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	**))))**	**Case No. 09-119-EL-AEC**

<u>OHIO POWER COMPANY'S POST HEARING BRIEF</u>

I. INTRODUCTION

On June 14, 2013, Ormet Primary Aluminum Corporation (Ormet) filed a motion to amend its 2009 unique arrangement (Contract) with Ohio Power Company (AEP Ohio or Company). This request is the latest chapter in the Ormet saga, which has ranged from Ormet being an AEP Ohio customer for several decades (Tr. II, p. 249), to Ormet petitioning the Commission and becoming a part of South Central Power Company service territory (Tr. II, p. 249-250), to Ormet then returning to AEP Ohio's certified service territory (Tr. II, p. 253), to the Commission approving the existing Contract that requires AEP Ohio -- over AEP Ohio's objection at the time -- to be Ormet's exclusive electric supplier (Tr. II, p. 257-258), to Ormet now wanting to shop while contemporaneously increasing its record breaking $335 million in assistance from AEP Ohio ratepayers.[1]

Unfortunately, as the Commission, Company, and rate payers pivot yet again to react to Ormet's business plan *du jure*, Ormet is not any closer to becoming a self-sufficient, long-term, on-going concern, even with the significant public support it receives. In fact, the current request

[1] Tr. II, p. 260 - Ormet Witness Fayne admits that he is not aware of any company in Ohio currently receiving a larger ratepayer subsidy; Tr. II, pp. 293, 304 – Fayne confirms that Ormet seeks the ability to shop while continuing to receive expanded discounts.

is being considered in the context of a threat by the purchaser of Ormet's assets in the United States Bankruptcy Court, Smelter Acquisition LLC, which is an affiliate of Wayzata Investment Partners LLC, that it will walk away from the sale absent the Commission's prompt approval of Ormet's request – even while the successor proposes to build a new power plant at the Hannibal facility in record time, even though the plant is already "at risk and behind schedule" according to Ormet's own witness. (Tr. I at 91; Tr. II, p. 263). Thus, the Commission once again is presented with several options – none of which are attractive.

The Company does not take a position regarding the merits of Ormet's request, as it recognizes that the level of additional assistance set forth in the request is an issue for the Commission to decide. (Tr. II, p. 432). Rather, the Company seeks to assist the Commission by identifying the financial impacts to the Company and ratepayers associated with the potential relief options the Commission may consider. (*Id.*). Consistent with the Commission's ultimate decision regarding Ormet's request, Ohio law requires that AEP Ohio be made whole as a result of the new unique arrangement. Specifically, Section 4905.31(E), Ohio Rev. Code, provides that electric light companies "recover costs incurred in conjunction with any economic development and job retention program of the utility within its certified territory, including recovery of revenue foregone as a result of any such program . . . ." If the Commission deems a modification to the Contract is warranted, any such modification should provide for full delta revenue recovery recognizing that the costs that were incurred in good faith by the Company under the Contract and, if the Commission allows Ormet to shop, it should implement an appropriate contract termination fee as proposed by the Company.

II. ARGUMENT

A. Existing Arrangement and Ormet's proposed changes

Under the Contract, AEP Ohio agreed to furnish to Ormet and Ormet agreed to take from AEP Ohio all of the electric energy to meet Ormet's requirements up to 540 MW through December 31, 2018. (AEP Ohio Ex. 1 at Articles 2.01, 2.02 and 4.0; AEP Ohio Ex. 2, p. 3). Ormet purchases its entire requirements from AEP Ohio with 50% of the usage initially priced at Columbus Southern Power rate zone Schedule GS-4 rates and 50% of the usage initially priced at Ohio Power rate zone Schedule GS-4 rates (AEP Ohio Tariff Rate). (AEP Ohio Ex. 1 at Articles 1.01; AEP Ohio Ex. 2, p. 3). Further, the Contract provides for a discount or premium to the AEP Ohio Tariff Rate based upon Ormet specific factors such as cash flow and legacy costs and the London Metals Exchange (LME) price for high grade aluminum. (AEP Ohio Ex. 1 at Articles 1.02, 1.03, 1.04, 1.13, 1.16, 1.17, 1.23, 5.03, 5.05, 5.07, 5.08, 5.09 and 6.01 relate to 2012 through 2018, additional Articles address specifics related to 2009, 2010 and 2011; AEP Ohio Ex. 2, p. 3). Under the Contract, the Maximum Rate Discount was limited as follows:

