request for emergency relief and set a procedural schedule consistent with Rule 4901:1-38-05(B)(3), O.A.C. On July 15, Ormet filed an interlocutory appeal, which the Commission denied on July 31. Thus, the Commission's process for conducting this proceeding under Chapter 4901, O.A.C., is running its proper course.

A. Commission should reject Ormet's attempt to circumvent its process.

Even if the Commission had jurisdiction to alter Ormet's payment arrangement agreed to in the bankruptcy court, there is no statute, administrative rule or legal basis that permits Ormet to file a separate request for amendment relief merely by styling the request as a "motion for expedited approval." The Commission has already determined that the appropriate process for Ormet's amendment requests is under Rule 4901:1-38-05(B), O.A.C. Moreover, Ormet has already been afforded the opportunity to make its arguments concerning the urgency of its cause, which culminated in the Commission's recent denial of Ormet's interlocutory appeal. It is inappropriate and procedurally deficient for Ormet to either repackage an existing amendment request or to make yet another request in the form of an expedited motion.

The present "motion" is akin to another application to amend its unique arrangement with AEP Ohio as that is precisely the relief Ormet seeks: to modify Section 6.04 of the agreement and defer payments otherwise required under the contract. Under the applicable rules, the Commission could interpret this filing as a new application, thus triggering a fresh comment cycle and/or hearing process. Thus, the "motion" should be denied, and the payment deferral request should be considered with the other significant changes Ormet seeks to its unique arrangement under Rule 4901:1-38-05(B), O.A.C., and pursuant to the Attorney Examiner's July

11, 2013 Entry. The parties should, instead, focus on the upcoming evidentiary hearing and briefing – in order to facilitate an expedited decision by the Commission.

B. The Waiver Requests Should Be Denied.

Ormet seeks approval of a unique arrangement under Section 4905.31. Rule 4901:1-38-05 (B)(1), O.A.C., states: “Each customer applying for a unique arrangement bears the burden of proof that the proposed arrangement is reasonable and does not violate the provisions of sections [4905.33](#) and [4905.35](#) of the Revised Code, and shall submit to the commission and the electric utility verifiable information detailing the rationale for the arrangement.” Subsection (B)(2) continues, “The customer shall provide an affidavit from a company official as to the veracity of the information provided.” These are the only things required in the instance where a mercantile customer – like Ormet – seeks approval of a unique arrangement under Section 4905.31.

Ormet’s motion asks (at p. 2) for a waiver of this requirement.

Aside from raising a serious red flag for why an Ormet official did not verify the information provided in the “motion” at the time of filing, seeking waiver of this singular requirement is like asking the Commission to waive or defer its burden of proof (and to do so on an expedited basis). This request is completely unwarranted, which likely explains why Ormet provides no basis for it other than to say that it will file the necessary affidavits by August 7, 2013. Moreover, there are important questions that arise in light of the motion that are unanswered because of the lack of affidavits. What is Ormet’s current cash flow situation? Can it afford to make any of the payments? How does deferral of the payments affect the business plan already filed with the Commission? How do the layoffs affect the employee commitments in the existing agreement? How will repayment of the deferred payments affect Ormet’s cash flow? Were Ormet’s officers not available to sign affidavits to support this important filing for

the Company? Are the payment deferrals permitted under the bankruptcy orders? Would it be cheaper for Ormet to temporarily shutdown and have ratepayers to fund a restart of Ormet's operations later if the proposed amendments are adopted?

Offering a confusing alternative, Ormet says it will file affidavits a week after filing the motion. Of course, since Ormet's motion sought expedited relief, the parties (including AEP Ohio) get seven days to respond under OAC 4901-1-12(C). Apparently, Ormet expects to shore up its burden of proof on these important questions at the same time the other parties are required to respond to its motion. That approach is unfair and inefficient. To the extent the Commission grants Ormet's misguided affidavit waiver request, it should grant the other parties an opportunity to also bifurcate their responses – by giving the parties an additional period of time to respond to the affidavits.

Ormet also asks for a waiver of Rule 4901:1-38-05 (F), O.A.C., which allows intervening parties to file comments and objections within 20 days of when the application is filed. Similar to its original June 14, 2013 filing, Ormet argues that the emergency nature of the relief warrants an abbreviated process. The Attorney Examiner and Commission rejected Ormet's rushed approach in the past, and for the same reasons it should do so again. The rules prescribing the process for consideration of unique agreements were created for a good reason, and an alleged non-verified financial crisis of a utility customer is not a sound basis for acting outside of the Commission process, especially when doing so exposes AEP Ohio and its ratepayers to additional financial risk without a clear justification.²

² AEP Ohio assumes Ormet would likely also want a waiver to Rule 4901:1-38-05 (B)(3), O.A.C., which provides the Commission discretion to set a hearing if an application appears to be unjust or unreasonable. Such a request should be denied for the same reasons stated above.

In sum, the Commission should reject Ormet's attempt to circumvent the process for consideration of the new unique arrangement Ormet seeks with AEP Ohio, and the Commission should deny Ormet's request for waiver as Ormet has not stated any valid reasons for the Commission to waive under 4901-1-38(B) the only requirement – and, in effect, Ormet's burden of proof – under Rule 4901:1-38-05(B), O.A.C.

III. It Is Not Prudent For The Commission, AEP Ohio, And Ratepayers To Take On This Escalation Of Financial Risk. If the Commission does allow deferred payments, it should provide for a carrying charge to AEP Ohio for recovery of its weighted average cost of capital.