Year	Maximum Rate Discount
2010	$60 million
2011	$60 million
2012	$54 million
2013	$44 million
2014	$34 million
2015	$24 million
2016	$14 million
2017	$ 4 million
2018	$ 0 million

To date, Ormet has received the maximum rate discount each year, and the LME price has never been high enough to invoke the Contract provisions wherein Ormet would pay a premium above the AEP Ohio Tariff Rate. (AEP Ohio Ex. 2, p. 4). In fact, Ormet's Indexed Rate under the

existing Contract[2] has shown that due to the low LME prices Ormet has needed free electricity since March 2013 in order to sustain its operations and pay its required legacy costs. (*Id*.). Further, the discount funding Ormet proposes for 2013 and 2014 exceeds Ormet's estimated total annual payroll. (*Id*.).

In its June 14, 2013 filing, Ormet proposes the following changes to the Contract:

1. Shorten the term of the contract by 3-years to end December 31, 2015.

2. Fix the annual generation price for calendar 2013 at $45.89 /MWh before discounts.

3. Allow Ormet to select a CRES Provider for service commencing on January 1, 2014.

4. Increase the annual discount for 2013 to $66 million and increase the annual discount for 2014 to $54 million.

5. Assign the modified Contract to Smelter Acquisition LLC.

6. Provide a discount of $4.5 million per month in January through May 2015.

7. Provide a shopping credit of $9 /MWh through May 31, 2015 on usage for potlines 5 and 6, should they be restarted – anticipated no earlier than July 1, 2014.

8. Pay the deferred bills for October and November 2012 usage over the 24 months January 2014 through December 2015.

9. Establish new LME target prices for 2013, 2014 and the first five months of 2015.

10. Provide a shopping credit of $6 /MWh during any portion or all of the June 1, 2015 through December 31, 2015 period on Ormet's entire usage if Ormet's proposed power plant is not in full operation due to weather, regulatory, financial or other factors outside the control of Ormet.

[2] AEP Ohio Ex. 2 at Article 1.13 provides the formula for determining what Ormet could pay that would produce sufficient cash flow to sustain its operations at the Hannibal Facilities and to pay its required legacy costs.

In addition, Ormet filed with the Commission a confidential business plan and detailed construction plan associated with the construction of an on-site power plant that will support the ongoing operation of the Ormet facility. (AEP Ohio Ex. 2, p. 5).

AEP Ohio witness Mr. David M. Roush calculates the total cost of Ormet's proposal is $237 million dollars, which is a $117 million dollar incremental increase from the current Contract. (AEP Ohio Ex. 2 at Exhibit DMR-2). Further, Ormet Witness Fayne admits that the proposed payment deferral requests would add cost - beyond the $19 million Mr. Roush identifies in DMR-2 - to AEP Ohio. (Tr. II, p. 265).

Because the cost impacts of Ormet's requested amendments and potential remedies differ based on whether the Commission permits Ormet to shop, the first issue for the Commission to decide is whether Ormet can shop. As discussed below, the history of this proceeding clearly shows that Ormet should not be permitted to shop.

B. The Commission, the Supreme Court of Ohio and Ormet itself have all emphatically determined Ormet would not be permitted to shop during the term of the existing contract and it would be unlawful and unreasonable to reverse that determination now after AEP Ohio acted in reliance on that unequivocal assurance by the Commission and the Court.

On February 17, 2009 Ormet filed an application for approval of a unique arrangement with AEP Ohio.[3] AEP Ohio did not join Ormet in filing the application, but did move to intervene on February 27, 2009. Although AEP Ohio's motion to intervene expressed general support for Ormet's initial proposal in this proceeding, it conditioned the support upon full recovery of revenues foregone as a result of the discount from tariff rates. (February 27, 2009 Motion of AEP Ohio to Intervene at 2). One of the provisions in the arrangement proposed by

[3] Historically, Ormet received service from the joint service territory of Columbus Southern Power Company and Ohio Power Company and, since the 2011 merger of the two companies, 50% of Ormet's load is billed under CSP rate zone and 50% under Ohio Power rate zone.

Ormet (Article 2.01) was for AEP Ohio to be the exclusive supplier to Ormet during the 10-year term of the arrangement. (July 15, 2009 Opinion and Order at 13; Power Agreement at Article 2.03). AEP Ohio argued against adoption of this provision, as violating the policy of the State of Ohio and the fundamental notion of customer choice embodied in SB 3 and SB 221.

Over AEP Ohio's objections, the Commission held as follows:

> The Commission finds that under the terms of the unique arrangement AEP-Ohio will be the exclusive supplier to Ormet. *Therefore, there is* *no risk that Ormet will shop* for competitive generation and then return to AEP-Ohio's POLR service.

(Opinion and Order at 13) (emphasis added; internal citations omitted).

AEP Ohio has previously experienced the situation of Ormet shopping for competitive generation service and then returning to AEP Ohio, even after Ormet had promised not to return. The Commission's September 15, 2009 Entry on Rehearing acknowledged this sordid history in referencing "the repeated transfer" of Ormet's facilities among certified service territories. (Entry on Rehearing at 7, 9). It is undisputed that Ormet has previously obtained special permission to "permanently" leave AEP Ohio's service territory to take advantage of low market prices for electricity[4] only to subsequently seek and obtain permission to return to being served by AEP Ohio when market prices rose.[5] Suffice to say that what was initially thought to be a "no risk" situation of Ormet returning to the AEP Ohio system proved to be something quite

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[4] In 1996, based on Ormet's desire to pursue low prices in the wholesale power market, Ohio Power agreed to allow Ormet to permanently leave Ohio Power's service territory and reallocate the service territory of South Central Power Company, such that Ohio Power no longer had any legal obligation to serve the retail load of Ormet. *In the Matter of the Joint Petition of Ohio Power Company and South Central Power Company for Reallocation of Territory*, Case No. 96-1000-EL-PEB ("*South Central*"), September 19, 1996 Joint Petition, Ap. at 248. This unprecedented move was permitted specially for Ormet several years before retail choice was implemented in Ohio. The Commission approved a permanent service territory reallocation to be effective January 1, 2000. *South Central*, November 14, 1996 Finding and Order.

[5] In 2005, Ormet filed a complaint and motion asking the Commission to transfer Ormet back to Ohio Power's certified service territory – based on rising prices in the electricity market. *Ormet Primary Aluminum Company v. Ohio Power Company and South Central Power Company*, Case No. 05-1057-EL-CSS ("*Ormet CSS*"), November 29, 2005 Motion. The Commission ultimately adopted an agreement in 2006 between the parties to allow Ormet to be served by a new combined service territory of Columbus Southern Power and Ohio Power. *Ormet CSS*, November 8, 2006 Supplemental Opinion and Order.

different. Based on this prior experience with Ormet, AEP Ohio sought a determination first by the Commission and subsequently by the Supreme Court of Ohio as to whether the exclusive supplier provision was valid and binding under Ohio law.

In its September 15, 2009 rehearing decision in this case, the Commission confirmed that:

> Under the terms of the unique arrangement as approved by the Commission, AEP Ohio will be the exclusive supplier to Ormet for ten years, commencing January 1, 2009.

(Entry on Rehearing at 8) (internal citations omitted).

AEP Ohio then sought a determination by the Supreme Court of Ohio as to whether the exclusive supplier provision was valid and binding under Ohio law. On appeal, AEP Ohio predicted back in 2010 that the circumstance presented by Ormet's current filing could happen and argued that the Court should strike down the exclusive supplier provision as being invalid:

> Ultimately, Ormet may again find – just like it did only ten years ago – that at some point during the contract term market prices for electricity become cheaper than the prices being paid under the involuntary contract imposed upon AEP Ohio.