Ormet has not described how the payment deferral furthers the policy of the State of Ohio or the public interest generally, and it would be hard pressed to do so. Ormet is asking the Commission, the Company, and the ratepayers to throw good money after bad. Through its pleadings in this docket Ormet has made it clear that without the emergency relief that it sought – and did not receive – it would not be able to pay its bills as of July 31, 2013.³ Now Ormet brazenly asks the Commission, AEP Ohio, and AEP Ohio ratepayers to forget what Ormet said when it sought emergency relief and instead permit Ormet to defer payment until the Commission rules on the new unique arrangement, which Ormet assumes it will be successful in

³ At page 6 of its Application for Interlocutory Appeal, Ormet states, “Ormet is facing an imminent liquidity crisis and will not be able to access additional capital to continue operations unless the emergency relief is granted before July 31, 2013. Ormet needs a cash infusion of more than \$1 million by the end of July in order to continue operations and an infusion of more than \$13 million by the end of August. The Wayzata Entities are prepared to provide additional capital to Ormet in connection with closing the sale between the Purchaser and Ormet only if the emergency relief is granted. Having provided \$30 million to Ormet since February of this year to fund operating losses and bankruptcy administrative expenses, the Wayzata Entities will not provide additional capital to Ormet without reasonable assurance that Ormet's energy costs will be rationalized. Thus, the proposed amendments to the unique arrangement were divided into two parts in order to ensure the most time-sensitive elements of the plan were approved before the critical July 31 deadline: a request for emergency relief to be addressed by July 31, 2013, and a request for non-emergency relief, which is equally important, but not as time sensitive. The July 11, 2013 Entry (“Entry”), however, denied Ormet's request for emergency relief, and instead set a procedural schedule governing all of the requested modifications that culminates in an August 27, 2013 evidentiary hearing. The Entry forecloses any possibility of putting a solution into place until sometime in September -- well past the deadline for Ormet obtaining the cash infusions necessary to continue its operations. The Entry therefore 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.”

not only obtaining the arrangement but also emerging from bankruptcy. There is no justification, however, for taking on this escalation in financial risk. AEP Ohio is not interested in taking on additional financial risk or elevating the tab to be covered by ratepayers – it has already carried the October and November 2012 billings without recovery of a carrying charge and subject to limited ratepayer backup of only \$20 million. Deferring the payments will only increase the delta revenue to be paid by the ratepayers, should Ormet fail or default. AEP Ohio submits that if Ormet is saying it can no longer afford to pay its bills while the Commission gives its application expedited consideration, the Commission should not add financial risk for AEP Ohio and additional financial burden to ratepayers.

The Commission fully understands the financial risk associated with approving a payment deferral. When the Commission approved a limited payment deferral in October 2012, it voiced its valid concerns and warned Ormet that the payment deferral was a limited fix and that it wanted Ormet to focus on its long-term ability to exist without ratepayer support. At pages 3-4 of its October 17, 2012 Entry (emphasis added), the Commission stated:

The Commission finds that the relief granted is a sufficiently reasonable and properly constrained means to address Ormet's cash flow problem, while considering the interests of AEP-Ohio and its other ratepayers. We emphasize that the relief granted to Ormet is limited to approval of the deferral of no more than the two payments specified in this entry, and should not be extended to other payments. Although the Commission grants Ormet's request for payment deferral, we are concerned by the financial risk being incurred by AEP-Ohio's ratepayers, and find that the recent history of cases involving Ormet's generation prices is relevant and must be recognized.

Further, the Commission noted that it “expects that any further relief requested by Ormet will be accompanied by a detailed business plan confirming its long-term ability to exist without ratepayer support.” Id. at 4. Here, contrary to the Commission's direction, Ormet has repeatedly

stated in its pleadings that it will not be a viable ongoing entity (short term or long term) without significant ratepayer support – even more than the current record level support where \$54 million has not been enough. And its current request for ratepayer support follows in the wake of its recent filings where it concedes it does not have any money to pay its bills as of July 31, 2013. Ormet’s motion for an additional payment deferral is without merit, contrary to the Commission’s October 17, 2012 Entry, and against public interest both in terms of Ormet’s inability to demonstrate any ability to exist without ratepayer support and because of the increased financial risk the deferral request places on AEP Ohio and its ratepayers. If the Commission does allow deferral of some amount of the payments due, it should provide for a carrying charge by AEP Ohio to recover its weighted average cost of capital.

Ormet states (at p.1) and repeats (at p.3) that its request will not impose new costs on ratepayers. But the truth of this representation depends on whether Ormet not only pays the prior deferred payments but also repays the current payments it seeks to defer (because unpaid bills upon a default by Ormet are considered delta revenue and the ratepayers are responsible for payment of those amounts). In this regard, Ormet only agrees to repay the deferred payments if the closing with Smelter Acquisition, LLC closes – which is dependent upon the Commission granting all of the relief sought in the June 14 motion to amend. Thus, Smelter Acquisition (and its financier, Wayzata) are attempting to “strong arm” the Commission into granting the same type of relief the Commission just refused to do in denying the emergency rate relief request. Unless the Commission is willing to presume now that it will eventually grant all of the requested relief after hearing and briefing on the issues, it cannot conclude that the deferred payments will be paid back or that the deferred payments is in the ratepayers’ best interests.

CONCLUSION

For the reasons set forth above, the Commission should deny Ormet's motion. If the Commission does, however, permit deferred payment of some of the payments due, it should provide for a carrying charge to recover AEP Ohio's weighted average cost of capital.

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 6th day of August, 2013 by electronic mail upon counsel listed below.

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