(S.Ct. Case No. 2009-2060, January 22, 2010 AEP Ohio Brief at 40). Despite AEP Ohio's explicit concerns about the Ormet contract and a companion case involving Eramet Marietta, the Supreme Court firmly upheld the Commission's imposition of the exclusive supplier provision:

> *Even though AEP argues to the contrary, the orders issued by the commission do not allow [Ormet and Eramet] to shop for electric service for the duration of the arrangement.* * * * We cannot say that the commission erred in finding that there was no risk that the manufacturers would shop. The commission relied on the fact that "AEP-Ohio will be the exclusive supplier" to the manufacturers. *As we have already discussed, that is true—the orders require the customers to take service exclusively from AEP. If they must take service exclusively from AEP, then it follows that they cannot take it from another supplier.*

(*Ohio Power Co. v. Pub. Util. Comm.*, 2011-Ohio-2377 at Par. 22, 26) (emphasis added).

The Contract incorporates the Commission and Ohio Supreme Court rulings concerning the exclusive supplier provision. Ormet Witness Fayne agreed during cross examination that the current Contract does not allow Ormet to shop. (Tr. II, p. 258). Indeed, Ormet unequivocally told the Commission in writing during AEP Ohio's recent ESP litigation that "No party disputes that under Ormet's September 16, 2009 power agreement Ormet may not shop." (Tr. II at 259). In light of the fact that the Commission found that AEP Ohio would be the exclusive supplier for the term of the contract and the Supreme Court of Ohio upheld that provision and similarly found that there was no risk of Ormet shopping, it would be unreasonable and unlawful to allow Ormet to shop now merely so it can obtain a market rate that happens to currently be lower than the SSO rate.

Based on its own emphatic statement that "no party disputes" Ormet cannot shop, Ormet is estopped from making any present claim to the contrary. *Ohio State Bd. of Pharmacy v. Frantz*, 51 Ohio St.3d 143, 555 N.E.2d 630, 633 (1990) (equitable estoppel is available to party defending a legal right to prevent second party from taking a different position after the first party relied on second party's original position). *See also Greer-Burger v. Temesi*, 116 Ohio St.3d 324,330 (2007). AEP Ohio has acted in reliance on all of these assurances that there would be no shopping by Ormet and the Company has planned for and set aside a massive amount of capacity and energy that is required to serve its largest customer, Ormet.

Any decision permitting Ormet to shop must be tied to payment of an appropriate termination fee, which is outlined below.

C. Financial Impacts of the Alternatives to Ormet's Request

1. Financial Impacts of Ormet going out of business

Ormet has made it clear that the only way to evaluate its request is in the context of the alternative, which is that Ormet will go out of business absent additional assistance. (Tr. II, pp. 396-409). Thus, it is relevant to first ascertain the rate impact on other AEP Ohio customers if Ormet goes out of business. If Ormet closed, there would no longer be delta revenues under the Contract, which would result in reduced Economic Development Rider charges for AEP Ohio customers. (AEP Ohio Ex. 2, p. 6). Under the Contract for 2014, this amount would be $34 million (approximately $2.8 million per month). (*Id.*). Any such savings for AEP Ohio's other customers would be offset by a number of items, such as: (1) Ormet would no longer contribute to paying the deferrals under the Phase-In Recovery Rider (approximately $0.5 million per month); (2) Ormet would no longer contribute to paying the fixed costs portion of the Fuel Adjustment Clause (FAC) (approximately $1.0 million per month); (3) Ormet would no longer pay the Energy Efficiency and Peak Demand Reduction Rider or contribute to the Universal Service Fund (approximately $0.14 million per month); and (4) Ormet would no longer pay the Retail Stability Rider (RSR) (approximately $0.7 million per month), which could result in an adjustment to the Rider rate as well as result in a larger deferral balance obligation for all other AEP Ohio customers. (*Id.*; see also Tr. II, pp. 396-409). Mr. Roush explained during cross examination that these estimated 2014 contributions were calculated based on a four-potline operation, and that one would need to increase each figure by roughly 50% to calculate losses associated with a six-potline operation. (Tr. II, pp. 398). The net of the above amounts is $0.46 million per month. (AEP Ohio Ex. 2, p. 6).

Ormet's failure would also cause ratepayers to incur another financial impact, as the RSR would need to be adjusted. The RSR was established presuming that AEP Ohio would receive

base generation revenue from Ormet and the Commission specifically reserved the right for AEP Ohio to re-open the ESP if there was a substantial reduction in non-shopping load:

> Finally, the Commission notes that our determination regarding the RSR is heavily dependent on the amount of SSO load still served by the Company. Accordingly, in the event that, during the term of the ESP, there is a significant reduction in non-shopping load for reasons beyond the control of the Company, other than for shopping, the Company is authorized to file an application to adjust the RSR to account for such changes.

(ESP II, Opinion and Order at 37-38). Thus, if Ormet goes out of business or shops, AEP Ohio will likely need to reopen the issue and request a significant increase in the RSR. Further, while this language seems to exclude shopping load, the fact is that Ormet was not expected to shop based on the exclusive supplier provisions in the contract; in that sense, the purpose of this RSR re-opener provision could still be determined to be applicable. If so, the RSR would need to be increased for all customers if Ormet is permitted to shop. So, the best resolution may be to require Ormet to address AEP Ohio's financial concerns directly (*i.e.*, pay an exit fee to terminate the exclusive supplier provisions) in order to stay in business or for the Commission to resolve those concerns through a combination of Ormet resources and ratepayer obligations.

Although AEP Ohio would like to see Ormet able to self-sustain its operations, the Company recognizes that this situation is quite challenging and that the Commission's evaluation of a reasonable arrangement considers a number of factors. Thus, AEP Ohio witness Mr. David M. Roush (AEP Ohio Ex. 2) provides an analysis of both a shopping and non-shopping alternative to assist with the Commission's evaluation of Ormet's request.

2. Financial impacts of AEP Ohio's non-shopping alternative

To provide Ormet the financial outcome it seeks without allowing it to shop, the Commission would need to modify the discount under the current Contract to achieve the equivalent financial outcome as Ormet's proposal. Mr. Roush provides an illustrative calculation

assuming Ormet's target price is similar to Ormet's proposed 2013 price in Exhibit DMR-3 to AEP Ohio Ex. 2. With a FAC/Auction price at $40 MWh, Mr. Roush calculates the existing discount to be $120 million, the revised discount to be $162 million, which results in an estimated cost of $42 million. (*Id.*). When he assumes a FAC/Auction price at $45 MWh, the existing discount equals $120 million, the revised discount equals $181 million, which results in an estimated cost of $61 million. (*Id.*).

During cross examination, OCC questioned Mr. Roush in an effort to complete an apples-to-apples comparison of the cost of Ormet's proposal ($237 million) with AEP Ohio's non-shopping alternative illustrated in Exhibit DMR-3 to AEP Ohio Ex. 2. Mr. Roush "took the $162 million that's shown in DMR-3, took the additional monthly discount of a million and a half per month times 11 months to come up with an additional $16.5 million, and then also added in the $15.2 million which is related to the shopping credit during June to December 2015 as shown in Exhibit DMR-1 to get a total of $193.7 million." (Tr. II at p. 444). Thus, the resulting comparison is Ormet's proposal at $237 million and AEP Ohio's non-shopping alternative at $193.7 million with a $40 FAC/auction level and $220.4 million with a $45 FAC/auction level. (Tr. II at p. 444-445). And as the FAC/auction price assumption goes up by $5 increments, an additional $19 million of cost can be added to the cost of AEP Ohio's non-shopping alternative; so a $50 FAC/auction level would render the AEP Ohio alternative slightly more expensive (by $2 million). (Tr. II at p. 446).

3. Financial impacts of AEP Ohio's termination fee under the shopping alternative

AEP Ohio will only voluntarily accept Ormet's shopping proposal if an appropriate contract termination fee is paid to AEP Ohio. (AEP Ohio Ex. 2, p. 8). An exit fee is reasonable because if Ormet is able to shop, the Company will be significantly harmed and it will upset the

careful balance achieved in the recent ESP cases between the Company's financial interests and the customers' rate impact concerns. Even Ormet Witness Mr. Fayne admits that Ormet's request seeks a specific outcome "and if the Commission determines that there are other costs that need to be addressed such as what you're referring to as an early termination cost or an exit fee or the right of a party to basically not honor the Commission's [prior] decision, that would have to be in the Commission decision." (Tr. II at p. 302). The following is a summary of the relevant financial harm, which justifies a reasonable total exit fee of $61 million - $18 million to AEP for lost capacity revenues; $16 million to ratepayers to offset increased capacity deferrals; and $27 million to ratepayers to offset increased fixed FAC payments.[6]

(a) $18 million dollar difference between the FRR Capacity revenues the Company would receive during 2014 and the base generation revenues that it would have received under the Contract

Under the existing Contract, AEP Ohio is made whole to the GS-4 generation tariff rates, which includes a margin for AEP Ohio. This revenue stream would be lost if Ormet shops, thereby causing AEP Ohio significant financial harm — some of which may also ultimately be borne by ratepayers directly or indirectly. Mr. Roush explains that because Ormet is a Standard Service Offer customer and the Company expects to purchase the requirements of Standard Service Offer customers through an auction process beginning in June 2015, it is reasonable to evaluate a contract termination fee over the period January 1, 2014 through May 31, 2015. (AEP Ohio Ex. 2, p. 8). During that period, the Company is obligated to stand ready at all times to be able to provide energy and capacity for six potlines (Tr. II at p. 409), and it planned to meet

[6] During cross examination, Mr. Roush clarified the time periods for the financial impacts as follows: "The first item, the capacity component, is only for 2014. The second item, the capacity deferral component, is for 2014 and the first five months of 2015. And the third item, the fixed FAC component, which is shown on Exhibit DMR-5, is for January 2014 through May 2015. And I think all of those are conservative given that the contract really – the current contract extends through 2018." (Tr. II at p. 410-411).

Ormet's needs under the terms of the Contract from its own resources. (AEP Ohio Ex. 2, p. 8). Under Ormet's proposal, Ormet would be able to shop for its electric service beginning January 1, 2014 and a reasonable component of the contract termination fee should be the difference between the FRR capacity revenues that the Company would receive during 2014 and the base generation revenues that it would have received under the Contract. (*Id*.). Beginning in 2015, those values would be equivalent. (*Id*.). This amount for calendar 2014 is approximately $18 million for a 6 potline operation as shown in Exhibit DMR-4. (*Id*.) (Tr. II at p. 408-409).

(b) $16 million dollar increase in capacity deferral

If Ormet is permitted to shop, Ormet's load will become shopping load that AEP Ohio will support through the provision of capacity in accordance with its obligations as a Fixed Resource Requirement entity. (AEP Ohio Ex. 2, p. 8). Under the Commission's decision in Case Nos. 10-2929-EL-UNC and 11-346-EL-SSO *et al*., the capacity deferral for the difference between $188.88/MW-Day and the applicable Reliability Pricing Model (RPM) rate will be increased for the period of time that Ormet shops for competitive generation service. Thus, because the CRES provider that would be serving Ormet would pay the RPM auction clearing price and not $188.88 /MW-day, any deferrals under the Retail Stability Rider would increase. (Id. at p. 8-9) (Tr. II at p. 415). This cost is a direct result of allowing Ormet to shop and would be approximately $16 million for January 2014 through May 2015 as also shown in Exhibit DMR-4. (AEP Ohio Ex. 2, p. 9). This amount would not be retained by the Company, but would be credited against the RSR deferrals that all customers pay. (*Id*.).

(c) $27 million dollar increase in fixed non-every component of FAC

If Ormet shops and bypasses the Fuel Adjustment Clause (FAC), the fixed non-energy costs recovered through the FAC will be spread over a smaller base and will thus increase the

cost for other non-shopping customers to bear. (Tr. II at p. 421). Mr. Roush explains that in addition, as a Standard Service Offer customer of AEP Ohio, Ormet would have continued to pay the FAC over the period January 1, 2014 through May 31, 2015. (AEP Ohio Ex. 2, p. 9). Because the FAC includes certain fixed costs that Ormet would have paid under the Contract, it is reasonable for Ormet to continue to pay those fixed costs rather than all other AEP Ohio standard service offer customers. (*Id.*). This amount for the 17-month period is approximately $27 million for a 6 potline operation as shown in Exhibit DMR-5. (*Id.*). This amount would not be retained by the Company but would be credited against the FAC rates that all non-shopping customers pay. (*Id.*) (Tr. II at p. 419).

D. Other Barriers to Adopting Ormet's Proposal

1. Proposed shopping credits are illegal

State policy requires the Commission to avoid subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service. R.C. 4928.02(H) states that it is the policy of the state to "[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies from flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, including by prohibiting the recovery of any generation-related costs through distribution or transmission rates." The Ohio Supreme Court has applied this policy to ensure that such subsidies do not flow. In *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d. 305, the court held that the Commission violated R.C. 4928.02([H]) when it gave FirstEnergy authority to collect deferred increased fuel costs through future distribution rate cases, or to alternatively use excess fuel-cost recovery to reduce deferred distribution-related expenses.

The expanded discounts proposed by Ormet exceed its "wires" charges. Specifically, during 2014 and 2015, the $4.5 million monthly discount will significantly exceed Ormet's expected distribution charges and nonbypassable riders. Ormet's entire bill for distribution service including non-bypassable charges such as the PIRR and RSR is less than $6 /MWh. (AEP Ohio Ex. 2, p. 10). Ormet's proposed shopping credits in 2014 and 2015 of $9 /MWh and $6 /MWh would result in Ormet being paid by AEP Ohio's other customers an amount greater than Ormet's regulated electric service charges. (*Id.*). These proposals amount to an explicit and significant unlawful subsidy of a competitive generation service.

In addition to creating an unlawful subsidy, the relief Ormet seeks also conflicts with statutory provisions that apply specifically to EDUs. For example, special arrangements under R.C. 4905.31 are only for contracts between EDUs and customers – for the provision of services rendered by the EDU – not a CRES provider. Similarly, nonbypassable charges for economic development under R.C. 4928.143 apply only in the limited context of an EDU's promotion of economic development. Thus, the Commission cannot approve a nonbypassable charge for the benefit of a CRES provider, which is essentially what Ormet requests, and charge the increase in delta revenue to all EDU customers. Should the Commission approve any level of shopping credit, such funding would need to come from all other AEP Ohio customers through the Economic Development Rider in the same manner as the other discounts proposed by Ormet. (AEP Ohio Ex. 1 at p. 10).

2. Retroactive ratemaking

Ormet's proposal to fix the annual generation price for calendar 2013 at $45.89 /MWh before discounts, would require the Commission to engage in unlawful retroactive ratemaking. Specifically, to implement Ormet's proposal the Commission would need to either provide a

refund for the 2013 rates already charged and collected or adjust the going-forward rate to achieve a similar result. Either action would be unlawful retroactive ratemaking because AEP Ohio cannot lawfully refund any sums already appropriately charged and collected. Even where rates are actually still being collected, such retroactive refunds are barred by the prohibition against retroactive ratemaking: "The rule against retroactive rates *** also prohibits its refunds." *In re Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 15. As this Ohio Supreme Court explained:

> As OCC recognizes, *** we have consistently held that the law does not allow refunds in appeals from commission orders. As we stated only two years ago, "any refund order would be contrary to our precedent declining to engage in retroactive ratemaking." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 121 Ohio St.3d 362, 2009-Ohio-604, 904 N.E.2d 853, ¶ 21.

Id. at ¶ 16; *see also Green Cove Resort I Owners' Assn. v. Pub. Util. Comm.*, 103 Ohio St.3d 125, 2004-Ohio-4774, 814 N.E.2d 829, ¶ 27 ("Neither the commission nor this court can order a refund of previously approved rates, however, based on the doctrine set forth in [*Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co.*, 166 Ohio St. 254, 141 N.E.2d 465 (1957)].") As a result, both the filed rate doctrine (*Keco*) and the ban on retroactive ratemaking bars the Commission in September 2013 from fixing the annual generation price for calendar 2013 at $45.89 /MWh before discounts.

3. The contractual result of Ormet's proposal is early termination

Ormet's proposal causes several issues with the existing Contract. First, Section 3.01(a) permits AEP Ohio to terminate the agreement in the event of a Default under the contract. Pursuant to Section 8.01(c), items of Default include an attempt to assign the contract under Section 13.04 without the assignee assuming all of the obligations under the contract. Section 13.04, in turn, prohibits assignment by Ormet without consent of AEP Ohio and makes it

mandatory for the assignee to assume all of the obligations under the existing contract. Ormet requests (Motion at 2, 11) that the Commission affirm the assignment by Ormet of its interest in the Amended Unique Arrangement to Smelter Acquisition LLC under Section 13.04 of the existing contract. Thus, Ormet's proposal violates the above provisions twofold. First, AEP Ohio is not consenting to the proposed assignment until adequate assurance of performance is given – which has not happened to date. Second, Ormet is proposing to amend, dilute and modify terms of the existing agreement as part of the assignment. Thus, Ormet's proposal also violates Sections 3.01(a), 8.01(c) and 13.04.

Moreover, Section 3.01(c) permits AEP Ohio to terminate the agreement if the Commission requires any modification that is "materially adverse" to AEP Ohio (as determined by AEP Ohio). More specifically, Section 3.01(d) permits AEP Ohio to terminate the agreement "if the Commission, in any order, whether specifically modifying this Power Agreement or otherwise, limits AEP Ohio's recovery of Delta Revenues associated with this Power Agreement in a manner more adverse than the July 15, 2009 Opinion and Order in Case No. 09-119-EL-AEC." Of course, the impact of Ormet's current proposals would result in lower delta revenue collection by AEP Ohio and would otherwise result in more adverse financial impact on AEP Ohio. Thus, Ormet's current proposal also violates Section 3.01, which triggers AEP Ohio's right to terminate the Contract upon 90-day written notice and collect a termination payment under Section 3.03.

Ormet expressed a self-serving interpretation of how these provisions of the existing Contract would operate if the Commission granted its request – put simply, the new unique arrangement would supersede the existing contractual rights *even though Section 3.01(c) explicitly contemplates a modification by the Commission.* (Tr. II at p. 303). Under Ormet's

view, the parties' rights under the current agreement Ormet signed simply do not apply and could be retroactively nullified. (Tr. II at p. 298). This position is completely without merit and should be rejected. As outlined above, the relevant contractual provisions speak for themself and explicitly contemplate future modification by the Commission, which is the point of the provisions to begin with. If Ormet truly believed its position, it would have requested a modification of Section 3 and supported the modification with testimony. It did not do so. Based on these multiple violations and default under the existing agreement, the Commission should reject Ormet's invitation for the Commission to retroactively impair AEP Ohio's contract rights in violation of the U.S. and Ohio Constitutions. *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 21 (1977); *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 219 (2003); *Linton by Arnold v. Comm'r of Health & Env't*, 65 F.3d 508, 518 (6th Cir. 1995).

4. There are rate issues associated with Ormet's proposal to build a power plant

Whatever the Commission decides to do with Ormet's request, it needs to be clear that Ormet's total usage, and not its usage net of generation, should be used for continued billing of all non-bypassable/wires charges. (AEP Ohio Ex. 2 at p. 9). Ormet does not know what entity will own the generation (Tr. II at 305) and it is clear that Ormet cannot avoid non-bypassable charges if it purchases power from a third party (such as a CRES). Regardless of whether a "normal" customer that creates behind-the-meter generation might typically get to avoid non-bypassable charges, however, Ormet should not be permitted to do so. The Commission can and should adopt the condition that Ormet continue to "pay" (even though it is a heavily subsidized payment) non-bypassable charges based on its full load, not net of any behind-the-meter generation. Examples of such charges include the Phase-In Recovery Rider (PIRR), or any successor thereto upon securitization, and the RSR. (*Id*.). With respect to the PIRR, Ormet

benefited from paying less than the full fuel costs which resulted in the deferrals that are being collected in the PIRR and should not be able to avoid paying back such deferrals by constructing a power plant. (*Id.*). Similar logic applies with respect to the RSR, particularly given Ormet's proposal to shop.

CONCLUSION

The Company recognizes that the Commission is again faced with a difficult decision with respect to Ormet. The Company has endeavored to provide useful information and identify potential issues in Ormet's proposal. If the Commission deems a modification to Ormet's contract is warranted, any such modification should provide for full delta revenue recovery and should recognize the costs that were incurred in good faith by the Company under the existing Contract and implement the contract termination fee proposed by the Company.

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 9th day of September, 2013 by electronic mail upon counsel listed below.

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